

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

PETITION FOR REHEARING

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. §924(c)(3)(A) (2018 ed.)

(c)(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

18 U.S.C. §924(e)(2)(B) (2018 ed.), “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[.]

United States Sentencing Guidelines Provisions

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[.]

State Statutes

720 ILCS 5/24-1.5(a) Reckless discharge of a firearm (1994)

(a) A person commits reckless discharge of a firearm by discharging a firearm in a reckless manner which endangers the bodily safety of an individual.

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[.].

ARGUMENT FOR REHEARING

Intervening lower federal court rulings in the Seventh and Ninth Circuits suggest that they may join the First Circuit to disqualify all reckless felony offenses as predicate crimes of violence triggering sharply enhanced federal sentences under 18 U.S.C. §§924(e)(2)(B)(i), 924(c)(3)(A), and U.S.S.G. §4B1.2(a)(1). If so, these two circuits would join the First Circuit's view that *Leocal v. Ashcroft*, 543 U.S. 1 (2004), disqualifies reckless felonies as predicate offenses having as an element the active "use, attempted use, or threatened use of force against" the person or property of another." See *United States v. Windley*, 864 F.3d 36, 37-38 (1st Cir. 2017). This alignment would tie the three circuits (the Sixth, the Eighth, and the Tenth) which hold that *Voisine v. United States*, 136 S. Ct. 2272 (2016), abrogated *Leocal* with the observation that mere "voluntary" physical action producing injury may amount to a use of force. See *United States v. Verwiebe*, 872 F.3d 408, 411 (6th Cir. 2017); *Ramey v. United States*, 880 F.3d 447, 449 (8th Cir. 2018); *United States v. Pam*, 867 F.3d 1191, 1205 (10th Cir. 2017). The Fifth Circuit and the District of Columbia Circuit hold that reckless offenses may qualify unless they encompass purely accidental conduct. See *United States v. Mendez-Henriquez*, 847 F.3d 214, 221-22 (5th Cir. 2017); *United States v. Haight*, 892 F.3d 1271, 1280-81 (D.C. Cir. 2018). Petitioner Ramey's case illustrates the confusion generated by this three-way split: the Eighth Circuit's blanket endorsement of reckless offenses meant that his Missouri conviction for reckless firearm discharge qualified, Pet. For Certiorari Appx. 3, even though the state law's indivisible inclusion of purely accidental injuries would disqualify it in the District of Columbia Circuit, the Fifth Circuit, and the First Circuit.

The intervening lower court decisions during this Court's summer recess document inevitable sentencing disparities invited by this three-way split: had Mr. Ramey committed his reckless act across the Poplar Street Bridge in East St. Louis, Illinois (in the Seventh Circuit) instead of the City of St.

Louis, Missouri (in the Eighth Circuit), he would not have qualified for the career offender enhancement on which his harsher sentence (essentially twice the recommended range) was based.

In the Seventh Circuit this July, the United States District Court for the Central District of Illinois granted post-conviction petitions from mandatory career offender guidelines sentences based on Illinois convictions for reckless discharge of a firearm, 720 ILCS 5/24-1.5(a). *See Zollicoffer v. United States*, 2018 WL 4107998, *4 (C.D. Ill., August 29, 2018); *McCullough v. United States*, 2018 WL 4186384, * 4 - *5 (C.D. Illinois, August 31, 2018). The Illinois legislature defined the offense to prohibit “discharging a firearm in a reckless manner which endangers the bodily safety of an individual.” *Id.* at *12. The District Court cited a Seventh Circuit 2007 decision that the reckless Illinois offense did not have as an element the “use or attempted use of force against the person of another,” required by the mandatory career offender Sentencing Guidelines as predicate “crimes of violence.” *Id.*, at *5, citing *United States v. Gear*, 577 F.3d 810, 812 (7th Cir. 2009).

Petitioner Ramey was convicted of recklessly discharging a firearm injuring another person in the City of St. Louis, Missouri, Mo. Rev. Stat. §565.060.1(5) (2009), yet the Eighth Circuit held this constituted “the use” of violent force, even though Missouri case law clearly showed the Missouri statute to be satisfied by purely accidental conduct. Pet. For Certiorari Appx. at 4-5 (Kelly, J., concurring in the judgment), citing *State v. White*, 138 S.W.3d 783, 785 (Mo. Ct. App. 2004) (upholding reckless assault conviction despite the testimony of every eyewitness, including the victim, that the gun discharged accidentally, because White’s “reckless handling of the weapon was volitional.”). Had Petitioner Ramey committed the identical acts a short drive across any of St. Louis City’s four bridges across the Mississippi River, federal law would not have prescribed the sharply enhanced sentence the district court applied as a designated “career offender

In the Ninth Circuit, an Arizona federal magistrate has recommended granting collateral relief from a conviction for carrying a firearm in a crime of violence premised on the federal offense of assault committed upon United States territory, 18 U.S.C. §113(a), because the offense indivisibly encompassed conduct committed “purposefully, knowingly, or recklessly.” *See Deel v. United States*, 2018 U.S. Dist. LEXIS 111013, *51 - *56 (D. Ariz., July 2, 2018) (magistrate judge’s Report and Recommendation¹). The Court reasoned that federal assault encompassing reckless behavior does not qualify as having as an element the “use” of force needed to qualify for conviction and sentence based on 18 U.S.C. § 924(c)(3)(A). *Id.* at *47. The Arizona federal court observed that this Court’s decision in *Voisine* called into question prior Ninth Circuit case law applying *Leocal* to exclude reckless felony crimes as predicate crimes subject to 18 U.S.C. §924(c)(3)(A). *See Deel*, at * 47, citing *United States v. Fernandez-Ruiz*, 466 F.3d 1121 (9th Cir. 2006)(*en banc*). The Arizona judges’ discussion of *Voisine* highlights the urgency for this Court to resolve the lower courts’ conflict:

“If *Voisine* controlled the interpretation of [18 U.S.C.] §16 (or §924(c)(3)), then *Leocal* and *Fernandez-Ruiz* would no longer be good law, and the potential that Movant’s violation of §113(a)(6) could be committed recklessly would have no effect. However, the *Voisine* court did not address whether its decision extended to §924(c)(3) and explicitly declined to resolve whether it extended to the comparable language in §16(b).

As such, the Arizona magistrate and district court in *Deel* logically found that the *en banc* Ninth Circuit ruling in *Fernandez-Ruiz* remained binding precedent disqualifying all reckless offenses as predicate crimes of violence under Section 16(a) and Section 924(c)(3)(A). *Deel*, at *56-*57, *64.

Hence, preliminary indications in the Seventh and Ninth Circuits lean toward the disqualification of all reckless crimes consistent with the First Circuit’s position set out in *Windley*. The three-way conflict amongst the six circuits already to have staked out a position alone calls for the resolution only this Court can give as to the proper construction of *Voisine* in relation to *Leocal*, no matter how the other

¹ The District Court has granted the government’s extensions to file objections to the magistrate’s report and recommendation.

six circuits that have yet to address the issue align themselves. No good reason justifies the inevitable and sharp sentencing disparities invited while this conflict persists.

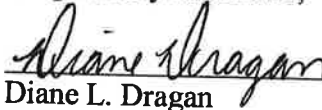
Petitioner Ramey further notes the intervening circumstance that a petition seeking certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit presents this very same issue to this Court in *Marlon Haight v. United States*, No. 18-370. This Court has requested the Solicitor General to respond by November 13, 2018. Petitioner's case presents the same circuit conflict raised in the *Haight* case, but without requiring this Court to decide the issue in the context of reviewing a decision by the newest Jurist on the Court, Justice Brett Kavanaugh, who authored the *Haight* opinion for the District of Columbia Circuit panel. Petitioner's case presents a clearer vehicle by which to resolve the question, without requiring this Court to examine and debate the issue in a way that would require this Court to consider directly overturning a decision by the newest member of the Court.

At the very minimum, petitioner asks that this Court hold this petition for rehearing pending this Court's disposition of Marlon Haight's petition in No. 18-370.

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court reconsider his Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals, or, at minimum hold a ruling on this petition until this Court rules on Marlon Haight's petition for this Court to decide the same issue in No. 18-370.

Respectfully submitted,



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Certificate of Counsel of Record

Undersigned counsel of record hereby certifies that this petition is submitted in good faith to raise intervening substantial circumstances of the type specified in Supreme Court Rule 44.2, and is not presented for delay.

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