In The

Supreme Court of the United States

CLINTON RUMLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Clinton Rumley was sentenced under the Armed Career Criminal Act (ACCA) to a mandatory minimum of 15 years in prison. The application of the ACCA sentencing enhancement was based on a 40-year old prior conviction for unlawful wounding – a Virginia criminal statute that does not require any affirmative act and which can be committed with a *mens rea* of mere recklessness. The sentencing judge found that the unlawful wounding conviction had occurred based on a plea agreement and an unsigned court judgment, applying the preponderance of the evidence standard over Mr. Rumley's objection. Mr. Rumley has long over-served the 10-year statutory maximum sentence otherwise applicable for a 18 U.S.C. § 922(g) offense without an ACCA enhancement.

Mr. Rumley presents three questions for this Court to review:

(1) Whether a criminal statute that prohibits the intentional causation of bodily injury to another "by any means," *including omissions*, is categorically a violent felony under the ACCA.

(2) Whether the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which created a carve-out to the rule later adopted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), should be reconsidered in light of *Apprendi* and its progeny which have, for the past two decades, called its holding into question and perpetuated litigation in both state and federal courts.

(3) Whether a *mens rea* of mere recklessness is sufficient for conviction under Virginia's unlawful wounding statute, thereby precluding the offense from qualifying as a violent felony under the ACCA.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit, No. 19-4412, *United States v. Rumley* (March 13, 2020 Order Denying Appeal) (April 20, 2020 Order Denying Petition for Rehearing)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Clinton Rumley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at *United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020). The order denying the petition for rehearing and rehearing en banc is unpublished at *United States v. Rumley*, No. 19-4412, dkt no. 63 (4th Cir. April 20, 2020).

JURISDICTION

The district court in the Western District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 18 U.S.C. § 3742. That court issued its opinion and judgment on March 13, 2020. A petition for rehearing was denied on April 20, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Armed Career Criminal Act provides:

> (e) (1) In the case of a person who violates section 922(g) of this title and has three previous convictions. . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]
>
> (B) 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; . . .

18 U.S.C. § 924(e).

2. Virginia Code § 18.2-51 provides:

> If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

STATEMENT OF THE CASE

In 2008, Mr. Rumley was convicted of possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and received a 15-year mandatory minimum sentence under the ACCA. App. 2a. In light of *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), which substantially narrowed the definition of "violent felony" in the ACCA, Mr. Rumley filed a petition under 28 U.S.C. § 2255 to obtain a resentencing. *Id.* Mr. Rumley successfully argued that two of the four prior convictions designated in his 2008 presentence report no longer qualified as ACCA predicates after *Johnson*. *Id.* The district court agreed and granted the petition, vacating his 2008 sentence and scheduling a resentencing hearing, which took place on June 6, 2019. *Id.*

Prior to Mr. Rumley's 2019 resentencing, the probation offer filed a presentence report identifying a replacement predicate conviction for one of the offenses that no longer qualifies after *Johnson*. *Id.* This offense appeared in the criminal history section of the prior report, but had not been identified or designated as a violent felony by the probation office or the court. This predicate conviction was a violation of Virginia Code § 18.2-51 (unlawful wounding) from 1979, nearly 40 years earlier – when Mr. Rumley was sixteen years old. App. 5a.

At the resentencing, Mr. Rumley argued that the government should have to prove the prior conviction to a jury, beyond a reasonable doubt, as it was an element of the ACCA offense, but that in the alternative the government had not proved the conviction to the court on the preponderance of the evidence standard. The district court disagreed, finding the conviction was sufficiently proven through a plea

agreement and unsigned judgment from 1979. Therefore, the district court in 2019 re-sentenced Mr. Rumley to a mandatory minimum sentence of 15 years imprisonment.

After Mr. Rumley's appeal, the Fourth Circuit found that the minimum conduct necessary to commit a violation of Virginia Code § 18.2-51 satisfied the ACCA "force clause" requirement. App. 21a. Mr. Rumley petitioned for rehearing, arguing that unlawful wounding could be committed with a *mens rea* of recklessness, and that under Fourth Circuit law that would mean it did not qualify as a violent felony. The Fourth Circuit declined rehearing on the issue. App. 23a.

This Court should exercise its discretion to review the Fourth Circuit's decision because Virginia unlawful wounding does not require an *actus reus* beyond omission alone. And it does not require a *mens rea* of more than recklessness. Either of these problems is sufficient on its own to find that a prior conviction for Virginia unlawful wounding is not a categorical match for a violent felony under the ACCA. The Court should also use this case – where a 15 year mandatory minimum sentence was imposed after a judge applied the preponderance of the evidence standard to an unsigned judgment and plea agreement – as a vehicle to reexamine *Almendarez-Torres*.

REASONS FOR GRANTING THE PETITION

This case presents an excellent vehicle to decide whether a criminal statute that can be violated through an omission, or recklessly, may qualify as a "violent felony" under the ACCA. This case also provides the Court with a perfect opportunity to reconsider *Almendarez-Torres*.

I. On the issue of whether conviction under a statute requiring no more than an omission is sufficient to constitute a violent felony predicate under the ACCA, the Fourth Circuit's decision conflicts with the text of § 924(e)(2)(B)(i), this Court's relevant precedent, and the decisions of other Circuits.

A. This Court in *Johnson v. United States*, 559 U.S. 133 (2010) interpreted the force clause definition of "violent felony" in § 924(e)(2)(B)(i) to require "violent physical force" exerted through concrete bodies

Section 924(e)(1) of Title 18, the Armed Career Criminal Act, provides that "a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another . . . shall be fined under this title and imprisoned not less than fifteen years[.]"

The "force clause" of § 924(e)(2)(B) defines "violent felony" as "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[.]"

In determining whether a prior offense qualifies as a "violent felony," courts are required to employ the categorical approach. *E.g., Mathis v. United States*, 136

S. Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013). Courts "look only to the statutory definitions – *i.e.*, the elements – of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a violent felony. *Descamps*, 133 S. Ct. at 2283. Under the categorical approach, a prior offense can qualify as a violent felony only if *all* the criminal conduct covered by a statute – including "the most innocent conduct" – matches or is narrower than the definition. *E.g.*, *United States v. Diaz-Ibarra*, 522 F.3d 343, 348 (4th Cir. 2008). In other words, a court must focus on the "minimum conduct" necessary for a violation of the statute. *See, e.g., United States v. Jones*, 914 F.3d 893, 901 (4th Cir. 2019) ("To decide whether a particular state offense includes the use, attempted use, or threatened use of violent physical force, we are entitled to turn to the relevant state court decisions to discern the minimum conduct required to sustain a conviction for that offense").

The Fourth Circuit held that convictions under Virginia Code § 18.2-51 qualify as violent felonies under the ACCA's force clause. To qualify under the force clause, such convictions must include "as an element the use, attempted use, or threatened use of physical force against the person of another[.]" 18 U.S.C. § 924(e)(2)(B)(i). "Physical force" in this context – the definition of "violent felony" under the Armed Career Criminal Act – is defined as "violent force," meaning "strong physical force," that is "capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. The word "physical," this Court has explained, "plainly refers to force exerted by and through concrete bodies[.]" *Id.* at 138.

Johnson observed that there are at least two understandings of the term "force" that are potentially relevant for purposes of the force clause definition of violent felony, and then chose between them. This Court noted that common law battery requires "force" that could be satisfied by "even the slightest offensive touching." *Johnson*, 559 U.S. at 139. And then *Johnson explicitly* rejected this common law definition of the word "force" for purposes of defining ACCA "violent felonies," holding that "force" in this context "means *violent* force." *Id*. at 140.

This Court explained:

> Even by itself, the word "violent" in § 924(e)(2)(B) connotes a substantial degree of force. Webster's Second 2846 (defining "violent" as "[m]oving, acting, or characterized, by physical force, esp. by extreme and sudden or by unjust or improper force; furious; severe; vehement . . ."); 19 Oxford English Dictionary 656 (2d ed.1989) ("[c]haracterized by the exertion of great physical force or strength"); Black's 1706 ("[o]f, relating to, or characterized by strong physical force"). When the adjective "violent" is attached to the noun "felony," its connotation of strong physical force is even clearer. *See id.*, at 1188 (defining "violent felony" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon"); *see also United States v. Doe*, 960 F.2d 221, 225 (C.A.1 1992) (Breyer, C.J.) ("[T]he term to be defined, 'violent felony,' . . . calls to mind a tradition of crimes that involve the possibility of more closely related, active violence").

Id. at 140-41.

Convictions under Virginia Code § 18.2-51 should not categorically qualify as "violent felonies" under the force clause because the statute can be violated without

the use or threat of *violent physical force*, *Johnson*, 559 U.S. at 140-41 (emphasis added), in that the statute can be violated "by any means."

The Virginia statute provides:

> [i]f any person maliciously shoot, stab, cut, or wound any person or *by any means* cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony [malicious wounding]. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony [unlawful wounding].

Va. Code § 18.2-51 (emphasis added).

Because the minimum conduct penalized by the Virginia statute does not require the use of violent physical force, or any force at all, the Fourth Circuit's decision conflicts with *Johnson*. Specifically, the statute, which by its own explicit terms can be violated "by any means," does not require the use of force "exerted by and through concrete bodies." *Johnson*, 559 U.S. at 138.

B. Virginia Code § 18.2-51 can be violated "by any means," including omissions, which is broader than violent physical force under *Johnson*.

The decision of the court of appeals conflicts with this Court's decision in *Johnson* because Virginia Code § 18.2-51 does not require sufficient violent physical force to fall within the force clause as interpreted in *Johnson*.

1. The Virginia Statute can be violated by omission

One category of conduct that would constitute "any means" under Virginia Code § 18.2-51 that is not violent "physical force" within the meaning of the force clause of § 924(e) and *Johnson* includes omissions, such as the withholding of food,

water, or medicine from a dependent child, or anyone else as to whom one has a duty of care. *Cf. Biddle v. Commonwealth*, 141 S.E.2d 710, 714 (Va. 1965) (noting that if death results from malicious omission of duty, it is murder, but if not willful, it is manslaughter). Omissions require no "force" whatsoever – neither violent, nor *de minimis,* nor indirect force. *See United States v. Oliver*, 728 F. App'x 107 (3d Cir. 2018) ("While there is no doubt that physical pain sufficient to constitute serious bodily injury under § 2702(a)(1) can occur as a result of an omission, *Johnson*'s ACCA violent felony definition requires the use or attempted use of physical force exerted by or through 'concrete bodies.'").

Applying the categorical approach, the elements of § 18.2-51 are so broad that one can violate the statute by using no physical force at all. Specifically, homicide resulting from the "malicious omission of the performance of a duty" is an example of conduct that meets the elements of § 18.2-51, but does not require the use of force in the commission of the offense. *See Davis v. Commonwealth*, 335 S.E.2d 375, 378 (Va. 1985); *accord Biddle*, 141 S.E.2d at 714 (stating that "if death is the direct consequence of the malicious omission of the performance of a duty, such as of a mother to feed her child, this is a case of murder"). If Virginia murder can be caused by omission, then so can unlawful wounding under Virginia Code § 18.2-51. In other words, one can cause "any bodily hurt whatsoever" with the requisite intent through the failure to provide, for example, food or medicine to a child or an invalid as to whom one has a duty of care, and thereby violate Virginia Code § 18.2-51.

This argument is premised on the elements of § 18.2-51 rather than citation to a published Virginia case in which a defendant was convicted of this specific offense based upon an omission.[1] But that does not matter. The categorical approach requires an analysis of the *elements* of an offense, not the factual circumstances in which prosecutors have obtained convictions. *E.g.*, *United States v. Aparicio-Soria*, 740 F.3d 152, 157-58 (4th Cir. 2014) (en banc) (holding that categorical approach turns on analysis of elements of offense, not probability that conduct that falls within statute would be charged); *see also id.* at 154 ("As required by the categorical approach, our analysis is restricted to 'the fact of conviction and the statutory definition of the prior offense.'" (quoting *Taylor v. United States*, 495 U.S. 575, 603 (1990))).

Just like the offense of murder in Virginia, the elements of § 18.2-51 can be satisfied either by commission or omission. The language of the statute – "by *any* means" – necessarily includes omissions. *Long v. Commonwealth*, 379 S.E.2d 473, 475 (Va. Ct. App. 1989) (noting that § 18.2-51, "by its explicit terms, does not

[1] In an amicus brief filed in the *James* litigation in the Fourth Circuit, the Capital Area Immigrants' Rights Coalition provided news articles and docket numbers for Virginia state cases in which it appears that Virginia courts have imposed criminal liability for malicious wounding and possibly unlawful wounding on the basis of omissions. Unfortunately, those state criminal cases did not result in published judicial decisions. *See* Brief of Capital Area Immigrants' Rights Coalition as Amicus Curiae, *United States v. James*, 4th Cir. No. 17-4111, Doc. 57 (March 29, 2018). The malicious wounding conviction appears (from news reports contained with the amicus brief) to have been based on the withholding of food from a child. *Id.* at 21.

contain a limitation upon the means employed"). "And that ends the inquiry," *Aparicio-Soria*, 740 F.3d at 158, because offenses that can be committed through omission categorically do not require the use of violent physical force. The First Circuit found the word "any" to be "a powerful beacon" that made it "clear that the crime does not require a showing of force 'capable of causing physical pain or injury'" and instead that "something short of that will do. *United States v. Mulkern*, 854 F.3d 87, 93-94 (1st Cir. 2017).

2. Because the statute can be violated by omission, the decision below (that the statute is an ACCA force clause predicate) conflicts with *Johnson*.

Because the Virginia statute criminalizes the intentional *causation* of bodily injury, the court of appeals concluded it must require the *use* of "force" and therefore be a "violent felony." The court below held:

> [N]ot only does the Virginia statute require the causation of bodily injury, but it also requires that the person causing the injury have acted with the specific intent to cause severe and permanent injury — maiming, disfigurement, permanent disability, or death. Such a crime categorically involves "the use of physical force" within the meaning of ACCA.

United States v. Rumley, 952 F.3d 538, 550 (4th Cir. 2020). But specific *intent* to do bodily harm does not require as an *actus reus* element that a defendant use "physical force" to do so. The Fourth Circuit erroneously imported the *mens rea* element to help interpret the minimum force required in the *actus reus* element of the statute.

The causation of injury was the part of the *Johnson* Court's analysis that determined what "violent" means: "We think it clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140.

That "violent" force may be force that can cause injury, however, does not answer the question of whether a statute requires any physical force at all. This is where the Fourth Circuit went astray, ignoring the ACCA statutory language at issue that "has as an element the use, attempted use, or threatened use of physical force against the person of another[.]" 18 U.S.C. § 924(e)(2)(B). In *Johnson*, the Court held that "physical force" that can cause injury must therefore be *violent physical force*, meeting the § 924(e) definition of "violent felony."

In this case, though, the Fourth Circuit untethered this analysis from its textual mooring. An omission with even the worst intent cannot constitute "physical force." Rather than assuming "violent" from the causation of injury, in this case the Fourth Circuit assumed "force" from intent – thereby destroying the important distinction between the *mens rea* and *actus reus* elements in analyzing the existence of "physical force." The Virginia statute's plain language says it can be violated by "any means" which includes omissions. Omissions are, by definition, not "physical force."

The Fourth Circuit decision below conflicts with *Johnson*, and with the text of § 924(e)(2)(B) requiring there be an element of the use, attempted use, or threatened use of "physical force."

C. There is a circuit split on whether omissions can satisfy the force clause.

There is a circuit split on whether criminal assault statutes that can be violated by omission satisfy the force clause. The Fourth Circuit's decision below conflicts with the Third Circuit, which has held that statutes that be violated by way of an omission cannot satisfy the force clause of the ACCA. *See United States v. Oliver*, 728 F. App'x 107 (3d Cir. 2018).

The Third Circuit explained:

> While there is no doubt that physical pain sufficient to constitute serious bodily injury under § 2702(a)(1) can occur as a result of an omission, *Johnson*'s ACCA violent felony definition requires the use or attempted use of physical force exerted by or through "concrete bodies." *Johnson*, 559 U.S. at 138. Under this binding definition, physical force is not used "when no act [is done]...." *United States v. Harris*, 205 F.Supp.3d 651, 671 (M.D. Pa. 2016). So, "when the act has been one of omission, ... there has been no force exerted by and through concrete bodies," *id.*, and thus, physical force as defined in *Johnson* has not been used. *See United States v. Resendiz-Moreno*, 705 F.3d 203, 204-05 (5th Cir. 2013) (holding that first-degree child cruelty under Georgia law is not a "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A)(ii) because the offense could be committed "by depriving [a] child of medicine or by some other act of omission that does not involve the use of physical force").

Oliver, 728 F. App'x at 111-12; *see also United States v. Mayo*, 901 F.3d 218, 229 (3d Cir. 2018) (concluding that Pennsylvania aggravated assault does not qualify as a violent felony because "Pennsylvania case law establishes that a person violates

§ 2702(a)(1) by causing 'serious bodily injury,' regardless of whether that injury results from any physical force, let alone the type of violent force contemplated by the ACCA.") (citation omitted).

The Second Circuit earlier reached the same conclusion about causation of bodily injury in *ChrzanoChrzanoksi v. Ashcroft*, 327 F.3d 188, 192 (2d Cir. 2003), in which it interpreted a Connecticut assault statute. As the *Chrzanoksi* Court observed, "human experience suggests numerous examples of intentionally causing injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient." 327 F.3d at 196; *see also United States v. Lassend*, 898 F.3d 115, 127 n.12 (1st Cir. 2018) (recognizing that withholding of medicine could be the basis of an assault charge). Other examples include a parent who withholds medicine from a sick child, or who withholds food from a child. *People v. Miranda*, 612 N.Y.S.2d 65, 66 (1994) (reinstating assault charges in part because New York "Penal Law provides that criminal liability may be based on an omission to act where there is a legal duty to do so, and parents have a nondelegable affirmative duty to provide their children with adequate medical care" (citations omitted)).

Each of these are examples of *omission*, not *commission*, not even commission by indirect means.

D. *United States v. Castleman* left open the question of whether the causation of injury by omission requires force within the meaning of *Johnson*.

The Court in *United States v. Castleman*, 572 U.S. 157 (2014), did not answer the question of whether causation of bodily injury by omission requires the use of violent physical force sufficient to satisfy *Johnson*'s interpretation of that phrase for purposes of the ACCA.

The Court in *Castleman*, 572 U.S. at 163, held that the phrase "physical force" in the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9) has a different meaning than "physical force" in the ACCA, as discussed in *Johnson*, supra. Rather, slight touching as in common law battery convictions would suffice for § 922(g)(9). 572 U.S. at 164. The Court also observed that the administration of poison would constitute common law "force" and the use of force, albeit indirectly, just as pulling the trigger of a gun is indirect. *Id*. at 170-71. This may have settled the question of indirect force and the force clause, but it does not speak to not omissions.

Castleman does not foreclose Mr. Rumley's omission argument. The *en banc* Fifth Circuit in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (*en banc*), expressly noted that *Castleman* "does not address whether an *omission*, standing alone, can constitute the use of force, and we are not called on to address such a circumstance today." *Id*. at 181 n.25 (emphasis added). The Fourth Circuit similarly recognizes that *Castleman* did not settle this issue. *See United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) ("*Castleman* did not however

abrogate the causation aspect of *Torres-Miguel* that 'a crime may result in death or serious injury without involving the use of physical force.'" (citing *United States v. Covington*, 880 F.3d 129, 134 n.4 (4th Cir. 2018) and quoting *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012)) (*Torres-Miguel* abrogated on other grounds by *Castleman*).

The Third Circuit in *Oliver* noted the existence a circuit split, or at least confusion among the lower courts after *Castleman*: "Two of our sister courts have reached the opposite conclusion, holding that acts of omission can constitute a use of force under *Castleman*." 728 F. Appx at 112 n.7. "These courts, however, conflate indirect force, which *Castleman* held was sufficient to satisfy the use of force, with omissions." *Id*.

In other words, Mr. Rumley's argument with regard to omissions does not rely on the distinction between direct and indirect uses of force. That is, it remains true that an offense can *result* in injury without the *use* of force in the context of an omission (in contrast to indirect force, such as poison). *See, e.g.*, *Davis v. Commonwealth*, 335 S.E.2d 375, 378 (Va. 1985) (murder by omission).

II. This case also raises the issue of whether *Almendarez-Torres* should be reconsidered.

Mr. Rumley's 15-year mandatory minimum sentence was imposed based on the judge's determination, by the preponderance of the evidence, that he had a prior conviction for unlawful wounding from when he was 16 years of age. The documents the judge relied on to make this finding included a plea agreement and

an unsigned judgment. This case is the perfect vehicle to reconsider *Almendarez-Torres* because there is reasonable doubt about whether Mr. Rumley had the requisite prior conviction.

The rule of *Apprendi,* as restated and applied in *Blakely* and *Booker* is that "[o]ther 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." *Blakely v. Washington.* 542 U.S. 296, 301 (2004); *see also United States v. Booker,* 543 U.S. 220, 244 (2005) (quoting *Apprendi,* 530 U.S. at 490). The phrase "other than the fact of a prior conviction" is a vestigial remnant of the Court's decision in *Almendarez-Torres.* In *Almendarez-Torres,* the defendant pleaded guilty to illegally reentering the country after having been deported, in violation of 8 U.S.C. § 1326(a), which provides a statutory maximum penalty of two years. 523 U.S. at 227. However, § 1326(b) increases the statutory maximum for those convicted of illegal reentry after having been deported following the commission of certain offenses. The indictment in *Almendarez-Torres* contained no allegation of the defendant's prior criminal history. 523 U.S. at 227. Therefore, Almendarez-Torres argued that he could not be sentenced pursuant to any of the enhanced penalties found in § 1326(b). *Id.*

This Court was sharply divided, but Chief Justice Rehnquist and Justices Breyer, Kennedy, O'Connor, and Thomas held that the Constitution does not require Congress to treat recidivism as an element of the offense — irrespective of Congress' contrary intent. *Id.* at 239. Underpinning the majority's opinion was a

historical analysis showing that recidivism "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence," *id.* at 243, with the majority arguing that to hold for Almendarez-Torres would "mark an abrupt departure from a longstanding tradition." *Id.* at 244. The majority also rejected Almendarez-Torres's argument that there was a tradition of treating recidivism as an element of the offense, because "such tradition is not uniform." *Id.* at 246.

In dissent, Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg, refuted the majority's position as to the "tradition" of recidivism. Justice Scalia noted that "many State Supreme Courts have concluded that a prior conviction which increases maximum punishment must be treated as an element of the offense under either their State Constitutions or as a matter of common law." *Id.* at 256-57 (citations omitted). "At common law," Justice Scalia continued, "the fact of a prior conviction had to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime." *Id.* at 261. The dissent concluded that "there is no rational basis for making recidivism an exception" to the protections of the Sixth Amendment. *Id.* at 258.

This Court's holding in *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), has always been controversial. Within three months of its publication, it again was called into question. *See Monge v. California,* 524 U.S. 721, 740-41 (June 26, 1998) (Scalia, J., dissenting) (noting that his preferred "disposition" of the case "would contradict, of course, the Court's holding in *Almendarez-Torres* that

'recidivism' findings do not have to be treated as elements of the offense, *even* if they increase the maximum punishment to which the defendant is exposed. That holding was in my view a grave constitutional error affecting the most fundamental of rights"). Since that time, this Court has repeatedly noted its discomfort with the decision.

Two years after this Court decided *Almendarez-Torres,* the decision came under attack in *Apprendi,* 530 U.S. 466. In *Apprendi,* this Court struck down a state statute that authorized a judge to increase the statutory maximum for an offense if the judge concluded that the crime was committed because of racial bias. *Id.* Justice Stevens, writing for the five-member majority, wrote that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice that we have described," *id.* at 487, that any fact that increases a defendant's sentence beyond the statutory maximum must be proven to a jury beyond a reasonable doubt. *Id.* at 490. The majority conceded that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* at 489-90. Nevertheless, the Supreme Court declined to reach that issue because it was not raised by Apprendi and was not critical to the outcome of the case. *Id.* at 490.

Justice Thomas, one of the five members of the *Almendarez-Torres* majority, wrote a lengthy concurrence in *Apprendi* (joined by Justice Scalia) that effectively undermined the historical argument that recidivism should be an exception to the general *Apprendi* rule. Justice Thomas set out a history showing a "long line of

essentially uniform authority" establishing that "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment." *Id.* at 501. Therefore, "if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact of whatever sort, *including the fact of a prior conviction* — the core crime and the aggravating fact together constitute an aggravated crime." *Id.* (emphasis added). After discussing that tradition, Justice Thomas concluded that "what is noteworthy is not so much the fact of that tradition as the reason for it: Courts treated the fact of a prior conviction just as any other fact that increased the punishment by law." *Id.* at 507. Justice Thomas clarified that *Apprendi,* "far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*—the status quo that reflected the original meaning of the Fifth and Sixth Amendments." *Id.* at 518.

"The consequences of the above discussion" for *Almendarez-Torres,* Justice Thomas wrote, "should be plain enough." *Id.* He concluded:

> [O]ne of the chief errors of *Almendarez-Torres* – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. For the reasons I have given, it should be clear that this approach just defines away the issue. What matters is the way by which a fact enters into the sentence . . . . When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute.

Id. at 520-521. (citation omitted).

The same five-member majority of the Court that decided *Apprendi* also applied its holding to the Washington sentencing scheme in *Blakely,* 542 U.S. 296.

In doing so, *Blakely* again repudiated the basic premise of *Almendarez-Torres.* In particular, while the Court in *Almendarez-Torres* focused on whether Congress intended the fact of a prior felony to be an "element" versus a "sentencing factor," such distinction was irrelevant to the holding in *Blakely.* Instead, *Blakely* held that if an increase in a defendant's punishment is contingent upon the finding of a fact, that fact, no matter how it is labeled— "element" or "sentencing factor" —must be submitted to the jury and proved beyond a reasonable doubt. 542 U.S. at 306-07. This Court reaffirmed this holding in *Booker.* 543 U.S. at 231-32.

This Court's decision in *Shepard v. United States,* 544 U.S. 13 (2005), further signified the erosion of *Almendarez-Torres.* In *Shepard,* this Court strongly suggested that the prior conviction exception should be viewed narrowly and that *Almendarez-Torres* may soon be overturned. *Shepard,* 544 U.S. at 25-26. The Court noted that judicial factfinding about a prior conviction "raises the concern under *Jones* and *Apprendi:* the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of *any* disputed fact essential to increase the ceiling of a potential sentence." *Id* at 25 (emphasis added).

In his concurrence in *Shepard,* Justice Thomas went a step further and stated that "*Almendarez-Torres* . . . has been eroded by the Supreme Court's subsequent Sixth Amendment jurisprudence, and a majority of the Supreme Court now recognizes that *Almendarez-Torres* was wrongly decided." *Shepard,* 544 U.S. at 27 (Thomas, J., concurring). Justice Thomas found the ACCA unconstitutional

as applied to Shepard because it required an increase in the sentence based on facts (the prior convictions) not admitted by the defendant or proven to a jury. *Id.*

Finally, in more recent holdings from this Court, the Court has continued to call into question the viability of the *Almendarez-Torres* exception to *Apprendi.* In *Alleyne v. United States,* 570 U.S. 99 (2013), the Supreme Court was asked to answer the question of whether the rule of *Apprendi* applied equally to minimum mandatory penalties. That *certiorari* was granted in *Alleyne* was somewhat unusual because this Court had already answered this question in the not-so-distant past. In *Harris v. United States,* 536 U.S. 545 (2002), the Court had held—in the § 924(c) context—that judicial factfinding that increases the mandatory minimum sentence imposed for a crime was permissible under the Sixth Amendment. *See id.* at 560-61. The Court in *Harris,* relying, in part, on a pre-*Apprendi* case — *McMillan v. Pennsylvania,* 477 U.S. 79 (1986) — held that because the judicial factfinding involved in *Harris* (whether a firearm had been brandished or merely possessed during a drug trafficking crime), did not alter the maximum penalty (life), the Sixth Amendment and the rule of *Apprendi* were not offended by judicial factfinding that merely increased the mandatory minimum.

The *Alleyne* Court did an about-face, expanding the holding of *Apprendi* and overruling *Harris.* Specifically, the Court held: "*Any fact* that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne,* 570 U.S. at 103 (emphasis added). In so holding, this Court once again recognized the "narrow" exception to the *Apprendi*

rule laid out in *Almendarez-Torres* but noted it was not going to address "that decision's vitality" because the parties had not contested it. *Id* at 2161, n. 1.

In *Mathis v. United States,* 136 S.Ct. 2243, 2249-50 (2016), this Court was called upon to determine whether the familiar "modified categorical approach" could be employed to determine by what "means" a defendant had committed a crime. In *Mathis,* the subject of Mathis' claim was an Iowa burglary statute which made it a crime to unlawfully enter into a "any building, structure, [or] *land, water, or air vehicle.*" *Id.* at 2250 (emphasis in original). The district court had found that a prior conviction under the Iowa statute could be used to enhance Mathis' sentence pursuant to the recidivist enhancement of the Armed Career Criminal Act ("ACCA"). This Court found that this list of places which would constitute a burglary if unlawfully entered, set out the "means" by which the locational element of Iowa's burglary statute could be satisfied, and that the courts below erred in applying the "modified" categorical approach to the locational element of Iowa's burglary statute. *Id.* at 2249-51. The "means" (unlawfully entering any one of a building, structure, [or] land, water, or air vehicle) of satisfying the locational element were not elements but facts, and therefore, could not be used to determine whether Mathis's prior burglary qualified as a generic burglary or not. *Id* at * 8-9. Instead, Iowa's burglary statute was simply overbroad and could not be used as an ACCA predicate violent felony. *Id.* at 2252. In so holding, this Court relied in large part on the rule of *Apprendi.* As it relates to this petition, with *Mathis* this Court again limited the reach of *Almendarez-Torres* by circumscribing the

evaluation a district court may engage in when determining whether to enhance a defendant's sentence pursuant to the recidivist-based ACCA.

In his concurrence in *Mathis,* Justice Thomas again called into question the vitality of *Almendarez-Torres*: "I continue to believe that the exception in *Apprendi* was wrong, and I have urged that *Almendarez-Torres* be reconsidered." *Id.* at 2259, 195 (Thomas, J. concurring). Today, the Court "at least limits the situations in which courts make factual determinations about prior convictions." *Id.* Even more recently still, in *Sessions v. Dimaya,* 138 S. Ct. 1204, 1253-54 (2018) (Thomas, J. dissenting), Justice Thomas again called the *Almendarez-Tarres* holding into question: "The exception recognized in *Almendarez-Torres* for prior convictions is an aberration [to the rule of *Apprendi*], has been seriously undermined by subsequent precedents, and should be reconsidered."

In sum, it is clear that the holding of *Almendarez-Torres* is, at best, on shaky ground as "the fact of a prior conviction" exception to the *Apprendi* rule crashes headlong into the Supreme Court's current Sixth Amendment jurisprudence.

The ongoing question regarding the vitality of *Almendarez-Tarres* has not been lost on lower courts that have struggled with its holding. The Fourth Circuit has noted the following:

> [T]he Supreme Court's recent characterizations of the Sixth Amendment are difficult, if not impossible, to reconcile with *Almendarez-Torres*'s lonely exception to Sixth Amendment protections. *See Alleyne,* 133 S.Ct. at 2160 ("any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime" that a jury must find beyond a reasonable doubt (quotation marks omitted)); *Shepard,* 544 U.S. at 25, 125 S.Ct. 1254 ("[T]he Sixth and Fourteenth Amendments guarantee a jury

> standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence").

United States v. McDowell, 745 F.3d 115, 124 (4th Cir. 2014); *see also United States v. Browning,* 436 F.3d 780, 782 (7th Cir. 2006) *("Almendarez-Torres* is vulnerable to being overruled not because of *Shepard but* because of *United States v. Booker[]").*

This Court continued to receive petition after petition challenging *Almendarez-Torres.* Even more challenges are made in the district courts and in the courts of appeals. This is true in state courts as well as federal courts. *See e.g. Matter of Rowley,* No. 51244-1-11, 2018 WL 4091736, at *1 (Wash. Ct. App. Aug. 28, 2018) (unpub.) ("Rowley also argues that the imposition of his sentence of life imprisonment without possibility of parole under the Persistent Offender Accountability Act, RCW 9.94A.570, violates the Sixth Amendment because it was based on the trial judge's finding that he had committed the requisite prior offense rather than a finding by a jury that he had committed the requisite prior offense. He supports his argument with what he describes as an inconsistency between *Apprendi[],* and *Almendarez-Torres[]*"); *see also People v. Norelli,* No. B278374, 2018 WL 4443804, at *2 (Cal. Ct. App. Sept. 18, 2018) (unpub.), *review denied* (Nov. 20, 2018) ("Norelli argues the trial court's finding that his 1990 assault conviction under section 245, subdivision (a)(1), was for a serious felony violated his right to a jury trial under the Sixth Amendment").

This Court should grant Mr. Rumley's petition, erase the doubt surrounding the continued vitality of *Almendarez-Torres*, and thereby save the lower courts time

and resources relitigating the issue.

III. Because a violation of Virginia Code § 18.2-51 requires no more than a *mens rea* of recklessness, the statute does not qualify as an ACCA predicate.

A. A *mens rea* of recklessness is insufficient for a statute to qualify as an ACCA predicate.

This Court has granted certiorari in *Borden v. United States*, 140 S. Ct. 1262, 206 L. Ed. 2d 253 (2020) on the issue of whether an offense with a *mens rea* of recklessness is categorically a violent felony. For the reasons set forth by the Petitioner in *Borden*, the answer is no. If this Court agrees, then the Court should grant this petition for review, vacate the judgment below, and remand for reconsideration, because Virginia courts have held that unlawful wounding may be committed recklessly.

B. The way a state actually applies a criminal law defines the *mens rea* required for that offense

When a defendant argues that a prior state offense is categorically broader or different than the generic definition of a listed crime in a federal statute, this Court has explained that there must be a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). To demonstrate that realistic probability a defendant can "point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.* To determine how a state applies a given criminal offense, the lower courts look to state Supreme Courts but also to

decisions from intermediate appellate courts to determine how a state applies its law. *See United States v. Winston*, 850 F.3d 677, 684 (4th Cir. 2017) (citing *United States v. Doctor*, 842 F.3d 306, 308 (4th Cir. 2016) (considered "decisions of Virginia's intermediate appellate court" as the "next best indicia of what state law is" absent a decision from the Virginia Supreme Court); *United States v. Sanchez*, 940 F.3d 526, 534 n.6 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 559 (2019) (where "state's highest court has been silent on the issue, we follow decisions from the state's intermediate appellate courts. . ."); *United States v. Burris*, 912 F.3d 386, 398 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 90 (2019) (in absence of relevant Ohio Supreme Court cases court looks to intermediate appellate court decisions).

C. Virginia unlawful wounding can be committed recklessly, therefore it is not a valid ACCA predicate.

The relevant Virginia statute is Va. Code Ann. § 18.2-51. To convict for either malicious wounding, or unlawful wounding, the statute requires an intent to maim, disfigure, disable or kill. And older caselaw did require a specific, subjective intent to maim. *Banovitch v. Comm.*, 196 Va. 210, 217-18 (1954) ("[p]roof of the specific intent is necessary to a conviction under the statute"). But Virginia courts now apply the statute in ways that include reckless conduct. For example, where the defendant was two feet away from the victim and fired "a bullet onto the cement drive where it reasonably could have been anticipated that the bullet would be deflected" it was reasonable to "infer the intent essential to sustain a conviction for unlawful wounding." *David v. Comm.*, 2 Va. App.1, 3 (Va. Ct. App. 1986). In a

later case, the Virginia Court of Appeals considered a case where the defendant "intentionally *twice* fired a powerful weapon into the floor of his upstairs apartment at three o'clock in the morning" which hit someone asleep in the apartment underneath the defendant's apartment. *Shimhue v. Comm.*, No. 1736-92-2, 1998 WL 345519 (Va. Ct. App. June 30, 1998). The court affirmed that this established malicious wounding because the "conduct was inherently dangerous and imposed grave risk to anyone in the vicinity" and that the defendant "must have known that the repeated discharge of the weapon into the floor of his upstairs apartment at a time when the building's occupants would be home could result in severe bodily harm or death." *Id.*; *see also Waller v. Commonwealth*, 1990 WL 746761 (Va. Ct. App. Nov. 20, 1990) (The specific intent to maim, disfigure, disable, or kill required for an unlawful wounding conviction "may be inferred when the defendant intentionally commits an act from which he or she *reasonably could have anticipated* that the injury would result") (emphasis added).

Recklessness is a "conscious disregard of risk." *United States v. Peterson*, 629 F.3d 432, 436-37 (4th Cir. 2011). In *Shimhue*, the Virginia Court of Appeals upheld an unlawful wounding conviction because the conduct was "inherent dangerous and imposed grave risk to anyone in the vicinity" and because the defendant "must have known" there was a risk of "severe bodily harm or death." 1998 WL 345519 at *2. In *David*, the Virginia Court of Appeals quoted at length from a decision from the Supreme Court of Maine that included the premise that "Criminal 'intent' may equally well flow, *as a matter of law*, from intentionally doing an act which has the

inherent potential of doing bodily harm, and doing so in a criminally negligent manner.'" 2 Va. App. 1 at 4 citing *State v. Anania*, 340 A.2d 207 (Me. 1975) (emphasis in the original). The Virginia Court of Appeals then affirmed that when the defendant fired a bullet into the cement drive "it reasonably could have been anticipated that the bullet would be deflected." *Id.* at 5. Finally, in *Waller*, the Virginia Court of Appeals again affirmed that the intent required for unlawful wounding could be inferred where the defendant's actions were reckless—where the "defendant intentionally commits an act from which he or she reasonably could have anticipated that the injury would result." 1990 WL 746761 at *1. Here, the action was throwing a bottle at a storm door from twelve feet away with enough force to shatter the door, which then injured the victim about to open the door. *Id.*

These decisions mirror not only the definition of recklessness in *Peterson*, but the understanding of recklessness under Virginia law in the vehicular manslaughter context. There, the Virginia Supreme Court has specifically held that:

> '[g]ross negligence' is culpable or criminal when accompanied by acts of commission or omission of a wanton or willful nature, showing a reckless or indifferent disregard of the rights of others, *under circumstances reasonably calculated* to produce injury, or which make it *not that injury will be occasioned*, and the offender knows, or is charged with the knowledge of, the *probable result* of his acts.

Bell v. Commonwealth, 195 S.E. 675, 681 (Va. 1938) (emphasis added). *See also Keech v. Commonwealth*, 386 S.E.2d 813, 817 (Va. Ct. App. 1989) (recklessness established "when the conduct of the driver constitutes a great departure from that of a reasonable person (gross, wanton or willful conduct) which creates a great risk

of injury to others and where by the application of an objective standard the accused should have realized the risk created by his conduct").

The caselaw demonstrates that Virginia unlawful wounding can be committed by reckless conduct. Therefore, this Court should grant this petition for review, vacate the decision below, and remand for further consideration.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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