

No. 20-8019

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERTO TORNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 4-11) that his prior conviction for New Jersey aggravated assault, in violation of N.J. Stat. Ann. § 2C:12-1(b)(1) (West 1995), does not qualify as a “crime of violence” under Sentencing Guidelines § 4B1.2(a)(1), on the ground that an offense that can be committed with a mens rea of extreme recklessness does not include as an element the “use, attempted use, or threatened use of physical force against the person of another” under Section 4B1.2(a)(1). In Borden v. United States, 141 S. Ct. 1817 (2021), this Court determined that Tennessee reckless aggravated assault, in violation of Tenn. Code Ann. § 39-13-102(a)(2) (2003), lacks a mens rea element sufficient to 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). A remand of this case for further consideration in light of Borden is not warranted, however, because the resolution of the question presented in Borden does not affect the reasoning of the decision below.

As the court of appeals explained, the parties "d[id] not dispute that a purposeful or knowing violation of the statute at issue" constitutes a crime of violence. Pet. App. 15. The parties also agreed that the New Jersey statute was divisible, "that the modified categorical approach applies here, and that the District Court could thus review charging documents and plea materials to determine which statutory language formed the basis of [petitioner's] conviction." Ibid. (citing Johnson v. United States, 559 U.S. 133, 144 (2010)); see Shepard v. United States, 544 U.S. 13 (2005). The court then determined that "[t]he state indictment and plea form collectively indicate that [petitioner] pled guilty to 'purposely or knowingly' causing or attempting to cause serious bodily injury to another person," and that, as a result, petitioner's "aggravated assault conviction was a crime of violence for sentencing purposes." Pet. App. 15. Because the court concluded that petitioner had been convicted of "a purposeful or knowing (rather than reckless)" variant of aggravated assault, id. at 14, Borden does not affect the decision below.

Petitioner briefly asserts (Pet. 7) that a conflict exists between the Ninth Circuit's decision in United States v. Garcia-Jimenez, 807 F.3d 1079 (2015), and the Third Circuit's decision in Baptiste v. Attorney Gen., 841 F.3d 601 (2016), cert. denied, 138 S. Ct. 2018 (2018), about whether New Jersey aggravated assault is categorically a crime of violence. But the unpublished decision below does not implicate any such conflict, as the court of appeals applied the modified categorical approach and reasoned only that a purposeful or knowing variant of aggravated assault would constitute a crime of violence. Pet. App. 14-15; see Baptiste, 841 F.3d at 615 (relying on residual clause in 18 U.S.C. 16(b) before its invalidation in Sessions v. Dimaya, 138 S. Ct. 1204 (2018)); Garcia-Jimenez, 807 F.3d at 1083 n.3 (observing that the government had "not argue[d] that the modified categorical approach applies here"). In any event, even if petitioner had identified a conflict in the courts of appeals as to the circumstances in which a conviction under the particular state statute at issue here could be classified as a crime of violence or violent felony, review would not be warranted. That issue ultimately depends on the interpretation of the state statute, and this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of

deferring to regional courts of appeals in matters that involve the construction of state law." ). Petitioner has offered no sound reason to depart from that "settled and firm policy" here. The petition for a writ of certiorari should therefore be denied.\*

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Acting Solicitor General

JULY 2021

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