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Eight Ways to Write a Superb Brief

Based on Kannon Shanmugam's merits brief in *Walker v. United States*

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1 Craft your Table of Contents so that each level of heading or subheading functions as a syllogism that proves a broader point. If "1," "2," and "3" below are all true, then "A" must be true.

2 In introducing your client, handpick nouns and verbs that put your position in the best light. Subtle narrative choices here make the petitioner relatable while subordinating bad facts (like the crack cocaine) to weaker parts of the sentences.

B. Facts And Procedural History

1. In 2007, petitioner was helping to manage a boarding house in Memphis, Tennessee. According to the unrebutted testimony at trial, while cleaning a room, petitioner discovered 13 bullets left behind by an occupant and placed them in his room for safekeeping. Several weeks later, officers with the Memphis Police Department responded to a complaint of drug sales at the house. Petitioner consented to a search of the premises. The officers seized the 13 bullets, along with 0.3 grams of crack cocaine, from petitioner's room. Petitioner explained that he did not have a firearm, and no firearm was ever found. Pet. App. 2a, 11a, 15a-16a, 26a-27a.

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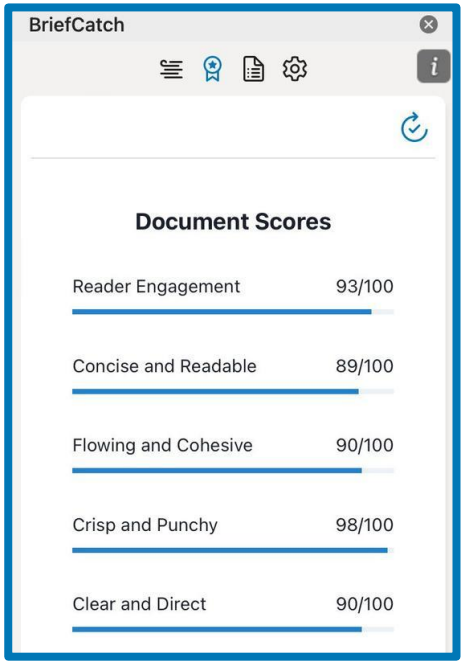
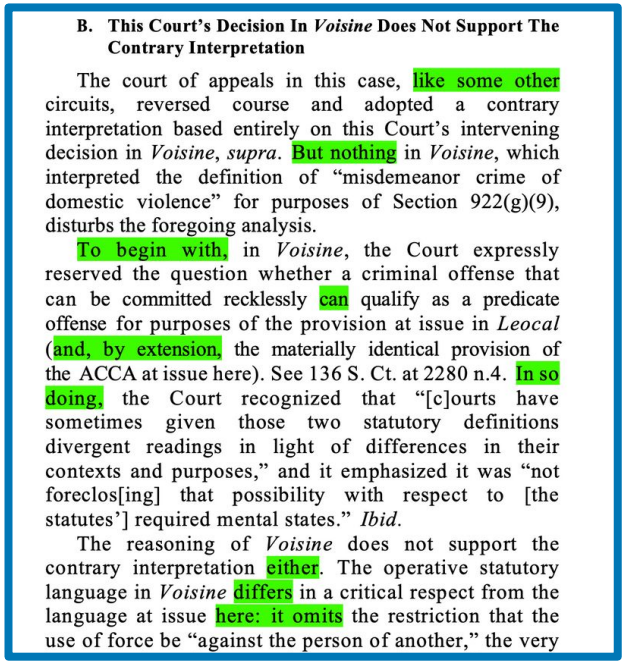
3 That blockbuster 98/100 BriefCatch "Crisp and Punchy" score is no accident! Favor short words like "can" and "but" and transitions like "In so doing" to take the reader on a smoother, faster ride.





B. This Court's Decision In *Voisine* Does Not Support The Contrary Interpretation

The court of appeals in this case, like some other circuits, reversed course and adopted a contrary interpretation based entirely on this Court's intervening decision in *Voisine*, *supra*. But nothing in *Voisine*, which interpreted the definition of "misdemeanor crime of domestic violence" for purposes of Section 922(g)(9), disturbs the foregoing analysis.

To begin with, in *Voisine*, the Court expressly reserved the question whether a criminal offense that can be committed recklessly can qualify as a predicate offense for purposes of the provision at issue in *Leocal* (and, by extension, the materially identical provision of the ACCA at issue here). See 136 S. Ct. at 2280 n.4. In so doing, the Court recognized that "[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes," and it emphasized it was "not foreclos[ing] that possibility with respect to [the statutes'] required mental states." *Ibid.*

The reasoning of *Voisine* does not support the contrary interpretation either. The operative statutory language in *Voisine* differs in a critical respect from the language at issue here: it omits the restriction that the use of force be "against the person of another," the very

4 Examples are priceless—but only if the court can see the link without having to work. See how the examples below build up to the actual fact pattern.

> Ordinary usage confirms the foregoing understanding. In everyday English, one does not describe a reckless action that results in harm to another person as an action being taken against that person. For example, a police officer who recklessly throws a can of tear gas to a colleague near a crowd of peaceful protesters has not used the tear gas against the crowd if the can falls and discharges. So too here, a thief who recklessly causes bodily injury to another person is not targeting the person with the use of force.

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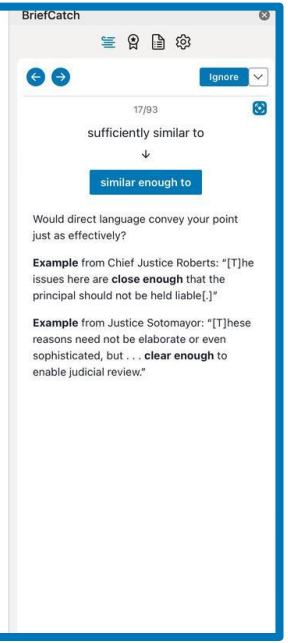
5 Quote language as only a means to an end. Sprinkle in short quoted snippets that let your own points and facts dominate.

Purpose, the highest level of culpability, exists when the actor has as "his conscious object" to cause a particular result. Model Penal Code § 2.02(2)(a)(i) (1985). Knowledge, the next highest level, exists when the actor is "practically certain that his conduct will cause such a result," regardless of whether he affirmatively desires that result. *Id.* § 2.02(2)(b)(ii). For most crimes, there is a "limited distinction" between purpose and knowledge. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 445 (1978).

Purpose and knowledge, however, stand apart from recklessness and negligence. Recklessness exists when the actor "consciously disregards a substantial and unjustifiable risk" that a result will follow from his conduct, and the disregard involves a "gross deviation" from "the standard of conduct that a law-abiding person would observe." Model Penal Code § 2.02(2)(c). A reckless actor "does not desire harmful consequences" but instead "takes [a] risk" without "car[ing] about [them]." *Black's Law Dictionary* 1462 (10th ed. 2014); see, *e.g.*, Tex. Penal Code Ann. § 6.03(c). Recklessness requires only "consciousness of something far less than certainty or



In determining whether a conviction qualifies as a "violent felony" under the ACCA, this Court uses the familiar "categorical approach"—examining the elements of the offense and not the particular facts underlying the defendant's previous conviction. See *Begay* v. *United States*, 553 U.S. 137, 141 (2008). The Court reviews the minimum conduct necessary for a conviction for the offense; only if that minimum conduct satisfies one of the ACCA clauses does the offense qualify as a predicate offense. See *ibid.* In applying the categorical approach, the Court first asks if the statute is divisible because it lists alternative elements. See *Descamps* v. *United States*, 570 U.S. 254, 263-264 (2013). If it is, under the so-called "modified categorical approach," the Court looks to a narrow set of documents to determine which alternative element formed the basis of the defendant's conviction; it then assesses the minimum conduct necessary for a conviction with that element. See *ibid.*; *Shepard* v. *United States*, 544 U.S. 13, 25-26 (2005).

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6 Build logical bridges by frontloading a new paragraph with a point the reader will remember from the end of the previous paragraph.

one that is directed or aimed at another person.

The distinction between an action that is targeted at another person, on the one hand, and an action that involves a substantial risk of harm to another person, on the other, maps onto the broader distinction between purposeful or knowing conduct, on the one hand, and reckless or negligent conduct, on the other. An actor who does not know that harm to another person will occur because he "consciously disregards" a substantial risk of harm has acted recklessly. Model Penal Code § 2.02(2)(c) (1985); see p. 5, *supra*. But he has not targeted his action at the other person. In that regard, an actor who "consciously disregards" a substantial risk of harm is indistinguishable from an actor who, in a "gross deviation" from the reasonable standard of care, should be but is not aware of that risk (and thus has acted negligently). Model Penal Code§ 2.02(2)(d). While

the reckless actor's deviation from norms may be greater, that is a difference in degree and not in kind. Because neither actor's conduct is focused on or directed at another person, neither actor can be said to have acted against that person.

The ordinary usage of the word "against" confirms that understanding. Consider a police officer who intentionally sprays protesters with pepper spray in order to disperse them. As a matter of everyday speech, that officer unquestionably has used pepper spray against the protesters. But now consider an officer who recklessly throws a can of tear gas to a colleague near a crowd of peaceful protesters. If the can falls to the ground and discharges, the effect on the protesters is identical, but it would be unnatural to say the officer has used tear gas against the protesters.

So too when the thing used is physical force. A person

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7 Use the "Why Should I Care?" technique, as I describe it in *Point Made*, to foreground what will happen if you lose. But merely predict the result, as here, without warning of slippery slopes.

C. Including reckless offenses would distort the meaning of "violent felony" by bringing garden-variety offenses into the ACCA's harsh regime. In particular, various reckless driving offenses would become "violent felonies" under the ACCA (and, presumably, "crimes of violence" for purposes of other criminal and immigration statutes). This Court has made clear that the ACCA did not seek to capture those types of offenses. And including those offenses would render meaningless another provision that separately delineates reckless driving offenses from the offenses at issue here. It would be similarly incongruous to treat petitioner's conviction for Texas robbery as a "violent felony," because the Texas robbery statute, unlike traditional robbery statutes, permits a conviction for what is effectively reckless shoplifting. And a host of similar offenses would be swept within the scope of the ACCA as well.

8 Keep it classy. Feel the subtle difference between “That was mistaken” and “The Court was mistaken.” Fight for principles, not against courts and opponents.

B. The court of appeals thought that the Court’s decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), dispositively altered the foregoing analysis. That was mistaken. In *Voisine*, the Court interpreted the phrase “misdemeanor crime of domestic violence” in 18 U.S.C. 922(g)(9), which is defined to include offenses that merely require the “use of physical force.” The Court held that offenses that could be committed recklessly satisfied that definition. But it made clear that it was not resolving the question presented here, recognizing that courts (including the Court itself) had treated that definition differently.

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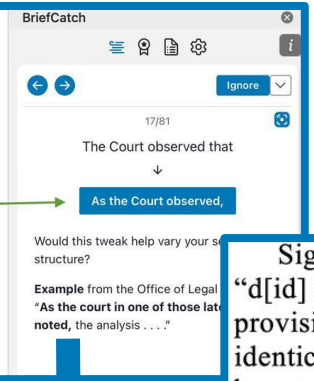
Bonus Tip! Vary your sentence structure and shake loose from this pattern: “Someone noted/observed/stated that . . . .”

BriefCatch could have helped even this rockstar brief in that regard.

Significantly, the Court acknowledged that its decision “d[id] not resolve” the question of whether Section 16 (the provision at issue in *Leocal* with a force clause materially identical to the ACCA’s) encompassed offenses that could be committed recklessly. 136 S. Ct. at 2280 n.4. The Court observed that courts have “sometimes given [the *Voisine* and *Leocal*] statutory definitions divergent readings in light of differences in their contexts and purposes,” and it “d[id] not foreclose that possibility” as to the “required mental states” for the statutes’ predicate offenses. *Ibid.*



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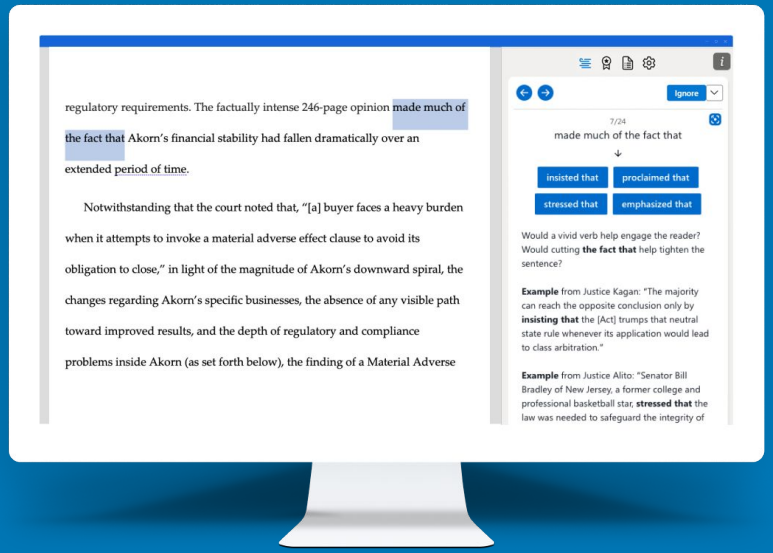

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