No. 18-9639

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The government acknowledges that the courts of appeals are divided over whether reckless crimes qualify as crimes of violence under USSG § 4B1.2. Gov't Br. 6. The government further notes that an analogous conflict exists in the Armed Career Criminal Act's violent-felony context (18 U.S.C. § 924(e)(2)(b)(i)). Gov't Br. 6. It is the government's position that this latter conflict warrants this Court's review, and it has identified two suitable vehicles for this Court to resolve the conflict. Gov't Br. 6-7, 9 (citing *Borden v. United States*, No. 19-5410; *Walker v. United States*, No. 19-373). The government asks this Court to grant certiorari in one of those cases and to hold this case, which involves § 4B1.2 and not § 924(e), pending that case's disposition. Gov't Br. 7, 10.

We agree that this Court should grant certiorari in *Borden* or *Walker*. And if this Court only grants certiorari in *Borden* or *Walker*, we agree that the Court should hold this case pending that case's disposition. For six reasons, however, this Court should also grant this Petition.

1. Although the government suggests otherwise, Gov't Br. 9 (citing *Braxton v. United States*, 500 U.S. 344 (1991), this Court in fact reviews decisions interpreting the Guidelines, Pet. 16 (citing cases). The government's contrary position overreads *Braxton*. *Braxton* acknowledges that, because the Sentencing Commission has the statutory authority to amend the guidelines, as well as to make any such amendments retroactive, it can eliminate conflicts itself, thus potentially negating the need for this Court's intervention. 500 U.S. at 348.

But *Braxton* did not rely on this abstract notion to punt the guidelines issue in that case. Instead, this Court chose not to resolve a conflict over the interpretation of USSG § 1B1.2(a) "because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of § 1B1.2." *Id.* at 348-349. This Court added a second reason as well, refusing to resolve the conflict "because the specific controversy can be decided on other grounds." *Id.* at 349. This Court then resolved the case on other grounds, ultimately holding that the lower courts misapplied § 1B1.2(a) on the merits. *Id.* at 351. In other words, the defendant in *Braxton* won his guidelines issue in this Court. *Id.*

Unlike in *Braxton*, the Sentencing Commission has not "already undertaken a proceeding that will eliminate circuit conflict over" whether § 4B1.2 reaches reckless crimes. At no point, ever, has the Commission proposed an amendment (let alone a retroactive amendment, which defendants like Mr. Ash would now need to obtain relief from the Commission) to resolve whether reckless crimes can count as crimes of violence under § 4B1.2. Thus, *Braxton* does not support the government's claim that this guidelines issue is unworthy of this Court's review.

The best the government can do is to note that, in August 2016, the Commission amended § 4B1.2's definition of crime of violence *in other respects* (eliminating the residual clause and expanding the list of enumerated offenses). Gov't Br. 10; *see also* USSG Supp. to App. C, amend. 798. The government implies that Amendment 798 somehow supports its claim here that this Court need not resolve § 4B1.2's reach to reckless crimes. But that's wrong. The Commission's decision to amend

§ 4B1.2 in other respects indicates its *unwillingness* to amend § 4B1.2 in the reckless-crimes context.[1] Had the Commission wanted to "undertake a proceeding" to clarify the reckless-crimes issue, it easily could have done so via Amendment 798. Its failure to do so distinguishes this case from *Braxton*.

And this is even more so when one realizes that Amendment 798 went into effect on August 1, 2016, **after** this Court issued its decision in *Voisine v. United States*, 136 S.Ct. 2272 (2016). We know that, prior to *Voisine*, the Circuits were essentially unanimous that reckless crimes did not count as crimes of violence under § 4B1.2. *See*, *e.g.*, *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008) (collecting cases) (overruling recognized by the panel's decision below, Pet. App. 14a). According to the government (and the Tenth Circuit below), *Voisine* is the reason why reckless crimes now count as crimes of violence under § 4B1.2. Gov't Br. 7. But if the Commission shared that view, it could have included such language in Amendment 798 (or a later Amendment). Its failure to do so puts this case well beyond *Braxton*'s reach.

Also consider this Court's grant of certiorari in *Beckles v. United States*, 137 S.Ct. 886 (2017). This Court granted certiorari in June 2016 to resolve whether § 4B1.2's residual clause was void for vagueness. *Beckles v. United States*, 136 S.Ct. 2510 (2016). Yet it was some six months earlier, in January 2016, that the

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[1] USSC, *Report to Congress: Career Offender Sentencing Enhancements* (Aug. 2016), available at: https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf
At page 50, the Commission indicated that "stakeholders" discussed the reckless-crimes issue, but that the Commission decided not to address the issue.

Commission adopted its amendment (Amendment 798) to strike the residual clause from § 4B1.2.[2] In *Beckles*, then, this Court granted certiorari to decide whether a clause that the Commission had since voted to strike from the guidelines was void for vagueness. If that issue merited this Court's review, then certainly this one does as well. Here, the Commission has never adopted, or even considered adopting, an amendment to address whether reckless crimes can count as crimes of violence. That inaction clears the way for this Court's (much needed) review. *See Braxton*, 500 U.S. at 348-349.

Two other cases from this Court further confirm that *Braxton* should not preclude a grant here. First, just one year after *Braxton*, this Court granted certiorari to resolve a guidelines conflict in *Williams v. United States*, 503 U.S. 193 (1992). If *Braxton* precluded this Court from resolving such conflicts, this Court would not have granted the petition in *Williams*.

Then, just two years after *Braxton*, this Court resolved a guidelines issue over the interpretation of USSG § 3C1.1 in *United States v. Dunnigan*, 507 U.S. 87 (1993). Importantly, it was the government who sought certiorari in *Dunnigan*, thus undermining its position here that this Court should not resolve guidelines issues. Moreover, it does not appear as if there was even a Circuit conflict on the issue in *Dunnigan*. 507 U.S. at 92. Yet, this Court still granted review. *Dunnigan* provides needed guidance on the meaning of § 3C1.1. It is a decision that (according to

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[2] USSC, *Amendment to the Sentencing Guidelines* (Jan. 21, 2016), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF_0.pdf

Westlaw) has been cited over 7,000 times. *Dunnigan* highlights the importance of resolving important guidelines issues. This case presents just such an issue.

The government also cites a proposed amendment (from August 2018) that would, if adopted, amend § 4B1.2 to allow courts to consider a defendant's actual conduct, rather than only the elements of the offense. Gov't Br. 10.[3] This amendment has nothing to do with whether reckless crimes count as crimes of violence. For that reason, this amendment also does not put this case within *Braxton*'s reach.

Nor would the adoption of this amendment resolve the reckless-crimes issue presented here. Even under a conduct-based approach, courts would still have to grapple over whether reckless conduct is sufficient to qualify as a crime of violence. Indeed, the district court would have to do just that in this case, as Mr. Ash's underlying conduct involved reckless driving. Pet. 10. There is no reason to think that the conflict in the Circuits on this issue would resolve itself under a conduct-based approach. If anything, this potential shift in tests is a reason to grant this petition. If the Commission moves to a conduct-based approach, then a decision under § 924(e)'s categorical approach might not extend to the guidelines context. So granting certiorari only in *Borden* or *Walker* could leave open the § 4B1.2 issue presented here.

Other portions of this proposed amendment also indicate that, on the merits, the Commission agrees with our position that reckless crimes do not count as crimes of violence under § 4B1.2. For instance, this proposed amendment would move inchoate

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[3] USSC, *Proposed Amendment to the Sentencing Guidelines* (Dec. 20, 2018), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20181219_rf-proposed.pdf

offenses from the guidelines commentary to the text of § 4B1.2.[4] As we have already explained, these inchoate offenses require the government to prove intent; they cannot be committed recklessly. Pet. 23-24. If these inchoate offenses cannot be committed recklessly, and for other already-explained reasons, it makes little sense to think that the Commission intended to include other reckless crimes as crimes of violence. Pet. 22-24. In any event, neither this proposed amendment nor any prior amendment to § 4B1.2 has addressed whether reckless crimes can count as crimes of violence. For these reasons, the government is wrong that *Braxton* counsels against review here.

One last point. *Braxton*'s rationale depends upon the Commission's ability to amend a particular guideline. 500 U.S. at 348-349. At present, however, the Commission has no ability to amend the guidelines. The Commission is supposed to have seven voting members. 28 U.S.C. § 991(a). But it has only two voting members (Judges Charles Breyer and Danny Reeves) at this time.[5] The Commission can amend the guidelines only via an "affirmative vote of at least four members." 28 U.S.C. §§ 991(a), (p). Two voting members cannot amend the guidelines. Thus, even if it wanted to, the Commission could not address this Circuit conflict. In such circumstances, *Braxton* has no application.[6] It is up to this Court to resolve the

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[4] USSC, *Proposed Amendment to the Sentencing Guidelines* (Dec. 20, 2018), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20181219_rf-proposed.pdf, at 23.

[5] https://www.ussc.gov/commissioners

[6] When this Court decided *Braxton*, the Commission had always functioned as envisioned by Congress. Five of the original seven voting members were still on the Commission, and replacements for the two who had left were quickly affirmed. *Braxton*'s nod to the Commission assumed a functioning Commission. That assumption cannot guide the Court today.

conflict in the Circuits over whether reckless crimes can count as crimes of violence under § 4B1.2.

2. This Court should grant review in this case, as well as in *Walker* or *Borden*, because there are guidelines-specific reasons (irrespective of the ACCA) why reckless crimes cannot count as crimes of violence under § 4B1.2. Our petition, citing the structure, purpose, and history of § 4B1.2, explains this point. Pet. 23-25. The government has done nothing to refute it. Regardless of how this Court resolves the conflict over § 924(e)'s element-of-violent-force clause, the text, structure, purpose, and history of the guidelines make clear that § 4B1.2's element-of-violent-force clause cannot plausibly encompass reckless crimes. Pet. 21-31.

3. If this Court were to grant certiorari only in *Walker* or *Borden*, there is no guarantee that the lower courts would apply that decision to the guidelines. It is not unheard of for the lower courts, including the Tenth Circuit, to refuse to apply ACCA precedent to § 4B1.2. *See*, *e.g.*, *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019) (refusing to strike down § 4B1.2's residual clause, when mandatory, as void for vagueness, and citing cases), cert. filed, No. 19-5219 (July 17, 2019); *United States v. Hall*, 714 F.3d 1270, 1272-1274 (11th Cir. 2013) (finding that possession of a short-barreled shotgun was a crime of violence under §4B1.2, but was not a violent felony under ACCA); *see also United States v. Gomez-Leon*, 545 F.3d 777, 786, 786 n.7 (9th Cir. 2008) (noting that "there are at least four different ways to determine whether an offense constitutes a crime of violence" under federal law (including the guidelines), and that "[w]hat may be a predicate offense under one approach is not

necessarily a predicate offense under another approach"). Indeed, this Court recently refused to apply ACCA precedent to the guidelines in *Beckles*. 137 S.Ct. at 890.

Thus, to resolve the § 4B1.2 split definitively, this Court should grant certiorari here as well as in *Walker* or *Borden*. This Court has taken this all-inclusive path before. *See*, *e.g.*, *Dorsey v. United States*, 567 U.S. 260, 270-272 (2012) (granting certiorari in two separate cases to resolve the Fair Sentencing Act's application, where one defendant was sentenced prior to the effective date of the Act's guidelines amendments, and the other was sentenced after those amendments had gone into effect). Just this term, this Court granted certiorari to determine whether discrimination based on sexual orientation is covered under Title VII, *Bostock v. Clayton County*, No. 17-1681, as well as whether discrimination against transgender people is covered under Title VII, *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107. The lesson is a good one: resolve all related issues. There is no good reason to grant certiorari in *Walker* or *Borden*, but not this case. Such an inclusive approach will provide more guidance than the piecemeal approach advocated by the government.

4. Contrary to the government's claim, the guidelines issue presented here is "more consequential" than the Armed Career Criminal Act issue. *See* Gov't Br. 10. The career-offender guideline is imposed with much greater frequency than the Armed Career Criminal Act, and it often results in a sentences much longer than the Armed Career Criminal Act's 15-year mandatory minimum, as a brief comparison of available data demonstrates:

	ACCA[7]	Career Offender[8]
Number of sentences FY 2016	304 of 67,742	1,796 of 67,742
Sentence lengths FY 2016	Average 182 months	Average 142 months 49.0% at 120-239 months 12.4% at 240+ months
Number of sentences FY 2018	289 of 69,425	1,597 of 69,425
Sentence lengths FY 2018	Average 186 months	Average 150 months 50.9% at 120-239 months 14.7% at 240+ months

With career offenders outnumbering ACCA offenders more than fivefold, the guidelines issue is surely the more "consequential" of the two, and at least equally deserving of this Court's attention.

5. This case is also an excellent vehicle to resolve the question presented. This is a direct criminal appeal, not a habeas case. There is no possibility that this Court would be asked to decide, for instance, whether the district court, at the time of sentencing, in fact relied on the residual clause when imposing sentence. *See*, *e.g.*, *Williams v. United States*, 927 F.3d 427, 439 (6th Cir. 2019) (requiring a prisoner in

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[7] USSC, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* (March 2018), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf; USSC, *Quick Facts: Felon in Possession of a Firearm* (2016), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf.

[8] USSC, *Quick Facts: Career Offenders* (2018), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY18.pdf;
USSC, *Quick Facts: Career Offenders* (2016), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY16.pdf.

this context to "show that it is more likely than not 'that the district court relied only on the residual clause in sentencing' him").

The statute at issue here also has just one recklessness mens rea ("recklessly causing bodily harm"). Pet. 2. It is not a statute, like some recklessness statutes, that also includes an additional heightened mens rea element. *See*, *e.g.*, Tex. Penal Code § 29.02(a)(1) (punishing reckless robbery "with intent to obtain or maintain control of the property"). And unlike a robbery statute, for instance, the statute at issue here implicates the broader, three-way split on this issue, as Mr. Ash's prior conviction was for reckless driving. Pet. 13. Again, to fully resolve the conflict below, it makes sense to address a statute that implicates the entire spectrum of the Circuit split. The statute at issue here does just that.[9]

6. We end with a discussion of the merits. The government's sole argument is that *Voisine* requires this Court to hold that reckless crimes can count as violent crimes under § 4B1.2. Gov't Br. 7-8. But its argument is unresponsive to the points made in our petition. The government ignores the fact that *Voisine* involved a statute limited solely to *misdemeanor* convictions, whereas § 4B1.2 encompasses only *felony* convictions. Pet. 26. The government also fails to acknowledge that the statute at issue in *Voisine* involves a different category of crimes (crimes of *domestic violence*) than the category of crimes at issue here (crimes of violence). Pet. 26. The government ignores the other textual differences between § 4B1.2 and the statute at issue in

[9] For similar reasons, *Borden* would appear to be a better vehicle than *Walker* in the ACCA context. A grant in this case and a grant in *Borden* would give this Court two clean vehicles to resolve this issue across the board.

Voisine, as well as the different purposes underlying the statutes. Pet. 26-28. The government sidesteps this Court's characterization of the statute at issue in *Voisine* as a "comical misfit" to provisions like § 4B1.2. Pet. 28-29.

The government also ignores this Court's decision in *Begay v. United States*, 553 U.S. 137 (2008). Pet. 4, 22-23. In *Begay*, this Court characterized violent crimes as "intentional or purposeful." 553 U.S. at 146. In doing so, this Court contrasted purposeful crimes with reckless crimes, noting that the latter would not count as crimes of violence. *Id.* at 145-147. As did Justice Scalia in his concurrence. *Id.* at 153. *Begay* resolves this case, not *Voisine*. Reckless crimes do not count as crimes of violence. This was the established rule in the Tenth Circuit pre-*Voisine*. *Zuniga-Soto*, 527 F.3d at 1124. The Tenth Circuit erred below when it relied on *Voisine* to overrule this precedent.

CONCLUSION

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

Respectfully submitted,

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