

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

*October Term, 2018*

---

JOSE NIEVES-GALARZA,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondents.*

---

**On Petition for Writ of *Certiorari*  
to the United States Court of Appeals  
for the Third Circuit**

---

**PETITION FOR WRIT OF *CERTIORARI***

---

HEIDI R. FREESE  
Federal Public Defender

RONALD A. KRAUSS  
First Assistant Federal Public Defender  
100 Chestnut Street, Suite 306  
Harrisburg, PA 17101  
(717) 782-2237  
Attorney ID# PA47938  
*Counsel for Petitioner,*  
*Jose Nieves-Galarza*

## Question Presented

For a prior conviction to qualify as a predicate for an enhanced sentence under the Armed Criminal Career Act, it must be for an offense that is a “violent felony”, defined as having “as an element the use . . . of physical force against another.” 18 U.S.C. § 924(e)(2)(B)(i). And that “physical force” must rise to the level of “violent force—that is, force capable of causing pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 140 (2010).

In *United States v. Castleman*, 134 S. Ct. 1405, 1413-15 (2014), the Court confirmed that certain “[m]inor uses of force” do not rise to a level that satisfy the ACCA’s “violent force” requirement, and left open whether *Johnson*’s required causation of pain or injury by physical force must involve the use of “violent force.”

The question presented is:

Did the Third Circuit misread *Castleman* to erroneously require that a conviction under New York’s first-degree robbery statute (N.Y. Penal Law § 160.15(1)) is a valid ACCA predicate, on the grounds that its “serious physical injury” element necessarily involves the use of “violent force”?

## **Table of Contents**

Question Presented .....	i
Table of Authorities.....	iii
Opinions Below.....	2
Jurisdiction.....	2
Statutory Provisions Involved.....	2
Statement of the Case.....	3
Reasons for Granting a Writ of <i>Certiorari</i> .....	6
A. The Circuits are split on whether an offense’s “serious physical injury” element necessarily involves force that rises to the level of “violent force” under <i>Johnson v. United States</i> .....	6
B. The Third Circuit’s decision is incorrect because it misread this Court’s decision in <i>Castleman</i> .....	8
C. This case presents an ideal vehicle to address this issue.....	9
Conclusion.....	10
Certificate of Bar Membership	
Certificate of Service	

## **Contents of Appendix**

Order Denying Petition for Rehearing, United States Third Circuit Court of Appeals, May 7, 2018.....	1a
Opinion and Judgment, United States Third Circuit Court of Appeals, December 21, 2017.....	3a

## **Table of Authorities**

### **Cases**

<i>Chrzanoski v. Ashcroft</i> , 327 F.3d 188 (2d Cir. 2003).....	8
<i>Hohn v. United States</i> , 524 U.S. 293 (1998) .....	2
<i>Johnson v. United States</i> , 559 U.S. 133 (2010) .....	5, 6, 7
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015) .....	4
<i>United States v. Anderson</i> , 695 F.3dd 390 (6th Cir. 2012) .....	6-7
<i>United States v. Calvillo-Palacios</i> , 860 F.3d 1285 (9th Cir. 2017) .....	7
<i>United States v. Castleman</i> , 124 S. Ct. 1405 (2014) .....	<i>passim</i>
<i>United States v. Jennings</i> , 860 F.3d 4509 (7th Cir. 2017) .....	7
<i>United States v. Nieves-Galarza</i> , 718 F. App'x 159 (3d Cir. 2017).....	2, 4
<i>United States v. Vargas-Duran</i> , 356 F.3d 598 (5th Cir. 2004) .....	8

*United States v. Winston*,  
845 F.3d 876 (8th Cir. 2017) ..... 7

*Whyte v. Lynch*,  
807 F.3d 463 (1st Cir. 2015) ..... 7-8

## **Statutes**

18 U.S.C. § 921(a)(33)(A).....	9
18 U.S.C. § 922(g)(1) .....	3-4
18 U.S.C. § 924(a)(2) .....	3
18 U.S.C. § 924(e) .....	<i>passim</i>
18 U.S.C. § 924(e)(2)(B)(i).....	2
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 2255 .....	4, 9
N.Y. Penal Law § 160.10(2) .....	3
N.Y. Penal Law § 160.15(1) .....	3, 5
N.Y. Penal Law § 160.15(4) .....	3, 5

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

*October Term, 2018*

---

JOSE NIEVES-GALARZA,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondents.*

---

**PETITION FOR WRIT OF *CERTIORARI*  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

Petitioner, Jose Nieves-Galarza, by his attorney Ronald A. Krauss, First Assistant Federal Public Defender in the Office of the Federal Public Defender for the Middle District of Pennsylvania, respectfully petitions for a writ of *certiorari* to review the Judgment entered in this case by the United States Court of Appeals for the Third Circuit.

## **OPINION BELOW**

The decision of the United States Court of Appeals for the Third Circuit is published at *United States v. Nieves-Galarza*, 718 F. App'x 159 (3d Cir. 2017)(not precedential), and is included, with the Judgment, in the Appendix. (3a.) Also included is the Court of Appeals' Order denying the Petition for Rehearing. (1a.)

## **JURISDICTION**

The Third Circuit entered its judgment on December 21, 2017. By Order of May 7, 2018, the Third Circuit denied a petition for rehearing and the judgment became final.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 253 (1998).

## **STATUTORY PROVISIONS INVOLVED**

The Armed Career Criminal Act (“ACCA”) defines a “violent felony” as a crime that “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).

The New York statute defining first degree robbery, N.Y. Penal Law §§ 160.15(1), (4), provides that a person is guilty when he forcibly steals property, and when, in the course of the commission of the crime, he: (1) causes serious physical injury to any person who is not a participant in the crime; or (4) displays what appears to be a pistol, revolver, rifle, or other firearm.

The New York statute defining second degree robbery, N.Y. Penal Law § 160.10(2), provides that a person is guilty when he forcibly steals property and when, in the course of the commission of the crime, he displays what appears to be a pistol, revolver, rifle, or other firearm.

## **STATEMENT OF THE CASE**

### **A. Background.**

Petitioner/Appellant Jose Nieves-Galarza pleaded guilty under a plea agreement to possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) & 924(e). In calculating his Guidelines sentencing range, the District Court considered five prior convictions for robbery in New York, and one conviction for a serious drug offense in York, Pennsylvania, when ruling that Nieves-Galarza was subject to an enhanced sentence under the Armed Career Criminal Act (“ACCA”), 18

U.S.C. § 924(e). The District Court ultimately imposed a sentence of 87 months.

Nieves-Galarza filed a Motion to Correct Sentence under 28 U.S.C. § 2255. He argued that in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), his mandatory sentence of 180 months under the ACCA violated the Due Process Clause, because his prior New York state convictions for robbery are no longer violent predicate felonies. Therefore, he should be resentenced to no more than the statutory maximum of 10 years for a violation of 18 U.S.C. § 922(g), with comparable downward departures from his Sentencing Guidelines range. Documents from the New York Queens County Supreme Court, titled “Certificate of Disposition”, stated that three of the robbery convictions were for second-degree robbery, and two convictions were for first-degree robbery

The District Court denied his Section 2255 motion, holding that his prior New York state robbery convictions were violent felonies for ACCA sentencing purposes.

## **B. The Third Circuit Panel’s opinion.**

The Third Circuit Panel’s opinion—reported at 718 F. App’x 159 (3d Cir. 2017) [attached]—affirmed.

The Panel concluded, first, that the first-degree robbery statute in New York, N.Y. Penal Law § 160.15, is a divisible statute. The Panel reviewed the New York State Certificates of Disposition and determined that Nieves-Galarza was convicted under N.Y. Penal Law §§160.15(1), (4).

Section 160.15(1) makes it a crime to forcibly steal property while causing “serious physical injury to any person who is not a participant in the crime.” The Panel ruled that this conviction was a qualifying predicate offense, reasoning that if a defendant causes serious physical injury to a person, *United States v. Castleman*, 124 S. Ct. 1405, 1414-15 (2014) dictates that he has necessarily employed “force capable of causing physical pain or inquiry to another” as required by *Johnson v. United States*, 559 U.S. 133 (2010), thus satisfying ACCA’s violent felony requirement.

Further, section 160.15(4) criminalizes forcibly stealing property while displaying what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm. The Panel similarly ruled that this conviction was a qualifying predicate offense. The Panel focused on “the threatened use of physical force” language in the force clause, and concluded that displaying a firearm necessarily threatens its use, based on New York state courts’ interpretation of the statute. The Panel thus

concluded that because Nieves-Galarza’s convictions for New York State first-degree robbery qualify as a violent felony under the elements clause of the ACCA, the sentence does not violate Due Process.

## **REASONS FOR GRANTING A WRIT OF *CERTIORARI***

There are three primary reasons for granting a Writ of *Certiorari* in this case. First, the Circuits are split on whether an offense’s “serious physical injury” element necessarily involves force that rises to the level of “violent force” under *Johnson*. Second, the Third Circuit’s decision is incorrect, because it misread and misapplied *Castleman*. And third, this case presents an ideal vehicle to address this issue.

### **A. The Circuits are split on whether an offense’s “serious physical injury” element necessarily involves force that rises to the level of “violent force” under *Johnson v. United States*.**

The circuits are split on whether a criminal offense is necessarily an ACCA predicate offense when it includes an element of serious physical injury. The Sixth, Seventh, Eighth, and Ninth Circuits have supported the view that if a criminal offense includes as an element causation of bodily harm or injury, then it necessarily requires the use of violent force, which would then qualify it as an ACCA predicate offense. *See United States v. Anderson*, 695 F.3d 390, 400 (6th Cir. 2012) (“one can knowingly cause

serious physical harm to another only by knowingly using force capable of causing physical pain or injury, i.e., violent physical force") (quotations and brackets omitted); *United States v. Jennings*, 860 F.3d 450, 458-59 (7th Cir. 2017) (applying *Castleman* to ACCA, and stating "a criminal act (like battery) that causes bodily harm to a person necessarily entails the use of physical force to produce the harm"); *United States v. Winston*, 845 F.3d 876, 878 (8th Cir. 2017) (applying *Castleman* to ACCA, and finding no "daylight between physical injury and physical force," and rejecting argument "that a defendant might cause physical injury without using physical force"); *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1290-1291 (9th Cir. 2017) (citing *Castleman* and ruling that "bodily injury [necessarily required] the use of violent, physical force," because "bodily injury" and "physical force" are "synonymous or interchangeable" terms).

But the First, Second, and Fifth Circuits have issued opinions with language that supports the argument that a defendant could be convicted of an offense with an element of physical harm without the use of violent force as defined in *Johnson*. See, e.g., *Whyte v Lynch*, 807 F.3d 463, 469 (1st Cir. 2015) (distinguishing between causation of harm and violent force, and observing that "[c]ommon sense suggests that" the state "can punish conduct that results in 'physical injury' but does not require the

‘use of physical force’’’); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 193-94 (2d Cir. 2003) (agreeing that “there is a difference between the causation of an injury and an injury’s causation by the ‘use of physical force,’” and finding a “logical fallacy” in “equat[ing] the use of physical force with harm or injury”) (citations omitted); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc) (“the fact that the statute requires that serious bodily injury result … does not mean that the statute requires that the defendant have used the force that caused the injury,” recognizing the “difference between a defendant’s causation of an injury and the defendant’s use of force”).

Plainly, this circuit split demonstrates that this Court needs to decide whether an offense with an element of bodily harm or injury necessarily requires “violent force”, or whether such a defendant could be convicted of such an offense even if he only employed *de minimis* force.

**B. The Third Circuit’s decision is incorrect because it misread this Court’s decision in *Castleman*.**

Contrary to the Third Circuit, *Castleman* does not support a holding on the grounds that a criminal offense’s “serious physical injury” element—as in New York’s first-degree robbery statute—necessarily involves the use of “violent force”.

In *Castleman*, the Court clearly distinguished the *violent* force required by Section 924(e) and the less significant force required to constitute a misdemeanor crime of domestic violence, holding that, in the latter case, “the common-law meaning of ‘force’ fits perfectly.” 134 S. Ct. at 1410. The Court specifically held that “Congress incorporated the common-law meaning of ‘force’—namely, offensive touching—in § 921(a)(33)(A)’s definition of ‘misdemeanor crime of domestic violence.’” *Id.* The Court noted, however, that the common-law meaning of force was not included in the ACCA’s definition of force. *Id.* The Court also pointed out that it did not reach the question of “[w]hether or not the causation of bodily injury necessarily entails violent force.” *Id.* at 1413. Because the Supreme Court did not decide whether the causation of bodily injury entails violent force, the Third Circuit erred in relying on *Castleman* for this conclusion.

### **C. This case presents an ideal vehicle to address this issue.**

This case presents an ideal vehicle to address whether, contrary to the Third Circuit’s decision, a criminal offense’s “serious physical injury” element necessarily involves the use of “violent force”. Petitioner preserved this issue by timely filing a Section 2255 motion, timely filing

a Third Circuit appeal of the District Court's denial, and then timely filing a Petition for Rehearing.

## **CONCLUSION**

WHEREFORE, the Petitioner, Jose Nieves-Galarza, respectfully requests that This Honorable Court grant his petition for a writ of *certiorari*.

Respectfully submitted,

/s/ Ronald A. Krauss

RONALD A. KRAUSS, ESQ.  
First Assistant Federal Public Defender  
Attorney ID# PA47938  
100 Chestnut Street, Suite 306  
Harrisburg, PA 17101  
(717) 782-2237  
*Counsel for Petitioner,*  
*Jose Nieves-Galarza*

Date: August 6, 2018

## **CERTIFICATE OF BAR MEMBERSHIP**

I, Ronald A. Krauss, Esq., First Assistant Federal Public Defender, hereby certify that I am a member of the Bar of this Court.

Respectfully submitted,

/s/ *Ronald A. Krauss*  
RONALD A. KRAUSS, ESQ.  
First Assistant Federal Public Defender

Date: August 6, 2018