

19-8221

IN THE
SUPREME COURT OF THE UNITED STATES

FEUU FAGATELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

SCOTT KEITH WILSON
Federal Public Defender
JESSICA STENGEL
Counsel of Record
46 W. Broadway, Suite 110
Salt Lake City, UT 84101
Tel. (801) 524-4010
Jessica_stengel@fd.org
Counsel for Petitioner

Table of Contents

Table of Contents.....	ii
Table of Authorities	iii
Conclusion.....	12

Table of Authorities

<i>Arellano Hernandez v. Lynch</i> ,	
831 F.3d 1127 (9th Cir. 2016)	6, 8
<i>Chapman v. United States</i> ,	
138 S.Ct. 1582 (2018)	5
<i>DeShazor v. United States</i> ,	
139 S.Ct. 1255 (2019)	5
<i>Curtis Johnson v. United States</i> ,	
559 U.S. 133 (2010)	1, 2, 3
<i>Descamps v. United States</i> ,	
570 U.S. 254 (2013)	4
<i>Frederick v. United States</i> ,	
139 S.Ct. 1618 (2019)	5
<i>Harmon v. United States</i> ,	
139 S.Ct. 939 (2019)	5
<i>Jennings v. United States</i> ,	
138 S.Ct. 701 (2018)	6
<i>Johnson v. United States</i> ,	
576 U.S. 591 (2015)	3
<i>McMahan v. United States</i> ,	
139 S.Ct. 456 (2019)	5
<i>Ontiveros v. United States</i> ,	
138 S.Ct. 2005 (2018)	5
<i>Sanchez v. United States</i> ,	
140 S.Ct. 559 (2019)	4
<i>Stokeling v. United States</i> ,	
139 S.Ct. 544 (2019)	2
<i>United States v. Castleman</i> ,	
572 U.S. 157 (2014)	<i>passim</i>

<i>United States v. Chapman,</i>	
866 F.3d 129 (3rd Cir. 2017)	8
<i>United States v. DeShazior,</i>	
882 F.3d 1352 (11th Cir. 2018)	8
<i>United States v. Ellison,</i>	
866 F.3d 21 (1st Cir. 2017)	8
<i>United States v. Haight,</i>	
892 F.3d 1271 (D.C. Cir. 2018)	6, 8
<i>United States v. Hill,</i>	
890 F.3d 51 (2018)	6, 8
<i>United States v. Jennings,</i>	
860 F.3d 450 (7th Cir. 2017)	6, 8
<i>United States v. Mayo,</i>	
901 F.3d 218 (3rd Cir. 2018)	11
<i>United States v. Middleton,</i>	
883 F.3d 485 (4th Cir. 2018)	11
<i>United States v. Ontiveros,</i>	
875 F.3d 533 (10th Cir. 2017)	8
<i>United States v. Perez-Vargas,</i>	
414 F.3d 1282 (10th Cir. 2005)	11
<i>United States v. Reid,</i>	
861 F.3d 523 (4th Cir. 2017)	6, 8
<i>United States v. Reyes-Contreras,</i>	
910 F.3d 2018 (5th Cir. 2018)	6, 8
<i>United States v. Rice,</i>	
813 F.3d 704 (8th Cir. 2016)	8
<i>United States v. Ron Pair Enterprises, Inc.,</i>	
489 U.S. 235 (1989)	4
<i>United States v. Scott,</i>	
954 F.3d 74 (2d Cir. 2020)	10
<i>United States v. Verwiebe,</i>	
874 F.3d 258 (6th Cir. 2017)	8

Federal Statutes

18 U.S.C. 924	7, 10
18 U.S.C. § 16	8

State Statutes

U.C.A § 76-5-102	1, 4
U.C.A § 103(1)(b).....	1

Other

USSG § 2L1.2	8
USSG § 4B1.1.....	8
USSG § 4B1.2	7, 8, 9

The government begins and ends its opposition to Mr. Fagatele's petition with a suggestion to hold it pending the disposition of *Borden v. United States*, cert. granted, No. 19-5410 (oral argument scheduled for Nov. 3, 2020). Mr. Fagatele acknowledges that holding this case for the resolution of *Borden* may make some sense as Utah aggravated assault can be committed recklessly. However, resolving the *mens rea* question raised in *Borden* does not answer the question currently dividing circuits and unambiguously reserved by this Court in *United States v. Castleman*, 572 U.S. 157, 170 (2014): whether causing injury categorically satisfies the definition of violent felony.

For the following reasons, then, this Court should not wait for *Borden* and should grant this Petition.

1. The government's arguments in favor of upholding the Tenth Circuit's decision in this case lacks support in both law and logic. BIO, 8-12.

a. The least act criminalized by Utah third-degree aggravated assault is the use of "other means or force" likely to produce death or serious bodily injury to create a substantial risk of injury. U.C.A. §§ 76-5-102(1)(c), 103(1)(b) (2012). Contrary to the government's assertion, this does not satisfy the force clause. BIO, 9-10. The government argues that "[f]orce that actually causes bodily injury is necessarily force capable of causing physical pain or injury." BIO, 10 (emphasis in original) (internal citation omitted). As this Court held in *Curtis Johnson*, in the context of violent felonies, "the phrase "physical force" means *violent* force—that is,

force capable of causing physical pain or injury to another person.” *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). It is a mystery how the government’s assertion, while true, in any way addresses the issue of whether risk of injury is the equivalent of the use of force. The government’s argument does not address the question raised, moreover, since there is no challenge to the *Curtis Johnson* definition of force.

b. The government correctly understands that Mr. Fagatele argues that as the statute is written, Utah assault can be committed without the use of any physical force. BIO, 10. The government disagrees, though, with the scope of the statute and the effect of *Castleman*, yet offers nothing to refute the fact that *Castleman* left open the question presented here: whether creating risk of injury categorically satisfies the definition of a crime of violence.

The holding in *Castleman* does not resolve the issue raised in this petition and does not justify the weight the government gives it. The government ignores the fact that *Castleman* is quite narrow, holding only that the common-law definition of force “fits perfectly” the common-law crime of misdemeanor domestic violence. 572 U.S. at 163. *See also Stokeling v. United States*, 139 S.Ct. 544, 554 (2019) (recognizing that *Castleman* “focused on domestic-violence misdemeanors, crimes involving relatively minor uses of force that might not constitute violence in the generic sense could nevertheless qualify as predicate offenses.”) (internal quotations omitted).

Castleman, in discussing force in the context of misdemeanor crimes of domestic violence, determined force includes the indirect application of force leading to physical harm. 572 U.S. at 170-71. This is indirect force and nothing more. The government hangs its hat on what it deems a “key insight” from *Castleman*, “that the relevant physical force is the physical process that acts on the victim to produce the harm.” BIO, 12. This is an explanation of this Court’s understanding of how force works and nothing more. Calling something a “key insight” neither makes it relevant to the question in this petition nor changes the fact that the *Castleman* Court unambiguously reserved the very question presented here. 572 U.S. at 170.

c. The government mistakenly contends that because Utah assault “references . . . causation of bodily injury,” a conviction could only involve the use of violent, physical force as defined in *Curtis Johnson*. BIO, 12. At the outset, that contention misstates Utah law. Utah third-degree aggravated assault speaks in terms of creating a risk of injury. Creating a risk of injury is not causing injury and it is decidedly not the use, attempted use, or threatened use of violent, physical force. Creating a risk of injury and assuming force, however, recreates the exact problems raised by the residual clause and what the Sentencing Commission eliminated following this Court’s decision in *Johnson v. United States*, 576 U.S. 591 (2015).

Moreover, a statute that requires proof of creating a risk of injury is not the same as one that requires proof of the use of force for a conviction. The categorical

approach makes clear that only “statutory definitions—i.e., the elements—of a defendant’s prior offense” factor into the analysis. *Descamps v. United States*, 570 U.S. 254, 261 (2013). Even if actual injury could stand in the place of force as an essential element, the plain language of Utah assault neither requires proof of force nor proof of injury for conviction. U.C.A. §§ 76-5-102, 103; *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (internal quotation omitted) (“where, as here, the statute’s language is plain, “the sole function of the courts is to enforce it according to its terms.”). It is for this very reason this case is an excellent vehicle, namely that the Utah statutory scheme is unambiguous in that neither force nor injury are essential elements.

2. The government erroneously asserts that this issue is not deserving of this Court’s attention and that the circuits are in lock-step agreement on whether causing injury, or even creating risk of injury, categorically satisfies the definition of violent felony, a question this Court reserved. BIO, 12-17.

a. The numerous petitions this Court has rejected over the past two years underscores the unsettled state of the law and the need for this Court’s intervention as the issue remains alive and unresolved in lower courts. BIO, 13. Mr. Fagatele summarizes the rejected petitions in the chart below:

Case name	Supreme Court case number	Westlaw citation	Question presented
<i>Sanchez v. United States</i>	19-6279	140 S.Ct. 559 (2019)	Whether <u>causation of physical injury</u> requires the use of violent force.

Case name	Supreme Court case number	Westlaw citation	Question presented
<i>Frederick v. United States</i>	18-6870	139 S.Ct. 1618 (2019)	Does <u>causation of harm</u> necessarily entail the use of force.
<i>Harmon v. United States</i>	18-5965	139 S.Ct. 939 (2019)	Whether <u>causation of bodily injury</u> necessarily includes the use of violent, physical force.
<i>DeShazor v. United States</i>	17-8766	139 S.Ct. 1255 (2019)	Whether offense that can be committed through indirect, non-violent application of force – such as use of spoon – has an element of force for purposes of ACCA.
<i>McMahan v. United States</i>	18-5393	139 S.Ct. 456 (2019)	Whether <u>intentionally causing physical contact</u> with another person with a deadly weapon <u>in a manner whereby great bodily injury, disfigurement or death can be inflicted</u> qualifies as a violent felony under ACCA's force clause.
<i>Ontiveros v. United States</i>	17-8367	138 S.Ct. 2005 (2018)	Whether the <u>causation of bodily injury</u> necessarily includes the use of violent force.
<i>Chapman v. United States</i>	17-8173	138 S.Ct. 1582 (2018)	Whether a statute that prohibits acts that <u>threaten or cause bodily injury</u> require physical force as an element and thus constitute a crime of violence.

Case name	Supreme Court case number	Westlaw citation	Question presented
<i>Jennings v. United States</i>	17-6835	138 S.Ct. 701 (2018)	Whether <u>causation of injury</u> , including impairment of physical condition, necessarily requires the use of force under ACCA.

b. The government's assertion that every circuit has comfortably accepted the expansion of *Castleman* such that injury categorically satisfies the definition of violent felony is erroneous and the cases it offers are inapposite to both that assertion as well as the question presented in this petition. BIO, 13-14. The Second Circuit's discussion of *Castleman* was merely dicta as it was unnecessary to the judgment. *United States v. Hill*, 890 F.3d 51, 59 (2018). The Fourth Circuit recognized that “[t]he *Castleman* Court did not employ *Johnson*'s construction of ACCA's force clause” in the course of accepting the premise that force includes both indirect and direct force. *United States v. Reid*, 861 F.3d 523, 527-8 (4th Cir. 2017). That force can be indirect is irrelevant to the question presented in this petition. The cases cited by the government from the Fifth, Seventh, and D.C. Circuit Courts of Appeal are likewise irrelevant. *United States v. Reyes-Contreras*, 910 F.3d 2018 (5th Cir. 2018), *United States v. Jennings*, 860 F.3d 450 (7th Cir. 2017), and *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018). Finally, the Ninth Circuit held it was bound by pre-*Castleman* precedent in finding a predicate to be a crime of violence. *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016). Like

every other case offered in the opposition brief, the Ninth Circuit's ancillary discussion of *Castleman* was limited to the indirect-versus-direct use of force and actually supports petitioner's position that the issue raised remains unresolved. *Id.*, 1131-2.

c. The government asserts that because this petition originates from a Guidelines challenge, it is inappropriate for review. BIO, 16-17. For three reasons, this is wrong. First, it is an artificial distinction in this context as the definition of "crime of violence" from the Guidelines and "violent felony" from the ACCA are identical.

18 U.S.C. 924(e)(B)(i)	USSG § 4B1.2(a)(1)
the term "violent felony" means any crime ... that – has as an element the use, attempted use, or threatened use of physical force against the person of another	the term "crime of violence" means any offense ... that – has as an element the use, attempted use, or threatened use of physical force against the person of another

Looking to the history of the Guidelines, any perceived difference between the two definitions evaporates: the Sentencing Commission borrowed the phrase "crime of violence," defined at § 4B1.2(a)(1), directly from the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i). USSG App. C., amend. 268 (1989). Both ACCA and the Guidelines narrowly define violent felonies such that creating risk of injury is necessarily excluded from the definition. A decision in this case will resolve the fomenting uncertainty on this issue, the very question the *Castleman* Court explicitly reserved.

Second, lower courts do not distinguish between ACCA and Guidelines cases when extending *Castleman*'s dicta, that indirect force is still physical force, to felony predicates. BIO 16-17. As illustrated in the chart below, the appellate cases cited by the government demonstrate that the expansion of *Castleman*'s 'indirect force is force' has been without regard to the source of the enhancement, be it the Guidelines or ACCA.

Case name	Citation	Source of enhancement
<i>United States v. Ellison</i>	866 F.3d 21 (1st Cir. 2017)	USSG §§ 4B1.1, 4B1.2
<i>United States v. Hill</i>	890 F.3d 51 (2d Cir. 2018)	ACCA
<i>United States v. Chapman</i>	866 F.3d 129 (3rd Cir. 2017)	USSG §§ 4B1.1, 4B1.2
<i>United States v. Reid</i>	861 F.3d 523 (4th Cir. 2017)	ACCA
<i>United States v. Reyes-Contreras</i>	910 F.3d 169 (5th Cir. 2018)	USSG § 2L1.2(b)
<i>United States v. Verwiebe</i>	874 F.3d 258 (6th Cir. 2017)	USSG §§4B1.1, 4B1.2
<i>United States v. Jennings</i>	860 F.3d 450 (7th Cir. 2017)	ACCA
<i>United States v. Rice</i>	813 F.3d 704 (8th Cir. 2016)	USSG §§ 4B1.1, 4B1.2
<i>Arellano Hernandez v. Lynch</i>	831 F.3d 1127 (9th Cir. 2016)	18 U.S.C. § 16(a)
<i>United States v. Ontiveros</i>	875 F.3d 533 (10th Cir. 2017)	USSG §§ 4B1.1, 4B1.2
<i>United States v. DeShazior</i>	882 F.3d 1352 (11th Cir. 2018)	ACCA
<i>United States v. Haight</i>	892 F.3d 1271 (D.C. Cir. 2018)	ACCA

Additionally, these cases offered by the government are an argument in favor of this Court's review, as they serve to directly undercut the government's position against granting certiorari because it "only involves" the Guidelines. BIO, 16-17.

Lower courts quickly adopted *Castleman* for the proposition that indirect force is no different than direct force and will satisfy the force clause of either ACCA or the Guidelines. The source of the challenge is immaterial.

Third, this Court does not categorically reject Guidelines-based petitions, which makes sense given that the Guidelines are in play with greater frequency and often times with greater consequence than the Armed Career Criminal Act as demonstrated in the following chart.¹

	Felon-in- possession (922(g))²	924(c)³
Number of cases/Total number of cases – FY 2019	7647 of 76538	3142 of 76538
Avg. min. sentence – FY 2019	64 months	138 months
Avg. min. guidelines sentence –FY 2019	71 months	185 months

¹ For example, the petitioner in *Ash v. United States*, No. 18-9639 (pending), identified multiple cases presenting different facets of a related issue in which this Court has granted certiorari. *Ash* Petition, 16; *Ash* Reply, 1-8. This Court appears to be holding the petition in *Ash* pending *Borden*, as the issue raised in *Ash* is “[w]hether reckless crimes ... qualify as crimes of violence under USSG § 4B1.2.” *Ash* Pet., i. As previously noted, Mr. Fagatele’s petition raises a different question, which is whether a statute that criminalizes creating a risk of injury categorically satisfies the definition of a crime of violence. As the question is distinct from that in *Ash* and *Borden*, this Court should not hold, but instead grant, Mr. Fagatele’s petition.

² https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf

³ https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY19.pdf

With the number of felon-in-possession convictions being 143% greater than the convictions under § 924(c), the guidelines issue will have a more immediate and substantive impact than waiting for a case arising from ACCA. The magnitude of the likely effect of a decision is deserving of this Court’s attention.

3. A discussion of the merits serves only to illustrate the pressing need for this Court’s intervention. The government ignores the issue raised in Mr. Fagatele’s petition: whether causing injury, or risk of injury, categorically satisfies the definition of violent crime.

Intermediate courts, such as the Third, Fourth, and just recently the Second Circuits, have resisted reading into a statute that criminalizes only an outcome, i.e., injury or creating a risk of injury, the means by which the outcome occurred. *See United States v. Scott*, 954 F.3d 74 (2d Cir. 2020). If injury or risk of injury was truly the determinative factor for ‘use of force,’ then even acts of omission would be considered force so long as injury occurred. Yet starting a crime-of-violence analysis at the result of conduct (risk of injury), ignoring the plain language of the statute, and then presuming the use of force is irreconcilable with this Court’s precedent, as the categorical and modified categorical approaches unequivocally start with the plain language of a statute.

The categorical and modified categorical approaches guarantee that any sentencing enhancement is based on the statutory language defining the prior crime and not the conduct a court finds offensive. When, as is the case here, a statute

criminalizes the end result, such a risk of injury, and remains silent on how that result comes to be, a court is prohibited from inferring what it believes to be the most likely cause of the outcome. Assuming absolute parity between injury or risk of injury and force requires a court to assume facts not essential to the conviction, and confuses injury with the use of force. *Cf. United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018). Fidelity to the categorical and modified categorical approaches ensures that enhanced penalties are suffered only by those who have a predicate that requires proof of the actual use physical force as an essential element.

It is true that some statutes forbid causing or threatening to cause injury, but to conclude that injury categorically is use of force is ipse dixit. *Cf. United States v. Mayo*, 901 F.3d 218, 229 (3rd Cir. 2018). Additionally, not only does starting with injury or risk of injury unjustifiably confuse injury with force, but it also assigns differing degrees of moral and legal culpability based wholly on choices of state legislatures.

Third, the government also fails to acknowledge that *Castleman* explicitly reserved the question presented in this petition: whether causing injury, or causing risk of injury, categorically satisfies the definition of a crime of violence. *Castleman*, 572 U.S. at 170. Statutes that require proof of injury or risk of injury do not categorically satisfy the definition of a crime of violence. This was the established rule pre-*Castleman*. *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005).

This Court has yet to say otherwise. The Tenth Circuit erred below when it relied on *Castleman* to overrule this precedent and answer a question this Court specifically reserved.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT KEITH WILSON
FEDERAL PUBLIC DEFENDER

By: /S/ Jessica Stengel
Assistant Federal Public Defender,
District of Utah
Counsel of Record for Petitioner
46 W Broadway Ste, 110
Salt Lake City, UT 84101

Salt Lake City, Utah
September 9, 2020

19-8221

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

FEUU FAGATELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

Jessica Stengel, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petitioner's Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Noel Franscisco
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with UPS on September 9, 2020 and all parties required to be served have been served.

/S/ Jessica Stengel
Assistant Federal Public Defender,
District of Utah
Counsel of Record for Petitioner
46 W Broadway Ste, 110
Salt Lake City, UT 84101

19-8221

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

FEUU FAGATELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF MAILING

Jessica Stengel, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29 Petitioner's Reply Brief in Support of Petition for Writ of Certiorari were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the UPS on September 9, 2020, and all parties required to be served have been served.

/S/ Jessica Stengel
Assistant Federal Public Defender
Counsel of Record for Petitioner
46 West 300 South, Suite 110
Salt Lake City, UT 84101
(801) 524-4010