No. 17-8766

IN THE

Supreme Court of the United States

EDWIN DESHAZIOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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In its brief in opposition, the government does not dispute Petitioner's assertion the question presented—whether the use of poison and other indirect applications of force constitute "violent force" under *Curtis Johnson v. United States*, 559 U.S. 133 (2010)—is a recurring issue of national importance warranting review. Pet. 9–10. Nor could it: the government itself has advocated that very position in the lower courts. Pet. 10; Pet. App. 41a–42a, 65a. The government also does not dispute that this case presents an ideal vehicle to decide that question. It was fully preserved below, it formed an indispensable component of the Eleventh Circuit's published opinion, and it is dispositive of this case. Pet. 11–13.

Instead, the government first argues (at 6–9) that the Eleventh Circuit correctly held that the poison reasoning from *United States v. Castleman*, 572 U.S. __, 134 S. Ct. 1405 (2014) applies in the ACCA context. But nowhere does the government even acknowledge the compelling counter-argument: *Castleman*'s reasoning came in the context of a different statute, where the Court defined "physical force" by its sweeping common-law definition. Indeed, the government makes no mention of that common-law definition. Nor does it acknowledge that *Castleman* specially refused to incorporate *Curtis Johnson*'s "violent force" definition for the ACCA, which requires a "substantial degree of force." 559 U.S. at 140. By neglecting those arguments—set forth at length in the petition, *see* Pet. i, 5, 13–16—the government repeats the mistake of the majority of the lower courts, wrenching *Castleman*'s reasoning from its distinct statutory context.

The government also argues (at 9–11) that, while the Fifth Circuit split with the other ten circuits on this issue, that court recently granted the government's petition for rehearing en banc in *United States v. Reyes-Contreras*, 882 F.3d 113, *vacated by* 892 F.3d 800 (5th Cir. 2018). But the government mistakenly contends (at 9) that this rehearing grant alone obviated the split. While it did vacate the panel opinion in *Reyes-Contreras*, that was not the only precedent refusing to incorporate *Castleman*'s reasoning into the ACCA context. The Fifth Circuit rejected the government's attempt to do so in *United States v. Rico-Mejia*, 859 F.3d 318, 321–23 (5th Cir. 2017). That court has since reiterated that precedent even after the grant of rehearing in *Reyes-Contreras*. *United States v. Burris*, 892 F.3d 801, 808 (5th Cir. 2018). And, even before *Rico-Mejia*, that court had held, post-*Castleman*, that poisoning does not constitute "violent force" under *Curtis Johnson*. *United States v. Garcia-Perez*, 779 F.3d 279, 283–84 (5th Cir. 2015).

To be sure, the en banc Fifth Circuit might reverse course in *Reyes-Contreras*, but there is reason to believe that it will not. The decisions in *Garcia-Perez* and *Rico-Mejia* were both unanimous and joined by six different Fifth Circuit Judges. The panel in *Reyes-Contreras* was comprised of three additional Fifth Circuit Judges, two of whom did not join Judge Jones' concurrence calling for reconsideration of circuit precedent in light of *Castleman*. Given that at least eight Fifth Circuit Judges have expressed no qualms about that precedent, and that *Rico-Mejia* firmly rejected the government's request for rehearing based on *Castleman*, it is hardly inevitable that the Fifth Circuit will overrule its longstanding precedent.

The prudent course, then, is for the Court to hold this petition while the en banc Fifth Circuit decides. *Reyes-Contreras* will be argued before this petition is conferenced. And the government has explained that *Reyes-Contreras* would "not be suitable for Supreme Court review" because it arises in the context of a "now-superseded Sentencing Guidelines provision." Pet. App. 66a. So if the en banc Fifth Circuit reaffirms its precedent, the government would not seek certiorari there. Yet the circuit split would remain fully mature; and it would be intractable. Because, again, this is an excellent vehicle to resolve that split, holding this petition would facilitate expeditious review if the Fifth Circuit holds firm, as it has in the past.*

CONCLUSION

Accordingly, the Court should hold this petition pending *Reyes-Contreras* and grant review if the en banc Fifth Circuit reaffirms its current precedent.

Respectfully submitted,

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* Last Term, for example, this Court held an ACCA-related petition for over six months pending resolution of an en banc decision in the court of appeals. The Court ultimately granted, vacated, and remanded in light of the en banc ruling. *Sykes v. United States*, 584 U.S. __, 138 S. Ct. 1544 (2018) (mem.). Here, the proper course would be to grant plenary review if the en banc Fifth Circuit reaffirms is precedent.