No. 18-5435

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN MICHAEL YBARRA, 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 bank robbery, in violation of 18 U.S.C. 2113(a) (Supp. IV 1986), is a "violent felony" under the Armed Career Criminal Act of 1984 because it "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. C1-C5) is not published in the Federal Reporter but is reprinted at 730 Fed. Appx. 660. The order of the district court (Pet. App. B1-B13) is unreported but is available at 2017 WL 3189555.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2018. The petition for a writ of certiorari was filed on July 10, 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 New Mexico, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. C1-C2. He was sentenced to 180 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. Petitioner did not appeal. Pet. App. A3. In 2016, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255, in which he argued that his sentence should be vacated. See Pet. App. B13. The district court denied petitioner's motion, but granted petitioner's request for a certificate of appealability (COA). Ibid. The court of appeals affirmed. Id. at C1-C5.

1. In July 2008, petitioner, a member of the Mexican Mafia prison gang, agreed to sell firearms to a confidential informant. Presentence Investigation Report (PSR) ¶¶ 19-20. On July 15, petitioner purchased a .40 caliber pistol from an individual who told petitioner that the firearm was stolen, and petitioner then sold the loaded firearm for $350 to undercover agents with the Bureau of Alcohol, Tobacco, Firearms, and Explosives. PSR ¶¶ 23-25.

A federal grand jury indicted petitioner on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2. Petitioner entered into a written plea agreement with the government and, pursuant to Federal Rule of

Criminal Procedure 11(c)(1)(C), petitioner and the government agreed that "the appropriate sentence in his case is 180 months." 09-cr-900 D. Ct. Doc. 17, at 4 (June 24, 2009).

2. The Probation Office determined that petitioner qualified for sentencing under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). PSR ¶¶ 48, 68. The ACCA provides that, for a defendant convicted under 18 U.S.C. 922(g)(1), if the defendant 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 defendant's Section 922(g)(1) conviction carries a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1); 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). Paragraph (1) is commonly referred to as the "elements clause," and the latter portion of paragraph (2) (beginning with "otherwise") is commonly referred to as the "residual 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 determined that petitioner qualified for sentencing under the ACCA based on his three prior federal convictions for bank robbery, in violation of 18 U.S.C. 2113(a) (Supp. IV 1986), which prohibits "tak[ing], or attempt[ing] to take" money belonging to a bank "from the person or presence of another" "by force and violence, or by intimidation." See PSR ¶¶ 48, 68. Petitioner did not object to the Probation Office's determination that he qualified for sentencing under the ACCA. The district court found that petitioner was an armed career criminal and imposed a sentence of 180 months of imprisonment. Pet. App. A3. Petitioner did not appeal his conviction or sentence. Ibid.

3. In 2015, this Court held in Samuel Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557. The Court emphasized that its decision "d[id] not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." Id. at 2563. The Court subsequently made clear that Samuel Johnson's holding is a substantive rule that applies retroactively to cases on collateral review. See Welch, 136 S. Ct. at 1265.

In 2016, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255, in which he relied on Samuel Johnson and argued that federal bank robbery does not qualify as a "violent felony" under the ACCA's elements clause because that offense can be accomplished by nonviolent force or intimidation, and thus his sentence should be vacated. See 16-cv-563 D. Ct. Doc. 1 (June 13, 2016).[1]

The district court, adopting the recommendation of a magistrate judge, denied petitioner's motion. Pet. App. B1-B13; see id. at A1-A19. The court determined that "federal bank robbery, even by intimidation, has as an element the threatened use of force of the type contemplated in [Curtis Johnson]." Id. at B10. The court explained that "[c]ommon sense, context, and the applicable jury instruction requiring that a bank robber's conduct cause 'a person of ordinary sensibilities [to] be fearful of bodily harm' dictate that federal bank robbery involves at least the threatened use of 'force capable of causing physical pain or injury to another person.'" Ibid. (second set of brackets in

[1] Petitioner initially asserted that the district court had sentenced him under the ACCA based on his three prior California convictions for bank robbery, and he argued that Samuel Johnson established that those convictions do not qualify as "violent felon[ies]" under the ACCA. See 16-cv-563 D. Ct. Doc. 1, at 3-5. After the government clarified in its opposition to his motion that the relevant prior convictions supporting petitioner's career-offender sentence were his convictions for federal bank robbery in violation of 18 U.S.C. 2113(a) (Supp. IV 1986), petitioner revised his argument in his reply brief. See Pet. App. A3-A4.

original); see Tenth Circuit Criminal Pattern Jury Instructions § 2.77, at 276 (West 2011); Curtis Johnson, 559 U.S. at 140. And the court rejected petitioner's argument that federal bank robbery does not require proof that the use, attempted use, or threatened use of physical force be "directed at the person of another." Pet. App. B10-B11; see id. at A13 ("In contrast to the crime of shooting at a building, the Court has little difficulty finding that federal bank robbery involves something more than force against property that 'a person happens to occupy at the time.'") (quoting 16-cv-563 Reply Br. 5). The court did, however, grant petitioner's request for a COA. Id. at B13.

4. The court of appeals affirmed. Pet. App. C1-C5. Like the district court, the court of appeals determined that a conviction for federal bank robbery is a "violent felony" under the elements clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(i). Pet. App. C3.

The court of appeals noted its prior decision in United States v. McGuire, 678 Fed. Appx. 643 (10th Cir. 2017), which had found that federal bank robbery qualifies as a "crime of violence" under the Sentencing Guidelines based on a definition whose elements clause is identically worded to Section 924(e)(2)(B)(i). Pet. App. C3. The court also observed "the uniform body of case law in other circuits" holding that bank robbery is a "crime of violence" or a "violent felony." Ibid. And considering the "least serious of the acts criminalized by the [bank-robbery] statute," the court

explained that taking property from another "by intimidation" satisfies the elements clause in Section 924(e)(2)(B)(i) because the bank robbery offense "could exist only if the defendant had intentionally acted in a way that would cause 'a person of ordinary sensibilities' to fear bodily harm." Ibid. (quoting Tenth Circuit Criminal Pattern Jury Instructions § 2.77, at 276).

The court of appeals rejected petitioner's argument that the district court had erred by "equating the fear of bodily harm with the required use of violent physical force." Pet. App. C4. The court of appeals explained that this Court's decision in United States v. Castleman, 572 U.S. 157 (2014), had "specifically rejected the contention that 'one can cause bodily injury without the use of physical force.'" Pet. App. C4 quoting United States v. Ontiveros, 875 F.3d 533, 536 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018)). The court of appeals also rejected petitioner's claim that bank robbery does not require that physical force be directed toward the person of another, reasoning that taking property from another by intimidation "necessarily entails a threat of bodily harm to the person controlling the property." Id. at C3.

ARGUMENT

Petitioner contends (Pet. 17-34) that his prior federal convictions for bank robbery, in violation of 18 U.S.C. 2113(a) (Supp. IV 1986), are not "violent felon[ies]" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i). That contention does

not warrant this Court's review. The court of appeals' decision is correct and in agreement with every other court of appeals to consider the question. This Court has recently and repeatedly denied review of petitions raising this issue, as well as related issues arising under similarly worded federal statutes or the Sentencing Guidelines.[2] It should follow the same course here. No reason exists to hold this petition pending this Court's decision in Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018), which will not affect the outcome of this case. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that federal bank robbery is a "violent felony" under the ACCA's elements clause.

a. Petitioner principally contends (Pet. 22-32) that federal bank robbery does not satisfy the ACCA's elements clause on the theory that commission of bank robbery by "intimidation" does not require the type of physical force described in Curtis Johnson v. United States, 559 U.S. 133, 140 (2010). That contention lacks merit. The ACCA is not limited to predicate

[2] See, e.g., Wilson v. United States, 138 S. Ct. 2586 (2018) (No. 17-8601); Lewis v. United States, 138 S. Ct. 2013 (2018) (No. 17-8483); Schneider v. United States, 138 S. Ct. 638 (2018) (No. 17-5477); Castillo v. United States, 138 S. Ct. 638 (2018) (No. 17-5471); Williams v. United States, 138 S. Ct. 272 (2017) (No. 17-5551); Bruce v. United States, 137 S. Ct. 1580 (2017) (No. 16-7084); Fox v. United States, 137 S. Ct. 1224 (2017) (No. 16-6989); McBride v. United States, 137 S. Ct. 830 (2017) (No. 16-6475); Wingate v. United States, 136 S. Ct. 1364 (2016) (No. 15-5979).

convictions involving completed force or violence; a conviction for an offense involving "attempted" or "threatened" use of physical force also satisfies the ACCA's elements clause. 18 U.S.C. 924(e)(2)(B)(i). And the ACCA is not limited to offenses that involve an express threat; an implied threat of physical force is a "threatened use of physical force." Ibid. See, e.g., United States v. Brewer, 848 F.3d 711, 715-716 (5th Cir. 2017) (holding that federal bank robbery involves a "threatened use of physical force" under the identically-worded definition of "crime of violence" in the Sentencing Guidelines, because that offense requires "at least an implicit threat to use force"); United States v. Watson, 881 F.3d 782, 785 (9th Cir. 2018) (per curiam) (same under 18 U.S.C. 924(c)(3)(A)), cert. denied, No. 18-5022, 2018 WL 3223705 (Oct. 1, 2018); United States v. Doctor, 842 F.3d 306, 310 (4th Cir. 2016) ("[T]he slight or implicit nature of a threat does not render it nonviolent."), cert. denied, 137 S. Ct. 1831 (2017); United States v. Duncan, 833 F.3d 751, 757 (7th Cir. 2016) (recognizing that a threatened use of physical force may be "shown by circumstances that communicated an implicit threat to use physical force, even if there was no explicit threat").

Moreover, the courts of appeals have interpreted the term "intimidation" in 18 U.S.C. 2113(a) to be synonymous with a threatened use of physical force. See, e.g., United States v. Ellison, 866 F.3d 32, 37 (1st Cir. 2017) ("proving 'intimidation' under § 2113(a) requires proving that a threat of bodily harm was

made"); United States v. Armour, 840 F.3d 904, 909 (7th Cir. 2016) ("A bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force * * * because bank robbery under [Section] 2113(a) inherently contains a threat of violent physical force."); United States v. McBride, 826 F.3d 293, 296 (6th Cir. 2016) (same), cert. denied, 137 S. Ct. 830 (2017); United States v. McNeal, 818 F.3d 141, 154 (4th Cir.) (same), cert. denied, 137 S. Ct. 164 (2016); United States v. Selfa, 918 F.2d 749, 751 (9th Cir.) (same), cert. denied, 498 U.S. 986 (1990).

Accordingly, every court of appeals to have considered the issue has concluded that bank robbery under 18 U.S.C. 2113(a) qualifies as a "violent felony" under Section 924(e)(2)(B)(i) or similar provisions. See United States v. McCranie, 889 F.3d 677, 679-681 (10th Cir. 2018); Killon v. United States, 728 Fed. Appx. 19, 21-22 (2d Cir. 2018); United States v. Horsting, 678 Fed. Appx. 947, 949-950 (11th Cir. 2017); Ellison, 866 F.3d at 35-39; United States v. Williams, 864 F.3d 826, 830 (7th Cir.) (citing Armour, 840 F.3d at 909), cert. denied, 138 S. Ct. 272 (2017); United States v. Jones, 854 F.3d 737, 740 & n.2 (5th Cir.), cert. denied, 138 S. Ct. 242 (2017); Holder v. United States, 836 F.3d 891, 892 (8th Cir. 2016) (per curiam); McNeal, 818 F.3d at 153; United States v. Wright, 215 F.3d 1020, 1028 (9th Cir.), cert. denied, 531 U.S. 969 (2000); see generally McNeal, 818 F.3d at 153 ("Our sister circuits have uniformly ruled that other federal crimes

involving takings 'by force and violence, or by intimidation,' have as an element the use, attempted use, or threatened use of physical force.").

Notwithstanding the courts of appeals' unanimous view, petitioner argues (Pet. 26-32) that federal bank robbery by "intimidation," which involves the "'fear of bodily harm' on the part of the victim," does not necessarily require "the threatened use of violent physical force by the defendant." Pet. 26. The premise of petitioner's argument -- that bodily harm can be caused through indirect means that do not involve the use of physical force -- is inconsistent with this Court's decision in United States v. Castleman, 572 U.S. 157 (2014), which recognized that the term "use of physical force" in 18 U.S.C. 922(g)(9) includes causing physical harm both directly and indirectly. 572 U.S. at 170-171. The Court in Castleman explained that "physical force" is a broad term encompassing all "force exerted by and through concrete bodies," including both direct physical contact and indirect contact by, for example, pulling the trigger of a gun to fire a bullet, administering poison, or infecting the victim with a disease. Id. at 170 (citation omitted).

Petitioner argues that Castleman is "explicitly inapplicable to the ACCA context" because that case addressed the application of 18 U.S.C. 921(a)(33)(A)'s definition of "'misdemeanor crime of domestic violence,'" which "encompasses a range of force broader than that which constitutes 'violence' simpliciter." Pet. 27-29

(quoting Castleman, 572 U.S. at 164 & n.4) (quotation marks omitted). But Castleman's reasoning on the point at issue here did not depend on any considerations unique to Section 921(a)(33)(A). Thus, although the Court in Castleman reserved whether a state crime involving "bodily injury" would satisfy the ACCA's elements clause, 572 U.S. at 170, the courts of appeals have, with one exception, uniformly applied Castleman's logic to the "physical force" requirement under that clause and similarly worded provisions. See, e.g., Ellison, 856 F.3d at 37-38; United States v. Hill, 890 F.3d 51, 59 (2d Cir. 2018); United States v. Chapman, 866 F.3d 129, 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), cert. denied, No. 17-8413, 2018 WL 1697291 (Oct. 1, 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 (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 sole exception is the Fifth Circuit's decision in United States v. Rico-Mejia, 859 F.3d 318 (2017), which the Fifth Circuit recently reaffirmed in United States v. Reyes-Contreras, 882 F.3d 113 (2018). But the court of appeals has granted the government's petition for rehearing en banc in Reyes-Contreras. See 892 F.3d 800 (2018) (en banc), No. 16-41218 (argued Sept. 18, 2018). The Fifth Circuit now has the opportunity to adopt the uniform view of the other courts of appeals and to resolve any division that may have existed.[3]

b. Petitioner's additional contentions are likewise incorrect. Petitioner contends (Pet. 18-21) that the courts of appeals disagree about the meaning of "physical force" under Curtis Johnson. But the cases cited by petitioner provide no basis for granting certiorari here. They involve state-law robbery offenses, and none suggests that federal bank robbery fails to satisfy the ACCA's elements clause or analogous definitional provisions, an issue on which the courts of appeals have no disagreement. Every court of appeals to have considered the question has determined that federal bank robbery requires the use, attempted use, or threatened use of sufficient physical force to qualify under these provisions.

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[3] The Third Circuit has sua sponte granted rehearing en banc to consider whether indirectly causing injury qualifies as the "use of physical force" under the ACCA. Order, United States v. Harris, No. 17-1861 (June 7, 2018) (oral argument scheduled for Oct. 10, 2018).

Petitioner also contends (Pet. 32-33) that federal bank robbery is not a violent felony under the ACCA's elements clause because it "does not specify who or what must be the target of" the "force and violence, or intimidation." Pet. 32. As the court of appeals below correctly explained, Section 2113(a) requires "the taking" of property "from the person or presence of a person," and even taking by intimidation "necessarily entails a threat of bodily harm to the person controlling the property." Pet. App. C3. The case cited by petitioner, United States v. Ford, 613 F.3d 1263 (10th Cir. 2010), is inapposite because it considered a separate state-law offense -- criminal discharge of a firearm at an occupied building or vehicle -- which required "force [or violence] against a building or vehicle, but not against the person inside." Id. at 1271 (emphasis omitted).

2. Petitioner alternatively contends (Pet. 9-17) that his petition should be held pending this Court's decision in Stokeling, supra. The question in Stokeling is whether a state-law robbery statute requiring force sufficient to overcome the victim's resistance contains as an element the type of violent force defined in Curtis Johnson. The resolution of that question will not affect this case because the Court will not address whether the "intimidation" element of federal bank robbery requires a threatened use of the type of violent force described in Curtis Johnson. Unlike the Florida robbery statute at issue in Stokeling, which is derived from the common law, this Court has declined to

impute the common law meaning of robbery into the federal bank robbery statute. See Carter v. United States, 530 U.S. 255, 264-266 (2000). Accordingly, no reason exists to hold this petition pending the Court's decision in Stokeling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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