

No: _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

FEUU FAGATELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

SCOTT KEITH WILSON
Federal Public Defender
JESSICA STENGEL
Counsel of Record
46 W. Broadway, Suite 110
Salt Lake City, UT 84101
Tel. (801) 524-4010
Jessica_stengel@fd.org
Counsel for Petitioner

Questions Presented

Whether a statute that criminalizes creating a risk of injury categorically satisfies the definition of a crime of violence?

Table of Contents

Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Petition For A Writ Of Certiorari.....	1
Opinion Below	1
Statement of Jurisdiction	1
Statutory and Guidelines Provisions Involved.....	1
Introduction	2
Statement of the case	3
Reasons For Granting The Writ.....	4
I. The Circuits Are Split Over Whether Causing Injury Or Risk Of Injury Categorically Satisfies The Definition Of A Crime Of Violence.	5
II. This Case Presents An Ideal Vehicle For The Court To Decide Whether Causation Of Injury Or Risk Of Injury Categorically Is A Crime Of Violence.	7
III. The Tenth Circuit’s Decision Is Incorrect and Conflicts With Decisions of This Court.....	9
Conclusion	12

Index to Appendix

<i>United States v. Fagatele</i> , Case No. 18-4004, 944 F.3d 1230 (10th Cir. November 5, 2019)	A-2
--	-----

Table of Authorities

Federal Cases

<i>Beckles v. United States</i> , 137 S.Ct. 886 (2017)	5
<i>Borden v. United States</i> , 769 Fed.Appx. 266 (Mem), <i>cert. granted in part</i> , -- S.Ct. --, 2020 WL 981806 (Mem) (2020)	5
<i>Curtis Johnson v. United States</i> , 559 U.S. 133 (2010)	6, 10
<i>E.P.A. v. EME Homer City Generation, L.P.</i> , 572 U.S. 489 (2014)	10
<i>Mathis v. United States</i> , 136 S.Ct. 2243 (2016)	5
<i>Samuel Johnson v. United States</i> , 135 S.Ct. 2551 (2015)	5
<i>Sessions v. Dimaya</i> , 138 S.Ct. 1204 (2018)	5
<i>Stokeling v. United States</i> , 139 S.Ct. 544 (2019)	5
<i>Taylor v. United States</i> , 495 U.S. 575 (1990)	10
<i>United States v. Baez-Martinez</i> , 950 F.3d 119 (1st Cir. 2020)	6
<i>United States v. Bass</i> , 404 U.S. 336 (1971)	10-11
<i>United States v. Brown</i> , 2018 WL 582536 (S.D. Fla. Jan. 25, 2018)	6
<i>United States v. Castleman</i> , 572 U.S. 157 (2014)	<i>passim</i>
<i>United States v. Davis</i> , 139 S.Ct. 2319 (2019)	5
<i>United States v. Dixon</i> , 874 F.3d 678 (11th Cir. 2017)	6
<i>United States v. Fagatele</i> , 944 F.3d 1230 (10th Cir. 2019)	1, 4
<i>United States v. Jones</i> , 914 F.3d 893 (4th Cir. 2019)	7
<i>United States v. Keitt</i> , 765 Fed.Appx. 882 (4th Cir. 2019)	7
<i>United States v. Mayo</i> , 901 F.3d 218 (3d Cir. 2018)	7
<i>United States v. Middleton</i> , 883 F.3d 485 (4th Cir. 2018)	7
<i>United States v. Ontiveros</i> , 875 F.3d 533 (10th Cir. 2017)	5
<i>United States v. Ovalles</i> , 905 F.3d 1231 (11th Cir. 2018)	6
<i>United States v. Peebles</i> , 879 F.3d 282 (8th Cir. 2018)	6
<i>United States v. Reyes-Contreras</i> , 910 F.3d 169 (5th Cir. 2018)	6
<i>United States v. Sanchez</i> , 940 F.3d 526 (11th Cir. 2019)	6
<i>United States v. Teague</i> , 884 F.3d 726 (7th Cir. 2018)	6
<i>United States v. Verwiebe</i> , 874 F.3d 258 (6th Cir. 2017)	6
<i>Villanueva v. United States</i> , 893 F.3d 123 (2d Cir. 2018)	6
<i>Voisine v. United States</i> , 136 S.Ct. 2272 (2016)	5

Federal Statutes

18 U.S.C. § 922	3, 9
18 U.S.C. § 924	3
28 U.S.C. § 1254	1

State Cases

<i>State v. Ricks</i> , 436 P.3d 350 (Utah Ct. App. 2018)	8
---	---

State Statutes

Utah Code Ann. § 76-1-601	2
Utah Code Ann. § 76-5-102	2, 8
Utah Code. Ann. § 76-5-103	1, 2, 8

Other

USSG § 4B1.2	1, 2
--------------------	------

Petition For A Writ Of Certiorari

Petitioner Feuu Fagatele respectfully petitions this Court for a writ of certiorari to review the judgement of the United States Court of Appeals for the Tenth Circuit.

Opinion Below

The Tenth Circuit's published decision is available at 944 F.3d 1230 and is included in the appendix at A2.

Statement of Jurisdiction

The Tenth Circuit issued its decision on November 5, 2019, and upon motion by the government, published the decision on December 13, 2019. On January 27, 2020, Justice Sotomayor extended the time to file until April 3, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory and Guidelines Provisions Involved

United States Sentencing Guideline 4B1.2 states in pertinent part:

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

USSG § 4B1.2(a).

Utah Aggravated Assault (U.C.A. § 76-5-103) (2012) provides that:

(1) A person commits aggravated assault if the person commits assault as defined in Section 76-5-102 and uses:

(a) a dangerous weapon as defined in Section 76-1-601; or

(b) other means or force likely to produce death or serious bodily injury.

(2) (a) A violation of Subsection (1) is a third degree felony, except under Subsection (2)(b).

(b) A violation of Subsection (1) that results in serious bodily injury is a second degree felony.

Utah Code Ann. § 76-5-103 (2012).

Utah defines simple assault as:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

Utah Code Ann. § 76-5-102 (2012).

Introduction

This case presents an important issue concerning the proper application of the force clause in United States Sentencing Guidelines § 4B1.2(a)(1), which is

materially identical to the force clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e), and 18 U.S.C. § 924(c). These provisions provide significant penalty enhancements based on a defendant's criminal history that involves the use of violent force. However, some statutes criminalize the causation of injury or risk of injury without requiring proof as to how the injury was caused. Lower courts are divided as to whether a prior offense that criminalizes the consequence, i.e., injury or risk of injury, and not the conduct, i.e., the use of force, categorically satisfies the violent-force requirement. Because a defendant can cause injury or cause a risk of injury without the use of violent force against a person, the better view is that causing injury or risk of injury does not categorically establish the use of violent force.

Petitioner Feuu Fagatele urges this Court to grant certiorari and resolve whether causing injury, or creating a risk of injury, categorically requires the use of violent, physical force against a person. This question arises not only in the context of Utah third-degree aggravated assault, but also in connection with many state statutes that criminalize causation of injury without specifying how that injury must arise. This case gives this Court a needed opportunity to resolve the split and clarify the proper scope and application of the force clause.

Statement of the case

1. Petitioner Feuu Fagatele pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).

2. A presentence investigation report (PSR) classified petitioner's 2013 conviction for Utah third-degree aggravated assault as a crime of violence, so the base offense level was 20 instead of 14.

3. Mr. Fagatele objected to this enhancement, but the district court ruled that Utah third-degree aggravated assault was a crime of violence, and applied the base offense level of 20.

4. With a three-level reduction for acceptance of responsibility, Petitioner's advisory guideline range in criminal history category VI was 51-63 months. The district court varied downward and imposed a sentence of 46 months.¹

5. Mr. Fagatele appealed his sentence to the Tenth Circuit Court of Appeals. Mr. Fagatele argued that the plain language of the Utah third-degree aggravated assault statute was broader than the force clause and therefore not a violent felony.

6. The Tenth Circuit Court of Appeals affirmed, finding itself bound by prior precedent that treated "bodily injury" and "physical force" as interchangeable and as such, concluding that creating a *risk* of injury was synonymous with *threatening* the use of force. *United States v. Fagatele*, 944 F.3d 1230, 1236 (10th Cir. 2019).

Reasons For Granting The Writ

The Court is faced with a split that will not resolve itself organically. This Court has granted certiorari to resolve disagreements about the scope and application of the force clause at issue every term since 2014: *United States v.*

¹ Had Mr. Fagatele prevailed, his advisory guideline range would have been 30-37 months.

Castleman, 572 U.S. 157 (2014); *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015); *Mathis v. United States*, 136 S.Ct. 2243 (2016); *Voisine v. United States*, 136 S.Ct. 2272 (2016); *Beckles v. United States*, 137 S.Ct. 886 (2017); *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018); *United States v. Davis*, 139 S.Ct. 2319 (2019); *Stokeling v. United States*, 139 S.Ct. 544 (2019). And it recently granted certiorari in *Borden v. United States*, 769 Fed.Appx. 266 (Mem), *cert. granted in part*, -- S.Ct. --, 2020 WL 981806 (Mem) (2020), to answer the narrow question of whether the “use of force” in ACCA includes crimes with a mens rea of mere recklessness. Despite careful and repeated attention from this Court, lower courts’ definition of “force” vary widely, resulting in disparate treatments of criminal defendants across the country. Two defendants incarcerated for the same offense, with identical criminal histories, face different sentences based solely on the circuit in which they were sentenced. The Tenth Circuit’s treatment of Utah third-degree aggravated assault demonstrates the irreparable analytical fracture amongst federal courts.

I. The Circuits Are Split Over Whether Causing Injury Or Risk Of Injury Categorically Satisfies The Definition Of A Crime Of Violence.

The circuits are irreconcilably divided about whether causing injury or risk of injury categorically requires the use of violent force. In *Fagatele*, the Tenth Circuit reaffirmed its holding in *United States v. Ontiveros*, that is: “[i]f it is impossible to commit a battery without applying force, and a battery can be committed by an omission to act, then” an assault criminalizing causing injury “must also require physical force.” 875 F.3d 533, 538 (10th Cir. 2017) (emphasis in original). Six other

circuits have reached the same conclusion.² *United States v. Peebles*, 879 F.3d 282 (8th Cir. 2018); *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017); *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018); *United States v. Teague*, 884 F.3d 726 (7th Cir. 2018); *United States v. Sanchez*, 940 F.3d 526 (11th Cir. 2019); *United States v. Dixon*, 874 F.3d 678 (11th Cir. 2017); *Villanueva v. United States*, 893 F.3d 123 (2d Cir. 2018).³ The First Circuit leans heavily towards the majority, but has not yet endorsed absolute parity between causing injury and violent, physical force. *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020).

The better view, however, is the rule of the Third and Fourth Circuits, which have consistently ruled that offenses criminalizing the consequence of conduct do not necessarily fall within the force clause. Following *Castleman*, the Fourth

² The circuits to have so held rely on faulty reasoning. The fact that violent force is force capable of causing physical pain or injury to another, *Curtis Johnson v. United States*, 559 U.S. 133, 140-2 (2010), does not mean that all physical pain or injury categorically results from violent force. *Castleman v. United States*, 572 U.S. at 167 (refusing to answer the question of whether causing bodily injury necessarily entails violent force).

³ The circuits themselves recognize the question of whether causing injury or risk of injury is the same as using force is problematic. See *United States v. Ovalles*, 905 F.3d 1231, 1257 (11th Cir. 2018), *abrogated on other grounds*, (Pryor, W. J. concurring) (elements clause has created confusion among members of the court) and n.38 (collecting Eleventh Circuit cases evidencing disagreement within the court); *United States v. Brown*, 2018 WL 582536, *5 (S.D. Fla. Jan. 25, 2018) (unpubl.) (holding injuries caused in a violation of 18 U.S.C. § 242 could be “predicated on omissions or non-violent actions and do not require the active employment of force,” and therefore fall outside of the force clause); *Villanueva v. United States*, 893 F.3d 123, 133-4 (2d Cir. 2018) (Pooler, J. dissenting) (“*Castleman* did not create a regime where causation of an injury is the dispositive question for force inquiries under federal law”).

Circuit has consistently drawn a distinction between the causation of bodily injury and the use of violent force. *See United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) (noting that “the use of violent force” cannot be conflated “with the causation of injury”); *United States v. Jones*, 914 F.3d 893 (4th Cir. 2019) (South Carolina felony conviction for assaulting, beating, or wounding a law enforcement officer while resisting arrest was not a violent felony under ACCA.)⁴

Similarly, the Third Circuit held that a prior conviction for Pennsylvania aggravated assault was not a crime of violence under ACCA’s force clause in *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018). In so holding, the *Mayo* court rejected the premise that this Court’s decision in *Castleman* meant that the fact of, or risk of, injury is equivalent to the use of force. *Id.*, 228. The court pointed out that “[it has] not said that bodily injury is always and only the result of physical force.” *Id.* While the element of bodily injury “will most likely be the result” of violent force, “‘most likely’ does not satisfy the categorical approach[.]” *Id.*, 230.

Such a clear divide among the circuits can only be settled by this Court.

II. This Case Presents An Ideal Vehicle For The Court To Decide Whether Causation Of Injury Or Risk Of Injury Categorically Is A Crime Of Violence.

Mr. Fagatele’s petition provides an ideal vehicle for this Court to determine whether a statute criminalizing causing or risk of causing injury should

⁴ The Fourth Circuit has extended the same reasoning to the Guidelines. *See United States v. Keitt*, 765 Fed.Appx. 882 (4th Cir. 2019).

categorically be a ‘crime of violence’ under the force clause. Utah third-degree aggravated assault is a result-oriented statute, criminalizing simple assault⁵ committed by “other means or force” that causes either injury or *risk* of injury. U.C.A. §§ 76-5-103, 76-5-102. This case cleanly raises the question of whether causing injury or risk of injury categorically involves the use of violent force.

Aside from the Utah third-degree aggravated assault, Mr. Fagatele’s criminal history is devoid of potential predicate offenses. Mr. Fagatele falls within criminal history category VI. If this Court agrees that statutes that criminalize the outcome, and not the means by which the result is achieved, do not fall within the force clause, Mr. Fagatele’s advisory Guideline range goes down by nearly two years to 30-37 months, instead of 51-63 months. Mr. Fagatele is like thousands of defendants who have been subjected to harsher terms of incarceration based on predicates that criminalize only the outcome. Mr. Fagatele’s sentence increased by nearly two years based on a ruling that causing risk of injury is the same as using violent force. By accepting review of Mr. Fagatele’s case, the Court can definitively answer whether a predicate criminalizing results instead of conduct is a violent felony per the force clause.

⁵ Utah simple assault can be committed by an offensive touching. *State v. Ricks*, 436 P.3d 350 (Utah Ct. App. 2018).

III. The Tenth Circuit's Decision Is Incorrect and Conflicts With Decisions of This Court.

Finally, the Court should grant certiorari because the Tenth Circuit's position on this issue is simply incorrect. Although the question of whether a predicate is a violent felony under the force clause has resulted in inconsistent decisions, the central question in the present case was anticipated by this Court's decision in *Castleman*, 572 U.S. 157, 167 (2014) (declining to address whether causing injury necessarily involves the use of violent force). The lower court decisions after *Castleman* and the resulting circuit split make clear that the question of whether an offense that criminalizes only the result – causing injury or causing risk of injury – and remains silent as to how that result is reached categorically satisfies the violent-force requirement of the force clause will not resolve without this Court's intervention.

This Court made clear that *Castleman* was confined to misdemeanors and common-law force, as the question presented was whether the minimum force required under the common-law—"namely, offensive touching"—applied to the determination of whether a crime qualifies as "a misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). 572 U.S. at 163-4. The *Castleman* Court reasoned that common-law force, with its roots in misdemeanor crimes, was a poor fit for the "*violent felonies*" discussed in ACCA, but, in the context of a "misdemeanor crime of domestic violence," it was "likely that Congress meant to incorporate that misdemeanor-specific meaning of 'force.'" *Id.*, 164 (emphasis

added). Consequently, “[m]inor uses of force may not constitute ‘violence’ in the generic sense[,]” but may well be “easy to describe as ‘domestic violence.’” *Id.*, 165-6. Necessarily, then, an injury that comes about without “making contact of any kind[,]” like poisoning, “necessitate force in the common-law sense” because “the common-law concept of force encompasses even its indirect application.” *Id.*, 170. And the very reasons this Court “gave for rejecting that [common-law] meaning in defining a “violent felony” [were] the reasons to embrace it in defining a “misdemeanor crime of domestic violence”” *Id.*, 163 (referencing *Curtis Johnson v. United States*, 559 U.S. 133, 140, 145 (2010)). Thus, *Castleman* makes clear that the result of causing injury conclusively demonstrates the use of force only in the narrow context where the common-law definition of force applies: misdemeanor crimes of domestic violence.

To determine if a prior offense falls within the force clause, a court must still apply the categorical approach (or modified categorical approach if the statute is divisible) and limit itself to the plain language of the statute. *Castleman*, 572 U.S. at 168. Doing otherwise disregards this Court’s precedent according great deference to state legislatures and the statutes they enact. *See, e.g., E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 509 (2014) (“We must presume that a legislature says in a statute what it means and means in a statute what it says there.”) (internal quotation omitted). Moreover, it is not for courts to rewrite statutes in order to fit them within the force clause. *United States v. Bass*, 404 U.S.

336, 348 (1971) (internal quotation omitted) (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.”) (internal quotation omitted).

The Tenth Circuit’s conclusion that causing injury or risk of injury is synonymous with the use of violent force erroneously disregards the analysis required by *Castleman*, 572 U.S. 157, and *Taylor v. United States*, 495 U.S. 575 (1990). The question of whether causation of injury or causation of risk of injury necessarily establishes violent physical force has created an irreconcilable circuit split and is ripe for review.

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT KEITH WILSON
FEDERAL PUBLIC DEFENDER

By: _____
/S/ Jessica Stengel
Assistant Federal Public Defender,
District of Utah
Counsel of Record for Petitioner
46 W Broadway Ste, 110
Salt Lake City, UT 84101

Salt Lake City, Utah
April 3, 2020

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

FEUU FAGATELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

Jessica Stengel, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Noel Franscisco
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with UPS on April 3, 2020, and all parties required to be served have been served.

/S/ Jessica Stengel
Assistant Federal Public Defender,
District of Utah
Counsel of Record for Petitioner
46 W Broadway Ste, 110
Salt Lake City, UT 84101

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

FEUU FAGATELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF MAILING

Jessica Stengel, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the UPS on April 3, 2020, and all parties required to be served have been served.

/S/ Jessica Stengel
Assistant Federal Public Defender
Counsel of Record for Petitioner
46 West 300 South, Suite 110
Salt Lake City, UT 84101
(801) 524-4010