No. --

IN THE

SUPREME COURT OF THE UNITED STATES

DONIELLE RASHI ROSS,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether this Court's holding in *Voisine v. United States*, __U.S..__,136 S.Ct. 2272 (2016), that recklessness is consistent with the "use of physical force" extends beyond the definition of "misdemeanor crime of violence" at issue in that case?

PARTIES

Donielle Rashi Ross is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Donielle Rashi Ross, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The first written judgment of conviction and sentence in this case was issued September 26, 2016. [Appendix A]. The first unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the sentence was captioned as *United States v. Ross,* 689 Fed. Appx. 237 (5th Cir. May 2, 2017)(unpublished), and is provided in the Appendix to the Petition. [Appendix B]. The second unpublished opinion of the court of appeals vacating the sentence and remanding to the district court following remand from this Court was captioned as United States v. Ross, 708 Fed. Appx. 206 (5th Cir. Jan. 10, 2018)(unpublished), and is provided in the Appendix. [Appendix C]. The second written judgment of conviction and sentence of the district court reducing the sentence was issued October 1, 2018, and is provided in the Appendix to the Petition. [Appendix D]. The third unpublished opinion of the court of appeals affirming the new sentence was issued May 31, 2019, and is also provided in the Appendix to the Petition. [Appendix E].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on May 31, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND FEDERAL SENTENCING GUIDELINES INVOLVED

Federal Sentencing Guideline 4B1.2 provides in relevant part:

> (a) The 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, or
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm

described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Tex. Penal Code §22.01(b) provides in relevant part:

> An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:
>
> ***
>
> (2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:
> (A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or
> (B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth...

18 U.S.C. § 922(g) provides in relevant part:

> It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable for a term of imprisonment exceeding one year... to ship or transport in interstate or foreign commerce, or possess in or effecting commerce, any firearm or ammunition....

18 U.S.C. § 924(a) provides in relevant part:

> (2) Whoever knowingly violates subsection...(g)... of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

A. Proceedings in District Court

Petitioner Donielle Rashi Ross pleaded guilty without a plea agreement to one count of possessing a firearm after having sustained a felony conviction (18 U.S.C. §922(g)), one count of drug trafficking (21 U.S.C. §841), and one count of possessing a firearm in connection with drug trafficking (18 U.S.C. §924(c)).A Presentence Report found that his offense level was 21, his criminal history category was V, and his Guideline range on the firearm and drug trafficking counts was 70-87 months imprisonment. The Guidelines, and the statute, also called for a consecutive term of five years imprisonment for the §924(c) crime. *See* USSG §2K2.4, 18 U.S.C. §924(c).

The defendant's offense level had been increased two levels due to Probation's conclusion that his prior conviction for assault was a "crime of violence" under USSG §§2K2.1 and 4B1.2. The defendant's prior assault conviction arose from Texas Penal Code §22.01(b). That statute punishes the knowing, intentional, and reckless causation of injury to a family member or person in a dating relationship with the defendant by impeding breathing or circulation by applying pressure to the throat and neck or blocking the nose and mouth. *See* Tex. Penal Code §22.01(b).

The defense objected to the treatment of this offense as a "crime of violence" in a detailed written pleading. The court overruled the objection.

The court agreed with defense counsel that Petitioner's criminal history more closely approximated the record of a category IV defendant than a category V defendant. It therefore thought the more appropriate range of imprisonment to be 57-71 months imprisonment on the firearm and drug counts. It imposed concurrent sentences of 57 months on those two counts (counts one and two), and a consecutive term of 60 months on the §924(c) count (count three). Finally, it stated that the sentence would have been the same even if it had granted the defendant's objection.

B. Proceedings in the First Appeal

On appeal before the Fifth Circuit, Mr. Ross argued that the court erred in terming his Texas assault offense a "crime of violence," because it may be committed recklessly, may be committed

by inflicting minor injury, and may be committed without the direct application of force. The court rejected the claim in light of *United States v. Howell*, 838 F.3d 489 (5th Cir. 2016), which held to the contrary. [Appendix B].

After that decision, this Court issued *Dean v. United States*, __U.S.__, 137 S.Ct. 1170 (April 3, 2017). *Dean* held that a district court may consider the deterrent and incapacitating effects of a defendant's §924(c) sentence when imposing sentence on another count. This Court vacated this Court's judgment against Mr. Ross and remanded in light of *Dean*. The Fifth Circuit , in turn, vacated the judgment and ordered resentencing. [Appendix C].

C. Resentencing

Noting Mr. Ross's efforts at rehabilitation since the first sentencing, the district court imposed a sentence of 48 months on counts one and two, and the same consecutive 60 month sentence on count three. [Appendix D]

D. Proceedings in the Second Appeal

In the second appeal, Petitioner argued again that his prior statute of conviction did not qualify as a "crime of violence" under USSG §4B1.2. He conceded that *Howell* and the law of the case foreclosed the claim. The court of appeals agreed and affirmed the sentence.

REASON FOR GRANTING THE PETITION

I. The lower courts are divided as to whether the recklessness holding of *Voisine v. United States*, __U.S.__, 136 S.Ct. 2272 (2016), extends to provisions other 18 U.S.C. §921(a)(33)(A).

Guidelines 2K2.1 and 4B1.2 provide for an enhanced base offense level when the defendant has been previously convicted of a "crime of violence." *See* USSG §§2K2.1, 4B1.2. Those provisions were used to enhance the sentence in this case. The definition of "crime of violence" in §4B1.2 includes any offense that has as an element "the use, attempted use, or threatened use of force against the person of another" USSG §4B1.2(a). Similar to USSG §4B1.2(a), 18 U.S.C. §16(a) classifies as a "crime of violence" any offense that as "has an element the use, attempted use, or threatened use of physical force against the person or property of another." In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court thought this language inconsistent with an offense that might be committed accidentally. *Leocal*, 543 U.S. at 8-12. Following *Leocal*, most courts of appeals believed that offenses that may be committed recklessly likewise lacked "the use of force against" another as an element. *See United States v. Castleman*, 572 U.S. 157, 169, n.8 (2014))("Although *Leocal* reserved the question whether a reckless application of force could constitute a use of force the Courts of Appeals have almost uniformly held that recklessness is not sufficient.")(internal citations omitted)

The issue became more complicated, however, following this Court's decision in *Voisine v. United States*, __U.S.__,136 S.Ct. 2272 (2016). *Voisine* and a co-petitioner were convicted of possessing firearms following their convictions for misdemeanor crimes of violence under 18 U.S.C. §922(g)(9). *See Voisine*, 136 S.Ct. at 2277. Both had been previously convicted under domestic assault statutes that could be violated by reckless conduct. *See id.* But this Court held that the causation of reckless injuries may constitute "the use or attempted use of physical force" within the meaning of 18 U.S.C. §921(a)(3)(A), which defines "misdemeanor crime of violence" for the purposes of 18 U.S.C. §922(g)(9). *See id.* at 2278. This holding, however, followed some consideration of the misdemeanor domestic assault statutes, which generally do capture reckless offenses. *See id.* at 2278-2280. A definition of "misdemeanor domestic violence" that excluded

recklessness, observed the *Voisine* court, would render the statute "broadly inoperative." *Id*. at 2280.

In the wake of *Voisine*, the courts of appeals have divided sharply as to whether its holding extends to provisions other than 18 U.S.C. §922(g)(9). The court below, in common with the Sixth, Eighth, Tenth and D.C. Circuits have understood *Voisine*'s interpretation of the "use of force" to apply to other provisions that contain the same language, including the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(c)(3)(A), USSG §4B1.2(a), USSG §2L1.2(b)(2015), and18 U.S.C. §16(a). *See United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018)(*en banc*) (USSG §2L1.2(b)); *United States v. Howell*, 838 F.3d 489, 500-01 (5th Cir. 2016) (USSG §4B1.2(a)); *United States v. De La Rosa*, 2019 U.S. App. LEXIS 1029 (5th Cir. 2019)(unpublished);(18 U.S.C. §16(a)) *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017)(USSG §4B1.2)(a)); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016)(ACCA); *United States v. Pam*, 867 F.3d 1191, 1207-08 (10th Cir. 2017) (ACCA); *United States v. Mann*, 899 F.3d 898, 905 (10th Cir. 2018)(18 U.S.C. §924(c)(3)(A)); *United States v. Haight*, 892 F.3d 1271, 1280-1281 (D.C. Cir. 2018)(ACCA).

By contrast, the First Circuit and a two judge panel concurrence in the Fourth Circuit understand *Voisine*'s holding as cabined by its statutory context. *See United States v. Windley*, 864 F.3d 36, 37 (1st Cir. 2017); *United States v. Middleton*, 883 F.3d 485, 499-500 (4th Cir. 2018)(Floyd, J. concurring and joined by Harris, J.). They have thus declined to hold that reckless offenses satisfy the "force clause" of ACCA. *See Windley*, 864 F.3d at 37; *Middleton*, 883 F.3d at 499-500 (Floyd, J. concurring and joined by Harris, J.). A divided panel of the Eighth Circuit has likewise declined to hold that reckless offenses constitute the "use of force" under USSG §4B1.2 if they may be committed by reckless driving. *See United States v. Fields*, 863 F.3d 1012, 1015-1016 (8th Cir. 2017).

This far-reaching circuit split over the meaning of *Voisine* has already implicated five different definitional provisions that employ the phrase "use of force," not counting §921(a)(33)(A) itself. Further, it has reached at least seven circuits and produced divergent results, between circuits, within circuits, and within individual panels. It will not spontaneously resolve, and should be

addressed by this Court.

This case presents the issue and is an apt vehicle to resolve it. Petitioner's prior Texas family violence assault offense may unquestionably be committed by reckless injury. *See* Tex. Penal Code §22.01, 22.02. Further, the court below has held that commission of the offense by recklessness and commission under some higher grade of *mens rea* represent only indivisible means of committing a single offense, not distinct offenses. *See Howell*, 838 F.3d at 498-99. As such, it has recognized that Texas family violence assault offenses possess the use of force as an element for the purposes of §4B1.2 only if reckless injury constitutes the use of force. *See id.*

And while the present case involves the Guidelines rather than a statute, the relevant language appears in a range of statutory and Guideline provisions. Determining the meaning of the phrase "use of force against the person of another" would offer guidance for a large number of federal criminal cases. Further, the issue was fully preserved by the defendant's written pleading in the original sentencing hearing. Although the claim was barred by the law of the case doctrine in the court of appeals, it is well-settled that the law of the case doctrine cannot protect a judgment from plenary review by the Supreme Court. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-259 (1916); *Christianson v. Colt. Indus. Operating Corp*. 486 U.S. 800, 817-818 (1988)("Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review.").

Finally, the court should not decline review because of the district court's statement that it would have imposed the same sentence irrespective of its resolution of the Guideline objection. It made this statement at the first sentencing, yet it imposed a lesser sentence after the first remand. This demonstrates that its sentence is not a settled conclusion about the proper application of 18 U.S.C. §3553(a) to the case. Rather, it may be reconsidered in light of intervening events, such as a showing of legal error. Further, the court below has not taken comparable statements at face value, and may therefore decline to find the error harmless. *See United States v. Martinez-Romero*, 817 F.3d

917 (5th Cir. 2016); *United States v. Cardenas*, 598 Fed. Appx. 264, 269 (5th Cir. 2015)(unpublished); *United States v. Vasquez-Tovar*, 420 Fed. Appx. 383, 384 (5th Cir. 2011)(unpublished); *United States v. Leal-Rax*, 594 Fed. Appx. 844 (5th Cir. 2014)(unpublished); *United States v. Bazemore*, 608 Fed. Appx. 207 (5th Cir. 2015)(unpublished), appeal after remand at 839 F.3d 379 (5th Cir. 2016).

CONCLUSION

Petitioner respectfully submits that this Court, grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 29th day of August, 2019.

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