No. 19-5410

IN THE

Supreme Court of the United States

CHARLES BORDEN, JR.,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a crime that can be committed with a mens rea of recklessness can qualify as a "violent felony" under the Armed Career Criminal Act, 18 U. S. C. § 924(e)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Statutes

Rule of Court

State Statutes

Secondary Authorities

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Armed Career Criminal Act (ACCA) is an important act of Congress aimed at removing from

1. Counsel for petitioner has filed a blanket consent. Counsel for respondent has consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

society for an extended period armed criminals who have committed three or more violent felonies on separate occasions. Many laws defining violent offenses include reckless conduct, as well as purposeful and knowing conduct, in the definition.

The categorical approach used by this Court for this act looks only at the minimum requirements of the statute, not the felon's actual prior conduct. As a result, if crimes that can possibly be committed recklessly are excluded from the ACCA's reach, a great many crimes that everyone would consider violent will not be counted. Even murder would be excluded in many states. Large numbers of incorrigible, violent criminals would be on the streets when they should be in prison. As a result, innocent people who would have been spared would instead be robbed, injured, raped, or murdered. This result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In Tennessee, the crime of aggravated assault may be committed intentionally, knowingly, or recklessly, but the reckless variant is broken out in a separate subdivision. See Tenn. Code Ann. §§ 39-13-102(a)(1)(A), (B). Intentional or knowing aggravated assault under subdivision (A) is a Class C felony, see §§ 39-13-102(e)(1)(A)(ii), (iii), while reckless aggravated assault under subdivision (B) is a Class D felony. See §§ 39-13-102(e)(1)(A)(v), (vi).

Petitioner Charles Borden has been convicted of aggravated assault three times. He was convicted of the knowing and intentional variant in 2002 and again in 2003. He was convicted of the reckless variant in 2007. See Brief for Petitioner 11.

In April 2017, petitioner was the subject of an arrest warrant. He was a passenger in a car that was searched by police with the consent of the owner. They found a gun that petitioner admitted was his. Other evidence found suggests the occupants were engaged in drug dealing, and petitioner admitted he had purchased the gun with methamphetamine. Brief for the United States 4-5.

The District Court found that petitioner's three priors qualified him for sentencing as an armed career criminal. See App. to Pet. for Cert. 2. The Court of Appeals for the Sixth Circuit affirmed. The Court of Appeals applied circuit precedent holding that the reckless variant of Tennessee aggravated assault is a crime of violence for this purpose. See *id*., at 2, 4. This Court granted certiorari to review this decision.

SUMMARY OF ARGUMENT

Recklessness has long been recognized as a culpable mental state for the purpose of criminal responsibility. Well before the Founding, English common law recognized that particularly reckless homicide was murder, not manslaughter. By the mid-nineteenth century, recklessness was understood to be a criminally culpable mental state for crimes where a specific intent to cause a particular result was not included in the definition of the crime. That is, in the old terminology, it was sufficient for a "general intent" crime.

More recent enactments confirm this basic value judgment. The Model Penal Code (MPC) provides that crimes with no specified mental state may be committed purposely, knowingly, or recklessly. This rule has been widely adopted by state legislatures.

Recent research supports the MPC's decision to generally draw the line between recklessness and negligence, not between knowledge and recklessness. Many people cannot distinguish knowing from reckless scenarios even after being instructed on the MPC definitions. Those who can distinguish them do not assign greater punishment for the knowing offenses overall.

As the Government's brief demonstrates, the text and history of the statute and this Court's decision in *Voisine* v. *United States* all point to application of the statute to reckless offenses. Given the requirement of three felony convictions, this application does not lead to unjust results in such a magnitude as to warrant evasion of this result. While there may be occasional cases of a person convicted of one reckless assault who was actually merely negligent, the other two convictions and the fact that all three are felonies ensure that the punishment is not grossly disproportionate to the crime combined with the criminal history. The potential for disproportionate punishment here is far less than in *Voisine*, where the prior record could be just one misdemeanor of any vintage.

ARGUMENT

I. Recklessness is a culpable *mens rea*, properly included in the mental state for violent crimes as both morally justified and practically necessary.

In a video-recorded incident that shocked the nation and drew widespread protests, George Floyd was killed by since-fired police officer Derek Chauvin. Chauvin was initially charged with third-degree murder under Minnesota law. See Kesling & Barrett, Ex-Officer Charged in Floyd Death, Wall Street Journal, May 30,

2020, p. A1, col. 2. That crime does not require intent to kill, but rather "an act eminently dangerous to others and evincing a depraved mind, without regard for human life." See Minn. Stat. § 609.195.

Is third-degree murder, as so defined, a violent felony? Most people would be surprised that the question can even be asked. Of course it is. Yet the defendant in the present case and his supporting *amici* would have this Court declare that it is not, at least for the purpose of the Armed Career Criminal Act (the "ACCA"), 18 U. S. C. § 924(e)(2)(B)(i). That cannot be right.

It is not right for two reasons. First, recklessness is a culpable mental state, as recognized at common law and by the many statutes throughout the country including recklessness as a possible *mens rea* element for violent crimes. Second, inclusion of recklessness for crimes that are usually intentional is necessary as a practical matter, given that mental state must be judged from actions and that presumptions are now constitutionally forbidden.

A. Moral Justification.

In the Petition for Certiorari, petitioner stated the question presented this way: "Does the 'use of force' clause in the Armed Career Criminal Act (the 'ACCA'), 18 U. S. C. § 924(e)(2)(B)(i) encompass crimes with a *mens rea* of mere recklessness?"[2] There is nothing "mere" about recklessness. It is a highly culpable mental state.

Throughout the "top-side" briefing in this case we see efforts to gloss over the important distinction

2. Petitioner reconsidered and stated the question differently in the merits brief, without "mere."

between recklessness and ordinary negligence. For example, the academic *amici* quote a passage from *Leocal* v. *Ashcroft*, 543 U. S. 1, 9 (2004), that expressly refers to accidents. Then they blithely assert that it applies as well to reckless conduct, see Brief for Leah Litman *et al*. as *Amici Curiae* 5-6 ("Litman Brief"), repeating an argument that this Court rejected in *Voisine* v. *United States*, 579 U. S. __, 136 S. Ct. 2272, 2279-2280, 195 L. Ed. 2d 736, 744-745 (2016). The academics cite as examples of "reckless" conduct "texting while running or performing an ill-advised parkour maneuver." Litman Brief 5-6. Those actions might be negligent, but few would consider them reckless on the standard required for criminal culpability.

The principle that crime is "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand ... took deep and early root in American soil." *Morissette* v. *United States*, 342 U. S. 246, 251-252 (1952).[3] The mental element was often described as "intent," and an "intent" element could be inferred where a statute made no mention of a mental element. See *id*., at 263. But the actual requirement was more complicated than the simple word implied.

At common law, mental states were most finely calibrated in cases of homicide. Well before the American Founding, English courts and commentators recognized that reckless conduct could be the moral equivalent of intentional conduct and punished equivalently. A defendant was judged guilty of murder, not manslaughter, for "discharging a Gun, among a Multitude of People, or throwing a great Stone or Piece of Timber from a House into a Street, through which he

3. "[A]n unwarrantable act without a vitious will is no crime at all." 4 W. Blackstone, Commentaries 21 (1st ed. 1769).

knows that many are passing; and it is no Excuse that he intended no Harm to any one in particular, or that he meant to do it only for Sport, or to frighten the People, etc." 1 W. Hawkins, Pleas of the Crown 74 (1724).

At the same time, it was well established that "if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter." 4 W. Blackstone, Commentaries 191 (1st ed. 1769); 1 Hawkins, at 82. Thus at common law, and at present in most states, an especially reckless killing is a higher degree of offense than a mitigated intentional killing. LaFave notes that a "significant minority" of states do not have the reckless variant of murder, citing 12 states. See 2 W. LaFave, Criminal Law § 14.4(a), p. 595, n. 18 (3d ed. 2018) ("LaFave"). A quarter of the states may be significant, but three-quarters remains a powerful majority.

By the mid-nineteenth century, it was established as a "general principle ... that carelessness, sufficient in degree [*i.e.*, recklessness], is to be regarded in the law as criminal" for general intent crimes, but not necessarily for those requiring the showing of a specific intent. See 3 J. Bishop, Criminal Law § 233, p. 268 (2d ed. 1858). "There is little distinction, except in degree, between a positive will to do wrong, and an indifference whether wrong is done or not. On this ground carelessness is criminal; and, within limits, supplies the place of the direct criminal intent." *Id.*, § 230, at 264.

In the Model Penal Code ("MPC"), the American Law Institute proposed replacing the cacophony of mental states with four, defined in what it believed to be descending steps of blameworthiness: purpose, knowledge, recklessness, and negligence. See ALI, Model Penal Code and Commentaries § 2.02, Comment, p. 232 (1985). This structure has been widely adopted

in the states. See Shen, *et al.*, Sorting Guilty Minds, 86 N.Y.U. L. Rev. 1306, 1318 (2011). Although this was a major change in terminology, the MPC established a "default rule" for the line between criminal and non-criminal in the same place as prior law. Section 2.02(3) provides that if the definition of a crime does not specify the mental element, then it may be committed purposely, knowingly, or recklessly, but not negligently. "This accepts as the basic norm what usually is regarded as the common law position." Model Penal Code, Comment, at 244.

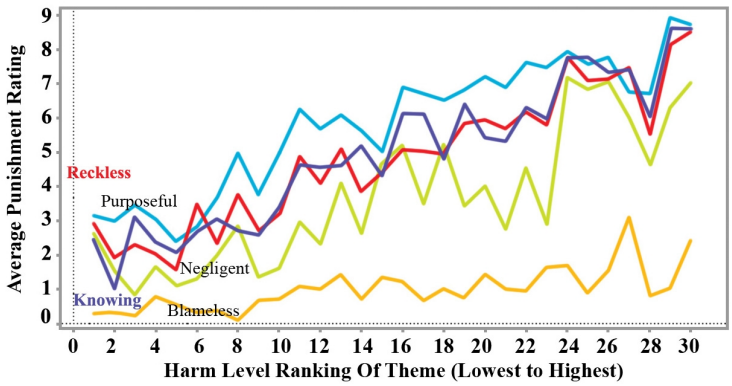
The easy call on the culpability ladder is between purpose and negligence. That is the basis of Justice Holmes's famous observation that "even a dog distinguishes between being stumbled over and being kicked." O. Holmes, The Common Law 3 (1881). One would not expect a dog to distinguish between knowledge and recklessness as defined in the MPC. Indeed, we now know that many people cannot.

Despite the importance and widespread legislative acceptance of the MPC hierarchy, there was very little empirical research into whether it really does reflect societal norms of culpability until 2011. See Shen, et al., 86 N.Y.U. L. Rev., at 1308. Shen and his colleagues conducted a series of experiments to determine how a diverse sample of Americans would assess culpability for varying mental states and whether they could distinguish the MPC classifications. See *id.*, at 1333, 1335-1336.

The participants were given scenarios of varying harm and mental states, given varying degrees of instruction on MPC mental states, and asked to make a judgment on punishment for each scenario. *Id.*, at 1326, 1331-1333. Not surprisingly, people assess consistently harsher punishment for purposeful harm than they do for negligent harm, and they assess more

for negligence than for blameless accidents. See *id*., at 1338 and Figure 1. Again, that is the easy call.

For the knowing and reckless scenarios, it is also unsurprising that they come in between purposeful and negligent, but the less obvious result is that the punishments imposed for these two states are essentially indistinguishable from each other. See *id*., at 1339 and Figure 2. This figure is reproduced below, colorized for clarity. Instructing on the MPC definitions makes no significant difference. See *id*., at 1340 and Figure 3. "Statistical analysis ... confirms that [with instruction], there remains—for the vast majority of the themes—no statistically significant difference between punishment ratings for [knowing] and [reckless] scenarios." *Id*., at 1340.



Average Punishment Ratings v. Harm Level For Different Mental States Without Instruction on MPC Definitions, from Shen, et al., Figure 2.

The participants' assessment of similar punishments for the knowing and reckless scenarios might be because they do not see the difference, or it might be

because they see a logical difference but do not consider the difference morally significant in assessing culpability. See *id*., at 1341. Further experiments tested these possibilities, and it turns out that both are partly true. Fewer participants, indeed, were able to correctly identify the knowing and reckless states than the others. See *id*., at 1341-1342. However, even when the analysis was limited to those who can reliably distinguish the two states, the "good sorter" subgroup still had no significant difference in punishment ratings. See *id*., at 1344.

The fact that recklessness is a sufficient *mens rea* in many jurisdictions for many violent crimes, including murder, manslaughter, and assault, see Brief for United States 19-22, reflects a long-standing and empirically validated belief that recklessness is a culpable mental state, and recklessly killing or injuring another person deserves criminal punishment. Recklessness is very often an alternative mental state for the same crime and even the same degree as causing the same harm intentionally. See, *e.g.*, 1 B. Witkin & N. Epstein, California Crimes, Crimes Against the Person §§ 105, 120 (4th ed. 2012) (intentional but unpremeditated murder and "wanton and wilful disregard" murder are both second degree in California); *United States* v. *Zunie*, 444 F. 3d 1230, 1235 (CA10 2006) (federal assault resulting in serious bodily injury requires a finding of purpose, knowledge, or recklessness).

No, it is not absurd to include crimes that may be committed either recklessly or intentionally in the definition of violent crimes. Cf. Litman Brief 8. It would be absurd to exclude them. Yes, there should be a background presumption that a culpable mental state is required for punishment. See Brief for Americans for Prosperity Foundation as *Amicus Curiae* 25. No, the line should not be drawn between knowledge and

recklessness but between recklessness and negligence. The MPC draws it there for good reason. See Model Penal Code § 2.02(3).

B. The Problem of Proof.

Explaining why the common law required an evil act as well as an evil mind, Blackstone said, "no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know." 4 Blackstone, at 21. This limitation, along with the requirement of proof beyond a reasonable doubt and the constitutional prohibition of presumptions shifting the burden of proof, adds a further reason why criminal statutes may need to include a reckless *mens rea* as a practical matter.

Suppose witness W sees defendant D load his gun, point it at victim V, and pull the trigger. The bullet strikes V in the head. D will be charged with assault with a deadly weapon if V survives and murder if he does not. D said nothing at the time of the incident, but his defense at trial is that he was not trying to shoot V but only shoot off his hat as a joke. W has no way of knowing if this is true and cannot testify on this point.

Under the California murder statute or the federal assault statute noted above, the law would say, in essence, "we don't care; you are guilty either way." If recklessness rather than intent were a defense, how could the defendant's claim be disproved beyond a reasonable doubt? It is no longer permitted to presume that a person intends the ordinary consequences of his acts, even if the presumption is rebuttable. See *Sandstrom* v. *Montana*, 442 U. S. 510, 524 (1979). No one but the defendant knows whether his act was intentional or reckless, but his act demonstrates it was one or the other.

State v. *Erskine*, 889 A. 2d 312 (Me. 2006), is a real-life example of evidence that is ambiguous as to which of the three mental states it proves even though it clearly proves that one of them is true. Erskine admitted giving the victim a bloody nose and "holding his hand over her mouth until she stopped yelling." *Id*., at 316, ¶ 11. Evidence also indicated the victim had been struck in the head with a hammer. See *ibid*. The trial judge instructed the jury on the intentional, knowing, and depraved indifference mental states but did not require them to agree on one of the alternatives. The Supreme Judicial Court affirmed, see *id*., at 316, ¶ 13, relying on *Schad* v. *Arizona*, 501 U. S. 624, 631-632 (1991).

In law school hypotheticals, and sometimes appellate opinions, facts are often crisply defined as if we were omniscient. In the real world, facts are often messy. The practical administration of justice requires that we be able to find guilt when the objective, externally observable facts demonstrate a culpable mental state for a crime that causes bodily harm or death. More difficult and sometimes unprovable mental states need to be reserved for matters of degree or sentencing. That is a powerful reason why so many statutes defining crimes against the person allow recklessness as one of the alternate mental states. See *Voisine* v. *United States*, 579 U. S. __, 136 S. Ct. 2272, 2280, 195 L. Ed. 2d 736, 745-746 (2016) (noting widespread acceptance of recklessness as sufficient for assault and battery).

Dissenting in *Voisine*, Justice Thomas argued that limiting the statute at issue there to intentional and knowing batteries, not reckless ones, "amply carries out Congress' objective." 136 S. Ct., at 2292, 195 L. Ed. 2d, at 758. That argument would carry more weight if the Court were to abandon the "categorical approach," see *Sessions* v. *Dimaya*, 584 U. S. __, 138 S. Ct. 1204, 1254,

200 L. Ed. 2d 549, 603 (2018) (Thomas, J., dissenting). There appears to be little prospect of that happening.

So long as we are stuck with the categorical approach, declaring reckless crimes to be nonviolent will preclude use of prior convictions under a statute that includes them, even if most convictions under that statute are actually intentional and clearly violent. See *Voisine*, 136 S. Ct., at 2280-2281, 195 L. Ed. 2d, at 746. If all convictions under all statutes with a recklessness alternative were excluded from the ACCA three-strikes provision, that would effectively repeal the provision. No doubt there are many who favor that result. "But this Court may not narrow a provision's reach by inserting words Congress chose to omit." *Lomax* v. *Ortiz-Marquez*, No. 18-8369 (June 8, 2020) (slip op., at 4). Those who favor repeal of the three-strikes provision must address their arguments to Congress.

II. The three-conviction requirement of ACCA precludes absurd results.

The academic *amici* note a handful of examples of persons convicted of reckless assaults, at least some of which seem dubious. See Litman Brief 9-10. In a country as large as the United States it will always be possible to find some dubious court decisions on any topic. However, the notion that including reckless offenses in the ACCA's three-strikes provision risks "convert[ing] [these defendants] into [] armed career criminal[s]," Litman Brief 9, overlooks the requirement of *three* strikes. The chances of a dubiously broad application of the recklessness mental state being applied three times to one person are infinitesimal.

The present case is an example. Borden is undisputedly a repeat violent felon. He has two unchallenged prior convictions for intentional or knowing

aggravated assault. See Brief for Petitioner 11. On a third occasion he committed another aggravated assault. There is nothing absurd, or in this case even harsh, in sentencing such a clearly incorrigible criminal to an extended term for the protection of innocent people.

By requiring three felony convictions for crimes committed on three separate occasions, 18 U. S. C. § 924(e)(1) is limited to habitual criminals, even without the limitation to violent or serious drug crimes. If two of the priors are clearly violent and one is in the debatable twilight zone, as in this case, application of the enhanced penalty for the new, fourth crime is not such an injustice as to warrant a tortured construction of the statute, particularly where that construction would defeat the statute's purpose in a great many cases.

The Government has thoroughly explained why the statute in this case is not distinguishable from the one in *Voisine* v. *United States*, 579 U. S. __, 136 S. Ct. 2272, 195 L. Ed. 2d 736 (2016). See Brief for United States 11-14. In a nutshell, both statutes require "use ... of physical force." "That language, naturally read, encompasses acts of force undertaken recklessly ...." *Voisine*, 136 S. Ct., at 2282, 195 L. Ed. 2d, at 747. The "victim" designation in the statute in *Voisine* effectively requires that the force be used *against* another person, as in the statute in this case. See *ibid*. The application is also clear from legislative history. See Brief for the United States 16-22. Nothing further needs to be said on these points, and *amicus* will not repeat the Government's arguments. See Supreme Court Rule 37.1.

Voisine is also relevant for comparison as a matter of sentencing policy and proportionality. The statute in that case imposes a lifetime forfeiture of a constitutional right for conviction of a single misdemeanor. See 18 U. S. C. § 922(g)(9). Under this law, a person who

committed a misdemeanor of domestic violence at age 18 and possesses an otherwise lawful gun at age 68 may be punished by up to 10 years in prison. See 18 U. S. C. § 924(a)(2).

The present case, in contrast, imposes the enhanced penalty only on habitual felons whose three prior felonies by themselves would warrant incapacitation via a lengthy prison sentence. See *Ewing* v. *California*, 538 U. S. 11, 29-30 (2003) (plurality opinion). There is nothing "breathtaking" about this sentence, cf. Litman Brief 8, given that the Court "must place on the scales not only his current felony, but also his long history of felony recidivism." *Ewing*, at 29.

The language, history, and purpose of the statute all call for its application to cases like the present case. There is no compelling reason in justice or fairness to evade the simple and obvious conclusion.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be affirmed.

June, 2020

Respectfully submitted,

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