

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

REPLY BRIEF FOR PETITIONER

Diane L. Dragan
Assistant Federal Public Defender
1010 Market, Suite 200
Saint Louis, MO 63101
(314) 241-1255
Fax: (314) 421-4177

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)?

TABLE OF CONTENTS

Question Presented	2
Table of Authorities	4
Statutory and Constitutional Provisions	6
Argument	8
1. Only this Court can cure the conflict among six circuits on whether <i>Voisine</i> established that reckless felonies qualify as crimes with the use of force by career criminals	8
2. The Government’s arguments ignore Congress’s dissimilar goals in defining domestic misdemeanors barring gun possession versus violent felonies marking career criminals . .	10
3. Only this Court, not the Sentencing Commission, can cure circuit conflict on whether <i>Voisine</i> affects <i>Leocal</i> ; this Court and the circuits apply cases interpreting identical ACCA and Guidelines interchangeably as the Commission simply imported the ACCA definition . . .	12
Conclusion	15

TABLE OF AUTHORITIES

Supreme Court Cases

<i>Begay v. United States</i> , 553 U.S. 137 (2008)	10, 11
<i>Braxton v. United States</i> , 500 U.S. 344 (1991)	12, 13
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	14
<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	11, 14
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004)	8, 9, 12, 13
<i>United States v. Castleman</i> , 572 U.S. 157 (2014)	11, 12
<i>Turner v. Safley</i> , 482 U.S. 78 (1987)	8
<i>Voisine v. United States</i> , 136 S. Ct. 2272 (2016)	<i>passim</i>

Docketed Cases

<i>Adarius Harper v. United States</i> , 17-7613	15
<i>Eric Michael Verwiebe v. United States</i> , No. 17-8413	15

Federal Circuit Court Cases

<i>United States v. Haight</i> , 892 F.3d 1271 (D.C. Cir. 2018)	9
<i>United States v. King</i> , 673 F.3d 274 (4th Cir. 2012).	14
<i>United States v. Mendez-Henriquez</i> , 847 F.3d 214 (5 th Cir. 2017)	9
<i>United States v. Moore</i> , 635 F.3d 774 (5th Cir. 2011)	14
<i>United States v. Ossana</i> , 638 F.3d 895 (8th Cir. 2011)	14
<i>United States v. Verwiebe</i> , 874 F.3d 258 (6 th Cir. 2017)	9, 10

Federal Statutes

18 U.S.C. §921(a)(33)(A)	6, 9, 10
--------------------------------	----------

18 U.S.C. §922(g)(9)	6, 10, 11
18 U.S.C. §924(e) (“ACCA”)	2, 6, 8, 10 11, 14

State Court Cases

<i>State v. White</i> , 138 S.W.3d 783 (Mo. Ct. App. 2004)	9, 15
--	-------

State Statutes

Mo. Rev. Stat. §565.060.1(5) (2009)	15
---	----

United States Sentencing Guidelines

U.S.S.G. §1B1.2(a) (1990)	7, 13
U.S.S.G. §4B1.2 (2016 ed.)	2, 7, 8, 14
U.S. Sentencing Commission, <i>Guidelines Manual</i> , Supplement to Appendix C, Amendment 798 (effective August 1, 2016)	14

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. §921, “Definitions”, provides in pertinent part:

(33)(A) Except as provided in subparagraph (c), the term “misdemeanor crime of domestic violence” means an offense that—

- (i) is a misdemeanor under Federal, State, or Tribal law; and
- (ii) 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, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. §922(g), “Unlawful acts,” provides in pertinent part,

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), “Penalties,” provides, in pertinent part,

(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. §1B1.2 (1990). **Applicable Guideliens**, provided

- (a) Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted). *Provided*, however, in the case of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

U.S.S.G. §4B1.2(a) (2016), “Definitions of Terms used in Section 4B1.1,” 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.”

State Statutes

Mo. Rev. Stat. §565.060.1 (2009), “Assault, second degree, penalty,” provides in pertinent part,

- 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[.].

PETITIONER'S REPLY

The Government confirms that a circuit conflict exists on whether reckless offenses constitute felony crimes of violence in the wake of *Voisine v. United States*, 136 S. Ct. 2272 (2016), Government's Brief in Opposition ("BIO") 5-6. Only this Court can settle the dispute. The ploy to label the circuits' discord "shallow" falls flat: Missouri's reckless assault law would not constitute a violent felony in the First, Fifth, and (as of last month) the District of Columbia Circuit. Suppl. Br. 1-3. Remarkably, the Government claims for the first time that *Voisine* itself disqualifies accidental assaults, BIO 10, which would actually exclude the Missouri law in Ramey's case because it is satisfied by accidents caused by voluntary conduct, Pet. 27-28. The government's plea to let the Sentencing Commission resolve a *Voisine*-based conflict should be disregarded. Like this Court, the circuits apply the definitions in U.S.S.G. §4B1.2(a) and 18 U.S.C. §924(e)(2)(B) interchangeably. The Commission took the guideline definition straight out of the statute and it follows this Court's lead in its interpretation. This Court's ruling in *Voisine* opened the conflict and this Court must now end it.

1. Only this Court can cure the entrenched conflict among six circuits on whether *Voisine* established that reckless felonies count as crimes involving use of force by career criminals.

The parties agree that the circuit conflict in this case arises from this Court's decision in *Voisine* and its interplay—if any—with the prior decision of this Court that led the circuits uniformly to reject crimes with a reckless *mens rea* as the "use of force" defining felony "crimes of violence," *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). BIO 5-6, 8, 9; Pet. 16-18. Only this Court can resolve such disputes. *See, e.g., Turner v. Safley*, 482 U.S. 78, 87-88 (1987) (the court of appeals too narrowly "cabined" this Court's prior decision on the standard of review applied to inmates' constitutional claims).

The Government belittles the circuit discord on the false premise that it only produces disparate prison terms for persons convicted in the First Circuit. BIO 5, 9-10. This is untrue. The Fifth Circuit and the District of Columbia Circuit (as of last month) have explicitly declared that reckless crimes

encompassing *accidental* assault do *not* qualify. See *United States v. Haight*, 892 F.3d 1271, 1280-81 (D.C. Cir. 2018); *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir. 2017). Combined with the First Circuit’s categorical exclusion of all reckless felonies, three circuits would today reject the Missouri assault conviction that the Eighth Circuit qualified as a crime of violence *knowing* it was satisfied by purely accidental and unintended gunfire resulting from a voluntary physical act. Pet. App. 4, Kelly, J., concurring in judgment, citing *State v. White*, 138 S.W.3d 783, 785 (Mo. Ct. App. 2004).

The government falsely asserts that none of the circuits that rely on *Voisine* to qualify reckless crimes as predicate violent felonies would include offenses satisfied by accidental conduct, BIO 10. This collapses in the face of the Eighth Circuit’s ruling in Ramey’s case, which upheld Missouri second degree assault based on recklessly causing physical injury by a firearm. In her concurring opinion, Judge Kelly cited the Missouri Court of Appeals decision in *White*, which found sufficient evidence for reckless assault in an indisputably unintentional shooting described by every witness—“including the victim”—as having occurred when White’s gun accidentally discharged as he waived it around “like a soldier.” Pet. App. 4.

Furthermore, and contrary to the Government’s contention, the Sixth Circuit has not clearly excluded reckless crimes proved by accidental causation of physical injury as crimes of violence under *Voisine*. The Sixth Circuit’s ultimate opinion in *United States v. Verwiebe*, 874 F.3d 258, 263 (6th Cir. 2017), tersely referred to “accidental conduct” only to dispute the First Circuit’s reliance on the absence of the phrase “against the person or property of another” in the definition for misdemeanor crimes of domestic violence in 18 U.S.C. §921(a)(33)(A)(ii). The Sixth Circuit merely observed that *Voisine* distinguished the rejection of reckless conduct in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), “on the ground that an accident like stumbling, or dropping a plate, is not considered an ‘active employment’ of

force.” 874 F.3d at 263. This two-sentence segment of *Verwiebe* did not clearly establish that the Sixth Circuit reads *Voisine* as excluding accidental shootings that cause physical injury to others.

The Government goes so far as to claim that *Voisine* excludes reckless offenses encompassing purely accidental conduct as “the use of force”. BIO 10. If so, the Eighth Circuit’s decision clearly clashes with that decision and warrants, at minimum, a GVR order remanding for reconsideration in light of *Voisine*.

2. The Government ignores Congress’s dissimilar goals in defining domestic misdemeanors that bar gun possession in contrast to identifying violent felonies that signify a career criminal.

The Government echoes the reasoning of Circuits that use *Voisine* to declare “reckless” felonies crimes that “use . . . force against the person of another.” BIO 7. It argues that, although Section 921(a)(33)(A)(ii) refers only to “use” of force without explicitly identifying the object of such force as “the person of another,” *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.’” BIO 7, citing 136 S. Ct. at 2278. By inferring that domestic misdemeanors defined by “use of force” implicitly require that it be directed at another, the Government summarily concludes that *Voisine*’s acceptance of “volitional” reckless acts extends to “violent felonies” having as an element the use of violent force explicitly directed “against the person of another.” *Id.*

Like the circuits that use this reasoning, the Government blissfully ignores the qualitatively dissimilar goals Congress sought to serve by the different wording in the definitions of domestic misdemeanor crimes in 18 U.S.C. §§921(a)(33)(A)(ii), 922(g)(9), and violent felonies in 924(e)(2)(B)(i). See Pet 25-26, Suppl. Brief 2. Congress drafted the violent felony definitions in ACCA with the goal of identifying armed career criminals. See *Begay v. United States*, 553 U.S. 137, 146 (2008). “[T]he Act looks to past crimes . . . because an offender’s criminal history is relevant to the question whether he is a career criminal, or, more precisely, to the kind or degree of danger the offender would pose were he

to possess a gun.” *Id.* This Court determined that the criminal record signifying the “career criminal” Congress had in mind for ACCA should encompass “crimes involving intentional or purposeful conduct”—crimes that go beyond mere “callousness toward risk” to establish an increased likelihood that the offender “is the kind of person who might deliberately point [a] gun and pull the trigger.” *Id.* Moreover, Congress’s purpose in defining an armed career offender was not to create a crime in itself; it sought to increase sharply the prison term such a person would serve for possessing a gun above the 10-year maximum set for persons with prior felony convictions for non-violent and non-serious drug offenses. Compare 18 U.S.C. §924(a)(2)(maximum ten year term) and §924(e)(2)(minimum mandatory prison term of fifteen years). Congress’s choice of an explicit requirement that a predicate violent felony involve “the use, attempted use, or threatened use of violent force *against the person of another*” reflects a logically heightened degree of purposeful, violent, and aggressive crime. See *Begay*, 553 U.S. at 144-45. Accord *Johnson v. United States*, 559 U.S. 133, 140-41 (2010) (Congress’s word choice in defining “violent felony” itself connoted a substantial degree of “strong physical force”).

In contrast, this Court has already ruled that Congress did not import the heightened thresholds of violent force when it created the definition of predicate “misdemeanor crimes of domestic abuse,” which rendered one ineligible to possess a firearm. See *United States v. Castleman*, 572 U.S. 157 (2014). Congress enacted §922(g)(9) to “close [a] dangerous loophole” in gun control laws which failed to encompass perpetrators of domestic violence convicted “only of misdemeanors.” *Id.* at 160. This Court explained it made sense for Congress to classify as a “misdemeanor crime of domestic violence” the type of conduct that would satisfy common-law assaults satisfied by merely offensive touching, “[w]hereas it was ‘unlikely’ that Congress meant to incorporate in the definition of a ‘violent felony’ a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor[.]” *Id.* at 164. The Court explained that “domestic violence” constitutes not merely a type of “violence”; rather,

“it is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context.” *Id.* at 165. “Indeed, ‘most physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping and hitting.’” *Id.*

The circuits that qualify reckless felonies as crimes of violence using the Government’s superficial textual analysis fail to address the explanation in *Castleman* of Congress’s misdemeanor calibration to define domestic abuse crimes to encompass “seemingly minor act[s]” —including reckless ones— sufficient to “draw[] the attention of authorities and lead[] to a successful prosecution for a misdemeanor offense[.]” *Id.* at 166. They likewise fail to grasp the premise in *Castleman* that such offenses would not meet the heightened threshold for “purposeful, violent, and aggressive” felonies marking career criminals. *Id.* at 163. The dissimilar goals Congress had in drafting the two provisions easily provides the “reason” why the requisite *mens rea* would be more purposeful and aggressive in the felony career criminal context, contrary to the Government’s protest that *Voisine* proves there is “no reason why the requisite *mens rea* would differ[.]” BIO 8-9. *Castleman* plainly established that Congress likely meant to incorporate a lesser, “misdemeanor-specific meaning of ‘force’ in defining a ‘misdemeanor crime of domestic violence’,” 572 U.S. at 164, that would not meet a felony calibration of crimes marking a career criminal.

3. Only this Court, not the Sentencing Commission, can cure circuit conflict on whether *Voisine* affects *Leocal*; this Court and the circuits interpret identical ACCA and Guidelines definitions interchangeably, as the Commission simply imported the ACCA language.

The Government’s final ploy to stop this Court from resolving the Circuit conflict caused by its own *Voisine* ruling is to let the Sentencing Commission handle it according to *Braxton v. United States*, 500 U.S. 344 (1991). The Government overstates and misrepresents the deference this Court afforded to the Sentencing Commission relating to guideline matters in the special circumstances of *Braxton*.

Braxton pled guilty to two of three counts of an indictment without any plea agreement. He pled guilty to assaulting a deputy marshal and to using a firearm in a crime of violence, but he did not plead guilty to a third count alleging that he attempted to kill a deputy United States marshal. The government did not dismiss that count. At a hearing held to establish a factual basis for his guilty plea, Braxton agreed “what the Government say[s] it could prove [happened] happened.” 500 U.S. at 346. At sentencing, the judge applied the harsher Guidelines created for attempts to kill a marshal, citing U.S.S.G. §1B1.2(a) (1990), which instructed judges to use any guideline corresponding to offenses more serious than the crime of conviction in the case of a guilty plea “containing *a stipulation* that *specifically establishes* a more serious offense than the offense of conviction[.]” *Id.* (emphasis added). The circuits disagreed on whether “a stipulation” required a formal plea agreement. *Id.* at 347.

Braxton won a writ of certiorari and argued that U.S.S.G. §1B1.2(a) did not apply because (1) he had no plea agreement “containing a stipulation,” and (2) the evidence did not “specifically establish” the crime of attempting to kill a marshal. 500 U.S. at 346-47. This Court declined to resolve the first Guidelines issue citing special indications supporting such forbearance in the Sentencing Commission’s intervening decision to invite comment on whether U.S.S.G. §1B1.2(a) should be amended to explicitly provide that any such “stipulation” should be part of a formal plea agreement. *Id.* at 348. Nevertheless, the Court proceeded to resolve Braxton’s second claim that the evidence did not satisfy the Guidelines threshold in U.S.S.G. §1B1.2(a) by “specifically establish[ing]” the harsher crime of which he did not stand convicted. *Id.* at 349.

The rationale for this Court’s choice in *Braxton* to let the Sentencing Commission resolve circuit conflict on a sentencing guideline the Commission itself composed goes missing here. The circuit conflict in this case springs from tension between this Court’s rulings in *Voisine* and *Leocal*, which only this Court can cure. Second, the Sentencing Commission did not compose the “element of force”

definition at the core of this conflict; the Commission imported it verbatim from the ACCA. *See* U.S. Sentencing Commission, *Guidelines Manual*, Appendix C, Amendment 268 (effective November 1, 1989) (“The definition of crime of violence used in this amendment is derived from 18 U.S.C. §924(e)”). The Circuit Courts of Appeals, like this Court interpret the identical definitions used to define predicate Guidelines crimes of violence and violent felonies under ACCA interchangeably. *See, e.g. Johnson v. United States*, 135 S. Ct. 2551, 2559-60 (2015) (citing four cases construing the Sentencing Guidelines crime of violence definition in deciding a challenge to the identical ACCA violent felony definition); *United States v. King*, 673 F.3d 274, 279 n.3 (4th Cir. 2012); *United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011); *United States v. Ossana*, 638 F.3d 895, 900 (8th Cir. 2011) (applying ACCA ruling in 2010 *Johnson* decision to crime of violence guideline definition). The Sentencing Commission itself follows this Court’s lead when it comes to the identical definitions in the ACCA and the career offender Guidelines, as it did when it struck the residual clause in U.S.S.G. §4B1.2(a)(2) after this Court struck the identical ACCA phrase as unconstitutionally vague in the 2015 *Johnson* ruling. *See* U.S. Sentencing Commission, *Guidelines Manual*, Supplement to Appendix C, Amendment 798 (effective August 1, 2016). To postpone resolution of a conflict spawned by this Court’s *Voisine* decision so that the Sentencing Commission could ponder a separate resolution that may not match the result this Court will reach in a future ACCA case illogically and needlessly invites greater confusion and lack of notice as to the meaning of identical federal sentencing laws.

The government does not deny that Ramey’s case presents the ideal vehicle for this Court’s consideration of the varied positions the circuits take on *Voisine*’s application to the identification of felony crimes of violence. *See* Pet. 27-28. Missouri second-degree assault based on “[r]ecklessly caus[ing] physical injury to another person by means of discharge of a firearm,” encompasses the reckless mens rea, and is satisfied by accidental conduct premised on the very type of “volitional acts”

encompassed by the *Voisine* analysis. *Compare Voisine*, 136 S. Ct. at 2279 (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”) and *State v. White*, 138 S.W.3d at 785 (the State carried its burden by proving White’s reckless handling of the weapon was volitional within the meaning of Mo. Rev. Stat. §565.060.1(5) (2009)).

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court grant his petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals, or, at minimum issue a GVR order for reconsideration of its decision in light of *Voisine* given the Government’s contention that it does not include reckless crimes encompassing accidental conduct. In the alternative, this Court should at minimum hold his case until the disposition of the Petitions already pending on whether reckless offenses qualify as crimes of violence in *Adarius Harper v. United States*, 17-7613, and *Eric Michael Verwiebe v. United States*, No. 17-8413.

Respectfully submitted,

/s/Diane L. Dragan
Diane L. Dragan
Assistant Federal Public Defender
1010 Market, Suite 200
Saint Louis, MO 63101
(314) 241-1255
Fax: (314) 421-4177