

IN THE SUPREME COURT OF THE UNITED STATES

ALFORD DONTA TARPLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Petitioner contends (Pet. 5-6) that his prior conviction for robbery, in violation of Tex. Penal Code Ann. § 29.02(a)(1) (West 2011), is not a conviction for a “crime of violence” under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1), on the theory that an offense that can be committed with a mens rea of recklessness does not “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another” under Section 4B1.2(a)(1). This Court has granted review in Borden v. United States, No. 19-5410 (argued Nov. 3, 2020), to address whether crimes that can be committed with a mens rea of recklessness can satisfy the definition of a “violent felony” under

a similarly worded provision of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i). It would not be appropriate, however, to hold the petition here pending the outcome of Borden because petitioner would not benefit from a decision in his favor in Borden. Even if this Court were to interpret the ACCA's elements clause to exclude offenses that can be committed through the reckless use of force, petitioner's advisory Sentencing Guidelines calculation does not depend on the application of the Guidelines' similarly worded elements clause.

The Sentencing Guidelines provide for an enhanced base offense level for certain offenders who have previously been convicted of one or more "crime[s] of violence," as defined in Section 4B1.2(a). Sentencing Guidelines § 2K2.1 & comment. (n.1). Although Section 4B1.2(a) contains an elements clause similar to the ACCA's, see Sentencing Guidelines § 4B1.2(a)(1), it also separately lists several specific offenses -- including "robbery" -- as crimes of violence, id. § 4B1.2(a)(2), that the ACCA does not list as violent felonies, see 18 U.S.C. 924(e)(2)(B)(ii). As a result, those offenses, including the generic offense of robbery, automatically qualify as crimes of violence under Section 4B1.2(a), even though the same offense qualifies as a "violent felony" under the ACCA only if it satisfies the ACCA's elements clause.

The Fifth Circuit has previously recognized that "the elements of the Texas [robbery] statute substantially correspond to the basic elements of the generic offense." United States v. Santiesteban-Hernandez, 469 F.3d 376, 381 (2006), overruled in part on other grounds by United States v. Rodriguez, 711 F.3d 541 (5th Cir.) (en banc), cert. denied, 571 U.S. 989 (2013) (abrogated in part by Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017)); see United States v. Nunez-Medrano, 751 Fed. Appx. 494, 498-500 (5th Cir. 2018) (per curiam); see also Gov't C.A. Br. 1 n.1 (citing, *inter alia*, Santiesteban-Hernandez, supra, in observing that petitioner's challenge "is foreclosed by binding precedent"). And petitioner offers no reason to conclude otherwise. As a result, even if this Court were to hold in Borden that a crime that can be committed with a mens rea of recklessness does not involve the "use of physical force" under the ACCA's elements clause, such a holding would not affect petitioner's sentence. Accordingly, no need exists to hold the petition in this case pending the Court's decision in Borden.

The petition for a writ of certiorari should be denied.*

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

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