No. 18-_____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

CORNELL BARBER,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

A.J. KRAMER
FEDERAL PUBLIC DEFENDER
LISA B. WRIGHT
ASSISTANT FEDERAL PUBLIC DEFENDER
(Counsel of Record)
625 Indiana Avenue, NW
Suite 550
Washington, D.C. 20004
(202) 208-7500
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a criminal offense with a reckless *mens rea* -- in this case, Assault with a Dangerous Weapon under D.C. Code § 22-402, which can be violated, for example, by reckless driving -- qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

II. Whether the causation of bodily injury necessarily entails "violent" force within the meaning of (Curtis) Johnson v. United States, 559 U.S. 133 (2010) -- an issue explicitly left open in United States v. Castleman, 134 S. Ct. 1405 (2014).

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PETITION FOR WRIT OF CERTIORARI

Cornell Barber respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The decision of the D.C. Circuit (Pet. App. 1a) is unreported. The orders denying panel rehearing and rehearing en banc are at 3a-4a.

JURISDICTION

The D.C. Circuit issued its judgment (Pet. App. 1a) on June 22, 2018. Orders denying panel rehearing and rehearing en banc

(Pet. App. 3a-4a) were issued on October 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), having been found void for vagueness under the Due Process Clause of the Fifth Amendment, (Samuel) Johnson v. United States, 135 S. Ct. 2551 (2015), whether Mr. Barber's prior convictions qualified him for ACCA status turns on the proper application of ACCA's "element of force" clause, 18 U.S.C. § 924(e)(2)(B)(i):

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony . . . , such person shall be . . . imprisoned not less than fifteen years . . . .
>
> (2) As used in this subsection--
>
> [. . .]
>
> (B) 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 . . . .

STATEMENT OF THE CASE

In late 2014, petitioner Cornell Barber was indicted for being a felon in unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At that time, the validity of the ACCA's "residual clause" was settled in this Court and the parties

believed, and Mr. Barber was advised by his counsel, that he was subject to ACCA's 15-year mandatory minimum, in part because his two prior convictions for D.C. Assault with a Dangerous Weapon (ADW) qualified as ACCA "violent felonies."

On March 6, 2015, Mr. Barber, in order to avoid ACCA's 15-year mandatory minimum, entered a plea of guilty to unlawful possession of a firearm under D.C. Code § 22-4503(a)(1) in exchange for dismissal of the federal felon-in-possession charge, and agreed to a binding sentencing range of 10-12 years.

On June 15, 2015, the district court, having been told that the plea agreement allowed Mr. Barber to avoid a 15-year minimum sentence, accepted the binding plea agreement and sentenced Mr. Barber to 12 years in prison.

Eleven days later, this Court in (Samuel) Johnson v. United States, 135 S. Ct. 2551 (2018), struck down the ACCA "residual clause" as unconstitutionally vague.

On appeal, Mr. Barber contended that he had never been ACCA-eligible because the residual clause had always been unconstitutionally vague. He argued that D.C. ADW did not qualify as a "violent felony" under the force clause for two reasons: 1) D.C. ADW can be committed without the degree of force necessary to satisfy the "violent" force requirement of (Curtis) Johnson,559 U.S. at 140; and 2) D.C. ADW can be committed with a *mens rea* of mere recklessness.

Mr. Barber therefore sought rescission of the plea agreement on grounds of mutual mistake and, alternatively, a resentencing on the ground that the district court's decision to accept the binding plea had been based on a clearly erroneous understanding of the plea agreement's impact. At a minimum, Mr. Barber sought a remand for a hearing on claims that his counsel had been ineffective in 1) telling Mr. Barber at the time of his March 2015 plea decision that he was subject to ACCA's 15-year minimum, when effective counsel would have been aware that this Court's January 2015 sua sponte ordering of reargument in (Samuel) Johnson on the void-for-vagueness issue rendered Mr. Barber's ACCA status uncertain and that, therefore, a straight-up plea to the federal indictment might limit his exposure to a 10-year maximum; and 2) failing to advise the sentencing court of the doubt surrounding Mr. Barber's ACCA status.

At the request of the parties in this case and in United States v. Haight, 892 F.3d 1271 (D.C. Cir. 2018), cert. denied, 2019 WL 113532 (Jan. 7, 2019) (Pet. App. 5a), in which the government was cross-appealing a ruling that D.C. ADW, due to its reckless mens rea, was not an ACCA violent felony, the D.C. Circuit set a same-day same-panel argument for Barber and Haight. The two cases were argued together on May 8, 2018.

THE D.C. CIRCUIT'S RULING

On June 22, 2018, the panel affirmed Mr. Barber's conviction and sentence in an unpublished judgment. Pet. App. 1a-2a. Noting that "all of Barber's claims rise or fall on a single legal claim: that a conviction for D.C. [ADW] is not a 'violent felony' under [ACCA]," the panel rejected this contention and affirmed Barber's judgment "for the reasons given in our opinion in [Haight]," which the panel published that same day.

First, the Haight opinion (Pet. App. 5a) rejected any argument that D.C. ADW does not have (Curtis) Johnson-level "violent" force as an element because "it can be committed with so-called indirect force, such as using a hazardous chemical to burn someone, rather than with more direct force, such as using a gun or a knife to maim someone." Pet. App. 13a (892 F.3d at 1280). The panel did "not perceive any such distinction between direct and indirect force in the language of the statute or in the relevant precedents," noted that this Court in United States v. Castleman, 134 S Ct. 1405 (2014), had "refused to distinguish indirect physical force from direct physical force," and held that "by analogy from Castleman, so-called indirect violent force is still violent force." Id. (citing 134 S. Ct. at 1414-15).

Second, the Haight opinion rejected the defendant's argument that, because D.C. ADW can be committed "recklessly," it does not categorically require the use of violent force against the person

of another within the meaning of ACCA. Pet. App. 14a (892 F.3d at 1280-81). The panel concluded that this recklessness argument "contravene[d]" Voisine v. United States, 136 S. Ct. 2272 (2016), where, in the context of thedefinition of "misdemeanor crime of domestic violence" (MCDV) used in 18 U.S.C. § 922(g)(9), and "[f]ocusing on the word 'use,' this Court reasoned that the word is 'indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.'" Id. (quoting Voisine, 136 S. Ct. at 2279).

> The statutory provision at issue in Voisine contains language nearly identical to ACCA's violent felony provision: Both provisions penalize defendants convicted of crimes that have "as an element" the "use" of "physical force." 18 U.S.C. §§ 921(a)(33)(A)(ii), 924(e)(2)(B)(i). So Voisine's reasoning applies to ACCA's violent felony provision. As long as a defendant's use of force is not accidental or involuntary, it is "naturally described as an active employment of force," regardless of whether it is reckless, knowing, or intentional. Voisine, 136 S. Ct. at 2279.
>
> It is true that ACCA requires a defendant to use violent force "against the person of another" -- a phrase that does not appear in the statutory provision at issue in Voisine. But the provision at issue in Voisine still required the defendant to use force against another person -- namely, the "victim." 18 U.S.C. § 921(a)(33)(A)(ii). In the words of the Supreme Court in Voisine, the phrase "misdemeanor crime of domestic violence" is "defined to include any misdemeanor committed against a domestic relation that necessarily involves the 'use . . . of physical force.'" Voisine, 136 S. Ct. at 2276 (quoting 18 U.S.C. § 921(a)(33)(A)(ii)).

Id.

The panel recognized the existence of a circuit split on this question:

> [W]e agree with four other courts of appeals that have addressed the issue either in the ACCA context or in the equivalent Guidelines "crime of violence" context. United States v. Mendez-Henriquez, 847 F.3d 214, 220-22 (5th Cir. 2017) (Guidelines); United States v. Verwiebe, 874 F.3d 258, 262 (6th Cir. 2017) (Guidelines); United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016) (ACCA); United States v. Pam, 867 F.3d 1191, 1207-08 (10th Cir. 2017) (ACCA). We recognize that the First Circuit has reached a contrary conclusion, but we respectfully disagree with that court's decision. See United States v. Windley, 864 F.3d 36 (1st Cir. 2017).

Pet. App. 14a (892 F.3d at 1281).

REASONS FOR GRANTING THE WRIT

I. THERE IS AN ACKNOWLEDGED CONFLICT OF AUTHORITY ON THE IMPORTANT AND RECURRING QUESTION WHETHER AN OFFENSE WITH A RECKLESS *MENS REA* CAN QUALIFY AS AN ACCA "VIOLENT FELONY."

This case presents a question upon which there is an acknowledged and intractable conflict amongst the courts of appeals: whether an offense with a reckless *mens rea* qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The answer to that question turns on whether an offense that can be committed with recklessness falls within the ACCA's "force clause," which applies when an offense involves "the use . . . of physical force against the person of another." See id. § 924(e)(2)(B)(i).

In the decision below, the D.C. Circuit held that Assault with a Dangerous Weapon (ADW) under D.C. law is a "violent

felony," relying on Haight's explicit rejection of the position that the crime's reckless *mens rea* – it can be committed, for example, via reckless driving[1] – placed it outside the ACCA's definition of a violent felony. In deciding Haight, the D.C. Circuit expressly "recognize[d] that the First Circuit has reached a contrary conclusion, but . . . respectfully disagree[d] with that Court's decision." Pet. App. 14a.

After this Court's decision in Leocal v. Ashcroft, 543 U.S. 1 (2004), the courts of appeals uniformly held that an offense with a reckless *mens rea* does not constitute a "crime of violence" under the force clause in 18 U.S.C. § 16. See United States v. Fish, 758 F.3d 1, 10 & n.4 (1st Cir. 2014) (collecting cases). But in the wake of Voisine, which ruled that a reckless domestic assault could be a "misdemeanor crime of domestic violence" (MCDV) under 18 U.S.C. § 922(g)(9) (prohibiting those convicted of an MCDV from possessing a firearm), the courts of appeals have divided over whether those post-Leocal holdings apply to the ACCA, which has a force clause almost identical to § 16. Thus, the First Circuit has held that an offense with a reckless *mens rea* is not a "violent felony" under the ACCA, and the majority of a Fourth Circuit panel endorsed that holding in a concurring opinion. See United States v. Windley, 864 F.3d 36, 38-39 (1st Cir. 2017) (per curiam); United States v. Middleton,

[1] Vines v. United States, 70 A.3d 1170, 1180 (D.C. 2013); Powell v. United States, 485 A.2d 596, 601 (D.C. 1984).

883 F.3d 485, 499-500 (4th Cir. 2018) (Floyd, C.J.) (concurring in the judgment) (joined by Harris, C.J.). By contrast, the D.C., Eighth and Tenth Circuits have held that offenses with a reckless *mens rea* can qualify as violent felonies under the ACCA. See Pet. App. 1a-2a, 14a; United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016); United Staes v. Pam, 867 F.3d 1191, 1204 (10th Cir. 2017). As noted by the D.C. Circuit in Haight (Pet. App. __), the Fifth and Sixth Circuits have reached the same conclusion in the Guidelines "crime of violence" context. See United States v. Mendez-Henriquez, 847 F.3d 214, 220-22 (5th Cir. 2017); United States v. Verwiebe, 874 F.3d 258, 262 (6th Cir. 2017). This square conflict will continue, and likely widen further, until this Court resolves the question presented. Further percolation is unnecessary and there is no reason to think that this conflict will resolve itself. Indeed, the First Circuit reached its decision even though the Eighth Circuit had already ruled the other way, and both the D.C. and Tenth Circuits decided this issue after the First Circuit and were thus forced to take sides in an existing circuit conflict.

The D.C. Circuit, along with the courts in Fogg, and Pam, erred by applying this Court's reasoning in Voisine without considering the material differences in the texts, histories, and purposes of the ACCA "violent felony" provision and § 922(g)(9)'s "misdemeanor crime of domestic violence" provision. The issue in

Voisine was "whether [18 U.S.C.] § 922(g)(9) [barring individuals convicted of MCDV's from possessing guns] applies to reckless conduct," id. at 2278, and this Court's analysis was specifically tied to the text and background of that particular statute. Id. ("Statutory text and background alike lead us to conclude that a reckless domestic assault qualifies as a 'misdemeanor crime of domestic violence.'").

Yet the D.C. Circuit (like the Eighth and Tenth Circuits) ignored that the context here (the definition of "violent felony" for the purpose of labeling a defendant an "armed career criminal" so as to increase his punishment from a 10-year maximum to a 15-year minimum) is vastly different from the context in Voisine (the definition of MCDV for the purpose of barring domestic abusers convicted of "garden-variety assault or battery misdemeanors" from owning guns where Congress "must have known" a significant majority of jurisdictions defined such misdemeanors to include reckless infliction of bodily harm, 136 S. Ct. at 2280).[2] See United States v. Middleton, 883 F.3d 485, 499-500 (4th Cir. 2018) (Floyd, C.J.) (concurring in the judgment) (joined by Harris, C.J.) ("While some of our sister circuits have applied Voisine to the ACCA force clause, they have done so without seriously considering or even discussing the divergent

[2] Excluding crimes that can be committed recklessly would have rendered the MCDV provisions "broadly inoperative" in 35 states. Voisine, 136 S. Ct. at 2280. No such issue exists with respect to ACCA.

contexts and purposes of the ACCA and the MCDV statute") (citing Fogg and Pam).

Just as "physical force" can mean common-law force in the MCDV context (Castleman), while meaning "violent" force in the ACCA context ((Curtis) Johnson), so can "use" of force include reckless acts in the MCDV context (Voisine), while requiring a higher level of intent in the ACCA context (where it must be used "against the person of another"). As Voisine explains, it makes sense that Congress would decide to keep guns out of the hands of reckless domestic abusers along with all others covered by states' ordinary misdemeanor assault laws. But to elevate someone to "armed career criminal" status because they were convicted of a crime that can be committed by recklessly driving a car, is a "comical misfit" of the type this Court rejected in (Curtis) Johnson, 559 U.S. at 145.

But beyond this serious contextual difference, the actual text in this case is critically different from that in Voisine. The MCDV force clause at issue in Voisine requires only "the use . . . of physical force," 18 U.S.C. § 921(a)(33)(A)(ii), whereas the ACCA force clause requires the "use . . . of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Voisine interpreted the single word "use." 136 S. Ct. at 2278 ("use" is "the only statutory language either party thinks relevant"). It said nothing about what it means to

"use" force "against the person of another."

The D.C. Circuit found this difference of no significance, concluding that:

> the provision at issue in Voisine still required the defendant to use force against another person -- namely, the "victim." 18 U.S.C. § 921(a)(33)(A)(ii). In the words of the Supreme Court in Voisine, the phrase "misdemeanor crime of domestic violence" is "defined to include any misdemeanor committed against a domestic relation that necessarily involves the 'use . . . of physical force.'" Voisine, 136 S. Ct. at 2276 (quoting 18 U.S.C. § 921(a)(33)(A)(ii)).

Pet. App. 14a (892 F.3d at 1281).

But there is a difference between using force "against" someone and using force, not against anyone, but rather with reckless disregard as to its effect on others. When someone becomes a "victim" of that recklessness (by, for example, being in shard's way of Voisine's reckless plate-thrower), that person is a victim of the crime of reckless use of force and it can be said, as this Court said in the Voisine quote above, that such crime was "committed against" them. That is very different from saying that the force was "used against" them. As Judge Kethledge wrote for the panel in United States v. Harper, 875 F.3d 329 (6th Cir. 2017),[3] a definition restricting the "use of physical force" to force "against the person of another" "requires a *mens rea* – not only as to the employment of force,

[3] The Harper panel acknowledged that it was bound by the Sixth Circuit's Verwiebe decision but wrote to "explain why, in our view, the decision in Verwiebe was mistaken." 875 F.3d at 330.

but also as to its consequences – that the provision in Voisine did not." Id. at 331 (emphasis in original). "The hypothetical plate-throwing in Voisine satisfies [the MCDV force clause] but not [a force clause requiring the use of force "against the person of another"] because the husband employs force volitionally (by throwing the plate) but does not knowingly or intentionally apply that force "against the person" of his wife; instead, being only reckless, he is indifferent as to whether the plate hits her. Id. at 332 (emphasis added).

This important and recurring question deserves resolution. As this Court's ACCA decisions indicate, it is important that the ACCA be applied uniformly throughout the country. It is wrong to allow the application of the harsh ACCA sentencing enhancement – which dramatically increases the punishment for a felon-in-possession-of-a-firearm offense from a 10-year maximum to a 15-year minimum – to turn on the geographic location in which a defendant is sentenced.

II. THIS CASE ALSO PRESENTS THE OPPORTUNITY TO DECIDE AN IMPORTANT QUESTION LEFT OPEN IN CASTLEMAN: WHETHER THE CAUSATION OF BODILY INJURY NECESSARILY ENTAILS (CURTIS) JOHNSON-LEVEL "VIOLENT" FORCE.

Mr. Barber argued below, alternatively, that D.C. ADW is not an ACCA "violent felony" because, where the term "dangerous weapon" includes weapons such as poison, as it does in D.C., the use of a dangerous weapon does not categorically involve the degree of force necessary for (Curtis) Johnson-level "violent" force. The Haight panel concluded that the fact that weapons

such as hazardous chemicals can be used to cause harm indirectly rather than directly, does not mean such weapons do not use violent force. Pet. App. 13a. But, unlike the defendant in Haight, Mr. Barber made clear in his briefing below that his challenge was not to the type of force used (direct versus indirect) but to the degree of force being used and whether it rose to the level of "violent" force. Thus, Mr. Barber acknowledged below that poisoning involves the "use" of force, that it causes bodily harm, and the fact "[t]hat the harm occurs indirectly, rather than directly (as with a kick or punch) does not matter." Castleman, 134 S. Ct. at 1415.

Rather, Mr. Barber's contention is that the force involved when weapons such as poison or bacteria are used is mere common-law force and that the whole point of (Curtis) Johnson was that, in the ACCA "violent felony" context, "force" does not have its common-law meaning but requires the actor to exercise "a degree of power" greater than mere common-law force. (Curtis) Johnson, 559 U.S. at 139. (Curtis) Johnson suggested that "violent" force is "force capable of causing physical pain or injury to another person," id. at 140, but Castleman makes clear that the issue raised here remains undecided.

Castleman supports Barber's contention that weapons such as poison, bacteria, and laser pointers cause harm through common-law force and the mere fact that such a use of force causes

physical pain or injury does not automatically supply the "degree of power" required for "violent" force. Castleman held that "[i]t is impossible to cause bodily injury without applying force in the common-law sense," including, as examples, "'by administering a poison or by infecting with a disease, or even by resort to some intangible substance,' such as a laser beam." 134 S. Ct. at 1414-15 (quoting 2 W. LaFave, Substantive Criminal Law § 16.2(b) (2d ed. 2003)) (emphasis added). But whether one can cause bodily injury without applying "violent" force was left open in Castleman. Indeed, Castleman explicitly identified the question of "[w]hether or not the causation of bodily injury necessarily entails violent force" as "a question we do not reach." 134 S. Ct. at 1413. See also id. at 1414 ("whether or not" forms of injury such as "physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty" are "forms of injury necessitat[ing] violent force, under [(Curtis)] Johnson's definition of that phrase" is "a question we do not decide").

This Court should grant certiorari in this case in order to decide the important question left open in Castleman.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A.J. KRAMER,
FEDERAL PUBLIC DEFENDER

/s/

LISA B. WRIGHT
ASSISTANT FEDERAL PUBLIC DEFENDER
(Counsel of Record)
625 Indiana Avenue, NW
Suite 550
Washington, D.C. 20004
(202) 208-7500

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