No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

STEVEN GERARD WALKER,

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) Whether a sentencing judge can find facts in the first instance about whether a defendant committed offenses on different occasions by a preponderance of the evidence, and then rely on those judge-found facts to apply the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), thereby increasing a defendant's sentence at least five years beyond the penalty established by Congress for the offense of conviction, being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)?

2) Where the definition of a violent felony under the ACCA includes the limiting language "against the person of another," is that language mere surplusage or must a defendant be more than negligent as to whether his intentional conduct could harm another?

3) Whether, when determining whether a state offense qualifies as a violent felony, 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

Questions Two and Three:

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 argument is set for November 3, 2020.

Additionally, while this case arises under the ACCA and the following two cases arise under U.S.S.G. § 4B1.2, the second two questions presented here are substantively identical to the ones 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).

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (Cont'd)

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (cont'd)

Page

CASES

TABLE OF AUTHORITIES (cont'd)

Page

CASES

TABLE OF AUTHORITIES (cont'd)

Page

CASES

TABLE OF AUTHORITIES (cont'd)

Page

STATUTES

STATE CASES

STATE STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Steven Gerard Walker 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 (1) that a sentencing judge can engage in judicial fact-finding in the first instance and rely on those judge-found facts to substantially increase a defendant's sentence beyond the offense of conviction under the Armed Career Criminal Act ("ACCA") so long as said fact-finding pertains to the issue of whether a defendant has three prior convictions for offenses committed on different occasions, and (2) that domestic battery resulting in minor bodily injury in violation of California Penal Code ("CPC") § 273.5 constitutes a violent felony under the ACCA even though a conviction under § 273.5 does not require proof that when the defendant acted he was even aware that his actions could harm another.

OPINIONS BELOW

On March 20, 2020, the United States Court of Appeals for the Ninth Circuit affirmed the district court's conclusion that Walker's three prior convictions for domestic battery in violation of § 273.5, two of which were sentenced on the same day, were categorically violent felonies under the ACCA, and the Ninth Circuit approved the district court's judicial fact-finding at sentencing to conclude that the convictions were committed on three different occasions. The Ninth Circuit's decision was a published opinion that is reproduced in the appendix to this petition

at B1-B11. Walker filed a petition for rehearing en banc, which the Ninth Circuit denied on June 26, 2020 in the order reproduced in the appendix at A1.

The May 25, 2018 Judgment in a Criminal Case of the United States District Court for the Eastern District of California sentencing Walker to 15 years imprisonment is reproduced in the appendix at C1-C7.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Walker's request for rehearing en banc was filed on June 26, 2020. Appendix at A1. 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 the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), "the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year. . . that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another"

Pursuant to California Penal Code § 273.5:

(a) Any person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b) is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000), or by both that fine and imprisonment.

(b) Subdivision (a) shall apply if the victim is or was one or more of the following:

(1) The offender's spouse or former spouse.

(2) The offender's cohabitant or former cohabitant.
(3) The offender's fiancé or fiancée, or someone with whom the offender has, or previously had, an engagement or dating relationship, as defined in paragraph (10) of subdivision (f) of Section 243.
(4) The mother or father of the offender's child. . . .

(d) As used in this section, "traumatic condition" means a condition of the body, such as a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation, whether of a minor or serious nature, caused by a physical force. . . .

STATEMENT

Walker requests certiorari to provide much needed clarification of this Court's reasoning in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Alleyne v. United States*, 570 U.S. 99 (2013), *Shepard v. United States*, 544 U.S. 13 (2005*), Descamps v. United States*, 570 U.S. 254 (2013), *Mathis v. United States*, 136 S. Ct. 2243 (2016) and *United States v. Haymond*, 139 S. Ct. 2369 (2019), as applied to the determination of whether a defendant has three previous convictions for ACCA predicates that were committed on occasions different from one another, and specifically whether a sentencing judge can make factual findings in the first instance by a preponderance of the evidence to increase an individual's penalty beyond the offense of conviction. (Question One). Additionally, Walker requests certiorari to provide much needed clarification regarding application of this Court's decisions in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and *Johnson v. United States*, 559 U.S. 133 (2010) in the context of determining whether a prior state conviction that only requires proof that a defendant was negligent regarding the possibility that his

intentional conduct could harm another qualifies as a violent felony under the ACCA. (Questions Two and Three).

A. Judicial Fact-Finding Across the Circuits is Serving as the Basis for Imposition of the ACCA.

Notwithstanding the clarity with which this Court has spoken, every circuit court, to varying degrees, continues to be confused about the interplay between *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which means that in the context of the ACCA, sentencing judges across the country are routinely engaging in fact-finding in the first instance by a preponderance of the evidence, and then, as occurred here, relying on those judge found facts to dramatically increase sentences beyond the penalty established by Congress for the offense of conviction. As a result of judicial fact-finding at sentencing, Walker was sentenced to five years in excess of the statutory maximum for the offense of conviction, and he went from the possibility of receiving zero months in custody, to being required to serve at least 15 years solely on the basis of the sentencing judge's findings regarding non-elemental facts about his prior convictions that had never been found by a jury nor necessarily admitted by him.

Recently this Court cited to both *Apprendi* and *Alleyne* for "the historic rule that a jury must find *all* of the facts necessary to authorize a judicial punishment," recognizing that the "promise that only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty stands as one of the Constitution's most vital protections against arbitrary government." *Haymond*, 139 S. Ct. at 2373, 2381

(internal quotations omitted) (emphasis in original). Given that the right to trial by jury is "the heart and lungs, the mainspring and the center well of our liberties, without which the body must die," this Court has never carved out an exception to the historic rule that "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Id.* at 2375-76 (internal quotations omitted).

The only exception this Court recognized in *Apprendi* is one of *timing*—so long as a fact was necessarily found by a jury beyond a reasonable doubt in a prior case, a sentencing judge in a subsequent case can rely on that jury-found fact to increase an individual's sentence beyond that authorized by the offense of conviction. On the flip side, where a fact was not an element of a prior conviction, a sentencing judge cannot engage in fact-finding in the first instance and then use that fact to increase a statutory maximum or mandatory minimum—a sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 136 S. Ct. at 2252.

That seems remarkably straightforward, yet every circuit court is getting it wrong in the context of the ACCA by permitting sentencing judges to find non-elemental facts in the first instance about a defendant's prior convictions, and to use said facts to aggravate the defendant's possible sentence from a maximum of 10 years to a minimum of 15 years in custody. The inquiry into whether three prior convictions were "committed on occasions different from one another" is not an

inquiry that is limited to "what crime, with what elements, the defendant was convicted of." *Mathis*, 136 S. Ct. at 2252. It is not an inquiry into what "the prosecution must prove to sustain a conviction." *Id.* at 2248. Instead, it is an inquiry into "real-world things," the determination of which in most, if not all, cases requires the sentencing judge to "go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense." *Id.* at 2248, 2252.

While the inquiry may differ cosmetically across the circuits, as a general rule, the inquiry "requires closely examining what [a defendant] did to commit each offense, when and where he did it, and what he did in between. The court must then weigh at least three factors—the timing, location, and overall substantive continuity of the crimes, plus whatever else might be relevant in a particular case." *United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring) (internal quotations omitted). *See, e.g.*, *United States v. Hennessee*, 932 F.3d 437, 443 (6th Cir. 2019) (explicitly acknowledging that where the "facts relevant to the different-occasions inquiry, such as the time and location of the prior offense, are most often not elements of the offense, a proceeding to answer the different-occasions question may well be more extensive than one to answer the ACCA-predicate question"); *United States v. Bordeaux*, 886 F.3d 189, 196 (2d Cir. 2018) (determining whether a defendant committed his convictions on three different occasions requires the sentencing judge to determine whether the "multiple crimes [are] separated by substantial effort and reflection," which requires the court to

consider "not only whether a defendant has committed different crimes at different times, but also the other circumstances of the crimes, such as whether the defendant committed the crimes against different victims and whether the defendant committed the crimes by going to the effort of traveling from one area to another"); *United States v. McCloud*, 818 F.3d 591, 595 (11th Cir. 2016) (a crime is committed on different occasions for purposes of the ACCA if the sentencing judge determines "the defendant had a meaningful opportunity to desist activity before committing the second offense and the crimes reflect distinct aggressions") (internal quotations and alterations omitted); *United States v. Span*, 789 F.3d 320, 328 (4th Cir. 2015) (determining whether three convictions were committed on separate occasions requires consideration of "(1) whether the offenses arose in different geographic locations; (2) whether the nature of each offense was substantively different; (3) whether each offense involved different victims; (4) whether each offense involved different criminal objectives; and (5) whether the defendant had the opportunity after committing the first-in-time offense to make a conscious and knowing decision to engage in the next-in-time offense"); *United States v. Elliott*, 703 F.3d 378, 381-82 (7th Cir. 2012) (acknowledging, without concern, that the inquiry into whether convictions were committed on different occasions "is a question that looks beyond the fact of a prior conviction. . . and for that matter beyond the elements essential to that conviction," and requires inquiry into matters such as "the times and dates, places, and victims of those crimes") (internal quotations omitted).

Not surprisingly, as a practical matter when sentencing judges attempt to address the inquiries set forth in the preceding paragraph they can engage in some rather extensive fact-finding in the first instance, with the imposition of the ACCA hanging in the balance. *See, e.g.*, *Bordeaux*, 886 F.3d at 196-97 (where three robberies all occurred within in the span of one hour, the court held that "the time lapse and the distances [between the robberies, which were "a little less and a little more than one-half mile"] provided [the defendant] an opportunity to reflect and change course, if he had wanted to do so," seemingly oblivious to issues that might impact one's capacity "to reflect and change course" such as mental health or intoxication); *Perry*, 908 F.3d at 1131-32 (where the defendant committed an assault at the checkout counter of a gas station and then "ran some distance" but "did not get far," the court held it was far enough such that in its opinion the defendant "had time after he left the gas station to choose to give up, or at least try to escape," and thus, the assault outside the gas station was committed on a different occasion from the one inside the gas station); *United States v. Morris*, 293 F.3d 1010, 1014 (7th Cir. 2002) (relying on non-elemental facts to determine that the defendant drove away after firing a shot and then drove back shortly thereafter to fire more shots, which, according to the court, meant he had the opportunity to decide whether to drive back and thus the offenses occurred on different occasions); *United States v. Phillips*, 149 F.3d 1026, 1030 (9th Cir. 1998) (relying on evidence provided by the government at sentencing, the district court found that two burglaries committed on the same night occurred in "separate structures, had

different addresses, had separate access, and were owned by different individuals," and thus were committed on different occasions); *United States v. Hamell*, 3 F.3d 1187, 1191 (8th Cir. 1993) (relying on non-elemental facts to find that two assaults committed "within minutes of each other" were committed on different occasions because one assault involved a knife and the other a gun, and one was inside the tavern and the other outside the tavern and because the assaults "had different motivations").

Surely, when a sentencing judge, in answering the different-occasions question, becomes the trier of fact regarding the when, where, how and why the offense was committed, that procedure raises the very constitutional concerns identified by this Court in *Apprendi*, *Alleyne*, *Shepard*, *Descamps*, *Mathis* and *Haymond*. When a sentencing court is sifting through the record to determine what a defendant did and when and why he did it, it makes no difference under the Fifth and Sixth Amendments if it is to determine whether a prior conviction is a violent felony or whether a defendant committed offenses on three different occasions. In either case the sentencing judge is relying on facts that have never been found by a jury beyond a reasonable doubt to increase the maximum penalty, which is exactly what this Court has said it cannot do—"rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Descamps*, 570 U.S. at 270.

Yet, notwithstanding the fact that this Court has left more than a few breadcrumbs along way, just like the Ninth Circuit did here, the circuit courts have

made it clear that they do not intend to reverse course and prohibit sentencing judges from relying on non-elemental facts about a defendant's prior convictions to increase the defendant's sentence beyond the offense of conviction until this Court addresses the issue directly. *Walker*, 953 F.3d at 581 (internal quotations and alterations omitted) (while acknowledging that there is "some tension between stray statements in *Mathis*," and the practice of sentencing judges making factual findings in the first instance to increase a defendant's sentence over the statutory maximum for the charged offense, the Ninth Circuit concluded that this Court has not made it "clear" that its "disfavor of factual determinations by sentencing judges" extends beyond simply determining whether an individual has three predicate convictions); *see, e.g.*, *Span*, 789 F.3d at 331-32 (recognizing that its "precedent permits a sentencing court's dive into *Shepard*-approved documents to sort out the facts of the underlying predicate conviction, not just its elements," the Fourth Circuit ultimately concluded that this "Court's statements in *Descamps*, while foreboding, will most likely be confined to identification of a violent felony under the categorical approach to the ACCA," and thus sentencing judges should continue to engage in fact-finding in the first instance of non-elemental facts about a prior conviction to increase the penalty beyond the offense of conviction); *Elliott*, 703 F.3d at 383 (announcing that "unless and until the Supreme Court overrules *Almendarez-Torres* or confines its holding solely to the fact of a prior conviction, as opposed to the nature and/or sequence of a defendant's prior crimes, [in the Seventh Circuit] a district judge properly may make the findings required by the ACCA");

United States v. Hollie, No. 18-13060, 2020 U.S. App. LEXIS 19634, at *11-12 (11th Cir. 2020) (unpub) (rejecting the notion that *Mathis* clearly limited a sentencing judge's ability to find non-elemental facts necessary to the application of the ACCA so long as the sentencing judge was engaged in fact finding regarding whether the offenses were committed on different occasions).

Absent clarification from this Court, the Sixth Amendment's promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury" and the Fifth Amendment's promise that no one shall be deprived of liberty without "due process of law," are merely illusory for defendants such as Walker whose sentence is not limited by a jury's factual findings, but instead dramatically increased beyond the offense of conviction based on a sentencing judge's subjective balancing of non-elemental facts concerning the when, where, how and why a prior offense was committed.

B. Across the Circuits There is No Consistency Regarding Whether a Violent Felony Requires Proof that When a Defendant Intentionally Acted, He Was More Than Merely Negligent Regarding the Possibility that His Conduct Could Harm Another.

Not only is the Ninth Circuit's implementation of the different-occasions analysis at issue here, so too is its application of this Court's precedents to the determination of whether a prior conviction qualifies as a violent felony.

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,[1] 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,

[1] *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).

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 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, and asking simply whether the conviction establishes that the defendant's intentional conduct resulted in injury to another. *Walker*, 953 F.3d at 579. That reasoning is directly at odds with *Leocal* where the defendant intentionally engaged in conduct that *resulted* in serious bodily injury to another, but because he was not aware that his intentional conduct could harm another, his prior conviction did not qualify as a crime of violence. An individual can be convicted of violating CPC § 273.5 with the same lack of awareness that his intentional conduct could harm another as the defendant in *Leocal*, *see, e.g.*, *People v. Williams*, 26 Cal. 4th 779, 788; (2001); *People v. Hayes*, 142 Cal. App. 4th 175, 180 (2006), but because the Ninth Circuit considered only whether the prior conviction involved intentional conduct, it held that Walker's convictions for violating § 273.5 were violent felonies.

Stripping federal judges of their sentencing discretion and subjecting individuals to at least fifteen years in federal prison on the fortuity of whether an

individual happens to sustain a minor injury as a result of the defendant's past conduct, irrespective of his intent to harm anyone, is an extremely unprincipled basis for imposing ACCA's draconian sentences, and, not surprisingly, it is at odds with this Court's jurisprudence. *Leocal*, 543 U.S. at 9-10 (instructing that the inquiry is not whether a defendant acted intentionally and in so doing put others in harm's way, but rather when the defendant intentionally acted, was he necessarily aware that his conduct could harm another?). Unfortunately, the Ninth Circuit is not alone—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). Clarification is needed from this Court.

The consequences here viewed from either the individual perspective or the systematic level are substantial. Walker's exposure for being a felon in possession of a firearm—the offense he actually pled to—was capped at a statutory maximum of ten years, and without application of the ACCA, Walker's guideline range was 77-96 months. Based on its determination, however, that Walker's three prior convictions for violating CPC § 273.5 were violent felonies that were committed on occasions different from one another, the district court enhanced Walker's sentence under § 924(e), thereby subjecting Walker to a mandatory minimum of 15 years in custody. Certiorari is necessary to ensure that federal judges are not subjecting individuals to years of additional incarceration beyond the offense of conviction on

the basis of judicial fact-finding by a preponderance of the evidence and by classifying as "violent felonies," 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.

C. Facts and Procedural History.

On June 23, 2016, the government charged Walker with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Walker pled guilty to the one-count indictment without a plea agreement. As part of the plea colloquy, Walker pled guilty to having been convicted of one crime punishable by more than a year imprisonment; he did not admit to having multiple prior felonies let alone to committing offenses on occasions different from one another.

In advance of sentencing, probation prepared a Presentence Report ("PSR") and attached three California abstract of judgments indicating that Walker had three prior convictions for violating CPC § 273.5, with two of those convictions sentenced on the same day, February 29, 2000. Beyond a box on one that read "98" and box on the other that read "99," the abstracts of judgements did not indicate when the offenses were allegedly committed, only when the convictions were secured. Notably, the completion of California abstracts is a clerical, not a judicial function and "in California, appellate courts routinely grant requests on appeal of the Attorney General to correct errors in the abstract of judgment." *United States v. Navidad-Marcos*, 367 F.3d 903, 909 (9th Cir. 2004) (internal quotation omitted).

At sentencing, Walker argued that there were no jury found facts or admissions by him that authorized the court to sentence him above the 10-year statutory maximum, and thus it would violate *Apprendi v. New Jersey* if the judge were to find facts in the first instance based on information it gleaned from the abstracts of judgments, and use those facts to sentence him under the ACCA. Walker also argued that CPC § 273.5 did not qualify as a violent felony, and thus he did not have any qualifying ACCA predicates, let alone have three predicate convictions that were committed on different occasions. The sentencing judge explicitly overruled both of Walker's objections, and concluded that Walker's three prior convictions for CPC § 273.5 were violent felonies and found, by reviewing abstract of judgments submitted at sentencing, that the three convictions were committed on different occasions.

Walker timely challenged the district court's rulings, arguing in the Ninth Circuit that (1) it was for the federal court, not the state court, to define the *mens rea* of negligence in the context of ACCA, and because a conviction under CPC § 273.5 does not require proof that when the defendant acted he was aware that his conduct could harm another, he did not have any convictions for a qualifying ACCA predicate, and (2) where the government never proved at trial, and Walker never admitted, facts to establish that he had three prior convictions for crimes committed on different occasions, the maximum sentence that he could have received consistent with the Fifth and Sixth Amendments was ten years under 18 U.S.C. § 924(a)(2). The Ninth Circuit rejected both of Walker's arguments, reasoning that

where a conviction for battery establishes that an individual intentionally engaged in conduct that happens to result in harm to another, the offense qualifies as a violent felony, and thus it makes no difference that the California Supreme Court has repeatedly held that a conviction for assault and battery will be sustained even if an individual honestly believed his conduct would not harm another. *Walker*, 953 F.3d at 579. The Ninth Circuit also reasoned that notwithstanding *Mathis* and *Descamps*, sentencing judges can engage in judicial fact-finding at sentencing to increase the penalty for a violation of 18 U.S.C. § 922(g) beyond the statutory maximum so long as the judge confines his fact-finding to the issue of whether the defendant committed three qualifying convictions on different occasions. *Id.* at 581-82. The Ninth Circuit rejected Walker's request to consider the matter en banc. Appendix at A1.

REASONS FOR GRANTING THE WRIT

A. Given the Remarkable Parallels Between the Reasoning of the Ninth Circuit Decision this Court Struck Down in *Descamps*, and the Ninth Circuit's Reasoning Here, this Case Provides a Particularly Compelling Vehicle for this Court to Clarify that Sentencing Judges May Not Engage in Non-Elemental Fact-Finding to Increase a Penalty Beyond the Offense of Conviction—Period.

Inexplicably, in light of what seems to be clear direction from this Court, when it comes to the ACCA, circuit courts across the country are still permitting sentencing judges to make factual findings in the first instance, by a preponderance of the evidence standard, to increase an individual's sentence by a minimum of least

five years beyond the ten-year statutory maximum Congress authorized for a conviction in violation of 18 U.S.C. § 922(g). *See, e.g.*, *United States v. Perry*, 908 F.3d 1126, 1135 (8th Cir. 2018) (Stras, J., concurring) (observing that "most courts, even after *Alleyne*, *Descamps*, and *Mathis*, assign judges the role of finding even more facts—including the timing, location, and nature of multiple convictions—in search of an answer to the vexing different-occasions question"). "Inertia may be part of the explanation."[2] *Id.* As is the case here, "[s]ometimes courts just continue along the same well-trodden path even in the face of clear signs to turn around." *Id.*

This should not be complicated. Where "a judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct," "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Haymond*, 139 S. Ct. at 2375-76 (internal quotations omitted). It seems clear, therefore, that any fact being used by a sentencing judge to increase a defendant's sentence beyond the offense of conviction must have been found a jury beyond a reasonable doubt at some point in time. Courts may not "evade this traditional restraint on the judicial power by simply calling the process of finding facts and

[2] To be sure, Judge Stras is not alone in calling for action. *See, e.g.*, *Perry*, 908 F.3d at 1137 (Kelly, J., concurring) (noting that *Shepard* documents are of limited value to a sentencing court tasked with determining whether three offenses occurred on different occasions because "judicial factfinding of non-elemental facts appears to conflict with Supreme Court precedent") (internal quotations omitted); *United States v. Hennesssee*, 932 F.3d 437, 446, 449 (6th Cir. 2019) (Cole, J., dissenting) (chastising his colleagues for upholding an ACCA sentence premised on judge-found non-elemental facts*); United States v. Starks*, No. 18-5309, 2019 U.S. App. LEXIS 24727, *4 (6th Cir. 2019) (unpub) (Merritt, J., concurring) (agreeing with Chief Judge Cole's dissent in *Hennessee*).

imposing a new punishment a judicial 'sentencing enhancement,'" or a recidivist exception. *Id.* at 2377. Yet that is what the circuit courts continue to do, and will continue to do, until this Court provides the needed clarity.

Given the striking parallels between the Ninth Circuit's decision at issue here, and the Ninth Circuit's decision in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (2011) (en banc) that this Court struck down in *Descamps*, this case provides a particularly compelling vehicle for this Court to make crystal clear "that when the Court had earlier said (and said and said) 'elements,' it meant just that and nothing else." *Mathis*, 136 S. Ct. at 2255. When using the fact of a prior conviction to enhance a defendant's sentence beyond that proscribed by the offense of conviction, it should make no difference whether said fact is being used to ascertain whether a prior conviction is a qualifying predicate or whether two convictions were committed on different occasions. *Id.* The Ninth Circuit got it wrong in *Aguila-Montes*, and it engaged in exactly the same flawed legal reasoning here.

In *Aguila-Montes*, the Ninth Circuit had reasoned that so long as facts about a prior conviction "are discernable from the limited set of documents approved in *Shepard*," a sentencing judge could use those facts, even if their veracity had never been established by a jury beyond a reasonable doubt subject to the constitutional safeguards that govern a trial, to enhance a defendant's sentence beyond the offense of conviction. *Aguila-Montes*, 655 F.3d at 937. The Ninth Circuit took great comfort in its foray into non-elemental fact finding to enhance both the mandatory

minimum and statutory maximum because it had "little difficulty" finding said facts in some *Shepard*-approved documents, and thus it was of no matter that the "facts" it was finding had never been found by a jury or necessarily admitted by the defendant as an element of the offense. *Id.* at 927. The Ninth Circuit acknowledged that this Court had previously issued decisions that could be read for the proposition that a sentencing judge could look to *Shepard* documents only to determine which elements of an offense a defendant had been convicted of if a statute was comprised of disparate elements, but dismissed this Court's reasoning as simply "dicta" because this Court had not considered the issue it was considering—endorsing a sentencing judge's reliance on non-elemental facts about a prior conviction to enhance the penalty under the ACCA beyond that established by Congress for the offense of conviction. *Id.* at 928, 931.

Not surprisingly, this Court chastised the Ninth Circuit for its complete disregard of the Sixth Amendment, which, as this Court has repeatedly explained, requires that "'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Descamps*, 570 U.S. at 269 (quoting *Apprendi*, 530 U.S. at 490) (alteration omitted). As this Court reiterated, the only facts about a prior conviction that a "court can be sure the [prior] jury so found are those constituting the elements of the offense," and thus those are the only facts about a prior conviction that, consistent with the Sixth Amendment, a subsequent court can use as the basis for increasing an individual's sentence beyond the

maximum proscribed by the offense of conviction. *Id.* at 269-70. Indeed, as this Court pointed out, it would make no sense for a subsequent court to rely on a non-elemental "fact" it unearthed just because said fact was found in a *Shepard*-approved document given that "the statements of fact in them may be downright wrong," where a defendant "often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to." *Id.* at 270. The issue is not whether the documents are "reliable materials," but whether the facts contained therein were found by a jury beyond a reasonable doubt. *Id.* at 265-66. Only those facts about a prior conviction that have been previously found to be true beyond a reasonable doubt satisfy *Apprendi* and the Sixth Amendment. In other words, in rummaging through *Shepard* documents to find non-elemental facts about a prior conviction, the Ninth Circuit "did just what [this Court has] said it cannot: rely on its own finding about a non-element fact to increase a defendant's maximum sentence." *Id.* at 270.

The Ninth Circuit has just done it again. "Dismissing everything [this Court has] said on the subject as lacking conclusive weight," here the Ninth Circuit once again rummaged through documents to find non-elemental facts and used said facts as the basis for substantially increasing Walker's penalty beyond the ten years authorized by his conviction for violating § 922(g). *Descamps*, 570 U.S. at 265 (internal alterations omitted). "[I]n this case, that meant Mr. [Walker] faced a minimum of [fifteen] years in prison instead of as little as none." *Haymond*, 139 S. Ct. at 2378.

Just like in *Aguila-Montes*, the Ninth Circuit took great solace that, at least in Walker's case, the non-elemental facts that it wanted to rely on were easy to find based on its review of some "certified judgments."[3] *Walker*, 953 F.3d at 581. It gave the Ninth Circuit no pause that this Court has clearly stated that when it comes to non-elemental facts, "[f]ind them or not, by examining the record or anything else, a court still may not use them to enhance a sentence." *Mathis*, 136 S. Ct. at 2253. That wasn't clear enough for the Ninth Circuit. *Walker*, 953 F.3d at 581 (opining that it is still "not clear whether and how" this Court's "disfavor of factual determinations by sentencing judges" "extends beyond determining that a given state-law crime is an ACCA predicate").

Putting aside for the moment the constitutional infirmity of the Ninth Circuit's reasoning, it strains credibility that when this Court said a sentencing judge cannot engage in fact-finding in the first instance to enhance a defendant's sentence under the ACCA because non-elemental facts are "prone to error because their proof is unnecessary to a conviction," *Mathis*, 136 S. Ct. at 2253, that what this Court really meant to say is that it is okay to use those "error prone" facts to enhance a sentence under the ACCA so long as the judge is doing so for the purpose of determining whether three offenses were committed on three different occasions.

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[3] For purposes of this exercise, we can assume that the California abstract of judgments upon which the Ninth Circuit relied qualify as *Shepard* documents. The Ninth Circuit thinks they do. *Chuen Piu Kwong v. Holder*, 671 F.3d 872, 880 (9th Cir. 2011) The Fifth Circuit disagrees. *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 357 (5th Cir. 2005) (relying on the fact that the creation of the abstract is a clerical rather than a judicial function and does not control if different from the actual judgment imposed by the court).

But, because this Court has not explicitly addressed the issue of using non-elemental facts to increase an individual's sentence under the ACCA when it comes to determining whether three convictions were committed on different occasions, just like in *Aguila-Montes*, the Ninth Circuit held sentencing courts were free to sift through *Shepard* documents and make factual findings in the first instance to increase an individual's penalty beyond the offense of conviction. *Walker*, 953 F.3d at 581. And, once again, "there's the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Descamps*, 570 U.S. at 269-70.

"Yet again, the Ninth Circuit's ruling flouts [this Court's] reasoning. . . by extending judicial factfinding beyond the recognition of a prior conviction." *Descamps*, 570 U.S. at 269. "The approach the Court rejected in *Descamps* is not meaningfully different from using *Shepard* documents to make the different-occasions determination. Both call for sifting through record materials for evidence of what a defendant actually did, either to determine whether it fits the definition of a violent felony. . . or to determine if two or more crimes were committed on different occasions." *Perry*, 908 F.3d at 1136 (Stras, J., concurring). If one violates the Constitution, so does the other.

Yet, as clear as all that seems, the Ninth Circuit is not only not alone here; all of the circuit courts are doing the same thing. Across the board, the circuit

courts reason that the "exception" that this Court recognized in *Apprendi* means that sentencing judges are permitted to rely on non-elemental facts about a prior conviction that they find in the first instance by a preponderance of the evidence to increase an individual's penalty under the ACCA so long as they find said fact in a *Shepard* approved document and they do not use said fact to determine whether the prior conviction qualifies as an ACCA predicate. *See, e.g.*, *United States v. Bordeaux*, 886 F.3d 189, 196-97 (2d Cir. 2018) (confirming that when applying the ACCA's "criminal-episode standard" sentencing judges can examine non-elemental "facts" about a conviction to determine whether a "defendant had a realistic opportunity for substantial reflection between offenses," so long as those "facts" are contained in *Shepard* documents); *United States v. Blair*, 734 F.3d 218, 227 (3d Cir. 2013) (rejecting the suggestion that *Descamps* had anything relevant to say when it comes to sentencing judges finding non-elemental facts in the first instance to determine whether offenses occurred on different occasions, opining that if this Court had "meant to say that all details related to prior convictions are beyond judicial notice, it would have said so plainly"); *United States v. Span*, 789 F.3d 320, 326-27, 330 (4th Cir. 2015) (likewise rejecting the notion that *Descamps* restricts a sentencing judge's ability to engage in fact-finding in the first instance to determine if prior convictions were committed on different occasions, holding instead that "a district court faced with inconsistent evidence may look to secondary sources. . . to engage in fact-finding in a routine and conscientious sense") (internal quotations omitted); *United States v. Fuller*, 453 F.3d 274, 279-80 (5th Cir. 2006) (because the

court was not able to find sufficient "facts" in the "*Shepard*-approved material" in the record to determine whether two robberies were committed on different occasions, the court vacated the defendant's sentence under the ACCA); *United States v. Hennessee*, 932 F.3d 437, 442-43 (6th Cir. 2019) (citing the Second, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits for the proposition that there is "no limitation on a sentencing court's consideration of non-elemental facts contained within *Shepard* documents" to "identify the who, when, and where of the prior offenses") (internal quotations omitted); *United States v. Elliott*, 703 F.3d 378, 381 (7th Cir. 2012) (explaining that because determining whether offenses occurred on different occasions pertains to "recidivism," it is "a sentencing factor that may be found by the sentencing judge, even when [it] increases the statutory maximum penalty to when the defendant is exposed"); *United States v. Wainwright*, 807 F. App'x 601, 602 (8th Cir. 2020) (unpub) (rejecting the defendant's Sixth Amendment argument that any fact relied upon a judge to alter the legally prescribed punishment must have been found by a jury, the court cited *United States v. Evans*, 738 F.3d 935, 936-37 (8th Cir. 2014) for the proposition "that whether prior offenses were committed on different occasions is among the recidivism-related facts that may be determined by a district court at sentencing"); *United States v. Harris*, 447 F.3d 1300, 1304 (10th Cir. 2006) (opining that "the separateness of prior crimes is inherent in the fact of conviction," and because the "time, place and substance of the prior convictions can ordinarily be ascertained from court records," a sentencing judge can make said factual findings in deciding whether to apply the ACCA);

United States v. Sneed, 600 F.3d 1326, 1333 (11th Cir. 2010) (explaining that based on its reading of *Shepard*, a sentencing judge can make factual findings "about the nature of a prior conviction" when those facts are contained in "*Shepard*-approved sources" to "avoid constitutional concerns");[4] *United States v. Thomas*, 572 F.3d 945, 950 (D.C. Cir. 2009) (permitting the sentencing court to make factual findings in the first instance as to whether two offenses were committed on different occasions based on evidence the government produced at sentencing).

In other words, the circuit courts are deeply entrenched in doing exactly what this Court has said over and over again they cannot do—permit sentencing courts to make factual findings in the first instance by a preponderance of the evidence to increase an individual's sentence beyond the offense of conviction. The confusion appears to arise from a misunderstanding regarding the exception this Court recognized in *Apprendi*, which courts have mistakenly come to refer to as the "recidivism exception" that allows sentencing courts to sift through *Shepard* approved documents at sentencing and rely on information contained therein that has never been found by a jury or necessarily admitted by a defendant, and thus could be downright wrong, to substantially enhance an individual's sentence beyond that permitted for the offense of conviction. It seems to follow from *Descamps*, *Mathis* and *Haymond*, that there is no "recidivism exception" to the requirement that before a sentencing judge can rely on any fact that increases the statutory

[4] The Eleventh Circuit also permits sentencing judges to make factual findings of disputed issues in a Presentence Report so long as "'the Government establishes the disputed facts by a preponderance of the evidence.'" *United States v. Simmons*, No. 19-12841, 2020 U.S. App. LEXIS 21962, at *6 (11th Cir. 2020) (unpub) (quoting *McCloud*, 818 F.3d at 595-96).

maximum or mandatory minimum beyond what is authorized by the offense of conviction, that fact must have been found by a jury or admitted by a defendant. Given the uncanny parallels between *Walker* and *Aguila-Montes*, this case provides an excellent vehicle for this Court to provide the much needed clarification.

B. Where California has Two Domestic Battery Statutes, the Application of Which Depends Solely on Whether a Defendant's Intentional Conduct Happens to Result in an Injury to Another, this Case Provides an Excellent 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.

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." *People v. Williams*, 26 Cal. 4th 779, 788 (2001); *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"). Indeed, in affirming a conviction under CPC § 273a(b)

where the defendant wound up killing his young son by wrestling with him too aggressively, the California Supreme Court explained that it did not matter that the defendant was not aware that his conduct could injure his son because "the requisite *mens rea* may be found even when the defendant honestly believes his act is not likely to result in such injury." *People v. Wyatt*, 48 Cal. 4th 776, 781 (2010).

In the context of domestic battery, California, therefore, draws a distinction not between different degrees of intent, but between situations where a defendant's intentional conduct happens to result in an injury to another (CPC § 273.5), and those where no injury results (CPC § 243(e)). One is a violent felony in the Ninth Circuit, and the other is not. *Compare Walker*, 953 F.3d at 579 with *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1020 (9th Cir. 2006). In other words, the Ninth Circuit is imposing the substantial sentencing enhancement under the ACCA arbitrarily based on circumstances that may have been out of the defendant's control when he acted.

For example, in *People v. Jackson* the defendant pushed the victim into a car and when the victim turned to run, she fell and sustained injuries. 77 Cal. App. 4th 574, 576 (2000). At trial the defendant was convicted of violating CPC § 273.5, but on appeal the court reduced the conviction to § 243(e) because the victim's injury was not the direct result of being pushed into a car by the defendant. *Id.* at 575.

By way of comparison, in *People v. Camarago*, the defendant also pushed his girlfriend, but unfortunately for Camarago, there was no car to break his

girlfriend's fall. Instead, his girlfriend "stumbled backwards and fell down," hurting her wrist as she attempted to break the fall. *Camarago*, H021791, 2003 Cal. App. Unpub. LEXIS 1501, at *5-6 (2003) (unpub). The defendant argued that he had no intent to harm his girlfriend, he was just trying to stop her from leaving when she was under the influence of PCP. *Id.* at 2-3, 5, 8. The court held that whether the defendant intended to harm his girlfriend was irrelevant; "the only intent necessary for defendant's crimes was that he intends to do the act, *i.e.*, the pushing," and because the act happened to result in his girlfriend getting injured, Camarago was therefore guilty of violating § 273.5. *Id.* at 10-11.

Similarly, in *People v. Dennis*, the defendant was convicted of violating § 273.5 where the victim's acrylic fingernail broke while the defendant tried to grab her cellphone. *Dennis*, D044201, 2005 Cal. App. Unpub. LEXIS 4577, at *3-4 (2005) (unpub). Based on the evidence at trial it was unclear whether the defendant had affirmatively pulled off the victim's thumbnail or whether it had simply broken in the struggle for the cellphone. *Id.* at 11. The court held, however, that the ambiguity did not matter – "in either scenario Dennis was in direct physical contact with [the victim]," and because it was indisputable that it was the defendant's intentional conduct that caused the injury to the victim's acrylic nail, that was sufficient to sustain a conviction under § 273.5. *Id.* at 11-12. It did not matter whether he had any awareness that his actions could result in physical injury to the victim, let alone any intent to physically harm the victim. *Id.* at 18. Of course, if the victim's acrylic nail had not broken when the defendant attempted to grab the

cell phone, there would have been no injury, and the defendant could not have been convicted under § 273.5. *See, e.g.*, *People v. M.V.*, B208478, 2009 Cal. App. Unpub. LEXIS 2326 (2009) (even though in the process of violently grabbing his son away from the arms of his son's mother, the defendant pushed the mother, because the mother was able to maintain her balance and was not injured, the defendant was convicted of § 243(e) battery instead of § 273.5 battery).

Surely it cannot be the rule that whether a defendant is subject to the draconian sentencing provisions of the ACCA hinges on whether an individual in the past stumbled and fell and injured themselves when they were the victim of a battery by a domestic partner. Yet that is exactly what the Ninth Circuit is doing when it looks simply to whether a defendant intentionally engaged in forceful conduct, and not to whether the prior conviction establishes that when the defendant acted he did so with at least an awareness that his conduct could harm another. *Walker*, 953 F.3d at 579. The fact that a defendant intentionally engaged in conduct that inadvertently harmed another does not stand for the proposition "that the offender is the kind of person who might deliberately point the gun and pull the trigger," *Begay v. United States*, 553 U.S. 137, 146 (2008), overruled on other grounds by *Johnson v. United States*, 135 S. Ct. 2551, 2558-59 (2015).

Not surprisingly, the Ninth Circuit's reasoning, which omits from the analysis the limiting language "against the person of another" is directly at odds with this Court's decision in *Leocal*. When the requisite definition of a crime of violence or violent felony includes the limiting language "against the person of

another," 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? *Leocal*, 543 U.S. at 9. 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). The analysis is different, however, when the narrowing language "against the person or property of another" is added. *Leocal*, 543 U.S. at 9. *See, e.g.*, *United States v. Harper*, 875 F.3d 329, 331 (6th Cir. 2017) (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 at issue is substantively different when it "requires 'the use . . . of physical force *against the person of another*'") (emphasis in original).

Certainly, from a public policy perspective it may make sense that liability for domestic battery 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. 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 appreciated the harm he was exposing others to, 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.

Given that domestic battery in California, either with or without a resulting injury, does not require a defendant to have been aware that his conduct could harm another, but the Ninth Circuit is treating one as a violent felony while recognizing that the other is not, this case provides an excellent vehicle for this Court to confirm that 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. When decades of an individual's life can hang in the balance, the inconsistent application of the ACCA in cases where a defendant's priors do not necessarily establish that when he acted he was anything but negligent about whether his conduct could harm another, undermines confidence in the criminal justice system.

C. This Case Also Provides Another Vehicle for this Court to Confirm that it is the Role of Federal, Not State, Judges to Define the Terms, Including the *Mens Rea*, that Establish the Scope of a "Violent Felony" Under the ACCA.

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, the result still would have been the same because, just like in *Smith v. United States,* Case No. 19-5727 and *Perez v. United States,* Case No. 19-5749, petitions for certiorari currently pending before this Court, in the Ninth Circuit, whether a defendant is subject to the draconian sentencing enhancements under § 924(e) is at the mercy of how a *state* defines criminal negligence.

The California Supreme Court has clearly articulated the substance of the *mens rea* required for the government to secure a conviction under CPC § 273.5, 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*. Specifically, notwithstanding the fact that this Court has clarified that when a criminal statute, such as California's assault and battery statutes, 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 v. United States*, 135 S. Ct. 2001, 2011 (2015), the Ninth Circuit has decided that it

is bound by the California Supreme Court's decision to label said *mens rea* as something greater than negligence. *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1067, 1067 n.5 (9th Cir. 2018) (dismissing *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"). In this case, the Ninth Circuit simply ignored the defendant's argument, failing to even acknowledge that in *Williams* and *Wyatt* the California Supreme Court substantively defined the *mens rea* for California assault and battery in a matter identical to this Court's definition of criminal negligence in *Elonis*.

Surely when this Court established in *Leocal* 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 what constitutes a violent felony under the ACCA. *Taylor v. United States*, 495 U.S. 575, 582 (1990). Yet that is what is happening in the Ninth Circuit.

Pursuant to *Johnson*, however, 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." *Johnson*, 559 U.S. at 138. 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.

D. *Borden v. United States* (Case No. 19-5410).

The question presented in *Borden v. United States* (Case No. 19-5410) (cert. granted) is whether the definition of a violent felony under the ACCA requires proof of the use of force against another can be satisfied with a *mens rea* of recklessness. The issue here is negligence, not recklessness, but it is possible that this Court's reasoning in *Borden* will be dispositive with respect to Question Two. 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.

This Court granted the petition for certiorari in *Borden* on March 2, 2020, and the case is set for argument on November 3, 2020.

CONCLUSION

Walker respectfully requests that this Court grant his petition for writ of certiorari with respect to Question One, but hold his petition in abeyance with respect to Questions Two and Three pending this Court's resolution of *Borden v. United States* (Case No. 19-5410) to assess whether additional clarification is needed from this Court to resolve those questions.

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