No. __-_____

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMIAH DAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a crime that can be committed by reckless driving resulting in injury be a predicate offense for the Armed Career Criminal Act and its significantly enhanced penalties?

PARTIES TO THE PROCEEDINGS

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Petitioner Jeremiah Davis respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's published opinion vacating Mr. Davis' non-ACCA sentence, and remanding for resentencing as an Armed Career Criminal, *Davis v. United States*, No. 17-5659, 900 F.3d 733 (6th Cir. August 16, 2018), appears at pages 1a to 7a of the appendix to this petition. The decision of the district court, *Davis v. United States*, No. 3:01-CR-83-RLJ-HBG-1, 262 F. Supp. 3d 539 (E.D.T.N. 2017), appears at pages 8a to 28a of the appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision of the court of appeals vacating Mr. Davis' sentence was entered on August 16, 2018. This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e) provides, in relevant part,

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions... for a violent felony... shall be... imprisoned not less than fifteen years.
>
> (2) the term "violent felony" means 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.

Tenn. Code Ann. § 39-13-102 (1990) provides, in relevant part,

> (a) A person commits aggravated assault who:
>
> (1) Commits an assault as defined in § 39-13-101, and:
>
> > (A) Causes serious bodily injury to another; or
> >
> > (B) Uses or displays a deadly weapon; ...

Tenn. Code Ann. § 39-13-101 (1990) provides, in relevant part,

> (a) A person commits assault who:
>
> > (1) Intentionally, knowingly or recklessly causes bodily injury to another;
> >
> > (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
> >
> > (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

STATEMENT OF THE CASE

In 2001, Jeremiah Davis pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). His Presentence Report asserted he qualified for the enhanced sentencing provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on three predicate convictions: two convictions under one of Tennessee's older aggravated assault statutes (Tenn. Code Ann. § 39-13-102 (1990)) and one conviction under Tennessee's current aggravated assault statute. The district court found he had the three predicates ACCA required and sentenced Mr. Davis to serve 180 months in prison, followed by five years of supervision.

The *Johnson* petition

After this Court found the ACCA's residual clause unconstitutionally vague, *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Davis filed a petition for sentencing relief under 28 U.S.C. § 2255. He argued his convictions under the 1990 aggravated assault statute were no longer violent felonies, because portions of the statute would only have qualified as predicate offenses under the residual clause. He also cited the Sixth Circuit's then-applicable law holding that reckless aggravated assault was not a violent felony, *United States v. McMurray*, 653 F.3d 367, 377 (6th Cir. 2011).

The government responded in opposition, arguing that this Court's ruling in *Voisine v. United States*, 136 S. Ct. 2272 (2016), effectively overruled *McMurray*. It argued that after *Voisine*, the ACCA's use-of-force clause "must be read to encompass even acts undertaken recklessly," and cited the Eighth Circuit's opinion in *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016). The government provided documentation showing that Mr. Davis' 1991 aggravated assault conviction was for attacking someone with a deadly weapon, causing serious

bodily injury, and that the 1992 aggravated assault conviction had been charged as attempted murder, but amended by agreement to aggravated assault (again using a deadly weapon and causing serious bodily injury).

The district court granted Mr. Davis' § 2255 petition. It believed the Sixth Circuit would not interpret *Voisine* as invalidating *McMurray*. Furthermore, extending *Voisine*'s definition of "use" to the ACCA would lead to a "comical misfit," in which "three past convictions for injuries that result from reckless plate throwing – the example discussed at length in *Voisine* – or reckless driving, could be sufficient to earn a designation as an 'armed career criminal.'" (citing *Bennett v. United States*, 868 F.3d 1 (1st Cir. 2017)).[1] The district court resentenced Mr. Davis to "time served" followed by three years of supervised release.[2]

The government's appeal

The government appealed the district court's determination that Mr. Davis' aggravated assault convictions under the 1990 statute were not violent felonies. It made two arguments. First, Mr. Davis' pre-1993 Tennessee aggravated assault convictions involved the kind of "violent force" required by the ACCA's use-of-force clause. It argued that Mr. Davis had been convicted under § 39-13-102(a)(1) for assaulting with a deadly weapon and causing serious bodily injury, which therefore met the required threshold of force. Second, the government argued that *Voisine* had overruled *McMurray* so that "use" of physical force included all reckless assaults.

[1] The *Bennett* opinion would later be withdrawn due to Mr. Bennett's death, however its reasoning was adopted by *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017).

[2] Since being released on April 27, 2017, Mr. Davis has maintained steady employment and abided by all conditions of supervised release.

Mr. Davis responded with arguments why *Voisine* would not apply to his convictions because the *Shepard* documents were unclear as to his precise conviction. He also argued the Sixth Circuit could affirm the court below because *Voisine* does not reach crimes that can be committed by recklessly driving, citing *United States v. Fields*, 863 F.3d 1012, 1015 (8th Cir. 2017), and *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017). A defendant convicted of aggravated assault for causing injury by driving while intoxicated does not pose the kind of risk that Congress appears to have had in mind in defining a violent felony. Tennessee's aggravated assault statute can be violated by recklessly employing a deadly weapon, which includes vehicles.

On August 16, 2018, the Sixth Circuit vacated Mr. Davis' sentence and remanded his case for resentencing as an Armed Career Criminal. It found Mr. Davis had been convicted under § 39-13-102(a)(1). It stated its ruling in *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017), holding that a mental state of recklessness is sufficient for a conviction to be a crime of violence, overruled *McMurray*. It further held that the holding in *Verwiebe* had been applied to the Tennessee aggravated assault statute in *United States v. Harper*, 875 F.3d 329, 330 (6th Cir. 2017). *Harper* bound this panel to holding that § 39-13-102(a)(1) is categorically a crime of violence. The Sixth Circuit did not address Mr. Davis' argument that statutes that can be violated by reckless driving resulting in injury are different from those covered by *Voisine*.

REASONS FOR GRANTING THE PETITION

At least five states – Alaska, Arizona, Nebraska, Oregon, Tennessee – have felony assault statutes that include reckless employment of a deadly weapon or dangerous instrument, where

the particular weapon or instrument used is a "means" rather than an element.[3] In all five states, the statutes can be violated by reckless driving causing injury.[4] Four Circuits – the Fifth, Sixth, Tenth, and D.C. – hold that, after this Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), a conviction under such a statute is a conviction for a violent felony and thus worthy of triggering the draconian sentencing enhancements of the ACCA. *United States v. Mendez-Henriquez*, 847 F.3d 214 (5th Cir. 2017); *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017); *United States v. Pam*, 867 F.3d 1191 (10th Cir. 2017); *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018) (*petition for certiorari pending*, No. 18-370).[5] Two Circuits – the First and the Eighth – have properly held that such statutes are not violent felonies because a crime that includes "the unadorned offense of reckless driving resulting injury" is distinct from other crimes of recklessness," *United States v. Ossana*, 638 F.3d 895, 901 n.6 (8th Cir. 2011), and are "similar to the Supreme Court's decision regarding DUI crimes in *Begay*." *United States*

[3] Alaska – Alaska Stat. § 11.41.200(a)(1) (1992); Arizona – Ariz. Rev. Stat. § 13-1204 (2017) (incorporating Ariz. Rev. Stat. § 13-1203); Nebraska – Reb. Rev. Stat. § 28-309 (2015); Oregon – Ore. Rev. Stat. § 163.165(a) (2017); Tenn. Code Ann. § 39-13-102 (1990) (incorporating Tenn. Code Ann. § 39-13-101).

[4] Alaska – *Tickett v. State*, 334 F.3d 708, 710 (Alaska Ct. App. 2014) (recklessly driving snowmobile and striking someone); Arizona – *United States v. Ossana*, 638 F.3d 895, 900 (8th Cir. 2011) (recognizing aggravated assault with a dangerous instrument includes reckless driving resulting in injury); Nebraska – *State v. Hoffman*, 416 N.W.2d 231, 234 (Neb. 1987) (intoxicated driver driving recklessly causes fatal accident); Oregon – *State v. Blan*, 358 P.3d 316, 317 (Or. Ct. App. 2015) (recklessly driven car can be a dangerous weapon when it is used in a manner capable of causing death or serious physical injury); Tennessee –*State v. Boone*, No. W2005-00158-CCA-R3CD, 2005 WL 3533318, *6 (Tenn. Crim. App. 2005) (defendant may be found guilty of reckless aggravated assault if he recklessly caused bodily injury using a deadly weapon, to wit: motor vehicle).

[5] The arguments made in *Haight* are similar enough to those here that a grant of certiorari in *Haight* would warrant a hold on this petition. However, the arguments are different enough that a ruling in *Haight* is not necessarily dispositive of the instant petition.

v. Fields, 863 F.3d 1012, 1015 (8th Cir. 2017) (quoting *Ossana* and *Begay v. United States*, 553 U.S. 137, 144-48 (2008)).

The Sixth Circuit in *Verwiebe* rejected the defendant's argument that "crimes satisfied by reckless conduct *categorically* do not include the 'use of physical force.'" *Verwiebe*, 874 F.3d at 264 (emphasis added). In rejecting that argument, *Verwiebe* did *not* rule that crimes satisfied by reckless conduct categorically *include* the use of physical force. *Verwiebe* specifically held that "the reckless conduct proscribed by [18 U.S.C.] § 113(a)(6) amounts to 'the use, attempted use, or threatened use of physical force.'" *Id*. *Verwiebe*'s reckless mens rea analysis should have been limited to § 113(a)(6) and should not have been extended to Tennessee reckless aggravated assault.

That *Verwiebe*'s analysis should have been cabined by the statute it analyzed is demonstrated by its choice of Eighth Circuit cases to support its argument. *Verwiebe,* 874 F.3d at 262 (citing *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016)). In *Fogg*, the Eighth Circuit held, post-*Voisine*, that recklessly shooting at a person is a violent felony. 836 F.3d at 956. However, the Eighth Circuit has also held, post-*Voisine*, that it is not just the *mens rea* of an offense that must be examined, but also the nature of the crime itself. *Fields*, 863 F.3d at 1015. *Fields* noted that in *Voisine*, the Supreme Court "did not decide that all crimes with a reckless *mens rea* are crimes of violence in all circumstances." 863 F.3d at 1015 (citing *Voisine*, 136 S. Ct. at 2280 n.4 ("Our decision today concerning [18 U.S.C.] § 921(a)(33)(A)'s scope does not resolve whether [18 U.S.C.] § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states.")).

Both the Eighth Circuit and the First Circuit have ruled *Voisine* does not reach crimes that can be committed by recklessly driving. *Fields*, 863 F.3d at 1015; *Windley*, 864 F.3d at 38, 39. A crime that includes "the unadorned offense of reckless driving resulting in injury" is "distinct from other crimes of recklessness," *Ossana*, 638 F.3d at 901 n.6, and are "similar to the Supreme Court's decision regarding DUI crimes in *Begay*." *Fields*, 863 F.3d at 1015 (quoting *Ossana* and *Begay*, 553 U.S. at 144-48). A defendant convicted of aggravated assault for "causing injury by driving while intoxicated" does not "pose the kind of risk that Congress appears to have had in mind in defining" a violent felony. *Bennett v. United States*, 868 F.3d 1, 22 (1st Cir. 2017), court opinion withdrawn upon death of defendant, reasoning adopted by *Windley*, 864 F.3d at 37 n.2.

Tennessee's 1990 reckless aggravated assault, Tenn. Code Ann. § 39-13-102, is one such statute. A motor vehicle "can constitute a deadly weapon for the purposes of aggravated assault." *State v. Tate*, 912 S.W.2d 785, 787 (Tenn. Crim. App. 1995). A defendant may be found guilty of reckless aggravated assault if he "recklessly caused bodily injury" using a "deadly weapon, to-wit: Motor Vehicle." *State v. Boone*, No. W2005-00158-CCA-R3CD, 2005 WL 3533318, at *6 (Tenn. Crim. App. Dec. 27, 2005) (unpublished) (finding jury instruction proper in reckless aggravated assault prosecution in connection with a car accident in which the defendant was driving recklessly). Tennessee courts have upheld convictions for reckless aggravated assault in connection with DUI- and reckless driving-related vehicle accidents, with the vehicle being the "deadly weapon." *State v. Harris*, No. W201501917CCAR3CD, 2017 WL 244117, at *4 (Tenn. Crim. App. Jan. 20, 2017) (unpublished) (DUI and reckless driving); *Boone*, 2005 WL 3533318, at *6 (reckless driving); *see also State v. Kennedy*, 152 S.W.3d 16, 18 (Tenn. Crim. App. 2004) (jury convicted defendant of vehicular homicide, reckless

aggravated assault, and reckless driving, for injuries/death caused by her reckless driving. Trial judge overturned verdict, finding defendant was insane at the time of the offense. Insanity ruling upheld on appeal). The courts have sustained convictions for reckless aggravated assault when someone in the vehicle the defendant strikes is injured, *Harris*, 2017 WL 244117, at *1, but also may be sustained when the defendant's own passenger is injured by the defendant's reckless driving. *State v. Jones*, No. E201600769CCAR3CD, 2018 WL 486004, at *3 (Tenn. Crim. App. Jan. 19, 2018) (unpublished); *State v. Huffine*, No. E201602267CCAR3CD, 2018 WL 1611591, at *1 (Tenn. Crim. App. Apr. 3, 2018) (unpublished) (defendant's passenger suffered injury in car crash caused by reckless driving).

The Fifth, Sixth, Tenth, and D.C. Circuits would hold such an offense to be a violent felony. This interpretation subverts the ACCA's purposes of subjecting severely violent repeat offenders to drastically increased prison sentences. The ACCA's enhanced penalty for any individual defendant is profound, imposing a mandatory minimum sentence of imprisonment for 15 years, and a maximum of life, rather than the statutory maximum of ten years. 18 U.S.C. §§ 924(a)(2) & (e). To mete out such punishment to someone who had prior convictions for causing injury while driving recklessly cannot be what Congress intended.

CONCLUSION

The split between Circuits holding reckless driving resulting in injury offenses to be predicates for the ACCA and those holding that ACCA was not intended to include such offenses is well-established and unlikely to resolve itself. This causes vastly divergent outcomes for defendants with the same convictions being sentenced in different Circuits and thus requires intervention by this Court. Jeremiah Davis respectfully requests that the petition for certiorari be granted.

Respectfully submitted,

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