NO._____

In the Supreme Court of the United States

CURTIS HULING,

PETITIONER-APPELLANT,

v.

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 4B1.1(a) of the United States Sentencing Guidelines raises the offense level for a "crime of violence" or "controlled substance offense" committed by an offender with two prior convictions of a "crime of violence" or a "controlled substance offense." Section 4B1.2(a)(2), lists "aggravated assault" as a "crime of violence." For a state offense to qualify as "aggravated assault," it must be punishable by over a year and have elements that are the same as or narrower than "generic" aggravated assault. *Descamps v. United States*, 570 U.S. 254, 257 (11th Cir. 2013). Additionally, under § 4B1.2(a)(1), any offense punishable by over a year that "has as an element the use, attempted use, or threatened use of physical force against the person of another[]" is a crime of violence.

This petition asks, first, what is the least culpable mental state that qualifies a state aggravated assault offense as generic: "knowledge, purpose, or intent," as the Ninth Circuit held in *United States v. Garcia-Jimenez*, 807 F. 3d 1079, 1084, 1087 (9th Cir. 2015), "extreme indifference recklessness," as the Fourth, Sixth, and Eighth Circuits have held, *see United States v. Barcenas-Yanez*, 826 F. 3d 752 (4th Cir. 2016); *United States v. McFalls*, 592 F. 3d 707, 717 (6th Cir. 2010), *abrogated on other grounds by Voisine v. United States*, __ U.S.__, 136 S. Ct. 2272 (2016); *United States v. Schneider*, 905 F.3d 1088 (8th Cir. 2018), "ordinary recklessness," as the Fifth Circuit held in *United States v. Mungia-Portillo*, 484 F. 3d 813 (5th Cir. 2007), or the general intent to commit an act without a particular *mens rea* as to its consequences, as the Eleventh Circuit held below.

Second, this petition asks whether the "use of physical force" under § 4B1.2 (a)(1) encompasses crimes of recklessness, like the analogous clause this Court considered in *Voisine*, 136 S. Ct. 2272, or if it excludes such crimes, like the pure accidents that this Court found not to qualify as a "use of physical force against the person or property of another" in *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

PARTIES TO THE PROCEEDINGS

Petitioner, Curtis Huling, was the Appellant in the Court of Appeals and the Defendant in the District Court.

Respondent, the United States of America, was the Appellee in the Court of Appeals, and the Plaintiff in the District Court.

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PETITION FOR WRIT OF CERTIORARI

Curtis Huling, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals was not reported in the Federal Reporter, but was reported in the Federal Appendix and is available on Westlaw. *United States v. Huling*, No. 17-13032, 741 F. App'x. 702, (11th Cir. July 10, 2018). A copy of the opinion is attached as Appendix A. The District Court made an oral ruling, which is unreported. A transcript of the sentencing is attached as Appendix B.

JURISDICTION

Appellant invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Court of Appeals entered its decision affirming Mr. Huling's conviction on July 10, 2018. He timely files this petition based on Supreme Court Rule 13.1.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S.S.G. § 4B1.1 raises the offense levels used to calculated the recommended sentencing ranges of persons deemed "career offenders." It provides, in pertinent part:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.
>
> (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

OFFENSE STATUTORY MAXIMUM	OFFENSE LEVEL*
(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 25 years	32
(4) 15 years or more, but less than 20 years	29
(5) 10 years or more, but less than 15 years	24
(6) 5 years or more, but less than 10 years	17
(7) More than 1 year, but less than 5 years	12.

Application note 1 to U.S.S.G. § 4B1.1 addresses three operative terms, stating:

> **1. Definitions.–**"Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in § 4B1.2.

U.S.S.G. § 4B1.2(a) defines "crime of violence" as follows:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Ga. Code Ann. § 16-5-21 (2008) proscribed "aggravated assault" in Georgia, stating, in pertinent part:

> (a) A person commits the offense of aggravated assault when he or she assaults:
>
> (1) With intent to murder, to rape, or to rob;
>
> (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; or
>
> (3) A person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons.

Ga. Code Ann. § 16-5-20 (2008) proscribed "simple assault" in Georgia, stating, in pertinent part:

> (a) A person commits the offense of simple assault when he or she either:
>
> (1) Attempts to commit a violent injury to the person of another; or
>
> (2) Commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

18 U.S.C. § 2113(a) proscribes bank robbery, stating, in pertinent part:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or the care, custody, control, management, or possession of, any bank, credit union, or savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union or such savings and loan association and in violation of any statute of the United States, or any larceny –
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

A. Legal Framework

Crimes of Violence. The career offender enhancement, U.S.S.G. § 4B1.1, raises the offense level for a "crime of violence" or "controlled substance offense" committed by an offender with two prior convictions of a "crime of violence" or a "controlled substance offense," as those terms are defined in U.S.S.G. § 4B1.2. The "crime of violence" definition has two clauses: the "force clause" of § 4B1.2(a)(1) (also called the "elements clause"), and the "enumerated clause" of § 4B1.2(a)(2). The enumerated clause lists eight offenses, including "aggravated assault." *Id.*

An offense is a crime of violence under the force clause if it has an element requiring the use, attempted use, or threatened use of physical force "against the person of another." *Id.* An offense qualifies under the enumerated clause if all of its elements match (or are narrower than) the "generic" elements of one of the enumerated offenses. *Descamps v. United States*, 570 U.S. 254, 257 (2013). A "generic" offense means "the offense as commonly understood." *Id.*

Both the force clause and the enumerated clause require the "categorical approach" – focusing exclusively on the legal elements of the crime and ignoring the factual details underlying a particular conviction. In practice, this means that to determine whether a particular conviction was for a crime of violence, courts must presume the conviction was predicated on the least culpable conduct legally sufficient to sustain the conviction, and then consider whether that conduct would satisfy either the force clause, or all of the generic elements of an enumerated offense.

To determine the elements of generic aggravated assault, courts consider how "the criminal codes of most States" define the offense, as well as how the Model Penal Code and legal treatises define the offense, to the extent they reflect the contemporary consensus among the states. *Taylor v. United States*, 495 U.S. 575, 598 (1990). It may also consider "reliable dictionaries." *Esquivel-Quintana v. Sessions*, __ U.S.__, 137 S. Ct. 1562, 1569 (2017) (citing B. Garner, *A Dictionary of Modern Legal Usage* 28 (2d ed. 1995), and *Black's Law Dictionary* 73 (10th ed. 2014)).

Georgia aggravated assault. Georgia defines aggravated assault as a simple assault plus one of several aggravating factors.[1] *Guyse v. State*, 690 S.E.2d 406, 409 (Ga. 2010). A person can commit simple assault in Georgia in two ways: "attempt[ing] to commit a violent injury to the person of another[,]" or "commit[ting] an act which places another in reasonable apprehension of immediately receiving a violent injury[.]" Ga. Code Ann. § 16-5-20(a) (2008). The aggravating factor relevant here is "[w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury[.]" Ga. Code Ann. § 16-5-21(a)(2) (2008).

In a long line of cases, the Georgia Supreme Court and Georgia Court of Appeals have held that Georgia aggravated assault with a deadly weapon does not

[1] Mr. Huling was convicted of Georgia aggravated assault in 2008. Since then, the Georgia legislature added another aggravating factor, but it has not changed the portions of the statute relevant here.

require a specific intent to injure. In *Smith v. State*, 629 S.E.2d 816, 818 (Ga. 2006), the Georgia Supreme Court explained:

> The crime of aggravated assault, as alleged, is established by the reasonable apprehension of harm by the victim of an assault by a firearm rather than the assailant's intent to injure. All that is required is that the assailant intend to commit the act which in fact places another in reasonable apprehension of injury, not a specific intent to cause such apprehension.

In *Patterson v. State*, 789 S.E.2d 175, 176-78 (Ga. 2016), *reconsideration denied* (July 25, 2016) the Georgia Supreme Court restated this rule emphatically. It noted its "multiple" rulings that simple assault does not require a specific intent. *Id*. at 177. It had repeatedly applied this rule in the context of Georgia aggravated assault "when squarely faced with a claim that a specific intent to cause apprehension is required when the defendant is alleged to have committed aggravated assault based on the victim's reasonable apprehension of harm under OCGA 16-5-20(a)(2), ..." *Id*. It noted this rule was based on the "plain" language of the statute. *Id*. It quoted *Rhodes v. State*, 359 S.E.2d 670, 672 (Ga. 1987), where it had "previously addressed the genesis of OCGA § 16-5-20(a)(2), ..." *Id*.

In *Rhodes*, 359 S.E.2d at 672 (quoting Ga. Code Ann. § 26-2908), the Georgia Supreme Court explained that prior to 1968, simple assault was only "an attempt to commit a violent injury on another[,]" and aggravated assault was only an assault "with the intent to murder, rape, or rob." Pointing a gun at someone, without intending one of these other offenses, was always a misdemeanor, regardless of the victim's apprehension. *Id*. Georgia modified both its assault and aggravated assault

statutes in 1968, adding the version of simple assault predicated on the apprehension of injury, and adding the version of aggravated assault based on use of a deadly weapon. *Id*. Together, these changes "established that the use of a deadly weapon in such manner as to place another in reasonable apprehension of immediate violent injury constitutes the felony of aggravated assault." *Id*.

Illustrating the breadth of this rule, Georgia courts have regularly found sufficient evidence of aggravated assault with a car based only on a defendant's intent to commit the act of driving the car. In *Kirkland v. State*, 638 S.E.2d 785, 787 (Ga. Ct. App. 2006), for example, an officer drew his pistol and approached Mr. Kirkland, who was in the driver's seat of his car. *Id*. He reached into the window and shot Mr. Kirkland, causing Mr. Kirkland to hit the gas. *Id*. The Georgia Court of Appeals held that the state had proven that Mr. Kirkland committed aggravated assault with a deadly weapon because the officer reasonably feared being seriously injured by the car. *Id*. at 786. It quoted: "the intent to injure is not an element of the charged offense. The crime of aggravated assault, as alleged, is established by the reasonable apprehension of harm by the victim of an assault . . . rather than the assailant's intent to injure." *Id*. (quoting *Smith*, 280 Ga. at 492); *see also Cline v. State*, 405 S.E.2d 524, 525 (Ga. Ct. App. 1991).

"**Generic" aggravated assault**. The Eleventh Circuit first addressed the generic meaning of aggravated assault in *United States v. Palomino Garcia*, 606 F. 3d 1317, 1334 (11th Cir. 2010). Based on the Model Penal Code, §211.1(2)(a)-(b), and

decisions in the Fifth, Sixth, and Ninth Circuits,[2] it defined generic aggravated assault as "a criminal assault accompanied by the aggravating factors of either the intent to cause serious bodily injury to the victim or the use of a deadly weapon." *Id*. at 1331-32.

It has never explicitly determined the mens rea of generic aggravated assault. It left this issue open in *Palomino Garcia*, 606 F. 3d at 1334, n. 14, because the Arizona offense in that case was overbroad in other ways. While Mr. Huling's direct appeal was pending, it held that Georgia aggravated assault qualified under the enumerated clause, because it contained aggravating factors, which were "divisible"[3] from its non-generic aggravating factors, that matched the generic aggravating factors. It again failed to address the mens rea to generic aggravated assault, so it did not consider whether Georgia's offense had a generic mens rea. *United States v. Morales-Alonso*, 878 F. 3d 1311, 1318-19 (11th Cir. 2018). Its analysis was limited to Mr. Morales-Alonso's argument that the deadly weapon aggravator was non-generic because it used the phrase "or with any object, device, or instrument which, when

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[2] *United States v. McFalls*, 592 F. 3d 707, 717 (6th Cir. 2010), *abrogated on other grounds by Voisine v. United States*, 136 S. Ct. 2272 (2016); *United States v. Esparza-Herrera*, 557 F. 3d 1019, 1024 (9th Cir. 2009); *United States v. Fierro-Reyna*, 466 F. 3d 324, 327-29 (5th Cir. 2006).

[3] This means the Georgia offense includes non-generic aggravating factors, but the deadly weapon aggravating factor must be specifically alleged, proven, and found by the factfinder to sustain a conviction of Georgia aggravated assault with a deadly weapon, thus allowing a later federal court to determine, based on "*Shepard*" documents, that a prior conviction was for a "generic" version of aggravated assault. *See Shepard v. United States*, 544 U.S. 13 (2005).

used offensively against a person, is likely to or actually does result in serious bodily injury[.]" Ga. Code Ann. § 16-5-21(a)(2) (2008). Because Georgia courts did not interpret this phrase in a way that would distinguish a deadly weapon in Georgia from a generic deadly weapon, it concluded Georgia aggravated assault with a deadly weapon qualified as a crime of violence under the enumerated clause.

B. Factual Background

Mr. Huling pled guilty to federal bank robbery in violation of 18 U.S.C. § 2113(a). Pet. App'x C at 2. Prior to his sentencing, the U.S. Probation Office prepared a presentence investigation report ("PSR"). ROA, 17-13032-J (11th Cir.), Doc. 33. It determined that he was a career offender under U.S.S.G. § 4B1.1(a), so an offense level of 32 should replace his otherwise applicable offense level, pursuant to the table in U.S.S.G. § 4B1.1(b). *Id.* at 6. In support of its career offender determination, it cited prior Georgia convictions for Sale of Cocaine and Aggravated Assault. *Id.* at 5-6. It subtracted three levels for Mr. Huling's timely acceptance of responsibility, resulting in a total offense level of 29. *Id.* at 6.

Based on his career offender status, § 4B1.1(b) dictated that his criminal offense category was VI. *Id.* at 13. With an offense level of 29 and a criminal history category of VI, the sentencing range recommended by the Guidelines was 151 to 188 months. *Id.* at 17.

Mr. Huling filed a written objection to his classification as a career offender. ROA, 17-13032-J (11th Cir.), Doc. 30. He argued that Georgia aggravated assault, Ga. Code Ann. § 16-5-21 (2008), did not qualify as a "crime of violence" under either the force clause or the elements clause. *Id.* Among other reasons, it did not qualify

under the force clause, because it incorporated Georgia simple assault, Ga. Code Ann. § 16-5-20(a)(2) (2008), which a person can violate by merely committing an act that places another in reasonable apprehension of imminent violent injury, without intending to threaten or to use force. *Id*. at 6-9.

It did not qualify under the enumerated clause for two reasons: first, it was broader than "generic" aggravated assault because Georgia aggravated assault only requires the general intent to commit an act, with no intent as to its consequences, while generic aggravated assault requires an intent to injure or to threaten injury. *Id*. at 3-4, 8. Second, Georgia aggravated assault was overbroad in that it defined "deadly weapon" more broadly than generic aggravated assault, to include objects, (such as hands or pepper spray), that are not likely to cause serious bodily injury. *Id*. at 3-6. At sentencing, defense counsel emphasized the overbroad mens rea, stating: "the Georgia statute, . . . focuses only on the reasonable apprehension of fear of the victim. And it doesn't matter what the intent of the defendant is, as long as the government were to prove that *that act* was voluntary and that he knowingly committed *the act*." Pet. App'x B at 31 (italics added.)

In considering whether Georgia aggravated assault qualified under the enumerated clause, the District Court honed in on the definition of Georgia simple assault. *Id*. at 42. It could not determine "what you would have to prove on the first element, which is that he committed a criminal assault." *Id*. The government posited "I do not know if there is a generic definition [of assault] put out there." *Id*. at 43. It pointed out that in *Palomino-Garcia*, 606 F.3d at 1344, n.4, the Eleventh Circuit "just

brushed right over" the issue. *Id*. The court therefore declined to rule on whether Georgia aggravated assault would qualify under the enumerated clause. *Id*. at 44. Instead, it found that Georgia aggravated assault qualified as a crime of violence under the force clause. *Id*. at 44 – 45. It sentenced Mr. Huling to 168 months, followed by supervised release. *Id*. at 72-73.

Mr. Huling appealed this decision to the Eleventh Circuit Court of Appeals. After he noticed his appeal, but before he filed his initial brief, a panel of the Eleventh Circuit decided *Morales-Alonso*, 878 F. 3d 1311, rejecting the argument that "deadly weapon" as applied to Georgia aggravated assault was non-generic. Again, because Mr. Morales-Alonso had not raised the issue, it did not address mens rea.

Thereafter, Mr. Huling filed his initial brief. Mindful of the holding of *Morales-Alonso*, he did not renew his argument that Georgia's definition of "deadly weapon" was broader than the generic definition. But he argued, as he did before the District Court, that Georgia aggravated assault did not qualify as a crime of violence under either the force clause or the enumerated clause, because it incorporated a version of Georgia simple assault that only required a general intent to "commit[] an act," Ga. Code Ann. § 16-5-20(a)(2) (2008), without any intent as to the consequences of the act.

As to the enumerated clause, he argued the Court of Appeals should follow *Esparza-Herrera*, 557 F. 3d at 1024, where the Ninth Circuit relied on the Model Penal Code, § 211.1(2)(a), in concluding that generic aggravated assault required a mens rea greater than "ordinary recklessness." Georgia aggravated assault, he

contended, required only a general intent, as demonstrated by *Kirkland*, 282 Ga. App. 331.

The government argued in response that the Court of Appeals should affirm Mr. Huling's conviction based on *Morales-Alonso,* 878 F. 3d 1311. It contended the mens rea of Georgia aggravated assault was not overbroad because it believed that causing a "reasonable fear" of injury necessarily required intentional conduct. It argued the statutory aggravator "with a deadly weapon" implied intentional conduct, so committing an assault with a deadly weapon ensured a generic mens rea was present regardless of which version of simple assault was involved.

A panel of the Eleventh Circuit affirmed Mr. Huling's conviction. *United States v. Huling*, No. 17-13032, 741 F. App'x. 702 (11th Cir. July 10, 2018); *see* App'x A. It held itself bound by *Morales-Alonso*, 878 F. 3d at 1320, and recounted the reasoning of that opinion, which, again, rejected the argument that the "deadly weapon" in Ga. Code Ann. § 16-5-21(a) (2008) was inconsistent with the generic definition of deadly weapon. It acknowledged "Huling maintains that *Morales-Alonso* failed to address whether the *mens rea* element is overbroad, as that argument was not addressed by the panel in that case," but it dispensed with this argument, broadly construing the holding of *Morales-Alonso*, and explaining " 'we have categorically rejected an overlooked reason or argument exception to the prior precedent rule.' " *Id*. at *3 (internal quote omitted.)

REASONS FOR GRANTING THE WRIT

I. A SPLIT OF AUTHORITY EXISTS REGARDING THE LEAST CULPABLE MENS REA THAT A STATE AGGRAVATED ASSAULT OFFENSE MAY REQUIRE AND STILL QUALIFY AS GENERIC UNDER U.S.S.G. §4B1.2(a)(2).

Six courts of appeals have addressed the mens rea element of generic aggravated assault. They have come to four different conclusions about the mental state that marks the least culpable mens rea necessary for an offense to qualify as generic aggravated assault.

The Fifth Circuit, eschewing the categorical approach in favor of a "common sense approach," has held that "'mere' recklessness" suffices. *United States v. Mungia-Portillo*, 484 F. 3d 813, 816-17 (5th Cir. 2007). The Sixth, Fourth, and Eighth Circuits have held, consistent with the Model Penal Code, that generic aggravated assault requires that the defendant act "recklessly under circumstances manifesting extreme indifference to the value of human life[.]" 2 Am. Law. Inst., MODEL PENAL CODE & COMMENTARIES § 211.1(2)(a); *see United States v. McFalls*, 592 F. 3d 707, 717 (6th Cir. 2010), *abrogated on other grounds by Voisine*, 136 S. Ct. at 2272; *United States v. Barcenas-Yanez*, 826 F. 3d 752, 758 (4th Cir. 2016); *United States v. Schneider*, 905 F.3d 1088 (8th Cir. 2018).

The Ninth Circuit has held that generic aggravated assault requires at least "knowledge." *United States v. Garcia-Jimenez*, 807 F. 3d 1079, 1086 (9th Cir. 2015). Only the Eleventh Circuit accepts as generic an aggravated assault offense that a person may commit based on nothing more than a volitional act, regardless of the

mental state as to the consequences of that act. *Huling*, No. 17-13032, 741 F. App'x. at 705; *see also United States v. Patmon*, No. 18-10030, __ F. App'x. __, 2018 WL 4849098 (11th Cir. Oct. 5, 2018); *United States v. Ellis*, No. 17-10713, 736 F. App'x. 855, 857 (11th Cir. June 13, 2018); *United States v. Reid*, No. 17-14764, __ F. App'x. __, 2018 WL 5778121 (11th Cir. Nov. 2, 2018); *United States v. Davis*, No. 16-14405, 718 F. App'x. 946 (11th Cir. Mar. 14, 2018).

A. In the Fifth Circuit, an offense that requires only "ordinary recklessness" can qualify as generic aggravated assault.

The Fifth Circuit first decided the issue. Mr. Mungia-Portillo's sentence was enhanced based on a prior conviction for Tennessee aggravated assault, which, like Georgia's offense, incorporated the elements of its simple assault statute. *Mungia-Portillo*, 484 F. 3d 813, 814. Tennessee simple assault applied to those who "recklessly cause[d] bodily injury to another[.]" Tenn. Code Ann. § 39-13-101(a)(1). To determine whether the Tennessee offense was generic, the Fifth Circuit properly presumed that Mr. Mungia-Portillo "pleaded guilty to the least culpable mental state, 'recklessly.' " *Id.* at 815-17. It then consulted the Model Penal Code, which defined aggravated assault to require "a kind of 'depraved heart' recklessness[.]" *Id.* at 816-17 (internal citation omitted.) Tennessee aggravated assault did not contain this language, but the Fifth Circuit found it qualified as a crime of violence anyways. It reasoned "the fact that the Tennessee statute defines 'reckless' differently than the Model Penal Code is not fatal, and . . . this difference in definition [was] sufficiently minor." *Id.* at 817.

B. In the Fourth, Sixth, and Eighth Circuits, an offense must require at least "extreme indifference recklessness" to qualify as generic aggravated assault.

The Ninth Circuit disagreed with the Fifth Circuit's conclusion that the difference between the Model Penal Code's definition of recklessness and "ordinary recklessness" was negligible. *Esparza-Herrera*, 557 F. 3d 1019, 1024. It concluded "a defendant can be reckless without manifesting an extreme indifference to human life." *Id*. It consulted the Model Penal Code commentary, which stated "the 'extreme indifference' clause" denoted a "special character of recklessness." *Id.* (quoting M.P.C. § 211.1 cmt. 4, at 189 (1980)). It was " 'adapted from the definition of murder" and " 'its meaning is discussed in the commentary to that section.' " *Id*. The commentary to murder specified " 'extreme indifference' recklessness 'should be treated as murder,' " while " 'the less extreme recklessness should be punished as manslaughter.' " *Id*. (quoting M.P.C. § 210.2 cmt. 4, at 21-11). " '[E]xtreme indifference' recklessness represents the 'kind of reckless homicide that cannot fairly be distinguished in grading terms from homicide committed purposely and knowingly.' " *Id*. The Ninth Circuit thus found a conviction of Arizona aggravated assault, *see* Ariz. Rev. Stat. §§ 13-1203(A)(1) & 13-1204(A)(11), which might rest on "ordinary recklessness," could not qualify as generic. *Id*.

The Sixth Circuit found that South Carolina "assault and battery of a high and aggravated nature" was not generic because it included aggravating factors that did not necessarily involve extreme indifference recklessness. *McFalls*, 592 F. 3d 707,

716-717. [4] For example, it incorporated " 'infliction of serious bodily injury,' " which it had applied to reckless driving, and a " 'great disparity in the ages or physical conditions of the parties, [and] a difference in gender.' " *Id*. at 716-7117 (quoting *State v. Fennell*, 531 S.E.2d 512, 517 (S.C. 2000) (which explains that South Carolina assault and battery of a high and aggravated nature is a common law misdemeanor.)) It concluded "[b]ecause South Carolina has not defined a particular mental state for ABHAN and South Carolina courts have upheld ABHAN convictions for conduct that was reckless, ABHAN does not meet the requirements for a 'crime of violence.' " *Id*.

In *Barcenas-Yanez*, 826 F. 3d 752, 755, 758, the Fourth Circuit found that a Texas aggravated assault offense that "permit[s] a conviction for 'recklessl[ly] caus[ing] bodily injury to another,' " was not generic. (quoting Tex. Penal Code § 22.01(a)(1)). It relied on *Garcia-Jimenez*, 807 F. 3d 1079, 1086, although, as discussed below, the Ninth Circuit went a step further in that case. *Id.* at 756-757.

Most recently, the Eighth Circuit found generic aggravated assault requires at least extreme-indifference recklessness in *Schneider*, 905 F. 3d at 1095. In addition to the Model Penal Code and a survey of state statutes, it relied on LaFave and Blackstone, stating "[a]t common law, a person who killed another recklessly was

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[4] In *United States v. Verwiebe*, 874 F. 3d 258 (6th Cir. 2017), another panel held that this Court's decision in *Voisine v. United States*, __ U.S. __, 136 S. Ct. 2272, 2280 (2016), abrogated *McFalls*. *Verwiebe* focused on the force clause. Although its holding under the force clause likely moots any argument in the Sixth Circuit that an aggravated assault offense with a recklessness mens rea does not qualify as a crime of violence under the elements clause, neither *Verwiebe* nor *Voisine* overruled *McFalls* as to the generic mens rea of aggravated assault.

guilty of manslaughter, but someone who committed the exact same act with extreme-indifference recklessness was guilty of murder." *Id*. at *5 (citing 2 W. LaFave, *Substantive Criminal Law* §14.4, at 593-604 (3d ed. 2018); 4 William Blackstone, *Commentaries* *199-201). It said "[t]he traditional view is alive and well. In all but one of the jurisdictions that define extreme-indifference recklessness as the minimum mental state for aggravated assault, ordinary recklessness gives rise to simple assault. Extreme-indifference recklessness also still divides murder from manslaughter in many states." *Id*. at 1096. It thus found a North Dakota aggravated assault offense that could rest on reckless driving was non-generic. *See* N.D. Cent. Code Ann. § 12.1-02-02(1)(e).

C. In the Ninth Circuit, an offense must require at least knowledge, purpose or intent to qualify as generic aggravated assault.

The Ninth Circuit again addressed the mens rea of generic aggravated assault in *Garcia-Jimenez*, 807 F. 3d 1079, 1085. It confined its *Esparza-Herrera* holding to the proposition that "ordinary recklessness" aggravated assault offenses *were not* generic. *Id*. It had not held that extreme indifference recklessness aggravated assault offenses *were* generic. *Id*. The state survey that the *Esparza-Herrera* court conducted "differentiated only between aggravated assault statutes that require simple recklessness and those that require *any* greater level of mens rea." *Id*. (italics in original.)

Now squarely faced with a New Jersey aggravated assault offense that a person could violate based at least on extreme indifference recklessness, the court in *Garcia-Jimenez* conducted a new survey. Based on this survey, it concluded "[t]hirty-

three[5] states and the District of Columbia do not punish as aggravated assault offenses committed with only extreme indifference recklessness[,]" while "[s]eventeen states and the Model Penal Code do punish aggravated assaults committed with extreme indifference recklessness (or a lesser level of mens rea)." *Id*. It found the New Jersey offense could not be a career offender predicate, concluding "the weight of authority – approximately two-thirds of the states, the common law, federal law, and at least one treatise, as compared to the Model Penal Code and one-third of the states – establishes that the federal generic definition of aggravated assault does not incorporate a mens rea of extreme indifference recklessness." *Id*. at 1087.

D. The Eleventh Circuit permits aggravated assault offenses requiring only a volitional act to qualify as generic.

The Eleventh Circuit is the only court of appeals to permit aggravated assault with a general intent mens rea to qualify as generic. This is the implication of its findings in *Huling*, 741 F. App'x at 705, *Patmon*, __ F. App'x. __, 2018 WL 4849098 at *3, and most recently *Reid*, __F. App'x __, 2018 WL 5778121 at *4, that *Morales-Alonso* was dispositive even as to the mens rea element of Georgia aggravated assault. Although it declined to further analyze the mens rea issue, it was not oblivious to the broad scope of Georgia aggravated assault. It acknowledged in each case that Georgia aggravated assault had a general intent mens rea. The *Huling*

[5] The Ninth Circuit erred by counting Georgia aggravated assault as one of the states that require a more specific mental state than extreme indifference recklessness, given the Georgia case law establishing that at least one version of Georgia aggravated assault turns only on whether the victim's fear was reasonable, regardless of the mens rea of the defendant.

panel cited *Patterson*, 789 S.E.2d at 178, which is the Georgia Supreme Court's most recent and thorough exposition of the mens rea to Georgia aggravated assault with a deadly weapon. *Huling*, 741 F. App'x at 704. The *Reid* panel said:

> Reid argues instead that *Morales-Alonso* is distinguishable because in that case the Court failed to consider that aggravated assault in Georgia requires only a general intent to commit the offense, a lower *mens rea* than is required for an offense to qualify as a "crime of violence" under the guidelines. But under *Lee*, this is immaterial: the prior panel precedent rule applies even if *Morales-Alonso* failed to consider a persuasive argument as to why the aggravated assault statute does not qualify as a crime of violence.

Reid, __ F. App'x. __, 2018 WL 5778121 at *4. Hence, the court below was aware of the mens rea issue, but considered it an "overlooked argument" in *Morales-Alonso* that was foreclosed by the Circuit's rigid and broadly construed prior panel precedent rule. It thus affirmed Georgia aggravated assault as equivalent to generic aggravated assault, knowing it applied to merely volitional acts like reckless driving.

E. The Ninth Circuit's approach is best because it reflects the least culpable aggravated assault mens rea in a substantial majority of jurisdictions.

In sum, four different mental states define the least culpable mens rea covered by generic aggravated assault. In some parts of the country, only defendants who intentionally or knowingly assaulted someone with a deadly weapon receive enhanced sentences. Throughout a large swath of the country, only those whose prior offenses manifested extreme indifference to human life are sentenced so harshly. But in Alabama, Georgia, and Florida, defendants whose prior convictions could stem

from merely volitional acts with no intent to injure, such as reckless driving causing an accident, receive sentences reserved for the most dangerous repeat offenders.

This Court should grant certiorari in order to determine the uniform, generic mens rea to aggravated assault. It should ultimately adopt the Ninth Circuit's analysis in *Garcia-Jimenez*, 807 F. 3d at 1086. By enumerating "aggravated assault," the Sentencing Commission "meant . . . the generic sense in which the term is now used *in the criminal codes of most States*." *Taylor*, 495 U.S. 575, 595 (italics added). The Ninth Circuit's construction of generic aggravated assault best reflects the consensus of "most States," as it turned on its conclusion, following a fifty-one-jurisdiction survey, that "a substantial majority of U.S. jurisdictions require more than extreme indifference recklessness to commit aggravated assault." *Garcia-Jimenez*, 807 F. 3d at 1086.

II. THE CIRCUITS ARE ALSO SPLIT OVER THE MENS REA AN OFFENSE MUST REQUIRE TO QUALIFY AS A CRIME OF VIOLENCE UNDER THE FORCE CLAUSE OF U.S.S.G. § 4B1.2(a)(1).

A similar Circuit split exists over the *mens rea* required to satisfy the force clause. This split emerged based on the broad reading some courts have given to *Voisine v. United States,* __ U.S.__, 136 S. Ct. 2272 (2016). Prior to *Voisine*, there was a consensus, based on this Court's decision in *Leocal v. Ashcroft,* 543 U.S. 1 (2004), that the various force clauses – 18 U.S.C. §16(a) ("the section 16(a) element-of-force clause"), 18 U.S.C. §16(b) (the section 16(b) risk-of-force clause), 18 U.S.C. §924(e)(2)(B)(i) ("the ACCA force clause"), and U.S.S.G. §4B1.2(a) ("the Guideline force clause") – did not include offenses committed with a recklessness mens rea. At

least ten courts of appeal so held. *See United States v. Castleman*, 572 U.S. 157, 169 n. 8 (2014) ("[a]lthough *Leocal* reserved the question whether a reckless application of force could constitute a 'use' of force, . . ., the Courts of Appeals have almost uniformly held that recklessness is not sufficient.") (collecting cites.) Now, the Fifth, Sixth, Eighth, Tenth, and D.C. Circuits have changed course, holding that *Voisine* abrogated their prior precedents. The First Circuit, on the other hand, has reconciled *Voisine* with *Leocal*, and with its prior holding that recklessness offenses do not satisfy the ACCA force clause.

A. **The First Circuit has held recklessness offenses do not qualify as a "use of physical force against the person or property of another," following the reasoning of *Leocal* and distinguishing *Voisine*.**

Since *Voisine*, the First Circuit has held three times that recklessness offenses do not satisfy the ACCA force clause. Its first, most detailed analysis resulted in an opinion that was vacated as moot upon the death of the defendant. *See United States v. Bennett*, 868 F. 3d 1, 7 (1st Cir. 2017). This opinion, however, thoroughly set out the reasoning it later adopted in *United States v. Windley*, 864 F. 3d 36, 39 (1st Cir. 2017) and *United States v. Rose*, 896 F. 3d 104, 110 (1st Cir. 2018).

Bennett, 868 F. 3d at 17, involved a Maine aggravated assault offense that a person can violate by " 'caus[ing] . . . bodily injury,' Me. Rev. Stat. Ann. tit. 17-A § 208, in 'conscious[] disregard[of] a risk' of doing so[]" – for example, by driving while intoxicated. The First Circuit considered whether this offense could qualify under the ACCA force clause. To answer this question, it consulted *Leocal,* 543 U.S. 1, and *Voisine*, 136 S. Ct. 2272.

In *Leocal*, this Court held that neither of the section 16 force clauses covered driving while intoxicated causing serious bodily injury. As to the element-of-force clause, it reasoned "the critical aspect of § 16(a) is that a crime of violence is one involving the 'use of physical force *against the person or property of another*.' " *Id*. at 9 (italics in original.)[6] The elastic word "use" in this context "most naturally suggest[ed] a higher degree of intent than negligent or merely accidental conduct." *Id*. It contrasted two simple examples. "[P]ushing" someone involves the use of physical force against another. *Id*. But "we would not ordinarily say a person 'use[s] . . . physical force against' another by stumbling and falling into him." *Id*.

The *Bennett* panel observed that the First Circuit, like many other circuits, had "emphasiz[e]d the significance of the same 'against' phrase that *Leocal* had deemed critical[]" in excluding recklessness offenses. *Bennett*, 868 F. 3d at 11; *see United States v. Fish*, 758 F. 3d 1, 16 (1st Cir. 2014). It reconsidered its precedent, however, in light of *Voisine*. *Id*. at 13.

Voisine, 136 S. Ct. at 2276, involved a force clause with different language and a different purpose. This force clause, 18 U.S.C. § 921(a)(33)(A)(ii) ("the misdemeanor crime of domestic violence force clause"), determines whether a conviction triggers a federal ban on possessing firearms. *See* 18 U.S.C. § 922(g)(9). Like the other force clauses, it applies to certain offenses that "ha[ve], as an element, the use or attempted

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[6] Under the Guideline and ACCA force clauses, the physical force must be used "against the person of another," while under the section 16(a) element-of-force and section 16(b) risk-of-force clauses, it may be used "against the person *or property* of another."

use of physical force, ...” 18 U.S.C. § 921(a)(33)(A)(ii). Unlike the other clauses, however, the misdemeanor crime of domestic violence force clause does not require that the force be used “against the person of another.” *See* U.S.S.G. § 4B1.2(a)(1).[7]

Voisine held that the misdemeanor crime of domestic violence force clause encompasses reckless assault statutes that do not require the assailant to intend or know he will cause harm. 136 S. Ct. at 2282. This Court emphasized the purpose of § 922(g)(9). *Id*. at 2280. Congress intended to keep guns from “those domestic abusers convicted of garden-variety assault or battery misdemeanors . . . .” *Id*. Limiting “misdemeanor crimes of domestic violence” to offenses that only bar intentional or knowing assaults would “render[] § 922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness . . . .” *Id*.

However, the Court left open the possibility that analogous force clauses might still exclude convictions based on recklessness. *Id*. at n. 4. It stated “our decision today concerning § 921(a)(22)(A)’s scope does not resolve whether § 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.” *Voisine,* 136 S. Ct. at 2282. The *Bennett* panel noted this “express reservation accords with *Leocal*’s earlier caution that, ‘when interpreting a statute that features as elastic a word as ‘use,’ we

[7] It also does not cover the threatened use of physical force, other than “the threatened use of a deadly weapon[.]” 18 U.S.C. §921(a)(33)(A)(i).

construe language in its context and in light of the terms surrounding it.' " *Bennett*, 868 F. 3d at 17 (quoting *Leocal*, 543 U.S. at 9.)

Bennett found the ACCA clause was materially different than the misdemeanor crime of domestic violence clause. It first distinguished the language of the clauses. *Id*. at 17-19. While *Voisine* defined "use" without a qualifying "against" phrase, under ACCA the word "use" was not isolated. The canon against surplusage suggested that the "against" phrase must narrow the clause beyond the volitional act required by the word "use" alone. *Id*. at 19. Moreover, "the use of force against another" was a "single, undifferentiated element," not two separate issues to consider. *Id*. at 17. This entire phrase defined the "relevant volitional act." *Id*. at 18. And because an injury caused by a merely reckless assault was, "by definition, neither the perpetrator's object, nor a result known to the perpetrator to be practically certain to occur[,]" the phrase "arguably convey[ed] 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." *Id*. at 18.

The First Circuit also reasoned that the two force clauses " 'address significantly different threats.' " *Id*. at 21 (quoting *United States v. Booker*, 644 F. 3d 12, 21 (1st Cir. 2011)). While " 'ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons[,]' " the firearm ban on domestic batterers " 'addresses an acute risk to an identifiable class of victims – those in a relationship with a perpetrator of domestic violence.' " *Id*. (quoting *Booker*.) Unlike narrowly construing the misdemeanor crime of domestic violence force clause,

which would exclude domestic battery offenses in 35 jurisdictions, *see Voisine*, 136 S. Ct. at 2280, narrowly construing the ACCA force clause would not "risk rendering ACCA broadly 'inoperative.' " *Bennett*, 868 F. 3d at 23.

Ultimately, the First Circuit acknowledged that *Voisine* " 'calls into question' our otherwise seemingly applicable analysis[.]' " *Id*. (quoting *United States v. Tavares*, 843 F. 3d 1, 18 (1st Cir. 2016)). So it construed the ACCA force clause favorably to the defendant under the rule of lenity. It pointed to this Court's statement in *Leocal*, "even if § 16 did not clearly exclude conduct committed negligently or with no mens rea at all, the Court 'would be constrained to interpret any ambiguity in the statute in petitioner's favor.' " *Id* at 10 (quoting *Leocal*, 543 U.S. at 11, n. 8.)

B. **The Fifth, Sixth, Eighth, Tenth, and D.C. Circuits, have overruled their prior precedents and held recklessness offenses qualify as a "use of physical force," based on the reasoning of *Voisine*.**

In the two years since *Voisine*, five Circuits have found the decision abrogated their respective precedents governing the very issue that this Court expressly left open in footnote four. 136 S. Ct. at 2282 n. 4. In these Circuits, offenses requiring nothing more than a reckless state of mind trigger the statutory and Guidelines enhancements reserved for violent recidivist offenders.

The Sixth Circuit provides the most detailed justification for its holding. In *United States v. Verwiebe*, 874 F. 3d 258 (6th Cir. 2017), *cert. denied* 139 S. Ct. 63 (Oct. 1, 2018), it held that federal assault resulting in serious bodily injury, *see* 18 U.S.C. § 113(a)(6), satisfied the Guideline force clause. It found that *Voisine* was a

"material intervening Supreme Court decision" sufficient to "override binding circuit precedent" without an *en banc* hearing. *Verwiebe*, 874 F. 3d at 262.

It disagreed with the First Circuit that the phrase "against the person of another" distinguished the force clause defining misdemeanor crime of domestic violence from the one defining crime of violence. *Id*. at 262 – 264. It believed adding the phrase "against the person of another" could not change the *Voisine* construction of "use of physical force" for four reasons. *Id*. at 262 - 263. First, drawing from a hypothetical reckless domestic assault posed in *Voisine*, where the defendant throws a plate against a wall that shatters and cuts a victim, the Sixth Circuit reasoned "[t]he addition of the word 'against' cannot change *Voisine*'s holding that the 'use of physical force' covers this act in the first instance." *Id*. at 263; *see Voisine*, 136 S. Ct. at 2279. Second, misdemeanor crimes of domestic violence require a victim, so the misdemeanor crime of domestic violence force clause implies the force must be against a person, just like the ACCA force clause. *Verwiebe,* 874 F. 3d at 263. Third, in distinguishing *Leocal*, the *Voisine* Court "tellingly placed no weight on the absence of 'against the person or property of another[.]' " *Id*. (citation absent in original.) Finally, the Sixth Circuit noted the 35 reckless misdemeanor assault laws cited in *Voisine*, and concluded "Verwiebe's argument would require us to find that no conviction under any of these statutes qualifies as a 'crime of violence.' " *Id*.

In a more conclusory opinion, the Eighth Circuit found recklessness offenses can satisfy the ACCA force clause. *See United States v. Fogg*, 836 F. 3d 951 (8th Cir. 2016). At issue was a Minnesota statute that proscribed recklessly discharging a

firearm from one vehicle towards another vehicle or a building (*i.e.* drive by shooting). *Id*. at 954; *see* Minn. Stat. § 609.66, subd. 1e. It quoted *Voisine*: " 'the word 'use' does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so.' " *Id*. at 956 (quoting *Voisine*, 136 S. Ct. at 2279). It then abruptly concluded, "reckless conduct thus constitutes a 'use' of force under ACCA." *Id*. This was because *both* the force clauses "involve the 'use ... of physical force' against another." *Id*. The Eighth Circuit did not acknowledge the textual and purposive differences between the force clause in *Voisine* and the ACCA force clause, or *Voisine's* express reservation of the mens rea applicable to other force clauses.

In *United States v. Hammons*, 862 F. 3d 1052, 1056 (10th Cir. 2017), the Tenth Circuit interpreted *Voisine* to mean that the ACCA force clause turns *only* on whether a person acted volitionally, affirming an Oklahoma drive by shooting offense as an ACCA predicate. It reasoned the *Voisine* Court "focuse[d] on whether the force contemplated by the predicate statute is 'volitional' or instead 'involuntary' – it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly." *Id*. The Tenth Circuit did not delve into the analysis underlying the *Voisine* holding, or mention the additional language of the ACCA clause, until it decided *United States v. Pam*, 867 F. 3d 1191, 1208 (10th Cir. 2017). By this point, however, the additional ACCA language could not alter its holding, as it had "already applied the *Voisine* Court's reasoning in the ACCA

context," and it was bound to follow its prior precedent absent *en banc* review or an intervening Supreme Court opinion. *Id*. at n. 16.

In *United States v. Howell*, 838 F. 3d 489, 491 (5th Cir. 2016), the Fifth Circuit considered whether a Texas assault, *see* Tex. Pen. Code § 22.01(a)(1), (b)(2)(B), that a person could violate with only a reckless mens rea satisfied the Guideline force clause in U.S.S.G. § 4B1.2(a)(1). It recited *Voisine*'s analysis of the word "use" and its conclusion that it only signifies an " 'active employment of force.' " *Id*. at 500 (quoting *Voisine*, 136 S. Ct. at 2278-2279.) It also considered *Voisine*'s survey of state misdemeanor assault statutes. *Id*. at 501. The *Voisine* Court had observed "in linking § 922(g)(9) to those laws, Congress must have known it was sweeping in some persons who had engaged in reckless conduct." *Id*. at 501. From this, the Fifth Circuit deduced that the Sentencing Commission "similarly must have known that the Model Penal Code had taken the position that a mens rea of recklessness should establish criminal liability, and that various states incorporated that view into assault statutes." *Id*. It thus concluded the Sentencing Commission must have intended to define crime of violence to include the recklessness offenses. *Id.; cf. United States v. Mendez-Henriquez*, 847 F. 3d 214, 220-22 (5th Cir. 2017) (finding, in light of *Voisine* and *Howell*, the force clause in application note 2 of U.S.S.G. § 2L1.2 applies to recklessness offenses).

Finally, in *United States v. Haight*, 892 F. 3d 1271 (D.C. Cir. 2018) (Kavanaugh, J.), *petition for cert. filed*, No. 18-370 (U.S. Sept. 20, 2018) the D.C. Circuit found that the ACCA force clause encompassed D.C. assault with a dangerous

weapon. *See Spencer v. United States*, 991 A.2d 1185, 1192 (D.C. 2010) (stating elements of offense. It found reckless conduct satisfies the clause, as long as the defendant acted volitionally, and not accidentally or involuntarily, based on *Voisine*'s definition of "use." *Id.* at 1280. The "against" clause did not distinguish the ACCA force clause from the misdemeanor crime of domestic violence force clause, because the latter clause still must be " 'committed against a domestic relation . . . .' " *Id.* at 1281 (quoting *Voisine*, 136 S. Ct. at 2276).

C. The Second, Third, Fourth, Seventh, and Ninth Circuits have not overruled their pre-*Voisine* decisions which held that recklessness offenses did not qualify as a "use of physical force against the person of another."

Of the ten Circuits that held prior to *Voisine* that recklessness offenses do not satisfy one of the force clauses, five of these holdings are still the law of their respective Circuits. In *Jimenez-Gonzalez v. Mukasey*, 548 F. 3d 557, 560-561 (7th Cir. 2008), the Seventh Circuit held that an Indiana "criminal recklessness" offense, *see* Ind. Code § 35-42-2-2(c)(3), did not satisfy the section 16(b) risk-of-force clause. It relied on the reasoning of *Leocal* that "using" physical force "naturally suggests a higher degree of intent than negligent or merely *accidental* conduct." *Id.* (quoting *Loecal*, 543 U.S. at 9) (emphasis in original.) It also pointed to this Court's "heavy reliance on burglary as the prototypical example of a crime of violence[]" in *Leocal*. *Id.* at 560. Accordingly, burglary was a crime of violence "not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime." *Id.* at 560-561. In contrast, Indiana

criminal recklessness did not create an inherent risk that using force would become "a means to an end during the commission of the offense." *Id*. at 561.

In *Fernandez-Ruiz v. Gonzales*, 466 F. 3d 1121, 1127-1132 (9th Cir. 2006) (en banc), the Ninth Circuit held that recklessness offenses such as an Arizona domestic assault offense, *see* Ariz. Rev. Stat. § 13-1082(A)(1)&(C), could not satisfy the section 16(a) use-of-force clause, in light of *Leocal*. It explained that *Leocal* "not only endorsed the position that crimes of violence must be volitional but also repeatedly emphasized that such crimes cannot be 'accidental.' " *Id*. at 1129 (quoting *Leocal*, 543 U.S. at 8-10). Black's Law Dictionary defined "accidental" as " '[n]ot having occurred as a result of anyone's purposeful act[]' " and defined "purposeful" as " '[d]one with a specific purpose in mind; deliberate.' " *Id*. at 1130 (quoting *Black's Law Dictionary 16* (8th ed. 2004.)) It concluded that whether a person is oblivious to the risk of injury their reckless act creates, or they consciously disregard the risk, the injury remains an accident, and not purposeful. *Id*. Thus "crimes of recklessness cannot be crimes of violence." *Id*.; *see also Gonzalez-Ramirez v. Sessions*, 727 F. App'x 404, 405 (9th Cir. June 20, 2018) (general intent drive-by shooting crime does not satisfy section 16 force clause); *cf. United States v. Benally*, 843 F. 3d 350 (9th Cir. 2016) (leaving open question of *Voisine*'s application to ACCA force clause).

In *Oyebanji v. Gonzales*, 418 F. 3d 260, 263-265 (3d Cir. 2005) (Alito, J.), the Third Circuit found New Jersey vehicular manslaughter, *see* N.J. Stat. Ann. § 2C:11-5(b)(1), did not satisfy the section 16(b) risk-of-force clauses. It could not "overlook the Court's repeated statement that 'accidental' conduct (which would seem to include

reckless conduct) is not enough to qualify as a crime of violence." *Id*. at 264. It was reminded that the clause was defining the term "crime of violence" and reasoned "[t]he quintessential violent crimes . . . involve the *intentional* use of actual or threatened force against another's person, ..." *Id*. (italics added.) *See also Tran v. Gonzales*, 414 F. 3d 464 (3d Cir. 2005); *Popal v. Gonzales*, 416 F. 3d 249 (3d Cir. 2005); *cf. Baptiste v. Attorney General*, 841 F. 3d 601, 607 n. 5 (3d Cir. 2016) (leaving open question of *Voisine*'s application to section 16(b) risk-of-force clause).

In *Jobson v. Ashcroft*, 326 F. 3d 367, 373 (2d Cir. 2003), the Second Circuit held that New York second degree manslaughter, *see* N.Y. Penal L. § 125.15(1), did not satisfy the section 16(a) risk-of-force clause. It believed this clause required that the offense risks the defendant "having to intentionally use force," while the defendant can commit "*pure* recklessness offenses" without "any 'intent, desire or willingness to use force or cause harm at all.' " *Id.* at 374 (quoting *United States v. Parson*, 955 F. 2d 858, 866 (3d Cir. 1992)) (italics in original.)

Finally, *Bejarano-Urrutia v. Gonzales*, 413 F. 3d 444 (4th Cir. 2005), involved a Virginia involuntary manslaughter statute that proscribed recklessly causing the death of another. *See* Va. Code Ann. § 18.2-36.1. The Fourth Circuit relied on *Leocal*, which emphasized the distinction between the risk that an accident may occur and the risk of having to use force. Because "a reckless disregard for human life is distinguishable from a reckless disregard for whether force will need to be used[,]" it held the Virginia offense did not satisfy the section 16(b) risk-of-force clause. *Cf. United States v. Middleton*, 883 F. 3d 485, 489-492 (4th Cir. 2018) (South Carolina

involuntary manslaughter does not satisfy ACCA force clause because it does not require violent physical force, but can be committed by act of selling alcohol to a minor).

D. The First Circuit's approach is best because it accounts for the materially different language and different purpose served by the force clause at issue in *Voisine*.

Despite this Court's express limitation of its holding in *Voisine*, a Circuit split has rapidly emerged, upending the law of five Circuits as it applies to various force clauses that contain different language and serve very different purposes than the misdemeanor crime of domestic violence force clause. Now, in these five Circuits, recklessness offenses of all stripes, most often reckless driving, can result in the considerably lengthier sentences of criminal defendants, and can trigger severe immigration consequences to aliens. In six Circuits, recklessness offenses do not occasion such severe collateral effects.

The First Circuit's analysis best reconciles *Voisine* with *Leocal*, by applying the relevant canons of statutory construction. *Bennett*, 868 F. 3d at 7. It recognizes the elasticity of the word "use" requires considering the surrounding language, as this Court did in *Leocal*. *Id*. at 10; *cf. Yates v. United States*, 135 S. Ct. 1074 (2015) ("we rely on the principle of noscitur a sociis – a word is known by the company it keeps – to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.' ") (quoting *Gustafson v. Alloyd Co*., 513 U.S. 561, 575 (1995)). It gives effect to each word Congress chose. *Bennett*, 868 F. 3d at 18-19; *cf. Corley v. United States*, 556 U.S.

303, 314 (2009) (rule against surplusage is "one of the most basic interpretive canons.") It is consistent with this Court's purposive analysis of the misdemeanor crime of domestic violence force clause in *Voisine*, 136 S. Ct. at 2280-2281. And, to the extent the language remained ambiguous, the First Circuit appropriately applied the rule of lenity to a criminal provision with severe consequences to the defendant. *Bennett*, 868 F. 3d at 19.

III. THIS CASE PRESENTS A SOUND VEHICLE TO RESOLVE BOTH CIRCUIT SPLITS.

Petitioner's case presents an ideal vehicle for answering the enumerated clause question, and a suitable occasion to address the force clause question. Alternatively, in the event that this Court grants certiorari as to the enumerated clause question and ultimately holds generic aggravated assault does not include Georgia's broad offense, it should remand the case to the Eleventh Circuit to determine in the first instance whether Georgia aggravated assault qualifies as a crime of violence under the force clause.

The facts of this case are simple and undisputed. The questions raised were preserved in the District Court and in the Court of Appeals. Both courts addressed the questions. The District Court considered the force clause and discussed the issue with the parties, before resolving the case based on the enumerated clause. The Eleventh Circuit acknowledged Petitioner's mens rea arguments, and the basis for the District Court's decision, but felt itself bound by *Morales-Alonso* to hold that Georgia aggravated assault qualified under the enumerated clause.

The elements of Petitioner's predicate Georgia aggravated assault conviction are clear. Georgia courts have repeatedly and recently outlined the elements of Georgia aggravated assault, and specifically noted that the state does not have to prove any mental state with regard to the consequences of his act, as long as he commits an act that triggers a reasonable fear of the victim. *See Patterson*, 789 S.E.2d at 176-178. This general intent mens rea falls outside any of the mens reas accepted as "generic" in other Circuits, and comports with one side of the dispute over the mens rea necessary to satisfy the force clause.

The facts thus squarely implicate two well-defined Circuit splits. In published opinions, the Fourth, Fifth, Sixth, Eighth, and Ninth Circuits each have defined the mens rea of generic aggravated assault differently than the Eleventh Circuit, and differently from one another. Their holdings were unambiguous, and the Ninth Circuit expressed its disagreement with the Fifth Circuit's conclusion, making the split of authority obvious. The opinions cover all of the sources relevant to defining generic aggravated assault, including the aggravated assault offenses of every United States jurisdiction, the Model Penal Code, and well-known treatises.

Likewise, in published opinions, ten Circuits applied *Leocal* to hold that the force clause excluded recklessness offenses before this Court decided *Voisine*. After *Voisine*, again in published opinions, five Circuits have held the opposite, while six Circuits continue to hold that various force clauses do not incorporate crimes that can be committed recklessly.

Finally, the answers to the questions presented are dispositive of the most significant issue related to Petitioner's sentence. His prior Georgia aggravated assault conviction was one of the two necessary predicate offenses for the enhancement to apply. Without it, Petitioner's Guidelines calculations would have led probation to recommend a substantially lower sentence: 70 to 87 months, instead of 151 to 188 months.[8] Given the foundational, "anchor[ing]" role that the advisory Guidelines' range continues to play in sentencing, such a drastically lower recommendation would be very likely to result in a substantially lower sentence. *Peugh v. United States,* 569 U.S. 530, 549 (2013).

IV. BOTH THE MENS REA OF GENERIC AGGRAVATED ASSAULT AND THE MENS REA REQUIRED FOR AN OFFENSE TO QUALIFY AS A CRIME OF VIOLENCE UNDER THE FORCE CLAUSE ARE IMPORTANT AND RECURRING ISSUES.

It is nearly impossible to know precisely how many sentences are enhanced under U.S.S.G. section 4B1.2(a). The United States Sentencing Commission does not publish this data. But relevant Westlaw queries confirm that countless appellate cases have involved an aggravated assault predicate to an enhancement under ACCA, the career offender Guideline, section 16, or similar determinations, and even more involved applying the force clause to offenses with a recklessness mens rea.

As to the enumerated clause issue, every jurisdiction in the country has an aggravated assault offense, and, as the Ninth Circuit's survey reveals, seventeen

[8] Without applying U.S.S.G. §4B1.1, Petitioner's total offense level would have been 21, and his criminal history category would have been V. ROA, 17-13032-J (11th Cir.), Doc. 33 at 5-6, 13.

states' aggravated assault offenses are broader than the majority. The issue has arisen frequently enough to generate opinions in at least six courts of appeal. A large number of district court cases and unpublished circuit court cases also resolve such claims. In just the eleven months since it decided *Morales-Alonso*, the Eleventh Circuit has relied on the decision to affirm the sentence of five defendants, including Mr. Huling, four of whom argued Georgia aggravated assault contained an overbroad mens rea. *See Huling*, No. 17-13032, 741 F. App'x. at 705; *Patmon*, No. 18-10030, __ F. App'x. __, 2018 WL 4849098 (11th Cir. Oct. 5, 2018); *Ellis*, No. 17-10713, 736 F. App'x. 855, 857 (11th Cir. June 13, 2018); *Reid*, No. 17-14764, __ F. App'x. __, 2018 WL 5778121 (11th Cir. Nov. 2, 2018); *Davis*, No. 16-14405, 718 F. App'x. 946 (11th Cir. Mar. 14, 2018).

As to the force clause, again, ten courts of appeals produced at least fourteen published opinions holding that offenses with a recklessness mens rea did not satisfy the force clause, prior to this Court's decision in *Voisine*. *See Castleman*, 572 U.S. at 169 n. 8. In the two and a half years since *Voisine*, at least six courts of appeals and nine district courts have revisited the issue.

The questions presented are of great consequence. As Petitioner's case demonstrates, career offender enhancements significantly increase the sentencing range recommended by the Guidelines. Petitioner's recommended sentence more than doubled based on a predicate offense, when it would not have triggered the enhancement in the Fourth, Sixth, Ninth, Tenth, and arguably the Fifth Circuits under the enumerated clause, nor have triggered the enhancement in the First,

Second, Third, Seventh, and Ninth Circuits under the force clause. This discrepancy is neither fair nor justified. A grant of certiorari is necessary to ensure the courts apply the career offender enhancement uniformly across the country.

The proceedings below show how the resolution of one question can often moot the other, perpetuating the confusion surrounding these two mens reas questions. The district court believed the force clause was the easier question to answer, while the court of appeals found this issue mooted by intervening Circuit precedent. Naturally, each court resolved the case based on the lowest hanging fruit. The byproduct of this is that the questions remain, vexing lower courts in their conscientious attempts to apply this ubiquitous statutory language to a common category of offenses.

Hence, this Court's resolution of only one of the Circuit splits will leave open the ultimate question of whether the eighteen state aggravated assault offenses with unusually broad mens reas qualify as a crime of violence. This case presents a timely occasion to ultimately resolve both issues, allowing lower courts to make final determinations in cases involving aggravated assault predicates.

For these reasons, the record in the case and the decisions below present an ideal vehicle for determining the least culpable mens rea required for an offense to qualify as generic aggravated assault, and the least culpable mens rea necessary to conclude that a person "use[d]," or attempted or threatened to "use physical force against the person of another." U.S.S.G. § 4B1.2(a)(1).

CONCLUSION

For the reasons above, Petitioner Huling respectfully requests this Court grant his petition for writ of certiorari.

s/ Jonathan R. Dodson
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IN THE
SUPREME COURT OF THE UNITED STATES
NO. _____

CURTIS HULING,
Petitioner-Appellant

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

PROOF OF SERVICE

I, Jonathan R. Dodson, do swear or declare, that on this date December 7, 2018; pursuant to Supreme Court Rules 29.3 and 29.4, that I have served the attached *Motion for Leave to Proceed in Forma Pauperis* and *Petition for a Writ of Certiorari* on each party in the above-captioned proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States, properly addressed to each, with first-class postage prepaid.

The name and address of those served are as follows:

The Honorable Noel Francisco, Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Subscribed and sworn to
before me this 7th day of
December, 2018.

Holly Elaine McDavid NOTARY PUBLIC BIBB COUNTY, GEORGIA

JONATHAN R. DODSON- Affiant

Holly E. McDavid
NOTARY PUBLIC – STATE OF GEORGIA