No. 18-5393

IN THE SUPREME COURT OF THE UNITED STATES

SHANE MCMAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for aggravated battery, in violation of Kan. Stat. Ann. § 21-3414(a)(1)(C) (1995) (repealed by 2010 Kan. Sess. Laws 1641), was a conviction for a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), because that offense "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).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not published in the Federal Reporter but is reprinted at 732 Fed. Appx. 665. The opinion of the district court is not published in the Federal Supplement but is available at 2016 WL 6083710.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2018. The petition for a writ of certiorari was filed on July 23, 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 District of Kansas, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2), and 924(e). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal his conviction or sentence. Pet. App. 2a. Petitioner later filed a motion to vacate, correct or set aside his sentence under 28 U.S.C. 2255, which the district court denied. After granting a certificate of appealability (COA), the court of appeals affirmed. Id. at 4a.

1. On July 2, 2012, a Kansas City police officer pulled his police cruiser behind a vehicle that was stopped illegally in the roadway. Presentence Investigation Report (PSR) ¶ 14. As the officer exited his cruiser, the occupant of the stopped vehicle began walking away from the scene. Ibid. The officer observed that the man, later identified as petitioner, was carrying a bag from which a shotgun was protruding. Ibid. The officer ordered petitioner to stop, but petitioner fled. Ibid. During a foot pursuit, petitioner threw the shotgun and bag into bushes. Ibid. After the officer apprehended petitioner, the officer discovered that petitioner had multiple warrants for his arrest and that he was carrying a syringe and pipe in his pants pocket. Ibid.

A federal grand jury returned an indictment charging petitioner with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2), and 924(e), and one count of possession of an unregistered short-barreled shotgun, in violation of 26 U.S.C. 5841, 5861(d), and 5871. Indictment 1-2. Petitioner entered into a plea agreement with the government pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), in which he agreed to plead guilty to the felon-in-possession count. D. Ct. Doc. 37, at 1 (Apr. 17, 2013).[1] The parties agreed that petitioner "is an 'armed career criminal' as defined by 18 U.S.C. § 924(e)" and to a proposed sentence of 180 months of imprisonment, followed by three years of supervised release. Id. at 2-3.

2. A conviction for violating Section 922(g)(1) has 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), applies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1); see Custis v. United

[1] All citations to district-court documents refer to No. 12-cr-20120 (D. Kan.).

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," and the portion beginning with "otherwise" is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

The Probation Office's presentence report listed petitioner's prior felony convictions, which included: (1) a 1998 Kansas conviction for burglary of a dwelling, (2) a 2001 Kansas conviction for burglary of a dwelling, (3) a 2001 Kansas conviction for attempted criminal threat, (4) a 2003 Kansas conviction for conspiracy to commit robbery, and (5) a 2003 Kansas conviction for aggravated battery. PSR ¶¶ 40, 42, 43. The report also classified petitioner as an armed career criminal under the ACCA on the ground that he had at least three prior convictions for violent felonies committed on different occasions. PSR ¶ 31. Petitioner did not object to the report's determinations. Addendum to PSR ¶ 105.

On July 19, 2013, the district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of

supervised release, which was the sentence required by Rule 11(c)(1)(C) if the court accepted the plea agreement. Judgment 1-3. Petitioner did not appeal.

3. In 2015, this Court held in Samuel Johnson v. United States, 135 S. Ct. 2551, that ACCA's residual clause is unconstitutionally vague. Id. at 2557. The Court later made clear that the holding of Samuel Johnson is a substantive rule that applies retroactively. See Welch, 136 S. Ct. at 1265.

Petitioner subsequently filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255, asserting that he was sentenced under the ACCA's residual clause and arguing that his sentence is unconstitutional. D. Ct. Doc. 58 (May 18, 2016). Although petitioner did not contest that his two prior Kansas residential burglary convictions qualify as violent felonies, he argued that his prior convictions for attempted criminal threat, conspiracy to commit robbery, and aggravated battery no longer do. Id. at 3-4.

The district court denied petitioner's Section 2255 motion. D. Ct. Doc. 70, at 1-8 (Oct. 17, 2016). The court first noted that the only predicate conviction that the parties disputed was petitioner's 2003 conviction for Kansas aggravated battery, in violation of Kan. Stat. Ann. § 21-3414(a) (1995). Id. at 2. The parties did not dispute, and the court found, that Section 21-3414(a) defines multiple distinct offenses and that petitioner had been convicted of violating Subsection (a)(1)(C), which

prohibits "intentionally causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." Id. at 2-3 (quoting Kan. Stat. Ann. § 21-3414(a)(1)(C) (1995)).[2] The court viewed petitioner's Section 2255 motion to "turn[] solely" on whether that offense "has as an element 'the use, attempted use, or threatened use of physical force' against another person." Id. at 3.

The district court found that the court of appeals' prior decision in United States v. Treto-Martinez, 421 F.3d 1156 (10th Cir. 2005), cert. denied, 546 U.S. 1118 (2006), "fully resolve[d]" petitioner's claim. D. Ct. Doc. 70, at 7. The district court explained that in Treto-Martinez, the court of appeals had held that "any conviction under [Section] 21-3414(a)(1)(C) satisfies the [Sentencing] Guidelines definition of a conviction for a 'crime of violence' for purposes of applying the career offender guideline because the statute contains as an element the threatened use of physical force." Id. at 3 (citing Treto-Martinez, 421 F.3d at

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[2] In 2010, Kansas repealed Section 21-3414 and enacted a new battery statute as part of a broader revision of the Kansas criminal code. See 2010 Kan. Sess. Laws 1432-1435, 1641; see also id. at 1410 (effective date of July 1, 2011). The current statute similarly criminalizes "knowingly causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." Kan. Stat. Ann. § 21-5413(b)(1)(C) (Supp. 2017).

1159-1160). The court found that the statute also qualified as a predicate felony under the ACCA's elements clause, id. at 3 n.1, 7, and declined to issue a COA, D. Ct. Doc. 79, at 2 (Nov. 1, 2016).

4. The court of appeals granted a COA and affirmed in an unpublished decision. Pet. App. 1a-9a.

The court of appeals "conclude[d] that aggravated battery, as defined by [Section] 21-3414(a)(1)(C), is a violent felony under the ACCA's elements clause." Pet. App. 8a. It noted that "the parties agree that 'intentionally causing physical contact with another person when done in . . . any manner whereby great bodily harm, disfigurement[,] or death can be inflicted,' is 'the least of the acts' that" Section 21-3414(a)(1)(C) "'criminalized' at the time of" petitioner's offense. Id. at 6a-7a (citations omitted; brackets in original).[3] The court then observed that its prior

[3] The statute prohibits "intentionally causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." Kan. Stat. Ann. § 21-3414(a)(1)(C) (1995) (emphasis added). The Supreme Court of Kansas has held, however, that "the phrase 'with a deadly weapon' describes a factual circumstance that proves bodily harm was caused in a 'manner whereby great bodily harm, disfigurement or death can be inflicted'" and is therefore a means of committing aggravated battery rather than an element of the offense. State v. Ultreras, 295 P.3d 1020, 1036 (Kan. 2013) (per curiam); cf. Mathis v. United States, 136 S. Ct. 2243, 2256 (2016) (explaining that the "ACCA disregards the means by which the defendant committed his crime, and looks only to that offense's elements").

holding in Treto-Martinez had been reaffirmed in United States v. Williams, 893 F.3d 696 (10th Cir. 2018), petition for cert. pending, No. 18-6005 (filed Sept. 13, 2018), which had determined that the "current version of Kansas' aggravated-battery statute -- which prohibits, in relevant part, 'knowingly causing bodily harm to another person . . . in any manner whereby great bodily harm, disfigurement[,] or death can be inflicted' -- is a crime of violence under Guidelines' elements clause." Pet. App. 8a (quoting Kan. Stat. Ann. § 21-5413(b)(1)(B) (Supp. 2017)) (brackets in original).

ARGUMENT

Petitioner contends (Pet. 11-35) that his prior conviction for Kansas aggravated battery, in violation of Kan. Stat. Ann. § 21-3414(a)(1)(C) (1995), does not qualify as a violent felony under the ACCA's elements clause. The court of appeals correctly rejected that contention, and its decision does not implicate any division among the courts of appeals that warrants this Court's review. The petition for a writ of certiorari should be denied.

1. In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court held that an offender uses "'physical force'" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B)(i), 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, 1220 (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 the "most 'nominal contact,' such as a 'ta[p] . . . 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)).

Application of Curtis Johnson's definition of "force" to the Kansas offense at issue here, however, yields a different result. In contrast to the offense at issue in Curtis Johnson, a conviction for Kansas aggravated battery, Kan. Stat. Ann. § 21-3414(a)(1)(C) (1995), requires not only that an offender intentionally make physical contact with another person, but also that such contact be made in a "manner whereby great bodily harm, disfigurement or death can be inflicted." Ibid. Because Kansas aggravated battery expressly requires force that "can" inflict great bodily harm, it necessarily requires "force capable of causing physical pain or injury," Curtis Johnson, 559 U.S. at 140 (emphasis added). The court of appeals therefore correctly determined that a conviction for Kansas aggravated battery "contains 'as an element the use, attempted use, or threatened use of physical force against the person of another.'" Pet. App. 9a (quoting 18 U.S.C. 924(e)(2)(B)(i)).

Petitioner's contrary view (Pet. 26) rests on the premise that a statute's "plain text" must "have an element of violent force" to satisfy 18 U.S.C. 924(e)(2)(B)(i). But petitioner cites no decision of this Court supporting that putative textual rule. The words "violent force," "forcibly," or "by force" (Pet. 28-31) need not appear in the statute defining the offense, as long as an element of the offense is, in substance, the use or threatened or attempted use of force "capable of causing physical pain or injury to another person," Curtis Johnson, 559 U.S. at 140 -- as the court of appeals correctly found to be true of Kansas aggravated battery.

2. Petitioner contends (Pet. 11-16) that this Court's review is warranted because the Fifth and Tenth Circuits are divided on the issue of whether Kansas aggravated battery has as an element the use of violent force. Petitioner further contends (Pet. 17-21) that the decision below implicates a division among the circuits on the broader issue of whether statutes that include as an element the causation of bodily harm necessarily require the use of violent force. Neither issue presents a conflict that warrants this Court's review.

a. Although petitioner is correct (Pet. 13-15) that a single decade-old decision of the Fifth Circuit, Larin-Ulloa v. Gonzales, 462 F.3d 456 (2006), concluded that a conviction for violating Kan. Stat. Ann. 21-3414(a)(1)(C) (1995) did not qualify as a "crime of violence" under the elements clause in 18 U.S.C.

16(a), id. at 466, that decision does not create a conflict with the decision below warranting this Court's review.

In Larin-Ulloa, the Fifth Circuit took the view that a conviction under Section 21-3414(a)(1)(C) did not qualify as "crime of violence" under 18 U.S.C. 16(a) because the provision "does not require that the defendant use physical force," but rather only that the defendant "'intentionally caus[e] physical contact with another person' under circumstances where 'great bodily harm, disfigurement or death' can result." 462 F.3d at 466 (quoting Kan. Stat. Ann. § 21-3414(a)(1)(C) (1995)). The court posited hypothetical examples that it believed would violate the statute but would not constitute a use of "physical force," such as "a physician negligently injecting a medication to which the patient is extremely allergic." Id. at 466-467. In the court's view, such situations involve "intentional physical contact that creates a risk of great bodily harm, but * * * not the type of violent or destructive contact that constitutes a use of physical force." Id. at 467.

That reasoning is inconsistent with this Court's later explication of the phrase "use of physical force" in United States v. Castleman, 572 U.S. 157 (2014). In Castleman, the Court considered whether conviction of a state misdemeanor assault offense requiring causation of bodily injury "ha[d], as an element, the use * * * of physical force," so as to qualify as a predicate

conviction under 18 U.S.C. 922(g)(9). Id. at 161 (quoting 18 U.S.C. 921(a)(33)(A)(ii)). The Court explained that "physical force" is a broad term encompassing all "force exerted by and through concrete bodies" and that Congress used the modifier "physical" to distinguish physical force from, for example, "intellectual force or emotional force." Id. at 170 (quoting Curtis Johnson, 559 U.S. at 138). The Court further explained that physical force may be applied to cause harm directly, through immediate physical contact with the victim, or indirectly -- for instance, "'by administering a poison or by infecting with a disease, or even by resort to some intangible substance,' such as a laser beam." Ibid. (citation omitted).

The Fifth Circuit's decision in Larin-Ulloa was premised on the rationale that a bodily injury can result without using physical force, but that premise does not survive Castleman and may soon be rejected by the en banc court. The Fifth Circuit has recently granted the government's petition for rehearing en banc in United States v. Reyes-Contreras, 882 F.3d 113 (2018), to revisit its previous view on that issue. See United States v. Reyes-Contreras, 892 F.3d 800 (5th Cir. 2018). 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 based upon the premise that bodily injury may occur in the absence of physical force. No reason exists, therefore, to grant review

in this case to resolve the shallow disagreement between the decision below and the Fifth Circuit's pre-Castleman (and pre-Curtis Johnson) holding in Larin-Ulloa.

b. Petitioner also argues (Pet. 17) that this Court should review the decision below to resolve a conflict among the circuits regarding whether "causation elements necessarily qualify as violent force elements." Specifically, petitioner cites (Pet. 17-18) decisions from the First, Fourth, and Fifth Circuits, which he asserts have held that "causation elements are not equivalent to violent force elements" under Curtis Johnson.

With the sole exception of the Fifth Circuit, which is now reconsidering the issue, the courts of appeals have invoked Castleman's logic in the context of the "use of physical force" requirement in the ACCA's elements clause and similarly worded provisions. See, e.g., United States v. García-Ortiz, No. 16-1405, 2018 WL 4403947, at *4 (1st Cir. Sept. 17, 2018); United States v. Hill, 890 F.3d 51, 59 (2d Cir. 2018); United States v. Chapman, 866 F.3d 129, 132-133 (3d Cir. 2017), cert. denied, 138 S. Ct. 1582 (2018); United States v. Reid, 861 F.3d 523, 528-529 (4th Cir.), cert. denied, 138 S. Ct. 462 (2017); United States v. Verwiebe, 874 F.3d 258, 261 (6th Cir. 2017), petition for cert. pending, No. 17-8413 (filed Apr. 3, 2018); United States v. Jennings, 860 F.3d 450, 458–460 (7th Cir. 2017), cert. denied, 138 S. Ct. 701 (2018); United States v. Rice, 813 F.3d 704, 705–706

(8th Cir.), cert. denied, 137 S. Ct. 59 (2016); Arellano Hernandez v. Lynch, 831 F.3d 1127, 1131 (9th Cir. 2016), cert. denied, 137 S. Ct. 2180 (2017); United States v. Ontiveros, 875 F.3d 533, 537-538 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018); United States v. Deshazior, 882 F.3d 1352, 1357-1358 (11th Cir. 2018), petition for cert. pending, No. 17-8766 (filed May 1, 2018); United States v. Haight, 892 F.3d 1271, 1280 (D.C. Cir. 2018), petition for cert. pending, No. 18-370 (filed Sept. 20, 2018).

The Fifth Circuit's outlier decisions -- which it may soon abrogate -- have focused on indirect use of force "without 'any bodily contact,'" Reyes-Contreras, 882 F.3d at 123 (citation omitted), not on intentional physical contact of the sort at issue here, and thus are of no help to petitioner.

The prior decisions of the First and Fourth Circuits that petitioner cites (Pet. 17-18) do not indicate any additional division in the courts of appeals on this issue. In Whyte v. Lynch, 807 F.3d 463, 466-471 (1st Cir. 2015), the court concluded that an indirect application of force could not qualify as a use of force under the definition of a "crime of violence" in 18 U.S.C. 16(a). But the First Circuit later suggested that its decision in Whyte is inconsistent with Castleman, see United States v. Edwards, 857 F.3d 420, 426 n.11, cert. denied, 138 S. Ct. 283 (2017), and the court recently suggested that Castleman has relevance to the

elements-clause definition of "crime of violence" in 18 U.S.C. 924(c)(3)(A), see García-Ortiz, 2018 WL 4403947, at *4.

The Fourth Circuit's decision in United States v. Middleton, 883 F.3d 485 (2018), likewise does not conflict with the decision below. There, the court held that South Carolina involuntary manslaughter, which applies where the defendant kills another person unintentionally while acting with "reckless disregard of the safety of others," is not a violent felony under the ACCA. Id. at 489 (citation omitted). The court noted that the statute had been applied to a defendant who sold alcohol to high school students who then shared the alcohol with another person who drove while intoxicated, crashed his car, and died. Ibid. The Fourth Circuit concluded that conduct leading to bodily injury through so "attenuated a chain of causation" did not qualify as a use of violent force. Id. at 492. But unlike the statute at issue in Middleton, the Kansas aggravated battery statute has no application to "illegal sale[s]," ibid.; it requires intentional physical contact capable of inflicting "great bodily harm," Kan. Stat. Ann. § 21-3414(a)(1)(C) (1995). And the Fourth Circuit has expressly recognized that Castleman's reasoning applies to the ACCA's elements clause. See Reid, 861 F.3d at 528-529.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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