No. _____

IN THE
Supreme Court of the United States

DUSTIN E. ASH,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Dustin Ash has a prior Kansas conviction for reckless aggravated battery. The underlying facts involved Mr. Ash's reckless driving, which resulted in his vehicle striking a patrol car. More recently, Mr. Ash possessed a firearm, which he cannot do under federal law because he is a felon. He possessed this firearm at an apartment complex in Kansas City, Kansas, just a few miles from the Kansas/Missouri state line. He pleaded guilty to the firearms possession in a Kansas federal court, and the district court found that his prior reckless aggravated battery conviction qualified as a crime of violence under USSG § 4B1.2(a)(1), a finding that ultimately lengthened his term of imprisonment. The Tenth Circuit affirmed, holding that reckless crimes can count as crimes of violence. But had Mr. Ash possessed his firearm just a few miles away in Missouri, his conviction would not have counted as a crime of violence because the Eighth Circuit excludes from § 4B1.2's reach any reckless crime that covers reckless driving. And five other courts of appeals exclude all reckless crimes as violent crimes. In other words, an extensive and entrenched conflict exists over whether reckless crimes can count as violent crimes. The question presented is:

> Whether reckless crimes, like Mr. Ash's Kansas reckless aggravated battery conviction, qualify as crimes of violence under USSG § 4B1.2.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dustin Ash respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's published decision is available at 917 F.3d 1238, and is included as Appendix A. The district court's oral ruling is included as Appendix B.

JURISDICTION

The Tenth Circuit entered judgment on March 12, 2019. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In 28 U.S.C. § 994(h)(2), Congress directed the United States Sentencing Commission to:

> assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> (2) has previously been convicted of two or more felonies, each of which is--
> (A) a crime of violence; or
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

In USSG § 4B1.2(a)(1) of the United States Sentencing Guidelines, the Sentencing Commission defined the term "crime of violence" as:

> 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).

Kansas's reckless aggravated battery statute (2010) punishes:

> recklessly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted.

KSA § 21-3414(a)(2)(B) (recodified at KSA § 21-5413(b)(2)(B) in July 2011).

STATEMENT OF THE CASE

There are few areas that garner more attention from this Court than the violent-crimes context. And deservedly so. When a lower court labels a defendant's prior conviction a violent crime, it inevitably leads to a longer term of imprisonment. It is thus important to ensure that a defendant's prior conviction is not inaccurately labeled a violent crime.

This case involves the crime-of-violence provision of the United States Sentencing Guidelines. USSG § 4B1.2. This provision exists because of Congressional mandate. 28 U.S.C. § 994(h)(2). Dustin Ash's violent-criminal designation turns on, *inter alia*, the classification of his Kansas reckless aggravated battery conviction under KSA § 21-5413(b)(2)(B). Pet. App. 2a, 14a-15a. With the residual clause gone, this conviction only counts as a crime of violence if it has an element of violent force. USSG § 4B1.2(a)(1). Pet. App. 14a-15a.

Five Circuits – the First, Third, Fourth, Seventh, Ninth, and Eleventh – hold that reckless crimes cannot count as violent crimes. *United States v. Moss*, 920 F.3d 752, 758 (11th Cir. 2019); *United States v. Vederoff*, 914 F.3d 1238, 1248 (9th Cir. 2019);

United States v. Hodge, 902 F.3d 420, 427 (4th Cir. 2018); *United States v. Kennedy*, 881 F.3d 14, 19 (1st Cir. 2018); *United States v. Campbell*, 865 F.3d 853, 856-857 (7th Cir. 2017); *United States v. Lewis*, 720 Fed. Appx. 111, 114, 117 (3d Cir. 2018) (unpublished). The Eighth Circuit has also held that a statute that punishes reckless driving (like the Kansas statute at issue here) does not count as a crime of violence. *United States v. Harris*, 907 F.3d 1095, 1096 (8th Cir. 2018). Had Mr. Ash committed his federal gun-possession offense in any of the thirty-four states within these eight Circuits, Mr. Ash's prior conviction would not qualify as a crime of violence. But Mr. Ash committed his federal gun-possession offense in Kansas, and the Tenth Circuit, in direct conflict with these other Circuits, has held that reckless crimes can qualify as crimes of violence under § 4B1.2(a)(1). Pet. App. 14a-15a. This Court should grant this petition to resolve this conflict.

Aside from an increase in punishment under § 4B1.2's crime-of-violence provision, review is critically important for three additional reasons. First, there are a number of other federal statutes that mirror § 4B1.2's crime-of-violence definition. *See* Section II, *infra*. These statutes often increase statutory penalty ranges, *see*, *e.g.*, 18 U.S.C. § 924(e), and even determine an immigrant's eligibility to remain in this country, 8 U.S.C. § 1101(a)(43)(F) (cross-referencing 18 U.S.C. § 16)). The treatment of reckless crimes as violent crimes has serious consequences in these other areas as well. Second, concomitantly, there are countless reckless crimes (state and federal). *See* Section II, *infra*. If reckless crimes can count as violent crimes, then the class of felons considered to be "violent" increases dramatically. And finally, this Court expressly

left this question open in *Voisine v. United States*, 136 S.Ct. 2272, 2279 n.4 (2016). Despite *Voisine*'s reservation, that decision has caused significant conflict and confusion in the lower courts.

On the merits, the Tenth Circuit erred. Courts presume that statutes have mens rea requirements, and this presumption applies with full force in the § 4B1.2 context. The text of § 4B1.2(a)(1) (which includes the phrase "against the person of another"), as well as the statutory structure (every other provision within § 4B1.2 only reaches intentional crimes), purpose (to punish people at or near the statutory maximum), and history (the Sentencing Commission has never called into question the majority rule excluding reckless crimes from § 4B1.2's reach), confirm the point. And in *Begay v. United States*, this Court characterized violent crimes under § 4B1.2 as "intentional or purposeful." 553 U.S. 137, 146 (2008). *Begay* went so far as to contrast purposeful crimes with reckless crimes, nothing that the latter would not count as violent crimes. *Id.* at 145-147. As did Justice Scalia in his concurrence. *Id.* at 153 (noting that crimes with force elements all require "purposeful" conduct).

Finally, this case is a suitable vehicle to resolve this conflict. The issue was preserved below, there are no procedural hurdles to relief, and there is an irreconcilable conflict in the Circuits on this issue. Although Mr. Ash's issue arises under the guidelines, the particular guideline at issue – § 4B1.2 – was mandated by Congress. 28 U.S.C. § 994(h)(2). And a decision in the guidelines context would no doubt apply in the other violent-crimes contexts as well. Review is necessary.

A. Legal Background

It is a federal crime for certain classes of individuals (like felons) to possess

firearms. 18 U.S.C. § 922(g). The typical statutory penalty range for this unlawful-possession offense (and the applicable range in this case) is 0 to 10 years' imprisonment. 18 U.S.C. § 924(a)(2). But where within this statutory range a sentencing court lands will (almost certainly) depend on the applicable range calculated via the United States Sentencing Guidelines ("guidelines"). *See*, *e.g.*, *Hughes v. United States*, 138 S.Ct. 1765, 1775 (2018) ("the Guidelines remain the foundation of federal sentencing decisions").

The guidelines have been around for over three decades. In 1984, Congress established the United States Sentencing Commission to, *inter alia*, "establish sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. § 991(b)(1). Congress directed the Commission to promulgate and distribute sentencing guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). Congress further instructed, *inter alia*, that the Commission "shall assure that the guidelines specify a sentence of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and has been convicted of two or more felonies, each of which is a crime of violence" (or controlled substance offense).[1] 28 U.S.C. § 994(h)(1).

For gun cases under § 922(g) (like this case), the applicable guideline is USSG § 2K2.1. Consistent with § 994(h)(2), § 2K2.1 provides for a significantly higher base offense level (24 instead of 12) "if the defendant committed any part of the instant

[1] This case has nothing to do with controlled substance offenses, so we say no more about them.

offense subsequent to sustaining at least two felony convictions" for crimes of violence. USSG § 2K2.1(a)(2).

The term "crime of violence" is defined at USSG § 4B1.2. The definition, as amended in 2016, has two parts. The first part covers a prior conviction that "has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 4B1.2(a)(1). The Commission borrowed this definition from the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i). USSG App. C, amend. 268 (1989).[2] We refer to this clause as the element-of-force clause. The second part covers any prior conviction for "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)." We refer to this provision as the enumerated offenses clause.

Section 4B1.2's guidelines commentary provides that the term crime of violence "include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG § 4B1.2, comment. (n.1). Section 4B1.2 does not expressly address, however, whether a prior conviction must have a particular mens rea in order to count as a crime of violence. That is the question that has divided the courts of appeals and that this Court should answer in this case.

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[2] As initially written, the Commission defined the term crime of violence via a cross-reference to the definition of crime of violence in 18 U.S.C. § 16. USSG App. C, amend. 268. Section 16 includes a similar element-of-force definition of crime of violence. 18 U.S.C. § 16(a) ("an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). The only difference is that § 16(a) also covers force against another person's *property*.

Although this Court has not interpreted § 4B1.2's element-of-force clause, this Court has interpreted § 924(e)'s identical element-of-force clause twice, initially holding that the word "force" in this clause means "violent force, that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). The element-of-force clause is thus concerned with prior convictions that require "a substantial degree of force," or "strong physical force." *Id.* In adopting this ordinary-meaning definition of force, this Court refused to apply the common-law definition of force (which includes "the merest touching"). *Id.* at 141-142.

More recently, this Court carved out an exception to this general rule, holding that physical force "encompasses the degree of force necessary to commit common-law robbery." *Stokeling v. United States*, 139 S.Ct. 544, 555 (2019). This was so because "the force necessary to overcome a victim's physical resistance is inherently violent in the sense contemplated by *Johnson*, and suggests a degree of power that would not be satisfied by the merest touching." *Id.* at 553 (cleaned up). As we (and others) understand *Stokeling*, the decision applies only to robbery statutes. *See*, *e.g.*, *United States v. Jones*, 914 F.3d 893, 905 (4th Cir. 2019).

Regardless, neither *Johnson* nor *Stokeling* opined on whether reckless crimes can counts as violent crimes. In contrast, in *Voisine*, this Court held that a reckless crime can count as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). This term, "misdemeanor crime of domestic violence," is defined in 18 U.S.C. § 921(a)(33)(A) as a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a domestic

partner.

This force clause differs from the element-of-force clause in § 4B1.2(a)(1) (and § 924(e)). For instance, whereas § 921(a)(33)(A) includes prior crimes that have "an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," § 4B1.2(a)(1) includes crimes that threaten the use of force, and not crimes that threaten the use of a deadly weapon. Moreover, whereas § 4B1.2(a)(1) requires that the element of force be used "against the person of another," § 921(a)(33)(A)(i) includes a list of individuals who must have "committed" the prior crime (i.e., the domestic abuser). There is no additional requirement that the domestic-abuser defendant's prior act be directed "against the person of another." Indeed, the statutes are so dissimilar that this Court has referred to § 921(a)(33)(A)'s force clause as a "comical misfit" to § 924(e)'s force clause. *Johnson*, 559 U.S. at 145. And this Court in *Voisine* expressly reserved the question presented here – whether reckless crimes can count as violent crimes. 136 S.Ct. at 2280 n.4.

Although this Court has never interpreted the "element" language in the element-of-force clause, this Court has adopted an elements-based approach when interpreting an enumerated-offenses clause. The analysis proceeds under the categorical approach, which looks only to the elements of the statute of conviction and not to the particular facts underlying that conviction. *Taylor v. United States*, 495 U.S. 575, 600 (1990). In order to determine whether a prior conviction qualifies under an enumerated-offenses clause, "[a]ll that counts . . . are 'the elements of the statute of conviction.'" *Mathis v. United States*, 136 S.Ct. 2243, 2251 (2016). "Elements are

the constituent parts of a crime's legal definition – the things the prosecution must prove to sustain a conviction." *Id.* at 2248 (cleaned up). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.* (citations omitted). If a statute's elements "are the same as, or narrower than, those of the generic offense," a conviction under that statute counts as a violent crime under the enumerated-offenses clause. *Id.*

Kansas reckless aggravated battery is not an enumerated offense under § 4B1.2(a)(2). Thus, the only question is whether the offense qualifies as a crime of violence under § 4B1.2's element-of-force clause. At the time of the offense, this crime was codified at KSA § 21-3414(a)(2)(B) (2010).[3] The provision punishes "recklessly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." KSA § 21-3414(a)(2)(B).

The statute thus has three elements: (1) a mens rea element of recklessness; (2) a conduct element of causing bodily harm; and (3) a circumstance element that the defendant cause the harm "with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." KSA § 21-3414(a)(2)(B). This last element sets forth various means that satisfy the element. *State v. Ultreras*, 295 P.3d 1020, 1036 (Kan. 2013). In particular, the "phrase 'with a deadly weapon' describes a factual circumstance that proves bodily harm was caused in a 'manner

[3] It has since been recodified at KSA § 21-5413(b)(2)(B). We cite to the prior version.

whereby great bodily harm, disfigurement or death can be inflicted' and, as such, is an option within a means." *Id.* at 1036. In Kansas, an "option within a means" does "not state a material, distinct element." *State v. Brown*, 284 P.3d 977, 990 (Kan. 2012). Thus, proof that a defendant used a deadly weapon is not an element of reckless aggravated battery, but rather merely one of multiple means to prove the third element. *Id.*

B. Proceedings Below

1. In 2016, Dustin Ash pleaded guilty to two counts of possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). Pet. App. 2a. Mr. Ash possessed the firearms at an apartment complex at 51st Street and Parallel Parkway in Kansas City, Kansas. R2.42 at 8. This apartment complex is under four miles from the Kansas/Missouri border.[4] Prior to sentencing, the probation officer authored a presentence investigation report (PSR), finding that Mr. Ash's 2012 Kansas reckless aggravated battery conviction qualified as a crime of violence under § 4B1.2(a)(1). Pet. App. 2a. The relevant documents demonstrate that Mr. Ash's underlying battery stemmed from his reckless driving. R1.34-1 at 1. Essentially, in trying to flee in a vehicle, Mr. Ash's vehicle struck a patrol car. R2.42 at 13.

With one prior crime of violence, the PSR set Mr. Ash's base offense level at 20, USSG § 2K2.1(a)(4)(A). The PSR included three adjustments: a 2-level increase because one of the firearms was stolen, USSG § 2K2.1(b)(4)(A); a 4-level increase

[4] Specifically, according to Google Maps, the Missouri River is roughly three-and-a-half miles from the apartment complex via Interstate 635.

because Mr. Ash possessed the firearms in connection with another felony offense, USSG § 2K2.1(b)(6)(B); and a 3-level reduction for acceptance of responsibility, USSG § 3E1.1. With these adjustments, the PSR set Mr. Ash's total offense level at 23. Pet. App. 2a-3a. With a criminal history category of V, the PSR set the advisory guidelines range at 84 to 104 months' imprisonment. Pet. App. 2a.

Neither party agreed with the PSR. Mr. Ash disagreed that his prior Kansas reckless aggravated battery conviction qualified as a crime of violence, as Tenth Circuit precedent (at that time) held that reckless crimes did not count as crimes of violence. Pet. App. 3a; R1.32 at 1-4. The government acknowledged this precedent, but asserted that this Court's decision in *Voisine* overruled this line of Tenth Circuit precedent. R1.34 at 5-11; R1.48 at 4-12; R3.42 at 26-27. The district court agreed with the government and overruled Mr. Ash's objection. Pet. App. 3a, 17a.

The government asserted that Mr. Ash's 2001 Missouri second-degree robbery conviction also qualified as a crime of violence. Pet. App. 3a. The district court disagreed and overruled the objection. Pet. App. 3a. With one prior crime of violence, the district court adopted the PSR's guidelines calculations and imposed a within-guidelines-range 94-month term of imprisonment. Pet. App. 3a.

2. Mr. Ash appealed, and the government cross-appealed. Pet. Ap. 3a. Mr. Ash asserted that his prior Kansas reckless aggravated battery conviction did not count as a crime of violence because reckless crimes cannot count as crimes of violence. Pet. App. 3a. The government cross-appealed on whether Missouri second-degree robbery qualifies as a crime of violence. Pet. App. 3a.

In light of intervening authority, the Tenth Circuit affirmed the district court's determination that Kansas reckless aggravated battery qualified as a crime of violence. Pet. App. 14a-15a. After oral argument below, the Tenth Circuit in a different case overruled prior precedent and held that reckless crimes can count as crimes of violence. Pet. App. 2a (citing *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2019)). And the Tenth Circuit had earlier held that the intentional version of Kansas's aggravated battery statute qualified as a crime of violence. Pet. App. 15a n.10 (citing *United States v. Williams*, 893 F.3d 696, 704 (10th Cir. 2018)). In light of *Bettcher* and *Williams*, the Tenth Circuit held that Mr. Ash's prior Kansas reckless aggravated battery conviction counted as a crime of violence. Pet. App. 15a.

The Tenth Circuit also held that Mr. Ash's prior Missouri second-degree robbery conviction qualified as a crime of violence in light of intervening authority – namely, this Court's decision in *Stokeling* (a decision that we do not challenge here). Pet. App. 2a. The Tenth Circuit vacated the sentence and remanded for resentencing. Pet. App. 16a. With two prior crimes of violence, Mr. Ash's base offense level will increase from 20 to 24, his total offense level will increase from 23 to 27, and his advisory guidelines range will increase from a range of 84 to 105 months' imprisonment to the statutory maximum 120 months' imprisonment (the range would otherwise be 120 to 150 months' imprisonment if not capped by the statutory maximum). The statutory maximum is 26 months longer than Mr. Ash's previously-imposed sentence (94 months' imprisonment). This timely petition follows.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are split over whether reckless crimes can count as violent crimes. The reach of this Court's decision in *Voisine* is at the heart of this split. This Court should use this case – which turned entirely on the belief that a reckless crime can count as a crime of violence – to resolve this important conflict. This Court should hold that the Kansas reckless aggravated battery statute at issue here is not a crime of violence because it has a mens rea of recklessness.

I. The Circuits are split over whether reckless crimes can count as violent crimes.

The Circuits are split three ways over whether reckless crimes can count as violent crimes. Five Circuits – the First, Fourth, Seventh, Ninth, and Eleventh – have held in published decisions that reckless crimes cannot count as violent crimes. *Moss*, 920 F.3d at 758; *Vederoff*, 914 F.3d at 1248; *Hodge*, 902 F.3d at 427; *Kennedy*, 881 F.3d at 19; *Campbell*, 865 F.3d at 856-857. These published decisions all postdate this Court's decision in *Voisine* (which, again, held that reckless crimes can count as misdemeanor domestic crimes of violence). And the Third Circuit has held the same in an unpublished decision (that also postdates *Voisine*). *Lewis*, 720 Fed. Appx. at 114, 117.

The Eighth Circuit has taken a narrower view, holding that some reckless crimes can count as crimes of violence but that other reckless crimes cannot count as crimes of violence. In particular, in the Eighth Circuit, statutes that cover reckless driving, like Missouri's second-degree domestic assault statute, North Dakota's aggravated-assault statute, and Arizona's aggravated-assault-with-a-deadly-weapon statute, are

not crimes of violence. *Harris*, 907 F.3d at 1096; *United States v. Schneider*, 905 F.3d 1088, 1091-1092 (8th Cir. 2018); *United States v. Ossana*, 638 F.3d 895, 903-904 (8th Cir. 2011). This distinction is important because the Kansas reckless aggravated battery statute at issue here clearly covers reckless driving, as indicated by the underlying facts of Mr. Ash's case. R1.34-1 at 1; R2.43 at 13.

In conflict with these six Circuits, the Tenth Circuit held below (in a published decision) that reckless crimes (including those that cover reckless driving) can count as crimes of violence. Pet. App. 14a-15a. But it did so only by overruling prior precedent that reckless crimes do not count as crimes of violence. *Bettcher*, 911 F.3d at 1045-1046. Three other courts of appeals – the Fifth, Sixth, and D.C. Circuits – have similarly held in published decisions that reckless crimes can count as violent crimes. *United States v. Howell*, 838 F.3d 489, 499-501 (5th Cir. 2016); *United States v. Verwiebe*, 874 F.3d 258, 262-264 (6th Cir. 2017); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018). But the Sixth Circuit is internally divided, as another published decision from that court disagrees with *Verwiebe*. *United States v. Harper*, 875 F.3d 329, 332 (6th Cir. 2017).

Thus, as it stands now, there is a 6-1-4 Circuit split over whether reckless crimes can count as violent crimes. The conflict is extensive and entrenched. There is no indication that the lower courts will resolve this conflict on their own. To do so, at least five courts of appeals would have to switch sides in the conflict. But none of the courts of appeals have indicated any desire or ability to do so. *See*, *e.g.*, *Harper*, 87 F.3d at 332 (disagreeing that reckless crimes can be crimes of violence, but following

contrary precedent); *United States v. Orona*, 923 F.3d 1197, 2019 WL 2063560, at *5 (9th Cir. May 10, 2019) (refusing to switch sides in the conflict post-*Voisine* because of, *inter alia*, the First Circuit's "similar conclusion" that reckless crimes do not count); *Haight*, 892 F.3d at 1281 (acknowledging the First Circuit's contrary view, but "respectfully disagree[ing] with that court's decision"). The conflict will persist until this Court resolves it. Review is necessary.

II. The question presented is critically important to federal sentencing procedure.

Resolution of this issue is critically important for four reasons. First, application of § 4B1.2's crime-of-violence provision increases the penalties for gun possession offenders, USSG § 2K2.1(a)(2), as well as many other offenders, USSG § 4B1.1 (career-offender provision). *See* USSC, 2018 Sourcebook of Federal Sentencing Statistics – Table 26 (listing 1,597 defendants sentenced as career offenders in fiscal year 2018). This Court has made clear, specifically in the guidelines context, that "any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907 (2018) (cleaned up).

And here, the geography of Mr. Ash's offense alone has increased his guidelines range (and, ultimately, his sentence). Had Mr. Ash been arrested with his guns just a few miles up the road, across the border in Missouri, his guidelines range would have been lower. His guidelines range would have also been lower had he been in any of the other thirty-three states in Circuits that do not count reckless crimes as violent

crimes. And this fact is true for any individual in similar circumstances.

Second, this Court often reviews violent-crimes designations in the § 924(e) context to ensure that individuals (like Mr. Ash) do not serve unnecessarily long sentences, as well as to resolve conflicts in the Circuits with respect to violent-crimes issues. *See*, *e.g.*, *Quarles v. United States*, __ S.Ct. __, 2019 WL 2412905 (June 10, 2019); *United States v. Stitt*, 139 S.Ct. 399 (2019); *Stokeling*, 139 S.Ct. 544; *Mathis*, 136 S.Ct. 2243; *Johnson v. United States*, 135 S.Ct. 2551 (2015); *Descamps v. United States*, 570 U.S. 254 (2013); *Sykes v. United States*, 564 U.S. 1 (2011); *McNeill v. United States*, 563 U.S. 816 (2011); *Johnson*, 559 U.S. 133; *Chambers v. United States*, 555 U.S. 122 (2009); *United States v. Rodriquez*, 553 U.S. 377 (2008); *Begay*, 553 U.S. 137; *Logan v. United States*, 552 U.S. 23 (2007); *James v. United States*, 550 U.S. 192 (2007); *Shepard v. United States*, 544 U.S. 13 (2005); *Caron v. United States*, 524 U.S. 308 (1998); *Taylor*, 495 U.S. 575. Indeed, this Court still has a pending violent-crimes case to decide this term. *United States v. Davis*, 139 S.Ct. 782 (2019).

Although this case involves § 4B1.2, and not § 924(e), that should not matter. This Court has granted certiorari in previous cases to interpret § 4B1.2. *Beckles v. United States*, 137 S.Ct. 886 (2017); *Buford v. United States*, 532 U.S. 59 (2001); *Salinas v. United States*, 547 U.S. 188 (2006); *Stinson v. United States*, 508 U.S. 36 (1993). Moreover, § 4B1.2 and § 924(e) are identical, and, again, the Commission adopted § 924(e)'s language when it amended § 4B1.2 in 1989. USSG App. C., amend. 268. Thus, when this Court issues a decision in a § 924(e) case, the lower courts apply that decision in the § 4B1.2 context. *See*, *e.g.*, Pet. App. 2a (applying *Stokeling* in this case

to hold that a robbery conviction qualifies as a crime of violence under § 4B1.2); *United States v. Moore*, 916 F.3d 231, 242 (2d Cir. 2019) (same); *United States v. Rodriguez*, 659 F.3d 117, 119 n.1 (1st Cir. 2011) (same analysis applies to both provisions); *United States v. Charles*, 576 F.3d 1060, 1068 n.2 (10th Cir. 2009) (same); *United States v. Sprouse*, 394 F.3d 578, 580 (8th Cir. 2005) (same). Concomitantly, a decision in this case would apply equally to a decision in the other violent-crimes contexts.

This leads to our third reason to grant certiorari here: a decision here would effectively resolve the recklessness split in all violent-crimes contexts. Indeed, the need to resolve this split is heightened in light of the number of federal statutes with element-of-force provisions that are identical or analogous to § 4B1.2(a)(1) and § 924(e)(2)(B)(i). *See*, *e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable"); 8 U.S.C. § 1101(a)(43) (defining an aggravated felony via 18 U.S.C. § 16, which includes an element-of-force provision); 18 U.S.C. § 16(a) (discussed above); 18 U.S.C. § 25(a)(1) (incorporating § 16(a)'s element-of-force definition in statute prohibiting the use of minors in crimes of violence); 18 U.S.C. § 119(b)(3) (incorporating § 16(a)'s element-of-force provision in statute prohibiting the disclosure of personal information to incite a crime of violence); 18 U.S.C. § 373(a) (prohibiting solicitation to commit a crime of violence); 18 U.S.C. § 521(c)(2) (prohibiting crimes of violence committed by criminal street gangs); 18 U.S.C. § 844(o) (penalties for transporting explosives with reasonable cause to believe that they will be used to commit a crime of violence as

defined in 18 U.S.C. § 924(c)(3)); 18 U.S.C. § 924(c)(3)(A) (prohibiting use of a firearm during a crime of violence); 18 U.S.C. § 929(a)(1) (enhanced penalties for possessing restricted ammunition during a crime of violence); 18 U.S.C. § 931(a)(1) (prohibiting possession of body armor by anyone with a prior conviction for a crime of violence, as defined in § 16); 18 U.S.C. § 1028(b)(3)(B) (enhanced penalties for committing identity fraud in connection with a crime of violence, as defined in § 924(c)(3)); 18 U.S.C. § 1039(e) (enhanced penalties for certain fraud offenses knowing that information obtained will be used to further a crime of violence); 18 U.S.C. § 1956(c)(7)(ii) (defining "specified unlawful activity" as, inter alia, a crime of violence under § 16); 18 U.S.C. § 2250(d)(1) (enhanced penalties for sex offenders who fail to register and commit "a crime of violence under Federal law"); 18 U.S.C. § 3156(a)(4) (defining "crime of violence" in bail statutes); 18 U.S.C. § 3181(b)(1) (incorporating § 16 definition of crime of violence in extradition context); 18 U.S.C. § 3663A(c)(1)(A)(i) (restitution in cases involving crimes of violence under § 16). The present conflict necessarily spills over into these other contexts as well.

Additionally, the resolution of this conflict is necessary in light of the number of federal and state statutes with mens reas of recklessness. In particular, there are numerous statutes that punish (or cover) reckless driving (thus implicating the three-way split) that either count as violent crimes or not depending on the prosecuting jurisdiction. *See*, *e.g.*, Fla. Stat. § 316.1923)(c)(2) (reckless driving that causes serious bodily injury to another); 625 ILCS 5/11-503(c) (reckless driving that results in great bodily harm); Nev. Rev. Stat. § 484B.653(6) (reckless driving that causes substantial

bodily harm); Ind. Stat. § 9-21-8-56(b), (g) (reckless driving in a work zone that results in bodily injury); Mo. Rev. Stat. § 565.072.1(2) (reckless second-degree domestic assault, which criminalizes reckless driving); N.D. Cent. Code Ann. § 12.1-17-02(1) (aggravated-assault statute, which criminalizes reckless driving); Ariz. Rev. Stat. §§ 13-1203, 1204 (same).

More generally, every reckless-crime statute with an element of force suffers from the same indeterminacy. In Kansas alone, we have found eight such statutes. KSA § 21-5405(a)(1) (reckless manslaughter); KSA § 21-5413(b)(2)(B) (reckless aggravated battery); KSA § 21-5414(a)(1) (reckless domestic battery – second offense); KSA § 21-5426(b)(5) (aggravated human trafficking via reckless disregard of minor's age); KSA § 21-5415(b) (aggravated criminal threat in reckless disregard of risk of disruption); KSA § 21-5427(a)(1), (b)(1)B) (reckless stalking – second offense); KSA § 21-5819(a)(3) (causing injury to person via reckless throwing of object into the street); KSA § 21-6308(a)(1) (reckless discharge of a firearm at structure where person is present). We found another sixteen statutes in a survey of five other states (Arizona, New Mexico, California, Texas, and Missouri) We have found other such statutes in other States. *See*, *e.g.*, N.M. Stat. § 30-6-1(D) (reckless abuse of a child); N.M. Stat. § 30-17-5(G) (reckless arson); Ariz. Rev. Stat. § 13-1103 (reckless manslaughter); Ariz. Rev. Stat. § 13-1104(A)(3) (reckless second-degree murder); Ariz. Rev. Stat. § 13-2903 (reckless riot); Ariz. Rev. Stat. § 13-3623(A)(2) (reckless child abuse); Ariz. Rev. Stat. § 13-2911(A)(1)(a) (reckless interference with educator or student); Tex. Penal Code § 19.04 (reckless manslaughter); Tex. Penal Code § 22.04(a) (reckless injury to a child);

Tex. Penal Code § 22.01(b) (reckless assault); Tex. Penal Code § 28.02(a-2)(2) (reckless arson); Tex, Penal Code § 19.01 (reckless homicide); Mo. Rev. Stat. § 565.024(1) (reckless manslaughter); Mo. Rev. Stat. § 565.052(1)(3) (reckless assault); Mo. Rev. Stat. § 565.073 (reckless domestic assault); Mo. Rev. Stat. § 565.056(1)(1) (reckless fourth-degree assault).

Until this conflict is resolved, the classification of these statutes as violent crimes will depend entirely on the geography of the district court. And because many of these Circuits share borders (the Tenth with the Eighth and Ninth, for instance), individuals are bound to be treated differently until this Court resolves the conflict. This case is just one example when one considers the Kansas City metropolitan area. This area merges Kansas and Missouri, with a population of over two million people.[5] Disparate treatment within this region is bound to exist in light of the conflict at issue here.

Additionally, consider that this conflict exists between the neighboring border states of New Mexico (in the Tenth Circuit) and Arizona (in the Ninth Circuit). As mentioned above, immigration law is also affected by the classification of crimes as violent (or not). For instance, statutes with force elements render an individual deportable as an aggravated felon. 8 U.S.C. § 1101(a)(43); 8 U.S.C. § 1227(a)(2)(A)(iii). As the law stands now, an immigrant with a prior recklessness conviction can be deportable if found (or moved to) New Mexico, but (likely) not deportable if found (or moved to) Arizona. Immigration officials could move immigrants from one side of the

[5] https://en.wikipedia.org/wiki/Kansas_City_metropolitan_area

Arizona/New Mexico border to the other to (knowingly or unknowingly) make an immigrant an aggravated felon (or not). In light of the number of violent-crimes provisions like § 4B1.2 and § 924(e), and recklessness statutes like KSA § 21-3414(a)(2)(B), this disparate treatment further highlights the need for this Court to resolve the issue presented in this petition.

Finally, review would give this Court the opportunity to address the issue expressly left open in *Voisine*. 136 S.Ct. at 2280 n.4. It is *Voisine* that caused the Tenth Circuit to switch sides in this conflict. *Bettcher*, 940 F.3d at 1045. Contrary interpretations of *Voisine* have split the Sixth Circuit. *Compare Verwiebe*, 874 F.3d at 262-264, *with Harper*, 875 F.3d at 332-333. In the end, until this Court answers the question left open in *Voisine*, conflicts in the lower courts will persist. Because this issue is too important and far-reaching to permit differing positions, review is necessary.

III. The Tenth Circuit erred.

The Tenth Circuit's decision is inconsistent with § 4B1.2's text, structure, purpose, and history. Start with three text-based points. *Maslenjak v. United States*, 137 S.Ct. 1918, 1924 (2017) ("We begin, as usual, with the statutory text."). First, although the text is silent with respect to any mens rea, the default rule is that, absent a clear statement to the contrary, a criminal statute includes a mens rea element of knowledge. *Staples v. United States*, 511 U.S. 600, 618-619 (1994); *Elonis v. United States*, 135 S.Ct. 2001, 2009-2010 (2015). Silence is not enough to dispense with this element. *Id.* And § 4B1.2(a)(1) is distinctively about the "element[s]" of the prior statute of conviction. USSG § 4B1.2(a)(1) ("has as an element"); *see also Leocal v.*

Ashcroft, 543 U.S. 1, 7, 9 (2004) (reading into § 16 – a similar recidivist sentencing statute with an element-of-force provision – a mens rea requirement).

Second, § 4B1.2(a)(1) applies only to felonies, and courts do not routinely dispense with a mens rea requirement for felony offenses. *Staples*, 511 U.S. at 616-681. And third, § 4B1.2(a)(1) includes the phrase "against the person of another." In *Leocal*, this Court expressly held that this phrase, following an element-of-force requirement, required a mens rea element. 543 U.S. at 9; *see also Harper*, 875 F.3d at 332 (concluding that the phrase "against the person of another" excludes reckless crimes from § 4B1.2(a)(1)'s reach); *Begay*, 553 U.S. at 144-145 (Scalia, J., concurring) (crimes that fall under § 924(e)'s identical element-of-force clause are "purposeful" crimes).

The structure of § 4B1.2 confirms that reckless crimes do not count. Section 4B1.2(a)(1)'s force clause covers three types of elements of force: use of force, attempted use of force, and threatened use of force. The latter two elements (an attempt to use force and a threat to use force) require a mens rea greater than recklessness. *See Braxton v. United States*, 500 U.S. 344, 351 n.* (1991) ("Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill."); *Elonis*, 135 S.Ct. at 2012 (under federal threat statute, the government must demonstrate, *inter alia*, that "the defendant transmits a communication for the purpose of issuing a threat"); *see also*, *e.g.*, *United States v. Viefhaus*, 168 F.3d 392, 395-396 (10th Cir. 1999) ("we define 'threat' as a declaration of intention, purpose, design, goal, or determination to inflict punishment, loss, or pain on another, or to injure another or his property by the commission of some

unlawful act"). As a textual matter, because two of the three variations require a higher mens rea than recklessness, this Court should not interpret the third variation (the use of physical force) any differently. *Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.").

Additionally, the enumerated offense clause only includes intentional crimes. USSG § 4B1.2(a)(2); *See Begay*, 553 U.S. at 145 (noting that the enumerated offenses in § 924(e)(2)(B) are all purposeful crimes); *see also United States v. Koufos*, 666 F.3d 1243, 1251 (10th Cir. 2011) (same, but in the context of § 4B1.2); *United States v. Park*, 649 F.3d 1175, 1180 (9th Cir.2011) (same). And when § 4B1.2 included a residual clause, that clause too reached only purposeful crimes. *Begay*, 553 U.S. at 144-145; *see also United States v. Williams*, 559 F.3d 1143, 1148 (10th Cir. 2009) ("The Supreme Court has stated the residual clause is intended to reach purposeful, violent, and aggressive conduct rather than merely negligent or reckless acts."); *United States v. Crews*, 621 F.3d 849, 855 (9th Cir. 2010) ("Following *Begay*, our sister circuits have similarly held that crimes involving only negligent or reckless mens reas do not fall within the residual clause.") (citing decisions from the First, Second, Fourth, Sixth, and Seventh Circuits).

Section 4B1.2's commentary further indicates that the provision includes "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG § 4B1.2, comment. (n.1). Aiding and abetting is an intentional crime. *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) ("[T]o aid and abet another to

commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"); *see also United States v. Rosalez*, 711 F.3d 1194, 1205 (10th Cir. 2013) (to convict under an aiding and abetting theory, "[t]here must be 'some showing of intent to further the criminal venture'"). Conspiracy is also an intentional crime. *Ocasio v. United States*, 136 S.Ct. 1423, 1429 (2016) ("A defendant must merely reach an agreement with the 'specific intent that the underlying crime be committed' by some member of the conspiracy."). And, as already mentioned, criminal attempts require proof of specific intent to commit the underlying crime. *Braxton*, 500 U.S. at 351 n.*.

In light of the text and context, a use-of-force offense must also be committed intentionally. Otherwise, § 4B1.2's "use" of physical force provision would be interpreted inconsistently with the rest of § 4B1.2. *See, e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1010 (2017) (noting that a court must "look to the provisions of the whole law" when interpreting a statutory phrase). On this point, this Court's decision in *Global Tech Appliances v. SEB S.A.*, 563 U.S. 754, 765 (2011), is particularly instructive. There, this Court found a knowledge requirement in one provision in light of its determination that a neighboring subsection had a knowledge requirement. *Id.* So too here.

With respect to purpose, § 4B1.2's purpose, as articulated by Congress, is to ensure that certain offenders are sentenced "at or near" the statutory maximum term of imprisonment. 28 U.S.C. § 994(h). That purpose is ill-served by including

unintentional crimes. *See Staples*, 511 U.S. at 616 ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea."). With respect to statutory history, the Commission has never called into question lower court precedent that reckless crimes do not count as crimes of violence, despite the Commission's broad and ongoing authority to amend the guidelines. 28 U.S.C. § 994(o); *see Global Tech*, 563 U.S. at 765 (noting "the 'special force' of the doctrine of stare decisis with regard to questions of statutory interpretation").

If nothing else, if § 4B1.2's text is ambiguous as to whether it reaches reckless crimes, the rule of lenity resolves that ambiguity in Mr. Ash's favor. *United States v. Manatau*, 647 F.3d 1048, 1055-1056 (10th Cir. 2011) (Gorsuch, J.) (applying the rule of lenity in the guidelines context to "support treating intent to mean purpose rather than some lower standard likely to increase the defendant's sentence"); *United States v. Windley*, 864 F.3d 36, 38-39 (1st Cir. 2017) (applying the rule of lenity to hold that a reckless crime does not count as a crime of violence).

The Tenth Circuit further erred below when it held that this Court's decision in *Voisine* means that reckless crimes count as violent crimes. Rather, and again, *Voisine* expressly states that the decision "does not resolve" whether crime-of-violence provisions like the one at issue here reach "reckless behavior." 136 S.Ct. at 2280 n.4. *Voisine* does not address the issue presented here because the *misdemeanor*-crime-of-*domestic*-violence statute at issue in *Voisine* contains different language and serves different purposes than violent-crime provisions like § 4B1.2.

Voisine did not involve § 4B1.2 of the guidelines, nor did it involve a similar crime-of-violence recidivist-sentencing statutory provision (like 18 U.S.C. § 924(e)'s violent-felony provision). Instead, *Voisine* involved a substantive criminal statute, 18 U.S.C. § 922(g)(9), that prohibits the possession of a firearm by any individual who has a prior *misdemeanor* crime of domestic violence. In contrast, § 4B1.2 enhances a defendant's guidelines calculation if that individual has a prior *felony* crime of violence. Thus, straight out of the gate, three material differences exist: (1) the relevant statutory provision in *Voisine* sets forth an element of the offense, whereas § 4B1.2 operates as a recidivist-sentencing guideline; (2) the statute in *Voisine* is aimed only at misdemeanor crimes, whereas § 4B1.2 excludes misdemeanor crimes from its reach; and (3) the statute at issue in *Voisine* only reaches crimes of domestic violence, whereas § 4B1.2 is not limited to crimes of domestic violence.

Moreover, a prior misdemeanor crime of domestic violence is defined in 18 U.S.C. § 921(a)(33) as, *inter alia*, an offense that

> has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A)(ii). In multiple ways, this definition is materially different than § 4B1.2's definition of a crime of violence.

First, the element-of-force language in § 921(a)(33)(A)(ii) differs from the element-of-force language in § 4B1.2(a)(1). Whereas the former includes prior crimes that have "an element, the use or attempted use of physical force, or the threatened use of a

deadly weapon," 18 U.S.C. § 921(a)(33)(A)(i), the latter incudes crimes that threaten the use of force, and not crimes that threaten the use of a deadly weapon, USSG § 4B1.2(a)(1). Second, whereas § 4B1.2(a)(1) requires that the element of force be used "against the person of another," § 921(a)(33)(A)(ii) includes a list of individuals who must have "committed" the prior crime (i.e., the domestic abuser). There is no additional requirement that the domestic-abuser defendant's prior act be directed "against the person of another." *Voisine* itself acknowledges the point. 136 S.Ct. at 2279 (noting that the statute would reach an abuser who throws a plate toward his wife, but not at her); *see also Leocal*, 543 U.S. at 9 (interpreting "use of physical force" in 18 U.S.C. § 16 to include a mens rea element because of the statute's inclusion of the phrase "against the person of another"). Conversely, § 4B1.2 applies to the defendant's prior convictions, regardless of the defendant's relationship with the victim.

Beyond the textual differences, the provisions serve different purposes. Section 922(g)(9)'s aim is "to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns." *Voisine*, 136 S.Ct. at 2278. As this Court determined in *Voisine*, that purpose would have been severely undermined if the statute was not read to reach reckless crimes. *Id.* at 2280 (noting that the provision would have been "broadly inoperative in [] 35 jurisdictions").

In contrast, § 4B1.2 exists to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants" who are convicted of a felony crime of violence and who have two prior

felony crimes of violence. 28 U.S.C. § 994(h). This stated goal – to sentence defendants with prior felony crimes of violence at or near the statutory maximum – has no relation to defendants with prior misdemeanor convictions (whether convictions for domestic violence or not). Moreover, the government has never asserted that excluding reckless crimes from § 4B1.2 would render that provision "broadly inoperative." Nor could it. As just one example, almost a decade ago, the Tenth Court excluded reckless crimes from the guidelines' crime-of-violence reach in *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008) (interpreting USSG § 2L1.2's identical element-of-force clause). There is no indication that, in the last decade, the district courts within the Tenth Circuit have struggled to apply § 4B1.2 to enhance guidelines ranges (and, thus, sentences). Nor is there any indication that § 4B1.2 was rarely used in the other lower courts because of precedent excluding reckless crimes as violent crimes. Nor has the Sentencing Commission done anything that would call into question precedent excluding reckless crimes. *See* 28 U.S.C. § 994(o) (providing the Commission with the authority to periodically "review and revise" the guidelines); USSG App. C, amend. 798 (2016) (amending the enumerated offense clause in § 4B1.2 to include additional intentional crimes).

Additionally, in *Johnson*, this Court refused to interpret the phrase "physical force" in 18 U.S.C. § 924(e) to mean force as defined under the common law. 559 U.S. at 139. It refused to do so in part because the common-law meaning of force "derived from a common-law misdemeanor." *Id.* at 1271. This Court labeled this common-law definition a "comical misfit" to § 924(e)(2)(B)(i)'s element-of-force clause (a clause,

which, again, is identical to § 4B1.2(a)(1)'s element-of-force clause). Thus, the common-law misdemeanor definition of physical force is a "comical misfit" to § 4B1.2(a)(1)'s element-of-force clause.

In contrast, in *United States v. Castleman*, this Court adopted the common-law misdemeanor definition of physical force to define the statute at issue in *Voisine* (§ 921(a)(33)(A)(ii)'s misdemeanor-crime-of-domestic-violence provision). 134 S.Ct. 1405, 1410 (2014). *Castleman* thus confirms that the statute at issue in *Voisine* is a "comical misfit" to § 4B1.2(a)(1)'s element-of-force clause. It made little sense for the Tenth Circuit to overrule established precedent interpreting § 4B1.2(a)(1) because of precedent interpreting a statute that is a "comical misfit" to § 4B1.2(a)(1).

Finally, to reiterate, this Court in *Voisine* expressly stated that its decision "does not resolve whether [18 U.S.C. § 16's definition of a crime of violence] includes reckless behavior." 136 S.Ct. at 2279 n.4. The Court noted that "[c]ourts 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." *Id.* Importantly, § 16 is a provision that defines the term "crime of violence" to include, *inter alia*, "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). This statutory language is almost identical to § 4B1.2(a)(1)'s crime-of-violence definition, and absent the one exception (involving property crimes), the lower courts have referred to the provisions interchangeably. *See*, *e.g.*, *United States v. Vigil*, 334 F.3d 1215, 1221-1222 (10th Cir. 2003) (citing

cases from the Fifth and Eight Circuits in support). And so, it is appropriate to read *Voisine* as not just acknowledging that the decision does not resolve the question presented here, but that the question presented here could, and should, come out differently in spite of *Voisine*. 136 S.Ct. at 2280 n.4.

Nor does this Court's clarification in *Voisine* of its prior decision in *Leocal* – that not all "force" statutes exclude reckless crimes – support the Tenth Circuit's decision below. *Leocal* involved the classification of a prior Florida conviction for "driving under the influence of alcohol (DUI) and causing serious bodily injury" as a crime of violence under § 16. 543 U.S. at 3. The question presented in *Leocal* was whether "state DUI offenses similar to the one in Florida, which either do not have a mens rea component or require only a showing of negligence in the operation of a vehicle, qualify as a crime of violence." 543 U.S. at 6. This Court said no. *Id.* at 4.

This Court criticized the parties for focusing too narrowly on the word "use" in the element-of-force clause. *Id.* at 9. It noted, as "critical," § 16(a)'s requirement that force be used "against the person or property of another." *Id.* "The key phrase in § 16(a) – the 'use . . . of physical force against the person or property of another' – most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* Like *Voisine*, *Leocal* reserved the question at issue here: whether a reckless crime could qualify as a crime of violence. *Id.* at 13.

In contrast, in *Voisine*, this Court made it a point to note that the word "use" was "the only statutory language either party thinks relevant." 136 S.Ct. at 2278. And unlike in *Leocal*, the *Voisine* Court could not look beyond the word "use" to an

"against-the-person-of-another" phrase because such a phrase does not exist in § 921(a)(33)(A). But such a phrase does exist in § 4B1.2, further undermining the claim that *Voisine*'s "clarification" of *Leocal* has relevance here. To put it more succinctly, to the extent that *Voisine* "clarified" *Leocal*, it was only to note that the word "use" within a statute does not necessarily exclude unintentional crimes from its reach. But *Voisine* did not overrule *Leocal*, which also means that some statutes with the word "use" in fact exclude unintentional crimes from its reach. And *Leocal* further explains that one such statute that could easily fall within this latter category is a statute that requires the use to be committed "against the person of another," like the guideline at issue here (§ 4B1.2(a)(1)). *Leocal*, 543 U.S. at 9.

One last point. It has become obvious that the government's (newfound) expansive reading of element-of-force clauses came about only because this Court struck down § 924(e)'s residual clause in *Johnson*, 135 S.Ct. at 2557. But now that the residual clause is gone, courts should not interpret element-of-force clauses atextually to bring within their reach residual-clause crimes. If Congress or the Sentencing Commission thinks that certain residual-clause crimes should again count as crimes of violence, the proper course is to amend the statutes and/or guidelines. *See*, *e.g.*, *Home Depot v. Jackson*, __ S.Ct. __, 2019 WL 2257158, at *6 (May 28, 2019) ("if Congress shares the dissent's disapproval of certain litigation 'tactics,' it certainly has the authority to amend the statute. But we do not."); *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1725 (2017) (such tasks are "for Congress, not this Court, to resolve"); *see also Perry v. Merit Sys. Prot. Bd.*, 137 S.Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting)

("If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation.").

IV. This case is an excellent vehicle to resolve the conflict.

Finally, this case is an ideal vehicle to resolve the conflict. The question presented was preserved below, and there are no procedural hurdles to this Court's review. The Tenth Circuit affirmed the district court's decision on the merits. Pet. App. 1a-16a. In doing so, the Tenth Circuit published a decision in conflict with decisions from the First, Third, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits. This Court should use this case to resolve the conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee/Cross-Appellant,

v.

DUSTIN E. ASH,

Defendant - Appellant/Cross-Appellee.

Nos. 17-3223 & 17-3245

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:15-CR-20054-CM-1)

Daniel T. Hansmeier (Melody Brannon, with him on the briefs), Kansas Federal Public Defender, Kansas City, Kansas, for Defendant - Appellant/Cross-Appellee.

James A. Brown (Stephen R. McAllister, with him on briefs), United States Attorney's Office, Topeka, Kansas, for Plaintiff - Appellee/Cross-Appellant.

Before **TYMKOVICH**, Chief Judge, **LUCERO** and **MATHESON**, Circuit Judges.

LUCERO, Circuit Judge.

In this cross-appeal, the parties challenge two district court rulings that considered whether certain offenses are crimes of violence under U.S.S.G.

§ 4B1.2(a). Intervening authority resolves both challenges. First, the Supreme Court recently determined that robbery qualifies as a crime of violence if the offense requires the perpetrator to overcome victim resistance. Stokeling v. United States, 139 S. Ct. 544, 549 (2019). We thus hold that Dustin Ash's Missouri conviction for second-degree robbery is a crime of violence. Second, our court recently reversed its prior precedent and rejected Ash's argument that offenses with a mens rea of recklessness cannot qualify as crimes of violence. United States v. Bettcher, 911 F.3d 1040, 1046 (10th Cir. 2018). We accordingly conclude that Ash's Kansas conviction for reckless aggravated battery is a crime of violence. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we reverse in part, affirm in part, and remand for resentencing.

I

Ash pled guilty to two counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). His Presentence Investigation Report ("PSR") identified a 2012 Kansas conviction for reckless aggravated battery as a "crime of violence" under U.S.S.G. § 4B1.2(a). Concluding that Ash had one such prior conviction, the PSR set his base offense level at 20 pursuant to § 2K2.1(a)(4)(A). After making several adjustments, the PSR indicated Ash's total offense level was 23.[1] Paired with a criminal history category of V, the PSR determined his Guidelines range was 84 to 105 months' imprisonment.

[1] The PSR imposed a two-level adjustment because one of the firearms was stolen, § 2K2.1(b)(4)(A), and a four-level adjustment because Ash possessed the

Both parties objected to the PSR. Ash contended the Kansas statute under which he was convicted does not categorically satisfy the definition of "crime of violence" because it can be committed with a mens rea of recklessness. He thus argued his base offense level should have been 14 under § 2K2.1(a)(6). The government countered that Ash had at least two prior convictions for crimes of violence: his Kansas conviction (already included in the PSR), and a 2001 Missouri conviction for second-degree robbery.[2] It argued Ash's base offense level should have been 24 pursuant to § 2K2.1(a)(2).

The district court overruled both objections. It determined Ash's Kansas reckless aggravated battery conviction qualifies as a crime of violence, but his Missouri second-degree robbery conviction does not. The court agreed with the PSR that the appropriate advisory Guidelines range was 84 to 105 months. It imposed a 94-month sentence. Ash appeals the district court's ruling as to the Kansas offense. The government cross-appeals as to the Missouri offense.

II

"Our review of whether a defendant's prior conviction constitutes a crime of violence under U.S.S.G. § 4B1.2 is de novo." United States v. Wray, 776 F.3d 1182, 1184 (10th Cir. 2015). That provision defines "crime of violence" in part as "any

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firearms in connection with other felony offenses, § 2K2.1(b)(6)(B). Ash received a three-level reduction for acceptance of responsibility. § 3E1.1.

[2] The government also argued a 1999 Kansas attempted robbery conviction qualified, but does not appeal the district court's determination that this offense is not a crime of violence.

offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another." § 4B1.2(a)(1). We refer to this portion of the definition as the "elements clause." United States v. Taylor, 843 F.3d 1215, 1220 (10th Cir. 2016).

Our inquiry under the elements clause demands application of "the categorical approach, examining the elements of the [state] statute to see whether they meet the requirements of U.S.S.G. § 4B1.2(a)(1)'s crime of violence definition." Bettcher, 911 F.3d at 1043. To determine if an offense satisfies "the elements clause's 'physical force' component . . . we must identify the minimum 'force' required by [state law] law for the crime of [conviction] and then determine if that force categorically fits the definition of physical force." United States v. Harris, 844 F.3d 1260, 1264 (10th Cir. 2017) (emphasis omitted).[3]

"Federal law defines the meaning of the phrase 'use, attempted use, or threatened use of physical force.'" Harris, Id. In analyzing an identically worded elements clause contained in 18 U.S.C. § 16, the Supreme Court held that the word "'use' requires active employment" rather "than negligent or accidental conduct." Leocal v. Ashcroft, 543 U.S. 1, 9 (2004). The modifier "physical" limits the

[3] In Harris, we considered whether a crime qualified as a violent felony under the elements clause of the Armed Career Criminal Act ("ACCA"). Id. Because the "definition set forth in the career-offender guideline, § 4B1.2, is virtually identical to the definition of violent felony contained in" ACCA, we have applied the "violent felony analysis in cases interpreting § 4B1.2's definition of crime of violence." Wray, 776 F.3d at 1184-85 (quotation omitted).

elements clause to "force exerted by and through concrete bodies" as opposed to, "for example, intellectual or emotional force." Johnson v. United States, 559 U.S. 133, 138 (2010). And "physical force" means "violent force—that is, force capable of causing physical pain or injury to another person." Id. at 140 (emphasis omitted).

We look to state law to define "the substantive elements of the crime of conviction." Harris, 844 F.3d at 1264. In identifying the "minimum force" required for the crime of conviction, such "minimum culpable conduct . . . only includes that in which there is a realistic probability, not a theoretical possibility the state statute would apply." Id. (quotations omitted). "Decisions from the state supreme court best indicate a realistic probability, supplemented by decisions from the intermediate-appellate courts." Id. (quotation omitted).

A

The government argues Ash's 2001 Missouri conviction for second-degree robbery qualifies as a crime of violence. The Missouri statute under which Ash was convicted provided, at the time of his offense, that "[a] person commits the crime of robbery in the second degree when he forcibly steals property." Mo. Rev. Stat. § 569.030 (1998). The term "forcibly steals" means that a person:

> uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> (a) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> (b) Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

Mo. Rev. Stat. § 569.010(1) (1998).[4]

The Supreme Court's recent decision in Stokeling dictates that this offense is categorically a crime of violence under the elements clause. In Stokeling, the Court determined ACCA's "elements clause encompasses robbery offenses that require the criminal to overcome the victim's resistance." 139 S. Ct. at 550. Although it had previously defined "force" for the purpose of the same clause as "violent force—that is, force capable of causing physical pain or injury to another person," Johnson, 559 U.S. at 140 (emphasis omitted), the Court clarified that "Johnson did not purport to establish a force threshold so high as to exclude even robbery from ACCA's scope," Stokeling, 139 S. Ct. at 553. It reasoned that "the force necessary to overcome a victim's physical resistance is inherently violent in the sense contemplated by Johnson, and suggests a degree of power that would not be satisfied by the merest touching." Id. (quotations and alteration omitted).

To reach this conclusion, the Court held that the term "force" is informed by its common law definition, and specifically "that the 'force' required for common-law robbery" was enough to satisfy the elements clause's use of force requirement. Id. at 551. At common law, force used to overcome victim resistance was sufficient, "however slight the resistance." Id. (quotation omitted). Thus, "it was robbery to seize another's watch or purse, and use sufficient force to break a chain or guard by

[4] The Missouri statutes were amended effective January 1, 2017. See L.2014 S.B. No. 491.

which it is attached to his person, or to run against another, or rudely push him about, for the purpose of diverting his attention and robbing him." Id. at 550 (quotation omitted). "[R]obbery that must overpower a victim's will—even a feeble or weak-willed victim—necessarily involves a physical confrontation and struggle." Id. at 553. And "it is the physical contest between the criminal and the victim that is itself capable of causing physical pain or injury." Id. (quotation omitted). The Court accordingly determined Florida robbery, which can be completed by "a defendant who grabs the victim's fingers and peels them back to steal money," is a violent felony. Id. at 555.

Nevertheless, not all physical contact establishes the quantum of force required by Johnson, as clarified in Stokeling. The Supreme Court stated in Johnson that the "merest touch" is insufficient to constitute force. 559 U.S. at 143; see also United States v. Garcia, 877 F.3d 944, 952 (10th Cir. 2017) (noting that "mere touching is insufficient to satisfy the violent force standard" (quotation omitted)). The Court emphasized in Stokeling that under the Florida law at issue, "[m]ere snatching of property from another will not suffice," and force is not used simply because "the victim feels [the assailant's] fingers on the back of her neck." 139 S. Ct. at 555 (quotations and alteration omitted). This court recently applied Stokeling to a Kansas robbery statute, holding that it did not qualify as a crime of violence under the elements clause because a defendant can be convicted for snatching property "without any application of force directly to the victim, and also, importantly, without any resistance by or injury to the victim." United States v. Bong, 913 F.3d

1252, 1264 (10th Cir. 2019). The line is drawn, therefore, between robbery that can be accomplished by the mere snatching of property and robbery that requires overcoming even slight victim resistance.[5]

The Missouri robbery statute under which Ash was convicted falls on the crime of violence side of that divide. Its plain text, which requires that an assailant "uses or threatens the immediate use of physical force upon another person," § 569.010(1), corresponds almost exactly to the Guidelines' requirement that a crime of violence have "as an element the use, attempted use, or threatened use of physical force against the person of another," § 4B1.2(a)(1). However, we must look to Missouri caselaw to determine whether the statute requires a showing that the defendant overcame the victim's resistance, and therefore satisfies the standard set out in Stokeling. See Bong, 913 F.3d at 1262, 1264 (holding Kansas robbery statute that facially required use of "force" did not qualify as a violent felony because state caselaw permitted conviction without application of force to victim or overcoming resistance).

[5] In Garcia, we arguably applied a different standard. There, we noted that "some federal circuit courts have decided a robbery statute which criminalizes the use of any physical force, however minimal, to overcome the victim's resistance and seize her property . . . does not meet the violent force" requirement. 877 F.3d at 950. We also questioned whether a New Mexico statute qualified as a violent felony given "language in the New Mexico cases suggesting any quantum of force which overcomes resistance would be sufficient to support a robbery conviction." Id. at 956. To the extent Garcia does not comport with the rule set out in Stokeling, it is no longer good law. See United States v. Myers, 200 F.3d 715, 720 (10th Cir. 2000) (noting panel precedent must give way to "a superseding contrary decision by the Supreme Court").

Several older Missouri Supreme Court cases distinguish snatching of property from takings that involve overcoming victim resistance. In State v. Adams, 406 S.W.2d 608 (Mo. 1966), that court concluded that

> snatching a valuable article from another is robbery where force is exercised in overcoming the resistance of the person robbed or in detaching the article taken where it is fastened to the clothing or person of the victim, but that where the article is merely snatched from the hand of another the offense is stealing and not robbery.

Id. at 611; see also State v. Houston, 451 S.W.2d 37, 39 (Mo. 1970) (noting "there was actual violence in excess of mere snatching"); State v. White, 34 S.W.2d 79 (Mo. 1930) ("The mere snatching of an article from the person of another, without violence or putting in fear, is not robbery, except where there is some injury or violence to the person of the owner or where the property snatched is so attached to the person or clothes of the owner as to afford resistance." (quotation omitted)); State v. Spivey, 204 S.W. 259, 261 (Mo. 1918) ("Snatching a valuable article from another is always denominated robbery where any force is exercised either to overcome the resistance of the person robbed or in detaching the article taken where it is fastened in some way to the clothing or person of the one robbed.").[6]

[6] The version of the robbery statute under which Ash was convicted became effective in 1979. See L.1977, S.B. No. 60. Prior versions of the statute differed in some important respects from the version we consider in this case. See State v. Tivis, 884 S.W.2d 28, 30 (Mo. Ct. App. 1994) (noting that prior robbery statutes "provided that putting a person in fear of some immediate injury was sufficient" rather than "the use or threatened use of immediate physical force"). But as described infra, Missouri case law as to the quantum of force necessary has been carried forward.

In more recent cases, the Missouri Court of Appeals has reversed robbery convictions in cases in which the defendant did not overcome victim resistance. In State v. Henderson, 310 S.W.3d 307 (Mo. Ct. App. 2010), that court determined there was insufficient force to sustain a second-degree robbery conviction because the evidence showed defendant only "brushed" a store clerk's arm in taking money from her cash register, but did not "hit, grab, pull, or use any force against her" and "the clerk did not resist." Id. at 308. This "contact incidental to the money snatch," the court held, was "not a threat or use of force to overcome resistance." Id. at 309. Similarly, in Tivis, the Missouri Court of Appeals overturned a robbery conviction because defendant merely "grabbed the [victim's] purse by its strap, took it from her shoulder and ran off," but "there was no struggle over the purse, [the defendant] did not touch her and she was not injured." 884 S.W.2d at 29-30.

On the other hand, Missouri courts have upheld robbery convictions in cases in which force was used to overcome victim resistance. In several cases, evidence of a struggle was deemed sufficient. For example, in State v. Childs, 257 S.W. 3d 655 (Mo. Ct. App. 2008), the defendant "tussled" with the victim for her car keys. Id. at 660. The court explained that "[t]he sudden taking or snatching of property is not sufficient to support a second-degree robbery conviction," but "evidence that the defendant struggled with or caused an injury to the victim" is enough. Id. Similarly, in State v. Jolly, 820 S.W.2d 734 (Mo Ct. App. 1991), defendant's second-degree robbery conviction was affirmed because he "grabbed" the victim's bag and "[i]n the ensuing struggle, [the victim's] fingernail was ripped off." Id. at 735. The court

explained that this evidence was sufficient to sustain a second-degree robbery conviction because it "was no mere purse-snatching; appellant and [the victim] struggled over the bag." Id. at 736; see also Hughes v. State, 204 S.W.3d 376, 381 (Mo. Ct. App. 2006) (defendant committed second-degree robbery because he "struggled with [store employees] while trying to escape with the stolen drugs").

Missouri courts have also determined that taking property securely attached to a person is sufficient for a second-degree robbery conviction. In State v. Butler, 719 S.W. 2d 35 (Mo. Ct. App. 1986), the victim's purse strap was "wrapped around [her] arm and one of her fingers" and her finger was mildly injured when defendant pulled it from her. Id. at 35. Citing to Adams, the court ruled that the quantum of force necessary for second-degree robbery is satisfied if "the article snatched is so attached to the owner's person as to afford resistance or injure the possessor in the taking." Id. (quotation and emphasis omitted). And in State v. Rice, 937 S.W. 2d 296 (Mo. Ct. App. 1996), defendant "jerked" a purse from the victim's shoulder, causing her pain and breaking the strap. Id. at 298. The court again held that an article can "be so attached to the owner's person as to afford resistance or cause injury in the taking." Id.

This degree of force is consistent with that required by Stokeling. As the Supreme Court noted in that case, common law robbery included instances in which the defendant "physically overcame a victim's resistance, however slight," as well as crimes in which the defendant "seize[d] another's watch or purse, and use[d] sufficient force to break a chain or guard by which it [was] attached to his person."

Stokeling, 139 S. Ct. at 550 (quotations omitted). "Similarly, it was robbery to pull a diamond pin out of a woman's hair when doing so tore away hair attached to the pin. But the crime was larceny, not robbery, if the thief did not have to overcome such resistance." Id. (citation omitted). And "the 'force' required for common-law robbery [is] sufficient to justify an enhanced sentence under the . . . elements clause." Id. at 551.

Ash cites to language in State v. Lewis, 466 S.W.3d 629 (Mo. Ct. App. 2015), arguing that case establishes second-degree robbery can be committed with less force than necessary to overcome victim resistance. In summarizing caselaw on the force necessary to commit second-degree robbery, the Lewis court stated that "where there was no physical contact, no struggle, and no injury, courts have found the evidence insufficient to support a robbery conviction. But where one or more of those circumstances is present, a jury reasonably could find use of force." Id. at 632. Ash thus argues that any type of physical contact, even mere touching, is enough under the statute to sustain a second-degree robbery conviction. But this language from Lewis is dicta. In that case, the defendant bumped the victim, yanked her purse away from her, and engaged in a "slight struggle." Id. at 631. The Lewis court recognized that "de minimus contact" would not be enough. Id. at 633. For that proposition, the court cited Henderson, which as noted above determined "contact incidental to [a] snatch" is insufficient to support a second-degree robbery conviction. 310 S.W.3d at 309.

Prior to the Supreme Court's decision in Stokeling, the Eighth Circuit, sitting en banc, reached the conclusion that Missouri second-degree robbery requires the use of force and cannot be committed by incidental contact. In United States v. Swopes, 886 F.3d 668 (8th Cir. 2018) (en banc), that court noted the dicta quoted above, but explained "[t]he offense in Lewis itself . . . did involve the use of violent force: The court upheld Lewis's second-degree robbery conviction when he bumped the victim from behind, momentarily struggled with her, and then yanked the purse out of her hands." Id. at 671 (quotation omitted). We agree with the Eighth Circuit that "[t]he text of the Missouri second-degree robbery statute at issue here requires proof that a defendant used physical force or threatened the immediate use of physical force" and that Missouri courts have applied that requirement in a manner consistent with the meaning of "physical force" as used in the elements clause. Id. at 672. We accordingly conclude that Ash's Missouri second-degree robbery conviction is categorically a crime of violence under § 4B1.2(a)(1).[7]

[7] In a Fed. R. App. P. 28(j) letter following Stokeling, Ash argues that Missouri robbery does not correspond perfectly to common law robbery because it permits a conviction if the defendant "uses or threatens the immediate use of physical force upon another person for the purpose of . . . [c]ompelling the owner . . . or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft." § 569.010(1). But Missouri robbery need not mirror common law robbery exactly to satisfy the elements clause. It need only require the same quantum of force. We cannot discern a reasonable scenario in which a defendant might use an amount of force less than that necessary to overcome slight victim resistance in order to compel a person to deliver up property or engage in other conduct which aids in the commission of the theft.

B

Ash argues the district court erred in treating his Kansas reckless aggravated battery conviction as a crime of violence. He was convicted of "recklessly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." Kan. Stat. § 21-3414(a)(2)(B) (repealed July 1, 2011).[8]

As noted above, the Supreme Court has held that the "use" of physical force does not include "negligent or accidental conduct." Leocal, 543 U.S. at 9. We previously interpreted this rule as excluding offenses with a mens rea of recklessness from the definition of crime of violence. See United States v. Duran, 696 F.3d 1089, 1095 (10th Cir. 2012) (interpreting § 4B1.2(a)(1)); see also United States v. Zuniga-Soto, 527 F.3d 1110, 1124 (10th Cir. 2008) (reaching the same conclusion under U.S.S.G. § 2L1.2, which contains an identical elements clause). However, our circuit has now recognized this line of cases has been overruled by intervening Supreme Court authority. Bettcher, 911 F.3d at 1045-46.[9]

Following Duran and Zuniga-Soto, the Supreme Court determined that reckless domestic violence crimes categorically include the use of physical force

[8] We assume without deciding, consistent with the parties' positions, that the Kansas statute at issue is divisible and thus the modified categorical approach applies. See Mathis v. United States, 136 S. Ct. 2243, 2248-49 (2016). We accordingly look to the elements of the particular subsection of the statute under which Ash was convicted.

[9] Bettcher had not been decided when we heard oral argument in this case.

within the meaning of 18 U.S.C. § 921(a)(33)(A)(ii). Voisine v. United States, 136 S.Ct. 2272, 2276 (2016). It explained that "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" because "that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness." Id. at 2279.

This court in Bettcher held that Voisine "overrides our contrary precedents classifying reckless harm with negligent or accidental harm." 911 F.3d 1045. We concluded that "after Voisine, the law is sufficiently plain that reckless [crimes] qualify as crimes of violence under U.S.S.G. § 4B1.2(a)(1)." Id. at 1047. Accordingly, we must reject Ash's argument that his Kansas conviction does not qualify as a crime of violence because it can be committed recklessly.[10] The Kansas reckless aggravated battery statute under which Ash was convicted is a crime of violence pursuant to § 4B1.2(a)(1).[11]

[10] In his opening brief, Ash also argued that the Kansas statute does not involve the use of physical force because the crime can be committed through mere offensive touching. But in his reply brief, he concedes that this argument fails under the applicable plain error standard of review based on existing circuit precedent. See United States v. Williams, 893 F.3d 696, 704 (10th Cir. 2018) (holding that analogous subsection of the Kansas aggravated battery statute with a mens rea of knowing qualifies as a crime of violence because "the causation of bodily harm . . . requires the use or threatened use of physical force").

[11] We therefore decline to decide whether it is also a crime of violence under § 4B1.2(a)(2).

III

For the foregoing reasons, we **AFFIRM** in part and **REVERSE** in part. Because Ash has two prior convictions for crimes of violence under the Guidelines, the district court miscalculated his advisory Guidelines range. We **REMAND** and instruct the district court to vacate Ash's sentence and resentence him consistent with this opinion.

because he was convicted of reckless aggravated battery and that Tenth Circuit precedent finds that reckless conduct cannot qualify as a crime of violence. The court, however, is persuaded by United States Supreme Court's recent decision *Voisine versus United States* in which the court found that reckless conduct can involve the use of force and can therefore be considered a crime of violence. The court finds that defendant's Kansas aggravated battery conviction is a crime of violence.

The government argues that the PSR should have also included defendant's Kansas attempted robbery and Missouri second degree robbery convictions as crimes of violence. The government first claims that defendant's Kansas attempted robbery conviction falls under the enumerated crimes clause in Section 4B1.2(a)(2). This court, however, has already found that Kansas robbery does not meet the generic definition of robbery because Kansas allows use of a subjective test for a threat of bodily injury and therefore the Kansas statute sweeps more broadly than the generic definition. Defendant's Kansas attempted robbery conviction therefore does not qualify as a crime of violence under Section 4B1.2(a)(2).

In regards to the Missouri second degree robbery conviction, the government argues that defendant's