

No. _____

In the Supreme Court of the United States

David Matthews,
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. Whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a “violent felony” under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

PARTIES TO THE PROCEEDING

Petitioner, David Matthews, was the Defendant-Appellant before the Court of Appeals. Respondent, the United States of America, was Plaintiff-Appellee.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
INDEX TO APPENDICES.....	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION	1
RELEVANT PROVISIONS	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THIS PETITION	3
I. The Court should hold this petition pending its decision in <i>Borden v. United States</i>	3
CONCLUSION.....	5

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the
Northern District of Texas

TABLE OF AUTHORITIES

Federal Statutes

18 U.S.C. § 924	1-2, 4-5
28 U.S.C. § 1254	1

State Statutes

TENN. CODE ANN. § 39-13-101	3
TENN. CODE ANN. § 39-13-102	3
TEX. PENAL CODE § 29.02	4

Federal Cases

<i>Davis v. United States</i> , 900 F.3d 733 (6th Cir. 2018)	4
<i>United States v. Borden</i> , 769 F. App'x 266 (6th Cir. 2019)	4
<i>United States v. Burris</i> , 920 F.3d 942 (5th Cir. 2019)	4-5
<i>United States v. Fogg</i> , 836 F.3d 951 (8th Cir. 2016)	4
<i>United States v. Haight</i> , 892 F.3d 1271 (D.C. Cir. 2018)	4
<i>United States v. Hodge</i> , 902 F.3d 420 (4th Cir. 2018)	4
<i>United States v. Matthews</i> , 799 F. App'x 300 (5th Cir. 2020)	3-4
<i>United States v. Pam</i> , 867 F.3d 1191 (10th Cir. 2017)	4
<i>United States v. Rose</i> , 896 F.3d 104 (1st Cir. 2018)	4

PETITION FOR A WRIT OF CERTIORARI

Petitioner David Matthews seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unpublished opinion can be found in the Federal Appendix at 799 F. App'x 300. The district court's judgment is unreported. Both are attached as appendices.

JURISDICTION

The Court of Appeals issued its panel opinion on April 3, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Section 924(e) of Title 18 of the United States Code provides in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * *

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm,

knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

LIST OF PROCEEDINGS BELOW

1. *United States v. David Matthews*, Case No. 4:17-CR-00121-A, United States District Court for the Northern District of Texas. Judgment and sentence entered on February 14, 2018. (Appendix B).

2. *United States v. David Matthews*, 799 F. App'x 300 (5th Cir. 2020), Case No. 18-10235. Judgment affirmed on April 3, 2020. (Appendix A).

STATEMENT OF THE CASE

The Fifth Circuit recently affirmed the petitioner’s statutorily enhanced sentence based on a pair of prior convictions for simple robbery. The government charged Mr. Matthews—a previously convicted felon—with unlawfully possessing a firearm. (ROA.10). He pleaded guilty, and his presentence report asked the district court to apply the Armed Career Criminal Act. (ROA.261). For support, the PSR identified four prior convictions as ACCA predicates. (ROA.242-43). Two of the four were convictions for simple robbery under the Texas Penal Code, both of which the PSR classified as “violent felony” offenses. (ROA.243). Mr. Matthews objected and argued that neither offense had as an element the use or threatened use of force. (ROA.296-97, 315-20). The district court overruled his objections at sentencing and applied the ACCA. (ROA.190). Mr. Matthews pursued the same issue on appeal, but the Fifth Circuit affirmed. *United States v. David Matthews*, 799 F. App’x 300, 300-01 (5th Cir. 2020).

REASONS FOR GRANTING THIS PETITION

I. The Court should hold this petition pending its decision in *Borden v. United States*.

This Court has already granted review in *Borden v. United States*, cert. granted, No. 19-5410 (Mar. 2, 2020). There, this Court will address whether an aggravated-assault offense defined in terms of reckless conduct qualifies as a “violent felony.” *See* TENN. CODE ANN. § 39-13-102(a)(1)(B) (citing TENN. CODE ANN. § 39-13-101(a)(1)). Mr. Borden argued that the offense did not have as an element the use of force against the person of another, but the Sixth Circuit Court of

Appeals held otherwise. *United States v. Borden*, 769 F. App'x 266, 267 (6th Cir. 2019). This Court has since granted review to clear up a circuit split concerning whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a “violent felony” on that basis. Compare *United States v. Hodge*, 902 F.3d 420, 426 (4th Cir. 2018) (reckless conduct insufficient to constitute use of force against the person of another); *United States v. Rose*, 896 F.3d 104, 110 (1st Cir. 2018) (same), with *United States v. Burris*, 920 F.3d 942, 951 (5th Cir. 2019) (reckless conduct sufficient to constitute use of force against the person of another); *Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018) (same); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (same); *United States v. Pam*, 867 F.3d 1191, 1208 (10th Cir. 2017) (same); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (same).

This petition turns on the same split. The PSR classified four prior convictions as “violent felony” offenses, and two were simple robbery under the Texas Penal Code. (ROA.242-43). The Texas Penal Code defines simple robbery to include the reckless causation of bodily injury, so long as the injury occurs “in the course of committing theft.” TEX. PENAL CODE § 29.02(a)(1). At the district court and on appeal, Mr. Matthews argued that the offense did not have “as an element the use, attempted use, or threatened use of physical force against the person of another.” See 18 U.S.C. § 924(e)(2)(B)(i). The Fifth Circuit’s opinion in *United States v. Burris* foreclosed the claim on direct appeal. 799 F. App'x at 300-01 (citing *Burris*, 920 F.3d at 945, 948, 958). *Burris*, however, depends on a proposition—

“reckless conduct constitutes the use of physical force”—that this Court may overrule in *Borden*. See 920 F.3d at 952.

The Court should hold this petition pending its decision in *Borden*. If a criminal offense that can be committed recklessly *cannot* qualify as a “violent felony,” *Burris* was wrongly decided. The outcome in *Borden* may also prove determinative. After all, the PSR identified four potential predicates, but this Court may soon overrule the analysis underlying two of those. Four minus two is two, but the ACCA requires a trio of qualifying convictions. See 18 U.S.C. § 924(e)(1). Given *Borden*’s importance to the outcome here, the Court should hold this petition for now and then dispose of it in light of that opinion.

CONCLUSION

Petitioner respectfully submits that the Court should hold this petition pending its decision in *Borden v. United States*.

Respectfully submitted August 28, 2020.

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