

IN THE SUPREME COURT OF THE UNITED STATES

CORTRELL A. RAMEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Missouri offense of recklessly causing physical injury to another person by means of discharge of a firearm, Mo. Rev. Stat. § 565.060.1(5) (2009), is a crime of violence under Sentencing Guidelines § 4B1.2(a)(1) (2015).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 880 F.3d 447.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2018. On April 12, 2018, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including May 7, 2018, and the petition was filed on that date. 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 Eastern District of Missouri, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 51 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-5.

1. In October 2015, a confidential informant told police in St. Louis County, Missouri, that petitioner had a firearm at his residence. Presentence Investigation Report (PSR) ¶ 10. Officers obtained a search warrant for petitioner's home and found a nine-millimeter carbine rifle. PSR ¶¶ 10-12. Petitioner ultimately pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. 1.

The Probation Office determined that petitioner's base offense level was 20 under Sentencing Guidelines § 2K2.1(a)(4)(A), which applies if a defendant was previously convicted of a "crime of violence." PSR ¶ 20. The Guidelines define a "crime of violence" 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." Sentencing Guidelines § 4B1.2(a)(1). The Probation Office classified petitioner's Missouri conviction for assault in the second degree as a crime of violence. PSR ¶¶ 20, 36. That conviction stemmed from an incident

in which petitioner fired shots in front of a residence and hit a victim in the chest, although the bullet did not break the skin. PSR ¶ 36. Petitioner was convicted under Mo. Rev. Stat. § 565.060.1(5) (2009) (now codified at Mo. Rev. Stat. § 565.052.1(4)), which criminalizes “[r]ecklessly caus[ing] physical injury to another person by means of discharge of a firearm.”

Petitioner objected that his conviction did not qualify as a conviction for a crime of violence because the Missouri offense covered reckless conduct. PSR Addendum 2. The district court overruled that objection and determined that the Missouri offense of recklessly causing physical injury to another person by means of discharge of a firearm is a crime of violence. Sent. Tr. (Tr.) 3-4; see Pet. App. 1-2. The court explained that in Voisine v. United States, 136 S. Ct. 2272 (2016), this Court had concluded that a “person who assaults another recklessly uses force no less than one who carries out that same action knowingly or intentionally.” Tr. 4.

The district court’s application of the Guidelines yielded an advisory Guidelines range of 51 to 63 months. Tr. 4. The court sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Tr. 14; Judgment 2-3.

2. The court of appeals affirmed. Pet. App. 1-5. The court rejected petitioner’s argument that, “because the Missouri statute criminalizes reckless conduct, rather than intentional or

purposeful acts, * * * he did not 'use' physical force within the meaning of the guideline." Id. at 2-3. The court relied on this Court's decision in Voisine, which interpreted the phrase "use of physical force" in the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. 921(a)(33)(A)(ii). Voisine held that a "person who assaults another recklessly 'uses' force, no less than one who carries out that same action knowingly or intentionally." 136 S. Ct. at 2280 (brackets omitted). Based on Voisine, the court of appeals had already held in United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), that reckless conduct can constitute a "use" of force for purposes of a provision of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i). Pet. App. 3. The court saw "no reason why 'use' of force under the guidelines would mean something different from 'use' of force under the ACCA." Ibid. Thus, "[c]onsistent with Voisine and Fogg," the court determined that "reckless conduct causing injury to another by use of a firearm constitutes a use of force under the guidelines." Ibid.

Judge Kelly concurred in the judgment. Pet. App. 4-5. She explained that petitioner had "argue[d] only that Fogg was wrongly decided," an argument that a three-judge panel could not entertain. Id. at 4. But she stated that Fogg had not decided "whether a statute that criminalizes the discharge of a firearm toward an occupied building or motor vehicle qualifies as a violent felony under the force clause" of the ACCA. Ibid. (quoting Fogg, 836

F.3d at 955). And she also noted that it was an open question (and one not raised by petitioner) whether the Missouri statute at issue here “requires that the force be used against the person of another.” Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 16-28) that the Missouri offense of recklessly causing physical injury to another by discharging a firearm is not a crime of violence because reckless conduct cannot qualify as the “use of physical force against the person of another” under Sentencing Guidelines § 4B1.2. The court of appeals correctly rejected that contention, as have most of the other circuits to consider it -- both under Section 4B1.2 and under the similar provision of the ACCA, 18 U.S.C. 924(e) (2) (B) (i). And although the First Circuit has reached the opposite conclusion in decisions interpreting the ACCA, that shallow and recent disagreement does not justify further review in this advisory Sentencing Guidelines case.¹

1. The court of appeals correctly determined that the Missouri offense of recklessly causing physical injury to another by means of the discharge of a firearm qualifies as a crime of violence under Section 4B1.2. That determination follows from this Court’s decision in Voisine v. United States, 136 S. Ct. 2272

¹ Two other pending petitions for writs of certiorari present similar questions. See Harper v. United States, No. 17-7613 (filed Jan. 24, 2018); Verwiebe v. United States, No. 17-8413 (filed Apr. 3, 2018). Like this case, both Harper and Verwiebe involve the interpretation of the Guidelines, not the ACCA.

(2016). In Voisine, the Court held in the context of 18 U.S.C. 921(a)(33)(A)(ii) that the term “use * * * of physical force” includes reckless conduct. 136 S. Ct. at 2279. Voisine had no occasion to decide whether its holding extends to other statutory contexts. Id. at 2280 n.4. But the Court’s textual analysis applies fully to Section 4B1.2, which likewise refers to an offense that has as an element “the use * * * of physical force.”

The 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 2278-2279; see id. at 2279 (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 (citation omitted). Rather, the Court indicated, the key “distinction [was] between accidents and recklessness.” Ibid.

Petitioner suggests (Pet. 23-25) that the phrase “against the person of another” in the Sentencing Guidelines renders

inapplicable Voisine's discussion of recklessness. As the Sixth Circuit has explained, however, 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." United States v. Verwiebe, 874 F.3d 258, 262 (6th Cir. 2017), petition for cert. pending, No. 17-8413 (filed Apr. 3, 2018). Rather, that phrase merely identifies the object of the use of force. Voisine took as a given that the object of the reckless use of force 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). Voisine's analysis of volition thus already incorporates the premise that the "use" of force is against another person.

Indeed, the absence of the phrase "against the person of another" from the statute at issue in Voisine simply reflects the fact 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. Section 4B1.2(a)(1) similarly specifies that the object of the force must be "the person of another." The fact that both Section 921(a)(33)(A)(ii) and Section 4B1.2(a)(1) contain functionally equivalent language limiting the "use of physical force" to crimes against another person refutes petitioner's suggestion that reckless conduct is volitional in the first context but not in the second.

Nor, as petitioner contends (Pet. 25-27), do this Court's decisions in United States v. Castleman, 134 S. Ct. 1405 (2014), and Johnson v. United States, 559 U.S. 133 (2010), suggest that Voisine's definition of recklessness should be limited to crimes of domestic violence. To the extent that those decisions distinguished the "force" necessary to meet the definition of Section 921(a)(33)(A) in the context of domestic violence from the quantum of force referred to by other provisions, see Castleman, 134 S. Ct. at 1411-1412; Johnson, 559 U.S. at 142-143, no such distinction is at issue here. The question presented here and in Voisine concerns the required mens rea, not the required force. And 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 Sixth Circuit observed, "a recklessly thrown plate that shatters and hurts somebody" remains a "use of physical force" no matter the

identity of the injured person. Verwiebe, 874 F.3d at 263; see Voisine, 136 S. Ct. at 2279. So too here: A reckless assault on another person by means of discharge of a firearm constitutes a “use” of physical force against another person whether the victim is a family member or a stranger.

2. Petitioner asserts (Pet. 16-25) that the courts of appeals have divided over the application of Voisine to the Sentencing Guidelines and the similarly worded provision of the ACCA, 18 U.S.C. 924(e) (B) (i). Petitioner overstates the extent of the conflict, and the shallow disagreement that does exist does not justify further review in this case.

Petitioner correctly notes (Pet. 17-18) that, before Voisine, most courts of appeals had concluded 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 were abrogated by Voisine. See United States v. Haight, 892 F.3d 1271, 1280-1281 (D.C. Cir. 2018); Verwiebe, 874 F.3d at 262; United States v. Pam, 867 F.3d 1191, 1207-1208 (10th Cir. 2017); 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); 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 statute at issue required "only gross negligence").

Petitioner incorrectly suggests that the Fifth Circuit has taken a different approach by classifying reckless offenses, but not those that "encompass accidental injury," as having the "use of force" as an element. Pet. 22 (citing United States v. Mendez-Henriquez, 847 F.3d 214, 221-222 (5th Cir.), cert. denied, 137 S. Ct. 2177 (2017)) (emphasis omitted). In fact, Voisine specifically distinguished between accidental and reckless conduct, 136 S. Ct. at 2279, and none of the decisions following Voisine have suggested that accidental conduct would qualify as a "use" of force. See, e.g., Verwiebe, 874 F.3d at 263 ("Voisine distinguished Leocal on the ground that an accident," unlike reckless conduct, "is not considered an 'active employment' of force.") (citation omitted).

Petitioner is correct (Pet. 22-25), however, that the First Circuit has departed from the approach followed by other courts of appeals. In a decision issued after the petition for a writ of certiorari was filed, the First Circuit made clear that its precedent "forecloses the argument that crimes with a mens rea of recklessness may be violent felonies under [ACCA's] force clause." United States v. Rose, No. 17-1059, 2018 WL 3454459, at *3 (July 18, 2018). Rose and the prior First Circuit decisions on which it relied involved the ACCA rather than Section 4B1.2. Id. at *3-*4 (citing United States v. Windley, 864 F.3d 36 (2017) (per curiam);

Bennett v. United States, 868 F.3d 1, vacated as moot, 870 F.3d 34 (2017)). But the First Circuit's refusal to extent Voisine's textual approach to the ACCA suggests that it likewise would not treat an offense with a mens rea of recklessness as a "crime of violence" under Section 4B1.2.²

The shallow conflict suggested by the First Circuit's recent decisions does not justify further review in this case. Petitioner's challenge to his sentence rests on a claimed error in the application of the advisory Sentencing Guidelines, not the ACCA or another statute. 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). Because the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions

² In its briefs in opposition in the two other pending cases raising similar issues, the government argued that the extent of any conflict created by the First Circuit's decisions in Windley and Bennett was unclear because those decisions focused on the breadth of the particular state assault statutes at issue and emphasized that those statutes covered reckless driving that results in injury. See Br. in Opp. at 10-11, Verwiebe v. United States, No. 17-8413 (June 6, 2018); Br. in Opp. at 12-13, Harper v. United States, No. 17-7613 (May 23, 2018). Those briefs were filed before the First Circuit's decision in Rose, which indicates that the First Circuit's view that a reckless assault cannot qualify as a "use" of force under the ACCA is not limited to statutes that possess that particular feature.

interpreting the Guidelines. Ibid.; see 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 illustrated its attention to such matters through its actions 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 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 to the definition of a crime of violence in particular. No sound 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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