

CASE NO. 17-8846

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

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Petitioner Cortrell Ramey wishes to alert the Court to two intervening matters relevant to his pending petition.

I. The D.C. Circuit widened the circuit split by ruling that reckless felonies constitute the “use of violent force” unless they encompasses accidental conduct.

After Ramey filed the petition in this case, the United States Court of Appeals for the District of Columbia Circuit decided *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. June 22, 2018). The Court ruled that a statute prohibiting reckless assault with a dangerous weapon qualified as a “violent felony” under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. §924(e)(2)(B). Haight was convicted of being a felon-in-possession of a firearm, among other crimes. The sentencing judge rejected the government’s arguments that Haight’s District of Columbia conviction for assault with a dangerous weapon satisfied ACCA’s element of force clause. The government cross-appealed from Haight’s direct appeal to demand an ACCA sentence for his gun possession conviction.

A three-judge panel of the District of Columbia Circuit ruled for the government, holding that reckless felony assault convictions qualify under ACCA unless the statute encompasses “accidental or involuntary” conduct. *Id.* at 1280-81. Writing for the Court, Judge Brett Kavanaugh stated that the Circuit thus joined four others (the Fifth, the Sixth, the Eighth, and the Tenth circuits) to declare reckless crimes predicate violent felony convictions under the ACCA or the career offender Guidelines, *id.* at 1281 (citing *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir. 2017) (Guidelines); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017) (Guidelines); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (ACCA); *United States v. Pam*, 867 F.3d 1191, 1207-08 (10th Cir. 2017) (ACCA)). In fact, however, the District of Columbia Circuit’s exclusion of statutes encompassing accidental or involuntary force applies only in the Fifth Circuit. *See Verwiebe*, 874 F.3d at 262 (qualifying reckless conduct while rejecting statutes encompassing accidental conduct in line with

Leocal v. Ashcroft, 543 U.S. 1, 2 (2004)). Hence, the District of Columbia Circuit would actually join the Fifth and the First Circuits in *rejecting* Ramey’s Missouri conviction for second-degree assault because that statute encompasses the accidental discharge of firearms. *See State v. White*, 138 S.W.3d 783, 788 (Mo. Ct. App. 2004) (reckless handling of shotgun resulting in injury qualified as intentional shooting, even though every eyewitness—including the victim—testified the gun went off accidentally).

The *Haight* decision also confirms that the three-way circuit split over reckless offenses as predicate “violent felonies” under the ACCA and the career offender Guidelines stems from this Court’s decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), on the scope of misdemeanor crimes of domestic abuse in 18 U.S.C. §921(a)(33)(A) which render subsequent gun possession illegal under 18 U.S.C. §922(g)(9). Judge Kavanaugh wrote that *Voisine*’s approval of reckless misdemeanor domestic abuse as predicate crimes for Section 922(g)(9) compels acceptance of reckless felonies under ACCA, because the statutory definitions in both instances have as an element the “use” of “physical force.” *Haight*, 892 F.3d at 1281. “So *Voisine*’s reasoning applies to ACCA’s violent felony provision.”

The *Haight* opinion acknowledged that the domestic misdemeanor definition in *Voisine* did not share the explicit ACCA requirement of force used “against the person of another,” but dismissed this distinction reasoning that domestic abuse misdemeanors must apply to a “victim.” *Id.* The District of Columbia Circuit panel did not acknowledge or account for the distinct character of domestic abuse laws—designed to encompass the often less violent abuse used to control domestic relations—which led Congress to adopt more expansive parameters to identify predicate misdemeanor crimes of domestic abuse. *See Castleman v. United States*, 134 S. Ct. 1405, 1411-12 (2014) (finding “unlikely” that Congress meant to incorporate as a “violent felony” a phrase to which the common law gave peculiar meaning only in defining a misdemeanor” and “likely that Congress meant to incorporate that misdemeanor-specific meaning of ‘force’ in defining a ‘misdemeanor crime of domestic violence’”).

Thus, the District of Columbia Circuit's *Haight* decision widened the circuit conflict on the issue after Ramey filed his petition in this case. It also increased the circuits' confusion and disparate application of federal sentence enhancements. With the addition of the District of Columbia Circuit's *Haight* ruling, Ramey's Missouri conviction would now be rejected in three circuits (the First, Fifth, and District of Columbia Circuits), and accepted in three others (the Sixth, Eighth, and Tenth Circuits). The District of Columbia's decision muddies the water even further, in that it claims to join a four circuit majority position led by the Eighth Circuit, yet the *Haight* ruling's exclusion of crimes encompassing accidental conduct would disqualify Ramey's Missouri conviction for reckless causation of injury by discharging a weapon—though the Eighth Circuit deemed it a qualified crime of violence. Moreover, the *Haight* decision crystalizes the source of the circuit conflict in their differing views on the applicability of *Voisine*'s interpretation of “misdemeanor crimes of domestic abuse” to predicate violent felony convictions under the ACCA and the Sentencing Guidelines. See Ramey's Petition at pp. 25-28.

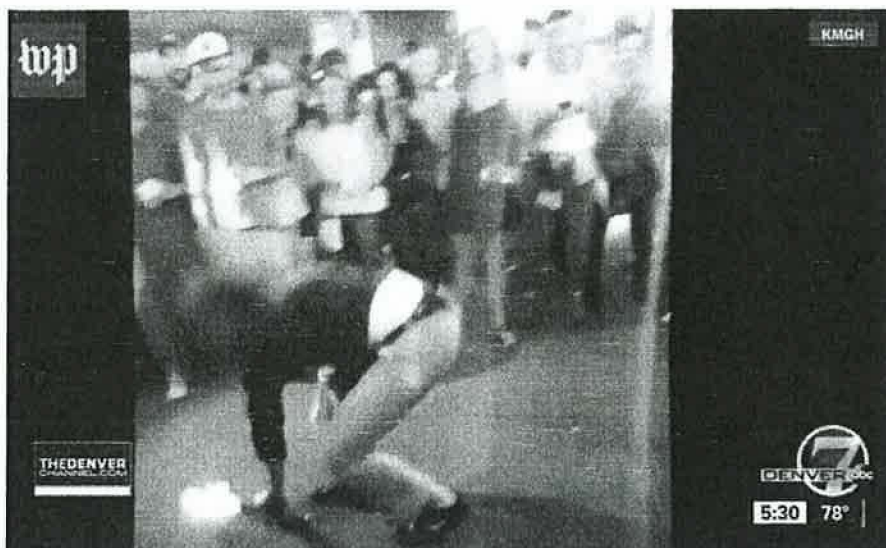
Only this Court can resolve these entrenched conflicts. Nothing is gained by waiting to see which of the conflicting positions already staked out by six circuits the other six circuits will join. Ramey's case clearly demonstrates the prejudice the conflict already generates, as his Missouri reckless assault conviction would not be a violent felony in the First, Fifth and District of Columbia Circuits.

II. The Denver reckless assault prosecution of the FBI agent whose gun accidentally discharged when he picked it up after dropping it on a dance floor illustrates why reckless crimes make poor indicators of “career criminals.”

Petitioner further notes the high profile prosecution of an FBI agent whose gun discharged as he picked it up off a dance floor graphically shows why reckless crimes do not reliably identify the “career criminals” Congress and the Sentencing Commission had in mind for ACCA and U.S.S.G. §4B1.2(a)(1).

On June 2, 2018, off-duty FBI Agent Chase Bishop executed a backflip as he danced at the Mile High Spirits tavern in Denver, Colorado. A video of the incident shows that as Bishop was about to land

his backflip, a gun flew out of a holster in the seat of his pants and landed at his feet. Bishop quickly reached down for the gun, which discharged the moment he touched it and struck a seated patron. The video is readily accessible on the internet:



Accessible at https://www.washingtonpost.com/news/post-nation/wp/2018/06/12/the-fbi-agent-who-accidentally-shot-someone-after-a-back-flip-has-turned-himself-in/?utm_term=.358aa658bcba .

Denver authorities charged Bishop for what they described to the press as an accidental, unintended discharge of the firearm, resulting in non-life-threatening injury to another. *Id.* Colorado's second-degree reckless assault law is essentially identical to the Missouri statute in Ramey's case. Bishops stands charged under Colo. Rev. Stat. §18-3-203, a class 4 felony, which provides

(1) A person commits the crime of assault in the second degree if:

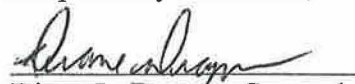
(d) He recklessly causes serious bodily injury to another person by means of a deadly weapon[.].

The crime encompasses a range of unspecified acts which "recklessly cause[] injury in a multitude of ways," including unintended accidents. *See, e.g., People v. Stewart*, 55 P.3d 107, 115-16 (Colo. 2002).

This Court has held that the ACCA focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun. *Begay v. United States*, 553 U.S. 137, 146 (2008). “In order to determine which offenders fall into this category, the Act looks to past crimes. This is because an offender’s criminal history is relevant to the question whether he is a career criminal, or precisely, to the kind or degree of danger the offender would pose were he to possess a gun.” *Id.* This Court has found no reason to believe Congress intended the harsh mandatory prison term in the ACCA to apply unless prior convictions “show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.” *Id.*

Without prejudging the second degree assault charge Agent Bishop faces, it is hard to square such unintended accidental recklessness with the sort of determined violence Congress or the Sentencing Commission deem proof of a nascent “career criminal.”¹ It illustrates the poor fit reckless offenses have with the definitions for felonies having as an element “the use, attempted use, or threatened use of physical force against the person of another,” as in Section 924(e)(2)(B)(i) and U.S.S.G. §4B1.2(a)(1), which are interpreted interchangeably, *see* 892 F.3d at 1281. Yet this is precisely the sort of conduct encompassed by Ramey’s reckless assault conviction that the Sixth, Eighth, and Tenth Circuits accept as predicate violent felonies under both provisions.

Respectfully submitted,



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¹ A Denver ABC News affiliate film report linked to the Washington Post’s internet story on the charges filed against Agent Bishop includes clips of three other accidental gun discharges by a DEA agent speaking to an elementary school and two off duty police officers whose firearms accidentally discharged in the presence of others. See, Kristine Phillips, *FBI Agent who accidentally shot a man after back flip in Denver club is charged with assault*, WASHINGTON POST, June 12, 2018, available at https://www.washingtonpost.com/news/post-nation/wp/2018/06/12/the-fbi-agent-who-accidentally-shot-someone-after-a-back-flip-has-turned-himself-in/?utm_term=.358aa658bcba.