

IN THE SUPREME COURT OF THE UNITED STATES

JORGE HIRAM BAEZ-MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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No. 20-5075

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Petitioner contends (Pet. 9-26) that his prior conviction for Puerto Rico second-degree murder does not qualify as a violent felony under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). Specifically, he asserts (Pet. 9, 14-20) that because Puerto Rico second-degree murder can be committed with a mens rea of "depraved heart" recklessness, or "extreme recklessness," it does not include as an element the "use, attempted use, or threatened use of physical force against the person of another" under the ACCA's elements clause, 18 U.S.C. 924(e) (2) (B) (i).

The court of appeals reaffirmed its view that offenses that can be committed with a mens rea of "ordinary recklessness" do not constitute violent felonies under the ACCA's elements clause. Pet. App. A7 (citing United States v. Rose, 896 F.3d 104, 109-110 (1st Cir. 2018)). The court, however, distinguished from "ordinary recklessness" the "extreme recklessness" (or "depraved heart" recklessness) required to establish malice aforethought for a Puerto Rico second-degree murder conviction. Id. at A7-A12. The court observed that the latter, "[m]alice-aforethought-style recklessness falls somewhere between ordinary recklessness and knowledge on the mens rea spectrum." Id. at A9. The court explained that "what separates malice aforethought is the 'extreme indifference to the value of human life.'" Ibid. (quoting Model Penal Code § 210.2(1)(b) (1980)).

This Court has granted review in Borden v. United States, No. 19-5410 (oral argument scheduled for Nov. 3, 2020), to address the question whether an offense that can be committed with a mens rea of recklessness can satisfy the definition of a violent felony in the ACCA's elements clause. As the court of appeals observed, this Court's resolution of that question could potentially -- but will not necessarily -- affect the court of appeals' disposition of this case. See Pet. App. A7 n.5. If this Court "holds that reckless crimes can be violent felonies, then a fortiori crimes requiring heightened recklessness can, too." Ibid. And if this Court were to hold that "a crime encompassing ordinary

recklessness" cannot satisfy the ACCA's elements clause, the possible inclusion of reasoning "broad enough to eliminate all forms of recklessness as sufficient" would implicate the court of appeals' resolution of this case. Ibid. The petition for a writ of certiorari should therefore be held pending the decision in Borden and then disposed of as appropriate in light of that decision.*

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

SEPTEMBER 2020

* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.