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In the
Supreme Court of the United States

JAMES AYERS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does the “use of force” clause in the Armed Career Criminal Act (the “ACCA”) 18 U.S.C. § 924(e)(2)(B)(i) encompass crimes with a *mens rea* of recklessness?

ii.

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1. Opinion, United States Court of Appeals for the Sixth Circuit, *United States of America v. James Ayers*, Court of Appeals No. 20-5222, affirming the district court, January 20, 2021.

2. Judgment, United States District Court for the Western District of Tennessee at Jackson, *United States of America v. James Ayers*, District Court No. 1:17-cr-10004-2, sentencing Mr. Ayers under the ACCA, February 21, 2020.

JURISDICTIONAL STATEMENT

Mr. Ayers was sentenced under the Armed Career Criminal Act (the “ACCA”), 18 U.S.C. § 924(e)(2)(B)(i) on February 21, 2020. He appealed, challenging the application of the ACCA and its 15-year mandatory minimum sentence. The United States Court of Appeals for the Sixth Circuit entered its Opinion affirming the judgment on January 20, 2021. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Rule 13(1) of the Supreme Court allows for ninety days within which to file a Petition for a Writ of Certiorari after entry of the judgment of the Court of Appeals. Accordingly, this Petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Acting United States Attorney Joseph C. Murphy, Jr. of the Western District of Tennessee and Assistant United States Attorney Adam Davis. The United States Attorney’s Office of the Western District of Tennessee, a federal office which is authorized by law to appear before this Court on its own behalf, appeared in the United States Court of Appeals for the Sixth Circuit.

Petitioner Ayers respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit. In that Opinion, the Sixth Circuit affirmed the district court's determination that the ACCA applied to Mr. Ayers because his prior Tennessee conviction for reckless aggravated assault constituted a violent felony under the use of force clause.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 921(a)(33)(A):

Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 922(g):

It shall be unlawful for any person—

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(1):

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(B):

As used in this subsection--

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Tenn. Code Ann. § 39-13-101 (1991):

a) A person commits **assault** who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another;

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or

(3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

Tenn. Code Ann. § 39-13-101 (1991) (repealed).

Tenn. Code Ann. § 39-13-102(a) (1991):

(a) A person commits aggravated assault who:

(1) Commits an assault as defined in Section 39-13-101, and:

(A) Causes serious bodily injury to another; or
(B) Uses a deadly weapon

Tenn. Code Ann. § 39-13-101 (1991) (repealed).

STATEMENT OF THE CASE AND FACTS

Defendant was indicted on January 17, 2017 on one count of conspiracy to distribute illegal narcotics, one count of aiding and abetting the sale of narcotics and one count of being a felon in possession of a weapon. (Indictment, R. 2, Page ID #7-10). On May 22, 2017 Defendant pled guilty to the gun charge and entered into a Plea Agreement whereby the government would move to dismiss the narcotics charges at sentencing. (Plea Agreement, R. 267, Page ID #371). Following the entry of the plea, the United States Probation Office prepared a Draft Presentence Investigative Report (“PSR”), which concluded that Defendant qualified as an armed career criminal under 18 U.S.C. §924(e), the Armed Career Criminal Act (“ACCA”) (Draft Presentence Report, R. 319 ¶22, Page ID #873-74), subjecting him to a mandatory minimum sentence of 180 months. The probation office determined that Defendant had three qualifying convictions, a 1985 Tennessee state court conviction for Robbery with a Deadly Weapon, a 1992 Tennessee state court conviction for three counts of Aggravated Assault and a 2001 federal drug conviction. Id¹. According to the calculations in the PSR, under the Guidelines, if Defendant did not qualify for the enhancement under the ACCA, he would have had a total offense level of 17 and

¹ The PSR appears to treat the aggravated assault as one conviction, even though Defendant was originally named in three separate indictments arising out of the same course of conduct on the same day. Defendant had pled to all three indictments in the same proceeding and was sentenced to concurrent six-year sentences for all three charges. It is possible that these separate counts could potentially be counted as separate predicate offenses under the ACCA. However, for the purposes of this appeal it would not matter since the same argument as to the availability of each count as a predicate offense would apply because the plea to all counts was under the 1992 version of the Tennessee Aggravated Assault which includes reckless conduct as an element of the offense.

would likely fall under criminal history category III, yielding a sentencing guideline range of 30-37 months of incarceration. (Draft Presentence Report, R. 317 ¶¶ 15-26, Page ID #873-85).

The Defendant filed an objection to the PSR arguing that the aggravated assault conviction(s) did not qualify as a violent felony under the ACCA because the statute encompassed reckless conduct and was, therefore, overbroad. Defendant argued that since it was possible to violate the statute in a way that would constitute a violent felony (by intentional or knowing conduct) and in a way that would not (by reckless conduct), it was divisible, and the court could review the “Shepard documents” to determine whether they establish a conviction for a violent felony. (Position Regarding Presentence Report by James Ayers, R. 335, Page ID #908-11). In response, the government submitted court and investigative documents from the 1992 convictions, including the indictments, the plea colloquy and the judgments. (Position Regarding Presentence Report by United States, R. 415, Page ID #1280-1324). The government argued, however, that the court no longer needed to determine whether Defendant was convicted under the provision that included reckless conduct, relying on the recent Sixth Circuit decision in *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017). (Position Regarding Presentence Report by United States, R. 415, Page ID #1277-79). In *Verwiebe* the Sixth Circuit held that this Court’s decision in *Voisine v. United States*, 136 S.Ct. 2272, 2280 (2016) established that convictions based on reckless conduct can qualify as violent felonies under the ACCA.

Prior to Defendant's sentencing hearing, multiple defendants in other cases had filed Petitions for Writs of Certiorari asking this Court to ultimately determine whether, following its decision in *Voisine*, convictions based on reckless conduct could constitute predicate ACCA violent convictions under the use of force clause. The Defendant filed a Motion to Stay his sentencing pending this Court's determination of the issue, arguing that this was the correct course to follow because at the time he entered his guilty plea in this case, *United States v. McFalls*, 592 F.3d 707 (6th Cir. 2010), was controlling precedent on the issue in this circuit and it appeared to be settled law (in the circuit) that Tennessee aggravated assault convictions based on reckless conduct were not countable as ACCA predicate offenses. (Motion to Stay Sentencing, R. 562, Page ID #2705-07). In his Plea Agreement, entered before *Verwiebe*, Defendant had waived his right to appeal his sentence in most situations and was, therefore, potentially at risk for losing the opportunity to have the issue addressed on appeal if he was sentenced as an armed career criminal and this Court ultimately decided that these offenses are not to be used as predicate offenses under the ACCA. In order to avoid an injustice, the district court on multiple occasions stayed Defendant's sentencing until after this Court issued a final ruling on the issue. (Orders Continuing Sentencing Hearing, R. 617, 619 and 620) This Court ultimately did grant certiorari in a case out of this circuit, *James Walker v. United States*, United States Supreme Court Dkt. #19-373 and it appeared as if a decision on the issue was forthcoming shortly. Unfortunately, after the case had been briefed by the Petitioner

and several *amici*, on January 22, 2020 Mr. Walker passed away, a suggestion of death was filed, and the court dismissed the writ.

Given the lengthy delays in the proceedings and uncertain status of the resolution of the issue by this Court, the government agreed to dismiss the pending indictment against the Defendant and allow him to plead to a Superseding Information that encompassed the same gun charge that he had previously pled to. (Transcript of Change of Plea and Sentencing, R. 632, Page ID #3241-3243) Procedurally, this voided the plea agreement the parties had previously entered into and allowed the Defendant to plead guilty to the gun charge and retain his right to appeal the determination that he qualified for an enhanced sentence under the ACCA. (Transcript of Change of Plea and Sentencing, R. 632, Page ID #3216-3268). At sentencing the Defendant continued to assert he did not qualify as an armed career criminal under the ACCA but recognized that the district court was bound by circuit precedent. (Transcript of Change of Plea and Sentencing, R. 632, Page ID #3240-41). The district court found that it was bound by circuit precedent and sentenced the Defendant to the 180-month mandatory minimum sentence as an armed career criminal under the ACCA. (Transcript of Change of Plea and Sentencing, R. 632, Page ID #3259-3261). The Defendant appealed the district court's determination that he qualified for enhanced sentencing under the ACCA to the Sixth Circuit. A panel of that court held it too was bound by circuit precedent in *Verwiebe* and affirmed the district court.

The circuits continue to be split with respect to whether the use of force clause

in the ACCA encompasses crimes committed recklessly. The Sixth Circuit falls into the group that extends this Court’s holding in *Voisine v. United States*, 136 S. Ct. 2272 (2016) (addressing the phrase “misdemeanor crime of domestic violence” in 18 U.S.C. § 921(a)(33)(A)) to the use of force clause in the ACCA. *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017). Even within the Sixth Circuit there is disagreement on this point, as a separate panel argued that the ACCA’s use of force clause cannot be so broad as to include recklessness. *United States v. Harper*, 875 F.3d 329 (6th Cir. 2017) (explaining it was bound by *Verwiebe*, despite its disagreement). Further, “the circuit courts overwhelmingly held before *Voisine* that crimes involving the reckless use of force are not crimes of violence under § 4B1.2 [or violent felonies under the ACCA].” *Harper*, 875 F.3d at 332 (collecting cases).

After the dismissal of the Petition in *Walker* the Court granted the Petition for Writ of Certiorari on March 2, 2020 in *Charles Borden v. United States*, 19-5410 to address the issue of whether recklessly committed crimes can qualify as predicate offenses under the ACCA. The *Borden* case has been briefed by the parties and several amici, was argued on November 3, 2020 and the Court’s ruling is pending. Accordingly, this critical issue remains unresolved as to Mr. Ayers.

REASONS FOR GRANTING THE WRIT

This Court has not yet defined what *mens rea* is necessary to constitute a violent felony under the ACCA’s use of force clause, 18 U.S.C. § 924(e)(2)(A)(i). In the absence of direction from this Court, a circuit split has developed, and continues to deepen, regarding whether crimes committed recklessly are sufficient to trigger the

fifteen-year mandatory minimum of the ACCA.

The First, Fourth, and Ninth Circuits have held, after *Voisine*, and after the Sixth Circuit’s decision in *Verwiebe*, that recklessness is not sufficient to satisfy the force clause in this context. *United States v. Rose*, 896 F.3d 104, 109-10 (1st Cir. 2018); *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018); *United States v. Middleton*, 883 F.3d 485, 497-500 (4th Cir. 2018) (Floyd, J., concurring); *United States v. Orona*, 923 F.3d 1197, 1202-03 (9th Cir. May 10, 2019). The Third Circuit *sua sponte* granted *en banc* review in two cases to consider the question, *United States v. Harris*, 17-1861 (granted June 7, 2018) (ACCA), and *United States v. Santiago*, No. 16-4194 (granted June 8, 2018) (career offender), and those cases remain pending.

In contrast, along with the Sixth, the Fifth, Tenth, and D.C. Circuits have held, after *Voisine*, that recklessness is sufficient. See *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir. 2017); *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018) (rehearing denied Mar. 19, 2019); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018). The Eighth Circuit has taken the middle ground. It held that recklessness is generally sufficient, *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), but after *Voisine* reaffirmed that it is not sufficient when the crime “encompasses the unadorned offense of reckless driving resulting in injury.” *United States v. Fields*, 863 F.3d 1012, 1015 (8th Cir. 2017) (relying on and quoting *United States v. Ossana*, 638 F.3d 895, 901 n.6 (8th Cir. 2011)). The specific statute at issue here, Tennessee’s reckless aggravated assault, also encompasses reckless driving

resulting in injury.² See, e.g., *State v. Boone*, No. W2005-00158-CCA R3CD, 2005 WL 3533318, *6 (Tenn. Crim. App. 2005) (defendant may be found guilty of reckless aggravated assault if he recklessly caused bodily injury using a deadly weapon, to wit: motor vehicle).

And, further evidencing the complexity of this question, judges within the Sixth Circuit differ in their views. The panel that decided *Harper*, just a few weeks after *Verwiebe*, explained why in its view *Verwiebe* was wrongly decided. 875 F.3d at 330-33. And Judge Stranch recently joined them. *Walker v. United States*, 769 F. App'x 195, 201 (6th Cir. Apr. 16, 2019) (Stranch, J., concurring) (“Like the *Harper* court, if we were not bound by *Verwiebe*, I would hold that an offense that requires only the reckless use of force, as does Texas robbery, is not a violent felony under the [force clause] of the ACCA.”).

This split is leading to inconsistent application of the ACCA, and thus arbitrary application of the 15-year mandatory minimum. An individual with a prior conviction for reckless aggravated assault would get a minimum sentence of fifteen years – and up to life imprisonment – if he was unlucky enough to be indicted in the Sixth Circuit, yet, that same individual would have a statutory maximum of ten years if indicted in the Fourth. This arbitrary application of substantially different statutory ranges is intolerable.

² In 1992, the Tennessee Aggravated Assault statute provided:

(a) A person commits aggravated assault who:

(1) Commits an assault as defined in Section 39-13-101, and:

(A) Causes serious bodily injury to another; or

(B) Uses a deadly weapon; Tenn. Code Ann. §Section 39-13-102 Aggravated Assault.

This case presents this Court with a good vehicle to address this split, as it provides the Court with an opportunity to define what constitutes the *mens rea* required under the ACCA’s use of force clause to trigger the fifteen-year mandatory minimum, and possible life sentence, of the ACCA. And, in so doing, to settle the divergent conclusions of the United States Courts of Appeals.

ARGUMENT

I. The “Use of Force” Clause in the Armed Career Criminal Act (the “ACCA”), 18 U.S.C. § 924(e)(2)(B)(i) Does Not Include Crimes with a *Mens Rea* of Mere Recklessness.

This Court held in *Voisine* that the phrase “misdemeanor crime of domestic violence,” defined at 18 U.S.C. § 921(a)(33)(A), includes crimes committed recklessly. 136 S. Ct. at 2282. But, the rationale in *Voisine* does not extend to the use of force clause in the ACCA because those two statutes use different language and have distinct goals.

A misdemeanor crime of domestic violence is defined as a misdemeanor that, in pertinent part, “has, as an element, the use or attempted use of physical force” 18 U.S.C. § 921(33)(A)(ii). This Court in *Voisine* was interpreting the meaning of this phrase in the context of 18 U.S.C. § 922(g)(9), which makes it a crime for an individual “who has been convicted in any court of a misdemeanor crime of domestic violence” to possess a firearm or ammunition. Just like 18 U.S.C. § 922(g)(1), the statutory range that applies is zero to ten years. 18 U.S.C. § 924(a)(2).

By contrast, the language at issue under the ACCA is a portion of the definition of a “violent felony,” which, in pertinent part, is any felony 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)(i) (emphasis added). This statute prohibits not just the use of force, but the use of force against another person. And, this definition is used to determine not whether an individual’s actions are sanctionable – but whether that individual should receive a substantial increase in his statutory range to a mandatory minimum sentence of fifteen years, up to a possibility of life in prison. Given the much harsher consequences of the statute, and the different language used by Congress, it makes sense that the violent felony definition in the ACCA would be limited to more serious conduct than the definition of “misdemeanor crime of domestic violence.”

In *Voisine*, this Court focused on the term “use,” and found that it means “the act of employing something.” 136 S. Ct. at 2278. It concluded that a person does not “employ” force accidentally, but that use of force in this context requires volition. *Id.* at 2279. The Court turned to the example of a husband and a dinner plate and explained the difference between the two examples. *Id.* In one, a husband drops the plate while doing dishes, and a shard cuts his wife’s face, while in the other the husband throws a dinner plate at a wall next to his wife’s head, and a shard cuts his wife’s face. *Id.* The court explained that in the first example we cannot say that the husband actively used force, but in the second example the act of throwing the plate constitutes a use of force. *Id.* The fact that the injury was not intended, but only the result of his reckless action did not matter. *Id.* This is because the action that is prohibited in the definition of “misdemeanor crime of domestic violence” is the “use

of force". *Id.* The Court further noted that if it were to interpret this phrase as excluding reckless crimes, that the majority of the states' misdemeanor domestic assault statutes would be excluded – which could not be the intention of Congress. *Id.* at 2280; see also *id.* at 2282 ("the state-law backdrop to that provision [the ban on firearm possession by individuals with a misdemeanor crime of domestic violence], which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said").

By contrast, the use of force clause in the ACCA does not apply to any use of force, as in the definition of "misdemeanor crime of domestic violence," but applies only to the use of force *against the person of another*. This additional language is limiting. "The italicized language is a restrictive phrase that describes the particular type of 'use of physical force' necessary to satisfy [the violent felony definition]." *Harper*, 875 F.3d at 331 (citing generally Shertzer, *The Elements of Grammar* 7 (1986)). Thus, the use of force clause in the ACCA "requires not merely a volitional application of force, but a volitional application [that is specifically] 'against the person of another.'" *Harper*, 875 F.3d at 331.

Thus, the use of force clause of the ACCA "requires a *mens rea*—not only as to the employment of force, but also as to its *consequences . . .*" *Id.* And, "that requirement is met if the actor intends (*i.e.*, 'consciously desires') to apply force to the person of another." *Id.* Acting with recklessness is not the same as consciously desiring to apply force to the person of another. Returning to the dinner plate example, the husband volitionally used force to throw the plate against the wall, but

he did not volitionally use force against the body of his wife. See *id.* Recklessness means that he is indifferent as to whether his actions cause harm, “hence he does not consciously desire that application”. *Id.* at 332. This indifference means that he has not *used* physical force *against the person of another*. See *id.* (“[a]s culpable as the reckless actor might be, therefore, he does not volitionally apply force “against the person of another”). Further, unlike the various state misdemeanor domestic violence statutes, excluding reckless crimes from the use of force clause in the ACCA will not wholly deprive the statute of practical effect. It will merely ensure that a fifteen-year mandatory minimum is applied only to individuals who have prior convictions for serious, intentional, acts of violence. Mr. Ayers respectfully requests that the Court grant certiorari review in order to resolve this important question.

CONCLUSION

The Courts of Appeals are divided regarding whether the use of force clause in the ACCA encompasses crimes committed recklessly. This means that some individuals will qualify for the ACCA’s fifteen-year mandatory minimum depending not on their prior record – but on which district the person is indicted in. Such arbitrary application of the ACCA should not be tolerated.

In consideration of the foregoing, Petitioner urges the Court to grant certiorari review in order to resolve the *mens rea* requirements of the ACCA. Petitioner respectfully submits that the Petition for Certiorari should be granted, the judgment of the Sixth Circuit Court of Appeals vacated, and the case remanded for further consideration.

Respectfully Submitted,

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