No. ____

IN THE

Supreme Court of the United States

CEDRICK PONDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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DECEMBER 17, 2019

QUESTION PRESENTED

Whether this Court should resolve the split of authority over whether a criminal offense with a reckless *mens rea* qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i).

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Ponder, No. 05-cr-20664 (Apr. 2, 2007)

United States District Court (S.D. Fla.):

United States v. Ponder, No. 16-cv-22455 (Oct. 25, 2017)

United States Court of Appeals (11th Cir.):

United States v. Ponder, No. 17-14290 (Aug. 7, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Cedrick Ponder ("Petitioner") respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reprinted at 774 F. App'x 625 (Aug. 7, 2019), and is reproduced as Appendix ("App.") A. App. 1a–3a. The district court's decision from the bench overruling Petitioner's objections to the report and recommendation is unreported.

JURISDICTION

The Eleventh Circuit issued its decision on August 7, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under the Armed Career Criminal Act, the term "violent felony" means, in relevant part, a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

STATEMENT

Petitioner pled guilty in the Southern District of Florida to being a felon in possession of firearm, in violation of 18 U.S.C. § 922(g)(1). App. 4a. The probation officer determined that he was subject to the Armed Career Criminal Act ("ACCA"), which transforms § 922(g)'s ten-year statutory maximum penalty into a fifteen-year mandatory minimum penalty where the defendant has three prior "serious drug offenses" or "violent felonies." 18 U.S.C. §§ 924(a)(2), (e).

The ACCA enhancement here was based on two prior convictions for robbery under Florida law, and one prior conviction for aggravated assault, in violation of Fla. Stat. § 784.07(2)(c). Petitioner was thus sentenced to 180 months' imprisonment. Dist. Ct. Entry 50.

After this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Ponder sought authorization to file a second or successive motion to vacate pursuant to 28 U.S.C. § 2255. The Eleventh Circuit Court of Appeals granted his application in 11th Cir. No. 16-13594, allowing him to argue to the district court that he no longer qualified as an armed career criminal.

As to the aggravated assault offense, Mr. Ponder argued that the offense did not have as an element the use, attempted use, or threatened use of physical force because it could be committed recklessly. He acknowledged that his position was foreclosed by circuit precedent. *See Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1338 (11th Cir. 2013). But, Mr. Ponder argued that *Turner* had overlooked Florida decisional law, which made clear that assault could be committed recklessly, and

several courts (including the Eleventh Circuit at the time) had held that reckless conduct did not satisfy the ACCA's elements clause.

Bound by circuit precedent, the district court adopted the magistrate's report and recommendation to deny his motion to vacate. Dist. Ct. Dkt. Entry 60 at 10. On appeal, Petitioner reiterated his arguments, again acknowledging that they were foreclosed by precedent but preserving them for this Court's review. The Eleventh Circuit affirmed. Citing *Turner* and its progeny, the court then reiterated that it had "held that [] Florida aggravated assault" does "satisfy the ACCA's elements clause." App. 2a. Accordingly, the court upheld his sentence. App. 2a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON WHETHER OFFENSES WITH A RECKLESS *MENS REA* SATISFIES THE ACCA'S ELEMENTS CLAUSE

1. In *Voisine v. United States*, 136 S. Ct. 2272 (2016), the Court held that reckless conduct did satisfy the elements clause in 18 U.S.C. § 921(a)(33)(A), which defined the term "misdemeanor crime of violence" in 18 U.S.C. § 922(g)(9). In so holding, however, the Court said that its decision "concerning § 921(a)(33)(A)'s scope does not resolve whether [18 U.S.C.] § 16" (and, in turn, the identical elements clause in the ACCA) "includes reckless behavior," as "[c]ourts have sometimes given those two statutory definitions divergent readings." *Id*. at 2280 n.4. Following *Voisine*, the circuits have divided on whether recklessness satisfies the ACCA's elements clause.

The First, Fourth, and Ninth Circuits have held that it does not. *See United States v. Windley*, 864 F.3d 36, 37–39 & n.2 (1st Cir. 2017); *United States v. Rose*, 896 F.3d 104, 109–10 (1st Cir. 2018); *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir.

2018); *United States v. Middleton*, 883 F.3d 485, 498–500 & n.3 (4th Cir. 2018) (Floyd, J., joined by Harris, J., concurring); *United States v. Orona*, 923 F.3d 1197, 1202–03 (9th Cir. 2019); *United States v. Begay*, 934 F.3d 1033, 1040–41, 1044 & n.14 (9th Cir. 2019).

The Fifth, Sixth, Eighth, Tenth, and D.C. Circuits have held that it does. *See United States v. Burris*, 920 F.3d 942, 951–52 (5th Cir. 2019); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016); *United States v. Hammons*, 862 F.3d 1052, 1056 (10th Cir. 2017); *United States v. Pam*, 867 F.3d 1191, 1208 n.16 (10th Cir. 2017); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018).

Two remaining circuits are currently considering that issue en banc. *See United States v. Santiago*, No. 16-4194 (3d Cir. 2018); *United States v. Moss*, 920 F.3d 752, 754 (11th Cir. 2019), *vacated on rehearing* 928 F.3d 1340 (11th Cir. 2019). Oral argument in the Third Circuit was held on October 16, 2019, and oral argument in the Eleventh Circuit is scheduled for February 2020. Any decision in those cases is therefore still many months away. And because the conflict is mature, any decision in those circuits will only exacerbate the split. So there is no reason to wait for this Court to intervene. Indeed, the lower courts recognize that the "deep circuit split" is now "intractable." *Walker v. United States*, 931 F.3d 467, 470 (6th Cir. 2019) (Kethledge, J., dissenting from the denial of rehearing en banc), *cert. petition pending* (U.S. No 19-373) (petition filed Sept. 19, 2019).

2. That question should be resolved. Due to the circuit conflict, individuals with identical criminal histories are now subject to disparate treatment based solely on the circuit in which they are sentenced. Hundreds of federal defendants are subject to the ACCA enhancement each year. And that enhancement transforms a ten-year statutory maximum into a fifteen-year mandatory minimum. Individuals should not face at least five additional years in prison based solely on the happenstance of geography.

That geographic disparity is particularly untenable given the frequency with which the question presented arises. That frequency is reflected by the number of post-*Voisine* cases addressing whether reckless conduct satisfies the elements clause. And *Voisine* was decided only two years ago. Those cases, moreover, span the nation and address various offenses from different jurisdictions. *See, e.g.*,: *Haight*, 892 F.3d at 1280–81 (D.C. assault with a dangerous weapon); *Verwiebe*, 874 F.3d at 262 (federal assault); *Pam*, 867 F.3d at 1207–08 (New Mexico shooting at or from a motor vehicle); *Windley*, 864 F.3d at 37–39 (Massachusetts assault and battery with dangerous weapon); *Fogg*, 836 F.3d at 956 (Minnesota drive by shooting).

3. This case provides the Court with an excellent opportunity to resolve the circuit split. Petitioner's ACCA enhancement was based on only three prior convictions, one of which was for Florida aggravated assault. And the Eleventh Circuit denied relief from that ACCA enhancement on the ground that his aggravated assault conviction satisfied the ACCA's elements clause, relying on binding circuit precedent in *Turner*, which it refuses to reconsider. App. 3a–4a; *see United States v.*

Golden, 854 F.3d 1256, 1257 (11th Cir. 2017) ("[E]ven if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it."); *In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016) (reiterating and applying *Turner*).

Moreover, Florida case law makes abundantly clear that aggravated assault requires only a reckless *mens rea*. *See LaValley v. State*, 633 So.2d 1126, 1127 (Fla. 5th DCA 1994) ("'reckless disregard for the safety of others' [may] substitute for proof of intentional assault on the victim") (quoting *Kelly v. State*, 552 So.2d 206, 208 (Fla. 5th DCA 1989) (citing *DuPree v. State*, 310 So.2d 396, 398 (Fla. 2nd DCA 1975) and *Green v. State*, 315 So.2d 499, 499–500 (Fla. 4th DCA 1975))); *accord Golden*, 854 F.3d at 1258 (Jill Pryor, J., concurring in result) (recognizing that "the State may secure a conviction under the aggravated assault statute by offering proof of less than intentional conduct, including recklessness").

Thus, this case squarely presents the question on which the circuits have divided, and a favorable resolution would substantially reduce Petitioner's 180-month ACCA sentence down to no more than 10 years.

4. Finally, reckless conduct does not satisfy the ACCA's elements clause. *Voisine* does not resolve that question, as there are material distinctions between the text, context, and purpose of the elements clause in § 16(a)/ACCA and that in § 921(a)(33)(A). When analyzing these provisions, this Court has repeatedly emphasized such distinctions. *See Voisine*, 136 S. Ct. at 2280 n.4; *United States v. Castleman*, 572 U.S. 157, 163–68 & n.4 (2014); *Curtis Johnson v. United States*, 559 U.S. 133, 143–44 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). Indeed, the

government recognized in *Voisine* that "[t]he definition of a 'misdemeanor crime of violence' under Section 922(g)(9) does not embody the same meaning as the term 'crime of violence' under 18 U.S.C. 16." *Voisine*, 136 S. Ct. 2272, U.S. Br. 12, 2016 WL 1238840 (Jan. 19, 2016).

As a textual matter, the elements clause in § 16(a) and the ACCA requires that the use of force be directed "against the person or another"—language that *Leocal* found significant, 543 U.S. at 9—whereas § 921(a)(33)(A) requires the use of force without any such qualification. *United States v. Bennett*, 868 F.3d 1, 8–9 (1st Cir. 2017), *vacated as moot* 870 F.3d 34 (1st Cir. 2017). "And, in context, the word 'against' arguably does convey the need for the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim's bodily injury in committing an aggravated assault." *Id.* at 18.

That is particularly true given that the elements clause in § 16(a) and the ACCA define the terms "crime of violence" and "violent felony," respectively, not "misdemeanor crime of violence." *See id*. at 22 (observing that assault committed by reckless conduct "does not necessarily reveal a defendant to pose the kind of risk that Congress appears to have had in mind in defining 'violent felony' under ACCA."). And this Court has repeatedly emphasized the importance of those underlying statutory terms. *See, e.g.*, *Curtis Johnson*, 559 U.S. at 139 ("Ultimately, context determines meaning," and "[h]ere we are interpreting the phrase 'physical force' as used in defining . . . the statutory category of 'violent felonies'") (brackets omitted); *Leocal*,

543 U.S. at 11 ("In construing . . . § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'").

Lastly, as a matter of statutory purpose, the ACCA targets offenders who would be likely to "deliberately point the gun and pull the trigger," not those those who merely "reveal a callousness toward risk." *Bennett*, 868 F.3d at 21 (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008)). By contrast, § 921(a)(33)(A) was designed to broadly reach all criminal acts of domestic violence, even those "that one might not characterize as 'violent' in a nondomestic context." *Id*. (quoting *Castleman*, 572 U.S. at 16). Thus, while including reckless conduct in *Voisine* comported with the statutory purpose, doing so in the ACCA context would not.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, vacate the judgment below, and remand for further proceedings.

Respectfully submitted,

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