

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2017 Term

CORTRELL A. RAMEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari

To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a statute prohibiting reckless discharge of a firearm resulting in accidental injury to another qualify as a crime having as an element “the use . . . of physical force against the person of another” within U.S.S.G. §4B1.2(a)(1) and 18 U.S.C. §924(e)(2)(B)(i)?

INTRODUCTION

Sharp division exists within and among the Circuits of the United States Court of Appeals on whether felony statutes prohibiting reckless conduct trigger harsh sentence enhancements under the identical “element of force” definitions in U.S.S.G. §4B1.2(a)(1) and the Armed Career Criminal Act (“ACCA”), 18 U.S.C. §924(e)(2)(B)(i). Both define predicate “crimes of violence” and “violent felonies” to include any felony that requires as an element “the use, attempted use, or threatened use of physical force against the person of another.” The circuit conflict traces directly to this Court’s 2016 decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016). There, this Court interpreted the law defining predicate “misdemeanor crime[s] of domestic violence” that have as an element “the use, or attempted use of physical force, or the threatened use of a deadly weapon, by a current or former spouse” or other domestic intimates in 18 U.S.C. §921(a)(33)(A)(ii). The Court concluded that “reckless” misdemeanor crimes satisfy this definition. That definition does not require that a “predicate offense” require the use of physical force “against the person of another.”

This Court in *Voisine* explicitly acknowledged that a different rule may apply in light of “other contexts and purposes” specifically as to “required mental states.” *Id.* at 2279 & n.4. Mr. Ramey’s case presents this issue in the context of federal sentencing enhancements based on prior felony convictions defined not merely by “the use” of force, but by the perpetrator’s use of such force specifically “against the person of another.” Stark sentencing disparities numbering many years result from the Circuit disagreement that has resulted and add urgency to this Court’s essential involvement to resolve the issue.

Parties to the Proceedings

Petitioner Cortrell Ramey was represented in the lower court proceedings by his counsel, Lee T. Lawless, Federal Public Defender for the Eastern District of Missouri, and Diane Dragan, Assistant Federal Public Defender, 1010 Market, Suite 200, Saint Louis, Missouri, 63101. The United States is represented by United States Attorney Jeff Jensen and Assistant United States Attorney, Allison H. Behrens, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri, 63102.

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OPINION BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is published at 880 F.3d 447. It appears in the Appendix (“Appx”, at 1).

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on January 22, 2018, Appendix 1. Petitioner’s timely request for two additional weeks in which to file his petition for a writ of certiorari was granted, extending the deadline from April 23, 2018, to May 7, 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. §16, “Crime of Violence defined,” provides:

The term "crime of violence" means—

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §922(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

To ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition...

18 U.S.C. §924(e)(2)(B), provides:

(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—

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

(2) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

United States Sentencing Guidelines Provisions

U.S.S.G. § 2K2.1(a)(4)(A) (2016). Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition.

(a) Base Offense Level (Apply the Greatest):

- (1)** 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. §5845(a); and (B)

- the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine, or (ii) firearm that is described in 26 U.S.C. §5845(a); and (B) the defendant committed any part of the instant offense, subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
- (4) 20, if
- (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
- (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. §5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. §922(d); or (III) is convicted under 18 U.S.C. §922(a)(6) or §924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;
- (5) 18, if the offense involved a firearm described in 26 U.S.C. §5845(a);
- (6) 14, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. §922(d); or (C) is convicted under 18 U.S.C. §922(a)(6) or §924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;
- (7) 12, except as provided below; or
- (8) 6, if the defendant is convicted under 18 U.S.C. §922(c), (e), (f), (m), (s), (t) or (x)(1), or 18 U.S.C. §1715.

Commentary

Application Notes:

1. Definitions. For purposes of this guideline:

“Crime of violence” has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

10. Prior Felony Convictions. For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.(a), (b), or (c). See §4A1.2(a)(2).

U.S.S.G. §4B1.2(a) (2016), provides:

- (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, or

- (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”

Missouri Statutes

Mo. Rev. Stat. §562.011. Voluntary act

1. A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act.
2. A "voluntary act" is
 - (1) A bodily movement performed while conscious as a result of effort or determination; or
 - (2) An omission to perform an act of which the actor is physically capable.

Mo. Rev. Stat. §565.060.1 (2009) Assault, second degree, penalty

1. A person commits the crime of assault in the second degree if he:

(5) Recklessly causes physical injury to another person by means of discharge of a firearm[.].

STATEMENT OF THE CASE

Petitioner Cortrell Ramey was prosecuted for unlawfully possessing a firearm as a convicted felon under 18 U.S.C. §922(g)(1). Police found the firearm in a closet in Ramey's home on October 21, 2015, pursuant to a search warrant secured after a police informant told police Mr. Ramey offered the weapon for sale. Mr. Ramey timely admitted his guilt and pled guilty. Over objection, the District Court ruled that Mr. Ramey had a prior felony conviction constituting a "crime of violence" having as an element "the use, attempted use, or threatened use of physical force against the person of another" within the definition of "crime of violence" in the United States Sentencing Guidelines. The District Court's calculation depended upon Mr. Ramey's teenage conviction for Missouri assault in the second degree defined to occur when one "recklessly causes physical injury to another person by means of discharge of a firearm." Mo. Rev. Stat. §565.060.1(5) (2009). Missouri courts upheld convictions under this statute for accidental and unintended discharges of weapons, even if a gun suddenly fires as a person sets it down, on the rationale that such conduct constitutes a "voluntary" exertion of force.¹

The District Court's ruling produced a Sentencing Guidelines base offense level of 20, and a total offense level of 17, producing an advisory range of 51-63 months in prison in Mr. Ramey's Criminal History Category 6. Absent the finding of this crime of violence, the base and total offense levels would have been 14 and 11, making for an advisory range of 27-33 months in prison. On November 22, 2016, the District Court sentenced Mr. Ramey to 51 months in prison.

In his direct appeal to the Eighth Circuit Court of Appeals, Mr. Ramey argued that conviction under a statute encompassing reckless behavior does not qualify as the "use" of physical force. By

¹ See, e.g., *State v. White*, 138 S.W.3d 783, 785 (Mo. Ct. App. 2004)(upholding conviction despite uniform testimony that gun discharged accidentally, because defendant's conduct was voluntary "in that his bodily movement in playing with the gun arose from his conscious effort or determination").

opinion dated January 22, 2018, the Eighth Circuit rejected petitioner’s argument relying heavily on this Court’s decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016):

“In *Voisine*[...] the Supreme Court rejected Ramey’s proffered distinction between intentional and reckless conduct. Applying 18 U.S.C. §921(a)(33)(A)(ii) and the term “misdemeanor crime of domestic violence,” the Court held that a “person who assaults another recklessly ‘use[s] force, no less than one who carries out that same action knowingly or intentionally.” *Voisine*, 136 S. Ct. at 2280. Following *Voisine*, this court considered a similar issue under the Armed Career Criminal Act [18 U.S.C. §924(e)], which defines ‘violent felony’ to include an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. §924(e)(2)(B)(i). Applying *Voisine*’s reasoning, we held that reckless conduct “constitutes a ‘use’ of force under the ACA because the force clause in 18 U.S.C. §921(a)(33)(A)(iii) and the ACCA both define qualifying predicate offenses as those involve the ‘use . . . of physical force’ against another.” *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (alteration in original).”

“Like the term ‘violent felony’ under the ACCA, the definition of ‘crime of violence under the guidelines includes an 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). We see no reason why ‘use’ of force under the guidelines would mean something different from ‘use’ of force under the ACCA. Consistent with *Voisine* and *Fogg*, we conclude that reckless conduct causing injury to another by use of a firearm constitutes a use of force under the guidelines. Section 565.060.1(5) requires proof that the defendant’s reckless discharge of a firearm caused physical injury to another person, so Ramey understandably does not dispute that the statute meets the guideline’s requirement that the defendant’s offense have as an element the use of physical force ‘against the person of another.’”

Appx. 5. Petitioner requested and received two additional weeks in which to file his petition for a writ of certiorari up through May 7, 2018. This petition is timely filed.

GROUND S FOR GRANTING THE WRIT

- I. The Circuits conflict as to whether felony statutes that include “as an element” reckless conduct resulting in injury to another is categorically a “crime of violence” or “violent felony” having “as an element the use . . . of physical force against the person of another.

The Circuits of the United States Courts of Appeal disagree on whether felony statutes prohibiting reckless conduct that injures others qualify as having an element of “the use of force . . . against the person of another,” and trigger sharp sentence enhancements in U.S.S.G. §4B1.2(a)(1) and 18 U.S.C. §924(e)(2)(B)(i). Until 2016, the Circuits uniformly rejected reckless felonies in light of this Court’s view that “key” statutory language requiring an element of “the use . . . of physical force against the person or property of another,” in 18 U.S.C. §16(a) “most naturally suggests a higher degree of intent than negligent or merely accidental conduct.” *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). See *United States v. Harper*, 875 F.3d 329, 332 (6th Cir. 2017) (“for good reason,” circuits previously held reckless criminal conduct did not constitute “the use of force *against* the person of another,” citing cases). Three circuits (the Sixth, Eighth, and Tenth) now accept reckless felony offenses under U.S.S.G. §4B1.2(a)(1) and §924(e)(2)(B)(i) because this Court held that reckless *misdemeanor* conduct satisfies a definition of “misdemeanor crimes of domestic violence” having as an element “the use . . . of physical force” by a current or former [cohabitant]” in *Voisine v. United States*, 136 S. Ct. 2272 (2016). The Fifth Circuit now qualifies reckless felony statutes, unless they encompass merely accidental conduct, while the First Circuit rejects reckless felony laws entirely.

Only this Court can resolve circuit conflict grounded in the Court’s opinions. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 422 (1984) (certiorari granted to resolve confusion of lower courts on *Miranda*’s application to minor offenses); *Foremost Ins. Co. v. Richmond*, 457 U.S. 668, 669 (1972) (certiorari granted to cure confusion over the impact of a prior decision on rules of federal admiralty jurisdiction). The stark sentencing disparities the circuit discord produces adds urgency to the need for

this Court’s resolution. *Cf. Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016) (certiorari granted to resolve conflict between a uniquely harsh Fifth Circuit standard for plain error relief); *Tapia v. United States*, 564 U.S. 319, & n.1 (2011) (certiorari granted in light of conflict between three circuits authorizing judges to lengthen prison terms to serve rehabilitative needs and two other circuits taking the opposite view); *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (certiorari granted to address discord between one circuit and nine others on victims’ rights to restitution).

A. Before 2016, circuits consistently rejected reckless crimes from “element of force” clause

All the Circuits use the “categorical approach” to identify predicate crimes of violence satisfying the “element of force” definition in U.S.S.G. §4B1.2(a) that this Court ordered to identify convictions satisfying the identical “violent felony” definition in Section 924(e)(2)(B)(i). *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Johnson v. United States*, 559 U.S. 133, 144 (2010).² This analysis focuses on the statutory elements defining a crime, ignoring the singular circumstances of an individual defendant’s offense. *Mathis*, at 2248. This minimum criminal conduct needed to sustain a conviction under a given statute provides the measure by which the statute is qualified or rejected. *See Moncrieffe v. Holder*, 569 U.S. 184, 191-92 (2013).

In *Leocal*, this Court held that the statutory phrasing in Section 16(a) referring to the “use . . . of force against the person or property of another” required active employment” and could not be satisfied by “negligent or merely accidental conduct.” 543 U.S. at 9. The Court reserved the question of whether a reckless application of force could constitute a “use” of force,” *id.* at 13, but the Courts of Appeals almost uniformly held that recklessness did not suffice in light of *Leocal*’s rejection of crimes satisfied

² The Circuits construe the identical definitions for crimes of violence under the Guidelines and violent felonies under the ACCA interchangeably. *See, e.g., United States v. Hall*, 877 F.3d 800, 806 (8th Cir. 2017); *United States v. Binford*, 818 F.3d 261, 264 (6th Cir. 2016); *United States v. Armijo*, 651 F.3d 1226, 1231 & n.3 (10th Cir. 2011); *United States v. Glover*, 558 F.3d 71, 80 & n. 3 (1st Cir. 2009); *United States v. Mohr*, 554 F.3d 604, 609 (5th Cir. 2009); *United States v. Spells*, 537 F.3d 743, 749 & n. 1 (7th Cir. 2008).

by accidental force against another person. Until 2016, the circuits regularly rejected statutory crimes requiring only a reckless *mens rea* as crimes of violence under the “element of force” definition in U.S.S.G. §4B1.2(a)(1) and the very similar definition of “crime of violence in 18 U.S.C. §16(a). See *United States v. Castleman*, 134 S. Ct. 1405, 1414 n. 8 (2014); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *United States v. Torres-Villalobos*, 487 F.3d 607, 616 (8th Cir. 2007) (manslaughter statute satisfied by *mens rea* of recklessness did not satisfy “use of force” as *Leocal* interpreted that phrase); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc) (“[T]he reckless use of force is accidental and crimes of recklessness cannot be crimes of violence [under §16.]”); *United States v. Smith*, 544 F.3d 781, 786 (7th Cir. 2008); *United States v. Otero*, 502 F.3d 331 (3rd Cir. 2007) (Pennsylvania simple assault statute’s requirement of minimum *mens rea* of recklessness rather than intent was not a crime of violence under Section 16(a); *United States v. Palomino Garcia*, 606 F.3d 1317, 1335-36 (11th Cir. 2010) (same for Arizona aggravated assault); *United States v. Moreno*, 821 F.3d 223, 228 (2nd Cir. 2016) (Connecticut assault law criminalizing reckless conduct did not qualify as the use of physical force against person or property).

B. *Voisine* spurred three circuits to categorically accept reckless crimes as “the use of force”

In 2016, this Court decided *Voisine*, which involved a definition used to identify a class of prohibited persons excluded from gun possession based on prior convictions for “misdemeanor crimes of domestic violence” pursuant to 18 U.S.C. §922(g)(9). 136 S. Ct. 2272. The definition used to identify predicate convictions included any misdemeanor under Federal, State, or Tribal law that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse [or other domestic relative or cohabitant],” 18 U.S.C. §921(a)(33)(A)(i)-(ii). The petitioner in *Voisine* challenged his classification as a prohibited person

based on a misdemeanor conviction for reckless assault under Maine law. This Court focused on the specific statutory language in §921(a)(33)(A)(i)-(ii) to conclude that this misdemeanor crime definition was indifferent as to the mental state so long as the element of “force used” arose from “volitional conduct”:

“Nothing in the word ‘use’—*which is the only statutory language either party thinks relevant*—indicates that § 922(g)(9) applies exclusively to knowing or intentional domestic assaults. Recall that under § 921(a)(33)(A), an offense counts as a “misdemeanor crime of domestic violence” only if it has, as an element, the “use” of force. Dictionaries consistently define the noun “use” to mean the “act of employing” something. Webster's New International Dictionary 2806 (2d ed. 1954) (“[a]ct of employing anything”); Random House Dictionary of the English Language 2097 (2d ed. 1987) (“act of employing, using, or putting into service”); Black's Law Dictionary 1541 (6th ed. 1990) (“[a]ct of employing,” “application”). On that common understanding, the force involved in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. . . . But the word “use” 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. Or, otherwise said, that word 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.

136 S. Ct. at 2278-79 (citation and footnote omitted, emphasis added). The Court noted that its decision left unresolved the issue of whether 18 U.S.C. §16 includes reckless behavior. *Id.* at 2279 & n.4. It acknowledged that lower courts had given the statutory definitions for misdemeanor domestic abuse and felony convictions “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.” *Id.* at 2279 & n.4, citing *Castleman*, 134 S. Ct. at 1411 & n. 6. “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.” *Id.*

Within a year, three circuits summarily concluded that *Voisine* removed any barrier to qualifying reckless felony offenses under sentencing enhancements based on prior “violent felonies” under

§924(e)(2)(B)(i).³ The Eighth Circuit spoke first in *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016). Devoting one paragraph to its reasoning, the Eighth Circuit upheld an ACCA enhanced sentence based on a Minnesota drive-by shooting statute that criminalized reckless conduct rather than intentional or purposeful action. *Id.* at 956. The Court of Appeals cited *Voisine*’s reasoning that “the word ‘use’ 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.” *Id.* The Eighth Circuit simply concluded that reckless crimes satisfy the “element of force” definitions for misdemeanor crimes of domestic violence and for violent felonies under ACCA because “both define predicate offenses as those involving the ‘use . . . of physical force’ against another.” *Id.* The Eighth Circuit did not address the textual difference in the ACCA definition’s requirement of “the use . . . of physical force against the person of another” nor consider why Congress might intend a broader definition of “misdemeanor crimes of domestic violence” involving simply a “use of force” without requiring that it be directed “against the person of another.” Section 921(a)(33)(A)(ii).

The Sixth and the Tenth Circuits followed the Eighth Circuit’s lead in *Fogg*. The Sixth Circuit likewise applied *Voisine* to qualify a federal conviction for assault resulting in serious bodily injury on United States Territory within 18 U.S.C. §113(a)(6), which may be satisfied by a mental state of recklessness. *See United States v. Verwiebe*, 872 F.3d 408, 411 (6th Cir. 2017). The panel in *Verwiebe* efficiently reasoned that the dictionary definition of the noun “use” this Court relied on in *Voisine* “applies with equal force to the Guidelines” definition for crime of violence, and thus “[t]he argument that crimes satisfied by reckless conduct categorically do not include the ‘use of physical force’ simply does not hold water after *Voisine*.” *Id.*

³ The Circuit for the District of Columbia has also issued an unpublished decision summarily citing *Voisine* to reject a claim of plain error by designating second degree murder a crime of violence, *United States v. Benbow*, 709 Fed. Appx. 25, 27 (D.C. January 12, 2018).

A subsequent Sixth Circuit panel applied the binding precedent of the prior panel’s ruling in *Verwiebe* to qualify Tennessee aggravated assault, yet rejected the justifications as “mistaken”:

“. . . the definition in §4B1.2 includes language that he [misdemeanor crimes of domestic abuse] in *Voisine* did not. There, §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, §3B1.2 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.”

United States v. Harper, 875 F.3d at 329, 331 (6th Cir. 2017). The *Harper* panel further explained that the “crime of violence” guideline required not only that the use of force be voluntary but that also “the force’s application to another person must be volitional or deliberate.” An actor who intentionally or knowingly applies physical force to the person of another, does so volitionally, “[b]ut the same is not true of an actor who uses force recklessly.... As culpable as the reckless actor might be, therefore, he does not volitionally apply force “against the person of another.” *Id.* at 332.

The Tenth Circuit also relied on *Voisine* to qualify reckless conduct for ACCA sentences based on statutes prohibiting drive-by shooting behavior. See *United States v. Pam*, 867 F.3d 1191, 1205 (10th Cir. 2017); *United States v. Hammons*, 862 F.3d 1052, 1055-56 (10th Cir. 2017). The Tenth Circuit drew support from *Voisine* for the proposition that “it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly.” *Hammons*, at 1056, citing *Voisine*, at 2279. The Tenth Circuit simultaneously bolstered these rulings by noting that the statutes in question consisted of a New Mexico statute defined in terms of “willfully discharging a firearm at or from a motor vehicle with reckless disregard for the person of another,” *Pam*, at 1205, and an Oklahoma statute prohibiting the use of a vehicle “to facilitate the intentional discharge of any kind of firearm . . . or other weapon in conscious disregard for the safety of any other person or persons,” *Id.*

C. The Fifth Circuit deems reckless felonies to qualify unless they encompass accidental injury.

The Fifth Circuit similarly relied on *Voisine* to uphold reckless misdemeanor crimes of domestic violence to the Guidelines “element of force” definition for felony “crimes of violence” in U.S.S.G. §2L1.2(b)(1)(A)(ii). *United States v. Mendez-Henriquez*, 847 F.3d 214, 221-22 (5th Cir. 2017). Like the Tenth Circuit, the Fifth Circuit inferred from *Voisine* “a separate dichotomy of volitional and non-volitional conduct” whereby reckless offenses reflecting a defendant’s voluntary conduct would qualify. *Id.* at 221. “In other words, ‘the word ‘use’ 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*’.” *Id.* (emphasis added by the Fifth Circuit. However, the Fifth Circuit held that its pre-*Voisine* precedents “remain[] good law to the extent it echoes *Leocal* that accidental conduct is not volitional, and, therefore, does not constitute ‘use of force.’” *Id.*, citing *Voisine*, at 2279-80, and *United States v. Vargas*, 356 F.3d 598, 602, 604 (5th Cir. 2004). The statute at issue in *Mendez-Henriquez* charged the defendant with “malicious[] and willful[]” conduct that the Fifth Circuit deemed to fall outside the “accidental conduct” exception it retained. *Mendez-Henriquez*, at 214.

D. The First Circuit rejects *Voisine*’s extension to violent felony requiring “use of physical force against the person of another.

The First Circuit stands in conflict with both the Fifth Circuit’s intermediate stance and the Eighth Circuit’s blanket extension of *Voisine* to reckless felony conduct. In its first reversal of an ACCA sentence premised on crimes committed with a mens rea of mere recklessness, the First Circuit rejected Maine’s aggravated assault statute criminalizing the conduct of causing bodily injury in conscious disregard of a risk of doing so. *United States v. Bennet*, 868 F.3d 1 (1st Cir. 2017). The panel concluded that the “element of force” definition for “violent felony” contained a “grievous ambiguity” as to whether it encompassed reckless aggravated assault under the Maine statute. The decision was subsequently vacated based on the intervening death of Appellant Bennet, 870 F.3d 34 (2017), but not

before another First Circuit panel adopted its reasoning and conclusion to reject the Maine statute proscribing reckless assault as failing to satisfy the ACCA “element of force” definition, *see United States v. Windley*, 864 F.3d 36, 37-38 (1st Cir. 2017).

The First Circuit discerned no justification in *Voisine* to find that “the key statutory phrase” in ACCA’s definition of felonies requiring “use . . . of physical force against the person of another” could encompass reckless conduct when the Circuits had long rejected such crimes as satisfying this distinct definition of predicate felonies. *Bennet*, 868 F.3d at 8-9. The misdemeanor definition in *Voisine*, did not present this Court the occasion to construe the “against” phrase, the First Circuit emphasized, and this Court expressly reserved the issue of whether other similar definitions of crime of violence (“namely, the one that is set forth in §16”) had to be construed to encompass reckless offenses. *Id.*, citing *Voisine* at 2280 n. 4. The *Bennet* panel reviewed this Court’s reliance in *Leocal* on plain meaning and ordinary language to conclude that, “[w]hile one may, in theory, actively employ something in an accidental manner,’ an ordinary English speaker would not likely ‘say that a person actively employs physical force against another person by accident.’” 868 F.3d at 10, quoting *Leocal* at 9. The First Circuit surveyed the ten years of consistent inter-circuit decisions rejecting reckless felony crimes as the “use of force . . . against the person of another.” *Id.* at 11-12. The First Circuit then focused on the statutory definition for misdemeanor crime of domestic abuse the Court examined in *Voisine*:

“The key, the Court explained, is that, although the word ‘use’ does require that the ‘force involved in a qualifying assault must be volitional,’ that word ‘does not demand that the person applying force have the purpose or practical certainty that [the force] will cause harm, as compared with the understanding that it is substantially likely to do so.’ *Id.* at 2278-79. Thus, the Court concluded that, at least when appearing in connection with § 921(a)(33)(A)’s phrase ‘use . . . of physical force,’ the word ‘use’ in § 921(a)(33)(A) 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.’”

Bennet, at 14, quoting *Voisine* at 2279. The First Circuit considered the circumstance that Congress intended to draft an expansive definition of “misdemeanor crimes of domestic violence” in §922(g)(9)

“to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies from owning guns.” *Id.* at 15, quoting *Voisine* at 2280. The First Circuit also cited this Court’s explanation in *Voisine* that its approval of reckless assault statutes as the “use of force” simpliciter under the misdemeanor crimes definition, was “in no way inconsistent” with “*Leocal*’s exclusion of accidental conduct” in the felony “crime of violence” definition in §16(a). *Id.* at 15, quoting *Voisine* at 2280 n.4.

Ultimately, the First Circuit contemplated the significance of the divergent purposes underlying the felony “element of force” definition in ACCA and the misdemeanor crimes of domestic violence in §921(a)(33)(A). *Id.* at 17. In ACCA, Congress chose to “denominate ‘the use of force against another’ as a single, undifferentiated element.” *Id.* at 17-18, quoting *United States v. Hayes*, 555 U.S. 415, 421 & n.4 (2009). “[I]n context, the word ‘against’ arguably does convey the need for the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim’s bodily injury[.]” *Id.* The logic of this conclusion resonated in the 10 years of consistent exclusion of reckless crimes from the felony definition prior to *Voisine*. “For that reason, one might doubt whether such a volitional action—even if it is an action that ‘deliberate[ly] . . . endanger[s] another,’...—is an action that also is naturally described as one that is taken ‘against’ another.” *Bennet*, at 18, quoting *Voisine* at 2279. Furthermore, under the categorical focus on the least level of conduct encompassed by a statute, the First Circuit found that Maine’s prohibition of assault with a mens rea of mere recklessness “covers conduct less clearly in Congress’s ken when it crafted ACCA[,]—namely, causing bodily injury in a drunk-driving crash with no intent to cause such injury and no certainty that injury to another would result from driving in an intoxicated state.” *Id.* at 21. The First Circuit’s review of the context and underlying purposes of ACCA left it lacking sufficient confidence to declare Maine’s criminalization of reckless conduct absent an intent or purpose to injure satisfied the “element of force” definition. It applied the

rule of lenity to reject Bennet’s conviction for Maine assault as predicate offense triggering such “a sentencing enhancement of great consequence.” *Id.* at 23.

The divergent positions taken by these five circuits already establish an entrenched conflict directly produced by this Court’s decision in *Voisine*. Mr. Ramey’s conviction for Missouri second-degree assault by “[r]ecklessly caus[ing] physical injury to another person by means of discharge of a firearm” would clearly not qualify as a felony crime of violence under the First Circuit’s rejection of reckless felonies under *Windley* and *Bennett*. Because Missouri courts construe the statute to be satisfied by accidental gunfire occurring when a defendant sets a gun down, see *State v. White*, 138 S.W.3d 783, 785 (Mo. Ct. App. 2004), Mr. Ramey would not have been subject to his enhanced sentence under the Fifth Circuit’s intermediate position rejecting reckless felonies encompassing unintended, accidental injuries. The severe sentencing disparities invited by the conflict already existing within and amongst the Circuits warrants this Court’s immediate resolution.

E. The Eighth Circuit’s summary extension of *Voisine* to violent felony definitions conflicts with this Court’s decisions in *Johnson* and *Castleman*

The Eighth Circuit’s decision also warrants review because its summary extension of the scope of “misdemeanor crimes of domestic abuse” in Sections 921(a)(33)(A) and §922(g)(9) to the context of predicate *felony* convictions cannot be reconciled with this Court’s rulings in *Castleman*, 134 S. Ct. 1405 and *Johnson*, 559 U.S. 133.

In *Johnson* this Court established that the definition of predicate violent felonies under the “element of force” definition in ACCA (which every circuit also applies to the “crime of violence” definition in U.S.S.G. §4B1.2(a)(1)) is limited to crimes requiring the use of active, “violent force” capable of causing pain to another. *Id.* at 140. This threshold could not be satisfied by crimes requiring no more than merely “offensive contact”, that would satisfy common-law definitions of battery, but that would constitute a “comical misfit” under the violent felony calibration in ACCA. *Id.* at 145.

In *Castleman*, this Court further established that Congress specifically intended that “misdemeanor crimes of domestic violence” defining prohibited persons in §922(g)(9) *would* encompass non-violent force, including merely offense contact. *Castleman*, 134 S. Ct. at 1410-11. 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.” *Id.* at 1411, quoting Brief for National Network to End Domestic violence et al. as Amici Curiae, 4-9. Indeed, this Court continued, “most physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting.” *Id.* at 1411-12, quoting DOJ, P. Tjaden & N. Thoennes, *Extent, Nature and Consequences of intimate Partner Violence* 11 (2000). While the “squeeze of the arm [that] causes a bruise,” could not easily be considered “violence,” this Court explained that if such conduct sufficed to “draw the attention of authorizes to lead to a successful misdemeanor prosecution,” it would not offend common sense to characterize the resulting conviction as a “misdemeanor crime of domestic violence.” *Id.* at 1412. This Court established an expansive interpretation of “misdemeanor crimes of domestic violence” encompassing non-violent conduct, because a contrary ruling would have rendered §922(g)(9) inoperative in many States at the time of its enactment (a requirement of violent force would have rendered the statute inoperative in at least 10 states home to nearly 30 percent of the nation’s population). *Id.* at 1413.

The Eighth Circuit used one-paragraph in *Fogg* to extend the *Voisine* interpretation of “misdemeanor crimes of domestic violence” summarily to the heightened felony threshold required under ACCA and the career offender Guidelines. 836 F.3d at 956. This cannot be reconciled with this Court’s emphasis on distinguish the divergent goals and phrasing of those two very different sets of laws. Judge Bright’s dissenting opinion in *Fogg* confirmed the minimal briefing and development of the issue preceding the Eighth Circuit’s quick decision to expand *Voisine* misdemeanor rule to the far

different context of defining “violent felonies.” 836 F.3d at 957 & n.2 (Bright, Circuit Judge, dissenting in part). The Court engaged in little more analysis when it extended *Fogg* to the identical Guidelines definition for felonious “crimes of violence” in Mr. Ramey’s case. Appx. 2-3. The Eighth Circuit’s lack of detailed consideration of the differing contexts and considerations relevant to measuring the scope of felony crimes of violence runs counters to this Court’s acknowledge of their significance in *Voisine* itself. See 2279 & n.4.

F. Missouri assault presents the best vehicle to evaluate the varied Circuit responses to *Voisine*.

Mr. Ramey’s case presents a perfect vehicle by which to review all three of the varying positions the circuits now apply to predicate felonies defined by reckless criminal conduct. No dispute existed between the parties that Mr. Ramey’s Missouri conviction for assault in the second degree was based on Mo. Rev. Stat. §565.065.060.1(5). Appx. 2. That subsection forbids “[r]ecklessly caus[ing] physical injury to another person by means of discharge of a firearm.” Missouri courts have explicitly held that this statute is satisfied by proof of reckless conduct including the unintended and accidental discharge of a firearm injuring another person. See *State v. White*, 138 S.W.3d 783, 788 (Mo. Ct. App. 2004).

In *White*, the Missouri Court of Appeals held that the state prosecutor was not required to prove that White intentionally pulled the trigger causing the injury for which he was convicted under this statute. “All of the eyewitnesses, including the victim, testified at the trial that the shooting was accidental.” *Id.* at 785. “The State’s case was based on evidence that White picked up a shotgun and handled it in a reckless manner.” *Id.* White testified that the gun went off as he was laying it down, but he did not know whether the trigger was pulled or something hit the gun as he laid it down. *Id.* The Missouri Court of Appeals dismissed White’s argument that he did not intentionally pull the shotgun trigger, because that did “not resolve the question of whether he committed a voluntary act.” The appellate court looked to a state statute requiring that “criminal liability must be based on conduct that

‘includes a voluntary act.’” *Id.* at 786, quoting Mo. Rev. Stat. §562.011. From this, the Missouri Court of Appeals held that an essential element under §565.060.1(5) “is the defendant’s reckless conduct in causing the discharge of a firearm.” *Id.* The evidence satisfied the reasonable doubt threshold to show that “White’s willful and reckless handling of the shotgun caused it to fire, resulting in serious injury to the victim.” *Id.*

Missouri’s reliance on proof of a “voluntary act” to measure criminal liability for the reckless conduct encompassed by Mo. Rev. Stat. 565.060.1(5) implicates the very type of “volitional act” *Voisine* deemed sufficient for a “misdemeanor crime of domestic violence.” *Voisine*, 136 S. Ct. at 2279-80. That this recklessness encompasses “accidental” gunfire, as in *White*, implicates the First Circuit’s extensive reasoning in *Bennet* adopted in *Windley*, as well as the Fifth Circuit’s intermediate position applying *Voisine* to volitional behavior except when a predicate statute encompasses “accidental” infliction of injury. *Mendez-Henriquez*, 847 F.3d at 221.

In short, Mr. Ramey’s Missouri assault conviction provides the perfect example of a reckless crime by which to measure the propriety and justice of each of the different approaches the circuit’s now apply to reckless felony convictions in the wake of *Voisine*.

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court grant his petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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