

NO. 17-7613

**IN THE
SUPREME COURT OF THE UNITED STATES**

ADARIUS HARPER,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Doris A. Randle-Holt
Federal Public Defender for the
Western District of Tennessee
By: Mary C. Jermann-Robinson
Assistant Federal Public Defender
Attorneys for Petitioner
200 Jefferson, Suite 200
Memphis, Tennessee 38103
E-mail: Mary_Jermann@fd.org
(901) 544-3895

TABLE OF CONTENTS

Table of Authorities.....	3
Argument.....	6
Conclusion.....	15

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Beckles v. United States</u> , 137 S. Ct. 886 (2017).....	12, 14
<u>Boylan v. United States</u> , 257 U.S. 614 (1921).....	6
<u>Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co.</u> , 389 U.S. 327 (1967).....	6
<u>Burrell v. United States</u> , 467 F.3d 160 (2d Cir. 2006).....	6
<u>Cole v. City of Memphis</u> , No. 2:13-cv-02117-JPM-dkv, 2017 U.S. Dist. LEXIS 27789 (W.D. Tenn. Feb. 28, 2017).....	7
<u>Curtis Johnson v. United States</u> , 559 U.S. 133 (2010).....	8, 12
<u>Samuel Johnson v. United States</u> , 135 S. Ct. 2551 (2015).....	11, 14
<u>State v. Boone</u> , No. W2005-00158-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 1296 (Tenn. Crim. App. Dec. 27, 2005).....	12
<u>State v. Cope</u> , No. M2014-00775-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 659 (Tenn. Crim. App. Aug. 14, 2015).....	12
<u>State v. Graham</u> , No. E2005-02937-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 39 (Tenn. Crim. App. Jan. 24, 2008).....	12
<u>United States v. Bennett</u> , 868 F.3d 1 (1st Cir. 2017).....	10-12
<u>United States v. Bennett</u> , 870 F.3d 34 (1st Cir. 2017).....	10
<u>United States v. Booker</u> , 543 U.S. 220 (2005).....	14

<u>United States v. Castleman</u> , 134 S. Ct. 1405 (2014).....	8-9
<u>United States v. Flores-Gallo</u> , 625 F.3d 819 (5th Cir. 2010).....	12
<u>United States v. Fogg</u> , 836 F.3d 951 (8th Cir. 2016).....	8
<u>United States v. Hayes</u> , 555 U.S. 415 (2009).....	10
<u>United States v. Howell</u> , 838 F.3d 489 (5th Cir. 2016).....	8
<u>United States v. Marrero</u> , 743 F.3d 389 (3d Cir. 2014).....	12
<u>United States v. McMillan</u> , 863 F.3d 1053 (8th Cir. 2017).....	12
<u>United States v. Middleton</u> , 883 F.3d 485 (2018).....	8-10
<u>United States v. Montes-Flores</u> , 736 F.3d 357 (4th Cir. 2013).....	12
<u>United States v. Oliver</u> , 20 F.3d 415 (11th Cir. 1994).....	12-13
<u>United States v. Pam</u> , 867 F.3d 1191 (10th Cir. 2017).....	8, 10
<u>United States v. Simmons</u> , 782 F.3d 510 (9th Cir 2015).....	12
<u>United States v. Spells</u> , 537 F.3d 743 (7th Cir. 2008).....	12
<u>United States v. Steed</u> , 879 F.3d 440 (1st Cir. 2018).....	12-13
<u>United States v. Verwiebe</u> , 874 F.3d 258 (6th Cir. 2017).....	10

<u>United States v. Walker</u> , 595 F.3d 441 (2d Cir. 2010).....	12
<u>United States v. Windley</u> , 864 F.3d 36 (1st Cir. 2017).....	10-12
<u>United States v. Wittig</u> , No. 02-40140-02-JAR, 2008 U.S. Dist. LEXIS 96637 (D. Kan. Nov. 28, 2008).....	7
<u>United States v. Wray</u> , 776 F.3d 1182 (10th Cir. 2015).....	12
<u>Voisine v. United States</u> , 136 S. Ct. 2272 (2016).....	9-11
<u>Weisniewski v. United States</u> , 353 U.S. 901 (1957).....	11
<u>Statutory Authority</u>	
18 U.S.C. § 921(a)(33)(A).....	9
18 U.S.C. § 922(g)(9).....	9
18 U.S.C. § 924(e)(2)(B).....	8, 10, 12
28 U.S.C. § 2101(f).....	7
S. Ct. R. 13(1).....	6
S. Ct. R. 13(3).....	6
USSG § 4B1.2(a)(1).....	12
Tenn. Code Ann. § 39-11-106(a)(2).....	9

ARGUMENT

A. The Harper panel's decision is a final judgment that is ripe for review by this Court.

In its brief in opposition, the government avers that this Court need not consider Mr. Harper's Petition because his case is in an interlocutory posture. (See Br. Opp., at 7-8.) But this case is not in an interlocutory posture. This Court's Rules provide that the time for filing a petition for writ of certiorari to review a judgment entered by a United States court of appeals is 90 days after entry of the judgment. S. Ct. R. 13(1). The time for filing a petition for certiorari review commences on the date of the judgment or order sought to be reviewed, and not from the date of the issuance of the mandate. S. Ct. R. 13(3). This Court has long held that the date of the entry of the final judgment of the court of appeals to which writ of error is issued, and not the date of the entry of judgment in the district court under the mandate of the court of appeals is the date upon which this time period commences. Boylan v. United States, 257 U.S. 614, 614 (1921).

The cases cited by the government are inapposite because the judgments involved were not final judgments. For instance, this Court denied the petition in Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co., 389 U.S. 327, 328 (1967), a contempt order case imposing substantial fines, because the district court was directed to further rule upon whether there was actually contempt, and if so, of what magnitude. Id. This presented a ripeness issue. Id. The case does not stand for the proposition that all remands render cases interlocutory.

In fact here, the resentencing is purely a ministerial act, with no discretion given to the trial judge. See, e.g., Burrell v. United States, 467 F.3d 160, 164 (2d Cir. 2006) (explaining that a ministerial act is one that involves obedience to instructions or laws instead of discretion, judgment, or skill). The panel's decision in this case dictates that the sentence to be imposed on

remand will include an enhanced base offense level founded upon the career offender Guideline's "use of force" definition, based upon Mr. Harper's conviction for reckless aggravated assault.

Moreover, a majority of courts have found under 28 U.S.C. § 2101(f) that district courts are not permitted to exercise jurisdiction to stay a circuit court's final judgment pending filing of a petition for writ of certiorari. See e.g. Cole v. City of Memphis, No. 2:13-cv-02117-JPM-dkv, 2017 U.S. Dist. LEXIS 27789, at *6 & n.1 (W.D. Tenn. Feb. 28, 2017) (collecting cases); United States v. Wittig, No. 02-40140-02-JAR, 2008 U.S. Dist. LEXIS 96637, *6 (D. Kan. Nov. 28, 2008) (same). Only an appellate court or a Justice of the Supreme Court has jurisdiction to stay an appellate court's final judgment pending this Court's review of a certiorari petition. Cole, 2017 U.S. Dist. LEXIS 27789, at *8; Wittig, 2008 U.S. Dist. LEXIS 96637, at *5-6.

Note also Mr. Harper entered a plea agreement prior to the changes in Sixth Circuit law discussed in his Petition for Certiorari. He agreed therein to waive his appellate rights. Indeed, the present appeal was brought by the government. Mr. Harper has no doubt that if had attempted to wait until the district court resentenced him to begin the appellate process anew, he would instead now be arguing about waiving his appellate rights instead of presenting the substantive issue to this Court. The government would most assuredly argue that he could not appeal his sentence upon resentencing because of the waiver in his plea agreement.

Mr. Harper's resentencing is admittedly taking an inordinate amount of time. But, for the reasons stated herein, Mr. Harper urges this Court to find that his petition is not in an interlocutory posture and rule on the merits.

B. The lower courts are struggling with consistent application of this Court’s jurisprudence and require further direction as to whether reckless crimes should be deemed violent outside of the context of domestic violence misdemeanors.

The government avers that the existing circuit split on the issue at hand does not warrant this Court’s review because the majority of circuits to have addressed the issue have recognized that recklessness is sufficient to constitute a “crime of violence” or “violent felony.” (See Br. Opp’n, at 12 (citing United States v. Pam, 867 F.3d 1191, 1207-08 (10th Cir. 2017); United States v. Howell, 838 F.3d 489, 500-01 (5th Cir. 2016); United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016)). Since Mr. Harper filed his Petition, however, the Fourth Circuit has weighed in on this issue, primarily relying on this Court’s precedent to find that a more culpable mens rea than recklessness is necessary to qualify an offense as a “violent felony” under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) (“ACCA”). See United States v. Middleton, 883 F.3d 485 (2018).

In Middleton, the government argued that “it is impossible to cause bodily injury without applying force in the common-law sense.” Middleton, 883 F.3d at 489-490 (quoting United States v. Castleman, 134 S. Ct. 1405, 1415 (2014)). The government has made a similar argument here, noting that the volitional “use” of force automatically implies that it would be “against the person of another.” (See Br. Opp’n, at 9-10).

The Middleton court rejected the argument, finding it misapprehended the law in two ways, only one of which is relevant here: it ignored the distinction between de minimis force, as discussed in Castleman, and violent force, as discussed in Curtis Johnson v. United States, 559 U.S. 133, 140 (2010).¹ Middleton, 883 F.3d at 490 (emphasis in original). The Middleton court explained that

¹ The second reason given by the Middleton court is an issue unique to the Fourth Circuit.

Castleman did not control the case because this Court has interpreted the terms “misdemeanor crime of domestic violence” (“MCDV”) and “violent felony” differently. Id. The Middleton court concluded that “the force discussed in Castleman thus differed from the force required in the ACCA: Section 921(a)(33)(A) accepts de minimis force, but the ACCA, by contrast, requires violent force.” Id.

The court then explained that Castleman was discussing the most de minimis force permissible under Tennessee’s statute defining “bodily injury.” Id. (citing Tenn. Code Ann. § 39-11-106(a)(2)). The Middleton court noted that the Castleman majority had actually reserved the question of whether “bodily injury” required “violent force.” Id. (citing Castleman, 134 S. Ct. at 1414). Thus, the Middleton court found that Castleman did not support the government’s argument that any form of bodily injury (i.e., offensive touching) would require violent force. Id.

The Middleton decision also contains a concurrence that discusses Voisine v. United States, 136 S. Ct. 2272 (2016). See Middleton, 883 F.3d at 493 (Floyd, J., concurring in part). Judge Floyd found the majority rationale inadequate because the ACCA requires a higher degree of mens rea than mere recklessness. Id. at 497. Judge Floyd reasoned that Voisine’s holding that reckless domestic assault qualifies as a MCDV under 18 U.S.C. § 922(g)(9) did not control how the lower courts should construe the ACCA’s force clause. Id. at 498. Pointing out that this Court declined to extend its holding in Voisine to the ACCA force clause, and this Court’s explanation that the prohibition against domestic abusers possessing firearms was based on a different rationale from the ACCA, Judge Floyd reasoned:

Given the divergent context of “use” and the divergent purpose of targeting armed career criminals, the ACCA force clause requires a construction different from that of the MCDV force clause. In drafting the ACCA force clause, Congress employed the word “use” differently than in the MCDV force clause. While the MCDV force clause concerns simply “the use . . . of physical force” by the perpetrators, 18 U.S.C. § 921(a)(33)(A)(ii), the ACCA’s force clause concerns “use . . . of physical force

against the person of another,” 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Congress chose to “denominate ‘the use of force against another’ as a single, undifferentiated element.” United States v. Hayes, 555 U.S. 415, 421 n.4, 129 S. Ct. 1079, 172 L.Ed.2d 816 (2009). While the word “use” by itself is “indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness,” Voisine, 136 S. Ct. at 2279, the subsequent phrase against the person of another arguably conveys “the need for the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim’s bodily injury,” United States v. Bennett, 868 F.3d 1, 18 (1st Cir.) [“Bennett I”], withdrawn 870 F.3d 34 (1st Cir. 2017) (withdrawing the first Bennett opinion as moot because of Bennett’s death but noting that a different panel had “‘endorse[d] and adopt[ed]’ the ‘reasoning’ of the [first] Bennett opinion as its own” (quoting United States v. Windley, 864 F.3d 36, 37 n.2 (1st Cir. 2017) (per curiam))).

Middleton, 883 F.3d at 498-99. Judge Floyd concluded:

In sum, while Congress’s broad purpose of preventing domestic abusers from possessing firearms by linking the MCDV statute to prevailing state laws justifies broadly construing the MCDV force clause, the ACCA’s purpose in targeting the truly purposeful and aggressive criminals warrants a narrower reading of the word “use.”

Middleton, 883 F.3d at 499.

At this point, Judge Floyd criticized the Sixth Circuit’s holding in United States v. Verwiebe, 874 F.3d 258 (6th Cir. 2017), because Verwiebe’s reading rendered the force clause’s language “against the person of another” superfluous. Id. at 499 n.3. That is the exact criticism leveled by Mr. Harper’s panel.

It should also be noted that while the Tenth Circuit admittedly applied Voisine’s holding to find that convictions requiring only a reckless mens rea could qualify under the ACCA’s use of force clause, it has yet to do so in the Guidelines context. See Pam, 867 F.3d at 1207 n.15. The Pam panel also expressed doubt about its own conclusions with regard to the ACCA, noting the First Circuit’s decision in Bennett I. Id. at 1208, n.16.

The diametrically opposed results amongst the circuits, the admitted confusion, the recalcitrance to extend an ACCA holding to the Guidelines when both have traditionally been

evaluated in the same manner by all of the circuits are all indications that the circuit courts are struggling with application of Voisine's reasoning to whether crimes with only a reckless mens rea should be deemed violent. This is not the minor disagreement amongst circuits that the government would like to paint. (See Brief Opp'n, at 11-12.) Instead, it is becoming a quagmire reminiscent of the years of residual clause angst this Court mercifully resolved in Samuel Johnson v. United States, 135 S. Ct. 2551 (2015). The circuit courts would no doubt dearly welcome direction from this Court.

Finally, the government states that the intra-circuit split that has developed in the Sixth Circuit between Mr. Harper's panel and the Verwiebe panel would not warrant this Court's review because doubt about the respect to be accorded to a previous intra-circuit decision from a different panel is not sufficient for invoking the jurisdiction of this Court. (See Br. Opp'n, at 13-14 (citing Wisniewski v. United States, 353 U.S. 901, 902 (1957).) While this may be generally true, Mr. Harper observes that the Sixth Circuit is not now the only circuit where different judges are expressing divergent opinions. As explained above when discussing Middleton, the Fourth Circuit's judges have very different opinions about how to apply this Court's Castleman and Voisine jurisprudence. The Tenth Circuit, while not in apparent disagreement, is exhibiting great uncertainty about its own holding. Perhaps the Court can, at the very least, take all of this into account as evidence of the extent of the lower courts' struggle when determining whether to grant certiorari review.

C. Bennett I and Windley are indistinguishable from Mr. Harper's case.

The government attempts to distinguish the First Circuit's decision in Bennett I, and Windley, by asserting that those decisions are somehow different from Mr. Harper's case because those cases involved a particular type of reckless conduct statute. (See Br. Opp'n, at 12-13.) The

two First Circuit cases addressed Maine’s aggravated assault statute and Massachusetts’ assault and battery with a dangerous weapon statute respectively, both of which permitted convictions based only upon reckless driving that resulted in injury. See Windley, 864 F.3d at 38. Tennessee’s aggravated assault statute is equally broad, allowing for convictions where reckless driving results in bodily injury. See State v. Cope, No. M2014-00775-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 659, at *14-19 (Tenn. Crim. App. Aug. 14, 2015); State v. Graham, No. E2005-02937-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 39, at *29-30 (Tenn. Crim. App. Jan. 24, 2008); State v. Boone, No. W2005-00158-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 1296, at *21 (Tenn. Crim. App. Dec. 27, 2005).

D. The Court has recently addressed the advisory Sentencing Guidelines where the question presented stemmed from the Court’s jurisprudence concerning the ACCA’s definition of violent felony and was confounding the nation’s circuit courts.

The government contends that this Court should refrain from reviewing the issue presented because this Court has, in some cases, left clarifying revisions to the Guidelines to the Sentencing Commission. (See Brief Opp’n, at 14-15.) Yet, this Court very recently addressed the question of whether the ACCA’s residual clause definition, which was mirrored in the Guidelines, could be challenged under the same rules of vagueness. See generally, Beckles v. United States, 137 S. Ct. 886 (2017).

As in Beckles, the “use of force” definition of “crime of violence” in the career offender Guideline in issue here is identical to the ACCA’s “use of force” definition of “violent felony.” Compare 18 U.S.C. § 924(e)(2)(B)(i), with USSG § 4B1.2(a)(1). The government cannot escape the fact that all jurisdictions evaluate whether a conviction qualifies as a “violent felony” under the ACCA in the same manner as whether it qualifies as a “crime of violence” under the Guidelines. See, e.g., United States v. Steed, 879 F.3d 440, 446 (1st Cir. 2018) (precedents that

construe the force clause in the definition of a “violent felony” under ACCA are directly relevant to the analysis construing the force clause of the career offender guideline’s definition of a “crime of violence”); United States v. McMillan, 863 F.3d 1053, 1056 n.2 (8th Cir. 2017) (seeing no reason to treat the analysis of “violent felony” under the ACCA any differently than the analysis for “crime of violence” under the guidelines); United States v. Simmons, 782 F.3d 510, 514 n.3 (9th Cir. 2015) (“[W]e make no distinction between the terms “violent felony,” as that term is defined in the ACCA, and “crime of violence,” as that term is defined in the Sentencing Guidelines.”); United States v. Wray, 776 F.3d 1182, 1184-85 (10th Cir. 2015) (“[T]his court and other federal courts of appeals have applied the Supreme Court’s ACCA “violent felony” analysis in cases interpreting § 4B1.2’s definition of “crime of violence.”); United States v. Marrero, 743 F.3d 389, 395 n.2 (3d Cir. 2014) (precedent requires the application of case law interpreting “violent felony” in the ACCA to “crime of violence” in USSG § 4B1.2 because of the substantial similarity of the two sections); United States v. Montes-Flores, 736 F.3d 357, 363 (4th Cir. 2013) (recognizing that court relies interchangeably on Guidelines and ACCA precedents in evaluating whether offense qualifies as crime of violence or violent felony); United States v. Flores-Gallo, 625 F.3d 819, 823 (5th Cir. 2010) (adopting Curtis Johnson’s definition of “physical force” for that same term in the definition of “crime of violence”); United States v. Walker, 595 F.3d 441, 443 n.1 (2d Cir. 2010) (substantial similarity between the ACCA’s definition of “violent felony” and the career offender guidelines definition of “crime of violence” means authority interpreting one phrase frequently is found to be persuasive in interpreting the other phrase); United States v. Spells, 537 F.3d 743, 749 n.1 (7th Cir. 2008) (Seventh Circuit treats the career offender guideline and the ACCA as interchangeable for analytical purposes); United States v. Oliver, 20 F.3d 415, 418 (11th Cir. 1994) (“Precisely the same analytical framework applied by the courts in

ascertaining the scope of a ‘crime of violence’ logically obtains with respect to the question of what kind of conduct comprises a ‘violent felony.’”).

The difference between what is being asked of the Court here, versus Beckles, however, is that the Court is not being called upon to change a Guideline at all. Rather, the Court is being asked for further guidance for the lower courts in applying the existing Guideline definition. Also unlike Beckles, whatever this Court determines on this issue will be binding upon judges, though the Guidelines themselves are advisory only. The Sentencing Commission has no such power. See United States v. Booker, 543 U.S. 220, 243 (2005) (explaining that the Commission is a “policymaking” body, not a court and, as such, has no judicial power). While the Commission may amend the Guidelines as a matter of policy, as it did after this Court’s decision in Samuel Johnson, it has no judicial authority to direct lower court judges as to whether an offense requiring only a reckless mens rea should constitute a “crime of violence” under its amendments.

Perhaps most importantly of all, because the courts conduct the same analysis to come to a determination of whether an offense is a “violent felony” or a “crime of violence”, should this Court determine to grant certiorari, the ensuing opinion will not be limited to impact upon those sentenced under the Guidelines. It will necessarily apply to those sentenced under the ACCA, thereby affecting hundreds of defendants each year.

At this point, the Court knows that the divide on this issue will only continue to grow amongst the circuits. Now is the time for the Court to step in and give further direction. Mr. Harper’s case is an excellent vehicle for this purpose.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully continues his prayer that this Court will grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 30th day of May, 2018.

Respectfully submitted,

DORIS RANDLE HOLT
FEDERAL DEFENDER

/s Mary C. Jermann-Robinson
By: Mary C. Jermann-Robinson
Assistant Federal Defender
Attorney for Petitioner
200 Jefferson, Suite 200
Memphis, Tennessee 38103
(901) 544-3895