

No.

In the Supreme Court of the United States

ERIC MICHAEL VERWIEBE, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The courts of appeals have consistently held that reckless conduct is not sufficient to qualify an offense as a “violent felony” under the Armed Career Criminal Act (ACCA) or as a “crime of violence” under U.S.S.G. § 4B1.2(a).

The question presented is:

Whether (as four circuits claim) this Court’s holding in *Voisine v. United States*, 136 S.Ct. 2272 (2016), that “a reckless domestic assault qualifies as a ‘misdemeanor crime of domestic violence’ under [18 U.S.C.] § 922(g)(9),” abrogates those prior decisions or whether (as two circuits continue to hold) a mens rea of greater than recklessness is necessary to qualify an offense as a “violent felony” or “crime of violence.”

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OPINION BELOW

The original opinion of the court of appeals was withdrawn from publication in response to a petition for rehearing filed by petitioner. It is reproduced at App., *infra*, 2a – 6a. The amended opinion of the court of appeals, App., *infra*, 9a -15a, is reported at 874 F.3d 258.

JURISDICTION

The amended judgment of the court of appeals was entered on October 20, 2017, and a timely petition for rehearing *en banc* was denied on January 3, 2018. App., *infra*, at 18a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

UNITED STATES SENTENCING GUIDELINE AND STATUTORY PROVISIONS INVOLVED

1. U.S.S.G. § 4B1.1 provides:

§ 4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

2. U.S.S.G. § 4B1.2 provides:

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

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

3. 18 U.S.C. § 113 provides:

§ 113. Assaults within maritime and territorial jurisdiction

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

* * *

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

INTRODUCTION

Among the necessary predicates for being sentenced as a career offender under the United States Sentencing Guidelines is a “crime of violence” which is defined in relevant part as “any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 4B1.2(a)(1). The Courts of Appeals had consistently held that the “use” of force requires a higher degree of mens rea than just recklessness. *E.g., United States v. Armijo*, 651 F.3d 1226, 1236-37 (10th Cir. 2011) (U.S.S.G. § 4B1.2(a)); *United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010) (U.S.S.G. § 4B1.2(a)). *See United States*

v. Castleman, 134 S.Ct. 1405, 1414 n. 8 (2014) (“the Courts of Appeals have almost uniformly held that recklessness is not sufficient” to constitute “use” of force).

Subsequently, in *Voisine v. United States*, 136 S.Ct. 2272 (2016), this Court held that a misdemeanor conviction for recklessly assaulting a domestic relation falls within the scope of 18 U.S.C. § 922(g)(9) which disqualifies a person convicted a misdemeanor crime of domestic violence from possessing firearms. For purposes of that statute, a “misdemeanor crime of domestic violence” is defined to include a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, that “has, as an element, the use or attempted use of physical force.” 18 U.S.C. § 921(a)(33)(A).

After *Voisine*, the almost uniform holding that recklessness is not sufficient to constitute “use” of force has fragmented. There now exists a split among the Circuits as to whether reckless conduct qualifies an offense as a crime of violence or violent felony.

The First and Fourth Circuits have held, post-*Voisine*, that reckless conduct does not qualify an offense as a violent felony under the ACCA.¹ The Fifth, Eighth,

¹ In 1989, the definition of “crime of violence” in the Sentencing Guidelines was amended, and the current definition is “derived from” the Armed Career Criminal Act (ACCA) definition of “violent felony,” one of the predicates for applying the fifteen-year mandatory minimum sentence under the ACCA. 18 U.S.C. § 924(e)(2)(B)(i). See U.S.S.G. app. C, amendment 268 (1989). Courts have interpreted the career offender and ACCA definitions in the same way. *E.g.*, *Verwiebe*, App., *infra*, 10a; *United States v. Rede-Mendez*, 680 F.3d 552, 556 (6th Cir. 2012); *United States v. Sprouse*, 394 F.3d 57, 580 (8th Cir. 2005), abrogated on other grounds by *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 151 (2008).

Tenth and now the Sixth Circuits - courts that previously had held that reckless conduct was not sufficient to qualify as offense as a crime of violence or violent felony - have relied on *Voisine* as the basis for holding that, contrary to the great weight of prior authority, reckless conduct *is* sufficient to constitute a crime of violence under the Sentencing Guidelines or a violent felony under the ACCA. Because these courts failed to recognize the contextual distinctions between misdemeanor crimes of domestic violence on the one hand and violent felonies and crimes of violence on the other, review by this Court is necessary.

STATEMENT

In relevant part, among the grounds for classifying a defendant as a career offender under the United States Sentencing Guidelines is that the defendant's instant conviction be for a felony "crime of violence" and that the defendant have two prior convictions for felony "crimes of violence." U.S.S.G. § 4B1.1(a). A "crime of violence" is defined, in relevant part, as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" U.S.S.G. § 4B1.2(a)(1).

Petitioner Eric Verwiebe pleaded guilty to assaulting, resisting, or impeding a federal officer with a dangerous weapon, in violation of 18 U.S.C. § 111(a)(1), (b). R. 34. At sentencing, the final presentence report classified petitioner as a career offender based on the instant offense being scored as a "crime of violence" and based on petitioner having had two prior felony convictions for "crimes of violence." One prior conviction was a 2007 conviction for assault resulting in serious bodily injury in

violation of 18 U.S.C. § 113(a)(6). R. 41 at 101-104. 106. Petitioner objected to being classified as a career offender. He argued, *inter alia*, that his 2007 conviction did not qualify as a crime of violence because a conviction under 18 U.S.C. § 113(a)(6) may be based on only reckless conduct, citing *United States v. Minnis*, 976 F.2d 1226, 123 (9th Cir. 1992), and *United States v. Loera*, 923 F.2d 725, 72 (9th Cir. 1991). R. 42 at 127-28 (Sentencing Memorandum).

The district court rejected petitioner's argument and concluded that the prior convictions both were crimes of violence. R. 47 at 168. Petitioner received a sentence of 168 months imprisonment. R. 44 at 139.

The court of appeals affirmed. App., *infra*, 2a – 6a. The court rejected petitioner's argument that a crime requiring only recklessness did not qualify as a crime of violence. The court of appeals concluded that this Court's opinion in *Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016), effectively abrogated prior Sixth Circuit precedent – *United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010), which held that a crime requiring only recklessness does not qualify as a crime of violence under U.S.S.G. § 4B1.2(a). In *Voisine*, this Court held that recklessness was sufficient to constitute a crime that “has, as an element, the use or attempted use of physical force” for purposes of 18 U.S.C. § 921(a)(33)(A)(ii) which prohibits persons convicted of “misdemeanor domestic violence” from possessing firearms.

The court of appeals noted that the Fifth, Eighth, and Tenth Circuits had relied on *Voisine* to conclude that recklessness was sufficient to establish an offense falling with the definition of “crime of violence” under the Sentencing Guidelines or “violent

felony” under the ACCA. The court of appeals concluded: “Because § 4B1.2(a) of the Guidelines tracks the provision at issue in *Voisine*, we join our sister circuits and hold that the reckless conduct proscribed by § 113(a)(6) amounts to “the use, attempted use, or threatened use of physical force.” App., *infra*, at 6a.

Petitioner sought rehearing *en banc*. Pet. For Reh’g *En Banc*. Petitioner contended that the panel’s decision failed to consider that this Court left open the question of whether recklessness was sufficient under other statutes in *Voisine*, 136 S.Ct. at 2280 n. 4, and *United States v. Castleman*, 134 S.Ct. 1405, 1411 n. 4 (2014) (“domestic violence’ encompasses a range of force broader than that which constitutes ‘violence’ *simpliciter*”). Pet. For Reh’g *En Banc* at 5-7.

The instant amended opinion, App. *Infra*, at 9a-15a, was filed in response to the rehearing petition. The panel recognized a circuit split on the recklessness issue because the First Circuit had held that a “grievous ambiguity” exists over whether certain offenses include recklessness as an element of assault and therefore the rule of lenity required the conclusion that the offenses were not ACCA predicates. App., *infra*, at 13a – 15a. However, the amended opinion again affirmed the judgment. Petitioner’s renewed petition for rehearing was summarily denied. App., *infra*, at 18a.

REASONS FOR GRANTING THE PETITION

A Significant Circuit Split Is Developing Which This Court Should Resolve

In holding that recklessness is sufficient for an offense to qualify as a crime of violence for Sentencing Guideline purposes, the Sixth Circuit confirmed the existence of a conflict between the circuit courts that have addressed the issue in the context of the Sentencing Guidelines and the Armed Career Criminal Act. The Sixth Circuit concluded that definitions of crimes of violence “nearly identical” to the definition at issue in *Voisine* resulted, “[n]ot surprisingly,” in the Fifth, Eighth, and Tenth Circuits applying *Voisine* to hold that “recklessness suffices under the elements clause of the Armed Career Criminals Act and the Guidelines.” The Sixth Circuit noted, however, that the First Circuit “has come out the other way, or at least partly the other way.” App., *infra*, at a13a.

The Tenth Circuit, however, actually limited its holding and follows *Voisine* only in the ACCA context, leaving in place its earlier decisions holding that reckless conduct is not sufficient to qualify an offense as a crime of violence under the Sentencing Guidelines. In addition, the Fourth Circuit now has directly repudiated the Sixth Circuit’s conclusion as well as the Sixth Circuit’s criticism of the First Circuit’s analysis.

A clear circuit split exists and it is not likely to resolve itself without this Court’s guidance. This Court should grant review to insure that sentencing enhancements under the Sentencing Guidelines and the Armed Career Criminal Act are applied consistently in the federal courts.

I. The First And Fourth Circuits Hold That Reckless Conduct Is Not Sufficient To Qualify An Offense As A Violent Felony Under the ACCA And The Tenth Circuit Holds Reckless Conduct Does Not Qualify An Offense As A Crime Of Violence Under The Sentencing Guidelines

A. Subsequent to the Sixth Circuit’s decision in the instant matter, the Fourth Circuit held that a higher degree of mens rea than recklessness was necessary to qualify an offense as a violent felony under the ACCA. *United States v. Middleton*, 883 F.3d 45 (4th Cir. 2018). In reaching that conclusion, the Fourth Circuit relied primarily on this Court’s precedents.

The Fourth Circuit began by noting that this Court had indicated in *Leocal v. Ashcroft*, 53 U.S. 1, 9-10, 125 S.Ct. 377, 382 (2004), that “‘use . . . of physical force against the person or property of another’ – most naturally suggests a higher degree of intent than negligent or merely accidental conduct.” The Fourth Circuit then noted that this Court, in *United States v. Castleman*, 134 S.Ct. 1405, 141 n. 8, observed that, “since *Leocal*, ‘the Courts of Appeals have almost uniformly held that recklessness is not sufficient’” to qualify as the use of force. *Middleton*, 883 F.3d at 498.

The Fourth Circuit concluded that *Voisine* is not controlling beyond 18 U.S.C. § 921(a)(33)(A)(ii) to other contexts. 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, the Fourth Circuit 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).

Middleton, 883 F.3d at 498. The Fourth Circuit summarized its conclusion:

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.

B. The First Circuit engaged in similar analysis in a series of cases arising under ACCA. This analysis was relied by the Fourth Circuit in *Middleton*.

In *Bennett v. United States*, 868 F.3d 1, 23 (1st Cir. 2017), the First Circuit pointed out the “grievous ambiguity . . . concerning whether Congress intended the phrase ‘use . . . of physical force against the person of another’ in ACCA’s definition of a ‘violent felony’ to include or exclude reckless aggravated assault as [the statute in question] defines it.” Because of the “grievous ambiguity,” the First Circuit applied the rule of lenity and ruled that a violation of the statute there in question was not an ACCA predicate because it could be committed with a mens rea of recklessness. *Id.*

The *Bennett* decision was later withdrawn after the death of the appellant and the case became moot. However, because the reasoning in the earlier opinion was

“endorsed and adopted” by the First Circuit in a subsequent decision, *United States v. Windley*, 864 F.3d 36, 3-39 (1st Cir. 2017), the initial *Bennett* opinion remained accessible. *Bennett v. United States*, 870 F.3d 34, 36 (1st Cir. 2017). This reasoning stands as the reasoning of the First Circuit.

The Sixth Circuit in the instant matter rejected the First Circuit’s rule of lenity analysis, particularly with regard to the fact that the misdemeanor crime of domestic violence definition did not include the clause, contained in the ACCA and Sentencing Guideline definitions, requiring the use of force “against the person of another.” App, *infra*, at a13a. The Sixth Circuit’s analysis was itself rejected by the Fourth Circuit in *Middleton*, when the Fourth Circuit pointed out the Sixth Circuit’s analysis would render the clause “against the person of another” superfluous. The Fourth Circuit also reasoned that applying similar treatment to the definitions with and without that clause fails to consider the “context and purposes of the various force clauses. . . . The failure to appreciate these differences would lead to broadly sweeping run-of-the-mill criminals as violent felons subject to the heavy hand of the ACCA’s sentencing enhancement.” The Fourth Circuit suggested that the Sixth Circuit’s analysis would create a “comical misfit” the implausibility of which this Court rejected in *Johnson v. United States*, 559 U.S. 133, 145, 130 S.Ct. 1265, 1273-7 (2010). *Middleton*, 883 F.3d at 499 n. 3.

C. Contrary to the Sixth Circuit’s statement, the Tenth Circuit’s analysis of the Sentencing Guidelines actually is consistent with the First and Fourth Circuits’ analysis. The Sixth Circuit cited *United States v. Pam*, 867 F.3d 1191, 1207-08 (10th

Cir. 2017), among others in support of its conclusion that *Voisine* “confirms that recklessness suffices under the elements clause of the Armed Career Criminal Act and the Guidelines.” App., *infra*, at 13a. However, in *Pam*, the Tenth Circuit limited its holding to application of *Voisine* only to the ACCA. 867 F.3d at 1207. The Tenth Circuit actually holds that reckless conduct is not sufficient to qualify an offense as a crime of violence under the Sentencing Guidelines.

In *United States v. Duran*, 696 F.3d 109 (10th Cir. 2012), the Tenth Circuit held that an offense that can be committed with only a mens rea of recklessness is not categorically a crime of violence under the Sentencing Guidelines. The Tenth Circuit in *Pam* expressly left open the question of whether *Voisine*, abrogated *Duran* and another prior opinion, because those opinions “did not involve construction of the ACCA’s elements clause.” *Pam*, 867 F.3d at 1207 n.15.

Because the instant matter seeks review of the application of *Voisine* to the Sentencing Guidelines, the Tenth Circuit’s opinion in *Pam*, applying *Voisine* to the ACCA, is inapposite. Under its current jurisprudence, the Tenth Circuit supports Petitioner’s position and reflects a further split among the circuits.

D. The Sixth Circuit’s application of *Voisine* in the instant matter is not without criticism. An intra-Circuit split also exists in the Sixth Circuit.

In *United States v. Harper*, 875 F.3d 329 (6th Cir. 2017), a different panel of the Sixth Circuit addressed the question of whether a Tennessee reckless aggravated assault conviction qualified as a crime of violence for Sentencing Guideline purposes.

Harper held that the reckless assault conviction did qualify as a crime of violence, but only because it was bound by *Verwiebe*. 875 F.3d at 330.²

Harper distinguished the language at issue in *Voisine* with the definition of crime of violence in U.S.S.G. § 4B1.2, noting that in *Voisine*,

§ 921(a)(33)(A) required only “the use ... of physical force” *simpliciter* (so far as the “use of force” element was concerned); here, in contrast, § 4B1.2 requires “the use ... of physical force *against the person of another*[.]” (Emphasis added.) The italicized language is a restrictive phrase that describes the particular type of “use of physical force” necessary to satisfy § 4B1.2. *See generally* Shertzer, *The Elements of Grammar* 7 (1986). Specifically, § 4B1.2 requires not merely a volitional application of force, but a volitional application “against the person of another.”

875 F.3d at 331. *Harper* foreshadowed the Fourth Circuit’s analysis in *Middleton*, *supra*, and reasoned that the phrase “against the person of another” in § 4B1.2 must be given meaning: “That phrase is not meaningless, but restrictive. And understood the way the English language is ordinarily understood, it narrows the scope of the phrase ‘use of force’ to require not merely recklessness as to the consequences of one’s force, but knowledge or intent that the force apply to another person.” 875 F.3d at 332. As *Harper* noted further: “None of the more recent cases upon which *Verwiebe* relies . . . even acknowledge, much less analyze, the language that § 4B1.2 has but that the provision in *Voisine* did not: namely, ‘against the person of another.’ Those cases therefore ‘confirm’ very little about the meaning of the language at issue here.” *Harper*, 875 F.3d at 332 (citation omitted).

² A petition for writ of certiorari challenging the application of *Voisine* to the Sentencing Guidelines is pending. *Harper v. United States*, No. 17-7613.

Rather than simply ignore the phrase “against the person of another,” *Harper* would give meaning to that phrase and distinguish the Sentencing Guideline definition of “crime of violence” from the definition at issue in *Voisine*. This conclusion is consistent with the interpretations of the First and Fourth Circuits, *supra*.

II. Although Three Other Circuits Conclude That *Voisine* Allows Reckless Conduct To Form The Basis Of A “Crime Of Violence” Their Analysis Is Not Persuasive

In its amended opinion, the Sixth Circuit recognized that the courts of appeals are in disagreement over whether this Court’s decision in *Voisine* extends beyond 18 U.S.C. § 921(a)(33)(A)(ii) to other contexts. The Sixth Circuit pointed out that the Fifth, Eighth, and Tenth Circuits have applied *Voisine* to hold that “recklessness suffices under the elements clause of the Armed Career Criminals Act and the Guidelines.” App., *infra*, at 13a. Strictly speaking, however, the reasoning of those Circuits should not withstand close review.

A. In *United States v. Mendez-Henriquez*, 847 F.3d 214 (5th Cir. 2017), the Fifth Circuit held that *Voisine* applies to U.S.S.G. § 2L1.2, finding that recklessness was sufficient, but that opinion addressed recklessness in the context of volitional, rather than accidental, conduct. 847 F.3d at 221.

The Court, however, did not factor into its analysis the phrase “against the person of another.” In discussing the effect of *Voisine* on a statute that criminalizes discharging a firearm into an occupied vehicle, the Fifth Circuit stated: “Holding to

the volition-versus-intent distinction drawn in *Voisine*, our decision does not turn on whether a person in the occupied vehicle was the target.” 847 F.3d at 222.

The dissent in *Mendez-Henriquez* criticized the majority for failing to conclude that the statute in question did not have as an *element* the use of force against the person of another. 847 F.3d at 225-27 (Costa, J., dissenting). Compare *United States v. Higdon*, 882 F.3d 605, 607-608 (6th Cir. 2018) (North Carolina statute criminalizing discharging a firearm into an occupied structure was not an ACCA violent felony because it did not have, as an element, a requirement that the projectile be intended to strike a person). According to the dissent, the statute in question therefore did not qualify as a crime of violence.

Similarly, in *United States v. Howell*, 838 F.3d 489 (5th Cir. 2016), relied on by both the Fifth Circuit in *Mendez-Henriquez* and by the Sixth Circuit here, the Fifth Circuit relied on *Voisine* to conclude that an offense committed by “intentionally, knowingly, or recklessly impeding the normal breathing ... by blocking the person’s nose or mouth” was sufficient to constitute a crime of violence under the Sentencing Guidelines when based on reckless conduct. 838 F.3d at 499-501. However, as the concurring opinion in *Howell* pointed out, applying pressure to the person’s throat or neck or by blocking the person’s mouth constitutes use of force against the person. 838 F.3d at 503. (Jordan, D.J., concurring). The statute in question in *Howell* specifically requires reckless conduct *and* actual contact with another person and therefore is distinguishable.

B. The Sixth Circuit in *Verwiebe*, also relied on *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016), where the Eighth Circuit concluded that a Minnesota conviction for attempted recklessly discharging a firearm toward a motor vehicle or building was an ACCA predicate because the defendant had admitted at his state court plea that he had attempted to shoot a person and therefore was sentenced under a subsection that called for an enhanced penalty if the person discharged the firearm “at or toward a person, or an occupied building or motor vehicle.” 836 F.3d at 954-56. The Eighth Circuit applied *Voisine* to hold that reckless conduct constitutes the use of force under the ACCA, but without addressing the issue of whether the statute requires use of force against the person of another.

In an opinion concurring in part and dissenting in part, Judge Bright analyzed the relevant Minnesota statute and its interpretation by the Minnesota Supreme Court to determine its elements. Judge Bright reasoned that, under Minnesota law, “[d]rive-by shooting is one crime consisting of three elements to obtain a conviction and none of the elements require the presence of a person.” He concluded that the statute was broader than the ACCA definition and therefore did not constitute an ACCA predicate. 836 F.3d at 959-62. (Bright, J., concurring in part and dissenting in part).

C. Finally, the Sixth Circuit’s reliance on *United States v. Pam*, 867 F.3d 1191 (10th Cir. 2017), is misplaced. The instant case involves the application of *Voisine* to the definition of “crime of violence” under the Sentencing Guidelines. *Pam* involved the collateral attack on a sentence imposed under the ACCA. Although the

Tenth Circuit held in *Pam* that *Voisine* applied to the ACCA and that reckless conduct was sufficient to constitute a “violent felony” for ACCA purposes, the Tenth Circuit expressly stated that it was not addressing the issue of whether *Voisine* abrogated its prior decisions because those opinions “did not involve construction of the ACCA’s elements clause.” *Pam*, 867 F.3d at 1207 n.15.

As is noted above, the prior Tenth Circuit decisions held that recklessness was not sufficient to qualify an offense as a “crime of violence” under the Sentencing Guidelines. The applicable law in the Tenth Circuit does not support the Sixth Circuit here.

D. These decisions relied upon by the Sixth Circuit, as well as the Sixth Circuit’s decision itself, fail to give sufficient weight to this Court’s analysis of the contextual distinctions between the “use of physical force” for purposes of 18 U.S.C. § 922(g)(9) and the “use of physical force against the person of another” for purposes of the ACCA and the Sentencing Guidelines. This Court’s analysis does not lead to the conclusion that *Voisine* abrogates the extensive line of authority holding that reckless conduct cannot qualify an offense as a violent felony under the ACCA or a crime of violence under the Sentencing Guidelines.

III. The Distinction Drawn By This Court Between The Force Necessary To Commit Misdemeanor Crimes Of Domestic Violence On The One Hand And Violent Felonies And Crimes Of Violence On The Other Hand Warrants Review Of This Case

In *Castleman*, this Court explained that “[d]omestic violence’ is not merely

a type of ‘violence’; it is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context.” 134 S.Ct. at 1411. This Court also pointed out:

The Courts of Appeals have generally held that mere offensive touching cannot constitute the “physical force” necessary to a “crime of violence,” just as we held in *Johnson* that it could not constitute the “physical force” necessary to a “violent felony.” *** Nothing in today’s opinion casts doubt on these holdings, because—as we explain—“domestic violence” encompasses a range of force broader than that which constitutes “violence” *simpliciter*.

134 S.Ct at 1411 n. 4 (citations omitted). This Court further recognized that, prior to *Voisine*, “the Courts of Appeals . . . almost uniformly held that recklessness is not sufficient” to “constitute a ‘use’ of force.” 134 S.Ct. at 1414 n. 8.

Nothing in *Voisine* suggests that this Court intended to abrogate the significant weight of prior authority holding that recklessness was not sufficient to qualify an offense as a violent felony or a crime of violence. The contextual distinctions drawn by this Court between misdemeanor crimes of domestic violence on the one hand and violent felonies and crimes of violence on the other militate against applying *Voisine* to the other definitions as the Sixth, Fifth, Eighth and Tenth Circuits have done. The holding in *Voisine* should not be extended.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 3, 2018

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33

I hereby certify that this petition for writ of certiorari complies with the type-volume limitation set forth in Rule 33(2). This petition contains 19 pages, complied with 12-point Century Schoolbook proportionally spaced type.

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