No. 19-5410

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES BORDEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Tennessee offense of reckless aggravated assault, Tenn. Code Ann. § 39-13-102(a)(2) (2003), is a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e).

2. Whether the district court violated the Due Process Clause in applying the ACCA to petitioner.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Tenn.):

United States v. Borden, No. 17-cr-120 (Apr. 17, 2018)

United States Court of Appeals (6th Cir.):

United States v. Borden, No. 18-5409 (Apr. 25, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 266.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2019. The petition for a writ of certiorari was filed on July 24, 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 Eastern District of Tennessee, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5. He was sentenced to 115 months of imprisonment, to be followed by five years of supervised release. Id. at 6-7. The court of appeals affirmed. Id. at 1-4.

1. In April 2017, officers with the McMinn County Sheriff's Department found petitioner sitting in the passenger seat of a car that was stopped on the road. Revised Presentence Investigation Report (PSR) ¶ 8. At the time, petitioner was the object of an active arrest warrant. Ibid. The driver of the car consented to a search, and petitioner told the officers that there was a gun in the car. PSR ¶ 9. The officers found the gun; they also found digital scales, a pill bottle, and drug paraphernalia. Ibid. In a subsequent interview, petitioner admitted to possessing the gun, which he had purchased with methamphetamine and which he planned to later sell. PSR ¶ 10.

2. A federal grand jury returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for possession of a firearm by a felon is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), however, prescribes a term of 15 years to life if the defendant had "three previous convictions"

for "violent felon[ies]" committed on different occasions. 18 U.S.C. 924(e)(1). Under the ACCA's "elements clause," a "'violent felony'" is defined to include felony offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B). Petitioner pleaded guilty pursuant to a written plea agreement in which he retained his right to appeal his sentence if the district court determined that he was subject to the ACCA. PSR ¶¶ 2, 4.

At sentencing, the United States contended that petitioner was subject to the ACCA because he had three prior convictions for Tennessee aggravated assault. Pet. App. 1. Petitioner did not dispute that his two convictions for intentional or knowing assault, in violation of Tenn. Code Ann. § 39-13-102(a)(1), constituted violent felonies. Gov't C.A. Br. 5 n.3. Petitioner contended, however, that his 2007 conviction for aggravated assault was not a violent felony under the ACCA because he had been convicted under Tenn. Code Ann. § 39-13-102(a)(2) (2003), which provides that "[a] person commits aggravated assault who * * * [r]ecklessly commits an assault" and "[c]auses serious bodily injury to another" or "[u]ses or displays a deadly weapon." Petitioner acknowledged that, during the pendency of his Section 922(g) charge, the court of appeals had determined in United States v. Verwiebe, 874 F.3d 258 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018), that reckless assault can qualify as a crime of violence under a provision of the Sentencing Guidelines that is

worded similarly to the ACCA's elements clause. Pet. App. 1-2. He argued, however, that "applying Verwiebe to his case would violate ex post facto and due process principles because [the court of appeals] decided Verwiebe six months after his arrest." Id. at 2.

The district court determined that all three of petitioner's aggravated-assault convictions qualified as violent felonies and that petitioner was therefore subject to the ACCA's 15-year statutory-minimum sentence. Pet. App. 2. Based on petitioner's assistance to law-enforcement authorities following his arrest, however, the United States asked the court to depart downward from the ACCA's statutory-minimum sentence under 18 U.S.C. 3553(e). Gov't C.A. Br. 6. The court granted that request and sentenced petitioner to 115 months of imprisonment. Pet. App. 2.

3. The court of appeals affirmed. Pet. App. 1-4. The court explained that, "[s]ince Verwiebe, our cases have held repeatedly that [Tennessee reckless aggravated assault] qualifies as a crime of violence" under the elements clause in the Sentencing Guidelines. Id. at 2.[1] In Verwiebe, the court of appeals had reasoned, based in part on this Court's decision in Voisine v.

[1] Petitioner and the United States disputed whether Tennessee reckless aggravated assault is further divisible into reckless assault causing serious bodily injury to another, Tenn. Code Ann. § 39-13-102(a)(2)(A) (2003), and reckless assault using or displaying a deadly weapon, id. § 39-13-102(a)(2)(B) (2003). See Gov't C.A. Br. 14-15; Pet. C.A. Br. 12. But because either variant covers recklessness, the court of appeals did not resolve the divisibility question.

United States, 136 S. Ct. 2272 (2016), that the relevant language does not exclude crimes with a mens rea of recklessness. Verwiebe, 874 F.3d at 262-263. The court of appeals here rejected petitioner's contention that Verwiebe was wrongly decided, observing that it was bound by circuit precedent. Pet. App. 3-4 (citing, inter alia, Davis v. United States, 900 F.3d 733, 736 (6th Cir. 2018) (determining that Tennessee reckless aggravated assault is an ACCA violent felony), cert. denied, 139 S. Ct. 1374 (2019)).

The court of appeals also rejected petitioner's argument "that applying Verwiebe to his case violated the Constitution's ex post facto and due process protections because [Verwiebe] was decided six months after he committed his offense." Pet. App. 2. The court observed that "[d]ue process entitled [petitioner] to 'fair warning' as to 'the reach of statutes defining criminal activity' and the punishment accompanying a conviction." Id. at 3 (citation omitted). Thus, the court reasoned, "the district court could not apply Verwiebe if by doing so it 'enforced changes in interpretations of the law that unforeseeably expand[ed] the punishment accompanying [his] conviction beyond that which [petitioner] could have anticipated at the time' he committed his crime." Ibid. (citation omitted; first and second sets of brackets in original). But the court observed that, "even if the court had given [petitioner] the benefit of then-existing precedent requiring more than recklessness for crimes of violence and

declined to enhance [his] sentence, [petitioner] could have anticipated a sentence of up to ten years" without the application of the ACCA. Ibid. And the court reasoned that "[t]he district court's application of Verwiebe * * * cannot be said to have disadvantaged" petitioner, who received a sentence of nine years and seven months and "suffered no deprivation of his due process rights." Ibid.

DISCUSSION

Petitioner contends (Pet. 17-21) that his prior conviction for aggravated assault under Tenn. Code. Ann. § 39-13-102(a)(2) (2003) does not qualify as a violent felony under the ACCA, 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," 18 U.S.C. 924(e)(2)(B)(i). He also contends (Pet. 21-25) that the district court violated ex post facto and due process principles by determining that he was subject to the ACCA. The first question presented warrants this Court's review, and this case would be an adequate vehicle in which to consider it. The second question presented, however, does not warrant further review.

1. On the first question presented, the court of appeals correctly rejected petitioner's contention that his 2007 conviction for reckless aggravated assault does not qualify as a conviction for a violent felony under the ACCA. The question whether a crime that may be committed recklessly can constitute a

violent felony has, however, divided the courts of appeals. The Court's review is therefore warranted to resolve that frequently recurring question.

a. The court of appeals correctly determined that petitioner's conviction for reckless aggravated assault -- which required that petitioner (1) recklessly caused serious bodily injury to another person or (2) recklessly caused bodily injury to another person while using or displaying a deadly weapon, Tenn. Code. Ann. § 39-13-102(a)(2) (2003) -- involved the "use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), and thus qualifies as a violent felony under the ACCA. 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 extends to other statutory contexts, id. at 2280 n.4, the Sixth Circuit has correctly recognized that "Voisine's analysis applies with equal force" to the elements clauses in the definitions of "crime of violence" under the Sentencing Guidelines and "violent felony" under the ACCA. United States v. Verwiebe, 874 F.3d 258, 262 (2017), cert. denied, 139 S. Ct. 63 (2018); see Davis v. United States, 900 F.3d 733, 736 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019).

This Court explained in Voisine that the word "'use'" 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 "violent felony" definition 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).

Petitioner contends (Pet. 17-21) that Voisine's logic does not apply to the ACCA. First, he asserts (Pet. 17-20) that the phrase "against the person of another" in the ACCA renders

inapplicable Voisine's discussion of recklessness. But as the court of appeals has previously explained, "Voisine's key insight is that the word 'use' refers to 'the act of employing something' and does not require a purposeful or knowing state of mind." Verwiebe, 874 F.3d at 262 (citing Voisine, 136 S. Ct. at 2278-2279). "That insight does not change if a statute says that the 'use of physical force' must be 'against' a person, property, or for that matter anything else." Ibid. (emphasis omitted). Rather, the phrase "against the person of another" in the ACCA merely identifies the object of the use of force.

Indeed, "the provision at issue in Voisine still required the defendant to use force against another person -- namely, the 'victim.'" Haight, 892 F.3d at 1281 (quoting 18 U.S.C. 921(a)(33)(A)(ii)); see ibid. ("In the words of the Supreme Court in Voisine, the phrase 'misdemeanor crime of domestic violence' is 'defined to include any misdemeanor committed against a domestic relation that necessarily involves the 'use . . . of physical force.'") (quoting Voisine, 136 S. Ct. at 2276) (emphasis added). And Voisine itself took as a given that the object of the recklessness would be another person, as it defined recklessness to require a person "to consciously disregard a substantial risk that the conduct will cause harm to another." 136 S. Ct. at 2278 (emphasis added; brackets, citation, and internal quotation marks omitted); see id. at 2279 (explaining that "reckless behavior" involves "acts undertaken with awareness of their substantial risk

of causing injury," such that any "harm such conduct causes is the result of a deliberate decision to endanger another").

Petitioner also highlights (Pet. 17-18, 20-21) the different penalties under Section 922(g)(9) and Section 924(e). Those different penalties, however, simply reflect the distinctions between the crimes that those provisions define. Section 922(g)(9) prohibits firearm possession after one misdemeanor-crime-of-domestic-violence conviction. See United States v. Castleman, 572 U.S. 157, 163 (2014). The ACCA, by contrast, prohibits firearm possession after three felony convictions for either a "serious drug offense" (with at least a ten-year minimum sentence) or a "violent felony" (burglary, arson, extortion, or a felony involving violent physical force). 18 U.S.C. 924(e)(2); see Johnson v. United States, 559 U.S. 133, 140 (2010).

Finally, petitioner asserts (Pet. 20) that excluding reckless assaults from Section 922(g)(9) would have rendered the statute broadly inoperative, while "excluding reckless crimes from the use of force clause in the ACCA will not wholly deprive the statute of practical effect." But to the extent that is correct, coverage of other offenses is no reason to disregard the linguistic congruity and to exclude paradigmatically violent crimes, like assault, that can be committed with a mens rea of recklessness.

b. Although the court below correctly resolved the question presented, its decision implicates a circuit conflict that warrants resolution by this Court. The majority of the courts of

appeals to address the issue after Voisine have determined that Voisine's logic applies to the ACCA. See United States v. Burris, 920 F.3d 942, 951 (5th Cir.), petition for cert. pending, No. 19-6186 (filed Oct. 3, 2019); Davis, 900 F.3d at 736 (6th Cir.); United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017); United States v. Pam, 867 F.3d 1191, 1207-1208 (10th Cir. 2017); Haight, 892 F.3d at 1281 (D.C. Cir.).

Meanwhile, the First and Ninth Circuits have concluded otherwise. Although the scope of earlier First Circuit decisions was uncertain, that court has now made clear that its precedent "forecloses the argument that crimes with a mens rea of recklessness may be violent felonies under the [ACCA's] force clause." United States v. Rose, 896 F.3d 104, 109 (2018). And a panel of the Ninth Circuit recently held in United States v. Orona, 923 F.3d 1197 (2019), that it was bound to apply pre-Voisine precedent holding that reckless crimes cannot constitute ACCA violent felonies, although it noted that "Voisine casts serious doubt on the continuing validity of" that precedent. Id. at 1202; see id. at 1202–1203. Another panel of that court, applying Orona, has held that federal second-degree murder is not a "crime of violence" under the elements clause of 18 U.S.C. 924(c), which is similar to the ACCA's, because second-degree murder can be committed with a mens rea of "extreme" recklessness. United States v. Begay, 934 F.3d 1033, 1040 (9th Cir. 2019); see id. at 1038-

1041. The United States has filed a petition for rehearing en banc in Orona. Pet. for Reh'g, Orona, supra (No. 17-17508).

Petitioner contends (Pet. 13) that the Fourth Circuit agrees with the First and the Ninth Circuits. But the Fourth Circuit's position is not clear. In United States v. Middleton, 883 F.3d 485 (2018), the Fourth Circuit concluded that the South Carolina crime of involuntary manslaughter, which proscribes killing another person unintentionally while acting with "reckless disregard of the safety of others," is not a violent felony under the ACCA. Id. at 489 (citation omitted); see id. at 493. The court reasoned that the statute had been applied to cover an "illegal sale" that, through an "attenuated * * * chain of causation," had resulted in injury. Id. at 492. In a concurrence in part and in the judgment, one judge -- joined in relevant part by one of the judges in the majority -- wrote that he would have instead concluded that "South Carolina involuntary manslaughter cannot serve as an ACCA predicate" because "the ACCA force clause requires a higher degree of mens rea than recklessness." Id. at 500 (Floyd, J.). It is not yet clear what precedential effect, if any, the Fourth Circuit will give that two-judge portion of a separate opinion.[2]

[2] In United States v. Hodge, 902 F.3d 420 (2018), a subsequent panel of the Fourth Circuit noted that the United States had conceded that "Maryland reckless endangerment constitutes a 'violent felony' only under the ACCA's [now-defunct] residual clause," and cited the Middleton concurrence for the proposition that "'[t]he ACCA force clause requires a higher degree of mens rea than recklessness.'" Id. at 427 (quoting Middleton, 883 F.3d

Petitioner also asserts (Pet. 14) that the Eighth Circuit "has taken the middle ground." The Eighth Circuit has, however, aligned with the majority view by applying Voisine's logic to the ACCA. See Fogg, 836 F.3d at 956. Nevertheless, it has carved out an exception for "the unadorned offense of reckless driving resulting in injury," United States v. Fields, 863 F.3d 1012, 1015 (8th Cir. 2017) (quoting United States v. Ossana, 638 F.3d 895, 901 n.6 (8th Cir. 2011)). The vitality of pre-Voisine precedent about reckless driving remains the subject of some debate within the Eighth Circuit. See id. at 1016 (Loken, J., dissenting) ("[P]rior decisions holding that recklessly driving a motor vehicle can never be a 'crime of violence' * * * were wrongly overbroad when decided, and they have been overruled or significantly restricted by subsequent Supreme Court and Eighth Circuit decisions."); United States v. Ramey, 880 F.3d 447, 449 (8th Cir.) (questioning, in dicta, "the vitality of [Ossana] after Voisine and Fogg"), cert. denied, 139 S. Ct. 84 (2018); but see

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at 498 (Floyd, J., concurring in part and concurring in the judgment)) (brackets omitted). But although the United States had conceded that Maryland reckless endangerment is not a violent felony under the ACCA, it had not conceded that the Middleton concurrence's reasoning controlled. Such a concession was unnecessary, as Maryland reckless endangerment likely does not satisfy the ACCA's elements clause regardless of whether other crimes involving a mens rea of recklessness can constitute violent felonies. In particular, Maryland reckless endangerment does not require proof of "contact [that] was not consented to by the victim." Manokey v. Waters, 390 F.3d 767, 772 (4th Cir. 2004) (citation and internal quotation marks omitted), cert. denied, 544 U.S. 1034 (2005).

United States v. Schneider, 905 F.3d 1088, 1091-1092 (8th Cir. 2018) (applying Fields to find that North Dakota aggravated assault, which "covers reckless driving," is not a crime of violence under the Sentencing Guidelines).

Finally, the Third and Eleventh Circuits have both sua sponte ordered rehearing en banc to address the issue. See United States v. Moss, 920 F.3d 752, 758, reh'g en banc granted and opinion vacated, 928 F.3d 1340 (11th Cir. 2019); Order for Reh'g en banc, United States v. Santiago, No. 16-4194 (3d Cir. June 8, 2018).

c. The question of whether Voisine's logic applies to the ACCA's elements clause is important and frequently recurring, and it warrants this Court's review. Several circuits are currently considering, or may consider, the issue en banc. See pp. 12-14, supra. Other circuits have declined to do so, adhering to the application of Voisine to the ACCA's elements clause. See, e.g., Walker v. United States, 931 F.3d 467 (6th Cir. 2019) (denying rehearing en banc). Meanwhile, a majority of active judges in the First Circuit appears to agree with that circuit's rejection of Voisine in this context. See Rose, 896 F.3d at 109-110; United States v. Windley, 864 F.3d 36, 37-39 (2017) (per curiam). It is therefore highly unlikely that the conflict will resolve itself without this Court's intervention. And although the Court could potentially await further percolation, the interests of judicial economy favor resolution of the issue this Term.

This case presents a suitable vehicle for resolving it. The court of appeals did not discuss the issue at length because of binding circuit precedent, but it was outcome-determinative. The Tennessee aggravated-assault statute covers reckless conduct, and the government relied on a conviction under that statute to apply the ACCA to petitioner. See Gov't C.A. Br. 4 n.2. Although petitioner was ultimately sentenced below the ten-year statutory-maximum sentence that would have applied had he not been subject to the ACCA, in light of his substantial assistance to law enforcement, the starting point for his sentence was the 15-year ACCA statutory-minimum term of imprisonment and his substantial assistance to the government. See Koons v. United States, 138 S. Ct. 1783, 1788 (2018). Thus, if Tennessee reckless aggravated assault does not qualify as a violent felony under the ACCA, petitioner would be entitled to resentencing.

Seven other pending petitions for writs of certiorari raise similar questions. See Ash v. United States, No. 18-9639 (filed June 10, 2019); Gomez Gomez v. United States, No. 19-5325 (filed July 19, 2019); Bettcher v. United States, No. 19-5652 (filed Aug. 16, 2019); Lara-Garcia v. United States, No. 19-5763 (filed Aug. 28, 2019); Combs v. United States, No. 19-5908 (filed Sept. 9, 2019); Walker v. United States, No. 19-373 (filed Sept. 19, 2019); Burris v. United States, No. 19-6186 (filed Oct. 3, 2019). Several present less suitable vehicles. Ash and Bettcher involve the interpretation of a provision of the Sentencing Guidelines.

Typically, this Court leaves such issues in the hands of the Sentencing 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). In both Gomez Gomez and Lara-Garcia, the question presented did not affect the petitioner's sentence under 8 U.S.C. 1326(b) and would at most be relevant for a future immigration or criminal proceeding. In Combs, the defendant has alternatively requested relief under this Court's pending decision in Shular v. United States, No. 18-6662 (cert. granted June 28, 2019), which raises the possibility that he would be entitled to relief regardless of the disposition of the question presented here. And in Burris, the petitioner has combined the argument about the application of Voisine to the ACCA with other overlapping arguments, and thus does not cleanly present the Voisine issue.

In addition to this petition, one other pending petition, Walker, involves the ACCA and appears to offer a suitable vehicle in which to consider the question presented. If anything, Walker may be a marginally better vehicle for this Court's review, as the panel in that case and the dissents from the denial of rehearing en banc clearly addressed the ACCA question. See Walker v. United States, 769 Fed. Appx. 195 (6th Cir.) (per curiam), reh'g denied, 931 F.3d 467 (6th Cir. 2019). The panel in this case, by contrast, repeatedly misstated the question presented as one involving the

"crime of violence" designation under the Sentencing Guidelines. See Pet. App. 2-4; but see Pet. C.A. Br. 3; Gov't C.A. Br. 2. The petition in Walker is also limited to the Voisine question and does not raise additional claims, as the petition in this case does.

2. In his second question presented, petitioner separately contends (Pet. 21-25) that the district court violated ex post facto and due process principles by applying the ACCA in determining his sentence. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Thus, even if the Court grants plenary review in this case on the first question presented, it should separate out and deny certiorari on the second question.

Although the Ex Post Facto Clause by its terms applies only to the legislature, this Court has concluded that "limitations on ex post facto judicial decisionmaking are inherent in the notion of due process." Rogers v. Tennessee, 532 U.S. 451, 456 (2001). Due process concerns, however, do not call for the "[s]trict application of ex post facto principles." Id. at 461. Rather, the Constitution's "check on retroactive judicial decisionmaking" is to be applied "in accordance with [a] more basic and general principle of fair warning." Id. at 459. A judicial departure from existing precedent "violates the principle of fair warning, and hence must not be given retroactive effect, only where it is

'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" Id. at 462 (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)); see Bouie, 378 U.S. at 350-355.

Here, the law as it existed when petitioner committed the offense of conviction provided fair warning of the penalties petitioner could face. As petitioner recognizes (Pet. 22-23), at the time he committed the offense, this Court had already explained in Voisine that "[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." Haight, 892 F.3d at 1281 (quoting Voisine, 136 S. Ct. at 2279). Although this Court did "not foreclose th[e] possibility" that Voisine's logic would not apply to other similarly worded statutes, Pet. 23 (citation and emphasis omitted), it was far from "unforeseeable," Pet. 21 (quoting Bouie, 378 U.S. at 353), that the Sixth Circuit (along with the majority of the courts of appeals to address the question) would apply Voisine's logic to the ACCA. By contrast, the only case cited by petitioner (Pet. 21) in which this Court has found a due process violation from the application of a judicial interpretation involved an interpretation that was both "clearly at variance with the statutory language" and "ha[d] not the slightest support in prior [judicial] decisions." Bouie, 378 U.S. at 356.

In any event, as the court of appeals explained, at the time of petitioner's offense, "a felon convicted of possessing a firearm faced up to ten years' imprisonment" even without a sentence enhancement under the ACCA. Pet. App. 3 (citing 18 U.S.C. 924(a)(2)). Thus, "even if the court had given [petitioner] the benefit of then-existing precedent requiring more than recklessness for crimes of violence and declined to enhance [his] sentence, [petitioner] could have anticipated a sentence of up to ten years." Ibid. After the United States moved for a departure from the 15-year ACCA minimum under 18 U.S.C. 3553(e), the district court imposed a sentence of nine years and seven months, less than the statutory maximum that would have applied if petitioner had not been subject to the ACCA. See ibid. Petitioner thus received any "fair warning" that due process requires. Rogers, 532 U.S. at 459. In arguing to the contrary, petitioner relies (Pet. 24) on Peugh v. United States, 569 U.S. 530 (2013), but that reliance is misplaced. Peugh considered an Ex Post Facto Clause claim involving a change in the applicable sentencing regime (a Sentencing Guidelines range that was increased after the defendant committed his crime), not a claim involving a foreseeable development in the judicial interpretation of a statute. See id. at 545-546 (distinguishing Ex Post Facto Clause and Due Process Clause protections).

Petitioner does not identify any decision of any court holding that the post-offense application of Voisine's logic to the ACCA

or other similarly worded statutes constitutes a due process violation. This Court's review of petitioner's ex post facto and due process argument is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari either should be granted, limited to the first question presented in the petition, or, if the Court grants the petition for a writ of certiorari in Walker v. United States, No. 19-373 (filed Sept. 19, 2019), should be held pending the disposition of that case.

Respectfully submitted.

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