No. __ – _____

IN THE

SUPREME COURT OF THE UNITED STATES

GUILLERMO VEGA-BOTELLO,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

Whether a court of appeals that finds a plain error in the district court's selection of a statutory maximum should ordinarily order a limited remand for the sole purpose of determining whether this error affected substantial rights, and, if not, whether it should affirm if the district court does not mention the statutory range in its sentencing commentary?

PARTIES

Guillermo Vega-Botello is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Guillermo Vega-Botello, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The judgment of conviction and sentence was entered October 4, 2018, and is provided in the Appendix to the Petition. [Appendix A]. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Vega-Botello,* 772 Fed. Appx. 201 (5th Cir. June 26, 2019)(unpublished), and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The opinion order of the United States Court of Appeals for the Fifth Circuit affirming the sentence as modified were issued on June 26, 2019. [Appx. B]. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES, RULES, AND GUIDELINES INVOLVED

8 U.S.C. §1326 provides in part:

(a) In general

> Subject to subsection (b), any alien who—
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent

under this chapter or any prior Act,
shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both...

18 U.S.C. §3553(a) provides in part:

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

***

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or

supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

Federal Rule of Criminal Procedure 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner Guillermo Vega-Botello was stopped on a traffic violation in 2018 by the Floydada Police Department. *See* (Record in the Court of Appeals, at 55). For reasons the record does not disclose, "the police officer believed he was in the United States illegally." (Record in the Court of Appeals, at 111). That turned out to be correct, and Petitioner pleaded guilty to illegal re-entry following removal in the Lubbock Division of the Northern District of Texas. *See* (Record in the Court of Appeals, at 54-56).

Probation generated a Presentence Report (PSR). The PSR noted a pair of 2007 Washington convictions, one for second degree assault and one for possessing a stolen firearm. *See* (Record in the Court of Appeals, at 118-119). And Probation attached judicial records for these convictions, and for an old Washington forgery offense. *See* (Record in the Court of Appeals, at 116, 127-138). It attached no other judicial records. *See* (Record in the Court of Appeals, at 116, 127-138). The PSR identified a Guideline range of 12-18 months imprisonment, and a statutory maximum of 20 years imprisonment. *See* (Record in the Court of Appeals, at 123).

The district court adopted the legal conclusions of the PSR, but imposed a sentence twice the maximum of the Guideline range, noting the defendant's criminal history, including all of his convictions. *See* (Record in the Court of Appeals, at 93, 96-97). It did not say that the sentence would have been the same under a different statutory range. *See* (Record in the Court of Appeals, at 96-97).

B. Proceedings in the Court of Appeals

On appeal, Petitioner argued that the district court plainly erred in determining his statutory maximum. All of this felony convictions plainly fell outside the definition of an "aggravated felony." As a consequence, he argued, the district court plainly erred in concluding that his statutory maximum was twenty rather than ten years imprisonment. He further argued that there was a reasonable probability of a different sentence if the district court had been aware of the true statutory

range.

The court of appeals affirmed without deciding whether the statutory maximum had been correctly determined. Rather, it found that Petitioner had not met his burden to show an effect on his substantial rights because the Guideline range was unaffected by the error, and the court did not mention the statutory range when explaining the sentence. [Appendix B, at 2].

REASON FOR GRANTING THE PETITION

The circuits are divided as to the appropriate response when the district court plainly errs in determining the defendant's statutory range.

A. The circuits are divided.

Federal Rule of Criminal Procedure 52 authorizes courts of appeals to correct plain errors affecting substantial rights. This Court has held that a party may show an effect on its substantial rights within the meaning of this Rule when it establishes a reasonable probability of a different result but for the error. *See United States v. Dominguez-Benitez*, 542 U.S. 74, 83 (2004). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Dominguez Benitez*, 542 U.S. at 83, n.9. It is now clearly established that a court of appeals may remand to the district court in doubtful cases to determine whether it would have imposed a lesser sentence in the absence of a plain error. This Court has authorized the practice. *See Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338, 1345 (2016)(observing that "courts have, for example, developed mechanisms short of a full remand to determine whether a district court in fact would have imposed a different sentence absent the error.")(citing *United States v. Currie*, 739 F.3d 960, 967 (7th Cir. 2014)).

In *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016), this Court held that a defendant may rely on the mere numerical change in a Guideline range to establish a reasonable probability of a different result. *See Molina-Martinez*, 136 S.Ct. at 1345. In so doing, this Court noted the central role of the Guidelines in federal sentencing, which serve as the "starting point and ... initial benchmark" for this process. *Id*. (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)(internal quotation marks omitted, ellipsis added by *Molina-Martinez*). It also noted the strong statistical case that a changed Guideline range would result in a changed outcome. *See id.* at 1346. Further, it rejected the approach of the court below, which had required additional, specific evidence of an effect on the outcome, such as a comment by the sentencing court. *See id.* at 1346-1347. Rather, under *Molina-Martinez*, the proponent of the sentence may argue for affirmance by

producing evidence that the district court would have imposed the same sentence irrespective of the Guidelines. *See id.*

This Court has thus provided important guidance for applying the substantial rights requirement of Rule 52(b) in cases involving Guideline error. But it has not provided guidance for cases where the district court miscalculates only the statutory range. Some cases are easy enough: if the sentence falls outside the correct statutory range, then an error in determining the range has affected the sentence. In cases where the sentence falls within both the true and erroneous statutory range, however, the courts of appeals have taken conflicting approaches as to the means by which prejudice might be shown.

In the Second and Seventh Circuits, the court of appeals will order a limited remand, asking the district court whether the statutory maximum affected the sentence imposed. In *United States v. Currie*, 739 F.3d 960 (7th Cir. 2014), a case cited with approval by *Molina-Martinez*, the district court mistakenly believed that the defendant was subject to a ten year mandatory minimum. *See Currie*, 739 F.3d at 962-963, 967. In fact, the minimum should have been just five years. *See id.* The court noted "competing inferences" that might have been drawn from the record, and ultimately concluded that it should simply ask the district court about the effect of the error, if any. *Id*. at 965

Although the district court in *Currie* said that the sentence "seems to be a reasonable sentence under the circumstance," and also noted aggravating factors in the case, this did not persuade the Seventh Circuit to affirm. *Id*. Rather, the court of appeals observed that "the statutory minimum was necessarily one of the circumstances that the judge had to consider in ascertaining a reasonable sentence." *Id*. at 966. Because the final sentence imposed is "a product of ... statutory limits," the Seventh Circuit thought that any ambiguity in the record should be resolved by the simple expedient of asking the district court what it would have done. *Id*. Importantly, *Currie* was a plain error case, and is not distinguishable from the one at bar on this basis. *See id.* at 964.

The Second Circuit has held likewise, also in the plain error context. In *United States v. Trudeau*, 562 Fed. Appx. 30 (2d Cir. 2014)(unpublished), the defendant received a 188 months

imprisonment for a collection of fraud and money-laundering crimes. *See Trudeau*, 562 Fed. Appx. at 32. Although the district court believed the statutory maximums to be 30 years, it was in fact only 20 years imprisonment, comfortably exceeding the sentence actually imposed. *See id.* at 34-35. Without considering any particular statements made by the district court at sentencing, and in spite of its conclusion that the Guidelines were correctly calculated, the Second Circuit took the same approach as the Seventh. *See id.* at 34-35. It retained jurisdiction, and remanded to the district court, instructing it to conduct resentencing only if "it would have sentenced Trudeau differently if it had understood the statutory maximum sentence was 20 years for each count." *Id*. at 35.

By contrast, the Third, Fifth, Sixth and Tenth Circuits have all undertaken to decide the substantial rights question on the basis of the record before them, without soliciting the views of the district court. *See United States v. Payano*, 930 F.3d 186, 193-197 (3d Cir. 2019); *United States v. Mondragon-Santiago*, 564 F.3d 357, 369 (5th Cir. 2009) *United States v. McCloud*, 730 F.3d 600, 603 (6th Cir. 2013); *United States v. Gonzalez-Coronado*, 419 F.3d 1090, 1094 (10th Cir. 2005); *United States v. Marquez*, 258 F. App'x 184, 188–189 (10th Cir. 2007)(unpublished). But even among these courts, the approaches diverge.

The court below has consistently held that an error in the statutory maximum does not affect the defendant's substantial rights if he or she is sentenced within the correct range, the Guidelines are unaffected, and the statutory range is not referenced by the district court at sentencing. This is certainly the explicit reasoning of the opinion below:

> The district court provided reasons for its selection of sentence, including Vega-Botello's criminal history and the pertinent 18 U.S.C. § 3553(a) factors, and it did not reference the statutory maximum or suggest that the statutory range affected its sentencing decision. Also, the sentence imposed was well below the 10-year statutory maximum set forth in otherwise applicable Section 1326(b)(1). We do not read *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016), as requiring a different result.

[Appendix B, at p.2]. This echoes a lengthy string of Fifth Circuit opinions affirming in spite of

claimed errors in the statutory maximum,[1] which addressed both sentences within and outside the Guideline range.

The Fifth Circuit approach diverges from the view of the Third Circuit. In *United States v. Payano*, 930 F.3d 186 (3d Cir. 2019), the Third Circuit distinguished *Molina-Martinez* in cases involving the selection of an incorrect statutory maximum. *See Payano*, 930 F.3d at 190. In its view "statutory ranges are generally too expansive to exert significant influence over the ultimate sentence imposed." *Id*. at 194. As such, it declined to presume prejudice in cases involving an erroneous statutory maximum. *See id.* The *Payano* panel nonetheless did remand the case before it, finding that the defendant had shown a reasonable probability of a different result had the court known of the correct range. *See id.* Persuasive to that court, the sentencing court sentenced above the Guidelines,

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[1] *See Mondragon-Santiago*, 564 F.3d at 369 ("Tthe record does not indicate the district court's sentence was influenced by an incorrect understanding of the statutory maximum sentence. ... In addition, the sentence imposed was both within a properly calculated Guidelines range and below the statutory maximum of § 1326(b)(1), points Mondragon-Santiago concedes.")(citing *United States v. Watson*, 476 F.3d 1020, 1023-24 (D.C.Cir.2007))(internal citation omitted); *United States v. Rodriguez-Garcia*, 748 F. App'x 597, 598 (5th Cir. 2018)("The record, however, does not indicate that the district court's selection of a 46-month sentence within the correctly calculated range was affected by its belief that the statutory maximum was 20 years under § 1326(b)(2) instead of 10 years under § 1326(b)(1). Rodriguez-Garcia therefore fails to show that the error affected his substantial rights."); *United States v. Ayala-Nunez*, 714 F. App'x 345, 351 (5th Cir. 2017)(unpublished)("Ayala–Nunez was sentenced to less than 20 years' imprisonment. And there is no indication in the record that the district court sentenced Ayala–Nunez based on the determination that his Delivery Offense was an 'aggravated felony.'"); *United States v. Romero-Mendoza*, 741 F. App'x 237, 238 (5th Cir. 2018)(unpublished)("Furthermore, the record does not indicate that the district court's selection of a 30-month sentence—within the correctly calculated guidelines range and below the ten-year § 1326(b)(1) statutory maximum—was affected by any belief that the statutory maximum sentence was 20 years pursuant to § 1326(b)(2), rather than ten years pursuant to § 1326(b)(1)."); *United States v. Fuentes*, 735 F. App'x 161, 162 (5th Cir. 2018)(unpublished)("As for whether the error affected Fuentes's substantial rights, nothing in the record suggests that the 20-year maximum sentence for a violation of § 1326(b)(2) influenced the district court's sentencing decision. Moreover, Fuentes's 30-month sentence did not exceed the 10-year statutory maximum under § 1326(b)(1)."); *United States v. Hermoso*, 484 F. App'x 970, 972 (5th Cir. 2012)(unpublished)("Nevertheless, the guidelines calculation in the PSR and accepted by the district court—41–51 months—remains unchanged, and the below-guideline sentence of 40 months is well below the 10–year maximum penalty under the correct statutory provision."); *United States v. Carapia Hernandez*, 742 F. App'x 28, 29 (5th Cir. 2018)(unpublished)("The district court gave lengthy reasons for imposing the sentence, noting, inter alia, that Carapia Hernandez had been removed from the United States on 16 prior occasions and had not been deterred from reentering the United States even after being sentenced to 20 months of imprisonment. Moreover, the 36-month term of imprisonment imposed was well below the 10-year statutory maximum of § 1326(b)(1) that Carapia Hernandez argues the district court was bound to apply.")

and expressly referenced the conviction that it misclassified to produce the higher range. *See id.* at 196-198. That contrasts sharply with the decision below in this case. Petitioner, like the defendant in *Payano*, was sentenced above his Guideline range. And as in *Payano*, the district court referenced the allegedly misclassified conviction, among his others. See (Record in the Court of Appeals, at 96)("This is an upward variance from the guideline range, but based upon the record before me, I believe it is justified. The criminal history of this defendant indicates that he has 15 prior convictions, 14 of which received zero criminal history points."). Yet the two cases produced opposite results, because the Fifth Circuit appears to require an express reference to the statutory maximum to show an effect on substantial rights in most cases. *See* Note 1, *supra.*

Decisions of the Tenth Circuit also demonstrate dissension among the courts that decline to undertake a limited remand in the case of plain Guideline error. In *United States v. Gonzalez-Coronado*, 419 F.3d 1090 (10th Cir. 2005), the defendant argued to the Tenth Circuit that the district court had plainly erred in determining that he was subject to a twenty year maximum rather than a ten year maximum. *See Gonzalez-Coronado*, 419 F.3d at 1094. The Tenth Circuit held it unnecessary to reach that question because the sentence fell below the ten year maximum. *See id.* It did not consider the possibility that the erroneous maximum affected the choice of sentence. *See id.* Its subsequent decision in *United States v. Carrillo-Torres*, 490 F. App'x 974 (10th Cir. 2012)(unpublished), also appears to apply a rule of *per se* harmlessness when the sentence selected is beneath the true maximum. *See Carrillo-Torres*, 490 F. App'x at 977-978.

But it took a very different approach in *United States v. Marquez*, 258 F. App'x 184 (10th Cir. 2007)(unpublished). In that case, the Tenth Circuit found an error in the selection of the statutory maximum – the district court erroneously believed the defendant to have suffered a a prior aggravated felony. *See Marquez*, 258 F. App'x at188. It thus mistakenly believed the maximum to be twenty years imprisonment rather than ten. *See id.* The *Marquez* panel vacated the sentence and remanded, resolving the substantial rights question in the defendant's favor because the court sentenced at the bottom of the Guidelines and referenced the mis-classified conviction. *See id.* at

188-189. Again, this contrasts with the result below, where the sentencing court also referenced the allegedly mis-classified conviction (among others), and where a sentence outside (and above) the Guidelines would seem to present an even stronger case for the influence of the statutory maximum. Yet the results were the opposite.

In short, the courts of appeals have taken conflicting approaches on the substantial rights question when defendants claim plain error in the selection of the statutory range. While some courts offer limited remands to clarify the record, others attempt to resolve the case on the ambiguous comments of the district court. The latter group of courts, moreover, have reached opposite conclusions even in similar cases. Guidance from this Court would be appropriate.

B. The division of authority merits the court's attention.

The circuit split regarding the proper treatment of an erroneous range on plain error is mature, implicating decisions from at least five years ago on either side of the divide. The guidance offered by this Court in *Molina-Martinez*, moreover, has not persuaded courts such as the Third and Fifth Circuits to perform limited remands in cases involving erroneous statutory maxima. *See Payano*, 930 F.3d at 193-197; [Appendix B]. Further, the division of authority now involves at six courts of appeal and has produced at least three distinct approaches to the question. This widespread and multifarious circuit split will not spontaneously resolve.

Finally, the issue is recurrent and important – the United States Code is replete with statutory maxima and minima that may be erroneously determine without a necessary effect on the defendant's Guideline range. *See* 8 U.S.C. §1326 (statutory maximum for illegal re-entry may be two, ten, or twenty years), USSG §2L1.2 (statutory maximum is not named as specific offense characteristic for illegal re-entry offenses); 18 U.S.C. §1343 (providing for a 20 or 30 year maximum), USSG §2B1.1 (distinguishing only between offenses that carry 20 year maxima from those carry lesser maxima); 21 U.S.C. §841(b) (providing a graduated system of maxima and minima for drug offenses, USSG §2D1.1 (statutory maximum is not named as specific offense characteristic for drug offenses).

C. The approach of the court below is not likely correct.

This Court has expressly endorsed the view of the Seventh Circuit in *Currie*, by citing that case with approval. *See Molina-Martinez*, 136 S.Ct. at 1345. It is thus difficult to see how a limited remand would be inappropriate in cases involving an incorrect statutory maximum, though appropriate in cases involving Guideline error, as stated by *Molina-Martinez*. *Currie* itself involved a limited remand to determine the effect on substantial rights in a case where the Guidelines were correct but the statutory range was incorrect. *See Currie*, 739 F.3d at 965. The failure of the court below even to consider this procedure likely conflicts with the guidance of *Molina-Martinez*, and would merit this Court's attention quite apart from the circuit split.[2] *See* Sup. Ct. Rule 10(c) (noting the propriety of certiorari when a federal court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court.").

Further, the position of the court below also ignores the guidance of *Molina-Martinez* insofar as that court demands express commentary from the sentencing court as to the likely sentence under a different statutory range. As this Court explained in *Molina-Martinez*, such commentary is rarely forthcoming when the error is not detected by any party. When the dispute about the appropriate range is unforeseen, district courts are not likely to discuss its influence over the sentence imposed:

> The Court of Appeals' rule to the contrary fails to take account of the dynamics of federal sentencing. In a significant number of cases the sentenced defendant will lack the additional evidence the Court of Appeals' rule would require, for sentencing judges often say little about the degree to which the Guidelines influenced their determination.

Molina-Martinez, 136 S.Ct. at 1347. An undisputed statutory range, like an undisputed Guideline range, is unlikely to provoke much commentary from the court, even if it is an important structuring factor in the selection of the sentence.

Finally, the extreme position of the court below undervalues the impact of the statutory maximum and minimum on the sentence imposed. The district court must calibrate the factors

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[2]In the event that the Court is disinclined to order briefing and argument, Petitioner requests summary relief to consider the option of a limited remand as set forth in *Molina-Martinez*. *See Spears v. United States*, 511 U.S. 261 (2009).

enumerated at 18 U.S.C. §3553(a) to the entire sentencing range. So it is reasonably probable that a district court considering a range of zero to twenty years would reach a different result than one considering a range of zero to ten years imprisonment. Petitioner's 36 month sentence is 30% of his true statutory range, but only 15% of the statutory range believed applicable by the district court. It is, in relative terms, twice as severe when the true range is known. As the Seventh Circuit has persuasively argued, the mere choice of a mandatory sentencing range may affect the sentence ultimately imposed. It observed:

> Statutory minima and maxima have an obvious anchoring effect on the judge's determination of a reasonable sentence in the sense that they demarcate the range within which the judge may impose a sentence.

Indeed, 18 U.S.C. §3553(a) probably *demands* that the district court consider the statutory range in deciding the sentence, as it requires consideration of "the kinds of sentences available." 18 U.S.C. §3553(a)(3).

D. The present case is an appropriate vehicle to address the conflict.

The sole ground for the decision below is the defendant's ostensible failure to show that the changed statutory maximum affected the decision, combined with the Fifth Circuit's refusal to ask the district court that question in a limited remand. *See* [Appendix B, at 2]. This is precisely the matter that divides the courts of appeals. And though this Court need not determine whether Petitioner's claim satisfies the remaining requirements of plain error review, it may rest assured that they will likely be satisfied should they ever be considered by this Court or the court below on remand. Thus, the question presented is likely dispositive.

There is plain error in the district court's selection of a statutory maximum. Here, the district court possessed records of three prior convictions: a 2007 Washington conviction for second degree assault, a simultaneously imposed Washington conviction for possessing a stolen firearm, and a 1998 Washington conviction for "Forging or Possessing a Fraudulent Public Seal." *See* (Record in the Court of Appeal, at 116, 127-138). None of these are aggravated felonies, so the court's application of a 20 year statutory maximum was plainly incorrect.

First, the Washington offense of second degree assault, RCW §9A.36.021, is not an aggravated felony. The term "aggravated felony" includes a "crime of violence" under 18 U.S.C. §16. *See* 8 U.S.C. §1101(a)(43)(F). That definition includes, under 18 U.S.C. §16(a), offenses that have as an element the use, attempted use, or threatened use of physical force against the person or property of another. The remaining Subsection of §16 has been invalidated. *Sessions v. Dimaya*, __U.S.__, 138 S.Ct. 1204 (2018)(invalidating 18 U.S.C. §16(b)).

The Ninth Circuit has recently held in clear terms that Washington's second degree assault statute lacks the use of physical force as an element, because it may be committed by conduct as minor as an offensive touching. *See United States v. Slade*, 873 F.3d 712, 713-716 (9th Cir. 2017); *United States v. Robinson*, 869 F.3d 933, 937 (9th Cir. 2017); RCW §9A.36.021(1)(e); *State v. Smith*, 154 P.3d 873, 875 (Wash. 2007) (*en banc*) (defining "assault" as, *inter alia*, "an intentional touching ... that is harmful or offensive regardless of whether any physical injury is done to the person"). And this Court has recognized that such conduct does not constitute the "the use of physical force against the person of another." *Johnson v. United States*, 559 U.S. 133, 140 (2010).

Some Subsections of the Washington statute require more serious conduct, such as the use of a deadly weapon. *See* RCW §9A.36.021(1)(c). But the Ninth Circuit has recognized that these are not distinct offenses, but merely manners or means of committing a single offense. *See Slade*, 873 F.3d at 716 ("We held in *Robinson* that section §9A.36.021 is not divisible because, after reviewing decisions of the Washington Supreme Court and Washington pattern jury instructions, we concluded that 'section 9A.36.021 defines a single crime—second-degree assault—and provides seven different "means" by which a person can commit that crime.'")(quoting *Robinson*, 869 F.3d at 941).

That conclusion is well-founded: the Washington Supreme Court has recognized that a jury need not be unanimous as to the alternatives named in §9A.36.021(1). *See Smith*, 154 P.3d at 876("the second degree criminal assault statute articulates a single criminal offense and then provides six separate subsections by which the offense may be committed."); *see also State v. Gomez*, 426

P.3d 787, 789 (Wash. Ct. App. 2018)("Assault in the second degree is an alternative means crime. The State charged Mauricio Garcia Gomez with two counts of assault in the second degree committed by three alternative means: intentional assault inflicting substantial bodily harm, or assault with a deadly weapon, or assault by strangulation."). As such, this Court's precedent requires that the Washington offense be treated as an indivisible whole, whose least culpable conduct does not require the use of violent physical force. *See Mathis v. United States*, __U.S.__,136 S.Ct. 2243, 2248-2250 (2016)("The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means. ... [If] they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.").

The non-qualifying nature of the second degree assault conviction is plain, requiring no departures from or extensions to settled precedent. It is certainly settled – by no less authority than this Court – that offenses lack force as an element if they may be committed by mere offensive touching. *See Johnson*, 559 U.S. at 140. And it is likewise clear both that the Washington second degree assault statute requires no jury unanimity as to manners and means, *see Smith*, 154 P.3d at 876, and that such statutes are indivisible, *see Mathis,* 136 S.Ct. at 2248-2250. And all of this is confirmed by multiple holdings of the circuit that contains the convicting jurisdiction. *See Slade*, 873 F.3d at 716; *Robinson*, 869 F.3d at 941.

Nor does Petitioner's Washington conviction for possessing a stolen firearm satisfy the definition of "aggravated felony." That term does include the possession of a stolen firearm under 18 U.S.C. §922(j). *See* 8 U.S.C. §1101(a)(43)(E)(ii). But §922(j) cannot be violated by possessing a stolen firearm. *See* 18 U.S.C. §921(a)(stating that the term "firearm" as used in 922(j) and related offenses "does not include an antique firearm."). The Washington statute of conviction, by contrast, contains no exception for possessing a stolen antique firearm. *See* RCW §9A.56.310(5)(incorporating RCW §9.41.010(11)(omitting any exception for antiques)). And, indeed, Washington courts have upheld convictions for possessing a stolen firearm for possessing a stolen antique. *See State v. Releford*, 200 P.3d 729, 731 (Wash. Ct. App. 2009)("Releford also

contends that his conviction for unlawful possession of a firearm must be reversed because the antique replica gun he was found carrying was missing certain components ... we affirm."). Accordingly, the least culpable conduct prosecuted under this statute contains conduct falling outside the definition of an "aggravated felony." It does not qualify.

This conclusion is also plain. The mismatch between the scope of the Washington statute and the federal definition of "firearm" incorporated into 8 U.S.C. §1101(a)(43) is clear on its face. And it is confirmed by a published opinion of the convicting jurisdiction. *See Releford*, 200 P.3d at 731.

Finally, the term "aggravated felony" includes some forgery offenses, but they must give rise to a sentence of at least a year imprisonment. *See* 8 U.S.C. §1101(a)(43)(R). Petitioner received only 99 days in jail, plus a term of probation. *See* (Record in the Court of Appeals, at 116). That is less than a year in prison. This conclusion is also obvious. The requirement of a year's imprisonment is plain from the face of the statute, and it is not met.

Because the district court plainly erred in deciding the statutory maximum, the approach to the substantial rights question makes all the difference. That question has divided the courts of appeals, and merits this Court attention.

CONCLUSION

This Court should grant *certiorari* to the United States Court of Appeals for the Fifth Circuit to examine the judgment affirming the sentence in this case. Alternatively, Petitioner prays for such relief as to which he may justly entitled.

Respectfully submitted this 24th day of September, 2019.

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