

No. 19-5727

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IN THE SUPREME COURT OF THE UNITED STATES

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TRAYVON SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the California offense of assault with a firearm, in violation of Cal. Penal Code § 245(a)(2) (West Supp. 2008), is a "crime of violence" under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Cal.):

United States v. Smith, No. 17-cr-70 (June 14, 2018)

United States Court of Appeals (9th Cir.):

United States v. Smith, No. 18-10225 (May 29, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 771 Fed. Appx. 370.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2019. The petition for a writ of certiorari was filed on August 27, 2019. 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 Eastern District of California, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. B1. The district court sentenced petitioner to 46 months of imprisonment, to be followed by three years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A2.

1. In March 2017, police officers in Fresno, California, encountered petitioner at an apartment complex where they were conducting an unrelated search. Presentence Investigation Report (PSR) ¶ 5. An officer observed petitioner reach into the front of his waistband, remove a handgun, and place the handgun in the back of an SUV. PSR ¶ 6. Officers detained petitioner and recovered from the back of the SUV a semi-automatic handgun loaded with 13 rounds in the magazine and a round in the chamber. PSR ¶ 7.

A federal grand jury returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Petitioner pleaded guilty, pursuant to a plea agreement. See PSR ¶¶ 1-2.

2. The Probation Office's presentence report determined that petitioner qualified for a base offense level of 20 under Sentencing Guidelines § 2K2.1(a), which applies if a defendant possessed a firearm after "sustaining one felony conviction of \* \* \* a crime of violence." Sentencing Guidelines

§ 2K2.1(a)(4)(A); see PSR ¶ 14. Under the Guidelines' "elements clause," a "'crime of violence'" is defined to include "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that \* \* \* 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). The crime of violence identified in the presentence report was petitioner's prior felony conviction for assault with a firearm, in violation of Cal. Penal Code § 245(a)(2) (West Supp. 2008), which criminalizes "commit[ting] an assault upon the person of another with a firearm," ibid. See PSR ¶ 14. After applying other adjustments, the presentence report calculated an offense level of 17 and a criminal history category of V, resulting in an advisory Sentencing Guidelines range of 46 to 57 months of imprisonment. PSR ¶¶ 23, 35, 70.

Petitioner objected to the classification of his California assault-with-a-firearm conviction as a conviction for a crime of violence. See Pet. Objections to PSR ¶¶ 2-3. The district court rejected his argument and adopted the presentence report's Guidelines calculations. Sent. Tr. 4-6, 12-13. The court sentenced petitioner to 46 months of imprisonment, to be followed by three years of supervised release. Pet. App. B2-B3.

3. The court of appeals affirmed. Pet. App. A1-A2. The court rejected petitioner's argument that his assault-with-a-firearm conviction did not qualify as a "crime of violence" under

the Guidelines. Id. at A2. The court observed that it had previously determined, in United States v. Vasquez-Gonzalez, 901 F.3d 1060, 1068 (9th Cir. 2018), that such a California assault crime categorically qualifies as a crime of violence because it requires the intentional use of force against the person of another. Pet. App. A2. The court acknowledged that Vasquez-Gonzalez had considered Cal. Penal Code § 245(a)(1), whereas petitioner had been convicted under Section 245(a)(2), but it explained that “[t]he difference is immaterial because the two subsections proscribe the same conduct, the only difference being the type of weapon involved.” Pet. App. A2 n.1 (citation and internal quotation marks omitted).

#### ARGUMENT

Petitioner contends (Pet. 7-26) that California assault with a firearm, in violation of Cal. Penal Code § 245(a)(2) (West Supp. 2008), does not qualify as a crime of violence under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1). The court of appeals rejected that contention, determining that California assault with a firearm 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). That determination is based on state-court interpretations of state law and does not conflict with any decision of this Court or of any other court of appeals. In addition, the court of appeals’ decision does not warrant review because it relates to the interpretation and application of the

advisory Sentencing Guidelines, which are subject to oversight and modification by the Sentencing Commission.\*

1. Petitioner's challenge to the decision below fundamentally rests on a contention that the court of appeals misconstrued state law. The court of appeals' decision does not conflict with any decision of any other court of appeals and does not warrant this Court's review.

The court of appeals determined that petitioner's conviction for assault with a firearm, which required proof that petitioner used a firearm and "intend[ed] to commit an act which would be indictable [as a battery]," People v. Williams, 29 P.3d 197, 203 (Cal. 2001) (citation and internal quotation marks omitted; second set of brackets in original), involved the "use, attempted use, or threatened use of physical force against the person of another," Sentencing Guidelines § 4B1.2(a)(1). See Pet. App. A2. In doing so, it relied on its prior determination in United States v. Vasquez-Gonzalez, 901 F.3d 1060 (9th Cir. 2018), that a materially identical California assault statute categorically satisfied the similar "elements clause" of 18 U.S.C. 16(a). See 901 F.3d at 1066-1067. Vasquez-Gonzalez, in turn, accepted petitioner's primary federal-law contention here -- namely, that a state offense would satisfy the elements clause only if it "requires an intentional use of force," and cannot be satisfied by "reckless or

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\* A similar question is presented in Perez v. United States, No. 19-5749 (filed Aug. 27, 2019).



grossly negligent conduct.” Ibid. (footnote omitted); see Pet. 7-26. And Vasquez-Gonzalez examined the critical decision of the Supreme Court of California on which petitioner relies here and determined that “assault in California requires an intentional use of force.” 901 F.3d at 1068; compare id. at 1066-1067 (examining Williams), with Pet. 10 (relying on Williams).

The court of appeals’ construction of state law does not warrant this Court’s review. In Johnson v. United States, 559 U.S. 133 (2010), in discussing the application of a similar elements clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B), to state convictions, this Court explained that it is “bound” by a state supreme court’s interpretation of state law, “including its determination of the elements” of a state statute. 559 U.S. at 138; see Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) (“[S]tate courts are the ultimate expositors of state law and \* \* \* we are bound by their constructions except in extreme circumstances.”) (citations omitted). And this Court’s “custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located.” Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004), abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) (“We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law.”).

Petitioner identifies no reason to depart from that settled policy in this case. In particular, his contention (Pet. 7-14) that the court of appeals confused federal and state negligence standards disregards Vasquez-Gonzalez's reliance on its own federal precedents describing the mental state it deemed a federal elements clause to require. See 901 F.3d at 1066-1067 & n.4.

Moreover, the court of appeals' determination that California assault with a firearm qualifies as a "crime of violence" under the Guidelines is consistent with decisions of every other court of appeals to have considered the question. See, e.g., Mass v. United States, 736 Fed. Appx. 102, 104 (6th Cir. 2018) (per curiam); United States v. Flores, 508 Fed. Appx. 864, 866 (11th Cir. 2013) (per curiam); United States v. Santos-Santos, 463 Fed. Appx. 728, 732 (10th Cir. 2011), cert. denied, 566 U.S. 969 (2012); United States v. Sanchez-Ruedas, 452 F.3d 409, 414 (5th Cir.), cert. denied, 549 U.S. 933 (2006); see also United States v. Pineda-Zetino, 583 Fed. Appx. 582, 582-583 (8th Cir. 2014) (per curiam) (same on plain-error review). Although petitioner cites (Pet. 17-18, 21-23) several decisions implicating a circuit conflict over whether an offense that can be committed with a mens rea of recklessness can qualify as a crime of violence under the Sentencing Guidelines (or a "violent felony" under the ACCA), that conflict -- which this Court recently agreed to review, Walker v. United States, cert. granted, No. 19-373 (Nov. 15, 2019) -- has no bearing on the outcome of this case. The court below already

applied the more defendant-favorable approach, under which crimes with a mens rea of recklessness do not qualify. Accordingly, no need exists to hold the petition in this case pending the resolution of Walker. And any error in the application of the defendant-favorable approach to the particular state law at issue here does not warrant this Court's review.

2. In any event, this case would be a poor vehicle for further review because petitioner's challenge to his sentence rests on a claimed error in the application of an advisory Sentencing Guidelines provision that the Sentencing Commission has proposed amending.

Typically, this Court leaves issues of 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 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.").

Indeed, the Commission has already taken steps to exercise its oversight authority with respect to other portions of the "crime of violence" definition. Effective August 2016, the Commission amended Sentencing Guidelines § 4B1.2(a) to eliminate the provision's residual clause and to expand the Guidelines' list of enumerated offenses. See 81 Fed. Reg. 4741, 4742-4743 (Jan. 27, 2016). In addition, the Commission proposed potentially amending the elements clause at issue here to "allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense." Final Priorities for Amendment Cycle, 83 Fed. Reg. 43,956, 43,956 (Aug. 28, 2018). Such an amendment, if adopted, would greatly diminish the importance of the question whether petitioner's prior conviction was for an offense that has, as an element, the use of force within the meaning of the Sentencing Guidelines.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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