

No. 17-8413

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the federal offense of assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6), is a crime of violence under Sentencing Guidelines § 4B1.2(a)(1) (2016).

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OPINION BELOW

The amended opinion of the court of appeals (Pet. App. 9a-15a) is reported at 874 F.3d 258.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2017. A petition for rehearing was denied on January 3, 2018 (Pet. App. 18a). The petition for a writ of certiorari was filed on April 3, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Michigan, petitioner was convicted of assaulting, resisting, or impeding a federal officer with a dangerous weapon, in violation of 18 U.S.C. 111(a)(1) and (b). Presentence Investigation Report (PSR) ¶¶ 2, 4. He was sentenced to 168 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 32. The court of appeals affirmed. Pet. App. 9a-15a.

1. In August 2015, tribal officers in Bay Mills, Michigan, received a report that petitioner had assaulted his girlfriend. Pet. App. 10a. When the officers approached petitioner, he brandished a knife, threatened to kill the officers, and fought them when they attempted to subdue him. Ibid. The officers ultimately arrested petitioner and placed him in a police car, where he continued to threaten and spit on them. Ibid.

2. A federal grand jury returned an indictment charging petitioner with one count of assaulting, resisting, or impeding a federal officer with a dangerous weapon, in violation of 18 U.S.C. 111(a)(1) and (b); and one count of assaulting, resisting, or impeding a federal officer with physical contact, in violation of 18 U.S.C. 111(a)(1). Indictment 1-2. Petitioner pleaded guilty to the first Section 111 count. PSR ¶ 4.

The Probation Office assessed a base offense level of 14, which it increased to 29 after various offense- and victim-related adjustments. PSR ¶¶ 25-29, 32. The Probation Office also determined, however, that petitioner had at least two prior felony convictions for a crime of violence -- based on convictions for assault with a dangerous weapon with intent to do bodily harm, in violation of 18 U.S.C. 113(a)(3) (1994), and assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6) -- and that he therefore qualified as a career offender under Sentencing Guidelines § 4B1.1. PSR ¶¶ 33, 40, 45. Because the statutory maximum sentence for petitioner's conviction is 20 years of imprisonment, see 18 U.S.C. 111(b), his base offense level became 32. PSR ¶ 33; see Sentencing Guidelines § 4B1.1(b)(3). With a three-level reduction for acceptance of responsibility, the Probation Office calculated a total offense level of 29. PSR ¶¶ 34-36. The Probation Office would have assigned petitioner a criminal-history category of V, but petitioner's career-offender status required a criminal-history category of VI. PSR ¶ 49; see Sentencing Guidelines § 4B1.1(b). A total offense level of 29 and a criminal-history category of VI yielded a guidelines range of 151 to 188 months. PSR ¶ 103.

At sentencing, petitioner objected to his career-offender designation, arguing that his prior convictions under 18 U.S.C. 113(a)(3) and (6) were not crimes of violence. Sent. Tr. 11-15.

As relevant here, the Guidelines define a "crime of violence" to include "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." Sentencing Guidelines § 4B1.2(a)(1). The district court overruled petitioner's objection, concluding that both convictions satisfied that "elements" clause of the Guidelines. Sent. Tr. 20-21. It sentenced petitioner to 168 months of imprisonment, to be followed by three years of supervised release. Id. at 32.

3. The court of appeals affirmed. Pet. App. 9a-15a.

The court of appeals' amended opinion first explained that petitioner's conviction under 18 U.S.C. 113(a)(3) qualified as a crime of violence because that offense "proscribes common law assault with a dangerous weapon." Pet. App. 11a. Because an assault "already includes some use or threat of physical force," the court reasoned that the additional use of a dangerous weapon "transforms that force into the type of violent force necessary to constitute a crime of violence." Ibid.

The court of appeals next considered petitioner's conviction under 18 U.S.C. 113(a)(6), which it described as "similar." Pet. App. 11a. It noted that Section 113(a)(6) "proscribes '[a]ssault resulting in serious bodily injury' within the territorial jurisdiction of the United States." Ibid. (quoting 18 U.S.C.

113(a)(6)) (brackets in original). The court explained that, because the offense “requir[es] proof of serious physical injury,” it “necessarily require[s] proof of violent physical force” under Curtis Johnson v. United States, 559 U.S. 133, 140 (2010). Pet. App. 12a.

The court of appeals then rejected petitioner’s argument that Section 113(a)(6) does not qualify as a crime of violence because it may be committed recklessly. Pet. App. 12a. The court acknowledged that prior Sixth Circuit precedent had treated recklessness as akin to negligence, which is insufficient to qualify as a “use” of force. Ibid. (citing United States v. McFalls, 592 F.3d 707, 716 (6th Cir. 2010)); see Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) (reasoning that a “use of force” requires “active employment” of force, and that it is not “natural to say that a person actively employs physical force against another person by accident”). But the court determined that circuit precedent treating recklessness as a species of accidental conduct had been abrogated by Voisine v. United States, 136 S. Ct. 2272 (2016). See Pet. App. 12a-13a.

In Voisine, this Court held that reckless conduct is “volitional” and therefore qualifies as the “‘use . . . of physical force’” within the meaning of 18 U.S.C. 921(a)(33)(A)’s definition of “‘misdemeanor crime of domestic violence.’” 136 S. Ct. at 2278-2279 (citations omitted). The “dominant

formulation" of recklessness, this Court explained, requires a person "to 'consciously disregard' a substantial risk that the conduct will cause harm to another." Id. at 2278 (brackets and citation omitted). Accordingly, the Court determined that "reckless behavior" involves "acts undertaken with awareness of their substantial risk of causing injury" and that "[t]he harm such conduct causes is the result of a deliberate decision to endanger another." Id. at 2279.

Explaining that "Voisine's analysis applies with equal force to the Guidelines," the court of appeals determined that a crime with a mens rea of recklessness could have as an element a "volitional" or non-accidental use of physical force under Sentencing Guidelines § 4B1.2(a), notwithstanding pre-Voisine circuit precedent to the contrary. Pet. App. 12a-15a. "Voisine's key insight," the court emphasized, "is that the word 'use' * * * does not require a purposeful or knowing state of mind." Id. at 13a-14a (citation omitted). The court reasoned that Voisine's key insight applied to the term "use" both in the statute at issue there and in Sentencing Guidelines § 4B1.2(a), and that it would make little sense to create a "gossamer thin" distinction between the two provisions. Pet. App. 15a.

ARGUMENT

Petitioner contends (Pet. 7-17) that his prior conviction for assault resulting in serious bodily injury under 18 U.S.C.

113(a)(6) does not qualify as a crime of violence under Sentencing Guidelines § 4B1.2 (2016) because it does not include as an element the “use of physical force against the person of another.” The court of appeals correctly rejected that contention, and its decision does not implicate any division among the courts of appeals that currently warrants this Court’s review. This Court’s review is especially unwarranted here because this case involves an application of the advisory Sentencing Guidelines, which can be amended by the United States Sentencing Commission.¹

1. The court of appeals correctly concluded that petitioner’s conviction for assault resulting in serious bodily injury qualifies as a crime of violence under Sentencing Guidelines § 4B1.2 (2016). Pet. App. 15a.

That conclusion follows from this Court’s decision in Voisine v. United States, 136 S. Ct. 2272 (2016). In Voisine, this Court determined in the context of 18 U.S.C. 922(g)(9) that the term “use . . . of physical force” includes reckless conduct. 136 S. Ct. at 2278 (citation omitted). Although Voisine reserved the question whether its holding extends to other statutory contexts, id. at 2280 n.4, the court of appeals correctly recognized that its textual analysis “applies with equal force” to the definition of the phrase “use of physical force” in the context of Sentencing

¹ Another pending petition for a writ of certiorari arising out of the Sixth Circuit presents a similar question. See Harper v. United States, No. 17-7613 (filed Jan. 24, 2018).

Guidelines § 4B1.2. Pet. App. 13a. This Court explained in Voisine that the word "use" requires the force to be "volitional" but "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." 136 S. Ct. at 2279; see ibid. (concluding that the word "use" "is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct"). Moreover, the Court noted, "nothing in Leocal v. Ashcroft, 543 U.S. 1 * * * (2004)," which addressed the mens rea requirement for a statutory "crime of violence" definition similar to the one at issue here, see 18 U.S.C. 16(b), "suggests a different conclusion -- i.e., that 'use' marks a dividing line between reckless and knowing conduct." 136 S. Ct. at 2279. Rather, the Court indicated, the key "distinction [was] between accidents and recklessness." Ibid.; see Pet. App. 13a.

Petitioner suggests (Pet. 9-10) that the phrase "against the person of another" in the Sentencing Guidelines renders inapplicable Voisine's discussion of recklessness. But the court of appeals correctly rejected that proposed distinction. See Pet. App. 13a-15a. As it explained, Voisine's "key insight" -- "that the word 'use' * * * does not require a purposeful or knowing state of mind" -- "does not change if a statute says that the 'use

of physical force' must be 'against' a person." Id. at 13a-14a (citation omitted). Rather, that phrase merely identifies the object of the use of force. Voisine took as a given that the object of the recklessness would be another person, defining recklessness to require a person "to consciously disregard a substantial risk that the conduct will cause harm to another." 136 S. Ct. at 2278 (emphasis added; brackets, citation, and internal quotation marks omitted); see id. at 2279 (explaining that "reckless behavior" involves "acts undertaken with awareness of their substantial risk of causing injury," such that any "harm such conduct causes is the result of a deliberate decision to endanger another") (emphasis added). Its analysis of volition thus already incorporates the premise that the "use" of force is against another person. See Pet. App. 14a (noting that Voisine "tellingly placed no weight on the absence of 'against the person or property of another' from § 921(a)(33)(A)(ii)").

Indeed, the absence of the phrase "against the person of another" from the statute at issue in Voisine simply reflects that other language in that statutory definition already established that it covered only crimes against persons. Under 18 U.S.C. 921(a)(33)(A)(ii), the object of the "use of physical force" must be a "victim" with whom the perpetrator shares a specified relationship -- meaning that the physical force must necessarily be used against another person. See Pet. App. 14a ("There thus

are no victim-less prosecutions under the Voisine statute.”). Sentencing Guidelines § 4B1.2(a)(1) similarly specifies that the object of the force must be “the person of another.” That both Section 921(a)(33)(A)(ii) and the Sentencing Guidelines contain functionally equivalent language limiting the “use of physical force” to crimes against another person refutes petitioner’s assertion that reckless conduct is volitional in the first context but not in the second.

Nor, as petitioner contends (Pet. 16-17), does this Court’s decision in United States v. Castleman, 134 S. Ct. 1405 (2014), suggest that Voisine’s definition of recklessness should be limited to crimes of domestic violence. To the extent that Castleman distinguished the “force” necessary to meet the definition of Section 922(a)(33)(A) in the context of domestic violence from the force referred to by other provisions, see id. at 1411-1412, no such distinction is at issue here. Voisine suggested no reason why the requisite mens rea would differ in the domestic-violence context -- particularly given the Court’s discussion of Leocal, which involved a conviction under 18 U.S.C. 16. See Voisine, 136 S. Ct. at 2279-2280. As the court of appeals observed, “a recklessly thrown plate that shatters and hurts somebody” is a “use of physical force,” whomever it is thrown at. Pet. App. 14a; see Voisine, 136 S. Ct. at 2279.

2. Petitioner asserts (Pet. 8-16) that the courts of appeals have divided over the application of Voisine to the Sentencing Guidelines and to a similarly worded provision of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2) (B) (i). Although some disagreement exists among the courts of appeals regarding how to apply Voisine outside the domestic-violence context, any disagreement does not currently warrant this Court's review of the question presented here.

Petitioner correctly notes (Pet. 2) that most courts of appeals had concluded before Voisine that recklessness was insufficient to constitute the "use" of force. See Castleman, 134 S. Ct. at 1414 n.8; see also United States v. McFalls, 592 F.3d 707, 716 (6th Cir. 2010). But the majority of the courts of appeals to address the issue have recognized that those decisions have now been abrogated by Voisine. See Pet. App. 12a-13a; United States v. Pam, 867 F.3d 1191, 1207-1208 (10th Cir. 2017);² United States v. Howell, 838 F.3d 489, 500-501 (5th Cir. 2016), cert. denied, 137 S. Ct. 1108 (2017); United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017);

² Petitioner suggests (Pet. 10-11) that the Tenth Circuit's decision in Pam is irrelevant here because that case involved the ACCA rather than the Sentencing Guidelines. Although the Tenth Circuit left open the question whether Voisine had abrogated earlier Sentencing Guidelines precedent, see Pam, 867 F.3d at 1207 n.15, its application of Voisine to the ACCA's similarly worded elements clause supports the court of appeals' reasoning in this case, see id. at 1207-1208.

see also United States v. Benally, 843 F.3d 350, 354 (9th Cir. 2016) (noting that Voisine suggested that reckless conduct may constitute a “crime of violence” under 18 U.S.C. 16, but declining to reach the issue where the challenged statute required “only gross negligence”).

Petitioner asserts (Pet. 8-10) that the First and Fourth Circuits have come out the other way and have concluded that Voisine’s analysis of recklessness does not apply. But the extent of the disagreement is unclear, as those courts have confronted the issue in the context of particular state statutes that they perceived as broadly applicable.

In Bennett v. United States, 868 F.3d 1 (2017), the First Circuit concluded that Maine aggravated assault did not qualify as a violent felony under the ACCA. Bennett was subsequently withdrawn and vacated as moot, 870 F.3d 34 (1st Cir. 2017) (per curiam), but its reasoning was in the interim adopted by another First Circuit decision, United States v. Windley, 864 F.3d 36, 37 n.2 (2017) (per curiam). Both decisions emphasized the breadth of the assault statutes at issue, which applied to reckless driving that results in injury. See Bennett, 868 F.3d at 18 (distinguishing throwing a plate against the wall near a “person who is clearly in harm’s way” from driving intoxicated and injuring someone “in the resulting, but unintended, car crash”); Windley, 864 F.3d at 38 (noting that, “[l]ike Maine’s aggravated assault

offense, reckless driving that results in a non-trifling injury has led to convictions" under the Massachusetts assault statute at issue) (citation omitted).

Similarly, in United States v. Middleton, 883 F.3d 485 (2018), the Fourth Circuit concluded that the South Carolina crime of involuntary manslaughter, which proscribes killing another person unintentionally while acting with "reckless disregard of the safety of others," is not a violent felony under the ACCA. Id. at 489 (citation omitted). The court noted that the statute had been applied to a defendant who sold alcohol to high school students who then shared the alcohol with another person who drove while intoxicated, crashed his car, and died. Ibid. The Fourth Circuit concluded that conduct leading to bodily injury through so "attenuated a chain of causation" did not qualify as a use of violent force. Id. at 492. Otherwise, it reasoned, "any illegal sale" could "trigger the ACCA's force clause, simply because physical pain or injury eventually results." Ibid.³

Petitioner does not suggest that Section 113(a)(6) is as broad as the statutes in Windley and Middleton, such that those decisions

³ Petitioner relies (Pet. 8-9) on language in a separate opinion. In a concurrence in part and in the judgment, one judge -- joined in relevant part by one of the judges in the majority -- wrote that he would have instead concluded that "South Carolina involuntary manslaughter cannot serve as an ACCA predicate" because "the ACCA force clause requires a higher degree of mens rea than recklessness." Middleton, 883 F.3d at 500 (Floyd, J.). It is not yet clear what precedential effect, if any, the Fourth Circuit will give that two-judge portion of a separate opinion.

could be deemed directly to encompass circumstances like his. In particular, he does not attempt to show that the offense can be committed either by "reckless driving that results in a non-trifling injury," as in Windley, 864 F.3d at 38, or by an "attenuated * * * chain of causation" beginning with an "illegal sale," as in Middleton, 883 F.3d at 492. At this point, therefore, the extent of disagreement among the circuits is unclear.

Finally, petitioner asserts (Pet. 11-12) that disagreement exists within the Sixth Circuit. As an initial matter, the decision on which he relies followed the decision here, even if it registered disagreement. See United States v. Harper, 875 F.3d 329, 330 (6th Cir. 2017), petition for cert. pending, No. 17-7613 (filed Jan. 24, 2018). In any event, any intracircuit tension would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

3. In addition, this case would be a poor vehicle for considering the question presented because petitioner's challenge to his sentence rests on a claimed error in the application of an advisory Sentencing Guidelines provision.

Typically, this Court leaves issues of Guidelines application in the hands of the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500

U.S. 344, 348 (1991). Given that the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. See ibid.; see also United States v. Booker, 543 U.S. 220, 263 (2005) (“The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.”).

Indeed, the Commission has done so with respect to other portions of the “crime of violence” definition at issue here: Effective August 2016, the Commission amended Sentencing Guidelines § 4B1.2(a) to eliminate the provision’s residual clause and to expand the Guidelines’ list of enumerated offenses. See 81 Fed. Reg. 4741, 4742-4743 (Jan. 27, 2016). Those amendments demonstrate the Commission’s continuing attention to the Guidelines in general and the definition of a crime of violence in particular. No reason exists for this Court to deviate from its usual practice of declining to review questions of Guidelines interpretation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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