

No. _____

IN THE
Supreme Court of the United States

JUAN LOPEZ-HERNANDEZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether federal courts applying the categorical approach must rely on state court decisions that establish the elements of state court statute of convictions rather than engaging in their own statutory interpretation.

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OPINION BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit can be found on pages 1 through 2 of the attached appendix.

JURISDICTION

The court of appeals entered judgment on September 18, 2018. Pet. App. 1a. It denied the petition for rehearing or rehearing en banc on January 18, 2019. Pet. App. 3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Petitioner lost his status as a lawful permanent resident, was removed from the United States, and was later arrested and prosecuted for illegal re-entry.

Petitioner was stripped of his status as a lawful permanent resident and ordered removed from the United States based on his conviction for battery on a peace officer pursuant to California Penal Code § 243(c)(2), for which he had received a 16-month custodial sentence. An immigration judge found that Petitioner was subject to removal from the United States “pursuant to...Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act)...in that, at any time after admission, [he had] been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act.” This section of the Act defines an aggravated felony as including “a crime of violence” as defined in 18 U.S.C. § 16. *See*

8 U.S.C. § 1101(a)(43)(F). In relevant part, Section 16 defines a “crime of violence” as “an 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. § 16(a)¹. Based on the IJ’s conclusion that Petitioner’s battery conviction qualified as a crime of violence aggravated felony, Petitioner was ordered removed to Mexico.

On May 22, 2016, Customs and Border Protection Officers found Petitioner in a car at the San Ysidro Port of Entry and arrested him. He was charged by way of information with attempted entry after deportation in violation of 8 U.S.C. § 1326.

II. Petitioner filed a motion to dismiss the illegal re-entry charge because it was based on an invalid removal order, but the district court denied the motion and Petitioner was convicted.

Petitioner moved to dismiss the information pursuant to 8 U.S.C. § 1326(d). That section provides that a defendant charged with illegal reentry may collaterally attack the removal order underlying the offense. To win his motion, Petitioner had to demonstrate that (1) he exhausted any administrative remedies, (2) he was improperly deprived of the opportunity for judicial review, and (3) the entry of the order was fundamentally unfair. *See* 8 U.S.C. § 1326(d).

Petitioner argued that the removal order was fundamentally unfair because he was not removable as charged, which also established that was excused from the

¹ This is the only relevant definition because this Court has already held that definition of a “crime of violence” found in 18 U.S.C. § 16(b) is unconstitutionally vague. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018).

administrative exhaustion and judicial review requirements of Section 1326(d).

Specifically, Petitioner argued that his conviction for battery on a peace officer did not have “the use, attempted use, or threatened use of physical force against the person or property of another” as an element, which means it was not a crime of violence and not an aggravated felony.

Petitioner acknowledged that the Ninth Circuit previously held that this type of conviction categorically qualifies as a crime of violence in *United States v. Colon-Arreola*, 753 F.3d 841 (9th Cir. 2014). But he argued that the decision in *Colon-Arreola* did not properly apply the categorical approach because the Ninth Circuit had not considered relevant California state court decisions when determining the elements of battery on a peace officer pursuant to Section 243(c)(2). In *Colon-Arreola*, the Ninth Circuit had correctly noted that this type of conviction has four elements: “(1) the offender committed a battery, defined by California Penal Code § 242 as ‘any willful and unlawful use of force or violence upon the person of another’; 2) the battery was committed against a peace officer engaged in the performance of his duties; 3) knowledge by the offender that the victim was a peace officer engaged in the performance of his duties; and 4) an injury was inflicted on the victim.” *Id.* at 844. The Ninth Circuit also correctly acknowledged that the first element “does *not* require the use of violent force.” *Id.* Turning to the fourth element—the requirement of proof of an injury—the Ninth Circuit noted that the term “injury” was statutorily defined as “any physical injury which requires professional medical treatment.” *Id.* (quoting Cal. Penal Code § 243(f)(5)). But then,

without analyzing any relevant California state court decisions, the Ninth Circuit concluded that “a person cannot be convicted under § 243(c)(2) unless he willfully and unlawfully applies force sufficient to not just inflict a physical injury on the victim, but to inflict a physical injury severe enough that it requires professional medical treatment.” *Id.* at 844-45.

That conclusion was wrong, which the Ninth Circuit would have known if it had considered any relevant California state appellate court decisions. Petitioner pointed out that California courts have explained that a conviction like Petitioner’s does not require proof that the defendant used *violent* force.² Indeed, Petitioner showed that even “battery resulting in serious bodily injury...can arise from the ‘least touching.’” *People v. Mansfield*, 200 Cal. App. 3d 82, 88 (Ct. App. 1988) (analyzing battery resulting in serious bodily injury pursuant to California Penal Code § 243(d)); *see also People v. Thomas*, 206 Cal. App. 3d 689, 694 (Ct. App. 1988) (embracing *Mansfield*’s holding); *People v. Lindsay*, 209 Cal. App. 3d 849, 857 (Ct. App. 1989) (analyzing a conviction for battery on a peace officer—Petitioner’s statute of conviction—and embracing *Mansfield*’s holding as to the level of force that must be proven). Petitioner argued that means the government only had to prove “the least touching” in order to convict him.

² California Penal Code § 243(d) criminalizes battery resulting in serious bodily injury. In this case, the government agrees that Section 243(c)(2)—Petitioner’s statute of conviction—is identical to Section 243(d) in all respects except the identity of the victim and the level of injury that must be proven. Petitioner’s conviction only required proof of an “injury,” not a “serious injury.”

Based on this binding interpretation of this California statute by the California state courts, Petitioner argued that the Ninth Circuit in *Colon-Arreola* was wrong to assume that the element requiring proof of an injury implicitly required proof that the offender had necessarily used violent force against the victim. Petitioner thus urged the district court to follow the guidance from the Court's decisions applying the categorical approach and rely on California state court interpretations of his statute of conviction rather than relying on *Colon-Arreola*. Doing so would lead to the conclusion that his conviction categorically did not qualify as an aggravated felony, so he urged the district court to grant his motion to dismiss.

After a hearing, the district court filed a written order denying Petitioner's motion to dismiss. The court held that, "[d]espite the inconsistencies among cases regarding the application of 'crime of violence' to various California battery offenses, this Court is bound by the *Colon-Arreola* decision that under the elements test a conviction for battery in violation of Penal Code § 243(c)(2) is a crime of violence."

Petitioner was convicted at a stipulated facts bench trial. He later received an eighteen-month sentence.

III. The appeal.

On appeal, Petitioner argued that his illegal reentry conviction should be vacated because it rests upon an invalid removal order. Specifically, Petitioner asserted that he was wrongly stripped of his status as a lawful permanent resident

and was ordered removed based on his battery conviction, which he argued did not qualify as an aggravated felony. He explained that an offense must necessarily involve the intentional use of violent force to fit within the generic definition of a “crime of violence” aggravated felony. Relying on the California state appellate court decisions in *Mansfield*, *Thomas*, and *Lindsay*, he argued that the elements of his conviction for battery on a peace officer do not require proof of the use, attempted use, or threatened use of physical force against the person or property of another. He noted that these decisions show that even the related portion of the California statute that criminalizes battery resulting in serious bodily injury does not require proof of the use of violent force under California law. He therefore reasoned that his conviction, which only required proof of a mere injury, must not have required proof of violent force. He concluded that he suffered prejudice because he was removed when he should not have been, and urged the court of appeals to vacate his illegal reentry conviction.

In an unpublished memorandum opinion, the Ninth Circuit affirmed Petitioner’s conviction. Without analyzing the relevant California state court decisions, the Ninth Circuit held that Petitioner’s argument was foreclosed by the prior panel’s decision in *Colon-Arreola*, 753 F.3d at 844-45. Pet. App. 2a. The Ninth Circuit did not address Petitioner’s argument that the *Colon-Arreola* decision relied on an erroneous assumption that the requirement to prove an injury necessarily meant violent force must be proven. It also did not address the California state

appellate court decisions that expressly held that violent force need not be proven to obtain this type of conviction.

Petitioner filed a petition for rehearing or rehearing en banc, in which he urged the Ninth Circuit to overrule *Colon-Arreola* because it relied on an incorrect interpretation of California state law that had been rejected by California appellate courts. In addition to the three California state appellate court decisions showing that this type of conviction could be based on “the least touching,” Petitioner pointed to *People v. Campbell*, No. H024866, 2004 WL 542544, at *2 (Cal. Ct. App. Mar. 19, 2004) (unpublished), as yet another California state appellate court decision that undermined the Ninth Circuit’s holding in *Colon-Arreola*.

In *Campbell*, the offender had argued that his convictions for battery on a peace officer—the same statute as Petitioner’s conviction—could not stand because he did not personally inflict the injuries. Indeed, “[a]ll three officers testified that their injuries did not result from a direct blow by [the defendant].” *Id.* at *5. But the California court held that the statute “imposes liability when ‘an injury is inflicted’ but “does not specify that the injury be willfully inflicted or personally inflicted,” noting that if the “Legislature wished to define culpability for the harm in terms of a personal, direct infliction of injury, it knew how to do so.” *Id.*

Petitioner pointed out that this holding undermined the Ninth Circuit’s reasoning in *Colon-Arreola* because it showed that the Ninth Circuit was wrong to assume that a defendant could not be convicted of this offense unless he personally used violent force that injured a peace officer. The Ninth Circuit had erroneously

inferred that the defendant must have used violent force in order to be convicted of this offense merely because the government was required to prove an injury. But *Campbell* shows that the injury need not be personally inflicted by the defendant. Petitioner argued that means the government is not required to prove the defendant used violent force in order to convict him of battery on a peace officer, which in turn means Petitioner's statute of conviction is not a crime of violence aggravated felony.

Without addressing any of the California state appellate court decisions, the Ninth Circuit denied the petition for hearing or rehearing en banc.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision violates the Court's precedent that establishes that state court interpretations of state statutes of conviction are controlling when federal courts apply the categorical approach. *See Johnson v. United States*, 559 U.S. 133, 138 (2010) (federal courts applying the categorical approach are "bound by the [state court's] interpretation of state law, including its determination of the elements"). This reliance on state court decisions to determine the elements of a state court conviction is consistent with the "elements-focus" of the categorical approach, which "avoids unfairness to defendants." *Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016). But in this case, the Ninth Circuit failed to analyze relevant state court decisions when deciding whether Petitioner's conviction of battery on a peace officer pursuant to California Penal Code § 243(c)(2) qualifies as a crime of violence aggravated felony. Had the Ninth Circuit analyzed the relevant California

state court decisions, it would have realized that the government was not required to prove Petitioner used violent force in order to convict him. Instead, the government only needed to prove “the least touching.” And because these relevant California state court decisions reveal that the elements of battery on a peace officer in California do not require proof of the defendant’s use of violent force, the Court’s precedents compel the conclusion that Petitioner’s conviction was not a crime of violence aggravated felony. The Court should accordingly grant review in this case based on the Ninth Circuit’s misapplication of precedent.

The categorical approach must be used to decide the central issue in this case: whether a conviction of battery on a peace officer pursuant to California Penal Code § 243(c)(2) requires proof of the intentional use of violent force and is therefore a crime of violence and an aggravated felony. Yet the Ninth Circuit did not consider relevant California state court interpretations when deciding whether this type of conviction requires proof of violent force. Instead, the Ninth Circuit assumed that a battery pursuant to Section 243(c)(2) must include violent force merely because the government must also prove an injury to obtain a conviction. But that assumption is wrong. At least four California state appellate court decisions reveal that this type of California battery offense only requires proof of the “least touching” and does not require proof of the defendant’s use of violent force. *See Campbell*, 2004 WL 542544, at *2 (analyzing conviction for battery on a peace officer pursuant to Section 243(c)(2) and concluding the defendant need not personally inflict the injury); *Mansfield*, 200 Cal. App. 3d at 88 (discussing elements of battery resulting in

serious injury pursuant to Section 243(d) and noting “force likely to cause serious bodily injury is not a requirement” (quotation and citation omitted)); *Thomas*, 206 Cal. App. 3d at 694 (embracing *Mansfield*’s holding); *Lindsay*, 209 Cal. App. 3d at 856 (same). The Ninth Circuit’s failure to consider these binding state court decisions when determining whether the elements of a Section 243(c)(2) battery required proof of violent force violated the Court’s precedent. This Court should therefore grant review in this case.

I. When applying the categorical approach, the Ninth Circuit failed to consider relevant California case law that reveals that Petitioner’s battery conviction did not require proof of the intentional use of violent force and therefore does not qualify as a crime of violence aggravated felony.

To determine whether Petitioner’s battery conviction qualifies as a crime of violence and is therefore an aggravated felony, the district court was required to apply the categorical approach first announced in *Taylor v. United States*, 495 U.S. 575 (1990). That approach requires a court to compare the elements of the state offense to the relevant generic definition and determine whether a person could be convicted of the state offense for behavior that does not fit within that generic definition. The Court has explained that one way to show that the state statute punishes conduct that does not fit within the generic definition is for a defendant to “point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.” *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). If this analysis reveals that a conviction

under the state criminal statute can be based on conduct that does not fit within the generic definition, then the statute is overbroad. But when analyzing the statute of Petitioner's conviction, the Ninth Circuit made a logical leap rather than following the Court's clear precedent and considering all relevant state court decisions. That led the Ninth Circuit to wrongfully conclude that Petitioner's statute of conviction was never applied to nongeneric conduct.

In this case, the relevant question is whether the elements of battery of a peace officer pursuant to California Penal Code § 243(c)(2) fit within the generic definition of a crime of violence. If they do, then Petitioner's conviction qualifies as an aggravated felony. *See 8 U.S.C. § 1101(a)(43)(F)* (defining the term "aggravated felony" to include "a crime of violence...for which the term of imprisonment [is] at least one year"). That would mean that the Petitioner's removal order was valid and his later illegal re-entry conviction (that is the subject of this appeal) is also valid. *See 8 U.S.C. § 1227(a)(2)(A)(iii)* ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). But if the elements of Petitioner's battery conviction allow a defendant to be convicted based on acts not covered by the generic definition of a crime of violence, then the statute is overbroad. That would mean that Petitioner was not convicted of an aggravated felony, his removal order is invalid, and his illegal re-entry conviction that is the subject of this appeal must be vacated.

The generic definition of a crime of violence is "an offense that has as an element the use, attempted use, or threatened use of physical force against the

person or property of another.” *See* 8 U.S.C. § 1101(a)(43)(F) (incorporating definition from 18 U.S.C. § 16). The Court has already explained that this definition “suggests a category of violent, active crimes.” *Leocal v. Ashcroft*, 542 U.S. 1 (2004) (holding that a conviction for driving under the influence causing serious bodily injury under Florida law does not qualify as a crime of violence); *see also Johnson*, 559 U.S. at 140 (quoting *Leocal*). Indeed, just three days before the Ninth Circuit issued its opinion in this case, the Court reiterated this definition does not encompass the “slightest offensive touching.” *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019).³ Rather, the level of force required for an offense to qualify as a crime of violence requires “a degree of power that would not be satisfied by the merest touching.” *Id.* (citation and quotations omitted, alteration accepted). It must be violent.

Thus, the elements of battery on a peace officer under California law—like Petitioner’s conviction—must require proof of the use, attempted use or threatened use of *violent* force in order for this type of conviction to fit within the generic definition of a crime of violence. But at least four California state appellate court decisions reveal that a conviction like Petitioner’s (which requires proof of an “injury”) or a related conviction (requiring proof of a “serious injury”) do not require proof that the defendant used violent force.

³ In *Stokeling*, the Court was analyzing the elements clause of the Armed Career Criminal Act (“ACCA”) found in 18 U.S.C. § 924(e)(2)(B)(i). The Court has already determined that the ACCA elements clause is analogous to the definition of a crime of violence found in 18 U.S.C. § 16(a) that is central to this case. *See Johnson*, 559 U.S. at 140 (describing the provisions as “very similar”).

The first of these California cases is *Mansfield*, 200 Cal. App. 3d at 87, in which the California Court of Appeal for the Fifth Circuit considered whether the trial court erred by allowing the defendant to be impeached with evidence of his prior conviction for battery resulting in serious bodily injury pursuant to Section 243(d). Under California law, a party may impeach a witness with evidence of his prior conviction only if it qualifies as a felony involving moral turpitude. *Id.* To determine whether a conviction qualifies as a felony involving moral turpitude, “the trial court may look only to the ‘least adjudicated elements’ of the crime for which the witness was previously convicted.” *Id.* In applying this test (which is essentially *Taylor*’s categorical approach), the court held that “the least adjudicated elements of battery resulting in serious bodily injury do not necessarily involve force likely to cause serious injury.” *Id.* at 88. While agreeing that “serious injury resulting from a simple offense touching may not be likely,” the court nonetheless concluded, “technically force likely to cause serious bodily injury is not a requirement of section 243.” *Id.* at 88 (quotations and citation omitted). In other words, even a battery resulting in *serious* bodily injury can be committed with “the least touching.” *Id.*

This holding was confirmed in the next relevant case, *Thomas*, 206 Cal. App. 3d at 689, in which the California Court of Appeal for the First District evaluated whether a conviction under different statute (criminalizing assault with a deadly weapon) could be used for impeachment purposes. In the course of its analysis, the court embraced the *Mansfield* Court’s holding that battery pursuant to Section 243(d) “is but a simple battery which results in serious bodily injury.” *Id.* at 694.

The court elaborated, “since the use of force likely to have caused the serious bodily injury is not an element of the offense...battery resulting in serious bodily injury...can arise from the ‘least touching.’” *Id.* (quotations and citation omitted).

And the holding that a battery causing serious bodily injury could be committed with even the least touching was also embraced in *Lindsay*, 209 Cal. App. 3d at 849. In that case, the issue before the California Court of Appeal for the Fifth District was whether a conviction for battery on a peace officer pursuant to Section 243(c)(2)—Petitioner’s statute of conviction—could be used for impeachment. Just as it had done in *Mansfield*, the court examined whether the “least adjudicated elements of the crime” necessarily involved moral turpitude. *Id.* at 855. The court concluded that it did, but not because of any requirement for proof of violent force. Rather, it was because it required proof that the defendant “know or reasonably should have known the victim was a peace officer in the performance of his duties.” *Id.* at 857. That knowledge “demonstrate[s] a disregard for what is reasonably expected of ordinary people.” *Id.* The court thus explained that the relevant distinction between simple battery under Section 242 (which is not a crime involving moral turpitude) and battery on a peace officer under Section 243(c)(2) (which is) was the “different mental state” involved. *Id.* at 857. Notably, on its way to this conclusion, the court accepted that a battery offense causing even serious bodily injury could be committed with “the least touching.” *Id.* at 856 (citing *Mansfield*).

Finally, in *Campbell*, the California Court of Appeal for the Sixth District analyzed battery on a peace officer pursuant to Section 243(c)(2)—Petitioner’s statute of conviction. Addressing the defendant’s argument that his convictions under this statute could not stand because had not personally inflicted the injuries on the officers, the *Campbell* Court did not dispute that defendant had not personally inflicted the injuries. But it concluded that the statute “imposes liability when ‘an injury is inflicted’ but ‘does not specify that the injury be willfully inflicted or personally inflicted,’ noting that if the ‘Legislature wished to define culpability for the harm in terms of a personal, direct infliction of injury, it knew how to do so.’” *Id.* That means a conviction pursuant to Section 243(c)(2) can be based on a simple battery on a peace officer involving “the least touching” as long as “an injury was inflicted on the officer as a proximate result of that battery,” even if the battery itself—the force applied by the defendant—was not the direct cause of the injury. *Id.*

These California appellate court cases show that a defendant could be convicted of battery on a peace officer pursuant to California Penal Code § 243(c)(2) with proof of less-than-violent force. That is because the injury need not be the direct result of the defendant’s use of force. In other words, the defendant’s use of force need not be sufficiently strong to cause the injury. Rather, the defendant could have engaged in “the least touching,” as long as there was also proof of an injury. Indeed, the defendant need not have personally inflicted the injury with his use of

force. That should mean that Petitioner's conviction does not qualify as a crime of violence and is not an aggravated felony.

Rather than analyze these decisions—as Petitioner urged, and as was required by the Court's clear precedent—the Ninth Circuit affirmed Petitioner's conviction by holding that his argument was foreclosed by the prior panel decision in *Colon-Arreola*, 753 F.3d at 841. But the *Colon-Arreola* Court also had not examined these relevant California state appellate court decisions. Instead, the Ninth Circuit assumed in *Colon-Arreola* that a conviction pursuant to Section 243(c)(2) required proof of violent force merely because it required proof of an injury. Indeed, the Ninth Circuit held that “a person cannot be convicted under § 243(c)(2) unless he willfully and unlawfully applies force sufficient to not just inflict a physical injury on the victim, but to inflict a physical injury severe enough that it requires professional medical treatment.” *Id.* at 844-45. That is wrong.

Again, the elements do not even require proof that the defendant himself personally inflicted the injury on the victim, let alone that he did so using violent force. *See Campbell*, 2004 WL 542544, at *5 (“Section 243, subdivision (c), imposes liability when ‘an injury is inflicted[,’] i]t does not specify that the injury be willfully inflicted or personally inflicted[, and h]ad the Legislature wished to define culpability for the harm in terms of a personal, direct infliction of injury, it knew how to do so.”); *see also* Order Denying Petition in *Campbell v. Flores*, Case No. 5:05-CV-3563 (N.D. Cal. Sept. 30, 2010) (denying habeas relief because Section 243(c)(2) “does not require a defendant to personally inflict an injury, but rather

requires that he proximately caused the harm,” and noting “a state court’s interpretation of state law binds a federal court...”).

If the Ninth Circuit had properly analyzed California state court decisions when applying the categorical approach, it would have determined that California Penal Code § 243(c)(2) is overbroad because it punishes more conduct than is covered by the generic definition of a crime of violence. Specifically, it punishes the use of less-than-violent force. It therefore does not qualify as a crime of violence and is not an aggravated felony. *See Duenas-Alvarez*, 549 U.S. at 193 (a defendant has shown that his conviction is overbroad if he “point[s] to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.”). That means Petitioner’s removal order is invalid and his illegal re-entry conviction, which rests upon that removal order, must be vacated.

* * *

In short, the district court ignored the Court’s binding precedent when it failed to analyze relevant state court decisions when deciding whether Petitioner’s conviction of battery on a peace officer pursuant to California Penal Code § 243(c)(2) qualifies as a crime of violence an aggravated felony. Had Ninth Circuit properly applied the categorical approach as explained in the Court’s precedent and analyzed relevant California state court decisions, the Ninth Circuit would have concluded that the government can obtain this type of conviction based on proof of the “least touching” because the elements do not require proof of violent force. That means the

Court's precedent compels the conclusion that Petitioner's conviction was not a crime of violence and was not an aggravated felony. This Court should accordingly grant review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: April 19, 2019



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