No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

MELVIN WHITEHEAD,

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) 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?

2) 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?

LIST OF PARTIES

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

LIST OF RELATED CASES PURSUANT TO SUPREME COURT RULE 15

The identical two questions presented here are currently before this Court in petitions for writs of certiorari in:

Trayvon Smith v. United States, **Case No. 19-5727** (U.S. Court of Appeals for the Ninth Circuit; Judgment entered May 29, 2019; Petition for Writ of Certiorari filed August 27, 2019; last distributed for Conference February 28, 2020), and

Juan Manuel Perez, **Case No. 19-5749** (U.S. Court of Appeals for the Ninth Circuit; Judgment entered May 29, 2019; Petition for Writ of Certiorari filed August 27, 2019; last distributed for Conference February 28, 2020).

Additionally, while the *mens rea* at issue in ***Borden v. United States***, **Case No. 19-5410**, is recklessness and the one at issue here is negligence, the reasoning, if not the holding, of this Court's decision in *Borden* will likely be dispositive. This Court granted *Borden*'s petition for Writ of Certiorari on March 2, 2020, and briefing has been completed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Melvin Whitehead 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 Whitehead's prior conviction for battery on a peace officer resulting in injury in violation of California Penal Code § 243(c)(2), which did not require proof that when Whitehead 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.

OPINIONS BELOW

On October 30, 2019, the United States Court of Appeals for the Ninth Circuit affirmed the district court's conclusion that Whitehead's prior battery conviction under Cal. Penal Code § 243(c)(2) 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. Whitehead filed a petition for rehearing en banc, which the Ninth Circuit denied on March 3, 2020 in the order reproduced in the appendix at B1.

The May 23, 2018 Judgment in a Criminal Case of the United States District Court for the Eastern District of California sentencing Whitehead to 96 months imprisonment is reproduced in the appendix at C1-C7.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Whitehead's request for rehearing en banc was filed on March 3, 2020. Appendix at B1. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1); Supreme Court Rule 13.3; Order, 589 U.S. ___ (March 19, 2020).

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 § 243(c)(2014)[1]:

(1) When a battery is committed against a [specified individual], and the person committing the offense knows or reasonably should know that the victim is a [specified individual] engaged in the performance of his or her duties, or a physician or nurse engaged in rendering emergency medical care, and an injury is inflicted on that victim, the battery is punishable by a fine of not more than two thousand dollars ($2,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

(2) When the battery specified in paragraph (1) is committed against a peace officer engaged in the performance of his or her duties, whether on or off duty, including when the peace officer is in a police uniform and is concurrently performing the duties required of him or her as a peace officer while also employed in a private

[1] Whitehead's prior conviction for violating Cal. Penal Code § 243(c)(2) occurred in 2014.

capacity as a part-time or casual private security guard or patrolman and the person committing the offense knows or reasonably should know that the victim is a peace officer engaged in the performance of his or her duties, the battery is punishable by a fine of not more than ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years, or by both that fine and imprisonment.

INTRODUCTION

Whitehead 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,* 934 F.3d 1033, 1042 (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 "against the person or property of another," and instead exclusively focusing on the *mens rea* modifying the *actus reus*—the intentional use of force—regardless of whether, when the person acted, he was even aware of the possibility that his conduct could harm another.

In other words, this case presents the identical issues to the ones currently before this Court in *Smith v. United States*, Case No. 19-5727 and *Perez v. United*

States, Case No. 19-5749. While the aforementioned cases concern California assault convictions, and the challenged prior conviction here concerns California's statute proscribing battery against a police officer resulting in injury, that is a distinction without a difference. Under California law an "assault occurs whenever the next movement would, at least by all appearance, complete the battery." *People v. Williams*, 26 Cal. 4th 779, 786 (2001) (internal quotations and alterations omitted). Accordingly, the mental state required for battery is the same as that required for assault. *People v. Colantuono*, 7 Cal. 4th 206, 214-15, 217 (1994) (explaining that there is an "infrangible nexus" between assault and battery, which "means that once the violent-injury-producing course of conduct begins, untoward consequences will naturally and proximately follow," and, thus, while assault (which punishes the initiation of the force) and battery (which punishes the resulting injury) are discrete offenses, "only an intent to commit the proscribed act is required" for both, and thus an "intent. . . to injure in the sense of inflicting bodily harm is not necessary").

Just like the panels in *Smith* and *Perez* were bound by prior Ninth Circuit precedent (*United States v. Vasquez-Gonzalez*, 901 F.3d 1060 (9th Cir. 2018)) that looked simply to a defendant's intentional use of force without any concern for whether the defendant had any awareness that his intentional conduct could harm another, so too the panel here considered itself bound by precedent that looked only to the result of the defendant's conduct, not his intent when he acted. *United States v. Whitehead*, 782 F. App'x 649, 650 (9th Cir. 2019) (considering itself bound by

United States v. Colon-Arreola, 753 F.3d 841 (9th Cir. 2014), which looked only to the resulting injury and not to the defendant's intent when he acted, and whose reasoning was recently reaffirmed in *United States v. Perez*, 932 F.3d 782, 788 (9th Cir. 2019)).

This case, therefore, 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, 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 § 243(c), that do not categorically qualify as crimes of violence? Second, once this Court confirms the requisite *mens rea* modifying "against the person of another," how is that *mens rea* defined? Specifically, 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?

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 August 3, 2017, the government filed an indictment charging Whitehead with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and one count of being a felon in possession of ammunition also in violation of § 922(g)(1). Whitehead pled guilty to count one 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), and the government moved to dismiss the second count.

Over defense counsel's objection, the district court found that Whitehead's 2014 conviction for battery on a peace officer resulting in an injury in violation of Cal. Penal Code § 243(c)(2) qualified as a crime of violence. The district court's finding increased Whitehead's base offense level under the U.S. Sentencing Guidelines from 17 to 23, which increased his advisory guideline range from 51 to 63 months in custody to 92 to 115 months. The district court sentenced Whitehead to 96 months.

Whitehead timely challenged the district court's conclusion that his 2014 conviction for violating Cal. Penal Code § 243(c)(2) is a crime of violence under U.S.S.G. § 4B1.2(a)(1). At the Ninth Circuit, Whitehead urged the court to take the matter en banc to overrule the *Vasquez-Gonzalez* / *Colon-Arreola* line of cases dealing with California's assault and battery statutes on the basis that they were incompatible with this Court's decision in *Leocal v. Ashcroft*, which requires that a prior conviction necessarily establish that when an individual intentionally used force he was at least negligent as to whether his conduct could result in harm to another before said conviction qualified as "an offense that has as an element the use. . . of physical force against the person. . . of another." *Leocal*, 543 U.S. at 5 (quoting 18 U.S.C. § 16(a)). The Ninth Circuit rejected Whitehead's request to consider the matter en banc. Appendix at B1.

Whitehead requests certiorari to clarify that (A) 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, and (B) federal judges, not state judges, define the terms, including the applicable *mens rea*, that establish the scope of federal sentencing enhancements.

REASONS FOR GRANTING THE WRIT

A. This Case Provides Yet Another 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 presents an another vehicle for this Court 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*, 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 § 243(c)(2) necessarily establishes that he is

someone who was more than negligent about 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 under a definition requiring that said force be "used *against the person of another*," courts across the country are churning out unpredictable and unprincipled results just like the Ninth Circuit did here by relying on its prior reasoning in *Colon-Arreola,* 753 F.3d 841 (9th Cir. 2014). 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. *Cf.*, *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 battery on a police officer resulting in injury 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, [2] 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).

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[2] *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).

Not surprisingly, therefore, this Court concluded that Leocal's conviction for driving under the influence *resulting in 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.

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. 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), but that that

assault as proscribed by Cal. Penal Code § 245 and battery on a peace officer resulting in injury as proscribed by Cal. Penal Code § 243(c)(2), neither of which requires proof that when the defendant acted that he was *even aware* of the possibility that another person might be harmed by his conduct, *are* crimes of violence. *Vasquez-Gonzalez*, 901 F.3d at 1068; *Colon-Arreola*, 753 F.3d at 844-45. That is a jurisprudence that is probably best understood by "taking crazy pills."

The flaw in the Ninth Circuit's reasoning in the *Vasquez-Gonzalez* / *Colon-Arreola* line of cases is readily apparent. The Ninth Circuit 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 the defendant's "use of force [was] intentional," and concluded that because the defendant's intentional conduct resulted in an injury, no further inquiry was needed regarding whether the defendant was necessarily aware that his conduct might injure anyone. *Colon-Arreola*, 753 F.3d at 844-45. Recently, the Ninth Circuit applied exactly the same reasoning in *Perez*, holding that when a battery results in serious bodily injury (California Penal Code § 243(d)), no inquiry is needed to assess whether the defendant had any awareness that his conduct might result in said injury. *Perez*, 932 F.3d at 788.

In other words, in the Ninth Circuit when a statute proscribes harm to another *resulting* from a defendant's intentional conduct it does not matter whether

the defendant intended to harm anyone; it is strict liability. That reasoning is directly at odds with *Leocal* where the defendant intentionally engaged in conduct that *resulted* in serious bodily injury to another. As this Court explained, it is not the result we look at; what matters in this context, when decades of an individual's life can be a stake, is whether, when the individual intentionally used force, he was more than merely negligent regarding the possibility that his conduct could harm another. *Leocal,* 543 U.S. at 6, 9. *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").

The reality is that an individual can be convicted of violating Cal. Penal Code § 243(c)(2) with the same lack of awareness that his intentional conduct could harm another as the defendant in *Leocal*. Specifically, an individual can be convicted so long as he intentionally commits an act with knowledge of facts that would have put a reasonable person on notice of the risk that his conduct could result in a battery. *See, e.g.*, *People v. Williams*, 26 Cal. 4th 779, 788; (2001); *People v. Hayes*, 142 Cal. App. 4th 175, 180 (2006). The individual who honestly believed his intentional conduct would not result in harm to another is guilty of violating Cal. Penal Code § 243(c), so long as a reasonable person, knowing the facts the defendant knew, would have appreciated the risk. *Id.* Nevertheless, in *Colon-Arreola*, looking only at the injury that resulted, the Ninth Circuit held that a conviction for violating Cal. Penal Code § 243(c)(2) is a crime of violence. *Colon-Arreola*, 753 F.3d at 845.

B. This Case Is Yet Another Case in Need of Clarification From This Court 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.

Even if the Ninth Circuit had not dispensed with a *mens rea* requirement by premising its ruling simply on the resulting injury, and had instead required that a defendant be at least negligent as to whether his intentional conduct might harm another as *Leocal* demands, the result still would have been the same because, just like in *Smith* (No. 5727) and *Perez* (No. 5749), the Ninth Circuit's binding precedent in *Vasquez Gonzalez* controls, which cedes authority to define "negligence" to the state of California, which, in the context of its assault and battery statutes, places no daylight between "negligence" and "strict liability."

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.

To be sure, "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). The California Supreme Court has clearly articulated the substance of the *mens rea* required for the government to secure a

conviction under Cal. Penal Code § 243(c), and federal courts are bound by that substance. *Johnson v. United States*, 559 U.S. 133, 138 (2010). The issue here is whether federal courts are also bound by the label the State elects to use to characterize the substantive *mens rea* it has identified when that label conflicts with how federal law would characterize the identified *mens rea*. Surely when this Court established that a predicate offense must require proof that when a defendant acted he was more than negligent about the possibility that his intentional conduct could harm another, it 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 is happening in the Ninth Circuit.

1. California Assault and Battery Convictions Do Not Require Proof that When the Defendant Acted He was Aware that His Intentional Conduct Could Harm Another.

In California, no matter whether the offense at issue is assault or battery, a defendant will be found guilty if it is established that he was "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 may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." *Williams*, 26 Cal. 4th at 788 (discussing assault); *see, e.g.*, *Hayes* (applying *Williams* to a battery conviction under Cal. Penal Code § 243(c)); *People v. Mansfield*, 200 Cal. App. 3d 82, 88 (1988)

("[T]he state of mind necessary for the commission of battery with serious bodily injury is the same as for simple battery; it is only the result which is different," and a defendant "need not have an intent to injure to commit a battery;" it is sufficient that he intended to commit the act that resulted in the battery).

In other words, in California assault and battery "focus[es] on the violent-injury-producing nature of the defendant's acts, rather than on a separate and independent intention to cause such injury." *Williams*, 26 Cal. 4th at 785 (internal quotations omitted). "The pivotal question is whether the defendant intended to commit an act likely to result in such physical force," and not whether he or she appreciated the risk of harm to another. *Id.* (internal quotations omitted). Accordingly, "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. Similarly, where "a reasonable trier of fact could. . . find beyond a reasonable doubt that appellant knew facts sufficient to establish that his intentional act 'would directly, naturally and probably result in a battery' . . . [i]t is of no consequence whether he may have honestly believed that his intentional act was unlikely to result in a battery." *Hayes*, 142 Cal. App. 4th at 180 (quoting *Williams*, 26 Cal. 4th at 788 n.3); *see, e.g.*, *People v. Wyatt*, 48 Cal. 4th 776, 781 (2010) (reaffirming that "the requisite *mens rea* may be found even when the defendant honestly believes his act is not likely to result in such injury").

Notably in *Hayes*, the defendant intentionally kicked a three-foot tall ashtray with the purpose of knocking it over. *Hayes*, 142 Cal. App. 4th at 179-80. The defendant argued on appeal that there was no evidence that he intended to harm anyone when he kicked the ashtray. *Id.* at 178. The court upheld the defendant's conviction for battery resulting in serious injuries on the basis that a "reasonable trier of fact could find beyond a reasonable doubt that appellant intentionally kicked the ashtray" and that the appellant knew the probation officer that got hit by the falling ashtray was nearby, and thus it was "of no consequence whether [the appellant] may have honestly believed that his intentional act was unlikely to result in a battery." *Id.* at 180. Similarly, in *Wyatt* the defendant was convicted of using force that resulted in the death of a child in violation of Cal. Penal Code § 273ab. The defendant had been wrestling with his son and testified he was unaware the degree of force he was using could harm his son. *Id.* at 785. The California Supreme Court upheld the conviction because the defendant knew the facts that would have alerted a *reasonable person* to the risk of injury, and thus "any failure on defendant's part to realize he was hurting and fatally injuring [his son] is of no consequence to the issue at hand." *Id.* at 779, 785.

In other words, California's definition of "negligence" in the context of its assault and battery statutes is the very definition of negligence that this Court rejected in *Elonis v. United States*, 135 S. Ct. 2001 (2015). In *Elonis*, 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.*

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 battery in violation of Cal. Penal Code § 243(c) 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, believes that it is required to defer to the California Supreme Court's definition of negligence over this Court's definition 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

[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.

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, and are instead being applied consistently to federal defendants regardless of geography

C. This Court Should Hold This Case in Abeyance Pending Resolution in *Borden v. United States* (Case No. 19-5410), *Smith v. United States* (Case No. 5727) and *Perez v. United States* (Case No. 19-5749).

While *Smith* and *Perez* raise the identical issues presented here, it is likely that the reasoning, if not the holding, of this Court's decision in *Borden* will be dispositive. This Court granted the petition for certiorari in *Borden v. United States* on March 2, 2020, and briefing in the case has been completed. The question in *Borden* is whether a sentencing enhancement provision (which in *Borden* is the ACCA) that requires proof of the use of force *against another* can be satisfied with a *mens rea* of recklessness. The questions presented here are, therefore, narrower than the one presented in *Borden*. That said, while the statute at issue here only required proof that a defendant was negligent, and thus the holding of *Borden* will not necessarily be dispositive, this Court's analysis in *Borden* likely will be. Specifically, in reaching the holding, *Borden* almost certainly will require this Court to clarify whether the relevant *mens rea* is the one that modifies simply the use of force, as the Ninth Circuit contends, or whether a prior conviction must categorically establish that when the defendant intentionally used force he had some awareness that his use of force could result in harm to another.

CONCLUSION

Whitehead respectfully requests that this Court hold his petition in abeyance pending this Court's resolution of *Borden v. United States* (Case No. 19-5410), and following resolution of *Borden*, grant his petition, vacate and remand for further proceedings consistent with this Court's reasoning in *Borden*.

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