No. 18-9639

IN THE SUPREME COURT OF THE UNITED STATES

DUSTIN E. ASH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Kansas offense of reckless aggravated battery, in violation of Kan. Stat. Ann. § 21-5413(b)(2)(B) (2010), is a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(1) (2016).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Kan.):

United States v. Ash, No. 15-cr-20054 (Oct. 17, 2017)

United States Court of Appeals (10th Cir.):

United States v. Ash, No. 17-3223 (Mar. 12, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 917 F.3d 1238. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2019. The petition for a writ of certiorari was filed on June 10, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Kansas, petitioner was convicted on two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 94 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed in part, reversed in part, and remanded for resentencing. Pet. App. 1a-16a.

1. In June 2014, the Kansas City, Kansas, Police Department received an anonymous call reporting that petitioner was driving a stolen black Honda Pilot and was in possession of a firearm. Presentence Investigation Report (PSR) ¶ 12. When officers arrived at the apartment complex that the caller had identified, they found the car in question, which they confirmed had been stolen during a burglary a week before. Ibid. Someone in the complex directed the officers to an empty apartment, where they found petitioner. PSR ¶ 13. Inside petitioner's shorts, which he was not wearing, they found a key to the stolen car and petitioner's identification. Ibid. Next to the shorts was a stolen pistol. Ibid. Petitioner was arrested, but was later released. Ibid.

Approximately one year later, an off-duty Kansas City police officer observed petitioner at a store. PSR ¶ 15. The officer was familiar with petitioner and believed that he had outstanding warrants. Ibid. The warrants were confirmed, and petitioner was

arrested and searched. Ibid. The officers found a loaded pistol and 3.2 grams of methamphetamine. Ibid.

A federal grand jury returned an indictment charging petitioner with two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Petitioner pleaded guilty without a plea agreement. Judgment 1; PSR ¶ 9.

2. At sentencing, the government argued that petitioner should be subject to a 15-year statutory minimum sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), because he had three prior convictions for a "violent felony," as defined by 18 U.S.C. 924(e)(2)(b)(i): a 2012 Kansas conviction for reckless aggravated battery, a 2001 Missouri conviction for second-degree robbery, and a 1999 Kansas conviction for attempted robbery. 1 C.A. App. 38-39.

In the alternative, the government argued that, for purposes of calculating petitioner's advisory Sentencing Guidelines range, the district court should apply a base offense level of 24 under Sentencing Guidelines § 2K2.1(a)(2) (2016), which applies if a defendant was previously convicted of two "crimes of violence." 1 C.A. App. 39. Under the Guidelines' "elements clause," a "crime of violence" is defined to include "any 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." Sentencing Guidelines § 4B1.2(a)(1) (2016). As relevant here, the

government argued that Kansas aggravated battery, in violation of Kan. Stat. Ann. § 21-3414(a)(2)(B) (2010) -- which criminalizes "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" -- satisfies the elements clause. 1 C.A. App. 42-43.

Petitioner argued that none of his three prior convictions should qualify as either a "violent felony" under the ACCA or a "crime of violence" under the Sentencing Guidelines, and that his base offense level should accordingly be 14 under Sentencing Guidelines § 2K2.1(a)(6). Pet. App. 3a. The district court determined that petitioner's Kansas aggravated battery conviction constituted a crime of violence under Sentencing Guidelines § 4B1.2(a)(1), but that petitioner's other prior convictions were neither ACCA violent felonies nor Guidelines crimes of violence. Pet. App. 3a. The court thus applied a base offense level of 20, under Sentencing Guidelines § 2K2.1(a)(4), and calculated a total offense level of 23. 2 C.A. App. 33-36. Combined with petitioner's criminal history category of V, the court determined that the advisory Sentencing Guidelines range was 84 to 105 months. Id. at 36. The court sentenced petitioner to 94 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. Both petitioner and the government appealed. Pet. App. 1a. Petitioner challenged the district court's determination that

Kansas aggravated battery is a crime of violence, while the government challenged the district court's determination that Missouri second-degree robbery is not a crime of violence.[1] The court of appeals affirmed in part, reversed in part, and remanded for resentencing. Id. at 1a-16a. It determined that both offenses are crimes of violence, and that the district court thus miscalculated petitioner's advisory Sentencing Guidelines range. Id. at 16a.

As relevant here, the court of appeals "reject[ed] [petitioner's] argument that his Kansas conviction does not qualify as a crime of violence because it can be committed recklessly." Pet. App. 15a. The court noted that, in Leocal v. Ashcroft, 543 U.S. 1 (2004), this Court held that "the 'use' of physical force" in 18 U.S.C. 16(a) "does not include 'negligent or accidental conduct.'" Pet. App. 14a (quoting Leocal, 543 U.S. at 9). And the court of appeals observed that it had "previously interpreted th[at] rule as excluding offenses with a mens rea of recklessness from the definition of "crime of violence" under Sentencing Guidelines § 4B1.2. Pet. App. 14a (citing United States v. Duran, 696 F.3d 1089, 1095 (10th Cir. 2012)). But the court explained that it had since recognized that its prior "line of cases has been overruled by intervening authority" from this Court -- in particular, Voisine v. United States, 136 S. Ct. 2272 (2016).

[1] The government did not challenge the district court's determination that Kansas attempted robbery is not a crime of violence. Pet. App. 3a n2.

Pet. App. 14a; see id. at 15a. The court of appeals recognized that in Voisine, this Court "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 15a (quoting Voisine, 136 S. Ct. at 2279). The court of appeals accordingly explained 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)." Ibid. (quoting United States v. Bettcher, 911 F.3d 1040, 1047 (10th Cir. 2018), petition for cert. pending, No. 19-5652 (filed Aug. 16, 2019)).

DISCUSSION

Petitioner contends (Pet. 13-32) that his prior conviction for aggravated battery under Kan. Stat. Ann. § 21-5413(b)(2)(B) (2010), does not qualify as a crime of violence under Sentencing Guidelines § 4B1.2(a)(1) (2016), on the theory that an offense that can be committed recklessly does not include as an element the "use, attempted use, or threatened use of physical force against the person of another." The courts of appeals are divided as to whether crimes that can be committed with a mens rea of recklessness can satisfy either that definition or a similarly worded ACCA definition of "violent felony," 18 U.S.C. 924(e)(2)(b)(i). As the government has explained in its briefs in

response in Borden v. United States, No. 19-5410 (Oct. 21, 2019), and Walker v. United States, No. 19-373 (Oct. 21, 2019), the conflict on the ACCA question warrants this Court's review.[2] Either Borden or Walker would provide a suitable vehicle for deciding that question; this case, in contrast, involves an interpretation of the Sentencing Guidelines, which are subject to oversight and modification by the Sentencing Commission. The Court should therefore grant the petition for a writ of certiorari in one of those two cases and hold this case pending that case's disposition.

1. The court of appeals correctly determined that petitioner's conviction for aggravated battery -- which required that he recklessly cause bodily harm with a deadly weapon or in a manner in which great bodily harm can be inflicted, Kan. Stat. § 21-3414(a)(2)(B) (2010) -- involved the "use, attempted use, or threatened use of physical force against the person of another," and thus qualifies as a "crime of violence," Sentencing Guidelines § 4B1.2(a)(1). That determination follows from this Court's decision in Voisine v. United States, 136 S. Ct. 2272 (2016). In Voisine, the Court held, in the context of 18 U.S.C. 921(a)(33)(A)(ii), that the term "use . . . of physical force" includes reckless conduct. 136 S. Ct. at 2278 (citation omitted). Although Voisine had no occasion to decide whether its holding

[2] We have served petitioner with a copy of the government's brief in Walker.

extends to other statutory contexts, id. at 2280 n.4, the court of appeals has correctly determined that Voisine's logic is similarly applicable to other statutes and Guidelines provisions that refer to offenses that have as an element the "'use' of force." United States v. Bettcher, 911 F.3d 1040, 1046 (10th Cir. 2018); see Pet. App. 15a.

This Court explained in Voisine that the word "'use'" in that context requires the force to be "volitional" but "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." 136 S. Ct. at 2279. The Court observed that the word "'use'" "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." Ibid. Moreover, the Court noted, "nothing in Leocal v. Ashcroft," 543 U.S. 1 (2004), which addressed the mens rea requirement for a statutory "crime of violence" definition similar to the one at issue here, see 18 U.S.C. 16(a), "suggests a different conclusion -- i.e., that 'use' marks a dividing line between reckless and knowing conduct." Voisine, 136 S. Ct. at 2279. Rather, the Court indicated, the key "distinction [was] between accidents and recklessness." Ibid. Thus, under Voisine, "[a]s 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." United States v. Haight, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (Kavanaugh, J.) (quoting Voisine, 136 S. Ct. at 2279), cert. denied, 139 S. Ct. 796 (2019).

2. As explained in the government's brief in response (at 10-13) in Walker, supra (No. 19-373), a circuit conflict exists on the question whether Voisine's logic applies to the similarly worded elements clause in the ACCA, and this Court's review of that question is warranted. The Court should accordingly grant review in either Borden or Walker, each of which appears to offer a suitable vehicle in which to consider that question.

This case, by contrast, does not provide an appropriate vehicle for further review. Here, petitioner's challenge to his sentence rests on a claimed error in the application of a provision of the advisory Sentencing Guidelines -- a provision, moreover, that the Sentencing Commission has proposed amending. Typically, this Court leaves issues of Guidelines application in the hands of the Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Given that the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. See ibid.; see also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court

decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

Indeed, the Commission has already taken steps to exercise its oversight authority with respect to other portions of the "crime of violence" definition. Effective August 2016, the Commission amended Sentencing Guidelines § 4B1.2(a) to eliminate the provision's residual clause and to expand the Guidelines' list of enumerated offenses. See 81 Fed. Reg. 4741, 4742-4743 (Jan. 27, 2016). In addition, the Commission has proposed potentially amending the elements clause at issue here to "allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense." Notice of Final Priorities for Amendment Cycle, 83 Fed. Reg. 43,956 (Aug. 28, 2018). That amendment, if adopted, would greatly diminish the importance of the question whether reckless offenses have, as an element, the use of force within the meaning of the Sentencing Guidelines.

3. If this Court grants the petition for a writ of certiorari in Borden or Walker, it should hold the petition in this case pending its decision there. The elements clause in Sentencing Guidelines § 4B1.2(a)(1) mirrors the elements clause in the ACCA, 18 U.S.C. 924(e)(2)(B)(i). The Court's resolution of the more consequential issue of the ACCA's application to prior convictions for crimes that can be committed recklessly could therefore affect the court of appeals' disposition of this case.

CONCLUSION

If this Court grants review in Borden v. United States, No. 19-5410 (filed July 24, 2019), or Walker v. United States, No. 19-373 (filed Sept. 19, 2019), the petition for a writ of certiorari should be held pending the disposition of that case and then disposed of as appropriate. If this Court grants review in neither Borden nor Walker, the petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

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