No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRO PINEDA-CAMPUZANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statute has as an element the use of force against the person of another when a conviction under that statute can be based on a reckless mental state.[1]

[1] The petitions for a writ of certiorari in *Alan Victor Gomez Gomez v. United States*, No. 19-5325 (filed July 25, 2019), *Jose Lara-Garcia v. United States*, No. 19-5763 (filed Aug. 28, 2019), and *Javier Segovia-Lopez v. United States*, No. 19-6025 (filed Sept. 20, 2019), among others, raise the same issue as is raised in this petition.

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

United States v. Pineda-Campuzano, Case No. 7:18-CR-1425-1 (S.D. Tex.).

United States v. Pineda-Campuzano, 812 Fed. Appx. 293 (5th Cir. 2020) (unpublished)

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PRAYER

Petitioner Alejandro Pineda-Campuzano prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit. Alternatively, this Court should hold this petition pending its final decision in *Borden v. United States*, 140 S. Ct. 1262 (2020) (granting the petition for writ of certiorari limited to Question 1), and then dispose of the petition as appropriate.

OPINIONS BELOW

The Westlaw version of the opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Pineda-Campuzano's case is attached to this petition as an Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's opinion was entered on July 20, 2020. *See* Appendix. This petition is filed within 150 days after the date of the Fifth Circuit's opinion and thus is timely. *See* Sup. Ct. R. 13.1; *see also* Miscellaneous Order Addressing the Extension of Filing Deadlines (Sup. Ct. Mar. 19, 2020). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 16

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

*****

18 U.S.C. § 3553(f)-(g)

(f) Limitation on applicability of statutory minimums in certain cases.— Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense.—As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

*****

21 U.S.C. § 841(a) & (b)(1)(B)(vii).

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

. . .

(B) In the case of a violation of subsection (a) of this section involving—

. . .

> (vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; . . .
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. . . .

*****

USSG § 5C1.2(a)

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) . . . .

*****

Tex. Penal Code Ann. § 22.01(a) & (b)(1)-(2) (West 2017).

(a) A person commits an offense if the person:

> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person’s spouse;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
>
> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

> (1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant;
>
> (2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:
>
> > (A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or
> >
> > (B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth; . . . .

STATEMENT OF THE CASE

I. Statutory framework

A defendant who is convicted of the crime of possessing with intent to distribute 100 kilograms or more of marijuana faces a minimum of 5 and a maximum of 40 years in prison. 21 U.S.C. § 841(a)(1) & (b)(1)(B)(vii). However, such a defendant is eligible to receive a sentence below the statutory mandatory 5-year minimum if:

> (1) the defendant does not have—
>
> > (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> >
> > (B) a prior 3-point offense, as determined under the sentencing guidelines; and
> >
> > (C) ***a prior 2-point violent offense***, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this

requirement.

18 U.S.C. § 3553(f) (emphasis added). The Sentencing Guidelines similarly provide that "the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5)." USSG § 5C1.2(a) As used in § 3553(f), "***the term 'violent offense' means*** a crime of violence, as defined in section 16, that is punishable by imprisonment." 18 U.S.C. § 3553(g) (emphasis added).

Section 16 of Title 18, in turn, defines crime of violence as:

> (a) an offense that that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16. Since § 16(b), the "residual clause," is void for vagueness, *see Sessions v. Dimaya*, 138 S. Ct. 1204, 1213-15 (2018), that leaves only § 16(a), the "force clause," for analyzing whether a prior conviction qualifies as a "crime of violence"-type of "aggravated felony."

Like § 16(a), the Armed Career Criminal Act ("ACCA") has a force clause. *See* 18 U.S.C. § 924(e)(1)(B)(i). Under ACCA, a person who commits the offense of unlawful possession of a firearm or ammunition after three convictions for a "violent felony" faces a mandatory minimum sentence of 15 years in prison. 18 U.S.C. § 924(e)(1). ACCA defines "violent felony" to include (in relevant part) "any crime punishable by

imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(1)(B)(i). The only difference between the two force clauses is that § 16 includes property but ACCA does not. Because the force clauses are nearly identical, courts typically treat the two clauses as interchangeable. *See, e.g.*, *United States v. Ramos*, 744 Fed. Appx. 215, 217 (5th Cir. 2018) (unpublished); *United States v. Holston*, 471 Fed. Appx. 308, 308 (5th Cir. 2012) (unpublished); *see also Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) (stating that § 16(a) "is very similar to § 924(e)(2)(B)(i)").

Interpreting the applicability of these force clauses requires courts to employ the categorical approach. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990). Under that approach, courts examine whether the elements in the statute of the prior conviction meet the requirements of the force clause, without regard to the underlying facts, or means, that are "extraneous to the crime's legal requirements." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). To determine whether a statute contains elements or means, courts must decide whether the statute's alternatives are indivisible because they create a single crime that can be committed in various ways or whether the alternatives are divisible because they define separate crimes. *See, e.g.*, *id.* at 2250-57. If the statute's alternatives are elements, the modified categorical approach permits courts to examine the prior conviction documents to determine which offense the defendant committed, and then determine whether that offense satisfies the force clause. *See id.* at 2253-54. If the statute's alternatives are means, however, the modified categorical approach has no role to play, and

courts must decide whether the least of the acts sufficient to meet the statute's elements satisfies the force clause. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017).

In Texas, a person commits simple assault in one of three ways: (1) "intentionally, knowingly, or recklessly caus[ing] serious bodily injury to another"; (2) intentionally or knowingly threaten[ing] another with imminent bodily injury"; or (3) "intentionally or knowingly caus[ing] physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." Tex. Penal Code § 22.01(a). Although the three types of Texas simple assault are divisible because they are elements comprising separate crimes, the culpable mental states in the Texas simple assault statute are alternative means and therefore indivisible. *See, e.g.*, *United States v. Howell*, 838 F.3d 489, 498-99 (5th Cir. 2016); *Landrian v. State*, 268 S.W.3d 532, 537-39 (Tex. Crim. App. 2008). As a result, a person's assault conviction cannot be narrowed under the modified categorical approach except to the type of simple assault with the minimum mental state under the statute – that is, reckless bodily injury assault.

II. Factual background

On August 29, 2018, Mr. Pineda-Campuzano was charged by a 2-count indictment with conspiracy (Count 1) and with possession with intent to distribute 100 kilograms or more of marijuana (Count 2), in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 846.

On September 27, 2018, pursuant to a plea agreement, Mr. Pineda-Campuzano entered a plea of guilty to Count 2.[2]

At the guilty-plea proceeding, the prosecutor offered the following as a factual basis for the plea:

> [PROSECUTOR]: On or about August 10, 2018, the defendant, Alejandro Pineda-Campuzano, did knowingly and intentionally possess with intent to distribute a controlled substance. The controlled substance involved was 100 kilograms or more, that is, approximately 212 kilograms of a mixture or substance containing a detectable amount of marijuana, a Schedule I controlled substance.
>
> On the date in question agents conducted a traffic stop on a vehicle they suspected had just been loaded with narcotics. After a short vehicle pursuit, the driver later identified as the defendant attempted to flee on foot. The defendant was quickly detained. In the vehicle agents observed large bundles that were later determined to be 212 kilograms of marijuana. In a subsequent interview the defendant admitted to knowing that the bundles in the vehicle were marijuana and he agreed to transport them for an unindicted co-conspirator. The defendant knew he was carrying a controlled substance and possessed it with the intent to deliver or transfer his possession to another individual.

Mr. Pineda-Campuzano agreed with these facts.

Using the 2018 edition of the Sentencing Guidelines, the presentence report ("PSR") and the district court calculated Mr. Pineda-Campuzano's total offense level as follows:

Calculation	Levels	USSG §	Description	ROA
Base offense level	24	2D1.1(c)(8)	At least 100 but less than 400 kgs. of marijuana	PSR ¶ 18
Adjustment to offense level	-3	3E1.1(a) & (b)	Acceptance of responsibility	PSR ¶¶ 24, 43

[2] The plea agreement did not contain any waiver of Mr. Pineda-Campuzano's appellate rights.

Total offense level	21			PSR ¶ 43

The PSR calculated Mr. Pineda-Campuzano's criminal history score and category as follows:

Date of sentence	Offense and sentence	USSG §	Pts.	ROA
2/28/18	Assault-family member/90 days in custody	4A1.1(b)	2	PSR ¶ 27
1/10/18	Violation of protective order/300 days in custody	4A1.1(b)	2	PSR ¶ 28
Criminal history total/ Category			**4/III**	PSR ¶ 29

Based on a total offense level of 21 and a criminal history category of III, the PSR determined that Mr. Pineda-Campuzano was subject to an advisory Guideline imprisonment range of 46 to 57 months, but that the range actually was the statutory minimum prison sentence of 5 years (*i.e.*, 60 months). PSR ¶ 43; *see also* 21 U.S.C. § 841(b)(1)(B). The PSR also determined that the Guideline range for a supervised release term was from 4 to 5 years and that the mandatory minimum term of supervised release was 4 years under 21 U.S.C. § 841(b)(1)(B). *See* PSR ¶ 46.

Mr. Pineda-Campuzano filed a supplemental objection to the PSR arguing that he was eligible for the safety-valve reduction under the First Step Act of 2018. His objection pointed out that he was eligible under the Act because he had no more than 4 criminal history points and met the other requirements under the Act, including that he did not have

a prior 2-point conviction for a violent offense, which the Act defines as a crime of violence under 18 U.S.C. § 16.

On May 22, 2019, the district court overruled Mr. Pineda-Campuzano's objection concerning the safety-valve reduction based on *United States v. Gracia-Cantu*, 920 F.3d 252 (5th Cir.), *cert. denied*, 140 S. Ct. 157 (2019), and found that Mr. Pineda-Campuzano's prior conviction for assault-family violence was, as in *Gracia-Cantu*, a crime of violence. The court sentenced Mr. Pineda-Campuzano to serve 60 months in the custody of the Bureau of Prisons and a 4-year term of supervised release. The court did not impose a fine, but it did impose a $100 special assessment.

On June 4, 2019, Mr. Pineda-Campuzano timely filed notice of appeal. ROA.25. On appeal, he argued that he qualified for the safety-valve reduction and a sentence below the statutory mandatory minimum because an offense with a mens rea of recklessness is not a crime of violence under 18 U.S.C. § 16(a) and thus is not a violent offense under 18 U.S.C. § 3553(f). Although he acknowledged that the issue was foreclosed in the Fifth Circuit, he pointed out that the federal circuits are divided on the issue, and he preserved the issue for further review. On July 20, 2020, the Fifth Circuit affirmed Mr. Pineda-Campuzano's conviction and sentence, holding that his prior conviction for assault-family violence was a violent offense under its prior opinion in *Gracia-Cantu*, 920 F.3d at 253-55. *United States v. Pineda-Campuzano*, 812 Fed. Appx. 293, 293-94 (5th Cir. 2020) (unpublished).[3]

[3] However, the Fifth Circuit agreed with Mr. Pineda-Campuzano's additional argument that the judgment had to be vacated and the case remanded for entry of an amended judgment in conformity with the sentence pronounced, and it vacated the judgment and remanded for the limited purpose of entry of an amended judgment. *Pineda-Campuzano*, 812 Fed. Appx. at 294.

Mr. Pineda-Campuzano now seeks to have this Court settle the circuit split on whether a statute with a reckless mental state has as an element the use of physical force against the person of another.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

Whether a reckless offense has as an element the use of force against another person is a question on which the circuits have acknowledged that they are divided, and this Court's intervention is therefore necessary to resolve this important and recurring question of federal sentencing and immigration law. Alternatively, this Court should hold this petition pending its final decision in *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate.

A. This Court's intervention is necessary to resolve an important and recurring question of federal sentencing and immigration law that has divided the circuits.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court considered whether a prior conviction for driving under the influence of alcohol and causing serious bodily injury qualified as a "crime of violence" under 18 U.S.C. § 16's force clause. The unanimous Court said "no," reasoning that "negligent or merely accidental conduct" does not satisfy "the critical aspect" and "key phrase" of the force clause: the "use . . . of physical force *against the person or property of another*." *Leocal*, 543 U.S. at 9 (emphasis in original). In doing so, the Court emphasized that, "when interpreting a statute that features as elastic a word as 'use,' [the Court] construe[s] language in its context and in light of the terms surrounding it." *Id.* And in the context of § 16, with its phrase "against the person of another," the Court found that "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Id.* at 11. Context was very important to the Court's decision: "[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.*; *see also Curtis Johnson*, 559 U.S. at 140-41

(contrasting "the context of a statutory definition of '*violent* felony'" with "a meaning derived from a common-law *misdemeanor*") (emphasis in original).

The Court in *Leocal* did not decide whether a reckless offense qualifies as a crime of violence. *Leocal*, 543 U.S. at 13. But after *Leocal*, the circuit courts uniformly held that reckless offenses, like negligent or strict liability offenses, did not satisfy § 16 either. *See United States v. Fish*, 758 F.3d 1, 10 & n.4 (1st Cir. 2014) (collecting cases); *see also United States v. Orona*, 923 F.3d 1197, 1200, 1202 (9th Cir.) (explaining how the Ninth Circuit, after *Leocal*, determined *en banc* that a reckless assault did not qualify as a § 16(a) "crime of violence" and thereby "brought the law of [that] circuit in line with that of several of [the court's] sister circuits"), *reh'g en banc granted* 942 F.3d 1159 (9th Cir. 2019).

Then came this Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), which has unsettled that uniformity. *Voisine* concerned 18 U.S.C. § 922(g)(9), a statute that prohibits a person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. The phrase "misdemeanor crime of domestic violence" is further defined as an offense involving a domestic relationship that "has, as an element, the use of physical force," and the Court held that the statute includes reckless domestic assaults. *Voisine*, 136 S. Ct. at 2278. The Court acknowledged *Leocal*, but found nothing in that opinion suggesting "that 'use' marks a dividing line between reckless and knowing conduct." *Id.* at 2279. However, the Court expressly noted that its decision in *Voisine* involving "misdemeanor crimes of domestic violence" did not resolve whether a "crime of violence" under § 16 encompasses reckless conduct and further acknowledged that

"[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes." *Voisine*, 136 S. Ct. at 2280 n.4.

Since *Voisine*, the circuit courts have diverged on whether a reckless offense qualifies as either a "crime of violence" under § 16 or the United States Sentencing Guidelines or a "violent felony" under the Armed Career Criminal Act ("ACCA"). The First Circuit has held that reckless offenses do not qualify as either a "crime of violence" or a "violent felony." In *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017), the First Circuit found that a prior conviction for Massachusetts assault and battery with a dangerous weapon did not qualify as a "violent felony" under ACCA due to that statute's reckless mental state. The First Circuit reasoned that, although the Massachusetts statute required "that the wanton or reckless act be committed intentionally," the statute "does not require that the defendant intend to cause injury" or "be aware of the risk of serious injury that any reasonable person would perceive." *Id.* at 39. The First Circuit specifically pointed to cases where a conviction under the Massachusetts statute involved "reckless driving that results in a non-trifling injury." *Id.* at 38. Similarly, in *United States v. Rose*, 896 F.3d 104 (1st Cir. 2018), the First Circuit held that a prior conviction for Rhode Island assault with a dangerous weapon was not a "violent felony" under ACCA because that statute required "a mental state of only recklessness." *Rose*, 896 F.3d at 114.

Both *Windley* and *Rose* relied heavily on the First Circuit's opinion in *Bennett v. United States*, 868 F.3d 1, 9 (1st Cir.), *opinion withdrawn and vacated*, 870 F.3d 34 (1st Cir. 2017). That opinion was withdrawn and vacated due to the petitioner's death, but

before that happened, the court in *Windley* "endorse[d] and adopt[ed] [*Bennett*'s] reasoning as its own." *Windley*, 864 F.3d at 37 n.2. In *Bennett*, a panel including Justice Souter carefully examined this Court's opinion in *Leocal*, recognizing that both ACCA and § 16 contain "a follow-on 'against' phrase" to which "*Leocal* gave significant weight . . . in concluding that Florida's driving-under-the-influence offense was not a 'crime of violence' under § 16." *Bennett*, 868 F.3d at 9-10. The *Bennett* opinion further evaluated the potential impact of *Voisine* on the recklessness question, acknowledging the division among the circuits after *Voisine*. *Bennett*, 868 F.3d at 15-16. Ultimately, the *Bennett* opinion determined that ACCA's context, with the "against" phrase, "arguably does convey the need for the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim's bodily injury in committing an aggravated assault" and that it is unclear whether it would be "natural to say that a person who chooses to drive in an intoxicated state uses force 'against' the person injured in the resulting, but unintended, car crash." *Id.* at 18. Given that uncertainty, the *Bennett* opinion invoked the rule of lenity to hold that Maine aggravated assault, which encompasses drunk driving through its reckless mental state variant, does not have as an element the use of force against another person. *Id.* at 22-24.

A panel of the Fourth Circuit has agreed with the First Circuit's approach to reckless offenses. In *United States v. Middleton*, 883 F.3d 485, 487 (4th Cir. 2018), Judge Gregory authored a majority opinion holding that a conviction for South Carolina involuntary manslaughter did not qualify as a violent felony under ACCA because that statute covered

the illegal sale of alcohol to a minor that resulted in a drunk driver's death. *Id.* at 489-93. Judge Floyd authored a separate opinion concurring in part and concurring in the judgment, with Judge Harris joining Parts II.A and B. Those two subparts concluded that "South Carolina involuntary manslaughter sweeps more broadly than the ACCA because an individual can be convicted of this offense based on reckless conduct, whereas the ACCA force clause requires a higher degree of *mens rea*." *Id.* at 497 (concurring opinion). Drawing on the First Circuit's *Bennett* and *Windley* opinions, Judge Floyd and Judge Harris emphasized the phrase "against the person of another" as the critical feature distinguishing ACCA from the statute involving misdemeanor crimes of domestic violence in *Voisine*. *Middleton*, 883 F.3d at 498-99 (concurring opinion).

Although the Eighth Circuit has held, after *Voisine*, that some reckless offenses have the use of force against another,[4] the Eighth Circuit has squarely held that an offense that can be committed by reckless driving does not have the requisite force element. In *United States v. Fields*, 863 F.3d 1012, 1013 (8th Cir.), *reh'g denied* (Nov. 7, 2017), the Eighth Circuit evaluated whether a prior conviction for Missouri second-degree assault was categorically a "crime of violence" for purposes of applying a sentencing enhancement under the United States Sentencing Guidelines. The Missouri statute defined the offense at issue as "recklessly caus[ing] serious physical injury to another person." *Fields*, 863 F.3d at 1014 (brackets in original omitted). The Eighth Circuit held that, because the Missouri

[4] *See, e.g., United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (holding that reckless discharge of a firearm qualifies as a violent felony under ACCA).

statute encompassed reckless driving resulting in injury, it did not qualify as a "crime of violence." *Id.*

The Eighth Circuit in *Fields* reaffirmed its pre-*Voisine* decision in *United States v. Ossana*, 638 F.3d 895 (8th Cir. 2011). In *Ossana*, the Eighth Circuit relied on this Court's decision in *Begay v. United States*, 553 U.S. 137 (2008),[5] which "distinguished crimes that show a mere 'callousness toward risk' from crimes that 'also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.'" *Ossana*, 638 F.3d at 902 (quoting *Begay*, 553 U.S. at 146). More specifically, *Begay* pointed to reckless polluting and reckless tampering with consumer products as "crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'" *Ossana*, 638 F.3d at 903 (quoting *Begay*, 553 U.S. at 146). Without "any meaningful distinction between" reckless tampering with consumer products and assault statutes "encompassing reckless driving that results in an injury," the Eighth Circuit applied *Begay* to find that reckless driving was not a crime of violence. *Ossana*, 638 F.3d at 903. Although the government sought rehearing of the Eighth Circuit's decision in *Fields* to reaffirm *Ossana* after *Voisine*, the court denied the petition. *See Fields*, 863 F.3d at 1012 n.*.

Similar to the Eighth Circuit, but on a broader scale, the Ninth Circuit has re-affirmed its pre-*Voisine*, *en banc* decision that a reckless assault does not qualify as a crime

[5] *Begay* primarily concerned the residual clause and was abrogated in that respect when the residual clause was later held to be void for vagueness. *See Samuel Johnson v. United States*, 576 U.S. 591 (2015). But if a crime does not even create the serious potential *risk* of physical injury necessary to satisfy the residual clause, it clearly does not have the use of force *as an element*.

of violence under § 16(a). *See Orona*, 923 F.3d at 1202-03. After *Leocal*, the *en banc* Ninth Circuit revisited (and expressly overruled) its precedent that a crime of violence included reckless offenses. *See Orona*, 923 F.3d at 1200-01 (discussing *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*)). In its *en banc* decision in *Fernandez-Ruiz*, the Ninth Circuit had "relied on 'the bedrock principle of *Leocal* . . . that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another." *Orona*, 923 F.3d at 1201 (quoting *Fernandez-Ruiz*, 466 F.3d at 1132). In *Orona*, the Ninth Circuit examined *Voisine* in detail but concluded that *Voisine* did not "wholly undercut the theory or reasoning of *Fernandez-Ruiz*" because the Ninth Circuit remained persuaded, even after *Voisine*, that "'running a stop sign solely by reason of voluntary intoxication and causing physical injury to another'—similar to the conduct at issue in *Leocal*, could not 'in the ordinary sense be called active or violent.'" *Orona*, 923 F.3d at 1203 (quoting *Fernandez-Ruiz*, 466 F.3d at 1130). The Ninth Circuit acknowledged the First Circuit's similar conclusion in *Rose* as well as the opposing views of other circuits. *See Orona*, 923 F.3d at 1202-03.

Four circuits have reached the opposite conclusion. The D.C. Circuit in *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019), held that the defendant's argument that D.C. assault with a dangerous weapon was not a violent felony because it included a mental state of reckless "contravenes" *Voisine*. *Haight*, 892 F.3d at 1281. The court expressed the view that "[t]he statutory provision at issue in *Voisine* contains language nearly identical to ACCA's violent felony provision." *Haight*, 892 F.3d

at 1280. Unlike the First Circuit, the D.C. Circuit was unpersuaded that the differentiating phrase "against the person of another" carried significance. *See id.* at 1281. The D.C. Circuit expressly recognized the First Circuit's conclusion on reckless offenses in *Windley* but disagreed with that decision. *Haight*, 892 F.3d at 1281. The Fifth, Sixth, and Tenth Circuits have likewise extended *Voisine* to the "crime of violence" or "violent felony" contexts. *See, e.g.*, *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir. 2017); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Mann*, 899 F.3d 898, 905 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2637 (2019). A three-judge panel of the Sixth Circuit, however, explained that they would have held that merely reckless conduct is not the use of force against another person, had they been writing on a clean slate and not been bound by circuit precedent. *United States v. Harper*, 875 F.3d 329, 330-32 (6th Cir. 2017), *cert. denied*, 139 S. Ct. 53 (2018). Like some other circuits, the Sixth Circuit panel was persuaded that "against the person of another" is "a restrictive phrase that describes the particular type of 'use of physical force' necessary to satisfy" the force clause. *Id.* at 331.

As the above discussion demonstrates, a number of circuits have weighed in on the question presented in thoughtful and comprehensive opinions with express consideration of contrary opinions. The division among the circuits is therefore unlikely to be resolved on its own, and further percolation among the circuit courts is not necessary. Through *Bennett*, *Windley*, and *Rose*, a majority of First Circuit judges in regular active service have authored or joined opinions concluding, after extensive analysis, that reckless offenses are

excluded from qualifying under § 16 and ACCA's force clauses, and so it is highly unlikely that the First Circuit will change its mind. The D.C. Circuit recognized the First Circuit's work on this subject but still reached the opposite conclusion. *Haight*, 892 F.3d at 1281. The Eighth Circuit had the opportunity to revisit its opinion on reckless driving, but declined to do so. *See Fields*, 863 F.3d at 1012 n.*. And the Fifth Circuit has denied at least one petition for rehearing *en banc* raising the recklessness issue. *See* Order, *United States v. Gomez Gomez*, No. 17-20526 (5th Cir. Apr. 23, 2019). It will therefore remain the situation, until this Court decides the issue, that whether a person's prior conviction qualifies as having the use of force against another—and the serious consequences flowing from that designation—will depend on the happenstance of geography.

Whether a prior conviction qualifies as a "crime of violence" under 18 U.S.C. § 16 or a "violent felony" under ACCA is a question with enormous consequences. Years of imprisonment turn on the answer. The penalties faced by a person convicted of being a felon in possession of a firearm increase dramatically under ACCA if that person has three previous convictions for a violent felony. The mandatory minimum prison sentence skyrockets from zero to 15 years. *Compare* 18 U.S.C. § 924(a)(2), *with id.* § 924(e)(1). The maximum prison sentence escalates from 10 years to life. *Compare id.* § 924(a)(2), with *id.* § 924(e)(1).

The force clause appears in a variety of other criminal statutes as well. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A), 924(c)(1)(C), 924(c)(1)(D)(3)(A) (firearms offenses); 18 U.S.C. § 1959(a) (RICO); 18 U.S.C. § 3142(f)(1)(A) (bail); 18 U.S.C. § 3553(f)(1)(C), (g) (eff.

Dec. 21, 2018) (eligibility for "safety valve" relief from mandatory minimum drug sentences).

And, the interpretation of the force clause carries severe immigration consequences. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (rendering an alien deportable for committing a crime of violence); *id.* § 1229b(a)(3) (rendering an alien ineligible for cancellation of removal). Indeed, "a conviction under [8 U.S.C.] § 1326(b)(2)—involving a prior conviction of an aggravated felony—is itself an aggravated felony, 'rendering [the defendant] permanently inadmissible to the United States.'" *United States v. Ovalle-Garcia*, 868 F.3d 313, 314 (5th Cir. 2017) (quoting *United States v. Briceno*, 681 Fed. Appx. 334, 337 (5th Cir. 2017) (unpublished)) (brackets added in *Ovalle-Garcia*).

Given the high stakes and widespread use of force clauses in federal criminal and immigration law, this issue raised in this case is worthy of the Court's attention, especially because Mr. Pineda-Campuzano was deprived of a sentence below the statutory mandatory minimum prison term based on a finding that he had a prior conviction for a "crime of violence"/"violent offense." Accordingly, the Court should grant Mr. Pineda-Campuzano's petition for certiorari to resolve the entrenched circuit conflict over the important question of whether a reckless offense has as an element the use of force against another person and thus qualifies as a "crime of violence" or "violent felony." *See* Sup. Ct. R. 10(c).

B. Alternatively, this Court should hold this petition pending its final decision in *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate.

Petitioner alternatively requests that the Court hold his petition until it decides *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate. In *Borden*, the Court has granted the petition of certiorari as to Question 1, which is whether the "use of force" clause in the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i) encompass crimes with a *mens rea* of mere recklessness?" Although *Borden* involves the force clause in ACCA, the only difference between that force clause and the one at issue in petitioner's case is that 18 U.S.C. § 16 includes force against property while ACCA does not. That difference is unlikely to be significant in the context of the recklessness argument here, given that the prior offense for review is recklessly causing bodily injury and that Mr. Pineda-Campuzano preserved this issue in both the district court and in the Fifth Circuit for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold this petition pending its final decision in final decision in *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate.

Date: December 2, 2020

Respectfully submitted,

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This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Alejandro PINEDA-CAMPUZANO,
Defendant-Appellant

No. 19-40517
|
Summary Calendar
|
FILED July 20, 2020

Appeal from the United States District Court for the Southern District of Texas, USDC No. 7:18-CR-1425-1

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Before JOLLY, ELROD, and GRAVES, Circuit Judges.

Opinion

PER CURIAM: *

Alejandro Pineda-Campuzano challenges the 60-month prison sentence and four-year term of supervised release imposed following his guilty plea conviction for possession with intent to distribute approximately 212 kilograms of marijuana. Pineda-Campuzano argues that the district court erred by (1) finding him ineligible for a safety-valve reduction and (2) including ***294** special conditions of supervised release in the written judgment that were not orally pronounced at sentence.

We review the district court's legal interpretation of the safety-valve provision de novo. *United States v. Towns*, 718 F.3d 404, 407 (5th Cir. 2013). Pineda-Campuzano's argument that he is eligible for a safety-valve reduction because his previous Texas conviction for Assault-Family Violence, pursuant to Texas Penal Code § 22.01(a), is not a violent offense is foreclosed by circuit precedent. In *United States v. Gracia-Cantu*, 920 F.3d 252, 253-55 (5th Cir.), *cert. denied*, —— U.S. ——, 140 S. Ct. 157, 205 L.Ed.2d 46 (2019), we held that a prior conviction for Assault-Family Violence under § 22.01(a)(1) fell within 18 U.S.C. § 16(a)'s definition of a crime of violence because it had the use of force as an element. Because the conviction qualified as a crime of violence under § 16(a), the conviction was properly classified as a violent offense under 18 U.S.C. § 3553(f), thus, precluding Pineda-Campuzano's eligibility for a safety-valve reduction. *See* § 3553(f)(1)(C), (g).

We generally review challenges to conditions of supervised release for an abuse of discretion. *United States v. Huor*, 852 F.3d 392, 397 (5th Cir. 2017). However, if a defendant challenges a condition for the first time on appeal, the plain-error standard applies. *United States v. Diggles*, 957 F.3d 551, 559 (5th Cir. 2020) (en banc). The district court abused its discretion by requiring Pineda-Campuzano to immediately report to a probation office if he were to return to the United States after deportation and by noting that active supervision would automatically reactivate upon his reporting because these special conditions were required to be orally pronounced and were more burdensome than special conditions announced during the sentencing hearing. *See id.*; *United States v. Mudd*, 685 F.3d 473, 480 (5th Cir. 2012); *United States v. Mireles*, 471 F.3d 551, 558 (5th Cir. 2006); *United States v. Bigelow*, 462 F.3d 378, 380 (5th Cir. 2006). Accordingly, Pineda-Campuzano's sentence is AFFIRMED IN PART, VACATED IN PART and REMANDED to the district court for the limited purpose of conforming the written judgment with the oral pronouncement of sentence.

All Citations

812 Fed.Appx. 293 (Mem)

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.