

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2020 Term

TYRONE VALENTINE

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari

To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

KEVIN C. CURRAN
Assistant Federal Public Defender
1010 Market, Suite 200
Saint Louis, MO 63101
(314) 241-1255
Fax: (314) 421-4177

QUESTIONS PRESENTED

Whether reasonable jurists could disagree on whether criminal statutes that encompass drunk driving “manifesting extreme indifference to the value of human life” that “creates a grave risk of death to another person and thereby causes serious physical injury” constitute a “violent felony” that requires as an element, “the use, attempted use, or threatened use of physical force against the person of another” within 18 U.S.C. §924(e)(2)(B)(i), making the issue worthy of a certificate of appealability per 28 U.S.C. §2253(c)(1)(B)?

- A. This Court’s pending decision in *Charles Borden v. United States*, No. 19-5410 (argued November 3, 2020), will decide the substantive issue.

Parties to the Proceedings

Petitioner Tyrone Valentine was represented in the lower court proceedings by his counsel, Lee T. Lawless, Federal Public Defender for the Eastern District of Missouri, and Kevin C. Curran, Assistant Federal Public Defender, 1010 Market, Suite 200, Saint Louis, Missouri, 63101. The United States is represented by Acting United States Attorney, Sayler A. Fleming, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri, 63102.

TABLE OF CONTENTS

Questions Presented	2
Parties to the Proceedings	3
Table of Authorities	5
Opinion Below	7
Jurisdictional Statement	7
Statutory and Constitutional Provisions	8
Statement of the Case	10
Grounds for Granting the Writ	12
I. The Court should grant certiorari to decide whether a Certificate of Appealability is warranted under 28 U.S.C. §2253(c)(1)(B) because reasonable jurists could disagree as to whether Missouri’s prior assault statute, Mo. Rev. Stat. §565.050.1 (1978) satisfies the definition of predicate violent felonies in The Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(B)(i).	14
Judicial economy may favor holding this Petition pending the <i>Borden</i> ruling	18
Conclusion	19
Appendix	

TABLE OF AUTHORITIES

Supreme Court Cases

<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017)	13, 15, 18
<i>Descamps v. United States</i> , 570 U.S. 254 (2013)	16
<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	16
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004)	10, 11, 12, 15
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	15, 16
<i>Miller-El v. Cockrell</i> , 527 U.S. 322 (2003)	13, 15, 18
<i>Moncrieffe v. Holder</i> , 569 U.S. 184 (2013)	16
<i>Taylor v. United States</i> , 495 U.S. 575 (1990)	15

Docketed Case

<i>Charles Borden Jr. v. United States</i> , No. 19-5410.	<i>passim</i>
--	---------------

Federal Circuit Court Cases

<i>United States v. Charles Naylor</i> , 887 F.3d 397 (8th Cir. 2018) (<i>en banc</i>)	17, 18
<i>United States v. Tucker</i> , 740 F.3d 1177 (8 th Cir. 2014)	16

State Court Cases

<i>State v. Gonzales</i> , 652 S.W.2d 791 (Mo. Ct. App. 1983)	14
<i>State v. Hartman</i> , 273 S.W.2d 198 (Mo. banc 1954)	17
<i>State v. Lusk</i> , 452 S.W.2d 219 (Mo. 1970).	17
<i>State v. Yardley</i> , 628 S.W.2d 703 (Mo. Ct. App. 1982)012)	14

Federal Statutes

18 U.S.C. §16 (a)	10, 15
18 U.S.C. §922(g)(1)	8, 10

18 U.S.C. §924(e)2, 6, 8, 10, 15, 18

State Statutes

Mo. Rev. Stat. § 565.050 (1978) 9, 11, 13, 14, 17

Mo. Rev. Stat. §565.050 (Supp. 1984) 9, 13

Mo. Rev. Stat. §556.061(7) (1978) 14

OPINION BELOW

The order denying Mr. Valentine's request for a certificate of appealability is not published. It appears in the appendix, at p. i.

JURISDICTION

The Eighth Circuit Court of Appeals entered its one paragraph judgment on September 28, 2020 Appx. p. 1. No petition for rehearing was filed. This petition is timely filed within 150 days of the denial of the petition for rehearing by deposit with a third party commercial carrier on February 25, 2021, for delivery within three days to the Clerk of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §16, “Crime of Violence defined,” provides:

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. §922(g) It shall be unlawful for any person—

- (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (9) who has been convicted in any court of a misdemeanor crime of domestic violence,

To ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition...

18 U.S.C. §924(e)(2)(B), provides:

(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—

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

28 U.S.C. §2253(c)(1)(B), provides (as pertinent to this case): Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –(B) the final order in a proceeding under [28 U.S.C.] section 2255.

Missouri State Statutes

Mo. Rev. Stat. § 565.050.1 (1978) provided

1. A person commits the crime of assault in the first degree if:
 - (1) He knowingly causes serious physical injury to another person; or
 - (2) He attempts to kill or to cause serious physical injury to another person; or
 - (3) Under circumstances manifesting extreme indifference to the value of human life he recklessly engaged in conduct which creates a grave risk of death to another person and thereby causes serious physical injury to another person.”

Mo. Rev. Stat. §565.050.2 (1978) provided that the offense was a Class B Felony “unless committed by means of a deadly weapon or dangerous instrument in which case it is a class A felony.”

Mo. Rev. Stat. §556.061(7) (1978), defined “dangerous instrument” as “any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury.”

Mo. Rev. Stat §565.050 (Supp. 1984)(effective Oct. 1, 1984), amended Mo. Rev. Stat. 565.050 to make the offense a Class B felony, “unless in the course thereof the actor inflicts serious physical injury on the victim in which case it is a class A felony.”

STATEMENT OF THE CASE

This Eighth Circuit denied Petitioner Valentine's request for a Certificate of Appealability pursuant to 28 U.S.C. §2253(c)(1)(B) on his contention that the 1980's assault statutes under which he was convicted required no more than reckless conduct such as drunk driving resulting in injury and could not satisfy the definition of "violent felony" as a crime involving "the use . . . of force against the person of another" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(2)(B)(i). His petition for a Certificate of Appealability in the Eighth Circuit noted that this Court was considering the question of whether crimes satisfied by conduct committed with a reckless *mens rea* satisfied the ACCA definition in *Charles Borden Jr. v. United States*, No. 19-5410. Petitioner Borden's merits briefs in this Court stress that a ruling that would authorize reckless conduct to qualify as "the use of force against the person of another" would directly conflict with this Court's prior decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that driving under the influence did not satisfy a virtually identical definition for "crimes of violence" in 18 U.S.C. §16(a). Mr. Valentine argued in the Court of Appeals that the grant of certiorari in *Borden* established that reasonable jurists could conclude that the Missouri assault statute encompassing drunk driving did not satisfy the ACCA definition and warranted a certificate of appealability under the standards this Court established to govern that preliminary determination.

Petitioner commenced a timely motion for post-conviction relief under 28 U.S.C. §2255(a) alleging, among other things that he was sentenced contrary to Federal law to an enhanced mandatory sentence of 15 years (180 months) under the ACCA, entered on June 17, 2015, upon his conviction for unlawfully possessing ammunition as a prohibited person previously convicted of being a felon-in-possession of a firearm under 18 U.S.C. §922(g)(1). The ACCA enhancement increases the punishment for the offense from a maximum prison term of 10 years to the mandatory minimum of 15 years for those who have three convictions for a crime of violence or a serious drug offense. Petitioner's ACCA

sentence was based on the only three prior convictions he had, two of which consisted of Missouri first degree assault convictions entered in the early 1980s pursuant to Mo. Rev. Stat. § 565.050.1 (1978). Petitioner cited Missouri state case law interpreting the statute to encompass the infliction of serious physical injury by means of dangerous instrument, such as drunk driving resulting in serious injury to another. Petitioner cited other ACCA precedents of this Court declaring that statutes interpreted by authoritative decision of the state's appellate courts as listing alternative means of committing offense, rather than distinct sets of elements cannot qualify if those means include conduct that does not satisfy the definition of "violent felony." This is significant to the analysis of whether a prior conviction qualifies as a "violent felony" looks as the least egregious conduct required to violate a criminal statute under the "categorical analysis" ACCA employs to identify predicate "violent felonies" by focusing on the elements of the crime, rather than a defendant's individual offense conduct underlying the prior conviction.

The District Court for the Eastern District of Missouri dismissed petitioner's challenge to the validity of his Missouri assault convictions as ACCA predicate violent felonies, reasoning that the language of the statute construed to encompass drunk driving resulting in injury was a divisible subsection of the assault statute, rather than in indivisible alternative means of violating the statute.

Petitioner timely appealed the decision to the United States Court of Appeals for the Eighth Circuit and petitioned the appellate court for a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)(1)(B). He cited the *Borden* case now pending in this Court, which will decide whether statutes satisfied by conduct committed with a reckless *mens rea* constitutes "the use" of force against the person of another. He also cited this Court's 2004 decision in *Leocal v. Ashcroft*, 243 U.S. 1 (2004), that reckless conduct (such as drunk driving) did not naturally seem to constitute the intentional use of force against the person of another, a precedent at the heart of the arguments made in *Borden*. Petitioner also

cited intervening Eighth Circuit case law that surveyed Missouri court cases and concluded that Missouri Courts generally regard a disjunctive listing of alternative definitions describing prohibited conduct as a list of alternative ways to commit a single crime. Petitioner argued that these precedents demonstrated that reasonable jurists could have decided that Missouri's assault statute lists alternative means of committing a single offense, rather than distinct sets of elements, as the district court concluded.

The Eighth Circuit denied petitioner's request for a Certificate of Appealability by an unexplained order issued on September 28, 2020. Appendix, p. 1. P

GROUND FOR GRANTING THE WRIT

- I. The Court should grant certiorari and reverse the denial of a certificate of appealability on the issue of whether Missouri's assault statute indivisibly encompasses reckless conduct like drunk driving or hold the petition pending the Court's decision in *Borden v. U.S.*

The Court's pending decision in *Borden* will likely determine the ultimate issue petitioner raised in his original petition under 28 U.S.C. § 2255 that his Missouri assault convictions were satisfied by reckless drunk-driving resulting in serious physical injury to another which this Court ruled in 2004 failed to constitute a "crime of violence" definition encompassing crimes that required as an element "the use . . . of physical force against the person or property of another." See *Leocal v. Ashcroft*, 243 U.S. 1, 11 (2004). Borden's petition for a writ of certiorari cited the split of circuit authority on the matter of whether crimes committed with a *mens rea* of recklessness constitute "the use . . . of force against the person of another," *Charles Borden, Jr. v. United States*, No. 19-5410, Petition for a Writ of Certiorari, pp. 13-15 (filed July 24, 2019) (detailing that the First, Fourth, and Ninth Circuit deemed recklessness insufficient to constitute the "use of force" while the Sixth, Fifth, Tenth and D.C. Circuits held that it did).

The existence of this entrenched circuit split bears directly on Petitioner Valentine's right to a Certificate of Appealability enabling him to appeal his ACCA challenge in the Eighth Circuit Court of Appeals. To obtain a certificate of appealability under §2253(c), a petitioner must make a substantial showing of the denial of a constitutional right. *Miller-El v. Cockrell*, 527 U.S. 322, 326 (2003). The Certificate of Appealability inquiry, however, "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). At this stage, "the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* quoting *Miller-El*, at 327. The gatekeeping court should decide the issue without "full consideration of the factual or legal bases adduced in support of the claims." *Id.*, quoting *Miller-El* at 336.

Missouri state court decisions construing the assault statute established that it could be violated by reckless drunk driving resulting in serious physical injury to another. In 1982 and continuing until October 1, 1984, Missouri law stated "[a] person commits the crime of assault in the first degree if:

- (1) He knowingly causes serious physical injury to another person; or
- (2) He attempts to kill or to cause serious physical injury to another person; or
- (3) Under circumstances manifesting extreme indifference to the value of human life he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes serious physical injury to another person."

Mo. Rev. Stat. §565.050.1 (1978). Subsection 565.050.2 provided that the offense was a Class B felony "unless committed by means of a deadly weapon or dangerous instrument in which case it is a class A felony." Effective October 1, 1984, the legislature amended §565.050 to make the offense a Class B felony, "unless in the course thereof the actor inflicts serious physical injury on the victim in which case it is a class A felony." Mo. Rev. Stat. §565.050 (Supp. 1984). The term "dangerous instrument" was statutorily defined as "any instrument, article or substance, which, under the circumstances in which it is

used, is readily capable of causing death or other serious physical injury.” Mo. Rev. Stat. §556.061(7) (1978). Missouri courts interpreted that definition to include automobiles, *see State v. Yardley*, 628 S.W.2d 703, 705 (Mo. Ct. App. 1982).

Missouri case law interpreting the 1978 statute’s language further revealed that recklessly driving a vehicle in circumstances manifesting extreme indifference to human life easily supported conviction for assault. In *State v. Gonzales*, 652 S.W.2d 791, 720 (Mo. Ct. App. 1983), a traffic-stop-turned-sobriety-testing of a man driving a vehicle three miles below the minimum legal speed led to “[a] chase of Hollywood dimensions”, *id.* at 720-21. Fleeing the officer who originally stopped him at high speed, Gonzales careened down a curved exit ramp and his car jumped a cement traffic island, missing by mere inches a patrol car occupied by another officer who accelerated forward to avoid collision. *Id.* at 721-22. The chase continued at 90-100 miles per hour until Gonzales struck a large concrete base, the rear of his car jumping 10 feet into the air before settling down in a cloud of steam and glass. *Id.* at 721-22. Gonzales fought with the officers who subdued him. Notwithstanding the state court’s reference to the charge citing the second statutory method of assault by “attempting to kill or cause serious physical injury,” the Court of Appeals analyzed the sufficiency of evidence by noting how close the proof came to showing reckless behavior manifesting extreme indifference:

“Extreme negligence there was, recklessness, heedlessness, ‘extreme indifference to the value of human life . . . creat[ing] a grave risk of death’ to others. One can scarcely imagine a more aggravated case. Our statute punishes such conduct as first-degree assault only if an actual injury results therefrom, §565.050.1(3), RSMo 1978, which shows quite plainly a legislative intent not to punish such conduct as first-degree assault where no injury is inflicted.”

Id. at 723. In short, Missouri case law establishes that the assault statute could be satisfied by reckless driving while drunk that either causes serious physical injury or that manifests extreme indifference to the value of human life, creating a grave risk of death to another person whereby physical injury is caused to another.

Petitioner Borden’s merits brief in this Court posits reckless drunk driving resulting in injury as the type of offense that *Leocal* repudiated as “the use of force” under §16(a)’s “crime of violence” definition, which is virtually identical to the ACCA “element of force” definition in §924(e)(2)(B)(i). Borden Merits Brief, at 8, 17-18, 39. In short, the litigation in *Borden* confirms that reasonable jurists could conclude that a criminal statute that is satisfied by reckless drunk driving does not satisfy the ACCA “violent felony” definition of an offense that requires as an element “the use . . . of force against the person of another.” This satisfies the threshold to warrant a Certificate of Appealability under this Court’s precedents. *See Buck v. Davis*, 137 S. Ct. at 777, quoting *Miller-El*, at 327.

Reasonable jurists could also disagree with the District Court’s decision that Missouri’s assault statute listed divisible sets of elements rather in light of Missouri case law declaring that Missouri legislation disjunctively listing alternative ways in which a statute may be violated constitute alternative means to establish what amounts to a single crime rather than divisible sets of elements.

To determine whether a prior conviction qualifies as an ACCA “violent felony,” federal courts apply “a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016), quoting *Taylor v. United States*, 495 U.S. 575, 600-01 (1990). The elements of a crime are “the things the prosecution must prove to sustain a conviction” and are “what the jury must find beyond a reasonable doubt to convict the defendant[.]” *Id.* (citations and internal quotations omitted). In contrast, the facts of a crime are “extraneous to the crime’s legal requirements” and have “no legal effect [or] consequence[.]” *Id.* (citations omitted).

The categorical approach is straightforward when a statute is indivisible, that is, when it defines a single crime with a single set of elements. *Id.* at 2248. Where a statute defines multiple crimes by listing multiple alternatives, the first task is to determine whether the alternatives are elements or means.

Mathis v. United States, 136 S. Ct. at 2247. Means are “[h]ow a given defendant actually perpetrated the crime.” *Id.* at 2251. Means “need neither be found by a jury nor admitted by a defendant.” *Id.* If the statutory alternatives are elements, the statute is divisible, and the Court may apply the modified categorical approach, whereby the Court may “look[] to a limited set of documents . . . to determine, what crime, with what elements, a defendant was convicted of.” *Id.* at 2249. If the statute lists alternative means, some of which do not qualify as a predicate violent felony, convictions thereunder do not support an ACCA sentence. *Id.* at 2257. Authoritative decisions of the state courts of the author jurisdiction may be critical to determining whether a statute lists “elements” or “means.” *Id.* at 2256.

Even when a statute is found to be divisible in some ways, it may include components that are indivisible, encompassing conduct that both does and does not satisfy the “violent felony” definitions. *See, e.g., United States v. Tucker*, 740 F.3d 1177, 1181-82 (8th Cir. 2014) (disqualifying a Nebraska escape statute that was divisible in providing alternative grounds for conviction for one who either “unlawfully removes himself from official detention or fails to return to official detention following temporary leave”, but indivisible in defining the type of detention facility to encompass anything from the most heavily guarded penitentiaries to non-secure community-based housing facilities”). Convictions pursuant to such over-inclusive statutes cannot qualify because a jury need not find the type of conduct required to satisfy the violent felony definition. *See Descamps v. United States*, 570 U.S. 254, 277 (2013)(because California burglary did not require unlawful entry as an element or as an alternative element, it could never constitute the enumerated violent felony of burglary). The Court must presume that the conviction rested upon nothing more than the least of the acts criminalized to determine if those acts come within the definition of violent felony. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010).

Several months before the District Court’s September 7, 2018 ruling, the Eighth Circuit Court of Appeals sitting *en banc* concluded that the Supreme Court of Missouri “has consistently held that disjunctive alternatives in Missouri’s criminal statutes should be construed as listing various ways of committing a single crime. *United States v. Charles Naylor*, 887 F.3d 397, 401-02 (8th Cir. 2018) (*en banc*), citing *State v. Lusk*, 452 S.W.2d 219, 223 (Mo. 1970). “[I]f a statute makes criminal the doing of this, or that, or that, mentioning several things disjunctively, there is but one offense which may be committed in different ways, and in most instances all may be charged in a single count. . . . And proof of the offense in any one of the ways will sustain the allegation.” *Id.*, quoting *State v. Hartman*, 273 S.W.2d 198, 203 (Mo. banc 1954).

The *Naylor* case establishes that a reasonable jurist viewing Missouri’s assault statutes could conclude that the disjunctive listing of forms of conduct comprise an indivisible roster of various means by which to commit a single offense. The Missouri Supreme Court’s rule in *Lusk* (described in *Naylor*) supports a conclusion that the assault statute encompassed both knowingly causing and attempting to cause serious physical injury as well as recklessly creating a grave risk of death or serious physical injury in circumstances manifesting extreme indifference to human life. Mo. Rev. Stat. §565.050.1(1)-(3) (1978). The assault statute created an aggravating element enhancing the punishment from a Class B to a Class A felony for use if a deadly weapon or dangerous instrument, Mo. Rev. Stat. §565.050.2 (1978), but the disjunctively listed methods still indivisibly defined both the Class A and Class B forms of assault. The only divisible aspect of the statute consisted of the use or lack of use of a deadly weapon or dangerous instrument.

The *Naylor* decision and the Missouri state court rulings it carefully surveyed further establish that a reasonable jurist could have disagreed with the District Court’s ruling that the Missouri statute identified divisible sets of elements rather than an indivisible set of elements satisfied by reckless

driving causing injury to another. Again, the issue at the Certificate of Appealability stage is not equivalent to determining the ultimate merits of the issue. The only question is whether jurists of reasons could disagree with the district court's resolution or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. at 773.

Petitioner's claims concerning the inadequacy of his Missouri assault convictions to satisfy the ACCA's "element of force" definition in §924(e)(2)(B)(i) and the indivisibility of those statutes under the precedents of this Court and the Eighth Circuit precedent in *Naylor* easily establish that reasonable jurists could have decided the issue differently than the District Court did. Petitioner submits that the foregoing establishes the Eighth Circuit mistakenly denied him a Certificate of Appealability on the District Court's error, which warrants a summary grant of certiorari to reconsider its ruling in light of *Buck v. Davis* and *Miller-El*.

The interests of judicial economy would seem to favor holding this petition in abeyance pending the imminent ruling by this Court in *Borden v. United States*, No. 19-1541, since it will likely be decisive on the ultimate issue of whether statutes satisfied by reckless conduct qualify under the ACCA's "element of force" definition in §924(e)(2)(B)(i).

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court grant his petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals, or, in the alternative, hold it in abeyance pending this Court's decision this Term in *Charles Borden v. United States*, No. 19-5410.

Respectfully submitted,



KEVIN C. CURRAN
Assistant Federal Public Defender
1010 Market, Suite 200
Saint Louis, MO 63101
(314) 241-1255
Fax: (314) 421-4177