No. 20-5278

IN THE SUPREME COURT OF THE UNITED STATES

MELVIN WHITEHEAD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

BRIAN C. RABBITT
Acting Assistant Attorney General

JAVIER A. SINHA
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the California offense of battery on a peace officer, in violation of Cal. Penal Code § 243(c)(2) (West 2014), is a "crime of violence" under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1) (2016).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Whitehead, No. 17-cr-177 (May 23, 2018)

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

United States v. Whitehead, No. 18-10194 (Oct. 30, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 782 Fed. Appx. 649.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2019. A petition for rehearing was denied on March 3, 2020 (Pet. App. B1). The petition for a writ of certiorari was filed on July 31, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of California, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. C1. He was sentenced to 96 months of imprisonment, to be followed by three years of supervised release. Id. at C2-C3. The court of appeals affirmed. Id. at A1-A2.

1. In 2017, police officers in Fresno, California, encountered petitioner while on patrol in a marked police car. Presentence Investigation Report (PSR) ¶ 5. When the officers directed petitioner to come toward their vehicle, he fled on a bicycle. Ibid. The officers apprehended him and recovered a loaded revolver from his backpack. PSR ¶ 7.

A federal grand jury indicted petitioner on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. He pleaded guilty to the charge. Pet. App. C1.

2. The Probation Office's presentence report determined that petitioner qualified for a base offense level of 20 under Sentencing Guidelines § 2K2.1(a), which applies if a defendant possessed a firearm after "sustaining one felony conviction of * * * a crime of violence." Sentencing Guidelines § 2K2.1(a)(4)(A) (2016); see PSR ¶ 14. Under the Sentencing Guidelines' "elements clause," a "crime of violence" is defined to include "any offense under federal or state law, punishable by

imprisonment for a term exceeding one year, that * * * has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (2016). The crime of violence identified in the presentence report was petitioner's prior felony conviction for battery on a peace officer, in violation of Cal. Penal Code § 243(c)(2) (West 2014), which criminalizes employing "any willful and unlawful use of force or violence upon the person" of "a peace officer," id. §§ 242, 243(c)(2), in which "an injury is inflicted on that victim" that "requires professional medical treatment," id. § 243(c)(1) and (f)(5); see PSR ¶ 14 & n.2. After applying other adjustments, the presentence report calculated an offense level of 23 and a criminal history category of VI, resulting in an advisory Sentencing Guidelines range of 92 to 115 months of imprisonment. PSR ¶¶ 25, 42, 75.

Petitioner objected to the classification of his California battery-on-a-peace-officer conviction as a crime of violence. See PSR, Exs. 1, 2. The district court overruled his objection and adopted the presentence report's Sentencing Guidelines calculations. Sent. Tr. 3-7, 9. It then sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Pet. App. C2-C3.

3. The court of appeals affirmed. Pet. App. A1-A2. It rejected petitioner's argument that his battery-on-a-peace officer conviction did not qualify as a "crime of violence" under the

Sentencing Guidelines. Id. at A2. The court explained that the objection was foreclosed by its determination in United States v. Colon-Arreola, 753 F.3d 841, 843-845 (9th Cir. 2014), that such a California battery crime categorically qualifies as a crime of violence as defined in the Sentencing Guidelines. Pet. App. A2.

ARGUMENT

Petitioner contends (Pet. 10-26) that California battery on a peace officer, in violation of Cal. Penal Code § 243(c)(2) (West 2014), does not qualify as a crime of violence under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1) (2016). The court of appeals rejected that contention, determining that California battery on a peace officer has as an element the "use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (2016); see Pet. App. A1-A2. That determination is based an interpretation of state law and does not conflict with any decision of this Court. In addition, the court of appeals' decision does not warrant review because it relates to the interpretation and application of the advisory Sentencing Guidelines, which are subject to oversight and modification by the Sentencing Commission.

1. The court of appeals has determined that under California law, battery on a peace officer requires proof that the defendant engaged in "willful and unlawful use of force or violence upon the person" of a peace officer in which "an injury was inflicted on the victim" that "'requires professional medical

treatment.'" United States v. Colon-Arreola, 753 F.3d 841, 844 (9th Cir. 2014) (citation omitted). Petitioner does not appear to dispute that the state law, so construed, would involve the "use, attempted use, or threatened use of physical force against the person of another," Sentencing Guidelines § 4B1.2(a)(1) (2016); see Pet. App. A2. He instead effectively challenges (Pet. 10-26) the court of appeals' determination that the state law in fact requires the intentional, as opposed to negligent, use of force. That claim does not warrant this Court's review.

The prior circuit case law on which the decision below relies accepted petitioner's primary federal-law contention here (Pet. 10-26) -- namely, that a provision worded like the elements clause in Sentencing Guidelines § 4B1.2(a)(1) (2016) applies only "if the use of force is intentional" and does not apply to "reckless or grossly negligent use of force." Colon-Arreola, 753 F.3d at 844 (citing Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc)); see Pet. App. A2 (relying on Colon-Arreola). Contrary to petitioner's assertion that the court of appeals "read[] the limiting language 'against the person of another' out of the definition of a crime of violence," Pet. 18, it specifically determined that California battery on a peace officer "requires" the " 'willful and unlawful use of force upon the person of another.' " Colon-Arreola, 753 F.3d at 844 (citation omitted). And petitioner's contention (Pet. 20-26) that the court of appeals confused federal and state mental-state standards disregards the

court of appeals' reliance on its own federal precedents describing the mental state it deemed a federal elements clause to require. See Colon-Arreola, 753 F.3d at 844-845.

Because petitioner's disagreement with the court of appeals is thus limited solely to its construction of state law, it does not provide a sound basis for certiorari. This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). Petitioner identifies no reason to depart from that settled policy in this case.

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

Typically, this Court leaves issues of Sentencing Guidelines application in the hands of the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines

conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Given that the Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Sentencing Guidelines. See ibid.; see also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

Here, the Commission has already taken steps to exercise its oversight authority with respect to other portions of the Sentencing Guidelines' "crime of violence" definition. Effective August 2016, the Commission amended Sentencing Guidelines § 4B1.2(a) to eliminate the provision's "residual clause" and to expand the Sentencing Guidelines' list of offenses that automatically qualify as crimes of violence. See 81 Fed. Reg. 4741, 4742-4743 (Jan. 27, 2016). In addition, the Commission has proposed potentially amending the elements clause to "allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense." 83 Fed. Reg. 65,400, 65,407 (Dec. 20, 2018). Such an amendment, if adopted, would greatly diminish the importance of the question whether petitioner's prior conviction was for an offense that has, as an element, the use of force within the meaning of the Sentencing Guidelines.

3. Petitioner separately contends (Pet. 27) that the Court should hold this case for Borden v. United States, cert. granted, No. 19-5410 (oral argument scheduled for Nov. 3, 2020), which presents the question whether a crime committed with the mens rea of recklessness can involve the "use of physical force" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i), see Pet. at ii, Borden, supra (No. 19-5410). But even if this Court were to hold in Borden that such a crime does not involve the "use of physical force," that would not entitle petitioner to any relief. That is because the court of appeals already applied the more defendant-favorable approach, under which crimes with a means rea of recklessness do not qualify. See p. 5, supra. Accordingly, there is no need to hold the petition in this case pending the resolution of Borden. And any error in the application of the defendant-favorable approach to the particular state law at issue here would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

BRIAN C. RABBITT
Acting Assistant Attorney General

JAVIER A. SINHA
Attorney

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