

No. 20-7394

IN THE SUPREME COURT OF THE UNITED STATES

JOAQUIN RAMOS DE LA CRUZ, 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

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1. Petitioner contends (Pet. 9-16) that his conviction following a guilty plea for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), should be vacated on plain-error review because knowledge of his felon status was not understood to be an element of his offense during the proceedings in the district court. See Rehaif v. United States, 139 S. Ct. 2191 (2019). This Court has granted review in United States v. Gary, No. 20-444 (argued Apr. 20, 2021), to consider whether plain-error relief is automatically available in such a circumstance. Because the Court's decision in Gary may affect the proper resolution of the

first question presented in the petition for a writ of certiorari, the petition should be held pending the decision in Gary and then disposed of as appropriate in light of that decision.

2. Petitioner also contends (Pet. 16-25) that his prior convictions for aggravated robbery, in violation of Tex. Penal Code Ann. § 29.03(a)(2) (West 2006), do not qualify as "violent felon[ies]" 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). In Borden v. United States, No. 19-5410 (June 10, 2021), this Court determined that Tennessee reckless aggravated assault, in violation of Tenn. Code Ann. § 39-13-102(a)(2), lacks a mens rea element sufficient to meet that definition. It would not be appropriate to remand this case in light of Borden, however, because petitioner's aggravated-robbery convictions were not for an offense that can be committed with a mens rea of recklessness.

Petitioner errs in suggesting (Pet. 16) that his aggravated-robbery convictions were for an offense that can be committed with a mens rea of recklessness. As petitioner recognizes (Pet. 30; see Pet. C.A. Br. 24), 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 they were for the deadly-weapon variant. In 2009, petitioner pleaded guilty to an indictment charging two counts of aggravated robbery in which petitioner had "intentionally and knowingly threaten[ed] and place[d] [the victims] in fear of imminent bodily injury and death" and that, in so doing, he "did then and there use and exhibit a deadly weapon, to-wit: a firearm." C.A. ROA 718; see id. at 720-725 (Judgment). Petitioner also pleaded guilty to another aggravated robbery charge in a separate indictment, which charged (as relevant here) that he "intentionally or knowingly threaten[ed] or place[d] [a victim] in fear of imminent bodily injury or death" and that, in so doing, he "did then and there use or exhibit a deadly weapon, to-wit: a firearm." Id. at 745; see id. at 742-744 (Judgment).

Petitioner thus did not dispute in the court of appeals that he had been convicted of the deadly-weapon variant of Texas aggravated robbery, and he conceded that, under the Fifth Circuit's decision in Lerma, such a conviction qualifies as a conviction for a violent felony under the ACCA's elements clause. See Pet. C.A. Br. 10-11, 24. Lerma, in turn, is premised on an interpretation of the state robbery statute as containing a divisible crime that requires intentional or knowing conduct involving intimidation with a deadly weapon. See 877 F.3d at 634.

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" in the context of a Texas robbery 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 previously declined to hold similar petitions pending its decision in Borden, and it should follow the same course here. See Wallace v. United States, No. 20-6756 (Apr. 26, 2021); Smith v. United States, No. 20-6773 (Apr. 19, 2021); Lewis v. United States, 141 S. Ct. 91 (2020) (No. 19-7472); Mitchell v. United States, 140 S. Ct. 2645 (2020) (No. 19-6800).

For the foregoing reasons, the petition for a writ of certiorari should be held pending this Court's decision in Gary,

supra, 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.