
No. 18-7500

In the

Supreme Court of the United States

CLAY O'BRIEN MANN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Supplement Brief in Support of Petition for Writ of Certiorari

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Petitioner's Supplemental Brief

Mann's case has been distributed for the Court's consideration at its Conference of May 23, 2019. Pursuant to this Court's Rule 15.8, Mann submits this supplemental brief to call the Court's attention to a case decided four days after he filed his reply brief in support of his petition for certiorari.

In his reply brief, filed on May 6, 2019, Mann again asked the Court to resolve a question over which the courts of appeals are divided: whether a felony offense with a recklessness mens rea, such as reckless driving while intoxicated, satisfies the requirements of the elements clauses of 18 U.S.C. § 924(c)(3)(A) and the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), when the offense does not require proof of any purposeful or knowing act to use violent physical force against the person or property of another.

On May 10, 2019, the United States Court of Appeals for the Ninth Circuit, in *United States v. Orona*, No. 17-17508, __ F.3d __, 2019 WL 2063560 (9th Cir. May 10, 2019), answered this question in Mann's favor. The decision deepens the conflict among the circuits on this question, and further demonstrates that the panel's decision here is incorrect. The Ninth Circuit's opinion directly conflicts with the panel's decision in this case, a Sixth Circuit panel, and with the D.C. and Eighth Circuits' decisions in *United States v. Verwiebe*, 874 F.3d 258, 262-64 (6th Cir. 2017) (U.S.S.G. § 4B1.2(a)(1)); *United States v. Haight*, 892 F.3d 1271, 1280-81 (D.C. Cir.

2018) (ACCA); and *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (ACCA). It expressly agrees with the First Circuit’s decision in *United States v. Rose*, 896 F.3d 104, 109-10 (1st Cir. 2018) (holding that reckless conduct does not meet ACCA’s force clause definition despite *Voisine v. United States*, 136 S.Ct. 2272 (2016)) and aligns with the Fourth Circuit’s decision in *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018) (unanimous panel endorsing *United States v. Middleton*’s plurality opinion that force clause requires higher degree of mens rea than recklessness) (citing *Middleton*, 883 F.3d 485, 498 (4th Cir. 2018)(Floyd, C.J., writing for the plurality)).

In *Orona*, the court looked to its opinion in *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1126, 1132 (9th Cir. 2006) (en banc) which held that Arizona aggravated assault did not have as an element “the use, attempted use of threatened use of physical force against the person of another” because it encompasses reckless conduct. *Fernandez-Ruiz*, in turn, relied on *Leocal v. Ahscroft*, 543 U.S. 1, 6 (2004), from which it deduced that “it would blur the distinction between the violent crimes Congress sought to distinguish for heightened punishment and other crimes” if offenses involving the reckless use of force fell within the force clause definition. 466 F.3d at 1130.

Using the reasoning from these cases, the *Orona* court held that reckless conduct will not satisfy the force clause because to constitute a federal crime of violence an offense must involve the intentional use of force

against the person or property of another. The court rejected the government's argument that *Voisine* dictated a different outcome. *Voisine*, the court said, was not clearly irreconcilable with *Fernandez-Ruiz*. It noted that in *Voisine*, this Court expressly limited its holding to the specific issue before it and did not resolve whether 18 U.S.C. § 16 includes reckless behavior. *Orona*, 2019 WL 2063560 at *4. Additionally, the court pointed out that this Court found that differences in context and purpose between misdemeanor crimes of violence and felony crimes of violence counseled in favor of “divergent readings.” *Id.* (citing *Voisine*, 136 S.Ct. at 2280 n. 4). The court concluded that “*Voisine* expressly did not decide whether reckless conduct falls within the scope of § 16(a) and instead confirmed that it did not foreclose a different interpretation of that statute.” *Id.* at *5. Therefore, it held that Arizona aggravated assault, which a person may commit by “[i]ntentionally, knowingly or recklessly causing any physical injury to another person,” is not a violent felony as defined in the ACCA’s force clause even after *Voisine*. *Id.* at *2-3, 6.

The Ninth Circuit’s decision deepens the circuit conflict over whether an offense with a reckless mens rea is categorically a crime of violence or violent felony. 2019 WL 2063560 at *4. The court acknowledged and then expanded the circuit conflict by expressly joining the First Circuit and implicitly aligning itself with the Fourth Circuit. *Id.* at *5. Without this

Court's intervention, only the geographic location of the prosecution will determine whether an individual is subject to the enhanced penalties that are dependent on the various statutory and sentencing guidelines force clauses.

Mann asks that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: May 13, 2019

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Certificate of Service

I, Margaret A. Katze, hereby certify that on May 13, 2019, a copy of the petitioner's Supplemental Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice,

Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001,
counsel for the Respondent.

Respectfully submitted,

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DATED: May 13, 2019

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