No. 19-8221

IN THE SUPREME COURT OF THE UNITED STATES

FEUU FAGATELE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's state conviction for aggravated assault, in violation of Utah Code Ann. § 76-5-103 (LexisNexis 2012), is a conviction for a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(1) (2016).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Utah):

United States v. Fagatele, No. 17-cr-62 (Jan. 5, 2018)

United States Court of Appeals (10th Cir.):

United States v. Fagatele, No. 18-4004 (Nov. 5, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A21) is reported at 944 F.3d 1230. The order of the district court is not published in the Federal Supplement but is available at 2018 WL 317826.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 2019. On January 27, 2020, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including April 3, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Utah, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 46 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. A3-A21.

1. On October 26, 2016, a Task Force Officer with the U.S. Marshals Service Violent Fugitive Apprehension Strike Team learned that a parole fugitive was in the area of a residential address in West Valley City, Utah. Presentence Investigation Report (PSR) ¶ 4. When the officer saw a BMW leave the residence and immediately make an illegal lane change, the officer ran a records check on its license plate. Ibid. After learning that the BMW was not covered by insurance, the officer conducted a traffic stop. Ibid.

Petitioner was driving the BMW, and the officer's records check on petitioner revealed that he had a suspended driver's license and active state warrants for his arrest. PSR ¶ 5. After the officer asked petitioner to step out of the BMW, the officer asked petitioner if he had anything that could be used as a weapon. PSR ¶ 6. Petitioner responded, "yea, I have a small 25 on my right hip," and the officer found a Raven Arms P-25 semiautomatic pistol in that location. Ibid.

2. A federal grand jury in the District of Utah returned an indictment charging petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. He subsequently pleaded guilty to that count, pursuant to a plea agreement. 1 C.A. App. 5, 13-19.

The Probation Office prepared a presentence report in accordance with the 2016 edition of the United States Sentencing Commission Guidelines Manual, which was the edition that was in effect at the time. PSR ¶ 12.[1] The Probation Office calculated petitioner's base offense level as 20, based on a determination that petitioner's prior Utah conviction for third-degree aggravated assault was a conviction for a "crime of violence." PSR ¶ 13; see Sentencing Guidelines § 2K2.1(a)(4)(A); see also Sentencing Guidelines § 4B1.2(a) (defining "crime of violence"). That conviction was based on an incident in which petitioner attacked a neighbor with a barstool -- striking the victim from behind, hitting him in the face, and punching and kicking him when he was on the ground. PSR ¶¶ 13, 38.

The version of the Utah aggravated-assault statute in effect at the time, Utah Code Ann. § 76-5-103(1) (LexisNexis 2012), provided that "[a] person commits aggravated assault if the person

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[1] Because the 2016 edition was the effective edition, all citations to the United States Sentencing Commission Guidelines Manual reference the 2016 edition.

commits assault as defined in Section 76-5-102" and uses either "a dangerous weapon" or "other means or force likely to produce death or serious bodily injury."[2] Section 76-5-102, in turn, defines assault as:

> (a) an attempt, with unlawful force or violence, to do bodily injury to another;
>
> (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
>
> (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

Utah Code Ann. § 76-5-102(1). An aggravated assault is a third-degree felony unless it "results in serious bodily injury," in which case it is a second-degree felony. Id. § 76-5-103(2).

Before sentencing, petitioner objected to the Probation Office's calculations, arguing that Utah aggravated assault was not a "crime of violence" under the Guidelines' "elements clause," Sentencing Guidelines § 4B1.2(a)(1). That clause defines the term "crime of violence" to include an offense punishable by imprisonment for more than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Ibid. Petitioner contended that Utah third-degree aggravated assault did not qualify, on the theory

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[2] Because petitioner was convicted of violating the 2012 version of Utah's aggravated assault statute, all citations to Utah's definitions of assault and aggravated assault reference the 2012 versions.

that it could be committed (1) with a mens rea of recklessness and (2) through the indirect application of force or without any force at all. See 1 C.A. App. 22-31, 77-82, 91-93.

The district court rejected petitioner's arguments. 1 C.A. App. 95-112. Relying on Voisine v. United States, 136 S. Ct. 2272 (2016), the court explained that a crime with a mens rea of recklessness can qualify as a crime of violence. 1 C.A. App. 104-109. And, relying on United States v. Castleman, 572 U.S. 157 (2014), the court explained that both direct and indirect force can qualify as the "use of physical force" under the Guidelines' elements clause. 1 C.A. App. 110-111. The court also rejected petitioner's contention that because an individual can be convicted of third-degree aggravated assault for using "other means * * * likely to produce death or serious bodily injury," Utah Code Ann. § 76-5-103(1)(b), it does not require the degree of "force" contemplated by the Guidelines. 1 C.A. App. 110-111. The court observed that, to be convicted under the "other means" alternative, a Utah defendant must still have "committed simple assault," which necessarily requires "threats, attempts, or acts, to do, cause, or create the risk of force to another" that involve the type of "actual or potential harm to another 'requisite' person" that would satisfy the Guidelines' definition. Ibid.

The district court accordingly agreed with the Probation Office that the advisory Guidelines range was 51-63 months of

imprisonment. 2 C.A. App. 40; see PSR ¶ 88. It ultimately imposed a below-Guidelines sentence of 46 months of imprisonment. Judgment 2; 2 C.A. App. 41; 3 C.A. App. 50.[3]

3. The court of appeals affirmed, rejecting petitioner's renewed challenge to the classification of his Utah third-degree aggravated assault conviction as a "crime of violence" under the Guidelines' elements clause. Pet. App. A3-A21.

The court of appeals acknowledged that, for purposes of the Guidelines' elements clause, a conviction must involve "force that is both (1) physical and (2) violent." Pet. App. A7. The court observed that conviction for third-degree aggravated assault requires proof of simple assault, which requires proof of a physical act that "necessarily causes bodily injury, attempts to cause bodily injury, threatens to cause bodily injury, or creates a substantial risk of bodily injury." Id. at A10-A11. The court also observed that third-degree aggravated assault itself requires

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[3] Following a stipulated motion from petitioner and the government, see D. Ct. Doc. 65 (Apr. 25, 2019), on May 16, 2019, the district court amended the judgment to give petitioner credit toward his sentence for time served in state prison related to the incident on which his federal conviction was based, D. Ct. Doc. 66. The court and the parties had intended to give petitioner credit for this time served when petitioner was originally sentenced, but unintentionally failed to do so. See D. Ct. Doc. 65, at 1-2. Petitioner and the government asserted that "the cleanest way to correct the misunderstanding at this stage[] is to amend the judgment/sentence," id. at 3, which the court did, amending petitioner's sentence of imprisonment from 46 months to 35 months, D. Ct. Doc. 66; see Am. Judgment.

proof that the defendant used a means "'likely to produce death or serious bodily injury.'" Id. at A16 (citation omitted). Relying in part on prior decisions that in turn relied on this Court's decision in Castleman, the court of appeals reasoned that it is impossible to cause or create a substantial risk of bodily injury under the Utah statute without the use of violent physical force. Id. at A8-A17.

The court of appeals also rejected petitioner's claim that the Utah crime did not require a sufficient mens rea to qualify under the Guidelines' elements clause. Pet. App. A17-A20. Petitioner recognized that under the court of appeals' recent decision in United States v. Bettcher, 911 F.3d 1040 (10th Cir. 2018), petition for cert. pending, No. 19-5652 (filed Aug. 16, 2019), a crime with a mens rea of recklessness could qualify. Pet. C.A. Br. 27-31. But he argued, for the first time on appeal, that a Utah third-degree aggravated assault conviction could be based on a mens rea below recklessness. See Pet. App. A17. The court found that because Utah case law "does not clearly or obviously demonstrate that a defendant can violate § 76-5-103(1)(b) with a mens rea less than recklessness," petitioner could not satisfy the plain-error standard applicable to such an unpreserved claim. Id. at A20.

ARGUMENT

Petitioner renews his claim that Utah third-degree aggravated assault is not a crime of violence under Sentencing Guidelines § 4B1.2(a)(1). He contends (Pet. 4-11), in particular, that such an offense does not require proof of violent physical force. That contention lacks merit, and the decision below does not implicate any division among the courts of appeals that warrants further review of that contention. The Court may, however, wish to hold this case pending the disposition of Borden v. United States, cert. granted, No. 19-5410 (oral argument scheduled for Nov. 3, 2020), which concerns whether a crime that may be committed with a mens rea of recklessness can qualify as a "violent felony" under the "elements clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i).

1. Petitioner errs in contending (Pet. 9-11) that his Utah third-degree aggravated assault offense did not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," Sentencing Guidelines § 4B1.2(a)(1), on the theory that it did not involve violent physical force.

a. In Johnson v. United States, 559 U.S. 133 (2010), the Court defined "physical force" under the analogous elements clause of the ACCA to "mean[] violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140;

see, e.g., Stokeling v. United States, 139 S. Ct. 544, 553 (2019). And the Court concluded that the offense at issue in Johnson itself -- simple battery under Florida law, which requires only an intentional touching and may be committed by the "most 'nominal contact,' such as a 'ta[p] . . . on the shoulder without consent'" -- does not categorically require such force. 559 U.S. at 138 (quoting State v. Hearns, 961 So. 2d 211, 219 (Fla. 2007)).

Application of Johnson's definition of "force" to the Utah offense at issue here, however, yields a different result. In contrast to the offense at issue in Johnson, a conviction for third-degree aggravated assault in violation of Utah Code Ann. § 76-5-103 requires that the offender commit an assault using either "a dangerous weapon," or "other means or force likely to produce death or serious bodily injury." The Utah Code in turn provides that an assault is:

> (a) an attempt, with unlawful force or violence, to do bodily injury to another;
>
> (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
>
> (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

Utah Code Ann. § 76-5-102(1). Those alternatives each satisfy the elements clause, because they require either attempted (subsection (a)), threatened (subsection (b)), or actual (subsection (c)) use

of force "capable of causing physical pain or injury to another person," Johnson, 559 U.S. at 140.

Force that actually causes bodily injury is necessarily "force capable of causing physical pain or injury," Johnson, 559 U.S. at 140 (emphasis added). Thus, an attempt to cause bodily injury under subsection (a), or a threat to do so under subsection (b), would be an attempt or threat of the "use of physical force." Likewise an act that causes, or creates a substantial risk of causing, bodily injury under subsection (c) is an act that involves force that is at least "capable of causing physical pain or injury." Ibid. As the Court made clear in Stokeling, "'[c]apable' means 'susceptible' or 'having attributes . . . required for performance or accomplishment' or 'having traits conducive to or features permitting.'" 139 S. Ct. at 554 (citation omitted).

b. Petitioner nevertheless contends (Pet. 9-11) that causation of bodily injury in the context of the Utah statute can occur without the "use of physical force." That contention is unsound.

To the extent that petitioner argues that the bodily injury contemplated by the Utah statute could be caused without the use of any physical force -- violent or otherwise -- that contention cannot be squared with this Court's decision in United States v. Castleman, 572 U.S. 157 (2014). In Castleman, the Court held that the phrase "use of physical force" in 18 U.S.C. 922(g)(9)'s

definition of "misdemeanor crime of domestic violence" encompasses the indirect application of force leading to physical harm. See 572 U.S. at 170-171; see also id. at 174 (Scalia, J., concurring in part and concurring in the judgment) (explaining that "it is impossible to cause bodily injury without using force 'capable of' producing that result"). The Court explained that "'physical force' is simply 'force exerted by and through concrete bodies,' as opposed to 'intellectual force or emotional force.'" Id. at 170 (quoting Johnson, 559 U.S. at 138). Thus, it reasoned that the "'use of force'" in an example like poisoning a drink "is not the act of 'sprinkling' the poison; it is the act of employing poison knowingly as a device to cause physical harm." Id. at 171 (brackets omitted). The Court further reasoned that, if it were otherwise, "one could say that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim." Ibid.

That same reasoning applies here. Petitioner does not explain how someone could, for example, undertake an "act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another," Utah Code Ann. § 76-5-102(1)(c), without the "use of physical force" -- namely, the force that produces, or would have produced, the injury. Petitioner emphasizes (Pet. 9-11) that the Court in Castleman was addressing the phrase "use of physical force" in the

context of a statute that required a lesser degree of force than the "violent force" that the ACCA's (or, in this case, the Guidelines') elements clause would require, and that Castleman's direct holding is limited to that context. But a distinction in the degree of force makes no difference to Castleman's key insight -- i.e., that the relevant "physical force" is the physical process that acts on the victim to produce the harm.

To the extent that petitioner contends that the Utah statute at issue here does not in fact require the higher "violent" degree of force, he is incorrect. As explained above, "violent" force is "force capable of causing physical pain or injury." Johnson, 559 U.S. at 140; see Stokeling, 139 S. Ct. at 553. And the Utah statute's references to the causation of bodily injury foreclose the argument that a conviction under that statute could involve an attempt, threat, or act involving force akin to the "'nominal contact'" found inadequate in Johnson, see 559 U.S. at 138 (citation omitted), as opposed to an attempt, threat, or act involving "force capable of causing physical pain or injury," id. at 140.

2. Petitioner asserts (Pet. 5-7) that the decision below implicates a division in the courts of appeals on the issue of whether a statute that criminalizes the causation of injury, or an act producing a risk of injury, categorically satisfies the definition of a crime of violence. That assertion is unsupported,

and this case would in any event not be a suitable vehicle for further review.

a. This Court has repeatedly denied petitions for writs of certiorari that, like petitioner's, raise the issue of whether a statute that criminalizes the causation of injury constitutes a crime of violence. See, e.g., Sanchez v. United States, 140 S. Ct. 559 (2019) (No. 19-6279); Frederick v. United States, 139 S. Ct. 1618 (2019) (No. 18-6870); Harmon v. United States, 139 S. Ct. 939 (2019) (No. 18-5965); DeShazior v. United States, 139 S. Ct. 1255, (2019) (No. 17-8766); McMahan v. United States, 139 S. Ct. 456 (2018) (No. 18-5393); Ontiveros v. United States, 138 S. Ct. 2005 (2018) (No. 17-8367); Chapman v. United States, 138 S. Ct. 1582 (2018) (No. 17-8173); Jennings v. United States, 138 S. Ct. 701 (2018) (No. 17-6835).

And no court of appeals has accepted petitioner's assertion (Pet. 9-11) that Castleman's reasoning is limited to misdemeanor crimes and common-law force. To the contrary, every court of appeals with criminal jurisdiction has invoked Castleman's logic in the context of the "use of physical force" requirement in similarly worded provisions, such as the ACCA or the Sentencing Guidelines. See, e.g., United States v. Ellison, 866 F.3d 32, 37-38 (1st Cir. 2017); United States v. Hill, 890 F.3d 51, 59 (2d Cir. 2018), cert. denied, 139 S. Ct. 844 (2019); United States v. Chapman, 866 F.3d 129, 132-133 (3d Cir. 2017), cert. denied, 138

S. Ct. 1582 (2018); United States v. Reid, 861 F.3d 523, 528-529 (4th Cir.), cert. denied, 138 S. Ct. 462 (2017); United States v. Reyes-Contreras, 910 F.3d 169, 182 (5th Cir. 2018)(en banc); United States v. Verwiebe, 874 F.3d 258, 261 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018); United States v. Jennings, 860 F.3d 450, 458–460 (7th Cir. 2017), cert. denied, 138 S. Ct. 701 (2018); United States v. Rice, 813 F.3d 704, 705–706 (8th Cir.), cert. denied, 137 S. Ct. 59 (2016); Arellano Hernandez v. Lynch, 831 F.3d 1127, 1131 (9th Cir. 2016), cert. denied, 137 S. Ct. 2180 (2017); United States v. Ontiveros, 875 F.3d 533, 537-538 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018); United States v. Deshazior, 882 F.3d 1352, 1357-1358 (11th Cir. 2018), cert. denied, 139 S. Ct. 1255 (2019); United States v. Haight, 892 F.3d 1271, 1280 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 796 (2019).

b. Petitioner errs in suggesting (Pet. 7) that the court of appeals' decision in this case conflicts with the Third Circuit's decision in United States v. Mayo, 901 F.3d 218 (2018). Mayo concluded that a particular Pennsylvania aggravated-assault offense was not a violent felony under the ACCA, citing state case law interpreting that particular statute and relying on the statute's inclusion of an omission theory of liability. See id. at 223-230. Petitioner, however, does not claim that Utah third-degree aggravated assault may be committed by omission, and he fails to show that the Pennsylvania and Utah statutes are

materially alike. The variants of Utah assault expressly require an attempt, threat, or act, see Utah Code. Ann. § 76-5-102, and aggravated assault requires "force or violence" involving either the use of a dangerous weapon or "other means or force likely to produce death or serious bodily injury," id. § 76-5-103(1). In any event, to the extent that any tension exists between Mayo and the decision below, the Third Circuit has granted rehearing en banc to consider whether an offense that requires causing injury entails the use of physical force under the ACCA, see Order, United States v. Harris, No. 17-1861 (June 7, 2018), and the issue remains unresolved in that circuit.

Petitioner also errs in contending (Pet. 6-7) that the decision below conflicts with the Fourth Circuit's decisions in United States v. Jones, 914 F.3d 893 (2019), and United States v. Middleton, 883 F.3d 485 (2018). In Jones, the Fourth Circuit concluded that a conviction under a South Carolina assault statute that criminalizes, inter alia, "attempting to touch another in a rude or angry manner" -- including spitting in someone's face -- is not a violent felony under the elements clause of the ACCA. 914 F.3d at 903. And in Middleton, the Fourth Circuit concluded that South Carolina involuntary manslaughter, which can lead to homicide liability when the defendant's actions are (1) inherently "lawful" but involve reckless disregard for others' safety or (2) would "not naturally tend[] to cause death or great bodily harm,"

is not a violent felony under the elements clause of the ACCA. 883 F.3d at 489 (emphasis added; citation omitted). The court noted that the statute had been applied to a defendant who sold alcohol to high school students -- who then in turn shared the alcohol with another person who drove while intoxicated, crashed his car, and died. Ibid. And the court reasoned that conduct leading to bodily injury through so "attenuated a chain of causation" did not qualify as a use of violent force. Id. at 492.

Neither of those decisions compels the conclusion that Utah third-degree aggravated assault is not a "crime of violence." As explained above, unlike the statute at issue in Jones, a conviction for Utah aggravated assault could not be based on an attempt at rude or angry touching. And unlike the statute at issue in Middleton, the Utah aggravated assault statute has no application to "illegal sale[s]," 883 F.3d at 492, or to other crimes involving an attenuated chain of causation. Instead, it requires an actual attempt, threat, or act that would constitute the "use of physical force" against a victim. See Utah Code Ann. § 76-5-102(1).

c. Even assuming the petition here presented an issue that might otherwise warrant this Court's review, this case would be an unsuitable vehicle for such review because it involves only the proper interpretation of the Sentencing Guidelines. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines, because the Sentencing Commission can amend the

Guidelines to eliminate a conflict or correct an error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348; see United States v. Booker, 543 U.S. 220, 263 (2005). Particularly because the Guidelines are now advisory, see Booker, 543 U.S. at 245, this Court's review of the court of appeals' decision applying the Guidelines is not warranted.

3. As petitioner briefly notes (Pet. 5), this Court has granted certiorari in Borden to resolve whether crimes that can be committed with a mens rea of recklessness can satisfy the ACCA's elements clause. Although petitioner has not reasserted in this Court the mens rea-based claims that he raised below, this Court appears to be holding for Borden a petition involving the same Utah statute, see Bettcher v. United States, No. 19-5652 (filed Aug. 16, 2019), as well as cases involving application of the Sentencing Guidelines rather than the ACCA, see ibid.; see also Ash v. United States, No. 18-9639 (filed June 10, 2019). The Court could choose to do the same here.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to hold the petition pending

the disposition of Borden v. United States, cert. granted, No. 19-5410 (oral argument scheduled for Nov. 3, 2020).

Respectfully submitted.

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