No. 20-5278

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

PETITIONER'S REPLY BRIEF

HEATHER E. WILLIAMS
Federal Defender

PEGGY SASSO*
Assistant Federal Defender
2300 Tulare Street, Suite 330
Fresno, California 93721
(559) 487-5561
Peggy_Sasso@fd.org
*Counsel of Record for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Page

FEDERAL STATUTES

FEDERAL REGISTER

UNITED STATES SENTENCING GUIDELINES

STATE CASES

STATE STATUTES

TABLE OF AUTHORITIES (cont'd)

Page

OTHER AUTHORITIES

PETITIONER'S REPLY BRIEF

The core question presented in this case was at the heart of the oral argument on November 3, 2020 in *Borden v. United States* (Case No. 19-5410). Just as the government attempted to do in *Borden*, the government here wants to focus on the resulting harm—that an individual's intentional conduct happened to result in to injury to another (specifically a peace officer)—without inquiry into whether, when the defendant acted, he was aware that his intentional conduct could harm another. Contrary to the government's results-based analysis, petitioner contends that when the definition of a "crime of violence" includes the limiting language "against the person of another, the issue is what the defendant actually understood he was doing, not what *resulted* from his conduct.

Because this Court in *Borden* will almost certainly address the question of whether "against the person of another" simply identifies the victim of the use of force as the government and the Ninth Circuit contend here, or whether the inclusion of said limiting language requires proof that when the defendant used force he was at least aware that his conduct could harm another as this Court held in *Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004), and because the answer to that question is dispositive of Whitehead's petition, this Court should hold his petition pending resolution of *Borden*.

I. The Only Interpretation At Issue Here is the Ninth Circuit's Interpretation of U.S.S.G. § 4B1.2(a)(1) that Reads the Limiting Language "Against the Person of Another" Out of the Guideline Provision.

The government's opposition proceeds from a false premise. Contrary to the government's assertion (BIO at 4-5), the crux of petitioner's argument here, as it is

in *Trayvon Smith v. United States*, Case No. 19-5727, and *Juan Manuel Perez v. United States*, Case No. 19-5749 (both distributed to conference on February 28, 2020), is that a statute such as CPC § 243(c)(2) that merely requires the intentional use of physical force that happens to result in injury to a person *does not* qualify as a crime of violence pursuant to *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Following *Leocal*, it is petitioner's position that the language "against the person of another" is not mere surplusage but instead requires proof that when the defendant acted he was necessarily aware that his conduct could harm another—an element that is unequivocally not required to sustain a conviction for battery or assault in California. *People v. Williams*, 26 Cal. 4th 779, 777-78, 788 n.3 (2001) (explaining that even if a defendant "honestly believe[d] that his act was not likely to result in a battery," he is still guilty so long as a reasonable person knowing the facts the defendant knew, would have appreciated the risk of harm to another); *c.f.*, *People v. Rocha*, 3 Cal. 3d 893, 899 (1971) (noting that when the legislature initially enacted California's assault statute, it had required proof that the defendant acted with the "intent to do bodily harm," but the legislature subsequently deleted "all reference to intent," and by so doing unequivocally established that proof of the "intent. . . to injure in the sense of inflicting bodily harm is not necessary" to sustain a conviction); *People v. Mansfield*, 200 Cal. App. 3d 82 (1988) ("[T]he state of mind necessary for the commission of a battery with serious bodily injury is the same as that for simple battery; it is only the result which is different.").

The Ninth Circuit was therefore only able to reach the conclusion that CPC § 243(c)(2) is a crime of violence by reading "against the person of another" out of the statute and holding defendants strictly liable for the fact that an individual was injured by their conduct, which is exactly what it did in the prior case of *United States v. Colon-Arreola*, 753 F.3d 841, 843–845 (9th Cir. 2014), which the Ninth Circuit subsequently held foreclosed Whitehead's appeal here. *United States v. Whitehead*, 782 F. App'x 649, 649-50 (9th Cir. 2019).

Tellingly, the Ninth Circuit in *Colon-Arreola* explained it understood *Leocal* to stand for the proposition that "a crime may only qualify as a 'crime of violence' if the use of force is intentional." *Colon-Arreola*, 753 F.3d at 844. Glaringly absent from the Ninth Circuit's "understanding" was any recognition that Congress' inclusion of the limiting phrase "against the person of another" means that the intentional use of force that happens to result in injury to another is not enough. *Leocal*, 543 U.S. at 9. Of course, as this Court clarified in *Leocal*, "[w]hether or not the word 'use' alone supplies *a mens rea* element, the parties' primary focus on that word is too narrow," explaining that simply using force that harms another is not enough; the conviction must at a minimum establish that when the defendant intentionally used force he was at least aware that his conduct could harm another. *Id.* (emphasis added).

Failing to appreciate that a "crime of violence" requires proof that when the defendant intentionally used force he did so with at least an awareness that his conduct could harm another, the *Colon-Arreola* court held that because CPC

§ 243(c)(2) establishes that the defendant engaged in intentional conduct that happened to result in injury to a peace officer that required medical treatment, the statute "therefore, 'fits squarely within the term [crime of violence] by requiring the deliberate use of force that injures another.'" *Colon-Arreola*, 753 F.3d at 844-45 (quoting *United States v. Laurico-Yeno*, 590 F.3d 818, 820-22 (9th Cir. 2010)) (alteration in original). The Ninth Circuit's understanding that § 243(c)(2) requires proof of the intentional use of force that results in harm to another was entirely accurate; the problem is that the federal definition of a "crime of violence" that includes the limiting language "against the person of another," as U.S.S.G. § 4B1.2(a)(1) does, requires more. It does not hold individuals strictly liable for injuries that result from their intentional use of force; it instead requires proof that the individual was at least aware that his conduct could harm another. *Leocal*, 543 U.S. at 9-10.

The *Colon-Arreola* court's reliance on *Laurico-Yeno* is revealing. In *Laurico-Yeno*, once again the Ninth Circuit had no problem interpreting California law as far as it went. It correctly understood that a conviction under CPC § 273.5 requires an intentional use of force that results in harm to another (specifically a domestic relation as opposed to a peace officer), and it was precisely "[b]ecause a person cannot be convicted without the intentional use of physical force, [that the Ninth Circuit held] § 273.5 categorically falls within the scope of a 'crime of violence.'" *Id.* at 821. Once again, glaringly absent from the Ninth Circuit's reasoning was any recognition that Congress' inclusion of the limiting phrase "against the person of

another" means that the intentional use of force that happens to result in injury to another is not enough. *Leocal*, 543 U.S. at 9.

By focusing exclusively on the use of force that happens to result in injury to another, the Ninth Circuit in *Laurico-Yeno* and its progeny is performing exactly the truncated analysis that this Court in *Leocal* held was insufficient. *See United States v. Perez*, 932 F.3d 782, 785-87 (9th Cir. 2019) (relying on both *Colon-Arreola* and *Laurico-Yeno* to hold that a battery that happens to result in serious injury to another qualifies a crime of violence that includes the limiting language "against the person of another" simply by virtue of the fact that an individual's intentional conduct caused the injury without any inquiry into whether the individual had any awareness that his conduct could harm another); *Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1084-85 (9th Cir. 2010) (relying on *People v. Jackson*, 77 Cal. App. 4th 574 (2000) for the uncontroversial proposition that CPC § 273.5 requires the "direct application of force," and then extrapolating from that fact that the "direct application of force" "is the equivalent of the 'intentional use of force,'" and then concluding that therefore § 273.5(a) was categorically a crime of violence" *without ever reaching the dispositive issue in Leocal* and asking whether the conviction required proof that when the defendant used force he was aware of the possibility of harming another, which pursuant to the California Supreme Court is unambiguously not an element of the offense); *United States v. Ayala-Nicanor*, 659 F.3d 744, 750-51 (9th Cir. 2011) (reaffirming that "[i]n *Laurico-Yeno*, we held that § 273.5 was a categorical crime of violence *precisely because* the statute requires

intentional use of *physical force that results* in a traumatic condition," once again holding the defendant strictly liable for the resulting injury regardless of his intent) (emphasis added).

The Ninth Circuit's reasoning in *Laurico-Yeno* and its progeny, including *Colon-Arreola*, relied upon by the *Whitehead* court is directly at odds with this Court's instruction in *Leocal* that the "use of force" alone is not dispositive; it matters whether the defendant was aware that he might harm another when he acted. And it should.

What is ultimately at issue in the definition of a crime of violence or violent felony is the interplay between 18 U.S.C. § 3553(a), which mandates that judges consider, among other things, the history and characteristics of the defendant and the need to avoid unwarranted disparities between similarly situated defendants to arrive at a sentence that is sufficient but not greater than necessary to accomplish the penological objectives of sentencing, and statutes such as 18 U.S.C. § 924(c) and (e) that strip sentencing judges of their discretion with respect to a small subset of particularly dangerous individuals for whom there is no viable alternative but a lengthy period of incarceration, regardless of the long-term consequences for the defendant, his family and the next generation. In an attempt to capture that seemingly irredeemable subset of individuals, Congress included the limiting language "against the person of another," to identify those individuals who repeatedly engage in violent conduct with an awareness that that their conduct could harm others such that they are the kind of person who would "use [a] gun

deliberately to harm a victim," *Begay v. United States*, 533 U.S. 137, 145 (2008), as opposed to those individuals whose possession of a firearm represents a danger to the community generally. Congress enacted 18 U.S.C. § 922(g) in combination with § 3553(a) to address the latter concern.

The government is incorrect, therefore, that the resolution of *Borden v. United States* (Case No. 19-5410) is not relevant to the analysis here. BIO at 8. Indeed, the core question presented here was at the heart of the oral argument in *Borden v. United States* (November 3, 2020). Just like in *Borden*, and consistent with the Ninth Circuit, the government here wants to truncate the analysis by focusing just on the intentional act that happened to result in harm without inquiry into whether the defendant was aware that his conduct could result in harm to another. Yet, as Justice Gorsuch, citing *Leocal*, reminded the government, when Congress elects to include the limiting language "against the person of another," it is not enough to simply look at the defendant's conduct and the resulting harm, the critical issue is the defendant's awareness of how his intentional conduct might impact another. *Borden*, No. 19-5410, Tr. of Oral Arg., at 57-59 (Nov. 3, 2020). Because *Borden* will almost certainly address the significance of the limiting language "against the person of another," and whether a defendant must at least be aware that his intentional conduct could result in harm to another, the Court's reasoning in *Borden* will likely be dispositive here.

II. The Fact that the Definitional Language Happens to be Located at U.S.S.G. § 4B1.2(a)(1) Has No Bearing on the Quality of this Case as a Vehicle to Address the Critical Questions Raised.

A. Federal Courts Interchangeably Apply Cases Interpreting the Elements Clause from the Sentencing Guidelines to the Identical Clause from the Armed Career Criminal Act and Vice Versa.

The government's objection to this Court granting Whitehead's petition because the disputed definition appears in the context of the Sentencing Guidelines as opposed to a statute such as the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i), is without merit. BIO, at 6-7. The significance of the limiting language "against the person of another" does not depend on whether said language is used to define a crime of violence under the Sentencing Guidelines or 18 U.S.C. § 924(c) or a violent felony under the ACCA. It is a distinction without a difference as the circuit courts have routinely recognized. As the Ninth Circuit explained just last year,

> The key language in this definition—'the use attempted use, or threatened use of physical force against the person of another'—is used in a number of statutes and Guidelines sections, including 18 U.S.C. § 16(a) (defining 'crime of violence'), the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i) (defining the term 'violent felony'); and U.S.S.G. § 2L1.2 app. 2 (establishing a sentencing enhancement for prior crimes of violence). We are guided by our prior interpretations of this statutory language, regardless of the context in which it appears. *See United States v. Chandler*, 743 F.3d 648, 650 (9th Cir. 2014), *cert. granted*, judgment vacated on other grounds, 135 S. Ct. 2926, 192 L. Ed. 2d 959 (2015) (holding that our analysis of the definition of crime of violence in the Sentencing Guidelines guides our interpretation of 'violent felony' in the ACCA because 'there is no meaningful distinction between the definitions'); *United States v. Narvaez-Gomez*, 489 F.3d 970, 976 (9th Cir. 2007) (holding that 'the relevant definitions under § 16(a) and U.S.S.G. § 2L1.2 are identical'); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1019 (9th Cir. 2006) (stating that § 4B1.2 'is identical in all material

> respects to § 16(a)); *see also United States v. Novak*, 476 F.3d 1041, 1051 (9th Cir. 2007) (en banc) (noting that 'courts generally interpret similar language in different statutes in a like manner when the two statutes address a similar subject matter').

Perez, 932 F.3d, at 785 n.2.

Indeed, the Ninth Circuit recently held that its prior decision in *Laurico-Yeno* that CPC § 273.5 was a crime of violence under the Sentencing Guidelines, foreclosed the argument that the same battery statute did not qualify as a violent felony under the ACCA. *United States v. Walker*, 953 F.3d 577, 579 (9th Cir. 2020) (petition for certiorari pending). The subsequent reliance on precedent in interpreting "against the person of another" in the context of the Guidelines in ACCA cases is hardly surprising given that when the Sentencing Commission added the definition in November 1989, it explicitly stated the "definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e)." U.S. Sentencing Guidelines, App'x C, Vol. I, Amend. 268, Reason for Amendment (effective Nov. 1, 1989). Accordingly, circuit courts routinely rely on their analysis of the definition of a crime of violence under the Guidelines to inform their analysis of what constitutes a violent felony under the ACCA, and vice versa. *See, e.g.*, *United States v. Sykes*, 914 F.3d 615, 620 (8th Cir. 2019) ("The relevant definition of a violent felony under the ACCA and the definition of a crime of violence under the Guidelines are so similar that we generally consider cases interpreting them interchangeably."); *United States v. Evans*, 924 F.3d 21, 29 n.4 (2d Cir. 2019) (same); *United States v. Ochoa*, 941 F.3d 1074 (11th Cir. 2019) (same); *United States v. Abdullah*, 905 F.3d 739, 747 n.11 (3d Cir. 2018) (same); *Snider v. United*

States, 908 F.3d 183, 188-89 (6th Cir. 2018) (same); *United States v. Oliveira*, 907 F.3d 88, 91 (1st Cir. 2018) (same); *United States v. Kendall*, 876 F.3d 1264, 1267 n.3 (10th Cir. 2017) (same); *United States v. Edwards*, 836 F.3d 831, 834 n.2 (7th Cir. 2016) (same); *United States v. Vann*, 660 F.3d 771, 773 n.2 (4th Cir. 2011) (same).

Where the circuit courts are interchangeably relying on the reasoning and precedents from Guideline cases and ACCA cases to define the universe of crimes that have as an element the use, attempted use, or threatened use of physical force against the person of another, the import of this Court's holding on the questions presented here will be the same no matter whether it is a Guidelines case or an ACCA case. Indeed, the government's objection here is disingenuous when in *Borden* it recently argued that "the Sixth Circuit has correctly recognized that "*Voisine*'s analysis applies with equal force" to the elements clauses in the definitions of 'crime of violence' under the Sentencing Guidelines and 'violent felony' under the ACCA." Government's Brief in Opposition, *Borden v. United States*, No. 19-5410, at 7. In other words, by the government's own admission, when it comes to the issue of *mens rea*, the analysis is the same whether the issue arises under the Guidelines or the ACCA.

Moreover, the fact that this is a Guidelines case does not diminish its importance. "[A]n an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than 'necessary' to fulfill the purposes of incarceration," and any jail time "has exceptionally severe consequences for the incarcerated individual

and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (internal quotations and alterations removed). "'[W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?'" *Id.* at 1908 (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (Gorsuch, J.)).

Accordingly, not only is there no need to wait for an ACCA case, in the interests of judicial economy, it would make no sense to do so if this Court were not already considering the issue of whether the limiting language "against the person of another" renders an individual strictly liable for any injury to another that happens to result from his intentional conduct, as the recent oral argument in *Borden* suggests it is.

B. In the Unlikely Event the Sentencing Commission Adopts the Proposed Amendment from 2018, It Would Not Alter the Definition of a "Crime of Violence" In Any Way Relevant to the Analysis Here.

Alternatively, the government argues that because the Sentencing Commission may someday amend U.S.S.G. § 4B1.2, this Court should wait for a different vehicle to answer the urgent questions pertaining to *mens rea* in the context of defining crimes of violence and violent felonies. BIO, at 7. As an initial matter, by statute the Sentencing Commission is comprised of seven voting members and four commissioners are required for a quorum to amend the

guidelines.[1] For the past two years the Commission has had only two voting members and has thus lacked a quorum to propose, let alone amend, the federal sentencing guidelines." Annual Report, at 2-3. It is unclear when the Commission will have a voting quorum, and even less clear that any newly constituted Commission will be interested in passing the amendment proposed in December 2018, particularly where the proposal would permit sentencing judges to review documents for "facts" about a past conviction, the meaning of which "will often be uncertain [a]nd the statements of fact in them. . . downright wrong," *Descamps v. United States*, 570 U.S. 254, 270 (2013), and where "the practical difficulties and potential unfairness of a factual approach are daunting." *Taylor v. United States*, 495 U.S. 575, 601 (1990).

What is clear, however, is that even if the Commission someday acquires a quorum and decides to enact the amendment, the proposed amendment changes nothing about the analysis called for here. The actual proposal would permit courts to "consider the conduct that formed the basis of the conviction, *i.e.*, only the conduct that *met one or more elements* of the offense of conviction or that was an alternative means of meeting *any such element*." 88 FR 65400-01 (December 20, 2018) (emphasis added). The proposal then identifies a limited universe of documents that sentencing judges could mine to determine whether a defendant's actual conduct satisfied the elements of the definition of a crime of violence. *Id.*

[1] U.S. Sentencing Comm'n, Annual Report 2–3, 2018, *available at* https://www.ussc.gov/about/annual-report-2018 [hereinafter "Annual Report"].

In other words, under the proposed amendment the definition of a "crime of violence" will remain identical to that of a "violent felony." Courts will still need to know what *mens rea* to apply to what provision of the definition and whose label characterizing *mens rea* controls.[2] The only thing that changes is what about a past conviction a judge could look at to determine whether said conviction matches the very same definition of a crime of violence at issue here. The exercise of defining *mens rea*, therefore, is as important today as it will be in the unlikely event the Sentencing Commission ever enacts its 2018 proposed amendment.

CONCLUSION

For all the above reasons, together with those presented in the petition, this Court should hold Mr. Whithead's 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*.

[2] As discussed in Whitehead's petition (Petition at 21-26) the Ninth Circuit believes that whatever label a state elects to use to characterize the requisite *mens rea* governs even if the label the state elects to use is clearly contrary to how federal law would characterize the same *mens rea*. That is a proposition the government seemed to reject at oral argument in *Borden*, noting that when it was talking about the *mens rea* of "recklessness," it was "talking about the standard definition of recklessness." *Borden*, No. 19-5410, Tr. of Oral Arg., at 66. Likewise, Justice Kavanaugh appeared to assume that the definition of negligence or recklessness would at least be informed by the Model Penal Code. *Id*. at 61.

Dated: December 14, 2020

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

PEGGY SASSO
Assistant Federal Defender
Eastern District of California
Counsel of Record for Petitioner
2300 Tulare Street, Suite 330
Fresno, CA 93721
(559) 487-5561
peggy_sasso@fd.org