

No. _____

In the

Supreme Court of the United States

Treshun Devonte Bates,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Can reckless conduct constitute a “crime of violence” by satisfying the “use of force” clause in the U.S. Sentencing Guidelines Manual’s definition of “crime of violence”? **[Petitioner requests a GVR when this Court decides *Borden v. United States*, 19-5410, ____ S. Ct. ____ (pending for 2020-21 term)]**

PARTIES TO THE PROCEEDING

Petitioner is Treshun Devonte Bates, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Bates*, No. 19-10813 (5th Cir. Mar. 18, 2020)
- *United States v. Bates*, No. 5:19-CR-24-C-1 (July 12, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND RULES PROVISIONS	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THIS PETITION.....	4
I. This Court should grant, vacate, and remand when this Court decides <i>Borden v. United States</i> , 19-5410, ___ S. Ct. ___ (pending 2020-21 term) because both cases involve the same dispositive issue: whether reckless conduct can satisfy a “use of force” clause	4
CONCLUSION.....	5
APPENDICES	
Fifth Circuit Opinion.....	App. A
Judgment of the District Court.....	App. B

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Borden v. United States</i> , No. 19-5410, ___ S. Ct. ___ (pending in 2020-21 term)	2, 3, 6
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004)	4, 5, 6
<i>United States v. Bates</i> , 797 F. App'x 888 (5th Cir. 2020)	1
<i>United States v. Burris</i> , 920 F.3d 942 (5th Cir. 2019)	4
<i>United States v. Fogg</i> , 836 951, 956 (8th Cir. 2017)	4
<i>United States v. Haight</i> , 892 F.3d 1271 (D.C. Cir. 2018)	4
<i>United States v. Hammons</i> , 862 F.3d 1052 (10th Cir. 2018)	4
<i>United States v. Hodge</i> , 902 F.3d 420 (4th Cir. 2018)	4
<i>United States v. Orona</i> , 923 F.3d 1197 (9th Cir. 2018)	4
<i>United States v. Rose</i> , 896 F.3d 104 (1st Cir. 2018)	4
<i>United States v. Vargas-Soto</i> , 700 F.3d 180 (5th Cir. 2012)	5
<i>United States v. Walker</i> , 769 F. App'x 195 (6th Cir. 2019)	4
<i>Voisine v. United States</i> , 136 S. Ct. 2272 (2016)	4

Statutes

8 U.S.C. § 1101(h)	5, 6
18 U.S.C. § 16(a)	5
18 U.S.C. § 922(g)(1)	2
28 U.S.C. § 1254(1)	1
Texas Penal Code § 6.03(c)	5
USSG § 2K2.1(a)(4)(A)	1, 2
USSG § 2K2.1(a)(6)	2

PETITION FOR A WRIT OF CERTIORARI

Petitioner Treshun Devonte Bates seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Bates*, 797 F. App'x 888 (5th Cir. 2020). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on March 18, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

U.S. Sentencing Guidelines Manual § 2K2.1(a)(4)(A) (2018) identifies a base offense level of 20 if the defendant has a prior conviction for a “crime of violence.”

U.S. Sentencing Guidelines Manual § 4B1.2(a)(1) defines “crime of violence” as “any offense that ... has as an element the use, attempted use, or threatened use of physical force against the person of another.”

STATEMENT OF THE CASE

This Court should grant this petition, vacate, and remand for reconsideration when this Court decides *Borden v. United States*, ___ S. Ct. ___ (pending in 2020-21 term).

A. Factual Background

On August 30, 2018, officers initiated a traffic stop after observing Mr. Bates change lanes without using a signal. Mr. Bates exited his vehicle and attempted to flee on foot. When officers captured Mr. Bates, they found a firearm, marijuana, and crack cocaine.

Mr. Bates was indicted on one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On March 20, 2019, Mr. Bates pleaded guilty to the one-count indictment. In its PSR, U.S. Probation initially calculated Mr. Bates's base offense level at 14 under USSG § 2K2.1(a)(6). The government objected, arguing that Mr. Bates's prior conviction for assault on a public servant is a "crime of violence." Probation accepted the objection and, in its addendum, calculated Mr. Bates's base offense level at 20 under USSG § 2K2.1(a)(4)(A). This translated to an increased advisory sentencing range of 57 to 71 months.

The district court held its sentencing hearing on July 12, 2019. At the hearing, the court sustained the government's objection, which defense counsel contested. The court then sentenced Mr. Bates to 71 months imprisonment, which was at the top of the advisory sentencing range in light of the district court's ruling.

Mr. Bates now asks that this Court grant his petition, vacate, and remand for

further consideration when this Court decides the same dispositive issue in *Borden v. United States*, ___ S. Ct. ___ (pending in 2020-21 term).

REASON FOR GRANTING THIS PETITION

This Court should grant, vacate, and remand when this Court decides *Borden v. United States*, ___ S. Ct. ___ (pending).

There is currently a circuit split over whether reckless conduct can satisfy a prior conviction enhancement's force clause. Since *Voisine v. United States*, 136 S. Ct. 2272 (2016), three courts of appeals have held that a force clause does not cover offenses that can be committed recklessly. *United States v. Rose*, 896 F.3d 104 (1st Cir. 2018); *United States v. Hodge*, 902 F.3d 420 (4th Cir. 2018); *United States v. Orona*, 923 F.3d 1197 (9th Cir. 2018). Five others have reached the contrary conclusion. *United States v. Burris*, 920 F.3d 942, 951 (5th Cir. 2019); *United States v. Walker*, 769 F. App'x 195 (6th Cir. 2019); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2017); *United States v. Hammons*, 862 F.3d 1052, 1056 (10th Cir. 2018); *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018).

Even though *Leocal v. Ashcroft*, 543 U.S. 1 (2004) "reserved" the question of whether recklessly causing injury was a use of force against the injured person, the decision provided a roadmap for resolving the issue.

Leocal rejected the argument that a drunk-driver who causes a collision has *used* physical force *against* the victim or the victim's property. This conclusion was based upon an analysis of the plain meaning of the statutory terms "use" and "against": a person would "use physical force against' another when pushing him; however, we would not ordinarily say a person 'uses physical force against' another by stumbling and falling into him." 543 U.S. at 9 (alterations omitted).

Texas defines recklessness in a way that surely includes most, if not all, drunk-driving accidents:

(c) A person acts recklessly, or is reckless, with respect to . . . the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that . . . the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Texas Penal Code § 6.03(c). In *United States v. Vargas-Soto*, 700 F.3d 180 (5th Cir. 2012), the Fifth Circuit analyzed a Texas prosecution where a single drunk-driving accident resulted in a conviction for intoxicated assault and manslaughter. *Id.* at 184.

In *Leocal*, this Court relied on Congress's decision to include both drunk-driving accidents and "crimes of violence" under the broader heading of "serious criminal offense" within the Immigration and Nationality Act. *Leocal*, 543 U.S. at 12 (discussing 8 U.S.C. § 1101(h)). The statute in question also lists *reckless driving* offenses that cause injury:

For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means--

- (1) any felony;
- (2) any crime of violence, as defined in section 16 of Title 18; or
- (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

8 U.S.C. § 1101(h) (emphasis added). If recklessly caused injuries were, by definition, a use of physical force against the victim, then those crimes would be violent under 18 U.S.C. § 16(a). "[T]he distinct provision for" reckless-driving-injury offenses under

[§ 1101(h)] should “bolster[]” Petitioner’s argument that the use-of-force clause “does not itself encompass” reckless-injury offenses. *Leocal*, 543 U.S. at 12 & n.9.

There is a non-trivial linguistic difference between “using physical force” and causing physical injury. *Leocal* acknowledged the difference. 543 U.S. at 10–11 & n.7. Section 16(b), this Court reasoned, “plainly does not encompass all offenses which create a ‘substantial risk *that injury will result from a person’s conduct.*’” *Id.* at 10 n.11 (emphasis added). Congress used both *injury* and *force* within § 924 itself, which suggests it intended a different meaning. *Compare* § 924(c)(3)(A), (c)(3)(B), (e)(2)(B)(i), *with* § 924(e)(2)(B)(ii). Surely Congress did not believe that language would extend to all statutes or Guidelines provisions defined by causing injury.

Thus, under the reasoning of *Leocal*, reckless conduct should not support any enhancement under a force clause.

CONCLUSION

This Court should grant, vacate, and remand once this Court decides *Borden v. United States*, No. 19-5410, ___ S. Ct. ___ (pending in 2020-21 term).

Respectfully submitted,

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