No. _____

In the Supreme Court of the United States

VERDELL MARCEL BROOKS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James T. Skuthan
Acting Federal Defender

Michelle R. Yard, Counsel of Record
Research and Writing Attorney
Florida Bar No. 0014085
Federal Defender's Office
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
E-mail: Michelle_Yard@fd.org

QUESTION PRESENTED

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

LIST OF PARTIES

Petitioner, Verdell Marcel Brooks, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Statutes **Page(s)**

Other Authorities **Page(s)**

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VERDELL BROOKS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Verdell Brooks respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of certificate of appealability (COA).

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Brooks' COA is provided in Appendix A. The district court order denying his motion to vacate is provided in Appendix B.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Brooks' case under 18 U.S.C. § 3231. The district court dismissed Mr. Brooks' 28 U.S.C. § 2255 motion on April 22, 2019. *See* App. B. Mr. Brooks subsequently filed a notice of appeal and application for a COA in the Eleventh Circuit, which denied the COA on November 1, 2019. *See* App. A. This petition is

timely filed under Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The **Armed Career Criminal Act (ACCA)**, 18 U.S.C. § 924(e), provides, in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .
>
> (2) As used in this subsection—
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

Fla. Stat. § 784.011. Assault

> (1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.
>
> (2) Whoever commits an assault shall be guilty of a misdemeanor of the second degree . . .

Fla. Stat. § 784.021. Aggravated Assault

> (1) An "aggravated assault" is an assault:

(a) With a deadly weapon without intent to kill; or

(b) With an intent to commit a felony.

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree . . .

STATEMENT

This case presents a significant and frequently recurring question of criminal law that requires this Honorable Court's review: whether a criminal offense that can be committed with a *mens rea* of recklessness qualifies as a "violent felony" under the Armed Career Criminal Act (ACCA). There is a deep and widely recognized conflict in the courts of appeals over that question—a question that the government itself has conceded is exceptionally important.

Mr. Brooks pleaded guilty to felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). At sentencing, the Court determined that Mr. Brooks qualified for a sentence under the Armed Career Criminal Act ("ACCA") based on three Florida convictions: possession with intent to sell cocaine, sale or delivery of cocaine, and aggravated assault in violation of Fla. Stat. § 784.021. PSR ¶ 17. Mr. Brooks was sentenced to 210 months' imprisonment followed by a term of supervised release for five years.

On June 24, 2016, Mr. Brooks filed his first motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. In the motion, Mr. Brooks argued that his ACCA sentence was unconstitutional based on *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The § 2255 motion was denied on April 22, 2019. In denying the motion, the district court found that "Brook's prior conviction for aggravated assault qualifies as a violent felony under the ACCA's elements clause." The district court denied a COA. Mr. Brooks filed a timely notice of appeal and sought a COA in the Eleventh Circuit Court of Appeals.

The Eleventh Circuit Court of Appeals denied Mr. Brooks' request for COA on November 1, 2019, finding that because Mr. Brooks' three ACCA predicates include Florida aggravated assault, his claim that his Florida conviction for aggravated assault no longer qualifies as a violent felony is foreclosed by "binding circuit precedent." Appendix A citing *Hamilton v. Sec'y, Fla. Dept. of Corr.,* 793 F.3d 1261, 1266 (11th Cir. 2015) (noting that "reasonable jurists will follow controlling law").

REASONS FOR GRANTING THE WRIT

This case presents a deep and widely acknowledged circuit conflict on a question of statutory interpretation regarding the definition of "violent felony" in the Armed Career Criminal Act—a provision that, because of its central importance in federal criminal sentencing, this Court has frequently addressed. The answer to the question presented will affect the sentences of a broad group of criminal defendants. The government has acknowledged the importance of the question. Seven courts of appeals have addressed the question (splitting 5-2 in the government's favor), and an additional three courts of appeals are currently considering the question en banc. Given the depth of the conflict, there is no realistic possibility that it will be resolved without this Court's intervention.

In finding the Mr. Brooks was not eligible for a COA, the district court and the Eleventh Circuit both relied on binding circuit precedent that Mr. Brooks prior conviction for Florida aggravated assault qualifies as a violent felony under the ACCA's elements clause. Recently, this Court granted review in *Walker v. United States*, No. 19-373 (Nov. 15, 2019), to decide whether a criminal offense that can be committed with a mens rea of recklessness can qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e). However, on January 22, 2020, a suggestion of death was filed by counsel for Mr. Walker. The government responded suggesting this Court dismiss the writ of certiorari in *Walker*, and recommending that the Court grant a writ of certiorari in *Burris v. United States*, No. 19-6186 (filed Oct. 3, 2019), limited to the first question presented, and expedite the briefing

schedule if the Court wishes to schedule oral argument this Term. On January 27, 2020, this Court dismissed the writ of certiorari in *Walker*. Accordingly, Mr. Brooks respectfully requests that this case be held pending the decision in *Burris* and then disposed of as appropriate in light of that decision.

I. There is a Conflict Among the Courts of Appeals

As numerous courts have recognized, there is an entrenched circuit conflict on the question of whether offenses that can be committed recklessly satisfy the force clause of the ACCA's definition of "violent felony." Before this Court's decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), all of the courts of appeals to have considered the question had agreed that such offenses do not qualify. But *Voisine*, which interpreted a different statutory provision to encompass such offenses, brought an end to that consensus.

Since *Voisine*, two courts of appeals have held that the ACCA's force clause does not cover offenses that can be committed recklessly, and five others have reached the contrary conclusion. Three additional courts of appeals have agreed to consider the question en banc. In light of that state of play, the question presented undoubtedly requires resolution by this Court, and further percolation would serve no value and would merely waste judicial resources. The time is ripe for the Court to address the question presented and bring to an end the uncertainty in the lower courts.

The circuits holding that an offense that can be committed with a *mens rea* of recklessness satisfies the ACCA definition of "violent felony," squarely conflict with the decisions of the First and Fourth Circuits.

The First Circuit has addressed the question presented on three separate occasions, each time unanimously holding that offenses that can be committed recklessly cannot qualify as "violent felon[ies]" under the ACCA. In *United States* v. *Windley*, 864 F.3d 36 (1st Cir. 2017), the First Circuit held that assault and battery with a dangerous weapon under Massachusetts law did not qualify as a "violent felony" because the offense could be committed with a *mens rea* of recklessness, which "does not require that the defendant intend to cause injury . . . or even be aware of the risk of serious injury that any reasonable person would perceive." *Id.* at 38 (citations omitted). That level of *mens rea*, the court explained, did not "fit with ACCA's requirement that force be used against the person of another." *Id.* Similarly, in *United States* v. *Rose*, 896 F.3d 104 (1st Cir. 2018), the First Circuit held that assault with a dangerous weapon under Rhode Island law did not qualify as a "violent felony" under the force clause because there was at least a possibility that recklessness would be sufficient for conviction of that offense. *See id.* at 110, 114.

Both *Windley* and *Rose* relied heavily on the reasoning of *Bennett* v. *United States*, 868 F.3d 1 (1st Cir. 2017)—a decision that was later withdrawn as moot because the defendant had died shortly before it was issued. *See Bennett v. United States,* 870 F.3d 34 (1st Cir. 2017). There, in an opinion joined by Justice Souter, the First Circuit held that aggravated assault under Maine law did not satisfy the

ACCA's force clause because it encompassed reckless conduct. *See* 868 F.3d at 4, 8. In so holding, the court emphasized "the differences in contexts and purposes between the statute construed in *Voisine* and ACCA," and it reasoned that the rule of lenity supported its holding. *Id.* at 23 (internal quotation marks and citation omitted). Those decisions— which were joined by five different judges and a retired Justice— squarely conflict with the decision below.

The Fourth Circuit has similarly held that offenses that can be committed recklessly cannot qualify as "violent felon[ies]" under the ACCA. In *United States* v. *Hodge*, 902 F.3d 420 (4th Cir. 2018), the government actually conceded—in briefing that followed this Court's decision in *Voisine*—that offenses that could be committed recklessly could not satisfy the ACCA's force clause. *See id.* at 427. The Fourth Circuit agreed, holding that reckless endangerment under Maryland law was not a "violent felony." *See id.* The Fourth Circuit relied on an earlier concurring opinion by the majority of a panel that explained that the "ACCA force clause requires a higher degree of *mens rea* than recklessness." *Id.* (quoting *United States* v. *Middleton*, 883 F.3d 485, 498 (4th Cir. 2018)) (Floyd, J., joined by Harris, J., concurring) (alteration omitted).

The latest circuit to weigh in on the question presented, the Ninth Circuit, joined the First and Fourth Circuits in holding that offenses that can be committed recklessly cannot qualify as "violent felon[ies]" under the ACCA's force clause. In *United States* v. *Orona*, 923 F.3d 1197 (9th Cir. 2019), a panel of the Ninth Circuit concluded that *Voisine* did not abrogate its prior precedent, which had held that

such offenses do not qualify. *See id.* at 1203. The court emphasized that *Voisine* had expressly left open the question whether reckless conduct satisfied the provision at issue in *Leocal*—a provision that, like the ACCA's force clause, requires "the use. . . of physical force against the person. . .of another." *See id.* The Ninth Circuit recognized that its holding was contrary to that of several other circuits, but noted that it was consistent with the First Circuit's. *See id.* at 1202-03. However, that opinion has been vacated in light of the Ninth Circuit's decision to grant rehearing en banc, *see* 942 F.3d 1159 (2019), however, it reflects the views of three additional judges on the question presented.

Also, the Ninth Circuit reaffirmed that holding in *United States* v. *Begay*, No. 14-10080, 2019 WL 3884261 (Aug. 19, 2019), and went a step further to hold that not even extreme recklessness was sufficient to satisfy an almost identical force clause in the definition of another firearms offense. *See id.* at *5. While a dissenting judge disagreed with the majority's characterization of extreme recklessness, he did not dispute that standard recklessness would have been insufficient to satisfy the force clause. *See id.* at *6-*12 (N.R. Smith, J., dissenting).

Finally, even a panel of the Eleventh Circuit has held that offenses that can be committed recklessly cannot qualify as "violent felon[ies]" under the ACCA's force clause. *See United States* v. *Moss*, 920 F.3d 752, 754 (11th Cir. 2019). However, that opinion has been vacated in light of the Eleventh Circuit's decision to grant rehearing en banc, *see* 928 F.3d 1340 (2019), but it reflects the views of three additional judges on the question presented.

The Sixth, Fifth, Eighth, Tenth, and District of Columbia Circuits, reached the opposite conclusion: that offenses that can be committed recklessly can nevertheless qualify as "violent felon[ies]" under the ACCA's force clause.

The Fifth Circuit has held that, in light of *Voisine*, the ACCA's force clause "includes reckless conduct." *United States* v. *Burris*, 920 F.3d 942, 951 (5th Cir. 2019). The court did not consider the significance of the phrase "against the person of another" in the force clause and instead emphasized that "reckless conduct" can involve the "use" of force. *Id.* at 952.

Relying on *Voisine*, the Eighth Circuit likewise concluded, after just a single paragraph of analysis, that an offense that "required a mens rea of recklessness * * * qualified as a violent felony under the ACCA's force clause." *United States* v. *Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017).

In *United States* v. *Hammons*, 862 F.3d 1052, 1056 (10th Cir. 2017), cert. denied, 138 S. Ct. 702 (2018), the Tenth Circuit reached the same conclusion, also with just a single paragraph of analysis. The court took the view that, for purposes of determining whether an offense constitutes a valid ACCA predicate, "it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly." *Id.* In a subsequent decision, the Tenth Circuit recognized that the First Circuit's intervening decision in *Bennett* "raise[d] questions" about its analysis, but concluded that it was "bound" by its decision in *Hammons* absent intervention by this Court or the en banc court. *United States* v. *Pam*, 867 F.3d 1191, 1208 n.16 (10th Cir. 2017).

The D.C. Circuit has also held that, in light of *Voisine*, offenses that can be committed recklessly can qualify as "violent felon[ies]" under the ACCA's force clause. *See United States* v. *Haight*, 892 F.3d 1271 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 796 (2019). In so holding, the D.C. Circuit "recognize[d] that the First Circuit ha[d] reached a contrary conclusion," but it "respectfully disagree[d]" with it. *Id.* at 1281.

The Sixth Circuit held that robbery under Texas law qualifies as a "violent felony" under the ACCA's force clause even though it can be committed with a *mens rea* of recklessness. *Davis* v. *United States*, 900 F.3d 733, 736 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019). Judge Stranch, who concurred on the basis of prior circuit precedent, observed that "[a]t least two other circuits have taken [the contrary] position." App., *infra*, 13a. And at the rehearing stage, Judge Kethledge emphasized that the Sixth Circuit's decision had "rendered more intractable what has become a deep circuit split." *Id.* at 59a.

Three courts of appeals have agreed to consider the question presented en banc. *See United States* v. *Moss*, 928 F.3d 1340 (11th Cir. 2019); *United States* v. *Santiago*, No. 16-4194 (3d Cir. June 8, 2018); *United States v. Orona*, 942 F.3d 1159 (9th Cir. 2019). The en banc Third Circuit heard argument in *Santiago* on October 16, 2019. The Ninth and Eleventh Circuit Court of Appeals have stayed *Orona* and *Moss* pending this Court's resolution of the issue in *Walker*. Thus, each of those cases is likely months away from a decision. Whichever way those courts ultimately come out on the question presented, however, it will only exacerbate the existing circuit conflict.

In short, the courts of appeals have taken divergent and flatly inconsistent positions on whether offenses that can be committed recklessly qualify as "violent felon[ies]" under the ACCA's force clause. Several of those courts have expressly acknowledged the existence of the circuit conflict, which has only continued to deepen. The mature circuit conflict on the question presented warrants the Court's review.

II. The Question Presented Is Exceptionally Important and Warrants Review In This Case

As the United States has itself recognized, the question presented is tremendously important, with the ongoing conflict having a dramatic and disparate effect on scores of criminal defendants across the country. The Court's intervention is desperately needed, and this case presents an optimal vehicle in which to resolve the conflict.

Last year alone, more than 6,700 individuals were convicted under 18 U.S.C. § 922(g), the firearms-possession statute to which the ACCA applies, and that number has been increasing. See United States Sentencing Commission, *Quick Facts, Felon in Possession of a Firearm, Fiscal Year 2018* <tinyurl.com/QuickFactsFY18>. Hundreds of those offenders were given mandatory minimum sentences under the ACCA. *See id.*

From those numbers—to say nothing about the large number of reported cases addressing the question presented—there can be no doubt that the question will continue to recur frequently until this Court intervenes. And as this case well illustrates, the consequences for individual defendants are vast, with the answer to

the question determining whether a defendant is subject to a mandatory 15-year minimum or what is often a substantially lower sentence. *See id.* (noting that the average ACCA sentence for a Section 922(g) violation is 186 months, whereas the average non-ACCA sentence is 50 months).

What is more, the answer to the question presented will have a bearing on various other provisions of the criminal code, as well as the Sentencing Guidelines where Congress has employed the phrase "use of physical force against the person of another." *See*, *e.g.*, *Begay*, 2019 WL 3884261, at *5 (18 U.S.C. 924(c)); *United States* v. *Bettcher*, 911 F.3d 1040, 1043 (10th Cir. 2018) (U.S.S.G. § 4B1.2), petition for cert. pending, No. 19-5652 (filed Aug. 16, 2019); *United States* v. *Mendez-Henriquez*, 847 F.3d 214, 220 (5th Cir.) (U.S.S.G. § 2L1.2), cert. denied, 137 S. Ct. 2177 (2017); *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121, 1125 (9th Cir. 2006) (18 U.S.C. 16(a)). Accordingly, the provision at issue is one of the more important definitions in all of federal criminal law.

The Court need not take our word for it: the United States has made exactly the same points in seeking further review on the question. In its petition for rehearing en banc in *Orona*, *supra*, the government described the question presented as "exceptionally important." Pet. for Reh'g at 17, *Orona*, No. 17-17508 (9th Cir.) (filed Aug. 22, 2019). The government emphasized the practical importance of the question in light of the "plethora of predicate offenses carrying reckless mens rea." *Id.* at 18. And it described the perils of the "circuit split," in which the "15-year ACCA mandatory minimum sentence[]" and "a host of other legal consequences that rely on

'violent felony' and 'crime of violence' definitions" turn on whether a defendant's crime occurs "in New Mexico" or steps away on the other side of "the Arizona border." *Id.* at 18-19. While the government is wrong on the merits, it is correct on the importance of the question. And until this Court resolves the question, the fate of scores of criminal defendants will depend on the fortune of geography.

This Court's review is urgently needed. Since the Court was squarely presented with the question earlier this year (in a case that would have been heard by an eight-member Court), *see Haight* v. *United States*, 139 S. Ct. 796 (cert. denied Jan. 7, 2019) (No. 18-370), the circuit conflict has developed significantly: the First and Fourth Circuits as solidly on one side, as were panels of the Eleventh and Ninth Circuits in now-vacated opinions, while the Fifth, Eighth, Tenth, and D.C. Circuits are on the other, and the Sixth Circuit declined to reconsider the question in this case over two impassioned dissents.

Notably, the question presented has also been the subject of substantial en banc activity. As noted above, the en banc Third and Eleventh Circuits have granted oral arguments on the question. *See supra.* And the en banc Ninth Circuit has heard oral argument. *See supra.*

In light of the extensive authority on both sides of the circuit conflict, there would be little value to additional percolation. Indeed, absent the Court's intervention in this case, at least two additional courts of appeals will expend considerable resources on en banc hearings, all to address a question that the Court will inevitably need to answer definitively. For that reason, even setting aside the

vast personal stakes for the defendants and families impacted nationwide by the question in the interim, considerations of judicial economy warrant immediate review.

This case also provides an optimal vehicle in which to decide the question presented. The dispute in this case is whether one state-law offense, Florida aggravated assault, qualifies as a predicate offense under the ACCA. *See* App, A, B. Recklessness suffices for that offense by state law. And there are no threshold questions about petitioner's other prior offenses.

In sum, this case presents the question whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a "violent felony" under the ACCA's force clause. There is a deep and widely acknowledged circuit conflict on that question. Only this Court's intervention can resolve that stark conflict on one of the more important definitions in all of federal criminal law. And once again, only this Court can eliminate the uneven application of the ACCA to criminal defendants nationwide. The Court should grant the petition for certiorari and end the chaos in the lower courts on an important question concerning the day-to-day administration of federal criminal law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

James T. Skuthan
Acting Federal Defender

s/Michelle R. Yard

Michelle R. Yard, Counsel of Record
Research and Writing Attorney
Florida Bar No. 0014085
Federal Defender's Office
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
E-mail: Michelle_Yard@fd.org

APPENDIX