No. _____

In the Supreme Court of the United States

Davion Fitzgerald,

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 a Writ of Certiorari

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Question Presented for Review

Fundamental to our system of federalism is the principle that federal courts "are not free to substitute [their] own interpretations of state statutes for those of a State's courts." *Schad v. Arizona*, 501 U.S. 624, 636 (1991). Respect for state decisions defining and interpreting what constitutes a state crime does not permit "second-guessing" by federal courts. *Id.* at 638.

May a federal court dismiss state precedent interpreting the state's own criminal statute as an "odd hypothetical" based on "legal imagination" to substitute the federal court's interpretation of that statute?

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Petition for Certiorari

Petitioner Davion Fitzgerald respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Related Proceedings and Orders Below

1. District Court of Nevada, 2:17-cr-00295-JCM-NJK, *United States v. Davion Fitzgerald*, final judgment issued March 1, 2018.

2. Ninth Circuit Court of Appeals, 18-10016, *United States v. Davion Fitzgerald*, 935 F.3d 814 (9th Cir. 2019), opinion vacating sentence filed August 26, 2019.

3. Ninth Circuit Court of Appeals, 18-10016, *United States v. Davion Fitzgerald*, rehearing en banc denied on November 19, 2019.

Jurisdictional Statement

The Ninth Circuit Court of Appeals issued its published decision in this direct appeal on August 26, 2019, in *United States v. Fitzgerald*, 935 F.3d 814 (9th Cir. 2019) (Appendix A), and denied rehearing en banc on November 19, 2020 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). This petition is timely filed pursuant to Supreme Court Rule 13.1.

Relevant Constitutional, Statutory, and Rule Provisions

1. U.S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. U.S.S.G. § 4B1.2(a) (2016), in part: "The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that— (1) has as an element the use, attempted use, or threatened use of physical force against the person of another. . . ."

3. Nev. Rev. Stat. § 200.481(2)(b), describes, as relevant here, a battery not committed with a deadly weapon where substantial bodily harm to the victim results.

4. Nev. Rev. Stat. § 193.330(1) defines attempt to commit a crime as "[a]n act done with the intent to commit a crime, and tending but failing to accomplish it."

5. Nev. Rev. Stat. § 0.060 defines "substantial bodily harm" as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or [p]rolonged physical pain."

Statement of the Case

I. Applying Nevada law, the federal district court held Nevada's attempted battery statute does not qualify as a crime of violence under the United States Sentencing Guidelines.

At Petitioner Davion Fitzgerald's federal sentencing for unlawfully possessing a firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2), the parties contested whether Fitzgerald had a prior qualifying crime of violence conviction under the 2016 Sentencing Guidelines. *See* U.S.S.G. § 4B1.2(a). The Probation Department and government believed Fitzgerald's 2011 conviction for Nevada attempted battery resulting in substantial bodily harm under Nev. Rev. Stat. §§ 193.330, 200.481 was a crime of violence. Fitzgerald objected, explaining the Nevada Supreme Court's opinion in *Collins v. State*, 203 P.3d 90, 92-93 (Nev. 2009), prohibited a crime of violence finding.

In *Collins*, the Nevada Supreme Court reviewed its battery statute to determine whether defining "substantial bodily harm" to include causing "prolonged physical pain" sufficiently provided notice of prohibited conduct to overcome a constitutional vagueness challenge. 203 P.3d at 91-92. *Collins* ultimately held a wrongdoer, by mere touching, need only inflict subjective "mild discomfort or dull distress" on another to commit battery resulting in substantial bodily harm. *Id.* at 92 (citing *Matter of Philip A.*, 400 N.E.2d 358, 359 (N.Y. 1980) ("Pain is, of course, a subjective matter. Thus, touching the skin of a person who has suffered third degree burns will cause exquisite pain, while the forceful striking of a gymnast in the solar plexus may cause him no discomfort at all.")). The Nevada Supreme Court

concluded mere touching satisfies the substantial bodily harm requirement if that touch results in lasting physical pain. *Collins*, 203 P.3d at 92 & n.3. Thus, in the context of a Nevada battery, the wrongdoer is not liable for "for the touching itself," only the "lasting physical pain resulting from the touching." *Id.* at n.3

Because mere touching does not require the violent physical force necessary to meet the elements clause of the crime of violence definition, Fitzgerald argued Nevada battery resulting in substantial bodily harm—and, as a result, the inchoate attempt to commit that offense—is categorically overbroad and cannot qualify as a crime of violence. The district court agreed, declined to apply a crime of violence enhancement, and sentenced Fitzgerald to 37 months imprisonment followed by three years of supervised release.

II. In a split decision, the Ninth Circuit panel reversed, disregarding the Nevada Supreme Court's interpretation of its own state statute as "an odd hypothetical" based on "legal imagination."

The government appealed the district court's decision. After oral argument, the panel reversed the district court in a published per curiam, two-judge opinion. *United States v. Fitzgerald*, 935 F.3d 814 (9th Cir. 2019). The panel majority characterized the Nevada Supreme Court's interpretation of its battery statute in *Collins* "as an exercise of 'legal imagination.'" *Id.* at 818. The opinion further characterized as an "odd hypothetical" the *Collins* court's explanation that merely touching another or using nonviolent force could cause prolonged physical pain under the Nevada battery statute. *Id.* Refusing to be bound by the Nevada

Supreme Court, the panel majority held Nevada's attempted battery offense categorically qualified as a federal crime of violence. *Id.*

The Honorable William A. Fletcher dissented. Quoting *Collins*, Judge Fletcher explained "[t]he Nevada Supreme Court has answered this question" and "told us that the amount of force required to cause 'prolonged physical pain' does not always involve the violent physical force" required to qualify as a federal crime of violence. *Fitzgerald*, 935 F.3d at 819-20. "Because 'prolonged physical pain' may be caused by simple touching—as in the Nevada Supreme Court's example, by touching a person suffering from third-degree burns—a conviction for battery causing substantial bodily harm can be sustained through 'the merest touching.'" *Id.* at 820. And because the merest touching is not violent physical force, Judge Fletcher concluded Nevada's attempted battery offense simply fails to qualify as a crime of violence under the elements clause. *Id.*

Judge Fletcher also disagreed with the majority's rejection of "this straightforward reading of state law" because "the crime I just described was not imagined or abstracted from the bare text of the statute. Instead, it comes directly from the Nevada Supreme Court's discussion of its own law." *Fitzgerald*, 935 F.3d at 820. Therefore, under binding precedent, "[t]his is precisely the kind of 'state case[ ] examin[ing] the outer contours of the conduct criminalized by the state statute' we are supposed to treat as 'particularly important' in deciding whether a state crime involves the use of violent force." *Id.*

Reasons for Granting the Petition

"Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). "This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules." *Id.*; U.S. Const. amend. X. Thus, federal courts "are not free to substitute [their] own interpretations of state statutes for those of a State's courts." *Schad v. Arizona*, 501 U.S. 624, 636 (1991).

Under this fundamental principle, when applying the categorical approach, this Court holds federal courts are "bound" by a state's highest court's interpretation of that state's statute. *Johnson v. United States*, 559 U.S. 133, 138 (2010). State cases examining "the outer contours of the conduct criminalized by the state statute are particularly important [to the categorical analysis] because 'we must presume that the conviction rested upon nothing more than the least of the acts criminalized'" by that statute. *United States v. Walton*, 881 F.3d 768, 771-72 (9th Cir. 2018) (collecting cases dating back to *Taylor v. United States*, 495 U.S. 575 (1990)).

The panel majority in *Fitzgerald* violated this fundamental federalism principle. To reverse the district court's sentencing decision, the Ninth Circuit panel majority opinion breached this Court's mandates and disregarded the Nevada Supreme Court's decision interpreting Nevada's battery statute. The *Fitzgerald* opinion breaks from this Court's precedent governing principles of comity and

federalism and violates this Court's directives for applying the categorical approach, adding an impermissible layer of judicial subjectivity to the categorical analysis that this Court has endeavored to avoid since the creation of the doctrine in *Taylor*. Certiorari is warranted.

I. This Court's precedent requires federal courts to defer to a state supreme court's interpretation of its own state criminal statutes.

"This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws." *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825). As such, federal courts are not free to alter a state court's interpretation of the elements of its own state criminal offenses. The panel majority's opinion here did not honor these principles. It ignored both the Nevada Supreme Court's *Collins* decision and this Court's authority commanding respect to state courts' statutory interpretations. By replacing the Nevada Supreme Court's interpretation with its own interpretation, the *Fitzgerald* majority opinion violates this Court's precedent and must be corrected.

In requiring federal court deference to state court interpretations of state law, this Court has held itself equally bound. In *Schad v. Arizona*, a state habeas petitioner challenged Arizona Supreme Court's treatment of premeditated murder and felony murder as alternative means of committing murder, rather than alternative elements. 501 U.S. 624, 636-37 (1991). Rejecting petitioner's request to reinterpret Arizona's statute in a manner contrary to the Arizona Supreme Court, this Court reiterated the "fundamental principle" that it was "not free to substitute

[its] own interpretations of state statutes for those of a State's courts." *Id.* at 629, 636. Respect for States' decisions to define and interpret what constitutes a state crime did not permit "second-guessing" or reinterpretation by federal courts. *Id.* at 638. This Court thus confirmed "[i]t goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government" and "what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court." *Id.*; *see also R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992) ("In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court."); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (holding "state courts are the ultimate expositors of state law" and "we are bound by their constructions except in extreme circumstances not present here").

This Court also requires federal courts to defer to the States' interpretation of their own statutes in the categorical approach context. *Johnson v. United States*, held the "physical force" in the violent felony definition for the Armed Career Criminal Act sentencing enhancement statute means "*violent* force." 559 U.S. 133, 140 (2010). Finding Florida battery did not meet the violent force requirements, this Court unequivocally held itself "bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of [the Florida battery statute]." *Id.* at 138. Because the "Florida Supreme Court has held that the element of 'actually and intentionally touching' under Florida's battery law is satisfied by any intentional physical contact, 'no matter how slight,'" this Court

concluded Florida battery did not require violent physical force and thus could not qualify as a violent felony. *Id.* at 138, 145.

Thus, "[w]here a state court has interpreted a provision of state law," a federal court cannot ignore that interpretation, even if the federal court would not have reached that interpretation if "construing the statute in the first instance." *R.A.V.*, 505 U.S. at 412 (J. White, concurring). Here, the Nevada Supreme Court did interpret its battery statute, and the majority panel in *Fitzgerald* disregarded that interpretation.

In *Collins*, the Nevada Supreme Court interpreted the conduct sufficient to commit battery with substantial bodily harm in Nevada. The *Collins* court held Nevada's battery statute includes mere touching that causes a subjective experience of "mild discomfort" that does not "immediately" dissipate. 203 P.3d at 92-93 & n.3. The Nevada Supreme Court also recognized "pain" is subjective and has "multiple meanings, rang[ing] from mild discomfort or dull distress to acute often unbearable agony," providing the following parenthetical with its citation: *Cf. Matter of Philip A.*, N.E.2d at 359 ("Pain is, of course, a subjective matter. Thus, touching the skin of a person who has suffered third degree burns will cause exquisite pain, while the forceful striking of a gymnast in the solar plexus may cause him no discomfort at all."). The *Collins* court subsequently reaffirmed its interpretation of the terms pain and substantial bodily harm in *LaChance v. State*, rejecting an argument that "where the substantial-bodily-harm element is based on prolonged pain, the pain must also be substantial." 321 P.3d 919, 925-26 (Nev. 2014).

As a result, Nevada's battery with substantial bodily harm offense does not require the use of violent physical force as defined in the federal Sentencing Guidelines. *See* U.S.S.G. § 4B1.2(a) (providing an offense meets the elements clause only if it "has as an element the use, attempted use, or threatened use of physical force against the person of another"); *Johnson*, 559 U.S. at 140 (holding element of "physical force" must involve "violent force—that is, force capable of causing physical pain or injury to another person"); *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (holding "[m]ere offensive touching" is insufficient) (citing *United States v. Castleman*, 572 U.S. 157, 182 (2014) (Scalia, J., concurring in part and concurring in judgment)). Because a completed battery offense in Nevada is not a crime of violence, it necessarily follows that attempted battery resulting in substantial bodily harm (Fitzgerald's predicate conviction) also is not a crime of violence.

The *Fitzgerald* majority disregarded the Nevada Supreme Court's interpretation of the scope of Nevada's battery statute. State sovereignty, however, prevents federal courts from reinterpreting a state statute based on federal judges' apparent disagreement with the State's highest court. *Schad*, 501 U.S. at 636; *see also Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) (finding state supreme court decision that "definitively answer[ed]" divisibility analysis was the final "authoritative source[] of state law"). The panel majority disregarded the "'fixed and received construction'" of Nevada's battery statute the Nevada Supreme Court

adopted and made part of its battery statute. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 609 (1874).

In concluding otherwise, the panel majority cited only to *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), stating Fitzgerald was required to demonstrate "more than the application of legal imagination to a state statute's language." *Fitzgerald*, 935 F.3d at 818. The majority then posited that, for Fitzgerald to prevail, he was required to show "a defendant could realistically be convicted of attempted battery with substantial bodily harm for trying, with the intent to cause lasting discomfort, merely to touch his victim (or use other nonviolent force)." *Id.* The majority's ruling conflicts with *Duenas-Alvarez*'s actual holding.

This Court held in *Duenas-Alvarez* that a defendant should show "a realistic probability" "*the State* would apply its statute to conduct that falls outside the generic definition of a crime." 549 U.S. at 193 (emphasis added). The Nevada Supreme Court, interpreting its own state statute, directly held a defendant is criminally liable for battery causing substantial bodily harm for touching a victim if that touch results in subjective discomfort. *Collins*, 203 P.3d at n.3. The State therefore *has* determined its statute applies to conduct that does not require violent physical force.

Furthermore, this Court's example in *Duenas-Alvarez* "is not the only way" to demonstrate a state offense is overbroad. *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009 (9th Cir. 2015). When a state statute "explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' *Duenas-Alvarez*, 127 S.Ct. at 822,

is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018).

To determine if the overbreadth of a state statute is evident, federal courts must look both to the text of the statute *and to state court interpretations of the statute*. *Johnson*, 559 U.S. at 138, 145. This is the process that should have been followed here, as the dissent correctly recognized. *Fitzgerald*, 935 F.3d at 820 (J. Fletcher, dissenting) (noting crime of battery with substantial bodily harm by touching a person with third-degree burns is a crime that "comes directly from the Nevada Supreme Court's discussion of its own law"—not from "the application legal imagination").

Federal courts are bound by the Nevada Supreme Court's decisions interpreting the meaning and scope of Nevada's criminal statutes. Respect for state sovereignty did not permit the panel majority to second-guess the Nevada Supreme Court's pronouncements on the meaning of its state law. Certiorari by this Court is warranted necessary to ensure federal courts do not alter a state court's interpretation of its own state criminal offenses.

II. The panel majority's opinion infuses judicial subjectivity and arbitrariness into the categorical approach.

The repercussions of the *Fitzgerald* opinion will extend far beyond the Nevada battery offense at issue. By rejecting a direct, unambiguous state court

interpretation of the state statute at issue, *Fitzgerald* exposes federal sentencing to the very arbitrariness and judicial subjectivity this Court seeks to avoid with the categorical approach. *See, e.g.,* M*athis,* 136 S. Ct. at 2251 (noting the categorical approach deems it "impermissible for 'a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case'").

In the last five years, this Court has addressed and struck down federal statutory provisions that permitted judicial arbitrariness to play a role in the analysis and application of the categorical approach. In *Johnson v. United States*, this Court struck down the Armed Career Criminal Act's residual clause on vagueness grounds, concluding "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. 2551, 2557 (2015). In *Sessions v. Dimaya*, the Court struck down 18 U.S.C. § 16(b)'s residual clause on vagueness grounds as it required courts "to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk." 138 S. Ct. 1204, 1216 (2018). For the same reasons, the Court struck down the residual clause of 18 U.S.C. § 924(c)(3)(B) in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). In doing so, the Court also reaffirmed federal application of the categorical approach. *Id.* at 2332-36.

The panel majority's opinion permits a new type judicial arbitrariness. Before *Fitzgerald*, it was clear that when a state's highest court has interpreted a statute, federal courts were to defer to that state court interpretation. *See Johnson*,

559 U.S. at 138 ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2)."). *Fitzgerald*'s majority now permits federal courts to challenge state court interpretations on decisions of state law, creating federal arbitrariness subjectivity that has no place in in our dual sovereign system of justice. This is especially so in federal criminal cases employing the categorical analysis to increase a defendant's criminal sentence where a state's highest court has already answered the question in the defendant's favor. Certiorari is necessary to prevent the arbitrary, inconsistent rulings the *Fitzgerald* opinion will generate.

Conclusion

For the reasons set forth herein, Petitioner Fitzgerald requests this Court grant this petition for certiorari.

Respectfully submitted,

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