No. 18-6005

IN THE SUPREME COURT OF THE UNITED STATES

TRAYON L. WILLIAMS, 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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QUESTIONS PRESENTED

1. Whether the court of appeals lacked authority to determine that petitioner had forfeited a claim of error because the government did not itself rely on forfeiture in addressing that claim.

2. Whether petitioner's prior state conviction for aggravated battery, in violation of Kan. Stat. Ann. § 21-5413(b)(1)(B) (West 2014 Supp.), was a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(1) (2015).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-16a) is reported at 893 F.3d 696. The order of the district court (Pet. App. 17a-34a) is not published in the Federal Supplement but is available at 2017 WL 1332721.

JURISDICTION

The revised judgment of the court of appeals following the grant of rehearing in limited part was entered on June 15, 2018. The petition for a writ of certiorari was filed on September 13, 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). Judgment 1. He was sentenced to 40 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-16a.

1. On December 1, 2015, police in Wichita, Kansas, responded to a call to investigate an unknown vehicle parked in a residential driveway. Presentence Investigation Report (PSR) ¶ 14. Petitioner, who was in the vehicle, ignored an officer's instructions to stop and drove away with the headlights off. Ibid. Following a pursuit in which petitioner committed a number of traffic violations, police apprehended petitioner. Ibid. A search of petitioner revealed a small baggie of marijuana in his sock. PSR ¶ 15. A search of petitioner's vehicle uncovered a loaded firearm on the floorboard in front of the driver's seat. PSR ¶ 16.

A federal grand jury returned a superseding indictment charging petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and one count of possession of a controlled substance, in violation of 21 U.S.C. 844(a). Superseding Indictment 1-2. Petitioner entered into a plea

agreement in which he agreed to plead guilty to the felon-in-possession count. Plea Agreement 1; see Plea Tr. 22.

2. The Probation Office prepared a presentence report in accordance with the 2015 edition of the United States Sentencing Commission Guidelines Manual. PSR ¶ 24. The presentence report proposed a base offense level of 14. PSR ¶ 25; see Sentencing Guidelines § 2K2.1(a)(6)(A) (2015) (providing a base level of 14 if a defendant "was a prohibited person at the time the defendant committed the instant offense").

The government objected to that base offense level, arguing that petitioner's base offense level should be 20 under Sentencing Guidelines § 2K2.1(a)(4)(A), which applies if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." See PSR ¶ 124. Petitioner qualified for the greater offense level, the government argued, because he had previously been convicted of a crime of violence, namely, aggravated battery under Kan. Stat. Ann. § 21-5413(b)(1)(B) (West 2014 Supp.). PSR ¶¶ 41, 125-129. The government explained that a defendant commits Kansas aggravated battery in violation of that section by "knowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." PSR ¶ 129 (quoting Kan. Stat. Ann. § 21-5413(b)(1)(B) (West 2014 Supp.)).

At petitioner's sentencing hearing, the district court sustained the government's objection and set petitioner's base offense level at 20. Sent. Tr. 7-9; see Pet. App. 17a. After applying other adjustments, the court determined that petitioner's total offense level was 17, which when combined with petitioner's criminal history category of V yielded an advisory Guidelines range of 46 to 57 months of imprisonment and one to three years of supervised release. Sent. Tr. 9. The court sentenced petitioner to a 40 months of imprisonment, to be served concurrently with a state sentence that petitioner was already serving, followed by three years of supervised release. Id. at 24.

The district court later issued a memorandum explaining its ruling on the government's objection. Pet. App. 17a-34a. The court observed that petitioner had been convicted under Kan. Stat. Ann. § 21-5413(b)(1)(B) (West 2014 Supp.), which sets forth "two distinct offenses": one for aggravated battery "with a deadly weapon," and another for aggravated battery "in any manner whereby great bodily harm, disfigurement or death can be inflicted." Pet. App. 20a-21a (citations omitted). The court determined (id. at 21a-34a) that a conviction for either offense qualifies as a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(1), which defines that term to include any offense which has "as an element the use, attempted use, or threatened use of physical force against the person of another."

The district court rejected petitioner's argument that the statute's mens rea of "knowingly" disqualified the offense from being a crime of violence. Pet. App. 21a-26a. The court explained that this Court has held that the word "use" in a similar context means "'active employment,'" id. at 22a (quoting Leocal v. Ashcroft, 543 U.S. 1, 9 (2004)), and that knowingly causing bodily harm to another person "necessarily requires an offender to take action when he or she was aware that his or her action was reasonably certain to cause bodily harm," id. at 24a. The court therefore reasoned that a mens rea of "knowingly" requires "active employment." Ibid.

The district court also found (Pet. App. 26a-34a) that an offender necessarily uses "physical force" when violating either of the two crimes listed in Kan. Stat. Ann. § 21-5413(b)(1)(B). Relying on United States v. Treto-Martinez, 421 F.3d 1156 (10th Cir. 2005), cert. denied, 546 U.S. 1118 (2006), the court determined that causing bodily harm with a deadly weapon (the first crime) requires the use of "physical force by means of an instrument calculated or likely to produce bodily injury." Pet. App. 29a. Similarly, the court determined that causing bodily harm "in any manner whereby great bodily harm, disfigurement or death can be inflicted" (the second crime) requires the use of "force that is capable of causing physical pain or injury to another person." Id. at 33a-34a (citation omitted). Both of the

crimes listed in the Kansas statute thus qualified as crimes of violence under the Guidelines.

3. The court of appeals affirmed. Pet. App. 1a-16a.

The court of appeals first determined that "knowing" conduct can constitute a crime of violence under Section 2K2.1. Pet. App. 5a-7a. The court stated that to qualify as a crime of violence, "the crime must require intent or purpose," and not merely "reckless conduct." Id. at 5a. The court had previously held that a mens rea of "knowing" suffices under a "virtually identical" provision in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i). Pet. App. 6a. And it reasoned that because "knowing" conduct under Kansas law "is separate[] * * * from conduct that is accidental, negligent, or reckless," it was thus sufficient to satisfy the requirements for a crime of violence under the Sentencing Guidelines. Id. at 6a-7a.

The court of appeals declined to consider petitioner's forfeited argument that Kansas's definition of "knowing" conduct is "indistinguishable from recklessness." Pet. App. 7a. The court observed that petitioner had failed in his brief to provide a record citation identifying where the issue had been addressed in the district court and that at oral argument, petitioner had "conceded that he had not raised the issue in district court." Id. at 8a. Although petitioner later filed a supplemental letter asserting that in fact he had presented the argument to the

district court in a sentencing brief, in the court of appeals' view that sentencing brief "had not included an argument that Kansas's definition of 'knowing' conduct was equivalent to recklessness." Ibid.

The court of appeals noted that, because the government did not rely on petitioner's forfeiture in its appellate brief, "[t]he government's omission [left the court of appeals] with 'dueling waiver/forfeitures.'" Pet. App. 9a (quoting United States v. Rodebaugh, 798 F.3d 1281, 1314 (10th Cir. 2015) (internal quotation marks omitted)). The court reasoned that it "must exercise discretion in deciding whose forfeiture or waiver to overlook," and in exercising that discretion, the court would "(1) weigh the harms from each party's failure to adequately present its argument and (2) consider the adequacy of input from the parties." Ibid. (citing Rodebaugh, 798 F.3d at 1314-1317, and Abernathy v. Wandes, 713 F.3d 538, 552 (10th Cir. 2013), cert. denied, 572 U.S. 1063 (2014)). The court of appeals observed that neither party had briefed the issue in the district court and that petitioner had not cited any judicial opinion supporting his position in the court of appeals. Id. at 9a-10a. The court further observed that "no other federal court of appeals has expressly addressed this issue," id. at 10a, but that one of its own unpublished decisions, Marin-Gonzales v. Sessions, 720 Fed. Appx. 496 (10th Cir. 2018), addressed a similar issue and "casts doubt" on petitioner's argument, Pet.

App. 10a-11a. Therefore, "[w]eighing the relative harms and considering the lack of input from the government and the uncertainty in the resolution, [the court] decline[d] to reach the merits of [petitioner's] forfeited argument." Id. at 11a.

The court of appeals also determined that petitioner's conviction qualified as a crime of violence because physical force was necessarily an element of the offense. Pet. App. 12a-15a. The court relied on its prior holding in Treto-Martinez, where it had found that "a prior version of Kansas's crime of aggravated battery required the use or threatened use of physical force and qualified as a crime of violence under the guidelines." Id. at 13a (citing 421 F.3d at 1159-1160). The court explained that its rationale in Treto-Martinez -- that the statute required "physical contact with another person in a way that could cause great bodily harm, disfigurement or death" -- "applies equally to" the statute underlying petitioner's conviction. Ibid.

The court of appeals observed (Pet. App. 14a) that petitioner's argument that using force and causing injury are distinct elements was foreclosed by circuit precedent. United States v. Ontiveros, 875 F.3d 533 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018) (No. 17-8367). The court explained that in United States v. Castleman, 572 U.S. 157, 169 (2014), this Court "specifically rejected the contention that one can cause bodily

injury without the use of physical force." Pet. App. 14a (citations and internal quotation marks omitted).

ARGUMENT

Petitioner contends (Pet. 9-19) that the court of appeals lacked authority to find that he had forfeited his argument that the mens rea of "knowingly" equates to recklessness under Kansas law because the government viewed petitioner as having preserved this claim. That contention lacks merit, as a federal court may adopt its own interpretation of the law, including the applicable scope or standard of review, notwithstanding the submissions of the parties. No conflict exists in the circuit courts on that settled principle. And the court of appeals' reasons for declining to explore petitioner's argument are equivalent to a determination that any error was not plain. This Court recently denied a petition for a writ of certiorari presenting a similar question, see Kearn v. United States, 138 S. Ct. 2025 (2018) (No. 17-7210), and the same result is warranted here.

Petitioner also contends (Pet. 32-40) that his prior conviction for Kansas aggravated battery did not warrant an upward adjustment to his base offense level because it does not constitute a "crime of violence" under Section 4B1.2(a)(1). 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. This Court recently denied a

petition for a writ of certiorari presenting a similar question, see McMahan v. United States, No. 18-5393 (Nov. 5, 2018), and the same result is warranted here.

1. Petitioner argues (Pet. 13-23) that the court of appeals lacked authority to determine that he had forfeited his argument that Kansas's definition of "knowing" conduct equates to recklessness. That contention lacks merit. The court of appeals had authority to find petitioner's argument to be forfeited even though the government did not rely on petitioner's forfeiture in its appellate brief. And its reasoning indicates that it did not find any error here to be plain, so as to warrant relief under Federal Rule of Criminal Procedure 52(b).

a. Federal Rule of Criminal Procedure 51(b) "tells parties how to preserve claims of error" in federal criminal cases. Puckett v. United States, 556 U.S. 129, 135 (2009). As relevant here, a party must "inform[] the court -- when the court ruling or order is made or sought -- of * * * the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). Failure to follow that rule precludes a party from raising the unpreserved issue on appeal unless the party can demonstrate a "plain error that affects substantial rights." Fed. R. Crim. P. 52(b); see Puckett, 556 U.S. at 135; United States v. Olano, 507 U.S. 725, 732 (1993). Here, petitioner argued in the court of appeals that Kansas's definition of "knowing" conduct is

indistinguishable from recklessness, and the government addressed the argument on the merits without asserting that petitioner had forfeited his argument by failing to raise it in the district court. Pet. App. 7a-9a.

The court of appeals, however, reasonably determined that petitioner had failed to raise the argument in the district court. Cf., e.g., United States v. Simmons, 587 F.3d 348, 357 (6th Cir. 2009) ("If * * * defense counsel had made a more specific objection, the judge might have defended his decision and [the court of appeals], in turn, would have the benefit of his explanation in assessing the adequacy of the proceedings."), cert. denied, 559 U.S. 1079 (2010). Indeed, the court noted that petitioner himself "conceded" at oral argument that he had not raised this issue in district court. Pet. App. 8a. Petitioner argues, as he did in his post-argument letter to the court of appeals, that he preserved the issue in district court by referring to Kansas's "dilute[d] scienter requirement" and informing the district court that the relevant question was "whether a crime of violence under § 4B1.2 may be committed recklessly." Pet. 17 (citations and internal quotation marks omitted; brackets in original). He also notes that the district court explained that the Kansas statute at issue "does not allow for a conviction based on reckless or criminally negligent conduct." Pet. 18 (citation omitted). Petitioner, however, does not identify any portion of

the district court record where he specifically argued that Kansas's definition of "knowing" equates to recklessness. And in any event, the factbound issue of how best to read petitioner's district-court briefing in this particular case does not warrant this Court's review.

Petitioner argues (Pet. 13-19) for a broad rule that a court of appeals must always consider forfeited legal arguments if the government does not rely on the forfeiture. That position is unsound. A court has independent authority to interpret federal statutes or rules of procedure, and the parties' joint view on the proper resolution of a legal question, such as the applicable standard of review, "is by no means dispositive." Roberts v. Galen of Va., Inc., 525 U.S. 249, 253 (1999) (per curiam); accord, e.g., Grove City Coll. v. Bell, 465 U.S. 555, 562 n.10 (1984) (explaining that a party's concession regarding interpretation of statute was "not binding"); see also NASA v. Nelson, 562 U.S. 134, 163 n.* (2011) (Scalia, J., concurring in the judgment) ("We are not bound by a litigant's concession on an issue of law.").

To be sure, "a federal court does not have carte blanche to depart from the principle of party presentation," and sua sponte consideration of an argument not raised by the parties can sometimes amount to an abuse of discretion. Wood v. Milyard, 566 U.S. 463, 472 (2012) (finding abuse of discretion where court of appeals raised a statute-of-limitations defense on its own

initiative). But petitioner identifies no support for his categorical assertion that a court of appeals may never find that a party has forfeited an argument unless the government advocates doing so. To the contrary, it is well settled that questions about whether parties preserved (or forfeited) legal arguments are "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106, 121 (1976). There is "no general rule." Ibid.

Although petitioner briefly argues (Pet. 18) that the court of appeals erred by failing to expressly apply plain-error review to his forfeited claim, the decision below makes clear that the court did not find that petitioner identified a plain or obvious error, as would be required for petitioner to prevail, see United States v. Olano, 507 U.S. 725, 734 (1993). The court explained that petitioner had "not identified a single opinion supporting his assertion" and that at least one unpublished opinion of that court "casts doubt" on petitioner's argument. Pet. App. 10a-11a (citing Marin-Gonzales v. Sessions, 720 Fed. Appx. 496 (10th Cir. 2018)). Therefore, even though the court of appeals did not expressly refer to plain-error review, it made clear that it found no plain or obvious error.

b. Petitioner incorrectly suggests (Pet. 9-13) that other courts of appeals would view themselves as powerless to find that a party forfeited an argument in similar circumstances. Although

courts often are willing to entertain an unpreserved argument when the government does not invoke forfeiture, see Pet. 9-11 (collecting examples), they are not required to do so, and none of the cases cited by petitioner holds that a court lacks authority to apply Rule 52(b) in those circumstances.

The cases petitioner cites (Pet. 11-13) from the Eighth and Tenth Circuits recognize that courts of appeals have "discretion" to determine whether to apply plain-error review to an unpreserved argument when no party urges them to do so. See United States v. Rodebaugh, 798 F.3d 1281, 1314 (10th Cir. 2015) (per curiam) (noting that waiver "is discretionary, not mandatory," and deciding to invoke plain-error review despite the government's waiver); id. at 1308 (Matheson, J., dissenting) (recognizing that "[t]his panel has discretion to overlook the Government's waiver" but concluding that "I would choose not to exercise it here"); United States v. Bain, 586 F.3d 634, 639 n.4 (8th Cir. 2009) (per curiam) (noting that "[a] party's concession on the standard of review does not bind the court"), cert. denied, 562 U.S. 946 (2010). The cases cited by petitioner therefore do not conflict with the decision below on the question presented.

Indeed, the Tenth Circuit itself has on some occasions declined to hold that a defendant has forfeited a claim when the government has not asserted a forfeiture argument. See, e.g., United States v. Heckenliable, 446 F.3d 1048, 1049 n.3, cert.

denied, 549 U.S. 924 (2006); United States v. Reider, 103 F.3d 99, 103 n.1 (1996); cf. United States v. McGehee, 672 F.3d 860, 873 n.5 (2012) (noting that "a colorable argument could be advanced that we should overlook [defendant's] apparent failure to preserve his acceptance-of-responsibility argument because the government forfeited the right to object to it," but ultimately applying plain-error review). Thus, any distinctions between the courts of appeals on when to apply plain-error review in the absence of a government request to do so amount at most to permissible variations in the exercise of discretion that do not warrant this Court's review. See Singleton, 428 U.S. at 121 (leaving preservation decisions "primarily to the discretion of the courts of appeals"). And petitioner identifies no court of appeals that would have granted plain-error relief in the circumstances of this case.

2. The court of appeals correctly determined that petitioner's prior conviction for aggravated battery under Kan. Stat. Ann. § 21-5413(b)(1)(B) (West 2014 Supp.) is a "crime of violence" under Section 4B1.2(a)(1) because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (2015).

a. In Curtis Johnson v. United States, 559 U.S. 133 (2010) the Court defined "physical force" under the analogous elements clause of ACCA, 18 U.S.C. 924(e)(2)(B)(i), to "mean[] 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)) (brackets in original).

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. § 21-5413(b)(1)(B) (West 2014 Supp.), requires that the offender "knowingly caus[e] bodily harm to another person with a deadly weapon" or "in any manner whereby great bodily harm, disfigurement or death can be inflicted." Ibid. Because Kansas aggravated battery expressly requires employing a deadly weapon or some other method that "can" inflict great bodily harm to actually cause 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 both forms of the offense defined in the Kansas statute "involve[] the use or threatened use of physical force." Pet. App. 15a.

That determination accords with this Court's explication of the phrase "use of physical force" in United States v. Castleman, 134 S. Ct. 1405 (2014). There, 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). Castleman, 134 S. Ct. at 1409 (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 1413 (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).

Petitioner's view (Pet. 32-34) that his prior conviction cannot qualify as a crime of violence rests on the premise that a statute's "plain text" must "have an element of violent force" to

constitute "violent force." But petitioner cites no decision of this Court supporting that putative textual rule. The words "violent force," "forcibly," or "by force" (Pet. 34-37) 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.

b. Petitioner contends (Pet. 25-30) that this Court's review is warranted because the decision below implicates a division among the circuit courts on the issue of whether statutes that include as an element the causation of bodily harm necessarily require the use of violent force. Specifically, petitioner cites (Pet. 25-27) decisions from the First, Third, 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, every court of appeals with criminal jurisdiction has invoked Castleman's logic in the context of the "use of physical force" requirement in Sentencing Guidelines § 4B1.2(a)(1) and similarly worded provisions. 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, 59 (2d Cir. 2018); United States v. Chapman, 866 F.3d 129, 132-133 (3d Cir. 2017), cert.

denied, 138 S. Ct. 1582 (2018) (No. 17-8173); United States v. Reid, 861 F.3d 523, 528-529 (4th Cir.), cert. denied, 138 S. Ct. 462 (2017) (No. 17-6359); United States v. Verwiebe, 874 F.3d 258, 261 (6th Cir. 2017), cert. denied, No. 17-8413 (Oct. 1, 2018); United States v. Jennings, 860 F.3d 450, 458–460 (7th Cir. 2017), cert. denied, 138 S. Ct. 701 (2018) (No. 17-6835); United States v. Rice, 813 F.3d 704, 705–706 (8th Cir.), cert. denied, 137 S. Ct. 59 (2016) (No. 15-9255); Arellano Hernandez v. Lynch, 831 F.3d 1127, 1131 (9th Cir. 2016), cert. denied, 137 S. Ct. 2180 (2017) (No. 16-860); United States v. Ontiveros, 875 F.3d 533, 537-538 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018) (No. 17-8367); 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.), petition for cert. pending, No. 18-370 (filed Sept. 20, 2018).

The only outlier is the Fifth Circuit's decision in United States v. Rico-Mejia, 859 F.3d 318 (2017), which the Fifth Circuit reaffirmed in United States v. Reyes-Contreras, 882 F.3d 113 (2018). But the Fifth Circuit has recently granted the government's petition for rehearing en banc in Reyes-Contreras to revisit its previous view on that issue. See United States v. Reyes-Contreras, 892 F.3d 800 (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 might have existed.

The prior decisions of the First, Third, and Fourth Circuits that petitioner cites (Pet. 25-27) 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 has also recently suggested that Castleman's logic has relevance outside the context of the specific statute at issue there, see García-Ortiz, 904 F.3d at 107-108.

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 here has no application to "illegal sale[s]," ibid.; it requires knowing use of a deadly weapon or other method that can inflict "great bodily harm, disfigurement or death," Kan. Stat. Ann. § 21-3414(a)(1)(C) (West 2002 Supp.). And the Fourth Circuit has expressly recognized that Castleman's reasoning is not limited to the statute directly at issue in that case. See Reid, 861 F.3d at 528-529.

Nor does the Third Circuit's decision in United States v. Mayo, 901 F.3d 218 (2018), which cited Middleton, suggest that the Third Circuit would have reached a different result in this case. See Mayo, 901 F.3d at 228-229. In that case, the court held that Pennsylvania aggravated assault, in violation of 18 Pa. Cons. Stat. § 2702(a)(1) (West 1993), does not necessarily require the use of "physical force" because it "criminalizes certain acts of omission," Mayo, 901 F.3d at 230. By contrast, the Kansas aggravated battery statute at issue in this case requires that an offender "knowingly caus[e] bodily harm to another person," Kan. Stat. Ann. § 21-5413(b)(1)(B), and petitioner does not contend that the statute criminalizes omissions. Furthermore, the Third Circuit might reconsider the issue decided in Mayo in its en banc review of United States v. Harris, No. 17-1861.

c. In any event, further review of the second question presented in this case is unwarranted because it pertains only to

the proper interpretation of the Sentencing Guidelines. This Court ordinarily leaves issues of Sentencing Guidelines application in the hands of the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Given that the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. See ibid.; see also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2018