No. 18-5923

IN THE SUPREME COURT OF THE UNITED STATES

BRENT EUGENE SANCHEZ, 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 the court of appeals correctly denied a certificate of appealability on petitioner's claim that his prior conviction for aggravated assault and battery with a drawn deadly weapon, in violation of Wyo. Stat. Ann. § 6-2-502(a)(iii) (2003), is not a conviction for a "crime of violence" under 18 U.S.C. 924(c)(3)(A).

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OPINION BELOW

The order of the court of appeals (Pet. App. A1–A7) is not published in the Federal Reporter but is reprinted at 739 Fed. Appx. 938.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2018. The petition for a writ of certiorari was filed on September 7, 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 Wyoming, petitioner was convicted on two counts of possessing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). 2 C.A. ROA 17. He was sentenced to 292 months of imprisonment, to be followed by five years of supervised release. Id. at 18-19. Petitioner did not appeal his convictions or sentences. He later filed a motion under 28 U.S.C. 2255 to vacate his sentences. 1 C.A. ROA 4-15. The district court denied his motion and declined to issue a certificate of appealability (COA). Pet. App. B1-B2. The court of appeals similarly denied a COA. Id. at A1-A7.

1. In November 2003, petitioner drove to a woman's residence in Indian country and attempted to lure her into a van belonging to the woman's husband. Presentence Investigation Report (PSR) ¶¶ 3, 5. Petitioner pulled out a pistol and pointed it at the woman's face. PSR ¶ 3. The woman ran inside her house and called the police. Ibid.

In December 2003, petitioner and another individual arrived uninvited to a party at a home in Indian country. PSR ¶¶ 3, 6. Petitioner confronted a guest at the party and used the butt of a pistol to beat him over the head until the pistol discharged and broke into several pieces. Ibid.

In January 2004, petitioner and another individual entered a home in Indian country, where a man and a woman had been watching

television. PSR ¶ 3. Petitioner was armed with a rifle. Ibid. He used the rifle to shove the woman onto the couch and then to hit the man in the mouth. Ibid. Petitioner kept the rifle pointed at the woman until he left with the other individual. Ibid.

2. A federal grand jury in the District of Wyoming returned a seven-count indictment charging petitioner with two counts of aggravated assault and battery in Indian country, in violation of 18 U.S.C. 1153 (2000) and Wyo. Stat. Ann. § 6-2-502(a)(iii) (2003); two counts of assault with a dangerous weapon with intent to do bodily harm in Indian country, in violation of 18 U.S.C. 113(a)(3) and 1153 (2000); and three counts of using and carrying a firearm during and in relation to crimes of violence, in violation of 18 U.S.C. 924(c)(1)(A). 2 C.A. ROA 6-9. Petitioner pleaded guilty to two counts of using and carrying a firearm in furtherance of a crime of violence, in violation of Section 924(c)(1)(A). Id. at 17.

Section 924(c)(1)(A) prohibits using or carrying a firearm "during and in relation to any crime of violence * * * for which the person may be prosecuted in a court of the United States." 18 U.S.C. 924(c)(1)(A). At the time of petitioner's offenses, 18 U.S.C. 1153 (2000) made it a federal crime for an Indian to commit, within "Indian country," "assault with a dangerous weapon," as defined by "the laws of the State in which such offense was committed." 18 U.S.C. 1153(a)-(b) (2000). Wyoming law, in turn, defined "aggravated assault and battery" to include

"[t]hreaten[ing] to use a drawn deadly weapon on another unless reasonably necessary in defense of his person, property or abode or to prevent serious bodily injury to another." Wyo. Stat. Ann. § 6-2-502(a)(iii) (2003).

The crime of violence underlying the first Section 924(c) count to which petitioner pleaded guilty was the incorporated Wyoming offense of aggravated assault and battery with a drawn deadly weapon that petitioner committed by threatening a woman with a pistol in November 2003. 2 C.A. ROA 6-7. The crime of violence underlying the second Section 924(c) count to which petitioner pleaded guilty was the incorporated Wyoming offense of aggravated assault and battery with a drawn deadly weapon that petitioner committed by hitting a man and a woman with a rifle in January 2004. Id. at 8-9.

The district court sentenced petitioner to 60 months of imprisonment on the first count and 232 months of imprisonment on the second count, to run consecutively. 2 C.A. ROA 17-18. Petitioner did not appeal his convictions or sentences.

3. In 2015, this Court held in Samuel Johnson v. United States, 135 S. Ct. 2551, that the "residual clause" of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. at 2555-2557. The Court has subsequently made clear that the holding of Samuel Johnson is a substantive rule

that applies retroactively. See Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

In 2016, petitioner moved to vacate his sentences under 28 U.S.C. 2255. 1 C.A. ROA 4-15, 16-22. Petitioner contended that his Section 924(c)(1)(A) convictions were invalid, on the theory that the incorporated Wyoming offense of aggravated assault and battery with a drawn deadly weapon is not a "crime of violence" as defined in 18 U.S.C. 924(c)(3). 1 C.A. ROA 10-13. Section 924(c)(3) defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B).

Petitioner argued that Section 924(c)(3)(B) is unconstitutionally vague in light of Samuel Johnson. 1 C.A. ROA 6-9. He also argued that Wyoming aggravated assault and battery with a drawn deadly weapon does not have as an element the use or threatened use of physical force under Section 924(c)(3)(A) because the offense may be committed "by threatening to spray mace into a victim's face" or "by threatening to dash a victim with acid." Id. at 11-12. In making that argument, petitioner relied on United States v. Rodriguez-Enriquez, 518 F.3d 1191 (10th Cir. 2008), which had taken the view that "physical force" for purposes

of a similarly worded provision of the then-current Sentencing Guidelines requires a "mechanical impact" and does not include "chemical action." Id. at 1194-1195 (citing United States v. Perez-Vargas, 414 F.3d 1282, 1286 (10th Cir. 2005)).

The district court denied petitioner's Section 2255 motion. 3 C.A. ROA 20-41. The court determined that incorporated Wyoming aggravated assault and battery with a drawn deadly weapon qualifies as a crime of violence under Section 924(c)(3)(A) because the offense has as an element the threatened use of physical force -- namely, "purposefully threatening . . . a victim with a weapon capable of causing death or great bodily harm." Id. at 29 (citation omitted). The court rejected petitioner's contention that the force threatened must be "force of the 'mechanical' variety in order to be a qualifying sort of force." Id. at 30. The court found petitioner's reliance on Rodriguez-Enriquez and Perez-Vargas misplaced because those decisions had been "fundamentally abrogated" by this Court's intervening decision in United States v. Castleman, 572 U.S. 157 (2014), which had held that the "use of physical force" in a provision worded similarly to Section 924(c)(3)(A) encompasses both the direct and the indirect causation of physical harm. 3 C.A. ROA 33-35. Having determined that the Wyoming offense qualified as a crime of violence under Section 924(c)(3)(A), the district court found it unnecessary to address the constitutionality of Section

924(c)(3)(B). Id. at 40. The court declined to issue a COA. Id. at 41.

4. The court of appeals similarly denied a COA. Pet. App. A1-A7. The court observed that, following this Court's decision in Castleman, it had recognized in United States v. Ontiveros, 875 F.3d 533 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018), that "Rodriquez-Enriquez is no longer good law." Pet. App. A6. In light of petitioner's "admi[ssion]" that "his argument for relief 'is dependent on * * * Rodriguez-Enriquez,'" ibid. (quoting Pet. C.A. Br. 7), and the court of appeals' "assessment of controlling precedent," the court declined to issue a COA, id. at A7. The court explained that "reasonable jurists would not find debatable the district court's conclusion that Castleman forecloses the theory of relief [petitioner] propounded under the Rodriguez-Enriquez line of cases." Id. at A6; see id. at A1 ("[Petitioner] admits that his application for a COA must fail because th[e] court [of appeals] has recognized the abrogation of the line of cases upon which [his] bid for relief depends.").

ARGUMENT

Petitioner renews his claim (Pet. 6, 11-15) that incorporated Wyoming aggravated assault and battery with a drawn deadly weapon is not a crime of violence under Section 924(c)(3)(A). The court of appeals correctly declined to issue a COA on that claim. Although petitioner asserts the existence of a circuit conflict on whether the logic of United States v. Castleman, 572 U.S. 157

(2014), extends beyond the context of "misdemeanor crimes of domestic violence," Pet. 7 (citation omitted); see Pet. 7-11, the courts of appeals are now substantially uniform in the application of Castleman's logic to Section 924(c)(3)(A) and other analogous provisions. This Court has recently and repeatedly denied review of the same alleged circuit conflict, and the same result is warranted here.[1] In any event, the question presented is of limited prospective importance because the Wyoming offense at issue here is no longer one that "may be prosecuted in a court of the United States." 18 U.S.C. 924(c)(1)(A).

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented

[1] See, e.g., Ramirez-Barajas v. Whitaker, cert. denied, No. 18-78 (Nov. 19, 2018); Rodriguez v. United States, 139 S. Ct. 87 (2018) (No. 17-8881); Solis-Alonzo v. United States, 139 S. Ct. 73 (2018) (No. 17-8703); Griffin v. United States, 139 S. Ct. 59 (2018) (No. 17-8260); Hughes v. United States, 138 S. Ct. 2649 (2018) (No. 17-7420); Gathers v. United States, 138 S. Ct. 2622 (2018) (No. 17-7694); Green v. United States, 138 S. Ct. 2620 (2018) (No. 17-7299); Robinson v. United States, 138 S. Ct. 2620 (2018) (No. 17-7188); Vail-Bailon v. United States, 138 S. Ct. 2620 (2018) (No. 17-7151); Hernandez v. Sessions, 137 S. Ct. 2180 (2017) (No. 16-860).

were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted).

The court of appeals correctly denied a COA on petitioner's claim that incorporated Wyoming aggravated assault and battery with a drawn deadly weapon is not a crime of violence under Section 924(c)(3)(A). Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck v. Davis, 137 S. Ct. 759, 773 (2017), the Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that] the issues presented are adequate to deserve encouragement to proceed further," ibid. (citation omitted). Petitioner's claim that incorporated Wyoming aggravated assault and battery with a drawn deadly weapon could qualify as a crime of violence only by resort to the now-invalidated residual clause did not "deserve encouragement to proceed further," ibid. (citation omitted), particularly given that petitioner "admit[ted]" in the court of appeals that the court had "recognized the abrogation of the line of cases upon which [his] bid for relief depends," Pet. App. A1.

2. Petitioner's contention that incorporated Wyoming aggravated assault and battery with a drawn deadly weapon is not a crime of violence under Section 924(c)(3)(A) lacks merit.

In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court held that the phrase "physical force" in a provision of the ACCA referring to "the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C.

924(e)(2)(B)(i), means "force capable of causing physical pain or injury to another person," 559 U.S. at 140. That standard does not necessarily extend to a statute like Section 924(c)(3)(A), which encompasses any offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A) (emphasis added). But even assuming that Curtis Johnson's force standard applies to Section 924(c)(3)(A), incorporated Wyoming aggravated assault and battery with a drawn deadly weapon would still qualify as a crime of violence.

Under Wyo. Stat. Ann. § 6-2-502(a)(iii) (2003), "[a] person is guilty of aggravated assault and battery if he * * * [t]hreaten[ed] to use a drawn deadly weapon on another." "'Deadly weapon' means but is not limited to a firearm, explosive or incendiary material, motorized vehicle, an animal or other device, instrument, material or substance, which in the manner it is used or is intended to be used is reasonably capable of producing death or serious bodily injury." Id. § 6-1-104(a)(iv). And the statute requires that the weapon be "drawn" when the threat to "use" the weapon is made. Id. § 6-2-502(a)(iii). The threatened use of a drawn weapon capable of producing death or serious bodily injury plainly constitutes the threatened use of "force capable of causing physical pain or injury." Curtis Johnson, 559 U.S. at 140.

Petitioner, however, contends otherwise (Pet. 4), asserting that incorporated Wyoming aggravated assault and battery with a

drawn deadly weapon "could be committed by threatening to employ a chemical weapon such as anthrax" and that bodily injury or death caused through indirect means -- such as chemical poisoning -- do not involve the "use * * * of physical force." That legal premise, however, is inconsistent with this Court's decision in Castleman, which recognized that the phrase "use of * * * physical force" in a provision worded similarly to Section 924(c)(3)(A) includes both the direct and indirect causation of physical harm. 18 U.S.C. 921(a)(33)(A); see Castleman, 572 U.S. at 171. Castleman explained that "'physical force' is simply 'force exerted by and through concrete bodies,' as opposed to 'intellectual force or emotional force.'" 572 U.S. at 170 (quoting Curtis Johnson, 559 U.S. at 138). Castleman accordingly determined that force may be applied directly -- through immediate physical contact with the victim -- or indirectly, such as by shooting a gun in the victim's direction, administering poison, infecting the victim with a disease, or "resort[ing] to some intangible substance, such as a laser beam." Ibid. (citation and internal quotation marks omitted). The Court reasoned that when, for example, a person "sprinkles poison in a victim's drink," id. at 171 (citation omitted), he or she has used force because the "'use of force' in [that] example is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm," ibid. (second set of brackets in original).

Petitioners' examples thus involve the "threatened use of physical force," 18 U.S.C. 924(c)(3)(A), under the logic of Castleman. If, for instance, a person "threaten[ed] to employ a chemical weapon such as anthrax," Pet. 4, that person has threatened to "employ[] [that chemical weapon] knowingly as a device to cause physical harm," Castleman, 572 U.S. at 171. Likewise, if a person "threaten[ed] to spray mace into a victim's face," 1 C.A. ROA 12, that person has threatened to "employ[] [mace] knowingly as a device to cause physical harm," Castleman, 572 U.S. at 171.

Petitioner argues (Pet. 12-15) that Castleman is inapplicable to Section 924(c)(3)(A) because that decision addressed the application of 18 U.S.C. 921(a)(33)(A)'s definition of "'misdemeanor crime of domestic violence,'" Castleman, 572 U.S. at 162-163, which "encompasses a range of force broader than that which constitutes 'violence' simpliciter," id. at 164-165 n.4. 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 "the causation of bodily injury necessarily entails violent force" of the sort that petitioner views to be required here, 572 U.S. at 167, the courts of appeals that have addressed the question are substantially

uniform in the application of Castleman's logic to Section 924(c)(3)(A) and other analogous provisions.[2]

3. Petitioner does not point to any conflict among the courts of appeals on whether Wyoming aggravated assault and battery with a drawn deadly weapon qualifies as a crime of violence under Section 924(c)(3)(A). Instead, petitioner asserts the existence of a circuit conflict on whether the logic of Castleman extends beyond the context of "misdemeanor crimes of domestic violence." Pet. 7 (citation omitted); see Pet. 7-11. Petitioner cites (Pet. 8-9) decisions from the First and Fifth Circuits, which he asserts "have held that Castleman plays no role when determining the definition of 'physical force' in the felony context."

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[2] See, e.g., United States v. García-Ortiz, 904 F.3d 102, 107-108 (1st Cir. 2018); United States v. Hill, 890 F.3d 51, 58-60 (2d Cir. 2018), petition for cert. pending, No. 18-6798 (filed Nov. 20, 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, 139 S. Ct. 63 (2018); United States v. Jennings, 860 F.3d 450, 458-460 (7th Cir. 2017), cert. denied, 138 S. Ct. 701 (2018); United States v. Winston, 845 F.3d 876, 878 (8th Cir.), cert. denied, 137 S. Ct. 2201 (2017); 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 Third Circuit has recently granted rehearing en banc to consider whether the causation of injury entails the "use * * * of physical force" under the ACCA. See Order at 1, United States v. Harris, No. 17-1861 (3d Cir. June 7, 2018).

The First Circuit decision petitioner cites, however, does not indicate any division in the courts of appeals on this issue. Pet. 9 (citing Whyte v. Lynch, 807 F.3d 463, 471 (2015)). In Whyte, the First Circuit 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). 807 F.3d at 466-471. But the First Circuit later explained that its decision in Whyte did not foreclose the argument that Castleman applies beyond "the misdemeanor-crime-of-domestic-violence context." United States v. Edwards, 857 F.3d 420, 426 n.11, cert. denied, 138 S. Ct. 283 (2017). And in recent decisions, the First Circuit has extended the logic of Castleman to Section 924(c)(3)(A) and analogous provisions. See United States v. García-Ortiz, 904 F.3d 102, 107-108 (2018) (explaining, in a case involving Section 924(c)(3)(A), that "a threat to poison someone involves the threatened use of force capable of causing physical injury, and thus does involve violent force" under Curtis Johnson); United States v. Ellison, 866 F.3d 32, 37-38 (2017) (rejecting, in light of Castleman, the argument that "a threat to poison" is not a "'threatened use of physical force'" under Sentencing Guidelines § 4B1.2(a) (2015), and noting that the First Circuit had previously "rejected the same argument" in the ACCA context).

The Fifth Circuit decision petitioner cites (Pet. 9), United States v. Rico-Mejia, 859 F.3d 318 (2017), did rest on reasoning that Castleman rejected. But after the petition for a writ of

certiorari in this case was filed, the Fifth Circuit en banc recognized that "[t]he panel decision in Rico-Mejia is incompatible with Castleman" and "expressly disapprove[d] its conclusion." United States v. Reyes-Contreras, No. 16-41218, 2018 WL 6253909, at *8 (Nov. 30, 2018); see id. at *13 (overruling Rico-Mejia). The en banc court thus adopted the uniform view of the other circuits that "Castleman is not limited to cases of domestic violence," resolving any division that may have existed. Id. at *9.[3]

4. Petitioner also asserts (Pet. 10) that the Tenth Circuit's decision in United States v. Ontiveros, 875 F.3d 533 (2017), cert. denied, 138 S. Ct. 2005 (2018), on which the court of appeals relied, see Pet. App. A6-A7, "stands alone" in interpreting Castleman to mean that acts of omission can constitute violent force. That contention lacks support. In Ontiveros, the Tenth Circuit considered whether Colorado second-degree assault, which requires that the offender "cause[] serious bodily injury" to another with intent to cause bodily injury, Colo. Rev. Stat. § 18-3-203(1)(g) (2011), involved the "use of physical force" under the Sentencing Guidelines. See 875 F.3d at 535-536. The court expressly agreed with "every circuit that has looked at this

[3] As noted above, see p. 13 n.2, supra, the question whether the causation of injury entails the "use * * * of physical force" under the ACCA is currently pending before the en banc Third Circuit. See also United States v. Mayo, 901 F.3d 218, 228-230 (3d Cir. 2018); United States v. Chapman, 866 F.3d 129, 133 (3d Cir. 2017), cert. denied, 138 S. Ct. 1582 (2018).

issue," aside from the Fifth Circuit at the time, in determining that "Castleman's logic applies to 'physical force' in the context of violent felonies." Id. at 537-538.

The Tenth Circuit also reasoned that this Court's analysis in Castleman indicated that the "use . . . of physical force" could be predicated on an omission, as well as an affirmative act. Ontiveros, 875 F.3d at 538. Although petitioner contends (Pet. 6, 10) that only the Tenth Circuit has concluded that causation of bodily injury necessarily requires force even if the offense can be committed by the failure to act, he identifies no circuit conflict on that point. And to the extent that Ontiveros might be in tension with United States v. Mayo, 901 F.3d 218, 228-230 (3d Cir. 2018), the Third Circuit is currently considering en banc its approach to these issues. See p. 13 n.2, supra. This Court denied a petition for a writ of certiorari in Ontiveros, 138 S. Ct. 2005 (2018) (No. 17-8367), and the same result is warranted here.

In any event, this case would be a poor vehicle to address the failure-to-act question. The text of the Wyoming statute does not encompass acts of omission. See Wyo. Stat. Ann. § 6-2-502(a)(iii) (2003) (stating that a "person is guilty of aggravated assault and battery if he * * * [t]hreatens to use a drawn deadly weapon on another") (emphasis added). Nor does petitioner cite any state-court decision in which the statute has been applied to an omission. See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) (requiring "a realistic probability, not a

theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime").

5. At all events, further review is unwarranted because whether Wyoming aggravated assault and battery with a drawn deadly weapon is a crime of violence under Section 924(c)(3)(A) is a question of limited prospective importance. To qualify as a predicate for a Section 924(c)(1)(A) conviction, an offense must be a "crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States." 18 U.S.C. 924(c)(1)(A). At the time of petitioner's offenses, Section 1153 made it a federal crime for an Indian to commit "assault with a dangerous weapon," as defined by state law, within Indian country. 18 U.S.C. 1153(a)-(b) (2000). Wyoming aggravated assault and battery with a drawn deadly weapon was therefore an offense "for which the person may be prosecuted in a court of the United States." 18 U.S.C. 924(c)(1)(A).

In 2013, however, Congress amended Section 1153 to remove the reference to "assault with a dangerous weapon." Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Tit. IX, § 906(b), 127 Stat. 125. The Wyoming offense at issue here therefore could not "be prosecuted in a court of the United States" under current law and serve as a predicate offense for purposes of Section 924(c)(1)(A). 18 U.S.C. 924(c)(1)(A). Because the question presented is of limited prospective importance, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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