No. _____

IN THE
Supreme Court of the United States

MARLON HAIGHT,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Armed Career Criminal Act, 18 U.S.C. § 924(e), a defendant convicted of violating 18 U.S.C. § 922(g) who has three previous convictions for a serious drug offense or violent felony is subject to a fifteen-year mandatory minimum term of imprisonment. D.C. Code § 22-402 provides "every person convicted . . . of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years." The D.C. Court of Appeals has held that the crime of assault with a dangerous weapon can be committed with a reckless *mens rea*. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013).

The question presented is whether a criminal offense with a reckless *mens rea* qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Marlon Haight petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the D.C. Circuit (Pet. App. 1a) is reported at 892 F.3d 1271 (D.C. Cir. 2018). The decision of the district court (Pet. App. 19a) is unreported.

JURISDICTION

The D.C. Circuit entered its judgment on June 22, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 922(g)(1) provides:

> 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;
>
> [. . .]
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a)(2) provides:

> Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as

provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(e) provides, in relevant part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection—
>
> [. . .]
>
> (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--
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

D.C. Code § 22-402 provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In addition to any other penalty

provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.

INTRODUCTION

This case presents a question upon which there is an acknowledged and entrenched conflict amongst the courts of appeals: whether an offense with a reckless *mens rea* qualifies as a "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The answer to that question turns on whether an offense that can be committed with recklessness falls within the ACCA's "force clause," which applies when an offense involves "the use . . . of physical force against the person of another." *See id.* § 924(e)(2)(B)(i). The Court should grant the petition for a writ of certiorari to decide this question for four reasons.

First, there is an acknowledged and intractable conflict among the circuits on the question presented. In the decision below, the D.C. Circuit held that assault with a dangerous weapon under D.C. law is a "violent felony," explicitly rejecting the position that the crime's reckless *mens rea* placed it outside the ACCA's definition of a violent felony. In reaching its decision, the D.C. Circuit expressly "recognize[d] that the First Circuit has reached a contrary conclusion, but . . . respectfully disagree[d] with that Court's decision." Pet. App. 17a.

After this Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the courts of appeals uniformly held that an offense with a reckless *mens rea* does not constitute a "crime of violence" under the force clause in 18 U.S.C. § 16. *See United States v. Fish*, 758 F.3d 1, 10 & n.4 (1st

Cir. 2014) (collecting cases). But in the wake of *Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016), which ruled that a reckless domestic assault could be a "misdemeanor crime of domestic violence" under a different statute, 18 U.S.C. § 922(g)(9), the courts of appeals have divided over whether those post-*Leocal* holdings apply to the ACCA, which has a force clause almost identical to § 16. Thus, the First Circuit has held that an offense with a reckless *mens rea* is not a "violent felony" for the purposes of the ACCA, and the majority of a panel of the Fourth Circuit endorsed that holding in a concurring opinion. *See United States v. Windley*, 864 F.3d 36, 38-39 (1st Cir. 2017) (per curiam); *United States v. Middleton*, 883 F.3d 485, 499–500 (4th Cir. 2018) (Floyd, C.J.) (concurring in the judgment) (joined by Harris, C.J.). By contrast, the D.C., Eighth, and Tenth Circuits have held that offenses with a reckless *mens rea* can qualify as violent felonies under the ACCA. *See* Pet App. 17a; *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016); *United States v. Pam*, 867 F.3d 1191, 1204 (10th Cir. 2017). This square conflict will continue, and likely widen further, until this Court resolves the question presented.

Second, the correct interpretation of this provision of the ACCA is an issue of national importance that arises frequently in the lower courts. ACCA enhancements are applied to hundreds of defendants each year, and as this Court's various ACCA-related decisions indicate, it is important that ACCA sentencing enhancements—which can dramatically increase a defendant's term of imprisonment—be applied uniformly throughout the country.

Third, this case presents an ideal vehicle for the Court to answer the question presented. The facts are undisputed, there are no jurisdictional issues for the Court to decide, and the D.C. Circuit directly decided the question presented in a published decision. Moreover, the question presented is dispositive for Petitioner Marlon Haight's sentence: If the answer to the question presented is "yes," then Petitioner is subject to the ACCA's mandatory minimum sentence. If the answer to the question presented is "no," then Petitioner is not.

Fourth, the decision below is wrong. The D.C. Circuit, and the courts with which it is in agreement, erred by applying this Court's reasoning in *Voisine* without considering the material differences in the texts, histories, and purposes of the ACCA and § 922(g)(9). Moreover, the D.C. Circuit failed to recognize that, ultimately, its task was to determine the meaning of the phrase "violent felony" rather than to construe the language of the ACCA's force clause in a vacuum. And the D.C. Circuit likewise erred by failing to consider whether the ambiguity in the ACCA's definition of "violent felony" requires the application of the rule of lenity.

The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. Statutory Framework

Federal law prohibits individuals who have been convicted of felonies from possessing firearms. 18 U.S.C. § 922(g)(1). Normally, the maximum penalty for

violating § 922(g)(1) is ten years of imprisonment. *Id.* § 924(a)(2). But under the ACCA, if defendants have three or more prior convictions for a "serious drug offense" or a "violent felony," they are subject to a mandatory minimum sentence of 15 years to life. *Id.* § 924(e)(1). The ACCA defines a "violent felony" to include "any crime 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." *Id.* § 924(e)(2)(B)(i). This provision of the ACCA is colloquially known as the "force clause."

Under D.C. law, anyone who commits assault with a dangerous weapon is subject to a maximum sentence of ten years of imprisonment. D.C. Code Ann. § 22-402. The elements of assault with a dangerous weapon under D.C. law are: "(1) an attempt, with force or violence, to injure another, or a menacing threat, which may or may not be accompanied by a specific intent to injure; (2) the apparent present ability to injure the victim; (3) a general intent to commit the acts which constitute the assault; and (4) the use of a dangerous weapon in committing the assault." *Spencer v. United States*, 991 A.2d 1185, 1192 (D.C. 2010) (internal quotation marks omitted).

Assault with a dangerous weapon can be committed with a *mens rea* of recklessness. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984). Like many other jurisdictions, D.C. defines "recklessness" to mean that "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct." *Jones v.*

United States, 813 A.2d 220, 225 (D.C. 2002) (citing, *inter alia*, Model Penal Code § 2.02(2)(c)).

B. Factual Background

Petitioner Marlon Haight was found guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) in the United States District Court for the District of Columbia. Pet. App. 11a.[1] At sentencing, the government contended that Petitioner had three prior qualifying convictions under the ACCA and thus sought a fifteen-year mandatory minimum sentence. Pet. App. 33a. The three qualifying convictions the government identified were for: (1) distribution of cocaine in violation of D.C. law, (2) first-degree assault in violation of Maryland law, and (3) assault with a dangerous weapon in violation of D.C. law. Pet. App. 11a.

Petitioner conceded that his first conviction qualified as a serious drug offense and that his second conviction qualified as a violent felony for the purposes of the ACCA. Pet. App. 33a. However, Petitioner argued that his conviction for assault with a dangerous weapon did not meet the definition of "violent felony." As noted by the district court, Petitioner argued that, under D.C. law, assault with a dangerous weapon can be committed recklessly, and reckless offenses do not qualify as violent felonies under the ACCA because they do not satisfy the statute's force clause. Pet. App. 34a-35a.

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[1] Mr. Haight was also found guilty of conspiracy to distribute cocaine base, cocaine, and marijuana; possession with intent to distribute; and using, carrying, and possessing a firearm during a drug trafficking. Pet App. 20a, 22a-23a.

The district court recognized that "the most important" issue for determining Mr. Haight's sentence was whether a violation of D.C.'s assault with a dangerous weapon statute qualifies as a "violent felony." Pet. App. 33a. "Although this would appear on it[s] face to be a simple question," the district court observed, "it is not and the courts are unfortunately hopelessly split." Pet. App. 33a.

The district court began its analysis by reciting the elements of assault with a dangerous weapon under D.C. law, which "[a]t first blush," seemed to indicate the crime qualifies as a violent felony. Pet. App. 34a. But as the district court observed, this Court held in *Leocal* that the force clause of an almost identical statute, 18 U.S.C. § 16, required a degree of intent higher than mere negligence. Pet. App. 35a. Following that decision, most courts held in various statutory contexts that reckless conduct does not categorically involve a use of force against the person of another. *See* Pet. App. 35a.

The district court noted, however, that in *Voisine*, this Court held that reckless misdemeanor assaults qualified as "misdemeanor crime[s] of domestic violence" under 18 U.S.C. § 922(g)(9). Pet. App. 35a. But the district court also noted that, in *Voisine*, this Court "expressly recognized that this ruling did not resolve the violent felony issue which remained an open question." Pet. App. 36a. (citing *Voisine*, 136 S. Ct. at 2280 n.4). The district court then surveyed the case law that had emerged after *Voisine*. Pet. App. 36a. As of March 2017, seven district courts had concluded that an offense with a reckless *mens rea* is not a "violent felony." *Id.* By comparison, two district courts and two courts of appeals

had reached the opposite conclusion. *Id.* The district court ultimately determined that "the majority of courts have got it right and those are the ones that hold that recklessness is not enough." *Id.* The district court concluded, however, "[t]here is also little doubt in my mind that our circuit will soon decide the question and that the Supreme Court will very likely weigh in, in the near future as well." *Id.*

The district court sentenced Petitioner to a total of 12 years and eight months of imprisonment. Pet. App. 24a. As part of that sentence, the court sentenced Petitioner to seven years and eight months for violating § 922(g)(1), rather than the fifteen-year mandatory minimum that would have applied to an armed career criminal. *Id.* Petitioner appealed, challenging various aspects of his conviction that are not at issue here,[2] and the government filed a cross-appeal arguing that assault with a dangerous weapon under D.C. law is a violent felony, even though the crime can be committed recklessly.

The Court of Appeals reversed, finding Petitioner subject to an ACCA enhancement "[i]n light of *Voisine*['s]" holding that "the use of violent force includes the reckless use of such force." Pet. App. 16a. In *Voisine*, the D.C. Circuit observed, this Court held

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[2] Specifically, Petitioner argued that the district court erred by denying his motion to postpone trial and by admitting two items of hearsay evidence at trial. Petitioner also argued that his trial counsel was ineffective. Pet. App. 5a. The D.C. Circuit affirmed on first three grounds and remanded the matter for a hearing on the fourth ground. Pet App. 5a-11a.

that a reckless misdemeanor assault involves "an active employment of force" satisfying the statutory requirement of a "misdemeanor crime of domestic violence." Pet. App. 15a-16a (citing 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 921(a)(33)(A)(ii)). Section 921(a)(33)(A) defines "misdemeanor crime of domestic violence" to include misdemeanors that have "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 . . . ." 18 U.S.C. § 921(a)(33)(A)(ii).

The Court of Appeals recognized that § 924(e)(2)(B), defining "violent felony" to include felonies that have "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), employs similar language to the provision at issue in *Voisine*. Thus, in the Court of Appeals' view, this Court's interpretation of "misdemeanor crime of domestic violence" under § 921(a)(33)(A) applied straightforwardly to the term "violent felony" as used in § 924(e). Pet. App. 15a-16a.

In reaching its conclusion, the Court of Appeals expressly acknowledged a conflict of authority on whether a reckless offense constitutes a "violent felony" for the purposes of the ACCA enhancement in § 924(e). Pet. App. 16a-17a. Specifically, the D.C. Circuit noted that its holding aligned with decisions from the Eighth and Tenth Circuits. *See* Pet. App. 17a (citing *Fogg*, 836 F.3d at 956; *Pam*, 867 F.3d at 1207-08). It likewise "recognize[d] that the First Circuit has reached a contrary conclusion, but we respectfully disagree with that court's decision." *Id.* (citing *Windley*, 864 F.3d 36).

REASONS FOR GRANTING THE PETITION

This case presents an ideal vehicle for this Court to resolve an acknowledged and entrenched conflict among the circuits on an important and frequently recurring issue of federal law. If Petitioner's case had arisen in the First Circuit, he would not have been subject to the ACCA's fifteen-year minimum sentence (and the same is likely true of the Fourth Circuit). Because Petitioner was sentenced in the D.C. Circuit, he was subject to the enhancement, as would have been the case had he been sentenced in the Eighth and Tenth Circuits. There is no reason in law or logic why the application of § 924(e)'s sentencing enhancement should turn on the geographic location in which the defendant is sentenced.

This circuit conflict has arisen as a result of lower courts' conflicting interpretations of the interplay between this Court's decisions in *Leocal* and *Voisine*. Further percolation is unnecessary, and there is no reason to think that this conflict will resolve itself. Indeed, the First Circuit reached its decision even though the Eighth Circuit had already ruled the other way, and both the D.C. and Tenth Circuits decided this issue after the First Circuit and were thus forced to take sides in an existing circuit conflict.

The petition for certiorari should be granted.

I. THERE IS AN ACKNOWLEDGED CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

As the D.C. Circuit acknowledged in its opinion, in ruling that offenses with a reckless *mens rea* fell within the ACCA's force clause, it was ruling on an issue upon

which the courts of appeals are firmly divided. Pet. App. 17a. Since this Court decided *Voisine* three terms ago, the courts of appeals that have addressed the question presented have split three to one, and the one other court to opine on the issue (in dicta) has indicated that it would have made the split three to two. Moreover, the Fifth and Sixth Circuits have held that reckless offenses qualify as crimes of violence under sections 2L1.2(b) and 4B1.2(a)(1) of the Sentencing Guidelines, which incorporate force clauses that are identical to the language of § 924(e)(2)(B)(i). *See United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir.), *cert. denied*, 137 S. Ct. 2177 (2017); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017), *petition for cert. filed*, No. 17-8413 (U.S. Apr. 6, 2018). There is thus strong basis for believing that, if this Court does not resolve the question presented, the conflict among the circuits will only continue to grow.

A. The First Circuit has held that an offense with a reckless *mens rea* cannot qualify as a violent felony under the ACCA.

The First Circuit has held—three times since this Court's decision in *Voisine*—that an offense with a reckless *mens rea* is not a "violent felony" for purposes of the ACCA.

In *United States v. Windley*, 864 F.3d 36, 38-39 (1st Cir. 2017), the First Circuit confronted the question of whether the crime of assault and battery with a dangerous weapon (ABDW) under Massachusetts law constituted a violent felony. Because it was unclear whether the defendant had been convicted of an intentional or reckless variant of the offense, the court

determined that the defendant's prior ABDW convictions "qualify as convictions for violent felonies only if both the intentional and the reckless forms of ABDW are violent felonies." 864 F.3d at 37. Holding that reckless ABDW did not qualify as a violent felony under the ACCA, the court noted that the offense "does not require that the defendant intend to cause injury . . . or even be aware of the risk of serious injury that any reasonable person would perceive." *Id.* at 38. Determining that there was a "grievous ambiguity as to whether the use of physical force against the person of another includes the reckless causation of bodily injury," the court ruled that reckless ABDW did not satisfy the ACCA's force clause. *Id.* at 39. Likewise, in *United States v. Rose*, 896 F.3d 104, 114 (1st Cir. 2018), the First Circuit held that because of the possibility that a defendant could be convicted of assault with a dangerous weapon (A/BDW) under Rhode Island law "when the defendant had a mental state of only recklessness . . . we cannot treat Rhode Island A/BDW as a violent felony for purposes of ACCA's force clause."

Both *Windley* and *Rose* relied heavily on the reasoning of *Bennett v. United States*, 868 F.3d 1, 7 (1st Cir. 2017), *withdrawn and vacated*, 870 F.3d 34 (1st Cir. 2017), a decision that was withdrawn as moot by the First Circuit because (unbeknownst to the court at the time) the defendant died five days before the decision was published. *See Windley* 864 F.3d at 37 n.2; *Rose*, 896 F.3d at 109-110. The reasoning of *Bennett*—a case for which Justice Souter was on the panel—is important, however, because it demonstrates the extent to which multiple First Circuit panels have carefully analyzed the question presented and determined that the ACCA's

force clause does not "encompass offense[s that] may be committed with a *mens rea* of mere recklessness." *Bennett*, 868 F.3d at 3. In fact, a majority of the judges on the First Circuit have now endorsed the view that a reckless offense is not a "violent felony" under the ACCA.

In *Bennett*, the First Circuit began by focusing on the textual differences between § 924(e)(2)(B)(i), the ACCA force clause at issue here, and § 921(a)(33)(A)(ii), the provision this Court analyzed in *Voisine*. In particular, the court observed that the ACCA's force clause covers the "use . . . of physical force *against the person of another*." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). By contrast, the force clause of § 921(a)(33)(A)(ii) refers to the "use . . . of physical force" without the qualification that the force be used "against the person of another."

The First Circuit reasoned that the presence of the phrase "against the person of another" made a crucial difference. *Bennett*, 868 F.3d at 8-9. In *Leocal*, this Court analyzed the force clause of 18 U.S.C. § 16 that—like the ACCA's but unlike § 921(a)(33)(A)—only applied to the "use of physical force against the person or property of another." *Leocal*, 543 U.S. at 5 (quotation marks omitted). The First Circuit noted that, after *Leocal*, ten circuits had determined that "injury caused to another by the volitional action in a reckless assault is, by definition, neither the perpetrator's object, nor a result known to the perpetrator to be practically certain to occur." *Bennett*, 868 F.3d at 18. And because the statutory provision in *Voisine* did not include the crucial qualifier "against the person of another" that the ACCA's force clause includes, the First Circuit found

that *Voisine* did not hold or require that the ACCA's force clause be read to encompass offenses taken recklessly.

Finding the textual argument inconclusive, however, the First Circuit also analyzed the different contexts and purposes of the ACCA and § 922(g)(9). As the First Circuit recognized, these statutes "address significantly different threats." *Id.* at 21 (quoting *United States v. Booker*, 644 F.3d 12, 21 (1st Cir. 2011)). The ACCA targets offenses that "show an increased likelihood that the offender is the kind of person who might *deliberately* point the gun and pull the trigger," *i.e.* offenses that are committed in "a *purposeful*, violent, an aggressive manner." *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 145, 146 (2008), *abrogated by Johnson v. United States*, 135 S. Ct. 2551 (2015)) (emphases added). Congress did not design the ACCA to reach crimes that merely "reveal a degree of callousness toward risk." *Id.* (quoting *Begay*, 553 U.S. at 146). By contrast, Congress intentionally designed § 922(g)(9) to reach all criminal acts of domestic violence—even "acts that one might not characterize as 'violent' in a nondomestic context." *Id.* (quoting *United States v. Castleman*, 572 U.S. 157, 165 (2014)). These different purposes likewise suggested that the ACCA and § 922(g)(9) might apply differently as regards reckless assault. *Id.*

Finding that "the text and purpose of ACCA leave us with a 'grievous ambiguity,'" as to whether the ACCA's force clause covered reckless offenses, the First Circuit concluded in *Bennett* that the rule of lenity required that the ACCA's force clause be construed not to encompass

an assault that could be committed with only with a reckless *mens rea*. *Id.* at 2-3.[3]

A panel of the Fourth Circuit has recently endorsed the First Circuit's interpretation. In *United States v. Middleton*, the defendant was sentenced as an armed career criminal based in part on his prior conviction for involuntary manslaughter under South Carolina law. 883 F.3d at 487. But under South Carolina law, a person can commit involuntary manslaughter by illegally selling alcohol to minors if the sale ultimately leads to another person's death. *See id.* at 489-90 (citing *State v. Hambright*, 426 S.E.2d 806 (S.C. Ct. App. 1992)). Because the crime could be committed by engaging in a "non-violent sale," the Fourth Circuit concluded that South Carolina's statute "simply does not fit the ACCA's force clause." *Id.* at 493.

In a concurring opinion, Judge Floyd and Judge Harris explained that they would have concluded "that South Carolina involuntary manslaughter cannot be an ACCA predicate because, although the ACCA force clause requires a higher degree of *mens rea* than recklessness, an individual can be convicted of involuntary manslaughter in South Carolina based on reckless conduct." *Id.* (Floyd, C.J., concurring). And Judge Floyd and Judge Harris cited *Bennett* for the proposition that the "against the person of another"

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[3] That the First Circuit reached this conclusion as regards the ambiguity between § 922(g)(9) and ACCA's force clause is particularly significant given that the First Circuit has previously held—in the very case affirmed by this Court—that § 922(g)(9) *did* cover reckless conduct. *See United States v. Voisine*, 778 F.3d 176, 177 (1st Cir. 2015), *aff'd*, 136 S. Ct. 2272 (2016).

language in the ACCA requires "the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim's bodily injury." *Id.* at 498 (quoting *Bennett*, 868 F.3d at 18). Although the Fourth Circuit decided *Middleton* on other grounds, Judge Floyd's concurrence suggests that the court will eventually side with the First Circuit on the question presented.

B. The D.C., Eighth, and Tenth Circuits have held that an offense with a reckless *mens rea* can qualify as a violent felony under the ACCA.

In the decision below, the D.C. Circuit held that assault with a dangerous weapon under D.C. law is a violent felony notwithstanding that the offense can be committed with a reckless *mens rea*. Pet. App. 17a. As the court noted, its decision conflicts with the rule in the First Circuit and is consistent with the rule in the Eighth and Tenth Circuits.

In *United States v. Fogg*, the Eighth Circuit concluded that "[r]eckless conduct . . . constitutes a 'use' of force under the ACCA because the force clauses in 18 U.S.C. § 921(a)(33)(A)(ii) [at issue in *Voisine*] and the ACCA both define qualifying predicate offenses as those involving the 'use . . . of physical force' against another." 836 F.3d at 956. Based on a one-paragraph analysis that failed to even acknowledge, let alone confront, the many differences between the ACCA and the provision at issue in *Voisine*, the court held that a conviction for attempted drive-by shooting under Minnesota law—defined as "recklessly discharg[ing] a firearm at or toward another motor vehicle or a building" while in or having just exited from a motor vehicle, Minn. Stat. §

609.66, subd. 1e(a)—qualified as a predicate offense under the ACCA's force clause. *Fogg*, 836 F.3d at 954.

In *United States v. Pam*, a defendant pleaded guilty to being a felon in possession of a firearm in violation of § 922(g)(1). 867 F.3d at 1208. The defendant received an ACCA-enhanced sentenced in light of two prior New Mexico convictions for "shooting at or from a motor vehicle," defined as "willfully discharging a firearm at or from a motor vehicle with reckless disregard for the person of another," N.M. Stat. Ann. § 30-3-8(B). In rejecting the defendant's challenge to the sentencing enhancement, the Tenth Circuit ruled that "a statute requiring proof only that the defendant acted willfully and with reckless disregard for the risk posed by that act to another person may categorically involve the use of physical force." *Pam*, 867 F.3d at 1208. The Tenth Circuit reached this conclusion—as did the Eighth Circuit—based on *Voisine*, which it read to hold that "whether a statute has the use of physical force as an element 'focuses on whether the force contemplated by the predicate statute is 'volitional' or instead 'involuntary [,]' [and that] it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly.'" *Id.* (quoting *United States v. Hammons*, 862 F.3d 1052, 1056 (10th Cir. 2017)). In so ruling, the Tenth Circuit recognized the tension between its decision and the First Circuit's decision in *Bennett*, but observed that "absent en banc review or an intervening Supreme Court decision we are bound by our own recent

decision extending *Voisine*'s reasoning to the ACCA." *Id.* at 1208 n.16.

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Had Petitioner's case arisen in the First Circuit, his prior conviction for assault with a dangerous weapon would not have been considered a violent felony, and he would not be sentenced under the ACCA. But because his case arose in the D.C. Circuit, he was subject to the ACCA's fifteen-year mandatory minimum. There is now a clear and intractable conflict of authority over whether offenses that can be committed with a reckless *mens rea* qualify as violent felonies under the ACCA. Further percolation would be futile, and this Court should grant the petition and resolve the question presented.

II. THIS CASE PRESENTS A RECURRING, IMPORTANT ISSUE THAT WARRANTS THIS COURT'S REVIEW.

In addition to being the subject of an acknowledged and entrenched conflict among the circuits, the question presented is also one that occurs frequently and is of national importance. Since 2016, over 11,400 defendants have been convicted of violating 18 U.S.C. § 922(g), and over 560 of these defendants were sentenced pursuant to the ACCA.[4] While it not possible to know precisely how many ACCA sentences are based on offenses with

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[4] *See* U.S. Sentencing Comm'n, *Quick Facts*, *Felon in Possession of a Firearm*, Fiscal Year 2016, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY16.pdf; U.S. Sentencing Comm'n, *Quick Facts*, *Felon in Possession of a Firearm*, Fiscal Year 2017, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf.

a reckless *mens rea*, in the just over two years since this Court decided *Voisine*, five courts of appeals and at least nine district courts have already addressed the question directly. The question presented is thus clearly one that arises frequently. And numerous jurisdictions incorporate recklessness into the *mens rea* requirement for crimes like assault. *See, e.g.*, Pet App. 17a (D.C.); *Windley*, 864 F.3d at 37 (Massachusetts); *Bennett*, 868 F.3d at 4 (Maine); *Fogg*, 836 F.3d at 955-56 (Minnesota); *Pam*, 867 F.3d 1205-06 (New Mexico); *Mendez-Henriquez*, 847 F.3d at 219-20 (California); *Fish*, 758 F.3d at 10 n.4 (collecting cases involving statutes from New York, Pennsylvania, Virginia, Texas, Florida, Indiana, Minnesota, Arizona, and California); *Cf. Voisine*, 136 S. Ct. at 2280 (noting that 34 states and D.C. define misdemeanor assaults to include reckless infliction of bodily harm).

Moreover, the question presented is important. The ACCA substantially enhances the sentences a defendant is eligible to receive, including raising the possibility of life imprisonment where it would not otherwise exist. As the cases discussed above demonstrate, defendants across the country are receiving substantially different federal sentences for almost identical conduct based solely on where the conduct arises. These discrepancies are unfair and unwarranted. This Court has previously recognized that applying the ACCA uniformly is a matter of national importance. *See Taylor v. United States*, 495 U.S. 575, 582 (1990) (quoting S. Rep. No. 98-190, at 5 (1983)). The need for uniformity applies with full force here and only further demonstrates that a grant of certiorari is warranted.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE CONFLICT.

The Court should grant the petition because Petitioner's case offers the Court an ideal vehicle for answering the question presented. The facts of the case are undisputed, there are no jurisdictional questions that complicate the issue, and the D.C. Circuit directly answered the question presented as a necessary part of its holding. Moreover, in ruling that an offense with a reckless *mens rea* can qualify as a violent felony under the ACCA's force clause, the D.C. Circuit explicitly recognized that its decision was in accord with decisions of the Eighth and Tenth Circuits and in conflict with decisions of the First Circuit.

The answer to the question presented is also dispositive for "the most important" issue regarding Petitioner's sentence. Pet. App. 32a. Petitioner was found to have exactly three prior felony convictions. If his prior conviction for assault with a dangerous weapon is a violent felony under the ACCA, then Petitioner is subject to a sentence of 15 years to life imprisonment. *See* 18 U.S.C. § 924(e). If Petitioner's conviction for assault with a dangerous weapon is not a violent felony, then he is not an armed criminal for the purposes of the ACCA and so not subject to the statute's mandatory minimum sentence.

For these reasons, the record in this case and the decision below present an ideal vehicle for deciding whether reckless offenses are violent felonies under the ACCA.

IV. THE D.C. CIRCUIT'S DECISION IS INCORRECT.

Finally, this Court should grant the petition for certiorari because the D.C. Circuit's decision is incorrect.

First, and most fundamentally, the D.C. Circuit held that *Voisine* was determinative of the question presented without giving any serious consideration to the differences between the ACCA and § 922(g)(9). But the ACCA and § 922(g)(9) differ in text, context, and purpose. Aside from a brief acknowledgement that the "against the person of another" clause is found in the ACCA but not in § 922(g), Pet. App. 16a, the D.C. Circuit failed to consider whether these distinctions made any material difference.

That approach conflicts directly with this Court's precedents. On several occasions, this Court has explained that courts should interpret use-of-force language in light of the overall context of the statute at issue. *See Voisine*, 136 S. Ct. at 2280 n.4; *Johnson v. United States*, 559 U.S. 133, 143-44 (2010); *Leocal*, 543 U.S. at 9. And as the government has previously argued before this Court, "important textual and contextual differences counsel against according Section 16 and Section 922(g)(9) the same meaning." Br. for the United States at 12, *Voisine v. United States*, 136 S. Ct. 2272 (2016) (No. 14-10154), 2016 WL 1238840. In particular, § 922(g)(9) does not include the "against the person or property of another" qualifier, which was critical to this Court conclusion in *Leocal* that § 16 incorporates a higher *mens rea* requirement than mere negligence. *Id.* (quotation marks omitted). That same rationale applies

to any comparison between § 922(g)(9) and the ACCA because the ACCA's the force clause is nearly identical to the force clause in § 16.

Second, the D.C. Circuit failed to recognize that the key question presented by the case was not the meaning of "use . . . of physical force against the person of another" read in isolation, but rather the meaning of the phrase "violent felony." *See Leocal*, 543 U.S. at 11 ("In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'"); *Johnson*, 559 U.S. at 140 (applying the same principle to "violent felony" under the ACCA); *Castleman*, 572 U.S. at 166-67.

The D.C. Circuit's oversight in this respect is significant. As Justice Thomas reasoned in dissent in *Voisine*, "[w]hen a person talks about 'using force' against another, one thinks of intentional acts—punching, kicking, shoving, or using a weapon. Conversely, one would not naturally call a car accident a 'use of force,' even if people were injured by the force of the accident." *Voisine*, 136 S. Ct. at 2284 (Thomas, J., dissenting). That reading is particularly compelling when defining the term "violent felony" as involving the use of physical force "against the person of another." In this context, the phrase "use . . . of physical force" most naturally suggests the intention to apply force to another person. *Cf. Leocal*, 543 U.S. at 10.

Any other reading would sweep in reckless conduct that Congress most likely did not intend to qualify as a "violent felony" under the ACCA. To give but one example, in many jurisdictions—including the District of Columbia—reckless driving can support a conviction for

assault with a dangerous weapon. *See, e.g.*, *Powell*, 485 A.2d at 601. Under the D.C. Circuit's rule, reckless drivers in these jurisdictions would be considered violent felons, at least when their recklessness results in injury to another person. *Voisine*, 136 S. Ct. at 2287. But the purposes of the ACCA strongly suggests that this result cannot be right. As this Court has explained on more than one occasion, the phrase "violent felony" is meant to target offenses committed in "a *purposeful*, violent, an aggressive manner" rather than those that merely "reveal a degree of callousness toward risk." *Begay v. United States*, 553 U.S. 137, 145-46 (2008), *abrogated by Johnson v. United States*, 135 S. Ct. 2551 (2015) (emphasis added). Congress did not design ACCA to reach crimes that merely "reveal a degree of callousness toward risk." *Id.* at 146. Rather, Congress intended the ACCA to protect society from convicted felons "who might *deliberately* point the gun and pull the trigger." *See id.* at 146 (emphasis added); *Sykes v. United States*, 564 U.S. 1, 12 (2011), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). There is no reason to think that, under the categorical approach, reckless drivers are particularly likely to do this. Thus, the better reading of the ACCA is that "when physical injuries result from purely reckless conduct—there is no 'use' of physical force" against the person of another. *Voisine*, 136 S. Ct. at 2287.

Third, the D.C. Circuit failed to consider whether any ambiguity in the scope of § 924(e)(2)(B) triggers the rule of lenity. At the very least, the case law surrounding the text of the ACCA and those of similar statutes strongly suggests that the statute is grievously

ambiguous as to the question presented, as the First Circuit has recognized. *See Leocal*, 543 U.S. at 11 n.8; *Bennett*, 868 F.3d at 23. In the years following *Leocal*, the courts of appeals almost uniformly agreed that reckless conduct could not be a "crime of violence" under § 16 or a "misdemeanor crime of domestic violence" under § 922(g)(9). But since *Voisine*, many courts have taken the view that this Court's interpretation of § 922(g)(9) requires a change of course and a more permissive construction of the ACCA. That view is mistaken, for the reasons discussed above. But courts' changing and conflicting positions at least suggest that the ordinary indicia of Congressional intent—the text, structure, history, and purposes of the statute—have failed to reveal whether Congress intended the ACCA to reach reckless conduct.

Interpretations of the ACCA "must be guided by the need for fair warning." *Castleman*, 572 U.S. at 172 (quoting *Crandon v. United States*, 494 U.S. 152, 160 (1990)). Under these circumstances, the ACCA's definition of "violent felony" has not given Petitioner or any other defendant fair warning as to whether reckless offenses can trigger a severe mandatory minimum sentence. Accordingly, at a minimum, the text of § 924(e)(2)(B) should be construed in Petitioner's favor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 2018

APPENDIX

Appendix A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 8, 2018 Decided June 22, 2018

No. 16-3123

UNITED STATES OF AMERICA,
APPELLEE

v.

MARLON HAIGHT,
APPELLANT

Consolidated with 17-3002

Appeals from the United States District Court
for the District of Columbia
(No. 1:15-cr-00088-1)

Jenifer Wicks argued the causes and filed the briefs for appellant/cross-appellee.

Luke M. Jones and *Lauren R. Bates*, Assistant U.S. Attorneys, argued the causes for appellee/cross-appellant. With them on the briefs were *Jessie K. Liu*, U.S. Attorney, and *Elizabeth Trosman*, *Nicholas P. Coleman*, and *Christopher Macchiaroli*, Assistant U.S. Attorneys.

Before: GARLAND, *Chief Judge*, and KAVANAUGH and SRINIVASAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: A jury convicted Marlon Haight of several drug- and gun-related offenses. The District Court sentenced Haight to 12 years and 8 months in prison.

Haight appeals his conviction on three grounds. He challenges the District Court's refusal to postpone his trial. He contests two of the District Court's evidentiary rulings at trial. And he raises an ineffective assistance of counsel claim. We affirm Haight's conviction except that, consistent with our ordinary practice, we remand for the District Court to address Haight's ineffective assistance claim in the first instance.

The Government cross-appeals Haight's sentence. The Government argues that Haight was subject to a 15-year mandatory-minimum sentence under the Armed Career Criminal Act because of Haight's three prior convictions for violent felonies and serious drug offenses. We agree with the Government. We therefore vacate Haight's sentence and remand for resentencing.

I

In 2014, the Metropolitan Police Department of Washington, D.C., received a tip that a man known as Boo was selling crack cocaine in the Lincoln Heights neighborhood of Washington. The tip came from Blaine Proctor, a cocaine user and long-time police informant. Proctor claimed to have bought cocaine from Boo on several occasions.

Proctor gave the police Boo's cell-phone number. Police Officer Herbert LeBoo ran the cell-phone number through a subscriber database and determined that the number belonged to Marlon Haight. Officer LeBoo then ran the name Marlon Haight through another database and matched the name to a photograph. Officer LeBoo showed the photograph to Proctor, who said, "That's Boo."

Under Officer LeBoo's supervision, Proctor then made three controlled purchases of crack cocaine from Boo. After the third controlled purchase, police officers executed a search warrant at the apartment where Boo had sold the cocaine to Proctor. No one answered the door, so the officers used a battering ram to enter the apartment. While most of the officers were breaking down the door, Officer Clifford, who was standing outside the apartment building, saw two men jump from one of the building's windows and run away before they could be apprehended. Officer Clifford later testified that he was "90 percent" sure that one of the jumpers was Marlon Haight, whose photo Officer Clifford had studied earlier that day.

Meanwhile, the other officers finished breaking down the door and entered the apartment. There, they found Russell Ferguson. Ferguson lived in the apartment. Ferguson denied that Haight was selling cocaine from the apartment. But Ferguson later cooperated with the police and changed his tune: He testified that he had allowed Haight and four other men to use his apartment to process and sell crack cocaine.

The police officers searched Ferguson's apartment and found cocaine, cocaine base, crack cocaine in small

plastic bags, a scale, baking soda, and hundreds of empty plastic bags. They also found marijuana, a loaded handgun, ammunition, cash, and a cell phone with a picture of Haight on its home screen.

In the bedroom, the police saw that the screen to one of the windows had been pushed out. They found another cell phone sitting on the window sill. The police later determined that Haight had purchased that cell phone.

About a month later, the police located and arrested Haight. The police then applied for a search warrant to search Haight's own apartment. While they were waiting for the warrant, the police staked out Haight's apartment building. They saw Haight's girlfriend leave the building carrying a backpack. They stopped her and eventually searched the backpack. In the backpack, the officers found several pounds of marijuana, Haight's employment documents, and a sheaf of handwritten papers. The handwritten papers turned out to be rap lyrics and a skit script that included Haight's name and expressed Haight's desire to deal drugs in Lincoln Heights. Later that day, after securing the search warrant for Haight's apartment, the police searched the apartment. There, they found another gun and more ammunition.

The Government charged Haight with numerous drug and gun crimes. The jury found Haight guilty on six counts.

At sentencing, the Government argued that Haight was subject to a 15-year mandatory-minimum sentence based on his three prior convictions for violent felonies

and serious drug offenses. The District Court ruled that one of the three convictions did not qualify as a violent felony. The District Court therefore concluded that Haight was not subject to the 15-year mandatory-minimum sentence. The District Court sentenced Haight to 12 years and 8 months in prison.

Haight appeals his conviction. The Government cross-appeals Haight's sentence.

II

In appealing his conviction, Haight first challenges the District Court's denial of his motion to postpone his trial. Haight also contests the District Court's decision to admit into evidence: (i) Officer LeBoo's testimony about Proctor's out-of-court statement identifying Haight; and (ii) the writings found in the backpack carried by Haight's girlfriend. Finally, Haight claims that his trial counsel was ineffective.

A

Haight's trial was originally scheduled to start in September 2015. Between September 2015 and February 2016, Haight moved three times to postpone the trial. The District Court granted each of those motions, eventually setting a June 2016 trial date. After granting the third motion and setting the June 2016 trial date, the District Court warned that Haight would need a compelling reason to postpone the trial any further.

In February 2016, the District Court held an evidentiary hearing on Haight's motion to suppress the writings found in the backpack. In early May, the District Court said that it was likely to deny Haight's

motion to suppress the writings. In early June, two weeks before trial, the Government moved in limine to introduce the writings into evidence. Haight responded with a fourth request to postpone the trial. Haight argued that he needed more time to decide how to address the writings and to consult with a handwriting expert.

The District Court denied Haight's motion to further postpone the trial. On appeal, Haight contends that the District Court abused its discretion in denying his motion. We disagree.

Recognizing that "judges necessarily require a great deal of latitude in scheduling trials," we review a district court's denial of a motion to postpone a trial under the deferential abuse-of-discretion standard. *United States v. Gantt*, 140 F.3d 249, 256 (D.C. Cir. 1998). We expect district courts to weigh various commonsense factors, including the reasons for the requested postponement; the length of the requested postponement; whether any postponements have already been granted; the effect of further delay on the parties, witnesses, attorneys, and court; and whether denying a postponement will result in "material or substantial" prejudice to the defendant's case. *Id.*

The District Court acted well within its discretion here. The court considered the relevant factors and explained why a further postponement was not warranted: Haight had already requested and received three postponements, which had delayed his trial by nine months; Haight's experienced counsel had a month to consider how to address the writings; and the writings did not present any difficult or novel issues that justified

further delay. The District Court's refusal to grant yet another postponement was entirely reasonable.

B

We review the District Court's two challenged evidentiary rulings for abuse of discretion. *See United States v. Borda*, 848 F.3d 1044, 1055 (D.C. Cir. 2017).

First, Haight argues that the District Court abused its discretion by admitting hearsay testimony. At trial, Officer LeBoo testified about Proctor's initial out-of-court photographic identification of Haight. Haight objected that Officer LeBoo's testimony on that point was inadmissible hearsay. The District Court disagreed with Haight and admitted the testimony.

Federal Rule of Evidence 802 renders hearsay generally inadmissible. But under Rule 801, a witness's testimony recounting a declarant's out-of-court statement is not hearsay if (i) the declarant's statement "identifies a person as someone the declarant perceived earlier," and (ii) the declarant "testifies and is subject to cross-examination about" the statement. Fed. R. Evid. 801(d)(1)(C). The declarant of the out-of-court statement is ordinarily "regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." *United States v. Owens*, 484 U.S. 554, 561 (1988).

Officer LeBoo's testimony recounting Proctor's out-of-court statement identifying Haight was not hearsay because the testimony fell squarely within Rule 801: (i) Proctor's out-of-court statement—"That's Boo"—identified Haight as someone whom Proctor had perceived earlier, and (ii) Proctor testified at Haight's

trial and was subject to cross-examination about that statement.

It is true that Haight's counsel did not actually cross-examine Proctor about the earlier identification of Boo. Defense counsel presumably chose that tack because, on direct examination by the Government, Proctor did not remember having identified Boo to Officer LeBoo. Proctor's memory failure was therefore potentially helpful to Haight's defense and not something for defense counsel to mess with on cross-examination. But Rule 801 was still satisfied. As the Seventh Circuit has stated, a "meaningful opportunity to cross-examine a declarant regarding his prior identification is enough to satisfy the requirements of Rule 801, even if," for strategic or other reasons, "the defendant chooses not to use the opportunity." *United States v. Foster*, 652 F.3d 776, 789 (7th Cir. 2011). We agree. Officer LeBoo's testimony about Proctor's earlier out-of-court identification of Haight was not hearsay.

Even if the District Court abused its discretion in admitting Officer LeBoo's testimony on that issue, the error was harmless. Officer LeBoo's testimony helped show that Haight and Boo were the same person. But the Government introduced abundant other evidence to establish that fact.

Second, Haight maintains that the District Court abused its discretion by admitting the handwritten lyrics and handwritten script that the police found in the backpack carried by Haight's girlfriend. Haight argues that: (i) the writings were not properly authenticated under Rule 901; (ii) the writings constituted prior-acts evidence not admissible under Rule 404(b); and (iii) the

probative value of the writings was substantially outweighed by the danger of unfair prejudice under Rule 403. We disagree with Haight.

Under Rule 901, the Government had to "produce evidence sufficient to support a finding that" the writings were what the Government claimed they were: lyrics and a script written by Haight. That authentication evidence could include the "appearance, contents, substance, internal patterns, or other distinctive characteristics" of the writings, "taken together with all the circumstances." Fed. R. Evid. 901(a), (b)(4).

The District Court did not abuse its discretion in concluding that the Government satisfied Rule 901. The Government established that Haight's name appeared on the writings and that the writings were in a backpack that also contained Haight's employment papers. Furthermore, Haight's girlfriend was carrying the backpack, and she had just brought it out of the apartment that she and Haight shared. *See, e.g.*, *United States v. Mejia*, 597 F.3d 1329, 1335-37 (D.C. Cir. 2010); *United States v. Thorne*, 997 F.2d 1504, 1508 (D.C. Cir. 1993); *United States v. Harvey*, 117 F.3d 1044, 1049 (7th Cir. 1997).

The District Court also did not abuse its discretion in admitting the writings under Rule 404(b). Assuming without deciding that the writings constituted evidence of another "crime, wrong, or other act" within the meaning of Rule 404(b), the District Court admitted the writings for permissible purposes, including identity, knowledge, and intent. *See United States v. Bowie*, 232 F.3d 923, 930 (D.C. Cir. 2000). As the District Court

explained, the writings tended to show that Haight: (i) owned the backpack and the marijuana found in the backpack; (ii) knew about guns and drug dealing; (iii) possessed the guns and drugs found in Ferguson's apartment; and (iv) intended to distribute drugs in Lincoln Heights.

Finally, as to Haight's Rule 403 argument, the District Court did not abuse its discretion in concluding that the probative value of the writings outweighed any danger of unfair prejudice.

In short, we reject Haight's evidentiary challenges.

C

Haight next contends that his counsel's failure to obtain a handwriting expert deprived him of his constitutional right to effective assistance of counsel. Haight asserts that a handwriting expert could have testified that the writings found in the backpack were not in Haight's handwriting.

Unlike most federal courts of appeals, we allow defendants to raise ineffective assistance claims on direct appeal. But because ineffective assistance claims typically require factual development, we ordinarily remand those claims to the district court "unless the trial record alone conclusively shows that the defendant either is or is not entitled to relief." *United States v. Rashad*, 331 F.3d 908, 909-10 (D.C. Cir. 2003); *see also Massaro v. United States*, 538 U.S. 500, 505 (2003) (district court is "the forum best suited to developing the facts necessary to determining the adequacy of representation" at trial). Like most ineffective assistance claims raised on direct appeal, Haight's claim

in this case requires further factual development to determine, for example, why Haight's trial counsel did not obtain a handwriting expert. We therefore remand Haight's ineffective assistance claim so that the District Court may consider that issue in the first instance.

III

The District Court sentenced Haight to 12 years and 8 months in prison. The Government cross-appeals the sentence, arguing that Haight was subject to a 15-year mandatory-minimum sentence under the Armed Career Criminal Act, known as ACCA. We agree with the Government and remand for resentencing.

Haight was convicted of violating 18 U.S.C. § 922(g)(1), the federal felon-in-possession statute. ACCA imposes a 15-year mandatory-minimum sentence on defendants who violate Section 922(g) and who have three prior convictions for "a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1).

When sentenced, Haight had prior convictions for: (1) distribution of cocaine in violation of D.C. law; (2) first-degree assault under Maryland law; and (3) assault with a dangerous weapon under D.C. law.

In his sentencing submissions to the District Court, Haight accepted that his prior D.C. conviction for distribution of cocaine qualified as a serious drug offense under ACCA. Haight also accepted that his Maryland first-degree assault conviction qualified as a violent felony under ACCA. Haight argued, however, that his D.C. conviction for assault with a dangerous weapon did not qualify as a violent felony under ACCA. Haight therefore maintained that he was not subject to ACCA's

15-year mandatory-minimum sentence because he did not have three prior convictions for violent felonies or serious drug offenses. The District Court agreed with Haight.

On appeal, the Government contends that the District Court erred in concluding that Haight's D.C. assault with a dangerous weapon conviction was not a violent felony under ACCA. We review the District Court's interpretation of ACCA de novo. *See United States v. Mathis*, 963 F.2d 399, 404 (D.C. Cir. 1992).

In response, Haight not only argues that his D.C. assault with a dangerous weapon conviction is not a violent felony, but also contends—for the first time—that his Maryland first-degree assault conviction is not a violent felony. Because Haight did not raise that latter argument in the District Court, we review that claim for plain error. *See United States v. Sheffield*, 832 F.3d 296, 311 (D.C. Cir. 2016).

A

We first address whether Haight's D.C. conviction for assault with a dangerous weapon qualifies as a conviction for a violent felony under ACCA.

As relevant here, ACCA defines "violent felony" to include, among other things, "any crime 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." 18 U.S.C. § 924(e)(2)(B)(i). The Supreme Court has stated that "physical force" in that provision means "*violent* force—that is, force capable of causing physical pain or

injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010).

In determining whether a given conviction qualifies as a violent felony under ACCA, we employ the so-called categorical approach, examining only the elements of the crime, not the particular facts underlying the defendant's prior conviction. *See Taylor v. United States*, 495 U.S. 575, 600 (1990). In other words, we assess the crime categorically, "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008). If the law defines the crime in such a way that it can be committed using either violent or non-violent force, then the crime is not a violent felony under ACCA, even if the defendant actually used violent force in committing the crime. *See United States v. Redrick*, 841 F.3d 478, 482 (D.C. Cir. 2016).

The elements of D.C. assault with a dangerous weapon are: "(1) an attempt, with force or violence, to injure another, or a menacing threat, which may or may not be accompanied by a specific intent to injure; (2) the apparent present ability to injure the victim; (3) a general intent to commit the acts which constitute the assault; and (4) the use of a dangerous weapon in committing the assault." *Spencer v. United States*, 991 A.2d 1185, 1192 (D.C. 2010). A "dangerous weapon" is an object that is "likely to produce death or great bodily injury by the use made of it." *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (emphasis removed).

The elements of the offense indicate that the D.C. crime of assault with a dangerous weapon qualifies as a

violent felony under ACCA. *See United States v. Brown*, No. 15-3056, 2018 WL 2993179, at *12-13 (D.C. Cir. June 15, 2018) (D.C. assault with a dangerous weapon is crime of violence under Sentencing Guidelines); *In re Sealed Case*, 548 F.3d 1085, 1089 (D.C. Cir. 2008) (equivalent ACCA and Guidelines provisions are interpreted the same way).

Haight raises two separate arguments against that conclusion.

First, Haight claims that the D.C. offense of assault with a dangerous weapon can be committed with so-called indirect force, such as using a hazardous chemical to burn someone, rather than with more direct force, such as using a gun or a knife to maim someone. *See, e.g.*, *Sloan v. United States*, 527 A.2d 1277 (D.C. 1987) (lye); *Bishop v. United States*, 349 F.2d 220 (D.C. Cir. 1965) (sulphuric acid). And he claims that the use of indirect physical force does not qualify as the use of physical force under this statute. We do not perceive any such distinction between direct and indirect force in the language of the statute or in the relevant precedents. Moreover, in *United States v. Castleman*, 134 S. Ct. 1405 (2014), the Supreme Court addressed a similar statute referencing prior crimes committed with "physical force," and the Court refused to distinguish indirect physical force from direct physical force. In the Supreme Court's analysis, it did not matter what tool or method the defendant may have used to harm the victim. *See id.* at 1414-15. Of course, ACCA requires that the physical force be violent force—that is, "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. But by analogy from

Castleman, so-called indirect violent force is still violent force.

In so concluding, we agree with ten other federal courts of appeals that have addressed the question either in the ACCA context or in equivalent contexts. *See United States v. Ellison*, 866 F.3d 32, 37-38 (1st Cir. 2017) (Guidelines); *United States v. Hill*, 832 F.3d 135, 143-44 (2d Cir. 2016) (18 U.S.C. § 924(c)(3)); *United States v. Chapman*, 866 F.3d 129, 132-33 (3d Cir. 2017) (Guidelines); *United States v. Reid*, 861 F.3d 523, 528-29 (4th Cir. 2017) (ACCA); *United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017) (Guidelines); *United States v. Jennings*, 860 F.3d 450, 458-60 (7th Cir. 2017) (ACCA and Guidelines); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016) (Guidelines); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016) (18 U.S.C. § 16); *United States v. Ontiveros*, 875 F.3d 533, 536-38 (10th Cir. 2017) (Guidelines); *United States v. Deshazior*, 882 F.3d 1352, 1357-58 (11th Cir. 2018) (ACCA). *But see United States v. Rico-Mejia*, 859 F.3d 318, 322-23 (5th Cir. 2017).

Second, Haight contends that D.C. assault with a dangerous weapon can be committed recklessly, and therefore does not categorically require the use of violent force "against the person of another" within the meaning of ACCA.

Haight's recklessness argument contravenes the Supreme Court's recent decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016). There, in interpreting Section 922(g)'s provision for misdemeanor crimes of domestic violence, the Court held that *reckless* domestic assault involves the use of physical force. *Id.* at 2278-80;

see 18 U.S.C. §§ 921(a)(33)(A)(ii), 922(g)(9). Focusing on the word "use," the Court reasoned that the 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." *Voisine*, 136 S. Ct. at 2279.

The statutory provision at issue in *Voisine* contains language nearly identical to ACCA's violent felony provision: Both provisions penalize defendants convicted of crimes that have "as an element" the "use" of "physical force." 18 U.S.C. §§ 921(a)(33)(A)(ii), 924(e)(2)(B)(i). So *Voisine*'s reasoning applies to ACCA's violent felony provision. As long as a defendant's use of force is not accidental or involuntary, it is "naturally described as an active employment of force," regardless of whether it is reckless, knowing, or intentional. *Voisine*, 136 S. Ct. at 2279.

It is true that ACCA requires a defendant to use violent force "against the person of another"—a phrase that does not appear in the statutory provision that the Supreme Court considered in *Voisine*. But the provision at issue in *Voisine* still required the defendant to use force against another person—namely, the "victim." 18 U.S.C. § 921(a)(33)(A)(ii). In the words of the Supreme Court in *Voisine*, the phrase "misdemeanor crime of domestic violence" is "defined to include any misdemeanor committed against a domestic relation that necessarily involves the 'use . . . of physical force.'" *Voisine*, 136 S. Ct. at 2276 (quoting 18 U.S.C. § 921(a)(33)(A)(ii)).

In light of *Voisine*, we conclude that the use of violent force includes the reckless use of such force. In so

concluding, we agree with four other courts of appeals that have addressed the issue either in the ACCA context or in the equivalent Guidelines "crime of violence" context. *See 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). We recognize that the First Circuit has reached a contrary conclusion, but we respectfully disagree with that court's decision. *See United States v. Windley*, 864 F.3d 36 (1st Cir. 2017).

In sum, we conclude that Haight's D.C. conviction for assault with a dangerous weapon counts as a violent felony under ACCA.

B

We conclude that the District Court did not err, much less plainly err, in classifying Haight's Maryland first-degree assault conviction as a violent felony under ACCA.

Maryland first-degree assault is defined as follows: "(1) A person may not intentionally cause or attempt to cause serious physical injury to another. (2) A person may not commit an assault with a firearm." Md. Code, Crim. Law § 3-202(a). To convict a defendant of first-degree assault, the government must prove that the defendant committed a second-degree assault and either (1) "used a firearm to commit assault" or (2) "intended to cause serious physical injury in the commission of the assault." Md. Crim. Pattern Jury Instr. 4:01.1.

As with D.C. assault with a dangerous weapon, the additional elements that convert Maryland second-degree assault into first-degree assault—the use of a firearm or the intention to cause serious physical injury—require the defendant to use, attempt to use, or threaten to use violent force against another person. The District Court did not err—much less plainly err—in reaching that commonsense conclusion, which is the same conclusion reached by the only federal court of appeals to have considered the question. *See United States v. Redd*, 372 F. App'x 413, 415 (4th Cir. 2010) ("Because the elements of first-degree assault under Maryland law encompass the use or attempted use of physical force," the defendant's two convictions for first-degree assault "categorically qualify as ACCA predicates.").

In sum, Haight had three ACCA-predicate convictions. As a result, Haight was subject to a 15-year mandatory-minimum sentence under ACCA. We therefore remand for resentencing.

* * *

As to Haight's conviction, we affirm the judgment of the District Court except that we remand for the District Court to address Haight's ineffective assistance claim in the first instance. As to Haight's sentence, we vacate the judgment of the District Court and remand for resentencing.

So ordered.

Appendix B

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

FILED
DEC - 5 2016

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

UNITED STATES DISTRICT COURT

District of Columbia

UNITED STATES OF AMERICA v. MARLON HAIGHT	**JUDGMENT IN A CRIMINAL CASE** Case Number: 15cr088 (JEB) USM Number: 30020-007 Nikki U. Lotze Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) ONE (1), TWO (2), THREE (3), FOUR (4), FIVE (5) & SIX (6) of the Indictment filed 7/21/15. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846	Conspiracy to Distribute and Possess with Intent to Distribute 28 Grams or More of Cocaine Base, Cocaine, and Marijuana.	11/30/2013	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) SEVEN (7) & EIGHT (8)

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/1/2016
Date of Imposition of Judgment

/s/
Signature of Judge

James E. Boasberg U.S. District Judge
Name and Title of Judge

12/2/2016
Date

DEFENDANT: MARLON HAIGHT
CASE NUMBER: 15cr088 (JEB)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841 (a)(1) and 841(b)(1)(B)(iii)	Unlawful Possession with Intent to Distribute 28 Grams or More of Cocaine Base.	11/20/2013	2
21 U.S.C. § 841 (a)(1) and 841(b)(1)(C)	Unlawful Possession with Intent to Distribute Cocaine.	11/20/2014	3
21 U.S.C. § 841 (a)(1) and 841(b)(1)(D)	Unlawful Possession with Intent to Distribute Marijuana.	10/20/2014	4
18 U.S.C. § 922 (g)(1)	Unlawful Possession of a Firearm and Ammunition by a Person Convicted of a Crime Punishable by Imprisonment for a Term Exceeding One Year.	11/20/2014	5

18 U.S.C. § 922 (c)(1)	Using, Carrying, and Possessing a Firearm During a Drug Trafficking.	11/20/2014	6

DEFENDANT: MARLON HAIGHT
CASE NUMBER: 15cr088 (JEB)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One hundred and Fifty-Two (152) Months, which is comprised of concurrent terms of Ninety-Two (92) Months on Counts 1, 2, 3 and 5, a concurrent term of Sixty (60) Months on Count 4 and a consecutive term of Sixty (60) Months on Count 6 of the Indictment.

☑ The court makes the following recommendations to the Bureau of Prisons:

That the Defendant be permitted to participated in the 500 Hour Residential Drug/Alcohol Abuse Program (RDAP), while serving his prison term. The Court recommends that the Defendant be permitted to serve his sentence at the Federal Correctional Institution (FCI) in Fairton, NJ.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prison:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment at follows:

Defendant delivered on _____ to ___ _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MARLON HAIGHT
CASE NUMBER: 15cr088 (JEB)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Concurrent terms of Sixty (60) Months on Counts 1, 2 and 6 and concurrent terms of Thirty-Six (36) Months on Counts 3, 4 and 5 of the Indictment.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: MARLON HAIGHT
CASE NUMBER: 15cr088 (JEB)

SPECIAL CONDITIONS OF SUPERVISION

THE COURT FINDS that you do not have the ability to pay a fine and, therefore, waives imposition of a fine in this case.

The special assessment is immediately payable to the Clerk of the Court for the U.S. District Court, District of Columbia. Within 30 days of any change of address, you shall notify the Clerk of the Court of the change until such time as the financial obligation is paid in full.

Within 72 hours of release from custody, you shall report in person to the probation office in the district to which you are released. While on supervision, you shall submit to collection of DNA, you shall not possess a firearm or other dangerous weapon, you shall not use or possess an illegal controlled substance, and you shall not commit another federal, state, or local crime. You shall also abide by the general conditions of supervision adopted by the U.S. Probation Office, as well as the following special conditions:

Substance Abuse Testing – You shall submit to substance abuse testing as approved and directed by the Probation Office.

The probation office shall release the presentence investigation report to all appropriate agencies in order to execute the sentence of the Court. Treatment agencies shall return the presentence report to the

probation office upon the defendant's completion or termination from treatment.

NOTICE OF APPEAL – Pursuant to 18 USC § 3742, you have the right to appeal the verdict and sentence. If you choose to appeal, you must file any appeal within 14 days after the Court enters judgment. If you are unable to afford the cost of an appeal, you may request permission from the Court to file an appeal without cost to you.

As defined in 28 USC § 2255, you also have the right to challenge the conviction entered or sentence imposed if new and currently unavailable information becomes available to you or, on a claim that you received ineffective assistance of counsel in entering a plea of guilty to the offense(s) of conviction or in connection with sentencing.

If you are unable to afford the cost of an appeal, you may request permission from the Court to file an appeal without cost to you.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA	Criminal Action 15-088-JEB
v.	
MARLON HAIGHT,	Defendant

----------X

Washington, D.C.
Thursday, December 1, 2016
11:00 a.m.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: Nihar Mohanty, AUSA
Christopher Macchiaroli, AUSA
U.S. Attorney's Office
Criminal Division
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(202) 252-7825

For the Defendant: Nikki U. Lotze, Esq.
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Washington, DC 20004
(202) 393-0535

Court Reporter: Lisa Walker Griffith, RPR
U.S. District Courthouse
Room 6507
Washington, D.C. 20001
(202) 354-3247

[2] **PROCEEDINGS**

THE DEPUTY CLERK: This is criminal case 15-088. United States of America versus Marlon Haight.

Nihar Mohanty and Christopher Macchiaroli appearing for the government. Nikki Lotze appearing for the defendant. Renee Moses-Gregory appearing for the Probation Office.

THE COURT: Mr. Haight, good morning to you.

Welcome, everybody here. We're here for sentencing.

Anything preliminary before we begin from the government?

MR. MOHANTY: No, Your Honor.

THE COURT: Okay. Ms. Lotze?

MS. LOTZE: No, Your Honor.

THE COURT: So let me deal with a few issues. The most important being the mandatory minimum question. So there are a couple of other preliminary questions issues first.

The first relates to the drug quantity. And the defense has argued that I shouldn't consider the marijuana in the backpack given the acquittal relating to that issue. My answer is that it doesn't matter because it doesn't change the drug quantity. So, whether I consider it or not, doesn't affect the sentence.

[3] The second thing is that on page nine of the presentence report, I just want to correct one error which relates to the drug amounts. And that is, if you

look where marijuana is listed for the drug quantity for 2311.2 grams, then the next column over lists 2311.2 kilograms which of course it should be 2.311 kilograms, not 2300 kilograms. The correct measurement is actually reflected in the total of 450. But that is just one error that I want to make sure is right.

So now let's talk about the mandatory minimum issue. I want to give you an oral ruling on that. The government here seeks a mandatory minimum penalty under 18 USC section 924(e) which is required if the defendant qualifies as an armed career criminal, which means a person with three prior convictions for a serious drug offense or a violent felony.

Mr. Haight concedes that two of his prior convictions, one for a serious drug offense and the other for a violent felony, are covered under the statute. So the disputes relates to the third, which is a District of Columbia conviction for assault with a dangerous weapon.

The question presented is whether ADW qualifies as a violent felony. If it does, then the defendant is an armed career criminal and subject to the mandatory 15 year penalty under that statute. If he is not, then no such [4] mandatory applies. Although this would appear on it face to be a simple question, it is not and the courts are unfortunately hopelessly split.

So let me go through the analysis. The Armed Career Criminal Act defines a violent felony as any crime 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. According to the Supreme Court in *Johnson*

versus the United States in this context, physical force means violent force that is capable of causing physical pain or injury to another person.

Read together then a crime is a violent felony under the ACCA if it has an essential element that involves the attempted or threatened use of physical force that is capable of causing physical pain or injury to another person.

At first blush, ADW seems to plainly fit the bill. Its essential elements under D.C. law are: One, an attempt with force or violence to injure another person or a menacing threat which may or may not be accompanied by a specific intent to injury; two, the apparent present ability to injure the victim; three, a general intent to commit the act or acts that constitute the assault; and four, the use of a dangerous weapon in committing the [5] assault.

That's a quote from *Frye versus the United States* 926 A2d at 1096.

Numerous courts in other jurisdictions considering statutes similar to districts have held that assault with a deadly or dangerous weapon does qualify as a violent felony. The Supreme Court in *Johnson*, in dicta anyway, also seems to have indicated that a crime like this is the sort of prototypical violent felony that fits within the common use of the ACCA's chosen language.

Mr. Haight, however, raises a number of arguments to rebut this, some of which are not terribly persuasive, but his strongest contention is that the mens rea required for ADW in the District is not limited to intentional assaults but also includes ones committed

recklessly. Reckless assaults he claims do not meet the ACCA definition of a violent crime because they do not necessarily entail the attempted or threatened use of physical force as those words are commonly or properly understood in this context.

So, is recklessness enough or not? Unfortunately, neither the Supreme Court nor our circuit has addressed this question, but many other courts have. Many have relied on the 2004 Supreme Court decision in *Leocal versus Ashcroft*, which held that a Florida conviction for driving under the influence and causing [6] serious bodily injury did not qualify as a crime of violence because use of physical force against another person necessarily required a higher degree of intent than negligent or merely accidental conduct.

Since 2004, the majority of courts considering the issue of recklessness have held that, like negligent or accidental conduct, it is not enough. So far so good. But to complicate matters further, five months ago the Supreme Court looked at a similar question under a statutory provision prohibiting any person convicted of a misdemeanor crime of domestic violence from possessing guns. That's the case of *Voisine versus the United States*.

Using similar language to the ACCA, the statute at issue in *Voisine* defines the phrase to include any misdemeanor that has as an element the use of, or attempted use of physical force. Ultimately the Court concluded that a domestic violence crime requiring only recklessness could qualify under that definition.

So, there is our answer, right?

Actually, no. Because in a footnote the Court expressly recognized that this ruling did not resolve the violent felony issue which remained an open question. That's footnote four. Footnote also reaffirmed that the domestic violence and felony crime of violence provisions have been subjected to differing interpretations in [7] recognition of their different purposes, even though the provisions contain an almost identical use of physical force language.

So how did *Voisine* alter the landscape? Over the past five months in my research, that means the five months since the Supreme Court's decision at the end of June, 11 cases have been issued. Three in November alone discussing whether *Voisine* does or does not mandate that crimes that may be committed recklessly qualifies for violent felonies. Seven district courts have relied on the *Voisine* footnote to conclude that a reckless mens rea is not enough. Four courts, two district and two appellate have come out the other way. So, that again does not provide any clear path for us here.

Obviously, if the Court had a binding precedent to follow in this district, it could easily hold that *Voisine* did not disrupt the precedent. But that is unfortunately not the case. There is also little doubt in my mind that our circuit will soon decide the question and that the Supreme Court will very likely weigh in, in the near future as well.

Until that time, I don't have a great deal of insight to add to all of the ink that has been spilled so far by many courts on the issue. So I ultimately find that the majority of courts have got it right and those are the [8] ones that hold that recklessness is not enough.

Although, as I said, we will get a specific answer from the circuit of the Supreme Court before too long. Until such time I must also pronounce a sentence that strikes me as fair in this case. The mandatory minimum of 20 years, in other words, the 15 for felon possession plus the five for 924(c) would yield a mandatory minimum of 20 years that, to me, does not strike me as a fair or appropriate punishment in this case. So I use that also in guiding my decision. So as I said, my ultimate decision is that I do not find that the defendant qualifies as armed career criminal under section 924(e).

Okay. So that said, I can now hear argument from both sides on what the appropriate sentence here should be.

Mr. Mohanty?

Before I say that, I appreciate that I received memoranda from both sides and with detail argument. I have read that and happy to hear anything else.

MR. MOHANTY: Thank you, Your Honor.

The Court has ruled. I don't mean to argue a point that you have already ruled on, Your Honor, but I do want to put a few things on the record. I think the Court probably was already aware of these cases because you indicated that you had looked at cases as recently as November.

* * * * *