

No. 20-8291

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT WEHMHOFER, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 7-17) that his prior convictions for aggravated robbery, in violation of Tex. Penal Code Ann. § 29.03 (West 1985, 1989, 1992), do not qualify as “serious violent felon[ies]” under 18 U.S.C. 3559(c)(2), on the theory that an offense that can be committed with a mens rea of recklessness does not qualify as a generic “robbery” under Section 3559(c)’s enumerated offense clause, 18 U.S.C. 3559(c)(2)(F)(i), and does not “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another,” under its elements clause, 18 U.S.C. 3559(c)(2)(F)(ii). 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), lacks a mens rea element sufficient to satisfy the definition of “violent felony” in 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 petitioner acknowledges (Pet. 6, 8), the court of appeals determined that the Texas aggravated-robbery statute, Tex. Penal Code Ann. § 29.03, is divisible into multiple offenses, including a robbery-by-threat 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.” Pet. App. 7a (quoting Tex. Penal Code § 29.02(a)(2)). The records of petitioner’s prior aggravated robbery convictions demonstrate that they were for the robbery-by-threat variant. Id. at 8a. The court of appeals correctly recognized that such convictions “match[] federal law,” and so satisfy the enumerated offense clause of Section 3559(c)(2)(F)(i). Ibid. This Court’s decision in Borden has no bearing on either the enumerated offense clause in Section 3559(c)(2)(F)(i) or the divisibility of the Texas aggravated-robbery statute.

Petitioner contends (Pet. 8-14) that the court of appeals erred in its determination that the Texas robbery statute is

divisible, but that question does not warrant this Court's review. Petitioner identifies no decision of another court of appeals that conflicts with the unpublished decision below on that question. See Pet. 8-14; see also United States v. Lerma, 877 F.3d 628, 634 (5th Cir. 2017) (holding that the Texas aggravated-robbery statute is divisible into multiple offenses, including a deadly-weapon variant), cert. denied, 138 S. Ct. 2585 (2018). In any event, review is unwarranted because the court of appeals' analysis ultimately depends on its interpretation of Texas law. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004), and petitioner provides no reason to deviate from that "settled and firm policy" here. Finally, petitioner does not suggest that this Court's decision in Borden undermines the divisibility analysis. See Pet. 16 (conceding that the court of appeals' divisibility ruling precludes relief regardless of the outcome in Borden). This Court has previously denied similar petitions pending its decision in Borden. See, e.g., Valentine v. United States, No. 20-7326 (June 7, 2021); Wallace v. United States, No. 20-6756 (Apr. 26, 2021);

Lewis v. United States, No. 19-7472 (June 8, 2020). The petition for a writ of certiorari should likewise be denied.*

Respectfully submitted.

EDWIN S. KNEEDLER
Deputy Solicitor General

AUGUST 2021

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