No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

TRAYVON SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____◆_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals For The Ninth Circuit

_____◆_____

PETITION FOR WRIT OF CERTIORARI

_____◆_____

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QUESTIONS PRESENTED

1) Whether, when determining whether a state offense qualifies as a crime of violence, a federal court is bound by the decision of the state's highest court to label a *mens rea* as something greater than negligence when this Court has unequivocally established that the same *mens rea* under federal law constitutes mere negligence?

2) Where the definition of a crime of violence under federal recidivism enhancement provisions, such as U.S.S.G. § 4B1.2(a)(1), include the limiting language "against the person of another," is that language mere surplusage or must a defendant be more than negligent with respect to whether his intentional conduct could harm another?

LIST OF PARTIES AND RELATED CASES

All parties appear in the caption of the case on the cover page.

Pursuant to Supreme Court Rule 15, the following case is directly related to the instant case in that California Penal Code § 245(a) was used to enhance a sentence under § 4B1.2(a) of the U.S. Sentencing Guidelines:

> *United States v. Juan Manuel Perez,* U.S.C.A. No. 16-10540
> U.S. Court of Appeals for the Ninth Circuit. Judgment entered May 29, 2019
> Petition for Writ of Certiorari filed August 27, 2017

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Trayvon Smith respectfully petitions this Court for a writ of certiorari to review the order by the United States Court of Appeals for the Ninth Circuit holding that Smith's prior conviction for assault in violation of California Penal Code § 245(a), which did not require proof that when Smith acted he was aware that his actions might harm another, is a crime of violence under § 4B1.2(a)(1) of the U.S. Sentencing Guidelines.

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OPINIONS BELOW

On May 29, 2019, the United States Court of Appeals for the Ninth Circuit affirmed the district court's conclusion that Smith's prior assault conviction under Cal. Penal Code § 245(a) is a categorical crime of violence under U.S.S.G. § 4B1.2(a)(1). The Ninth Circuit's decision was an unpublished memorandum that is reproduced in the appendix to this petition at A1-A2. There was no request for a rehearing.

The June 14, 2018 Judgment in a Criminal Case of the United States District Court for the Eastern District of California sentencing Smith to 46 months imprisonment is reproduced in the appendix at B1-B7.

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JURISDICTION

The memorandum of the United States Court of Appeals for the Ninth Circuit affirming Smith's sentence was filed on May 29, 2019. Appendix at A1.

This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

PROVISIONS OF LAW INVOLVED

Under U.S.S.G. § 4B1.2(a)(1), "[t]he term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another. . .

Pursuant to California Penal Code § 245(a) (2008)[1]:

(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

(3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 12200, or an assault weapon, as defined in Section 12276 or 12276.1, or a.50 BMG rifle, as defined in Section 12278, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.

[1] Smith was convicted of violating Cal. Penal Code § 245(a)(2) in 2008.

INTRODUCTION

Smith requests certiorari to provide much needed clarification of this Court's reasoning in both *Johnson v. United States*, 559 U.S. 133 (2010) and *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

Absent clarification from this Court, defendants across the country will continue to receive substantially different federal sentences for substantively identical conduct based solely on geography. These discrepancies are unfair and unwarranted. Indeed, this Court has previously recognized that while states have the prerogative to define their own offenses, in the interests of "'fundamental fairness'" it is critical that when defining a "crime of violence" or "violent felony" for purposes of a federal recidivism enhancement that "'the same type of conduct is punishable on the Federal level in all cases." *Taylor v. United States*, 495 U.S. 575, 582 (1990) (quoting S. Rep. No. 98-190, p. 20 (1983)) (discussing the need for uniformity when defining a "violent felony" under the Armed Career Criminal Act). That is not currently happening.

In the Ninth Circuit whether a defendant is subjected to the draconian sentencing enhancements under § 924(c) and (e), which can result in a life term of imprisonment, as well as recidivist sentencing enhancements under the U.S. Sentencing Guidelines such as § 4B1.2(a)(1), is at the mercy of how a state defines criminal negligence even when the state's definition of criminal negligence would not constitute criminal negligence in federal court.

Moreover, circuit courts across the country are erratically applying this Court's reasoning in *Leocal* resulting in "a Rube Goldberg jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone's confidence in predicting what will pop out at the end." *United States v. Tavares*, 843 F.3d 1, 19 (1st Cir. 2016); *see, e.g.*, *United States v. Begay*, __ F.3d__, 2019 U.S. App. LEXIS 24608, *17-18 (9th Cir. 2019) (N.R. Smith, J., dissenting) ("MURDER in the second-degree is NOT a crime of violence??? Yet attempted first-degree murder, battery, assault, exhibiting a firearm, criminal threats (even attempted criminal threats), and mailing threatening communications are crimes of violence. How can this be? 'I feel like I am taking crazy pills.'").

The unpredicatabilty and lack of principled legal reasoning arises primarily from a lack of understanding of this Court's decision in *Leocal* in which this Court explained that when the definition of a crime of violence includes the attendant circumstance – against the person or property of another – the dispositive issue is the *mens rea* that modifies that attendant circumstance. Notwithstanding this Court's reasoning in *Leocal*, circuit courts across the country are routinely ignoring the *mens rea* that modifies the attendant circumstance "against the person or property of another" and instead exclusively focusing on the *mens rea* modifying the *actus reus*.

United States v. Vasquez-Gonzalez, 901 F.3d 1060 (9th Cir. 2018), upon which the Ninth Circuit relied in denying Smith's appeal, is a prime example. This case provides an excellent vehicle for this Court to provide the needed clarification on

how to interpret the scope of a "crime of violence" that includes the limiting phrase "against the person or property of another."

This case presents two questions of exceptional importance that requires this Court's guidance in the interests of fundamental fairness to ensure that "the same type of conduct is punishable on the Federal level in all cases." *Taylor*, 495 U.S. at 582. First, is the scope of federal sentencing enhancements defined by the oddities of state law, or is it the role of federal courts to determine whether conduct proscribed by a state meets the elements of the federal sentencing enhancement? Second, does *Leocal* mean what it appears to say, which is, when the definition of a crime of violence includes the limiting language "against the person or property of another," a prior conviction does not qualify as a crime of violence if the conviction does not necessarily establish that when the defendant acted he understood his conduct could harm another, or are federal courts across the country imposing extremely harsh sentencing enhancements under 18 U.S.C. §§ 924(c) and 924(e), as well as guideline enhancements, for offenses, including Cal. Penal Code § 245, that do not categorically qualify as crimes of violence?

The consequences viewed from either the individual perspective or at a systematic level are substantial. Certiorari is necessary to ensure that federal judges are not subjecting individuals to years of additional incarceration under "crime of violence" enhancements on the basis of prior convictions that do not require proof that a defendant was anything but negligent with respect to whether his use of force could harm another.

STATEMENT OF THE CASE

On March 16, 2017, the government charged Smith with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Smith entered a guilty plea to the one-count indictment pursuant to a conditional plea agreement in which he reserved the right to appeal any finding by the district court that a prior conviction qualified as a crime of violence under U.S.S.G §§ 2K2.1(a) and 4B1.2(a). Over defense counsel's objection, the district court found that Smith's 2008 conviction for assault with a firearm in violation of Cal. Penal Code § 245(a)(2) qualified as a crime of violence. The district court's finding increased Smith's base offense level under the U.S. Sentencing Guidelines from 14 to 20, which increased his advisory guideline range from 27 to 33 months in custody to 46 to 57 months. The district court sentenced Smith to 46 months.

Smith timely challenged the district court's conclusion that his 2008 conviction for violating Cal. Penal Code § 245(a) is a crime of violence under U.S.S.G. § 4B1.2(a)(1) in the Ninth Circuit. Smith argued that when determining whether a federal sentencing enhancement applied it was the federal definition of negligence, not the state of California's definition, that controlled. Additionally, Smith argued that when the definition of a crime of violence includes the limiting language "against the person of another," in order to qualify as a crime of violence a prior conviction must have required proof not only that the defendant engaged in intentional conduct but that when the defendant acted, he understood that his

conduct could harm another. Relying exclusively on its prior decision, *United States v. Vasquez-Gonzalez*, 901 F.3d 1060 (9th Cir. 2018), the Ninth Circuit summarily rejected Smith's arguments and affirmed his sentence. Appendix at A2.

Smith requests certiorari to clarify that (A) federal judges, not state judges, define the terms, including the applicable *mens rea*, that establish the scope of federal sentencing enhancements, and (B) when the definition of a crime of violence includes the limiting phrase "against the person of another," said phrase is not surplusage but instead requires proof that a defendant was more than merely negligent about the possibility that his intentional conduct might harm another.

REASONS FOR GRANTING THE WRIT

A. This Case Provides an Excellent Vehicle for this Court to Clarify that it is the Role of Federal, Not State, Judges to Define the Terms, Including the *Mens Rea*, that Establish the Scope of a "Crime of Violence" Under Federal Law.

The Ninth Circuit's decision to use the state of California's definition of criminal negligence, a definition that has been unequivocally rejected by this Court, cedes Congress' power to define the scope of its federal recidivism enhancements to the whim of state legislatures and judges, thereby producing federal sentences that can vary by decades as a factor simply of where a defendant was sentenced. The resulting discrepancies are unfair and unwarranted, and are directly at odds with Congress' stated objective to treat all federal defendants consistently notwithstanding the prerogative of States to define their own offenses. *Taylor*, 495 U.S. at 582.

In *Johnson v. United States*, 559 U.S. 133 (2010), this Court established that it was up to states to define the elements of their offenses but that it was the role of federal courts to define the meaning of the terms codifying federal recidivist enhancement provisions. *Id.* at 1269-70. In *Johnson*, the term at issue "physical force" appeared directly in the recidivist enhancement provision at issue, 18 U.S.C. § 924(e). *Id.* at 1269. Here, the term at issue is the *mens rea*, which does not appear in the actual text of the statute, but was established through judicial ruling by this Court in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).[2] In *Leocal*, this Court held that before an offense can qualify as a crime of violence, a conviction for the offense must necessarily establish that when a defendant used "physical force *against the person or property of another*," he must have done so with a higher degree of intent then mere negligence. *Id.* (emphasis in original).

Surely when this Court established that a predicate offense must require proof that when a defendant acted he was at least aware that his conduct might result in harm to another, this Court did not mean to leave it up to individual states to define what constitutes criminal negligence, and by so doing, define the scope of all federal sentencing enhancements involving crimes of violence, including those under § 924 that can deprive individuals of decades of liberty. Yet that is what the Ninth Circuit is doing, and this case provides an excellent vehicle to address the

[2] In *Leocal* this Court addressed the definition of a crime of violence codified at 18 U.S.C. § 16. Section 16 is slightly broader in scope in that it captures intentional violence against property as well as people and U.S.S.G. § 4B1.2(a)(1) is limited to violence against persons. It is a distinction without a difference here.

Ninth Circuit's abdication of its responsibility to define the scope of federal sentencing enhancements to ensure that in the interests of fundamental fairness defendants are being treated consistently across the circuits when it comes to depriving their liberty on the basis of a prior crime of violence.

The Ninth Circuit's decision in this case was based solely on the Ninth Circuit's earlier decision in *United States v. Vasquez-Gonzalez*, 901 F.3d 1060 (9th Cir. 2018). Appendix at A2. Specifically, the Ninth Circuit held that "Smith's argument is foreclosed by *United States v. Vasquez-Gonzalez*," and because "[c]ontrary to Smith's argument, *Vasquez-Gonzalez* addressed and rejected his argument that section 245 does not require the intentional use of force against the person of another," the Ninth Circuit held that Smith's conviction for violating Cal. Penal Code § 245 was "a categorical crime of violence." *Id.* Accordingly, the Ninth Circuit's reasoning and holding in *United States v. Vasquez-Gonzalez* is squarely before this Court in this case.

In *United States v. Vasquez-Gonzalez*, the issue presented was whether a prior conviction for violating Cal. Penal Code § 245(a)(1) qualified as a crime of violence under 18 U.S.C. § 16(a). *Vasquez-Gonzalez*, 901 F.3d at 1064. The Ninth Circuit rejected the defendant's argument that a conviction under Cal. Penal Code § 245 did not require the government to establish that the defendant was more than negligent regarding whether his conduct would likely result in harm to another on the basis that "the Supreme Court of California has expressly stated that the *mens rea* for assault in California requires more than negligent conduct." *Id.* at 1067.

What the Supreme Court of California defines as more than negligence, however, is exactly what this Court has held constitutes criminal negligence under federal law.

The California Supreme Court decision relied upon by the Ninth Circuit in *Vasquez-Gonzalez* was *People v. Williams*, 26 Cal. 4th 779 (2001). *Id.* The *Williams* court held that to be guilty of assault in violation of Cal. Penal Code § 245 "only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." *Williams*, 26 Cal. 4th at 790. "In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. . . . *He, however, need not be subjectively aware of the risk that a battery might occur*." *Id.* at 788 (emphasis added). *Compare* 18 U.S.C. § 2119 (limiting its reach to only those individuals who "with the *intent to cause death or serious bodily harm* takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation") (emphasis added).

Least there be any suggestion that the government has to prove that the defendant was aware that his conduct might harm another in order to sustain a conviction under § 245, the Court clarified in a footnote that "*a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery*." *Id.* at 788 n.3 (emphasis added); *see, e.g.*, *People v. Wyatt*, 48 Cal. 4th 776, 779 (2010) (reaffirming

that in California "a defendant may commit an assault without realizing he is harming the victim"). Not surprisingly, California's jury instructions are consistent with its Supreme Court decisions. *See, e.g.*, CALJIC § 9.00 (explaining that a conviction under § 245 does not require the government to prove that the defendant had "an actual awareness of the risk that injury might occur to another person").

The *mens rea* set forth by the California Supreme Court, and relied upon by the Ninth Circuit, unequivocally constitutes criminal negligence under this Court's jurisprudence. In *Elonis v. United States*, 135 S. Ct. 2001 (2015), the defendant was charged with making a communication that contained a threat to injure another person in violation of 18 U.S.C. § 875(c). *Id*. at 2004. The government argued that where the defendant knew the facts about his communication that would have caused a reasonable person to interpret the communication as threating, the defendant was more than merely negligent with respect to communicating a threat. *Id*. at 2011. Rejecting the government's argument, this Court held that in fact the government had articulated precisely the definition of criminal negligence. *Id*. Criminal negligence hinges not on facts that the defendant did not know, but on facts that he did know, and asks whether a reasonable person would have been aware of the harm. *Id*.

Just like the government did in *Elonis*, the California Supreme Court in *Williams* took the position that because the government was required to prove that a defendant at least knew the facts that would put a reasonable person on notice that his conduct could harm another, that required proof of something more than

"mere recklessness or criminal negligence." *Williams*, 26 Cal. 4th at 788. Of course, as this Court clarified in *Elonis*, when a criminal statute looks at the facts known to the defendant and asks "whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct," "[t]hat is a negligence standard." *Elonis*, 135 S. Ct. at 2011.

In other words, following *Elonis* there is no ambiguity that where an individual is liable for assault under Cal. Penal Code § 245(a) simply on the basis of being "aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct" regardless of whether the defendant was "subjectively aware of the risk that a battery might occur," *Williams*, 26 Cal. 4th at 788 – that "is a negligence standard."[3] *Elonis*, 135 S. Ct. at 2011; *cf.* ALI, Model Penal Code § 2.02(2)(d) (1984) (defining negligence as "considering . . . the circumstances known to [the defendant]," the defendant should have been "aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct") (emphasis added).

The Ninth Circuit, however, seemed to believe that it was at liberty to adopt the California Supreme Court's definition of negligence over this Court's definition

[3] Of course, to recognize that an offense requires nothing more than a showing of negligence with respect to whether a defendant's conduct might harm another, is not to say that an offense is a crime of negligence. Complex statutes, such as Cal. Penal Code § 245, have multiple material elements each of which may have a distinct *mens rea*. *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). The *mens rea* pertaining to the defendant's decision to engage in forceful conduct does not tell us whether when the defendant acted he was anything but merely negligent with respect to the possibility that his conduct might result in harm to another.

of criminal negligence. *Vasquez-Gonzalez*, 901 F.3d at 1067. The Ninth Circuit explicitly rejected the defendant's attempt to point out that the California Supreme Court's definition of negligence was at odds with the definition of negligence under federal law as articulated by this Court. *Id*. at 1067 n.5. The Ninth Circuit explicitly dismissed *Elonis* because this "Court in *Elonis* did not discuss *Williams*, nor did it discuss the *mens rea* for assault. . . and we have been expressly told by the California Supreme Court that negligence is not enough." *Id*.

To be sure, the holding of *Elonis* addressed the elements of 18 U.S.C. § 875, *Elonis*, 135 S. Ct. at 2012, but this Court's holding was premised on first rejecting the government's definition of criminal negligence, which did not require proof that the defendant knew the relevant facts that would have put a reasonable person on notice of the likelihood of harm to another resulting from his conduct, *Elonis*, 135 S. Ct. at 2011 – a definition of criminal negligence that is substantively identical to the one articulated by the California Supreme Court in *Williams* and subsequently adopted by the Ninth Circuit.

Surely the definition of what constitutes criminal negligence for purposes of federal sentencing enhancement provisions is the province of federal, not state law. *Johnson*, 559 U.S. at 138 (suggesting that when it comes to defining legal terms that place an offense on one side of the line or the other with respect to whether it qualifies as a federal crime of violence, that "is a question of federal, not state law"). Indeed, were it otherwise, as the Ninth Circuit appears to believe, then the scope of a federal sentencing enhancement provision would be at the whim of however a

state elects to define its *mens rea* provisions even if said definitions were in direct conflict with how this Court defines *mens rea*, and there could be no expectation of fundamental fairness in federal courts whereby federal defendants who engage in the same conduct are punished the same at the federal level across the circuits.

In other words, this is a simple issue in desperate need of clarification by this Court to ensure that the scope of federal recidivist sentencing enhancement provisions are not being hijacked by the oddities of state law,[4] and are instead being applied consistently to federal defendants regardless of geography.

B. This Case Also Provides an Excellent Vehicle for this Court to Clarify that the Limiting Language "Against the Person of Another" is Not Surplusage, But Instead Requires Proof that when the Defendant Acted He Was More than Merely Negligent About the Possibility that His Conduct Could Harm Another.

This case also presents an excellent vehicle to address the inconsistent application of this Court's decision in *Leocal v. Ashcroft* not only between circuits but between panels within the same circuit, resulting in a process that "renders doubtful anyone's confidence in predicting what will pop out at the end." *Tavares*,

[4] The concern animating Cal. Penal Code § 245 is very different from the one animating the federal definition of a crime of violence. Unlike the federal inquiry which is concerned with whether an individual is categorically dangerous because he has a history of intentionally harming others, California's assault statutes "seek[] to prevent such harm irrespective of any actual purpose to cause it." *People v. Colantuono*, 7 Cal. 4th 206, 217 (1994). While the lack of concern with whether the defendant was aware his conduct could harm another may make sense as a broad prosecutorial tool for a state, it does not, however, make sense to use the offense in federal court to serve as a proxy for identifying the narrow class of defendants who purposefully engage in violent behavior against another person, and are therefore appropriately subjected to a recidivist sentencing enhancement premised on their past violent behavior against others.

843 F.3d at 19. *See, e.g.*, *Begay*, 2019 U.S. App. LEXIS 24608, *17-18 (N.R. Smith, J., dissenting) (befuddled that battery and assault are crimes of violence but second-degree murder is not). The inconsistencies, which produce absurd results that undermine public confidence in the criminal justice system, almost entirely result from a failure to consistently apply this Court's reasoning in *Leocal*; urgent action is needed from this Court to clarify how courts should be analyzing recidivist sentencing enhancements that are premised on crimes of violence and violent felonies.

The issue here, as in all such cases, is not whether the defendant is guilty of a serious crime that puts innocent people in harm's way, and it is not whether the defendant intentionally engaged in conduct that a reasonable person would recognize might cause harm to another. The issue is whether the defendant's conviction for violating Cal. Penal Code § 245 necessarily establishes that he is someone who was more than negligent regarding whether his intentional conduct could harm another such that it is appropriate to subject him to severe sentencing enhancements on top of the sentence he would otherwise receive for committing the underlying offense. The answer to that question would clearly seem to be "no" pursuant to *Leocal v. Ashcroft*, 543 U.S. 1 (2004), yet when it comes to determining whether an offense qualifies as a crime of violence or violent felony because the offense has as an element the use, attempted use or threatened use of force against a person, courts across the country are churning out unpredictable and unprincipled

results such as the decision by the Ninth Circuit in this case relying on its prior reasoning in *Vasquez-Gonzalez*. Appendix at A2.

In *Leocal v. Ashcroft*, this Court broke down the elements of 18 U.S.C. § 16(a), which, as relevant here, are substantively identical to U.S.S.G. § 4B1.2(a)(1). *Leocal*, 543 U.S. at 7-9. As this Court explained, the fact that a defendant intentionally used violent physical force is not the dispositive issue in defining what constitutes a crime of violence under § 16(a). The definition of a crime of violence under § 16(a), like the definition under § 4B1.2(a)(1) here, contains a critical attendant circumstance – against the person or property of another. Accordingly, we look not to the fact that the defendant intentionally used force, but instead ask whether when the defendant engaged in said conduct, did he act with more than negligence with respect to the possibility that his conduct could harm another? In other words, the dispositive element under § 16(a) and § 4B1.2(a)(1) is "against the person or property of another," and specifically the defendant's intent with respect to the "'use . . . of physical force *against the person or property of another*.'" *Leocal*, 543 U.S. at 9 (emphasis in original).

Notably, both parties in *Leocal*, (as well as the Ninth Circuit here and circuit courts across the country), looked just to the fact that the defendant *used* force, and not to the defendant's awareness that said use of force might be directed at the person of another. *Id.* at 9. This Court explained that where the definition included the language "against the person or property of another," the parties were wrong to

look to the defendant's intentional use of force – what matters is the defendant's awareness that said intentional use of force might impact the person of another. *Id*.

Indeed, as this Court has subsequently explained, when the relevant statutory language simply requires proof of the use of force, that *can* be satisfied by the "knowing or intentional application of force," *United States v. Castleman*, 134 S. Ct. 1405, 1409, 1415 (2014), or even by the reckless use of force given that nothing in the word "use" alone "applies exclusively to knowing or intentional domestic assaults," *Voisine v. United States*, 136 S. Ct. 2272, 2278-79 (2016), but the analysis is different when the narrowing language "against the person or property of another" is added. *Leocal*, 543 U.S. at 9.

Bemoaning that its hands were tied by a previous panel that had gotten the analysis wrong, the Sixth Circuit explained that unlike the definition of "crime of violence" at issue in *Voisine* which defined a crime of violence as "'the use . . . physical force' *simpliciter*," the definition of "crime of violence" under U.S.S.G. § 4B1.2(a)(1) "requires 'the use . . . of physical force *against the person of another*.'" *United States v. Harper*, 875 F.3d 329, 331 (6th Cir. 2017) (emphasis in original). The addition of the phrase "against the person of another" "is not meaningless, but restrictive." *Id*. at 332. Accordingly, "§ 4B1.2 requires a *mens rea* – not only as to the employment of force, but also as to its consequences – that the provision in *Voisine* did not." *Id*. at 331. As the Sixth Circuit figured out seemingly too late, while "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," the addition of the restrictive phrase "against the person of the another," demands such an analysis if courts are to read "§ 4B1.2 to mean what it says (rather than to mean what only a part of it says)." *Id*. at 331-33. *See, e.g.*, *United States v. Woods*, 576 F.3d 400, 410-11 (7th Cir. 2009) ("Every crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome. Indeed, when pressed at oral argument to provide an example of a situation where a defendant would be reckless as to the outcome and not begin with an intentional act, the Government could not provide one.").

In other words, the "critical aspect" of the crime of violence defined under § 16(a) and § 4B1.2(a)(1), in contrast to the definition at issue in *Castleman* and *Voisine*, is that the predicate offense necessarily requires not only the intentional use of force but "one involving the 'use . . . of physical force *against the person or property of another*.'" *Leocal,* 543 U.S. at 9 (emphasis in original). And where the "key phrase in § 16(a) [is] – the 'use. . . of physical force against the person or property of another,'" a conviction for the predicate offense must necessarily establish that the defendant acted with "a higher degree of intent than negligen[ce]" with respect to the possibility that his conduct would harm another. *Id.*

As this Court has repeatedly explained, the addition of the phrase "against the person of another" is not mere surplusage but indicates Congress' intent to target a narrow class of defendants who have necessarily demonstrated a callousness towards others – those who, at the very least, perceive the risk of harm to others resulting from their conduct but who chose to act anyway. *Begay v. United*

States, 553 U.S. 137, 145 (2008), overruled on other grounds by *Johnson v. United States*, 135 S. Ct. 2551, 2558-59 (2015). Accordingly, while a person may intentionally drink, and presumably, intentionally drive, DUI statutes do not require proof that a defendant "purpose[fully] or deliberate[ly] drove under the influence, and "this distinction matters considerably" where sentencing enhancements predicated on prior crimes of violence are intended to target those individuals "who might deliberately point the gun and pull the trigger." *Id*. at 145-46. Certainly, from a public policy perspective it may make sense that liability for assault turns on whether a reasonable person would have recognized the likelihood that the defendant's conduct could harm another, irrespective of what the defendant understood. What does not make sense, however, is to use said conviction as a proxy for identifying the narrow class of defendants who have demonstrated such a callous disregard for their fellow humanity that they would knowingly place another in danger of violent physical force.

In other words, the issue is not whether the defendant intentionally used force, or intentionally engaged in conduct that a reasonable person would realize could harm another, but whether the offense of conviction required the government to prove beyond a reasonable doubt that when the defendant intentionally used force he was more than merely negligent about the fact that his conduct could harm another. Were it otherwise, and courts, as they are doing now, simply looked to whether a defendant intentionally engaged in dangerous conduct without asking

whether the defendant necessarily knew the harm he was exposing others to, [5] then the "mandatory minimum sentence would apply to a host of crimes which, though dangerous" do not necessarily evince "the deliberate kind of behavior associated with violent criminal use of firearms." *Begay*, 553 U.S. at 146-47 (citing, among other offenses, 18 U.S.C. § 365(a) which proscribes the tampering of consumer products under circumstances manifesting extreme indifference to the risk that by so doing one is placing another person in danger of death or bodily injury, as an offense that does not identify the type of person Congress meant to capture when defining a violent felony).

Not surprisingly, therefore, this Court concluded that Leocal's conviction for driving under the influence and causing serious bodily injury did not qualify as a crime of violence where the definition included the restrictive phrase "against the person of another." *Id*. at 3-4. Specifically, because the state statute of conviction merely required proof that a defendant intentionally operated a vehicle and in so doing caused serious bodily injury to another, the government was not required to prove that when the defendant intentionally engaged in conduct that involved the use of force against another (driving a vehicle while intoxicated) that he had any awareness that his intentional conduct could harm another. *Id*. at 7.

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[5] *See, e.g.*, *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (reading out of the definition the phrase "against the person of another" and instead analyzing only the word "use" in a vacuum), *United States v. Verwiebe*, 872 F.3d 408, 411 (6th Cir. 2017) (same); *United States v. Hammons*, 862 F.3d 1052, 1056 (10th Cir. 2017); *United States v. Mendez-Henriquez*, 847 F.3d 214, 221 (5th Cir. 2017) (same); *United States v. Haight*, 892 F.3d 1271, 1280-81 (D.C. Cir. 2018) (same).

Precisely because all offenses begin with a volitional act that sets in motion a later outcome, it is a mistake to "equat[e] intent to cause injury. . . with any injury that happens to occur," *Flores v. Ashcroft*, 350 F.3d 666, 671 (7th Cir. 2003), yet that is a mistake that the Ninth Circuit, as well as at least the Fifth, Sixth, Eighth, Tenth and D.C. circuits are repeatedly making, subjecting countless numbers of individuals to years, and sometimes decades, of over incarceration.

Tellingly, it is not a mistake many of these courts were making prior to this Court's decision in *Voisine*. *Compare United States v. Jordan*, 812 F.3d 1183, 1185-86 (8th Cir. 2016) (Arkansas' aggravated assault statute is not a crime of violence even though it requires proof that the defendant manifest "'extreme indifference to the value of human life' and 'purposely [e]ngage[] in conduct that creates a substantial danger of death or serious physical injury to another person,'" because engaging in intentional conduct that puts another at risk is not sufficient to constitute a crime of violence) with *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (purportedly relying on *Voisine* notwithstanding the fact that the limiting phrase "against the person of another" was not before this Court in *Voisine*, the Eight Circuit held that it was irrelevant that the defendant may have been reckless regarding the possibility that someone might have been injured by his volitional conduct), and *United States v. Alfaro*, 408 F.3d 204, 209 (5th Cir. 2005) (holding that shooting at an inhabited dwelling in violation of a Virginia statue was not a crime of violence where "a defendant could violate this statute merely by shooting a gun at a building that happens to be occupied without actually shooting, attempting

to shoot, or threatening to shoot another person") with *United States v. Mendez-Henriquez*, 847 F.3d 214, 221-22 (5th Cir. 2017) ("[P]ost-*Voisine* . . . Guidelines provisions using the language 'has as an element the use, attempted use, or threatened use of physical force against the person of another' are indifferent to *mens rea*: we concern ourselves only with whether Mendez' predicate conduct was volitional.").

The Ninth Circuit has also reversed course, but not seemingly based on any principled reason. Indeed, the Ninth Circuit's jurisprudence in this area is entirely erratic and unpredictable, prompting Judge N.R. Smith to recently observe that he felt like he was "taking crazy pills" if second-degree murder is not a crime of violence, but assault, an inchoate battery, is. *Begay*, 2019 U.S. App. LEXIS 24608, *17-18 (N.R. Smith, J., dissenting). Perplexingly, the Ninth Circuit has held that shooting at an inhabited building in conscious disregard of the possibility that a person may be injured is not a crime of violence given that "subjective awareness of possible injury is not the same as the intentional use of physical force against the person of another," *Teposte v. Holder*, 632 F.3d 1049, 1054 (9th Cir. 2011), and that aggravated assault, which requires proof that when the defendant used force that he at *least consciously disregarded the possibility* that a someone might be harmed by his conduct, is likewise not a crime of violence, *United States v. Orona*, 923 F.3d 1197, 1198 (9th Cir. 2019), yet the Ninth Circuit held that assault as proscribed by Cal. Penal Code § 245, which does not require proof that when the defendant acted that he was *even aware* of the possibility that another person might be harmed by

his conduct, *is* a crime of violence. *Vasquez-Gonzalez*, 901 F.3d at 1068. That is a jurisprudence that is probably best understood by "taking crazy pills."

The flaw in the Ninth Circuit's reasoning in *Vasquez-Gonzalez* is readily apparent. The *Vasquez-Gonzalez* court is doing exactly what the Fifth, Sixth, Eighth, Tenth and D.C. circuits are doing – reading the limiting language "against the person of another" out of the definition of a crime of violence. Instead of looking to see whether the prior conviction required the defendant to evince some awareness that his intentional conduct might harm another, the Ninth Circuit simply asked "whether assault in California can be committed accidently or whether it requires an intentional use of force," and held that "because assault in California requires an intentional use of force, assault in California satisfies the *mens rea* requirement" even though in California an assault conviction will be sustained so long as a defendant had "'knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another'" whether or not the defendant was subjectively aware of the possibility. *Vasquez-Gonzalez*, 901 F.3d at 1068 (quoting *Williams*, 26 Cal. 4th at 790). *Compare United States v. Windley*, 864 F.3d 36, 38-39 (1st Cir. 2017) (assault with a dangerous weapon *does not* constitute a crime of violence given that a defendant need not "even be aware of the risk of serious injury that any reasonable person would perceive").

Tellingly, a defendant can be guilty of violating Cal. Penal Code § 245 with the same lack of awareness that his intentional conduct could harm another as the

defendant in *Leocal*. For example, in *People v. Aznavoleh*, 210 Cal. App. 4th 1181 (2d Dist. 2012), the defendant intentionally ran a red light at an intersection. *Id*. at 1183. The court upheld his conviction under § 245 because even if the defendant had no intention of hurting anyone and was not even "subjectively aware of the prospect of such a consequence," a "reasonable person" would have recognized that the defendant's intentional use of force would likely result in harm to another. *Id*. at 1189-90.

Similarly, in *People v. Rainville*, 2017 WL 712603 (1st Dist. 2017) (unpub), review denied (2017), the defendant drove through her neighbor's backyard while severely intoxicated; nobody was injured. *Id*. at 1. The government was not required to prove that the defendant was aware that her intentional conduct placed another in harm's way. *Id*. at 3 ("The crime does not require any intent to cause an application of physical force to another person, or a substantial certainty that an application of force will result. . . . Nor does assault require a "subjective awareness of the risk that an injury might occur."). Because "the jury could reasonably have deduced Rainville intentionally drove the car," a reasonable jury could find Rainville willfully engaged in the conduct constituting the assault." *Id*. at 4. Notably, the defendant in *People v. Rainville* did not actually injure anyone as a result of her drunken driving and thus could not even have been convicted of the statute at issue in *Leocal* which required proof of serious bodily injury to another.

Given the clarity with which the California Supreme Court has consistently articulated the elements the government must prove to secure a conviction under

§ 245, which explicitly does not include proof that when the defendant intentionally used force he was subjectively aware that his conduct might harm another, it is hardly surprising that it takes no "legal imagination" to establish that California does in fact "apply its statute to conduct that falls outside" the definition of a crime of violence codified at U.S.S.G. § 4B1.2(a)(1). *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

This case, which relied exclusively on the Ninth Circuit's decision in *Vasquez-Gonzalez*, therefore provides an excellent vehicle for this Court to clarify that it meant what it said in *Leocal* – when the definition of a crime of violence includes the limiting language "against the person of another," a prior conviction cannot qualify as a crime of violence where the government was not required to prove that when the defendant intentionally acted he was aware of the possibility that his conduct might harm another and consciously disregarded that risk. Having liability under U.S.S.G. § 4B1.2(a)(1) turn on whether an ordinary person would perceive the defendant's conduct as potentially harmful to another regardless of whether the defendant understood his conduct could harm another, is the very definition of negligence, and it is exactly what this Court held in *Leocal* is insufficient to constitute a crime of violence. *Leocal*, 543 U.S. at 9-11.

It is difficult to image a cleaner vehicle in which to address the critical and timely issues presented here, which reach beyond § 4B1.2(a)(1) to any definition of a crime of violence that includes the limiting language "against the person or property of another." It is no secret that the circuit courts are inundated with crimes of

violence litigation, but if courts were following this Court's reasoning in *Leocal*, that should not be the case. There simply are not that many offenses that satisfy the requirements this Court set forth in *Leocal*, nor should there be when we are talking about stripping judges of their sentencing discretion under 18 U.S.C § 3553(a) and categorically adding what can amount to decades of additional prison time to a defendant's sentence for the underlying offense. Clarification from this Court is desperately needed.

CONCLUSION

Smith respectfully requests that this Court grant his petition for writ of certiorari, vacate the Ninth Circuit's decision and summarily remand this matter to the Ninth Circuit with directions to remand to the United States District Court for resentencing.

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Respectfully submitted,

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