

No. 20-7030

IN THE SUPREME COURT OF THE UNITED STATES

DEVARON ANTOINE LOVE, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 6-11) that the court of appeals erred in declining to excuse his procedural default under 28 U.S.C. 2255, because he is "actually innocent" of his conviction for brandishing a firearm during a "crime of violence," in violation of 18 U.S.C. 924(c). His substantive request for relief is based on a claim that pharmacy burglary involving assault or putting a life in jeopardy by the use of a dangerous weapon, in violation of 18 U.S.C. 2118(b) and (c), no longer qualifies as a "crime of violence" under Section 924(c) after United States v. Davis, 139 S. Ct. 2319 (2019).

On that underlying issue, petitioner contends (Pet. 11-13) that pharmacy burglary involving assault or putting a life in jeopardy by the use of a dangerous weapon is not a "crime of violence" because it does not include as an element the "use, attempted use, or threatened use of physical force against the person or property of another" under Section 924(c)'s elements clause, 18 U.S.C. 924(c)(3)(A). Specifically, he asserts (Pet. 13) that "[a] defendant can use a dangerous weapon in the course of committing a burglary without the active use of force," such as by "striking a police car because he was speeding and driving recklessly" while "fleeing a robbery."

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, 18 U.S.C. 924(e)(2)(B)(i). If, as a result of Borden, petitioner's pharmacy-burglary offense would not qualify as a crime of violence, the United States would ordinarily waive any procedural-default defense under Section 2255 in this case.

The Court's resolution of Borden could thus potentially affect the disposition of this case. 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.

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.