No. 19-5652

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY WAYNE BETTCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for 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 agrees that the issue presented in this case should be decided by this Court, but it asks the court to hold this case while it decides the issue in *Walker v. United States*, No. 19-373, *cert. granted* (U.S. Nov. 15, 2019). Gov't Br. 10. Mr. Bettcher agrees that if the Court does not grant certiorari, it should hold the case.

However, there are several compelling reasons why the Court should grant certiorari in a Guidelines case. Those reasons are largely before the Court in the Petitioner's Reply Brief in *Ash v. United States*, No. 18-9639 (Nov. 1, 2019) (hereinafter *Ash* Reply), which is scheduled for conference the same day as this case, and those arguments will not be belabored here. However, a few points are developed further below. Most significantly, this court should grant certiorari here because (1) the lower courts' caselaw gives reason to question whether they will actually apply an ACCA ruling to the identical sentencing guideline; and (2) a recent guideline amendment requires the conclusion that the force clause of USSG §4B1.2 does not extend to reckless conduct, even if this Court concludes that the pre-amendment language is not so limited.

Because a ruling in *Walker* will not necessarily resolve the issue presented here, the Court should grant certiorari in a guideline case, and as discussed further below, *Bettcher* is the best vehicle.

DISCUSSION

I. The development of *this very issue* gives reason to question whether lower courts will apply an ACCA ruling to the Guidelines.

The Petitioner in *Ash* articulates six reasons why this Court should grant certiorari in a guidelines case, and Mr. Bettcher agrees with those reasons. As Mr. Ash argues, the government is wrong that this Court's precedent disfavors resolving important legal questions surrounding the Sentencing Guidelines, and Mr. Ash correctly points out that the Court has granted certiorari in multiple cases that present different aspects of a related issue. *Ash* Reply 1-4, 8.

Mr. Ash also correctly points out that the force clause in §4B1.2 affects many more offenders under the career offender guideline than under the Armed Career Criminal Act (ACCA). *Id.* At 8-9. But this is only the beginning. In addition to those defendants sentenced as career offenders, USSG §2K2.1 extends the force clause in §4B1.2 to thousands of offenders who unlawfully possess a firearm. Apparently patterned after the ACCA, this guideline applies a significant enhancement for offenders who possess a firearm after one or two crimes of violence, as defined by §4B1.2. USSG §2K2.1(a) (increasing base offense level from 14 to 20 or 24 based on §4B1.2). In FY 2018, 7,032 offenders were sentenced under §2K2.1 as the primary guideline, and another 7,415 were sentenced under §2K2.1 along with another

guideline.[1] While these sentences are not as long as individuals sentenced under the ACCA or career offender guideline, the average sentence for felon in possession hovers around 5 years.[2] The application of §4B1.2 to thousands of offenders each year, and the significant increase it triggers, make the correct interpretation of the guidelines' force clause far more consequential than the ACCA.

If Mr. Bettcher had confidence that lower courts would apply an ACCA ruling in *Walker* to the force clause in §4B1.2, he might be content with waiting for that decision. But recent rulings raise doubts that they will do so. In addition to the decisions that Mr. Ash identifies, *Ash* Reply 7-8, the development of *this very* issue in the Tenth Circuit raises questions about whether lower courts will necessarily apply an ACCA ruling to the Guidelines.

Taken on its face, the language of the force clause in USSG §4B1.2(a) offers no reason to interpret it differently from the identical force clause in 18 U.S.C. § 924(e)(2)(B)(i). However, that is exactly what the Tenth Circuit did in the decisions leading up to *Bettcher*. Following this Court's decision in *Leocal v. United States*, 543 U.S. 1 (2004), the Tenth Circuit—like virtually every other circuit—concluded that the force clause in §4B1.2 did not include reckless crimes. *United States v. Duran*,

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[1] USSC, 2018 Sentencing Sourcebook of Federal Sentencing Statistics, Table 20, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table20.pdf.

[2] *Id.*, Figure F-5, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/FigureF5.pdf.

696 F.3d 1089 (10th Cir. 2012); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2018); *see also United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 1414 n.8 (2014) (noting that lower courts "almost uniformly held that recklessness is not sufficient").

Then, after this Court issued its decision in *United States v. Voisine*, 136 S.Ct. 2272 (2016), the Tenth Circuit began a piecemeal retraction of the old rule. First, it recognized in dicta that *Voisine* may have abrogated the rule, but it did not actually resolve that question because it held that the prior offense always "require[d] the deliberate use of force," so it was categorically a violent felony under the ACCA. *United States v. Hammons*, 862 F.3d 1052, 1055-56 (10th Cir. 2017).

Then, in *United States v. Pam*, 867 F.3d 1191 (10th Cir. 2017), the appellant argued that he was wrongly sentenced under the ACCA because one of his prior convictions could be committed recklessly. Rather than grapple with the analysis in *Duran* and *Zuniga-Soto* that led the Court to issue those decisions in the first place, the Tenth Circuit ignored them entirely on the ground that they were not ACCA cases: "In reaching our decision, we need not address whether the Supreme Court's discussion in *Voisine* abrogated our decisions in *Duran* and *Zuniga-Soto*. *This is because* Duran *and* Zuniga-Soto *did not involve construction of the ACCA's elements clause*." *Id.* at 1207 n.15 (citations omitted; emphasis added). Despite a longstanding precedent of treating these clauses interchangeably, the Tenth Circuit, without explanation, concluded that the interpretation of one did not control the

interpretation of the other. And rather than seriously wrestle with the merits of the old rule after *Voisine*, *Pam* simply concluded that it was foreclosed on this issue by *Hammons* (which actually didn't resolve this issue at all). *Id.* at 1208 n.16.

Next, the Tenth Circuit considered whether this rule applied to the force clause of 18 U.S.C. § 924(c). *United States v. Mann*, 899 F.3d 898 (10th Cir. 2018). Following *Pam* and *Hammons*, the court unsurprisingly concluded that § 924(c) could be based on reckless crimes, but it again refused to acknowledge the preclusive effect of *Zuniga-Soto* and *Duran* because "none of those cases construed § 924(c)(3)(A), so once more we decline to address whether their holdings survive *Voisine*." *Id.* at 905, n.6. Again, despite the longstanding practice of treating these provisions the same, the Tenth Circuit refused to be bound by its prior ruling in guideline cases when interpreting the virtually identical force clause in § 924(c).

Finally, in this case, the Tenth Circuit got around to the survivability of the guideline holdings. In *Bettcher*, the Tenth Circuit concluded that *Voisine* had, in fact, abrogated *Zuniga-Soto* and *Duran*. 911 F.3d 1040, 1045-46 (10th Cir. 2018). Mr. Bettcher, of course, disagrees with the Tenth Circuit's analysis on the merits. But this development of the caselaw is discussed here to make the point that it is hardly clear from this caselaw that the Tenth Circuit will apply an ACCA ruling in *Walker* to Mr. Bettcher.

If the Court concludes that the force clause in the ACCA does not extend to reckless crimes, that ruling should logically apply to §4B1.2 as well. But the road to

this case shows that the Tenth Circuit may not see it that way. Thus, the Court should grant certiorari in a guidelines case to ensure that Mr. Bettcher benefits from a favorable ruling in *Walker*.[3]

II. The 2016 guideline amendment requires the conclusion that the force clause of USSG §4B1.2 does not extend to reckless conduct.

Even if the Court finds that the ACCA is not so limited, the Guidelines present several unique reasons why §4B1.2 should not extend to reckless crimes. In addition to those "guideline-specific reasons" that Mr. Ash identifies—structure (including the commentary), purpose, and history of §4B1.2, *Ash* Reply 5—the 2016 guideline amendment *compels* the conclusion that §4B1.2 does not extend to reckless conduct.

The government cites the 2016 amendment to §4B1.2 as a reason for this Court not to grant certiorari in a guideline case because the Sentencing Commission has authority to amend this definition however it sees fit. Gov't Br 9. However, the 2016 amendment actually serves a much different conclusion: when the Commission amended §4B1.2 in 2016 and left the force clause intact, it endorsed and adopted the existing interpretation of that clause, which did not reach reckless crimes.

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[3] As an example of how circuits disregard ACCA caselaw when it comes to the Guidelines, Mr. Ash notes the circuit split on whether the ACCA ruling in *Johnson v. United States*, 135 S.Ct. 2551 (2015), applies to mandatory guidelines. *Ash* Reply 7-8. Granting certiorari in a guidelines case on the question presented here will provide an opportunity for the Court to give guidance about the uniform application of these recidivist enhancements, and this guidance may have a secondary benefit of informing the current split regarding *Johnson* and mandatory guidelines.

Under the "prior construction canon," "if courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has the same meaning." *Lightfoot v. Cendant Mortg. Corp.*, 137 S.Ct. 553, 563 (2017). Put otherwise, "[i]f a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)).

Here, when the Sentencing Commission amended §4B1.2, the lower courts had previously and unanimously agreed that this clause did not reach reckless conduct. *See United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 1414 n.8 (2014). It is not just that the Commission could have changed the statute if it wanted to do so. Under the prior construction canon, the 2016 amendment that preserved the force clause actually endorsed or adopted the judicial construction of that language. This Court must read the new clause against the backdrop of these holdings and find that it does not reach reckless conduct.

Indeed the legislative history of the 2016 Amendment shows that the Commission was aware of this precedent and respected it with this amendment. For example, the Commission explained that it rejected the prior term "manslaughter" in favor of a new term, "voluntary manslaughter," that did not include "involuntary manslaughter." USSG, App. C, amend. 798. The reason for this change was that

"involuntary manslaughter generally would not have qualified as a crime of violence under the 'residual clause,'" which had been limited to crimes that were "purposeful, violent and aggressive." *Id.* (citing *Begay v. United States*, 553 U.S. 137 (2008)). The Commission was clearly aware of the distinction between intentional and reckless crimes, and the 2016 Amendment to §4B1.2 shows a decision to exclude the latter from its reach.

Thus, even if the Court were to conclude that the ACCA reaches reckless crimes, the 2016 Amendment is a reason for this Court to interpret §4B1.2 differently in this regard. Of course, the more sensible course is to read identical provisions the same, and the 2016 Amendment offers a reason to conclude that *neither* provision reaches reckless conduct. But this legislative history will not be before the Court in *Walker*, so the Court should grant certiorari in a guidelines case to ensure that this aspect of the analysis is fully briefed and understood.

III. The Court should conclude that the force clauses of §4B1.2 and the ACCA do not reach reckless crimes.

Finally, the government argues that *Voisine* controls because it teaches us what the word "use" means in every context: "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.'" Gov't Br. 8 (quoting *Voisine*, 136 S.Ct. at 2279).

Like the circuits that have adopted its position, the government focuses myopically on the word "use" and boils its essence down to a volitional act.

The government ignores the clear teaching in *Leocal* that "use" is an "elastic" word that must be understood in its context. And where "the word use" was "the only statutory language either party [thought] relevant" in *Voisine*, 136 S.Ct. at 2278, this Court held that the meaning of that word in 18 U.S.C. § 16(a) had to be understood "in its context *and in light of the terms surrounding it*." *Leocal*, 543 U.S. at 9. The government extends *Voisine* too far when it reads it to say that the word "use" has inherent meaning independent of its context.

With respect to volition, the government conflates the requirement that a criminal act be volitional with the question of mens rea. The government ignores Mr. Bettcher's discussion of the Model Penal Code, which makes clear that a volitional act is a requirement in *every* offense and that volition and mens rea are distinct concepts. Pet. Br. 22 (discussing M.P.C. §2.01(1), §2.02(1)). Absent contextual clues to the contrary, the word "use" in *Voisine* required nothing more than a volitional act. However, given the way that lower courts have conflated the concepts of volition and mens rea, the Court should take care that it correctly understands these distinct concepts. The Government has ignored this distinction in its reply here, and it does not appear that the petitioner in *Walker* raised this distinction in its petition. The Court should grant certiorari in this case to ensure that these concepts are fully developed in the briefing.

At the end of the day, both §4B1.2 and the ACCA are recidivist enhancements that make sense only to the extent they imply a history of purposeful violence against people. Reckless crimes make no such implication, which is why this Court and *every* lower court until *Voisine* excluded reckless crimes from their reach when the question came up. *See, e.g., Begay v. United States*, 553 U.S. 137 (2008); *United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 1414 n.8 (2014) (citing cases). This Court should conclude that *Voisine* was a product of a unique context and make clear that the old, unanimously held rule is right in *this* context: neither §4B1.2 nor the ACCA reaches reckless crimes.

IV. This case is the best vehicle to resolve all aspects of the question presented.

Like the petition in *Ash*, this case raises some aspects of the question presented that will not necessarily be resolved by *Walker*, in addition to the unique guideline considerations discussed above. For one thing, the prior offense in this case—Utah aggravated assault—can be committed by reckless driving, *see* Pet. Br. 5-6, so it provides an opportunity to consider whether reckless driving offenses should be excluded when reckless crimes in general are not. *See, e.g., United States v. Harris*, 907 F.3d 1095, 1096 (8th Cir. 2018). It does not appear that either *Walker* or the government in any of its responses have touched on this issue. If the Court were to adopt the Eighth Circuit rule, Mr. Bettcher would prevail. But *Walker* alone will not present an opportunity for the Court to fully consider the Eighth Circuit rule. The

Court should grant certiorari in this case to ensure it is fully addressed in the merits briefing.

Additionally, *Bettcher* involves a direct appeal from a criminal sentence, where *Walker* is an appeal from a § 2255 petition. While the Court will likely be able to reach the central legal question even in a § 2255 appeal, it is conceivable that merits briefing would reveal some procedural problem under AEDPA that makes *Walker* an unsuitable vehicle for this question. Granting certiorari in *Bettcher* will ensure that the Court has a suitable vehicle in the event that AEDPA rears its head in *Walker*.

At the end of the day, *Bettcher* is the best vehicle to ensure that all aspects of the question presented are before the court. As described above, *Bettcher* was the case in which the Tenth Circuit finally got around to wrestling with its old precedents, so its analysis in *Bettcher* is more detailed than its discussion in *Ash*. The Tenth Circuit in *Ash* merely applied the rule adopted in *Bettcher*, making *Bettcher* the best vehicle to address these issues.

CONCLUSION

Although the Court has granted certiorari in *Walker*, it should still grant certiorari in a guideline case. This case is the best vehicle to resolve all aspects of the question presented in these cases, and the Court should grant the writ here.

Respectfully submitted,

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STATES OCTOBER TERM, 2019

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AFFIDAVIT OF SERVICE

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals was served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

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It is further attested that the envelope was deposited with the UPS on November 19, 2019 and all parties required to be served have been served.

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AFFIDAVIT OF MAILING

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petitioner's Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

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