

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRITT JARRIEL HAMMONS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(a) **The Question Presented for Review Expressed in the Terms and Circumstances of the Case.**

This Court explicitly declined to address whether its holding in *Voisine v. United States*, 136 S.Ct. 2272(2016), in which the “use of force” described in 18 U.S.C. § 921(a)(33)(A) included misdemeanor crimes of domestic violence that can be committed recklessly, applied in another statutory contexts. The question presented here is:

Whether the Tenth Circuit erroneously held – in conflict with the First Circuit, but consistent with the Fifth, Sixth, and Eighth Circuits, that the term “use of force against the person of another” in 18 U.S.C. § 924(e)(2)(B)(i) includes reckless conduct.

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

TABLE OF CONTENTS

(a)	<u>The Question Presented for Review Expressed in the Terms and Circumstances of the Case</u>	1
(b)	<u>List of all Parties to the Proceeding</u>	2
(c)	<u>Table of Contents and Table of Authorities</u>	2
(d)	<u>Reference to the Official and Unofficial Reports of any Opinions</u>	7
(e)	<u>Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked</u>	7
(f)	<u>The Constitutional Provisions, Statutes, and Rules which the Case Involves</u>	8
(g)	<u>Concise Statement of the Case</u>	10
(h)	<u>Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ</u>	13
(i)	<u>Appendix</u>	19

TABLE OF CITED AUTHORITIES

CASES

<i>Baptiste v. Attorney General</i> , 842 F.3d 601 (3d Cir. 2016).	14-15
<i>Begay v. United States</i> , 553 U.S. 137 (2008).	15
<i>Curtis Johnson v. United States</i> , 559 U.S. 133 (2010)	15
<i>Jefferson v. United States</i> , 2016 WL 6023331 (S.D. Ala. 2016).	14
<i>Johnson v. United States</i> , 135 S.Ct. 2551 (2015)	12
<i>Leocal v. Ashcroft</i> , 125 S.Ct. 337 (2004).	16
<i>United States v. Benally</i> , 843 F.3d 350 (9th Cir. 2017).	14
<i>United States v. Bennett</i> , 868 F.3d 1 (1st Cir. 2017) <i>vacated due to death of defendant as held in</i> <i>Bennett v. United States</i> , 870 F.3d 34 (1st Cir. 2017).	14, 16
<i>United States v. Bonilla</i> , 687 F.3d 188 (4th Cir. 2012).	17
<i>United States v. Brown</i> , 249 F.Supp.3d 287 (D.D.C. 2017).	14
<i>United States v. Burns-Johnson</i> , 864 F.3d 313 (4th Cir. 2017).	14

<i>United States v. Butler</i> , 253 F.Supp.3d 133 (D.D.C. 2017).....	14
<i>United States v. Castleman</i> , 134 S.Ct. 140 (2014).....	15-16
<i>United States v. Constante</i> , 544 F.3d 584 (5th Cir. 2008).....	18
<i>United States v. Dancy</i> , 248 F.Supp.3d 292 (D. Mass. 2017).	14
<i>United States v. Fisher</i> , 2017 WL 1426049 (E.D. Pa. 2017).....	14
<i>United States v. Fogg</i> , 836 F.3d 951 (8th Cir. 2016).....	14
<i>United States v. Hammons</i> , 153 Fed.Appx. 492 (10th Cir. 2005) (unpublished).	11
<i>United States v. Hammons</i> , 862 F.3d 1052 (10th Cir. 2017).....	7, 12, 19
<i>United States v. Harper</i> , ___ F.3d ___, 2017 WL 5181614 (6th Cir. Nov. 9, 2017)	14
<i>United States v. Hill</i> , 225 F.Supp.3d 328 (W.D. Penn. 2016).....	14
<i>United States v. Johnson</i> , 227 F.Supp.3d 1078 (N.D. Tex. 2016).	14
<i>United States v. Lattanzio</i> , 232 F.Supp.3d 220 (D. Mass. 2017).	14

<i>United States v. Lee</i> , No. 16-6288, ___ Fed.Appx___, 2017 WL 2829372 (10th Cir. 2017) (unpublished)	18
<i>United States v. Mendez-Henriquez</i> , 847 F.3d 214 (5th Cir. 2017)	13, 14
<i>United States v. Pam</i> , 867 F.3d 1191 (10th Cir. 2017)	17
<i>United States v. Romo-Villalobos</i> , 674 F.3d 1246 (11th Cir. 2012)	18
<i>United States v. Vail-Bailon</i> , 868 F.3d 1293 (11th Cir. 2017)	14
<i>United States v. Verwiebe</i> , 874 F.3d 258 (6th Cir. 2017)	14
<i>United States v. Wehunt</i> , 230 F.Supp.3d 838 (E.D. Tenn. 2017).	14
<i>Voisine v. United States</i> , 136 S.Ct. 2272(2016)	1, 12, 13, 15-18

STATUTES

18 U.S.C. § 16.	16
18 U.S.C. § 921(a)(33)(A)	1, 16
18 U.S.C. § 921(a)(33)(A)(ii)	15
18 U.S.C. § 922(g)	8, 11, 15
18 U.S.C. § 924(e)	8
18 U.S.C. § 924(e)(2)(B)(i)	1, 12, 16

21 U.S.C. § 801.	8
21 U.S.C. § 802.	9
21 U.S.C. § 951.	8
28 U.S.C. § 1254(1).	7
28 U.S.C. § 2255	7, 10, 11
FLA. STAT. § 893.13	18
OKLA. STAT. tit. 21, § 652(B) (1992).	10, 11, 17
TEX. PEN. CODE ANN. §30.02(a)(3)	17

RULES

SUP. CT. R. 13.1.	10
SUP. CT. R. 29.4(a).	7
SUP. CT. R. 29.4(b)	7
SUP. CT. R. 29.4(c)	7

MISCELLANEOUS

USSG §2L1.2	18
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(d) **Reference to the Official and Unofficial Reports of any Opinions**

The order and judgment of the of the United States Court of Appeals for the Tenth Circuit affirming the district court's denial of relief under 28 U.S.C. § 2255 is published. *United States v. Hammons*, 862 F.3d 1052 (10th Cir. 2017).

(e) **Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.**

- (i) Date of judgment sought to be reviewed.

The published opinion of the Tenth Circuit of which review is sought was filed July 7, 2017;

- (ii) Date of any order respecting rehearing.

The unpublished order denying panel rehearing and rehearing *en banc* is dated August 15, 2017;

- (iii) Cross Petition.

Not applicable;

- (iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

- (v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) **The Constitutional Provisions, Statutes and Rules which the Case Involves.**

(1) Constitutional Provisions:

None.

(2) Statutes Involved:

18 U.S.C. § 924(e):

(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).

(2) As used in this subsection –

(A) the term “serious drug offense” means –

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing,

distributing, or possession with intent to manufacture or distribute, a controlled substances (as defined in Section 201 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

OKLA. STAT. tit. 21, § 652(B) (1992):

B. Every person who uses any vehicle to facilitate the intentional discharge of any kind of firearm, crossbow or other weapon in conscious disregard for the safety of any other person or persons shall upon conviction be punished by imprisonment in the State Penitentiary for a term of not less than two (2) years nor more than twenty (20) years.

(3) Rules Involved: None.

(4) Other: None.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of a published opinion entered by a United States Court of Appeals affirming judgment denying relief in the district court. The jurisdiction of the district court was invoked pursuant Title 28, United States Code, Section 2255. The district court denied relief and Mr. Hammons sought appellate review. The United States Court of Appeals for the Tenth Circuit granted a certificate of appealability but affirmed in a published opinion. Mr. Hammons sought panel and *en banc* rehearing. Rehearing was denied on August 15, 2017. This petition is timely filed pursuant to Supreme Court Rule 13.1.

Facts Material to Consideration of Question Presented

On September 7, 2004, Mr. Hammons was indicted on a single count of being a felon in possession of a firearm in violation of Title 18, United States Code, Section 922(g). Mr. Hammons pled guilty and was sentenced to a term of 180 months' incarceration pursuant to the Armed Career Criminal Act (ACCA). In applying the ACCA, the Court relied upon Mr. Hammons' convictions for three offenses of Using a Vehicle to Facilitate the Intentional Discharge of a Firearm (hereinafter "Facilitating Discharge of Firearm") and one instance of Attempting to Facilitate Discharge of Firearm contrary to Oklahoma Statute, Title 21, Section 652(B).

Mr. Hammons appealed his sentence to the Tenth Circuit, arguing (1) the Court erred when the indictment, plea petition, and plea proceedings failed to inform him of the ACCA's applicability; (2) the Court erred when it considered separate convictions for using, and attempting to use, a vehicle to facilitate the discharge of a firearm as separate offenses for purposes of applying the ACCA, and (3) the Court abused its discretion by refusing to run his federal sentence concurrently with Mr. Hammons' state sentences. *United States v. Hammons*, 153 Fed.Appx. 492, 493-94 (10th Cir. 2005) (unpublished). The Tenth Circuit affirmed. *Id.* at 495.

On August 24, 2015, Mr. Hammons filed a *pro se* Motion to Vacate under Title 28, United States Code, Section § 2255 in which he argued the United States Supreme

Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015) invalidated his sentence. Specifically, Mr. Hammons argued after *Johnson* his convictions for Facilitating the Discharge of a Firearm (and attempting to do so) did not qualify as violent felonies under the force clause of the ACCA. *See* 18 U.S.C. § 924(e)(2)(B)(i).

On October 19, 2015, the Court appointed the Office of the Federal Public Defender to represent Mr. Hammons in his Section 2255 Motion proceedings. After filing a further argument in support of Mr. Hammons' petition, the District Court denied relief and denied a Certificate of Appealability. Mr. Hammons appealed and successfully moved for a Certificate of Appealability.

In a published opinion, the United States Court of Appeals for the Tenth Circuit affirmed. *United States v. Hammons*, 862 F.3d 1052 (10th Cir. 2017). In pertinent part, the Court determined Oklahoma's offense of facilitating the intentional discharge of a firearm qualified as a violent felony under the ACCA because it contains, as an element, the intentional use of physical force against the person of another. *Id.* at 1055. The Tenth Circuit continued, applying this Court's recent decision in *Voisine v. United States*, 136 S.Ct. 2272 (2016):

The Supreme Court's recent decision in *Voisine v. United States* confirms the point. 136 S.Ct. 2272 (2016). In interpreting the word "use ... of physical force" in 18 U.S.C. § 921(a)(33)(A)(ii), *Voisine* reasoned that because reckless conduct involves a "deliberate decision to endanger another," a predicate statute requiring only a reckless mental state would categorically involve the use of physical force. *Id.* at 2279 (emphasis

added). The Court clarified that the categorical inquiry focuses on whether the force contemplated by the predicate statute is “volitional” or instead “involuntary” - it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly. *Id.*; *see also United States v. Mendez-Henriquez*, 847 F.3d 214, 222 (5th Cir. 2017) (interpreting *Voisine* to establish a dividing line between “volitional acts [and] involuntary motion[,] not recklessness [and] intention”). We have already observed that Oklahoma’s § 652(B) requires the deliberate use of physical force-the facilitation of the intentional discharge of a weapon. *See Burleson*, 46 P.3d at 152. Accordingly, we conclude that § 652(B) necessarily involves “the use ... of physical force against the person of another.”

Id. at 1056.

Mr. Hammons’ petition for panel rehearing and rehearing *en banc* was denied on August 15, 2017.

Mr. Hammons’ current projected release date is July 11, 2027.

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

Circuit Courts of Appeals have split on the issue of whether this Court’s recent decision in *Voisine v. United States*, 136 S.Ct. 2272 (2016) applies to the mens rea requirement of habitual offender statutes such as the ACCA. This case presents the first published opinion by the Court of Appeals for the Tenth Circuit in which it applied *Voisine* to the ACCA. Not only does this decision incorrectly extend *Voisine*, it creates a widening rift between the circuit courts of appeals.

This case presents the Court with a vehicle to resolve the developing split amongst the circuits.

At present, the Tenth Circuit's decision to extend *Voisine* is in conformity with decisions from the Fifth Circuit in *United States v. Mendez-Henriquez*, 847 F.3d 214 (5th Cir. 2017), Sixth Circuit in *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017),¹ and Eighth Circuit in *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016).

In contrast, the First Circuit issued a published opinion declining to extend *Voisine* in *United States v. Bennett*, 868 F.3d 1 (1st Cir. 2017).² Numerous district courts have also declined to extend *Voisine*.³

Other circuits have yet to weigh in, though the courts of appeals have acknowledged the tension and identified the unresolved issue. *See United States v. Benally*, 843 F.3d 350 (9th Cir. 2017); *United States v. Vail-Bailon*, 868 F.3d 1293

¹*But see United States v. Harper*, ___ F.3d ___, 2017 WL 5181614 (6th Cir. Nov. 9, 2017) (explicitly criticizing *Verwiebe* as incorrectly decided, but acknowledging its binding effect).

²Due to the death of the petitioner, the First Circuit's opinion in *Bennett* was vacated. *Bennett v. United States*, 870 F.3d 34 (1st Cir. 2017).

³*United States v. Lattanzio*, 232 F.Supp.3d 220 (D. Mass. 2017); *United States v. Dancy*, 248 F.Supp.3d 292 (D. Mass. 2017); *United States v. Johnson*, 227 F.Supp.3d 1078 (N.D. Tex. 2016); *Jefferson v. United States*, 2016 WL 6023331 (S.D. Ala. 2016); *United States v. Fisher*, 2017 WL 1426049 (E.D. Pa. 2017); *United States v. Brown*, 249 F.Supp.3d 287 (D.D.C. 2017); *United States v. Wehunt*, 230 F.Supp.3d 838 (E.D. Tenn. 2017); *United States v. Hill*, 225 F.Supp.3d 328 (W.D. Penn. 2016); *United States v. Butler*, 253 F.Supp.3d 133 (D.D.C. 2017).

(11th Cir. 2017); *United States v. Burns-Johnson*, 864 F.3d 313 (4th Cir. 2017); *Baptiste v. Attorney General*, 842 F.3d 601 (3d Cir. 2016). It does not appear the Second, Seventh, or District of Columbia Courts of Appeals have decided the issue or acknowledged it at the time of the filing of this petition.

Not only has the Tenth Circuit’s decision to extend *Voisine* contributed to the split amongst the circuits, it is incorrect. At issue in *Voisine* was whether a misdemeanor offense of domestic abuse with a mens rea requirement of recklessness was sufficient to prohibit possession of firearms under Title 18, United States Code, Section 922(g)(9). The ACCA was not at issue. This Court has made clear it interprets the two statutes entirely differently. Compare *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) (“‘physical force’ means violence force – that is, force capable of causing physical pain or injury to another person”) with *Voisine*, 136 S.Ct. at 2279 (describing the force requirement for misdemeanor crime of violence as “the active employment of force”).

Applying *Voisine* to the ACCA would also run contrary to *United States v. Castleman*, 134 S.Ct. 140 (2014). *Castleman* noted the “hesit[ion] . . . to apply the [ACCA] to ‘crimes which, though dangerous, are not typically committed by those whom one normally labels ‘armed career criminals.’” 143 S.Ct. at 1412 (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008)). Compare 18 U.S.C. §

921(a)(33)(A)(ii) (“the use or attempted use of physical force”) with 18 U.S.C. § 924(e)(2)(B)(i) (“the use, attempted use, or threatened use of physical force *against the person of another*”) (emphasis added). While an actor may be said to have “used” force whether or not he intended to cause harm or was aware of a substantial likelihood of doing so, the use of “force against the person of another” suggests intentional, not reckless behavior. *See also Bennett*, 868 F.3d at 19 *vacated due to death of defendant as described in Bennett*, 870 F.3d 34 (1st Cir. 2017) (“It is hard to know whether the majority in *Voisine* would describe such reckless driving as merely involving a “use ... of physical force” or as also involving a “use ... of physical force against” the injured party.”). Indeed, footnote four of the *Voisine* opinion explained it was not resolving the mental state issue of a similar habitual offender statute, 18 U.S.C. § 16:

Like *Leocal* [*v. Ashcroft*, 125 S.Ct. 337 (2004)], our decision today concerning § 921(a)(33)(A)’s scope does not resolve whether § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states. *Cf. United States v. Castleman*, 572 U.S. ___, ___, n. 4, 134 S.Ct. 1405, 1411, n. 6, 188 L.Ed.2d 426 (2014) (interpreting “force” in § 921(a)(33)(A) to encompass any offensive touching, while acknowledging that federal appeals courts have usually read the same term in § 16 to reach only “violent force”). All we say here is that *Leocal*’s exclusion of accidental conduct from a definition hinging on the “use” of force is in no way inconsistent with our inclusion of reckless conduct in a similarly worded provision.

Voisine, 136 S.Ct. at 280 n.4.

In cases of statutory interpretation, context matters. *Voisine* does not apply to the Armed Career Criminal Act, the penalties for which are reserved for the worst of the offenders – those that have been convicted of intentional, not reckless, offenses.

Though the Tenth Circuit determined the underlying predicate offense, OKLA. STAT. tit 21, § 652(B) had an intentional mens rea component, it still discussed and applied *Voisine*.⁴ In his petition for rehearing, Mr. Hammons unsuccessfully argued to the Tenth Circuit that its discussion of *Voisine* was dicta in light of its review of the relevant Oklahoma statute. Indeed, the Tenth Circuit subsequently recognized *Hammons* specifically applied *Voisine* in the ACCA setting. *See, e.g., United States v. Pam*, 867 F.3d 1191, 1208 (10th Cir. 2017) (“[W]e have already applied the *Voisine* Court’s reasoning in the ACCA context.”).

In addition to a developing circuit split on this issue, this case presents a compelling issue of national importance. Uniformity on the application of the ACCA implicates due process concerns. For example, the Fourth Circuit Court of Appeals in *United States v. Bonilla*, 687 F.3d 188 (4th Cir. 2012), found a Texas burglary conviction under §30.02(a)(3) of the Texas Penal Code qualified as a crime of

⁴Indeed, the text of the statute provides for an offense in which the intentional discharge of the firearm is done in “conscious disregard for the safety of any other person or persons.” OKLA. STAT. tit. 21, § 652(B).

violence for purposes of a guideline enhancement pursuant to USSG §2L1.2. This finding was made in spite of the fact the Fifth Circuit Court of Appeals held a violation of the same Texas statute was not a violent felony for purposes of the ACCA. *United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008). Whether a particular crime qualifies as a violent felony or crime of violence should not be dependent on which Circuit a defendant finds himself. *Compare also United States v. Lee*, No. 16-6288, ___ Fed.Appx___, 2017 WL 2829372 (10th Cir. 2017) (unpublished) (concluding Florida Statute § 893.13 does not qualify under the Armed Career Criminal Act) *with United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012) (concluding Florida Statute § 893.13 qualifies under the ACCA).

The developing circuit split on whether a predicate offense with a mens rea of recklessness qualifies to enhance a defendant's sentence can result in disparate sentences depending on the geographic location of the sentencing court. Whether *Voisine* applies to the ACCA is a matter requiring intervention from this Court.

Conclusion

The petition for a writ of certiorari should be granted.

(i) **Appendix.**

- (i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Hammons, No.16-6024, 862 F.3d 1052 (10th Cir. 2017).

- (ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

- (iii) Any order on rehearing:

Order Denying Rehearing, dated August 15, 2017, *United States v. Hammons*, No. 16-6024 (10th Cir. Aug. 15, 2017);

- (iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

Order, dated January 15, 2016, United States District Court for the Western District of Oklahoma, CR-04-172-F; CIV-15-912-F (Docket Number 55);

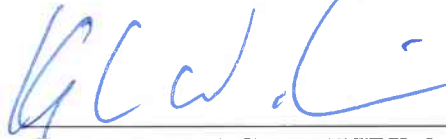
- (v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

- (vi) Other appended materials:

None.

Respectfully submitted,



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