No. 20-6756

IN THE SUPREME COURT OF THE UNITED STATES

DAVID RAY WALLACE, 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

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-6756

DAVID RAY WALLACE, 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

---

1. Petitioner contends (Pet. 12-17) that his prior conviction for robbery, in violation of Tex. Penal Code Ann. § 29.02(a) (West 1974), and his two prior convictions for aggravated robbery, in violation of Tex. Penal Code Ann. § 29.03(a)(2) (West 1974), do not qualify as violent felonies under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), 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," 18 U.S.C. 924(e)(2)(B)(i). 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 the ACCA. 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 would still have three qualifying convictions for violent felonies: a 1984 aggravated-robbery conviction, a 1988 aggravated-robbery conviction, and a 1984 burglary conviction. See Pet. App. 6a-7a; C.A. ROA 1379-1381, 1384-1386.

Petitioner errs in contending (Pet. 15-16) that his aggravated-robbery convictions were for offenses that can be committed with a mens rea of recklessness. As petitioner recognizes (Pet. 15), the court of appeals determined in United States v. Lerma, 877 F.3d 628, 634 (5th Cir. 2017), cert. denied, 138 S. Ct. 2585 (2018), that the Texas aggravated-robbery statute, Tex. Penal Code Ann. § 29.03, is divisible into multiple offenses, including a deadly-weapon variant. That variant of aggravated robbery applies where a defendant "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death," while "us[ing] or exhibit[ing] a deadly weapon" in "the course of committing theft * * * with intent to obtain or maintain control of the property." Tex. Penal Code Ann. §§ 29.02(a), 29.03(a)(2). The Fifth Circuit has correctly recognized that such

deadly-weapon aggravated robberies satisfy the ACCA's elements clause because they have "as an element the threatened use of physical force against the person of another." Lerma, 877 F.3d at 636.

The record of petitioner's prior aggravated-robbery convictions demonstrates that both were for the deadly-weapon variant. For his 1984 conviction, petitioner pleaded guilty to an indictment charging that, "by using and exhibiting a deadly weapon, to-wit: a knife," he did "knowingly and intentionally threaten and place [the victim] in fear of imminent bodily injury." C.A. ROA 28-29. And for his 1988 conviction, petitioner pleaded guilty to an indictment charging that, by "us[ing] and exhibit[ing] a deadly weapon, to-wit: a handgun," he did "knowingly and intentionally threaten and place the [victim] in fear of imminent bodily injury and death." Id. at 34, 40. The district court accordingly recognized that petitioner's deadly-weapon aggravated robberies constituted ACCA violent felonies. See Pet. App. 25a (magistrate report and recommendation citing, inter alia, Lerma, 877 F.3d at 636); C.A. R.O.A. 289-291 (district court order accepting magistrate's findings and conclusions).

Petitioner did not challenge in the court of appeals the district court's determination, following Lerma, that he had been convicted of the deadly-weapon variant of Texas aggravated robbery and that such a conviction qualifies as a conviction for a violent felony under the ACCA's elements clause. See Pet. C.A. Br. 7-10.

And petitioner does not explain how this Court's decision in Borden could undermine the divisibility analysis in Lerma. Nor does he offer any meaningful reason to conclude that a defendant could be convicted under Section 29.03(a)(2) for reckless conduct of the sort at issue in Borden, or any independent argument for why "us[ing] or exhibit[ing] a deadly weapon" would fail to constitute at least the "threatened use of physical force" under the ACCA, 18 U.S.C. 924(e)(2)(B)(i). This Court has previously declined to hold similar petitions pending its decision in Borden, and it should follow the same course here. See Mitchell v. United States, cert. denied, No. 19-6800 (Apr. 6, 2020); Lewis v. United States, cert. denied, No. 19-7472 (June 8, 2020).

2. Petitioner separately contends (Pet. 16-17) that his prior conviction for burglary of a habitation or building, in violation of Tex. Penal Code Ann. § 30.02(a) (West 1974), is not a "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii). For the reasons explained on pages 11 to 16 of the government's brief in opposition to the petition for a writ of certiorari in Herrold v. United States, No. 19-7731 (Apr. 24, 2020), a copy of which is being served on petitioner, those contentions lack merit and do not warrant this Court's review. This Court recently denied petitions for writs of certiorari in Herrold v. United States, 141 S. Ct. 273 (2020) (No. 19-7731), and another case raising the same

issue, Wallace v. United States, No. 20-5588 (Dec. 7, 2020). The same result is warranted here.*

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

MARCH 2021

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