

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*

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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ARGUMENT

Introduction

The question presented here is much broader, and of much more significance, than the government suggests. The question presented is not simply whether a violation of 18 U.S.C. § 113(a)(6) for assault resulting in serious bodily injury is a crime of violence. The question presented pertains to how offenses are classified for sentencing purposes. As the cases cited in the instant petition note, the question of whether reckless conduct is sufficient to qualify an offense as a “crime of violence” under the Sentencing Guidelines also arises under the Armed Career Criminal Act (ACCA) in determining whether an offense qualifies as a “violent felony.” Petition, 8-16.

The question presented here reaches far beyond how one particular federal offense is treated under the Sentencing Guidelines. Simply put, the government appears to argue that this Court’s decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), was intended to overrule, without expressly saying so, the virtually unanimous decisions of the Courts of Appeals holding that reckless conduct was not sufficient to qualify an offense as a violent felony under the ACCA or as a crime of violence under the career offender guidelines.

There now exists a clear conflict among the circuits over the proper interpretation of the ACCA and the career offender guidelines. Further guidance to the lower courts on this sentencing issue of great importance is needed. This matter offers a vehicle for this Court to resolve this conflict.

ARGUMENT

I. The phrase “against the person of another” contained in the ACCA and the career offender guideline should be given meaning.

As the government notes (Brief in Opposition at 7), this Court in *Voisine* left open the question of whether reckless behavior falls within the scope of 18 U.S.C. § 16. *Voisine*, 136 S. Ct. 2272, 2280 n. 4 (2016). That that question was left open does not support the government’s opposition to this petition.

The government’s argument begs the question. This Court’s decisions leading up to *Voisine* show the flaws in the reasoning of the government and the several courts of appeals’ decision on which the government relies.

As the Sixth Circuit did, the government attempts to dismiss the use of the phrase “against the person of another” in the ACCA and Sentencing Guidelines definitions. The government argues “the absence of the phrase ‘against the person of another’ from the statute at issue in *Voisine* simply reflects that other language in the statutory definition already established that it covered crimes against persons.” (Brief In Opposition at 9). However, this Court’s analysis in *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377 (2000), shows the flaw in this argument.

In *Leocal*, this Court specifically addressed the phrase “against the person or property of another” in 18 U.S.C. § 16(a) as significant in interpreting the word “use.” 543 U.S. at 9, 125 S. Ct. at 382. Noting that “use” requires active employment:

While one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would “use ... physical force against” another when pushing him; however, we

would not ordinarily say a person “use[s] ... physical force against” another by stumbling and falling into him. When interpreting a statute, we must give words their “ordinary or natural” meaning. * * * The key phrase in § 16(a)—the “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.

Id. But “use” as employed in the statute at issue in *Voisine* “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.” *Voisine*, 136 S. Ct. at 2279.

That is the distinction between 18 U.S.C. § 921(a)(33)(A), on the one hand, and the ACCA and Sentencing Guidelines on the other. It is true, of course, as the Sixth Circuit stated: “There are no victim-less prosecutions under the *Voisine* statute.” App., at 14a. However, “domestic violence’ encompasses a range of force broader than that which constitutes ‘violence’ *simpliciter*.” *United States v. Castleman*, 134 S. Ct. 1405, 111 n. 4. It does not necessarily follow, however, that simply because different offenses each have a “victim,” the offenses must be treated in the same fashion regardless of the definitional language.

The Sixth Circuit itself has recognized that the distinction noted in *Castleman* has continued significance. In *United States v. Glover*, 681 Fed. Appx. 432 (6th Cir. 2017), the panel rejected an argument that *Castleman* abrogated *United States v. Evans*, 699 F.3d 858, 863 (6th Cir. 2012), a prior Sixth Circuit decision that had held that a particular Ohio offense constituted a crime of violence under the Sentencing Guidelines. In *Glover*, the Sixth Circuit stated:

[Appellant] argues that *Castleman*, which interpreted “physical force” as used to define “misdemeanor crime of violence,” 18 U.S.C. § 921(a)(33)(A), invalidates *Evans* by further limiting what constitutes “physical force” in the violent felony context, 18 U.S.C. § 924(e)(2)(B).

His argument is meritless. In *Castleman*, the Court did not in any way reconsider the meaning of “physical force” as used in 18 U.S.C. § 924(e)(2)(B). Instead, the Court held that, *despite* what the phrase may mean in the violent-felony section of the Code, it has a different meaning and covers more conduct in § 921(a)(33)(A)'s domestic violence context. *See Castleman* 134 S. Ct. at 1412, n.4. Indeed, the Court made clear that it was not casting doubt on Courts of Appeals decisions that had interpreted § 924(e)(2)(B) more narrowly than it was interpreting § 921(a)(33)(A). *See id.*

Glover, 681 Fed. Appx. at 434.¹ This is a meaningful distinction that warrants continued recognition.

Interpretation of the phrase “against the person of another” is as necessary to the resolution of the conflict among the circuits here as the it was to this Court’s conclusion in *Leocal*, *supra*. The Court “must give effect to every word of a statute wherever possible. . . .” *Leocal*, 543 U.S. at 12, 125 S. Ct. at 384, citing *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125 (2001). This phrase should not be disregarded in addressing the question presented here. If the phrase is superfluous, this Court should say so directly rather than through inferences drawn by the courts of appeals.

¹ It should be noted that the opinion in *Glover* was written by Sixth Circuit Judge David McKeague. *See Glover*, 681 Fed. Appx. at 432. Judge McKeague had dissented in the Sixth Circuit’s *Castleman* opinion. *See Castleman*, 134 S. Ct. at 1410.

II. This case does not present simply an issue of application of the Sentencing Guidelines.

The government argues that the petition should be denied “because petitioner’s challenge to his sentence rests on a claimed error in the application of an advisory Sentencing Guidelines provision.” (Brief in Opposition at 14). That is an oversimplification.

As was noted in the Petition (Petition at 3, n. 1), and by the Sixth Circuit (App., 10a), the courts generally have interpreted the Sentencing Guideline definition of “crime of violence” and the ACCA definition of “violent felony” in the same way. *See United States v. Steed*, 879 F.3d 440, 446 (1st Cir. 2018) (analysis under ACCA is relevant because of similarity to career offender guideline); *United States v. McMillan*, 863 F.3d 1053, 1056 n. 2 (8th Cir. 2017) (because ACCA and career offender definitions are “nearly identical . . . we see no reason to treat them differently.”).

There can be little if any doubt that a ruling regarding the sufficiency of reckless conduct to establish an offense as a “crime of violence” for career offender purposes will be followed in the ACCA context. Interpretation of what constitutes “use of force” for career offender purposes is a difference in kind rather than in degree when compared to the examples cited by the government. (Brief in Opposition at 15). Elimination of the residual clause or the expansion of the list of enumerated offenses reflect changes in the scope of the career offender guideline. This Court’s interpretation of the *mens rea* required for a crime of violence reflects a possible change in the *meaning* of the guideline. This Court’s interpretation of a phrase

contained in both the career offender guideline and in the ACCA is a significant legal issue the resolution of which will provide needed guidance to the courts and the parties.

III. Decisions by the Fourth Circuit and another panel of the Sixth Circuit warrant consideration.

The government suggests that Petitioner's reliance on *United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018), and *United States v. Harper*, 875 F.3d 329 (6th Cir. 2017), petition for cert. pending, No. 17-7613 (filed Jan. 24, 2018), should be discounted. (Brief In Opposition at 13-14). However, the reasoning in *Middleton* and *Harper* exposes the flaws in the decisions of the Sixth Circuit in the instant case and in other courts of appeals holding that *Voisine* implicitly overruled the great weight of authority holding that recklessness was not sufficient to qualify an offense as a violent felony under the ACCA or as a crime of violence under the career offender guidelines. The reasoning in *Middleton* and *Harper* should be considered by this Court.

CONCLUSION

For these reasons, as well as for the reasons set out in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 20, 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 7 pages, complied with 12-point Century Schoolbook proportionally spaced type.

Respectfully submitted,

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