No. 17-8766

IN THE SUPREME COURT OF THE UNITED STATES

EDWIN DESHAZIOR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Florida offense of sexual battery with a deadly weapon, in violation of Fla. Stat. § 794.011(3) (1989), qualifies as a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 882 F.3d 1352.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2018. The petition for a writ of certiorari was filed on May 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of

possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Pet. App. 2a. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-13a.

1. In 2015, Miami-Dade police officers responded to a complaint that petitioner was waving a gun in public. Presentence Investigation Report (PSR) ¶ 3. When the officers arrived, petitioner attempted to flee; he was quickly apprehended. Ibid. A search of petitioner revealed a revolver and four rounds of ammunition. PSR ¶ 4; see Pet. App. 2a.

A federal grand jury returned an indictment charging petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Pet. App. 2a; PSR ¶ 1. Petitioner pleaded guilty, without a plea agreement. PSR ¶¶ 1-2.

2. A conviction for violating 18 U.S.C. 922(g) carries a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1); see Custis v.

United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the "elements clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court defined "'physical force'" under the ACCA's elements clause to "mean[] violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140.

The Probation Office classified petitioner as an armed career criminal based on five prior Florida convictions: a 1989 conviction for sexual battery, a 1989 conviction for aggravated assault, a 1993 conviction for attempted sexual battery, a 1993 conviction for kidnapping, and a 2005 conviction for resisting arrest with violence. Pet. App. 2a-3a. The Probation Office calculated a criminal-history category of IV and a total offense level of 30 under the Sentencing Guidelines, which would result in an advisory sentencing range of 135 to 168 months of imprisonment. PSR ¶ 72. Because the statutorily required minimum sentence under

the ACCA was 15 years, however, the Probation Office noted that the Guidelines term was 180 months. Ibid. (citing Sentencing Guidelines § 5G1.1(b) (2015)).

Petitioner objected to his classification as an armed career criminal, contending that his prior convictions were not violent felonies under the ACCA. Pet. App. 3a. The district court overruled petitioner's objection and sentenced him to the statutory minimum term of 180 months. Sent. Tr. 9-12.

3. The court of appeals affirmed. Pet. App. 1a-13a. It first determined that petitioner's prior convictions for aggravated assault and resisting arrest with violence qualified as violent felonies under binding circuit precedent. Id. at 4a-6a.

The court of appeals then analyzed petitioner's 1989 conviction for sexual battery and 1993 conviction for attempted sexual battery, which it treated as analytically identical. Pet. App. 6a-12a.[1] Florida defines "sexual battery" as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object," other than for bona fide medical purposes. Fla. Stat.

[1] The court of appeals did not expressly address petitioner's 1993 conviction for attempted sexual battery with a deadly weapon, beyond noting that petitioner had conceded that he had been convicted of that offense and that "the same ACCA analysis applies" to that conviction and to the 1989 conviction for sexual battery with a deadly weapon. Pet. App. 7a. Petitioner does not contend that the Court erred in focusing on the 1989 sexual-battery conviction or that focusing on the 1993 attempted-sexual-battery conviction should yield a different result.

§ 794.011(1)(h) (1989). The court determined that Florida's sexual-battery statute is divisible into distinct offenses and that petitioner had been convicted of sexual battery with a deadly weapon -- specifically, a handgun. Pet. App. 7a-9a; see Fla. Stat. § 794.011(3) (covering "[a] person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury").

The court of appeals then determined that Florida sexual battery with a deadly weapon necessarily entails "the use, attempted use, or threatened use of physical force" under the ACCA. Pet. App. 9a (quoting 18 U.S.C. 924(e)(2)(B)(i)). It explained that, under Florida law, a weapon is "deadly" if it is used or threatened to be used in a way likely to produce death or great bodily harm. Id. at 10a (citing Florida jury instructions). The court noted that Florida courts had held that a deadly weapon may include bleach "sloshed" into a victim's face or a large dog given a command to "sic" the victim. Ibid. (citations omitted). But it rejected petitioner's argument that those actions fail to qualify as the "use of force" under the ACCA because they involve indirect force. Id. at 10a-11a. The court relied on this Court's decision in United States v. Castleman, 134 S. Ct. 1405 (2014), in explaining that an indirect use of force satisfies the "use" of

force under the ACCA. Pet. App. 11a. The court of appeals reasoned that the actions covered by the Florida law were not meaningfully different from "pulling the trigger of a gun," observing that in each case, "the actor knowingly employs a device to indirectly cause physical harm -- from a bullet, a dog bite, or a chemical reaction." Ibid.

Because it determined that petitioner had at least three ACCA-predicate convictions, the court of appeals declined to consider whether petitioner's 1993 conviction for kidnapping also qualified as a violent felony. Pet. App. 12a.

ARGUMENT

Petitioner contends (Pet. 5-16) that his prior convictions for Florida sexual battery with a deadly weapon and attempted sexual battery with a deadly weapon do not qualify as violent felonies under the ACCA because they do not include as an element the use, attempted use, or threatened use of "physical force" as the Court defined that term in Curtis Johnson v. United States, 559 U.S. 133 (2010). The court of appeals correctly rejected that contention, and its decision does not implicate any continued division among the courts of appeals that warrants this Court's review.

1. The court of appeals correctly determined that petitioner's convictions for Florida sexual battery with a deadly weapon and attempted sexual battery with a deadly weapon, in

violation of Fla. Stat. § 794.011(3), qualify as violent felonies under the ACCA. Pet. App. 12a.

In Curtis Johnson, this Court held that an offender uses "'physical force'" for purposes of the ACCA when he uses "violent force -- that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140; see Sessions v. Dimaya, 138 S. Ct. 1204, 1208 (2018) (noting that "this Court has made clear that 'physical force' means 'force capable of causing physical pain or injury'") (quoting Curtis Johnson, 559 U.S. at 140). The Court concluded that the offense at issue in Curtis Johnson itself -- simple battery under Florida law, which requires only an intentional touching and may be committed by "[t]he most 'nominal contact,' such as a 'tap on the shoulder without consent'" -- does not categorically require such force. 559 U.S. at 138 (quoting State v. Hearns, 961 So. 2d 211, 219 (Fla. 2007)) (brackets and ellipses omitted).

Application of Curtis Johnson's definition of "force" to the different offense at issue here, however, yields a different result. In contrast to the offense at issue in Curtis Johnson, Florida sexual battery with a dangerous weapon requires that a weapon be used or be threatened to be used in a way likely to produce death or great bodily harm. Pet. App. 10a (citing Florida jury instructions). That definition of sexual battery with a dangerous weapon meets the physical-force requirement of the

ACCA's elements clause. Indeed, in Curtis Johnson, this Court assumed that assault and battery with a dangerous weapon qualifies as a violent felony, as it approvingly cited the Black's Law Dictionary definition of a "violent felony" as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon." 559 U.S. at 140-141 (brackets and citation omitted).

Petitioner emphasizes (Pet. 3) that, under Florida law, a deadly weapon is "broadly defined to encompass poison, anthrax, or a chemical agent, which d[o] not require any direct force at all." He contends (Pet. 13-16) that the use of poison or other "indirect" applications of force do not satisfy Curtis Johnson's definition of violent force. But this Court has already rejected a similar contention in United States v. Castleman, 134 S. Ct. 1405 (2014).

In Castleman, this Court held that the phrase "use of physical force" in 18 U.S.C. 922(g)(9) encompasses the indirect application of force leading to physical harm. See 134 S. Ct. at 1414-1415; see also id. at 1416-1417 (Scalia, J., concurring in part and concurring in the judgment) (explaining that "it is impossible to cause bodily injury without using force 'capable of' producing that result"). The Court explained that "'physical force' is simply 'force exerted by and through concrete bodies,' as opposed to 'intellectual force or emotional force.'" Id. at 1414 (quoting Curtis Johnson, 559 U.S. at 138). Thus, it reasoned that the "'use

of force'" in an example like poisoning a drink "is not the act of 'sprinkling' the poison; it is the act of employing poison knowingly as a device to cause physical harm." Id. at 1415 (brackets omitted). The Court further reasoned that, if it were otherwise, "one could say that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim." Ibid.

That same reasoning applies here. A person uses force when he poisons a drink or pulls the trigger of the gun because he "knowingly employs a device to indirectly cause physical harm." Pet. App. 11a. It does not matter that, as petitioner asserts (Pet. 14-15), Curtis Johnson requires "violent force." 559 U.S. at 140. The element of "violent force" is satisfied by the force's "capab[ility] of causing physical pain or injury to another person," ibid. (emphasis omitted), not by the directness of its application.

2. Petitioner contends (Pet. 5) that "the circuits have divided on whether [Castleman's] indirect force/poison reasoning applies to the elements clause in the ACCA (and the Sentencing Guidelines)." That is no longer correct.

Petitioner recognizes (Pet. 7) that all but one of the courts of appeals in which the issue could arise have concluded that, in light of Castleman, the indirect use of physical force qualifies as a use of force under the ACCA's elements clause or analogous

statutory or Guidelines provisions. See United States v. Ellison, 866 F.3d 32, 37-38 (1st Cir. 2017); United States v. Hill, 890 F.3d 51, 58-60 (2d Cir. 2018); United States v. Chapman, 866 F.3d 129, 134-135 (3d Cir. 2017), cert. denied, 138 S. Ct. 1582 (2018); United States v. Covington, 880 F.3d 129, 134 (4th Cir.), cert. denied, No. 17-8628 (May 29, 2018); United States v. Verweibe, 874 F.3d 258, 261 (6th Cir. 2017), petition for cert. pending, No. 17-8413 (filed Apr. 3, 2018); United States v. Waters, 823 F.3d 1062, 1066 (7th Cir.), cert. denied, 137 S. Ct. 569 (2016); United States v. Rice, 813 F.3d 704, 706 (8th Cir.), cert. denied, 137 S. Ct. 59 (2016); Hernandez v. Lynch, 831 F.3d 1127, 1131 (9th Cir. 2016), cert. denied, 137 S. Ct. 2180 (2017); United States v. McCranie, 889 F.3d 677, 679 (10th Cir. 2018); United States v. Haight, No. 16-3123, 2018 WL 3077534, at *6 (D.C. Cir. June 22, 2018).

The sole exception, as petitioner also acknowledges (Pet. 5-9) is the Fifth Circuit, which suggested in United States v. Rico-Mejia, 859 F.3d 318, 322-323 (2017), that Castleman's reasoning does not apply outside the context of the statute concerning a prior crime of domestic violence that was at issue in Castleman. The Fifth Circuit later reaffirmed that decision in United States v. Reyes-Contreras, 882 F.3d 113 (2018). But the government petitioned for rehearing en banc on the relevant issue, and the court recently granted its petition. See 6/15/18 Order, Reyes-Contreras, supra (No. 16-41218). That order vacates the panel

opinion on which petitioner relies (Pet. 6-7). See 5th Cir. R. 41.3. The Fifth Circuit now has the opportunity to adopt the uniform views of the other courts of appeals and to resolve any division that may have existed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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