No. 19-5652

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY WAYNE BETTCHER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Utah offense of aggravated assault, in violation of Utah Code Ann. § 76-5-103 (LexisNexis 2012), is a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(1) (2015).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Utah):

United States v. Bettcher, No. 15-cr-623 (Aug. 17, 2016)

United States Court of Appeals (10th Cir.):

United States v. Bettcher, No. 16-4165 (Dec. 21, 2018)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 911 F.3d 1040.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2018. A petition for rehearing was denied on March 19, 2019. On June 6, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 16, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Utah, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 37 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals reversed. Pet. App. A1-A13.

1. In October 2015, police in Salt Lake City, Utah, stopped a stolen vehicle that petitioner was driving, and petitioner fled on foot. Presentence Investigation Report (PSR) ¶ 4. Officers followed petitioner into a nearby apartment complex's laundry room and arrested him. Ibid. They found a baggie of heroin in his pocket and a stolen pistol hidden behind a clothes dryer. Ibid.

A federal grand jury returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), and possession of heroin, in violation of 21 U.S.C. 844(a). Indictment 1-2. Petitioner pleaded guilty to the felon-in-possession charge. Pet. App. A2.

2. The Probation Office's presentence report recommended a base offense level of 20 under Sentencing Guidelines § 2K2.1(a)(4)(A) (2015), which applies if a defendant was previously convicted of a "crime of violence." PSR ¶ 10. Under the Guidelines' "elements clause," a "crime of violence" is defined to include "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that * * * has as an

element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1). The Probation Office classified petitioner's 2013 Utah conviction for aggravated assault as a crime of violence. PSR ¶¶ 10, 25. That conviction stemmed from an incident in which petitioner had stabbed the victim in the neck with a throwing star. PSR ¶ 25. Petitioner was convicted under Utah Code Ann. § 76-5-103(2)(b) (LexisNexis 2012), which applies when a defendant commits simple assault using "a dangerous weapon" or "other means or force likely to produce death or seriously bodily injury" and the conduct actually "result[ed] in serious bodily injury." Id. § 76-5-103(1), (2)(b).

Petitioner objected that his conviction should not qualify as a conviction for a crime of violence because the Utah simple assault statute covered reckless conduct. Pet. App. A4; see Utah Code Ann. § 76-2-102 (LexisNexis 2012) (providing that, where "the definition of the offense does not specify a culpable mental state * * * , intent, knowledge, or recklessness shall suffice to establish criminal responsibility"). The district court agreed, concluding that it was bound by Tenth Circuit precedent holding that "a mens rea of recklessness does not satisfy the use of * * * physical force requirement" under Sentencing Guidelines § 4B1.2(a)(1). Pet. App. A17. And the court calculated that, without the "crime of violence" enhancement, petitioner's total offense level was 13, and his criminal history category was V,

resulting in an advisory Sentencing Guidelines range of 30 to 37 months (rather than the range of 57 to 71 months that the presentence report had calculated). Id. at A18; see PSR ¶ 47. The court sentenced petitioner to 37 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals reversed. Pet. App. A1-A13.

The court of appeals acknowledged that it had previously held in United States v. Zuniga-Soto, 527 F.3d 1110 (10th Cir. 2008), that offenses that can be committed with a reckless mens rea do not satisfy the "use-of-physical-force requirement" in the elements clause of Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2006), and that it had subsequently applied the same reasoning to Sentencing Guidelines § 4B1.2(a) in United States v. Duran, 696 F.3d 1089, 1095 (10th Cir. 2012). Pet. App. A8. It observed, however, that those decisions had relied on Leocal v. Ashcroft, 543 U.S. 1, 9-10 (2004), which held that the "use" of force in 18 U.S.C. 16(a) requires "a higher degree of intent than negligent or merely accidental conduct." Pet. App. A6. And the court determined that its decisions in Zuniga-Soto and Duran had been "override[n]," Pet. App. A8, by this Court's decision in Voisine v. United States, 136 S. Ct. 2272 (2016), which interpreted the phrase "use of physical force" in the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. 921(a)(33)(A)(ii) to encompass crimes that con be committed recklessly. Voisine had observed that a "person who assaults another recklessly 'uses'

force, no less than one who carries out that same action knowingly or intentionally." 136 S. Ct. at 2280 (brackets omitted).

The court of appeals rejected petitioner's contention that Voisine's logic should be "confine[d] * * * to the misdemeanor-crime-of-domestic-violence context." Pet. App. A9-A10. The court explained that it had already applied Voisine outside of that context to find that reckless offenses could satisfy the "use of physical force" requirement in the similarly worded elements clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), and in 18 U.S.C. 924(c)(3)(A). Pet. App. A9-A10 (citing United States v. Pam, 867 F.3d 1191, 1206-1211 (10th Cir. 2017). And it determined that Voisine's logic applied with equal force to Sentencing Guidelines § 4B1.2(a)(1). Pet. App. A10. The court also rejected petitioner's invocation of the rule of lenity, explaining that, "after Voisine, the law is sufficiently plain that reckless assaults qualify as crimes of violence." Id. at A12-A13.

DISCUSSION

Petitioner contends (Pet. 18-26) that his prior conviction for aggravated assault under Utah Code Ann. § 76-5-103(1), (2)(b) (LexisNexis 2012) does not qualify as a crime of violence under Sentencing Guidelines § 4B1.2(a)(1) (2015), on the theory that an offense that can be committed recklessly does not include as an element the "use, attempted use, or threatened use of physical force against the person of another." The courts of appeals are

divided as to whether a crime that can be committed with a mens rea of recklessness can satisfy either that definition or a similarly worded ACCA definition of "violent felony," 18 U.S.C. 924(e)(2)(b)(i). As the government has explained in its briefs in response in Borden v. United States, No. 19-5410 (Oct. 21, 2019), and Walker v. United States, No. 19-373 (Oct. 21, 2019), the conflict on the ACCA question warrants this Court's review.[1] Either Borden or Walker would provide a suitable vehicle for deciding that question; this case, in contrast, involves an interpretation of the Sentencing Guidelines, which are subject to oversight and modification by the Sentencing Commission. The Court should therefore grant the petition for a writ of certiorari in one of those two cases and hold this case pending that case's disposition.

1. The court of appeals correctly determined that petitioner's conviction for aggravated assault -- which required that he commit simple assault using "a dangerous weapon" or "other means or force likely to produce death or seriously bodily injury," where the conduct actually "result[ed] in serious bodily injury," Utah Code Ann. § 76-5-103(1), (2)(b) (LexisNexis 2012) -- involved the "use, attempted use, or threatened use of physical force against the person of another," and thus qualifies as a "crime of violence" Sentencing Guidelines § 4B1.2(a)(1). That determination

[1] We have served petitioner with a copy of the government's brief in Walker.

follows from this Court's decision in Voisine v. United States, 136 S. Ct. 2272 (2016). In Voisine, the Court held, in the context of 18 U.S.C. 921(a)(33)(A)(ii), that the term "use . . . of physical force" includes reckless conduct. 136 S. Ct. at 2278 (citation omitted). Although Voisine had no occasion to decide whether its holding extends to other statutory contexts, id. at 2280 n.4, the court of appeals correctly determined that Voisine's logic is similarly applicable to other statutes and Guidelines provisions that refer to offenses that have as an element the "'use' of force." Pet. App. A10.

This Court explained in Voisine that the word "'use'" in that context requires the force to be "volitional" but "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." 136 S. Ct. at 2279. The Court observed that the word "'use'" "is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." Ibid. Moreover, the Court noted, "nothing in Leocal v. Ashcroft," 543 U.S. 1 (2004), which addressed the mens rea requirement for a statutory "crime of violence" definition similar to the one at issue here, see 18 U.S.C. 16(a), "suggests a different conclusion -- i.e., that 'use' marks a dividing line between reckless and knowing conduct." Voisine, 136 S. Ct. at 2279. Rather, the Court indicated, the key

"distinction [was] between accidents and recklessness." Ibid. Thus, under Voisine, "[a]s long as a defendant's use of force is not accidental or involuntary, it is 'naturally described as an active employment of force,' regardless of whether it is reckless, knowing, or intentional." United States v. Haight, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (Kavanaugh, J.) (quoting Voisine, 136 S. Ct. at 2279), cert. denied, 139 S. Ct. 796 (2019).

2. As explained in the government's brief in response (at 10-13) in Walker, supra (No. 19-373), a circuit conflict exists on the question whether Voisine's logic applies to the similarly worded elements clause in the ACCA, and this Court's review of that question is warranted. The Court should accordingly grant review in either Borden or Walker, each of which appears to offer a suitable vehicle in which to consider that question.

This case, by contrast, does not provide an appropriate vehicle for further review. Here, petitioner's challenge to his sentence rests on a claimed error in the application of a provision of the advisory Sentencing Guidelines -- a provision, moreover, that the Sentencing Commission has proposed amending. Typically, this Court leaves issues of Guidelines application in the hands of the Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Given that the Sentencing Commission can amend the Guidelines to eliminate a

conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. See ibid.; see also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

Indeed, the Commission has already taken steps to exercise its oversight authority with respect to other portions of the "crime of violence" definition. Effective August 2016, the Commission amended Sentencing Guidelines § 4B1.2(a) to eliminate the provision's residual clause and to expand the Guidelines' list of enumerated offenses. See 81 Fed. Reg. 4741, 4742-4743 (Jan. 27, 2016). In addition, the Commission has proposed potentially amending the elements clause at issue here to "allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense." Notice of Final Priorities for Amendment Cycle, 83 Fed. Reg. 43,956 (Aug. 28, 2018). That amendment, if adopted, would greatly diminish the importance of the question whether reckless offenses have, as an element, the use of force within the meaning of the Sentencing Guidelines.

3. If this Court grants the petition for a writ of certiorari in Borden or Walker, it should hold the petition in this case pending its decision there. The elements clause in Sentencing Guidelines § 4B1.2(a)(1) mirrors the elements clause in

the ACCA, 18 U.S.C. 924(e)(2)(B)(i). The Court's resolution of the more consequential issue of the ACCA's application to prior convictions for crimes that can be committed recklessly could therefore affect the court of appeals' disposition of this case.

CONCLUSION

If this Court grants review in Borden v. United States, No. 19-5410 (filed July 24, 2019), or Walker v. United States, No. 19-373 (filed Sept. 19, 2019), the petition for a writ of certiorari should be held pending the disposition of that case and then disposed of as appropriate. If this Court grants review in neither Borden nor Walker, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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