

CASE NO. 20-7326

IN THE SUPREME COURT OF THE UNITED STATES

October 2020 Term

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TYRONE VALENTINE

*Petitioner,*

v.

UNITED STATES OF AMERICA

*Respondent.*

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On Petition for a Writ of Certiorari

To the Eighth Circuit Court of Appeals

PETITION FOR REHEARING

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## STATUTORY PROVISIONS AND RULES 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. §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.

SUP. CT R. 44.2 provides, in pertinent part, “Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial . . . , but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented[.]”

### 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.”

## ARGUMENT FOR REHEARING

This Court's ruling three weeks ago in *Christopher J. Borden v. United States*, No. 19-5410, 593 U.S. \_\_\_, 2021 WL 2367312 (June 10, 2021), constitutes an intervening circumstance with controlling effect on the claim Mr. Valentine raised in his Petition for Certiorari and warrants rehearing within the terms of SUP. CT R. 44.2.

Mr. Valentine's Petition for a Writ of Certiorari asked this Court to review the denial of a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(B) on his contention that the Missouri assault statutes under which he was convicted were satisfied by reckless conduct, including drunk driving resulting in injury to another, and could not satisfy the definition of "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(2)(B)(i). Petition for Certiorari ("Cert. Pet.") at 12-17. He raised the claim in a timely petition to vacate his 180-month sentence pursuant to 28 U.S.C. § 2255, arguing that the ACCA was improperly applied to raise his sentence from a maximum of 10 years under 18 U.S.C. § 924(a)(2) to a minimum of 15 years based on three Missouri assault convictions from the 1980s. The District Court denied the claim and denied a certificate of appealability.

Petitioner sought a certificate of appealability in the Eighth Circuit, on the basis that reasonable jurists could disagree on whether the Missouri assault statute underlying his Missouri assault convictions required as an element "the use of physical force *against the person of another*," within the meaning of Section 924(e)(2)(B)(i) (emphasis added). He cited authoritative Missouri state court decisions holding that the statute was satisfied by reckless conduct such as reckless drunk driving causing injury to another.

This Court’s intervening decision in *Borden* squarely established that crimes satisfied by reckless or culpably negligent conduct do not constitute the “use” of physical force against the person of another. 2021 WL 2367312 at \*4. The Court explained that recklessness and culpable negligence “are less culpable states because they . . . involve insufficient concern with a risk of injury,” whereas the ACCA definition requires a targeted use of force “against the person of another.” *Id.* The Court relied heavily on its precedent in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), which held that a conviction for driving under the influence amounted to merely negligent conduct that did not satisfy the nearly identical “element of force” definition for “crimes of violence” in 18 U.S.C. §16(a). *Borden*, at \*7-8, \*9-10.

Although the parties in *Leocal* focused on the active employment of force based on Congress’s choice of the word “use” in the statute, this Court thought that focus to be too narrow and that the “critical aspect” of Section 16(a) was its demand that the perpetrator use physical force specifically “against the person or property of another.” 543 U.S. at 9. “When read against the words ‘use of force,’ the ‘against’ phrase—the definition’s ‘critical aspect’—‘suggests a higher degree of intent’ than (at least) negligence.” *Borden*, at \*7, quoting *Leocal*, 543 U.S. at 9. In *Leocal*, the Court reserved the question of whether the same reasoning applied to the “elements” definition in ACCA. *Id.*, at 13. In *Borden*, this Court confirmed that the same reasoning excluded reckless and negligent crimes as violent felonies under the ACCA’s “use . . . of physical force against the person of another” definition in Section 924(e)(2)(B)(i). 2021 WL 2367312 at \*4, \*12.

The ruling in *Borden* constitutes a controlling intervening decision on the issue Petitioner Valentine raised in his Petition for Certiorari and warrants rehearing under SUP. CT R. 44.2. The *Borden* decision adopted the very reasoning Petitioner argued in his motion for a certificate of appealability in the United States Court of Appeals for the Eighth Circuit and in his petition for certiorari in this Court. Cert. Pet. at 15. Petitioner argued that Missouri convictions for assault in the first degree rested upon statutory definitions that indivisibly encompassed driving under the influence of alcohol resulting in serious physical injury to another. Cert. Pet. at 13-14. *See State v. Gonzales*, 652 S.W.2d 791, 720 (Mo. Ct. App. 1983). 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.” 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). 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).

Missouri case law interpreting the 1978 statute’s language showed that recklessly driving a vehicle in circumstances manifesting extreme indifference to human life easily supported conviction for assault, even if the state charged the crime as an assault under the statutory alternative means that the accused “attempted to kill or cause serious physical injury to another person[.]”. *Gonzales*, 652 S.W.2d at 723 (finding sufficient evidence to convict where the conduct approximated a showing of reckless behavior manifesting extreme indifference,” despite the fact the original charge alleged he attempted to kill or cause serious physical injury

In light of *Borden*, Mr. Valentine’s petition for a certificate of appealability easily satisfied the threshold to “show[] 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.’” *See Buck v. Davis*, 137 S. Ct. 759, 773 (2017), cited in the Petition for Certiorari at 13. Indeed, the opinion of the Court in *Borden* observed that “[m]any convictions for reckless crimes result from unsafe driving,” and cited a variety of state assault statutes satisfied by reckless conduct. 2021 WL 2356312 at \*10.

The Missouri Supreme Court’s decision in *Gonzales* provides salient evidence that the assault statute upon which Mr. Valentine was convicted stands within the class of cases *Borden* invalidated as ACCA predicate offenses. The issue at the certificate of appealability stage does not authorize a “full consideration of the factual or legal bases

adduced in support of the claims.” *Buck*, 137 S. Ct. at 773, quoting *Miller-El v. Cockrell*, 527 U.S. 322, 337 (2003). “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 774, quoting *Miller-El*, 527 U.S. at 338. The Missouri case law demonstrating that reckless driving satisfies the assault statute underlying Mr. Valentine’s convictions confirms that his claim is significant enough to proceed to further consideration in the Eighth Circuit in light of *Borden*.

### CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court reconsider his Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals and grant the petition to remand the case for reconsideration in light of *Borden v. United States*.

Respectfully submitted,



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**Certificate of Counsel of Record**

Undersigned counsel of record hereby certifies that this petition is submitted in good faith to raise intervening substantial circumstances of the type specified in Supreme Court Rule 44.2, and is not presented for delay.

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