No. 20-5774

IN THE SUPREME COURT OF THE UNITED STATES

ARCHIE MANZANARES, 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

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

DAVID P. BURNS
Acting Assistant Attorney General

DANIEL J. KANE
Attorney

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

QUESTIONS PRESENTED

1. Whether New Mexico armed robbery, in violation of N.M. Stat. Ann. § 30-16-2 (Lexis Nexis 1994), qualifies 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).

2. Whether New Mexico aggravated assault with a deadly weapon, in violation of N.M. Stat. Ann. § 30-3-2(A) (Lexis Nexis 1984), qualifies as a "violent felony" under the ACCA's elements clause.

3. Whether New Mexico felony aggravated battery, in violation of N.M. Stat. Ann. § 30-3-5(C) (Lexis Nexis Supp. 2004), qualifies as a "violent felony" under the ACCA's elements clause.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.M.):

United States v. Manzanares, No. 12-cr-1563 (July 11, 2013)

United States v. Manzanares, No. 12-cr-1563 (Dec. 1, 2017)

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

United States v. Manzanares, No. 18-2010 (Apr. 17, 2020)

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's motion to vacate his sentence under 28 U.S.C. 2255 and denying petitioner's motion to expand the certificate of appealability (Pet. App. 1a-10a) is reported at 956 F.3d 1220. The order of the district court denying in part and granting in part petitioner's motion for a certificate of appealability (Pet. App. 45a-46a) is unreported. The order of the district court denying petitioner's motion to vacate his sentence under 28 U.S.C. 2255 (Pet. App. 11a-44a) is not published in the Federal Supplement but is available at 2017 WL 5956886.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2020. The petition for a writ of certiorari was filed on September 14, 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 District of New Mexico, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), and possessing heroin, in violation of 21 U.S.C. 844(a). Pet. App. 5a; Judgment 1. The district court sentenced him to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. Petitioner did not appeal. In 2017, the district court denied petitioner's motion under 28 U.S.C. 2255 to vacate his sentence, Pet. App. 11a-44a, and denied in part and granted in part petitioner's motion for a certificate of appealability, id. at 45a-46a. The court of appeals affirmed the denial of petitioner's 28 U.S.C. 2255 motion and declined to expand the certificate of appealability. Pet. App. 1a-10a.

1. In July 2011, petitioner was driving a GMC Silverado truck in Albuquerque, New Mexico, when he struck a pedestrian. Presentence Investigation Report (PSR) ¶¶ 7-8. The victim responded by throwing food at the truck, after which petitioner stopped and exited the truck, and then retrieved a firearm from a

passenger in the truck. PSR ¶ 8. Petitioner pointed the firearm at the victim and pulled the trigger twice, but the gun did not fire. Ibid. Petitioner then reached into his pocket for a magazine and loaded the gun. Ibid. As the victim fled, he heard three gunshots, and, while hiding from petitioner, the victim saw petitioner drive by holding a firearm out of the truck's window. Ibid.

Police officers who were dispatched to the area located petitioner driving the GMC Silverado truck and initiated a traffic stop. PSR ¶ 7. The officers searched the truck and discovered a .22-caliber pistol, two rounds of .22-caliber ammunition, and one round of 9mm-caliber ammunition. PSR ¶ 9.

2. A federal grand jury in the District of New Mexico returned an indictment charging petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1-2. The government later filed an information charging petitioner with possessing heroin, in violation of 21 U.S.C. 844(a). Information 1.

A conviction for violating Section 922(g)(1) carries a default sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life

imprisonment. 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as an offense punishable by more than a year in prison that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated-offenses clause"; and the latter part of clause (ii), beginning with "otherwise," is known as the "residual clause." See Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

After petitioner was charged, petitioner and the government entered into a conditional plea agreement. 2 C.A. ROA 10-17. The plea agreement provided that 180 months of imprisonment would be appropriate if petitioner was found to be an armed career criminal under the ACCA and permitted petitioner to withdraw from the plea agreement if he was found not to be an armed career criminal. Id. at 12.

The Probation Office prepared a presentence report that classified petitioner as an armed career criminal. PSR ¶¶ 39, 58. Although the Probation Office did not specify which of petitioner's prior convictions supported that classification, it listed, among others, prior New Mexico convictions for armed robbery, aggravated assault with a deadly weapon, and felony aggravated battery. PSR

¶¶ 10, 13, 15, 45, 51, 54. Petitioner did not object to his designation as an armed career criminal or otherwise object to the presentence report. Pet. App. 12a; 4 C.A. ROA 3. Consistent with the plea agreement and the presentence report, the sentencing court found that petitioner's prior convictions satisfied the prerequisites for an enhanced sentence under the ACCA and sentenced him to 180 months of imprisonment, to be followed by three years of supervised release. Pet. App. 5a; Judgment 3-4; 4 C.A. ROA 5. Petitioner did not file a direct appeal.

3. In 2015, this Court concluded in Samuel Johnson v. United States, 576 U.S. 591, 597 (2015), that the ACCA's residual clause is unconstitutionally vague. This Court subsequently held that Samuel Johnson announced a new substantive rule that applies retroactively to cases on collateral review. See Welch, 136 S. Ct. at 1268.

In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. 1 C.A. ROA 5-29. Petitioner argued that Samuel Johnson established that he was wrongly sentenced under the ACCA because it precluded classifying his New Mexico convictions for armed robbery, aggravated assault with a deadly weapon, and felony aggravated battery as violent felonies under the ACCA's residual clause, and that those convictions did not qualify as violent felonies under the ACCA's elements clause.

A magistrate judge recommended that petitioner's Section 2255 motion be denied. 1 C.A. ROA 85-117; see Pet. App. 11a. After

reviewing de novo the portions of the magistrate judge's proposed findings and recommended disposition to which petitioner objected, the district court denied petitioner's Section 2255 motion. Pet. App. 11a-44a. The court first rejected petitioner's argument that his aggravated assault conviction was not an ACCA predicate, observing that the court of appeals had previously determined that New Mexico aggravated assault with a deadly weapon is categorically a violent felony under the elements clause. Id. at 32a-35a. The court then applied the modified categorical approach to the New Mexico aggravated battery statute and determined that it is divisible into separate crimes with distinct elements; found that petitioner was convicted of the felony version of aggravated battery; and determined that felony aggravated battery -- which requires "[b]attery that inflicts or could have inflicted great bodily harm," id. at 40a -- necessarily requires "the use or threat of force 'capable of causing physical pain or injury to another person.'" Ibid. (quoting Curtis Johnson v. United States, 559 U.S. 133, 140 (2010)); see id. at 35a-40a. Finally, the court found that a conviction for New Mexico armed robbery satisfies the elements clause, id. at 40a-43a, because it likewise requires proof of force capable of causing physical pain or injury to another person.

In a separate order, the district court sua sponte granted a certificate of appealability (COA) on the question of whether petitioner's conviction for New Mexico armed robbery satisfies the

elements clause. Pet. App. 45a-46a. The court declined to issue a COA on any other issue. Id. at 46a.

4. The court of appeals affirmed. Pet. App. 1a-10a.

Relying on United States v. Garcia, 877 F.3d 944 (10th Cir. 2017), cert. denied, 139 S. Ct. 1257 (2019), which was decided after the district court issued its decision, the court of appeals explained that New Mexico armed robbery is categorically a violent felony under the elements clause. Pet. App. 5a-8a. In Garcia, the court of appeals had determined, based on decisions from New Mexico courts, that a conviction for New Mexico simple (unarmed) robbery, in violation of N.M. Stat. Ann. § 30-16-2, qualifies as a violent felony under the elements clause because it requires force sufficient to overcome a victim's resistance. 877 F.3d at 950-956. Here, the court found that because petitioner's prior conviction for armed robbery, also in violation of N.M. Stat. Ann. § 30-16-2 (Lexis Nexis 1994), necessarily entailed simple robbery, that conviction satisfies the elements clause. Pet. App. 7a-8a, 10a. And the court observed that this Court's decision in Stokeling v. United States, 139 S. Ct. 544 (2019), confirmed that Garcia was correctly decided, because it held that the elements clause "encompasses robbery offenses that require the criminal to overcome the victim's resistance," id. at 550. Pet. App. 7a.

The court of appeals denied petitioner's motion to expand the COA so that it could consider whether his prior convictions for aggravated assault with a deadly weapon and felony aggravated

battery satisfy the elements clause. Pet. App. 8a-9a. The court observed that it had previously found that New Mexico aggravated assault with a deadly weapon satisfies the elements clause, see id. at 8a (citing United States v. Maldonado-Palma, 839 F.3d 1244 (10th Cir. 2016), cert. denied, 137 S. Ct. 1214 (2017), and United States v. Ramon Silva, 608 F.3d 663 (10th Cir. 2010), cert. denied, 562 U.S. 1224 (2011)), and it rejected petitioner's argument that the New Mexico Court of Appeals' intervening decision in State v. Branch, 417 P.3d 1141 (2018), undermined that determination, Pet. App. 8a. The court of appeals explained that New Mexico aggravated assault with a deadly weapon "is a violent felony because it requires 'unlawfully assaulting or striking at another,' employing a deadly weapon, with general criminal intent, all of which * * * at least threaten the use of physical force against the person of another." Ibid. (citations omitted).

In declining to expand the COA, the court of appeals also rejected petitioner's argument that New Mexico felony aggravated battery does not require sufficient force to satisfy the elements clause. See Pet. App. 8a-9a. The court observed that under New Mexico law, felony aggravated battery requires proof that the defendant "unlawful[ly] touch[ed] or appli[ed] * * * force to the person of another with intent to injure that person or another," and either "inflict[ed] great bodily harm," "d[id] so with a deadly weapon," or "d[id] so in any manner whereby great bodily harm or death can be inflicted." Ibid. (quoting N.M. Stat.

Ann. § 30-3-5(A), (C) (Lexis Nexis Supp. 2004)). And the court relied on a prior decision that in turn relied on this Court's decision in United States v. Castleman, 572 U.S. 157 (2014), to reason that such a crime can be a violent felony. Pet. App. 9a.

ARGUMENT

Petitioner renews (Pet. 9-29) his claims that his prior New Mexico convictions for armed robbery, aggravated assault with a deadly weapon, and felony aggravated battery do not qualify as violent felonies under the ACCA. The court of appeals correctly rejected those claims, and its decision does not conflict with any decision of this Court or any other circuit. This Court recently denied review of another petition for a writ of certiorari presenting nearly identical questions, Sanchez v. United States, 139 S. Ct. 2011 (2019) (No. 18-7232), and the same result is warranted here. Nor is there any reason to hold this petition pending the decision in Borden v. United States, No. 19-5410 (argued Nov. 3, 2020), because the outcome in Borden will have no effect on whether petitioner's prior convictions qualify as violent felonies under the ACCA.

1. Petitioner errs in contending (Pet. 16-21) that his prior conviction for armed robbery, in violation of N.M. Stat. Ann § 30-16-2 (Lexis Nexis 1994), does not qualify as a violent felony under the ACCA's elements clause because it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). This

Court has recently denied petitions for writs of certiorari raising similar arguments about New Mexico robbery, see Sanchez, supra (No. 18-7232); Serrano v. United States, 139 S. Ct. 1258 (2019) (No. 18-5288), and it should follow the same course here.

a. New Mexico defines armed robbery as "robbery while armed with a deadly weapon," with simple robbery defined as "the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence." N.M. Stat. Ann § 30-16-2 (Lexis Nexis 1994). In United States v. Garcia, 877 F.3d 944 (10th Cir. 2017), cert. denied, 139 S. Ct. 1257 (2019), the court of appeals conducted a detailed analysis of New Mexico law and determined that a conviction for New Mexico simple robbery satisfies the elements clause because it requires proof of more than minimal force to "overcome the victim's resistance." Id. at 950.

Shortly after the court of appeals decided Garcia, this Court decided Stokeling v. United States, 139 S. Ct. 544 (2019). Stokeling held that a defendant's prior conviction for robbery under Florida law satisfied the ACCA's elements clause because the "force necessary to overcome a victim's resistance" constitutes "physical force" for purposes of the ACCA -- no matter how "slight the resistance." Id. at 551, 555 (citation and internal quotation marks omitted). Shortly after deciding Stokeling, this Court denied the petition for a writ of certiorari in Garcia. 139 S. Ct. 1257 (2019) (No. 17-9469). Because a conviction for New

Mexico armed robbery requires the use of force greater than that necessary to overcome a victim's resistance, Garcia, 877 F.3d at 950 -- i.e., force greater than that deemed sufficient to satisfy the elements clause in Stokeling -- the court of appeals correctly determined that Stokeling forecloses petitioner's challenge to the treatment of his armed robbery conviction as an ACCA predicate. See Pet. App. 7a.

b. To the extent that petitioner suggests (Pet. 16-21) that the court of appeals erred in determining that New Mexico law requires proof of force sufficient to "overcome the victim's resistance" for a conviction for armed robbery, Garcia, 877 F.3d at 950, that contention is belated, does not implicate any circuit conflict, and is incorrect. Petitioner did not raise such an argument in the district court or in the court of appeals; indeed, petitioner acknowledged below that force sufficient to overcome resistance is necessary to sustain a conviction under Section 30-16-2. See Pet. C.A. Br. 13 ("The force used must be more than the force needed to remove the object, but it need only be just enough to overcome the 'resistance of attachment.'") (quoting State v. Curley, 939 P.2d 1103, 1105 (N.M. Ct. App. 1997)); 1 C.A. ROA 18-19 (similar). This Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and traditionally declines to grant a writ of certiorari where, as here, "'the question presented was not pressed or passed upon below,'" United States v. Williams, 504 U.S. 36, 41 (1992)

(citation omitted). Petitioner identifies no sound reason to depart from that rule in this case, particularly where the decision below does not implicate a division in the court of appeals regarding the interpretation of New Mexico armed robbery. Indeed, this Court's "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," Bowen v. Massachusetts, 487 U.S. 879, 908 (1988), provides an additional reason to deny review.

In any event, the court of appeals correctly determined that a conviction for New Mexico armed robbery at a minimum requires proof of force necessary to overcome a victim's resistance. Contrary to petitioner's suggestion (Pet. 9-10, 16-18), both the court below and in Garcia correctly applied the categorical approach by "focus[ing] * * * on the statutory elements" and looking to state case law to assess "how those elements are actually applied in the state's courts." Garcia, 877 F.3d at 953; see Pet. App. 5a-8a, 10a. And petitioner cites (Pet. 20) no New Mexico case that holds that New Mexico permits a conviction for armed robbery based on something less than "force necessary to overcome a victim's resistance." Stokeling, 139 S. Ct. at 555.

In State v. Curley, supra, the New Mexico Court of Appeals addressed the "force sufficient to constitute a robbery" and explained that "when property is attached to the person or clothing of a victim so as to cause resistance, any taking is a robbery * * * because the lever that causes the victim to part with the

property is the force that is applied to break that resistance" but that "when no more force is used than would be necessary to remove property from a person who does not resist, then the offense is larceny, and not robbery." 939 P.2d at 1105 (emphasis added); see State v. Clokey, 553 P.2d 1260, 1260 (N.M. 1976) (summarily concluding that, on the facts of that case, "the evidence supported the verdict of the jury that the snatching of the purse was accompanied by force sufficient to convert the crime from larceny to robbery"). And commission of New Mexico robbery through "threatened use of physical force," 18 U.S.C. 924(e)(2)(B)(i), would likewise satisfy the ACCA's element's clause, see State v. Lewis, 867 P.2d 1231, 1233 (N.M. Ct. App. 1993) (explaining that "in order to convict for [robbery], the use or threatened use of force must be the factor by which the property is removed from the victim's possession" and "'force or fear must be the moving cause inducing the victim to part unwillingly with his property'") (citation omitted).

2. Petitioner next contends (Pet. 22-25) that his prior conviction for aggravated assault with a deadly weapon, in violation of N.M. Stat. Ann. § 30-3-2(A) (Lexis Nexis 1984), is not a violent-felony conviction under the ACCA's elements clause because, in petitioner's view, New Mexico permits a conviction for aggravated assault based on a mens rea of recklessness or no mens rea at all. This Court has recently denied petitions for writs of certiorari presenting similar arguments about the New Mexico

statute, see Sanchez, supra (No. 18-7232); Marquez v. United States, 139 S. Ct. 940 (2019) (No. 18-6097); Ramon Silva v. United States, 562 U.S. 1224 (2011) (No. 10-7062), and it should do so again here.

a. As relevant here, New Mexico defines aggravated assault as "unlawfully assaulting or striking at another with a deadly weapon." N.M. Stat. Ann. § 30-3-2(A) (Lexis Nexis 1984). An "assault," in turn, may consist of "any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery." Id. § 30-3-1(B). Contrary to petitioner's argument -- raised for the first time in this Court -- a defendant cannot be convicted of New Mexico aggravated assault with a deadly weapon based on reckless conduct. In United States v. Ramon Silva, 608 F.3d 663 (10th Cir. 2010), cert. denied, 562 U.S. 1224 (2011), the court of appeals proceeded on the assumption that the elements clause applies only to intentional conduct, and not to reckless conduct, and determined that a conviction for New Mexico aggravated assault involves only "intentional conduct" because it "requires proof of general criminal intent, which New Mexico courts have consistently 'defined as conscious wrongdoing or the purposeful doing of an act that the law declares to be a crime.'" Id. at 673 (quoting State v. Campos, 921 P.2d 1266, 1277 n.5 (N.M. 1996)); see also ibid. (collecting New Mexico cases and citing New Mexico's Uniform Jury Instructions). Petitioner points to no contrary authority on that

point, either from other courts of appeals or from the New Mexico state courts.

To the extent that petitioner suggests that because New Mexico aggravated assault with a deadly weapon requires only a showing of general criminal intent, Pet. 12, it "does not have the critical 'against the person of another' element," Pet. 23, and is thus not a violent felony, he is mistaken. To prove that a defendant "unlawfully assault[ed] or str[uck] at another with a deadly weapon," N.M. Stat. Ann. § 30-3-2(A) (Lexis Nexis 1984) (emphasis added), the State must establish at least "that he did an unlawful act which caused [the victim] to reasonably believe that she was in danger of receiving an immediate battery, that the act was done with a deadly weapon, and that it was done with general criminal intent," State v. Branch, 417 P.3d 1141, 1148 (N.M. Ct. App. 2018) (citation omitted). Although the State need not prove that the defendant intended to assault the particular victim, as discussed above, in New Mexico general criminal intent requires that the defendant engage in conscious wrongdoing or the purposeful doing of an act the law declares to be a crime.

Petitioner contends that the New Mexico Court of Appeals' decision in Branch, supra, "demonstrates that the Tenth Circuit has relied on an incorrect, or at least incomplete, understanding of New Mexico aggravated assault's elements." Pet. 12. The court of appeals properly rejected that argument, explaining that Branch's "holding that aggravated assault is a general-intent

crime did not alter the state of the law." Pet. App. 8a. Rather, aggravated assault with a deadly weapon under Section 30-3-2(A) remains "a violent felony because it requires 'unlawfully assaulting or striking at another,' employing a deadly weapon, with general criminal intent, all of which * * * at least threaten the use of physical force against the person of another." Ibid. (citations omitted).

b. Contrary to petitioner's suggestion (Pet. 10-12), the court of appeals' treatment of his conviction for aggravated assault with a deadly weapon does not conflict with any decision of this Court or of another court of appeals. Petitioner cites (Pet. 22) Leocal v. Ashcroft, 543 U.S. 1, 9 (2004), in which this Court concluded that merely accidental conduct could not qualify as a crime of violence under 18 U.S.C. 16. But because a defendant must possess general criminal intent to violate Section 30-3-2(A), a conviction under that statute cannot be based on merely accidental conduct.

Petitioner likewise identifies no decision holding that aggravated assault with a deadly weapon under Section 30-3-2(A) does not qualify as a "violent felony" under the elements clause. Instead, he cites (Pet. 11-12) cases concerning materially different statutes criminalizing discharging a firearm (or throwing a hard object) into a vehicle or other structure. None of those statutes requires, as the New Mexico aggravated assault statute does, that force be directed "at another with a deadly

weapon," N.M. Stat. Ann. § 30-3-2(A) (Lexis Nexis 1984) (emphasis added), which ensures that force is used or threatened to be used "against the person of another," 18 U.S.C. 924(e)(2)(B)(i). See United States v. Parral-Dominguez, 794 F.3d 440, 445 (4th Cir. 2015) (North Carolina offense of discharging firearm into occupied building that does not require "proving that an occupant is targeted or threatened"); United States v. Alfaro, 408 F.3d 204, 209 (5th Cir.) (Virginia offense that permits conviction "for discharging a firearm within an unoccupied school building"), cert. denied, 546 U.S. 911 (2005); United States v. Jaimes-Jaimes, 406 F.3d 845, 850 (7th Cir. 2005) (Wisconsin offense of discharging firearm into vehicle or building under which "the state need not prove that another person was present in the vehicle or building, or even anywhere near the targeted object"); United States v. Narvaez-Gomez, 489 F.3d 970, 977 (9th Cir. 2007) (California offense of discharging firearm into certain occupied structures, where "purely reckless conduct" "need[] only be directed toward [a] dwelling or building"); United States v. Estrella, 758 F.3d 1239, 1252 (11th Cir. 2014) (Florida offense of wantonly or maliciously throwing, hurling, or projecting a missile, stone, or other hard substance at an occupied vehicle, which lacks any "requirement that force be directed against" the vehicle's occupant as opposed to the vehicle itself).

In fact, the Tenth Circuit has itself determined -- in line with the cases petitioner cites -- that a Kansas conviction for

criminal discharge of a firearm at an occupied building or dwelling does not constitute a violent felony under the elements clause. See United States v. Ford, 613 F.3d 1263, 1271-1272 (2010). The distinction between that type of state statute and the aggravated-assault statute at issue in this case demonstrates that no relevant division exists in the courts of appeals on the second question presented here.

c. Petitioner also asks this Court (Pet. 23-24) to hold his petition for Borden v. United States, supra (No. 19-5410), which presents the question whether a crime committed with the mens rea of recklessness can involve the "use of physical force" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i). 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 because the court of appeals has already found that an individual cannot be convicted of New Mexico aggravated assault with a deadly weapon based on reckless conduct. See pp. 14-15, supra. Accordingly, no need exists to hold the petition in this case pending the resolution of Borden.

3. Finally, petitioner contends (Pet. 25-29) that his prior conviction for felony aggravated battery, in violation of N.M. Stat. Ann. § 30-3-5(C) (Lexis Nexis Supp. 2004), is not an ACCA predicate under the elements clause on the theory that such a conviction does not require proof of violent physical force. This Court has recently denied a petition for a writ of certiorari

presenting a similar argument about the same statute, see Sanchez, supra (No. 18-7232), and further review of this claim, which does not raise a conflict with any decision of this Court or implicate a circuit conflict, is unwarranted.

a. In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court defined "physical force" under the elements clause to "mean[] violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140. The Court concluded that the offense at issue in Curtis 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. Id. at 138 (quoting State v. Hearns, 961 So. 2d 211, 219 (Fla. 2007)) (brackets in original).

Application of Curtis Johnson's definition of "force" to the New Mexico offense at issue here, however, yields a different result. In contrast to the offense at issue in Curtis Johnson, a conviction for New Mexico felony aggravated battery requires both that the offender engage in "unlawful touching or application of force to the person of another with intent to injure that person or another" and that in doing so he "inflict[] great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted." N.M. Stat. Ann. § 30-3-5(A), (C) (Lexis Nexis Supp. 2004). Force that actually causes bodily injury is necessarily "force capable of causing

physical pain or injury." Curtis Johnson, 559 U.S. at 140 (emphasis added). Because the offense here expressly requires inflicting great bodily harm or employing a deadly weapon or some other method that "can" inflict great bodily harm or death, N.M. Stat. Ann. § 30-3-5(C) (Lexis Nexis Supp. 2004), it involves force that is at least capable of causing physical pain or injury. Cf. Stokeling, 139 S. Ct. at 554 ("'Capable' means 'susceptible' or 'having attributes . . . required for performance or accomplishment' or 'having traits conducive to or features permitting.'") (citation omitted). The court of appeals therefore correctly determined that New Mexico felony aggravated battery necessarily involves the use or threatened use of physical force under the ACCA's elements clause. See Pet. App. 9a.

Petitioner acknowledges (Pet. 15, 29) that a conviction for New Mexico felony aggravated battery requires some amount of physical force, but nevertheless contends (Pet. 25-27) that New Mexico felony aggravated battery can be committed without the level of violent physical force that the elements clause requires. But, as discussed, Section 30-3-5(C)'s references to the causation of bodily injury and the ability to cause bodily injury -- along with its intent requirement -- foreclose the argument that a conviction under that statute could be premised on an act involving only force akin to the "'nominal contact'" found inadequate in Curtis Johnson, 559 U.S. at 138 (citation omitted). Indeed, petitioner cites (Pet. 14, 25-26) no New Mexico case in which a defendant was convicted

of felony aggravated battery based on contact of that sort; every case that petitioner cites refers to a conviction for "[b]attery upon a peace officer," which is a separate offence under New Mexico law and merely requires that touch or application of force be "done in a rude, insolent or angry manner." N.M. Stat. Ann. § 30-22-24(A). See State v. Hill, 34 P.3d 139 (N.M. Ct. App. 2001); State v. Ortega, 827 P.2d 152 (N.M. Ct. App. 1992); State v. Kraul, 563 P.2d 108 (N.M. Ct. App. 1977).

b. To the extent that petitioner suggests (Pet. 27-29) that the decision below implicates a purported division in the courts of appeals on the issue of whether a statute that merely criminalizes causation of injury, or an act producing a risk of injury, categorically satisfies the ACCA's definition of "violent felony," any such question is not presented here. New Mexico aggravated assault explicitly requires the use of "unlawful touching or application of force" with "intent to injure" in addition to "inflicting great bodily harm" or employing a deadly weapon or some other method that can inflict great bodily harm or death. N.M. Stat. Ann. § 30-3-5(A), (C) (Lexis Nexis Supp. 2004). Petitioner acknowledges that some amount of touching or force is "necessary to complete an aggravated battery" in New Mexico. Pet. 15; see Pet. 25-26, 29. This case thus does not implicate any questions regarding whether a crime that solely references injury or risk of injury may constitute a violent felony. And even if it did, for the reasons set forth in the government's brief in

opposition to the petition for a writ of certiorari in Fagatele v. United States, this case still would not warrant this Court's review. See Br. in Opp. at 12-16, Fagatele v. United States, No. 19-8221 (Aug. 21, 2020; cert. denied Oct. 5, 2020).[1]

Finally, to the extent that the analysis here implicates United States v. Castleman, 572 U.S. 157 (2014), which 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, 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

[1] We have served petitioner with a copy of the government's brief in opposition in Fagatele. That brief is also available on the Court's electronic docket.

(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). Nothing in this case hinges on the difference between "physical force" under 18 U.S.C. 922(g)(9) and "violent" physical force under the ACCA's elements clause. As discussed, it is clear that New Mexico requires proof of "violent" physical force, as understood in Curtis Johnson, to sustain a conviction for felony aggravated assault.

4. In any event, even assuming the petition here presented an issue that might otherwise warrant this Court's review, this case would not be a suitable vehicle in which to address it because an independent basis supports the judgment below. For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Casey v. United States, a defendant who files a motion under 28 U.S.C. 2255 seeking to vacate his sentence on the basis of Samuel Johnson is required to establish by a preponderance of the evidence that his sentence in fact reflects error under that decision. See Br. in Opp. at 7-9, 11-13, Casey

v. United States 138 S. Ct. 2678 (2018) (No. 17-1251);[2] see also Parke v. Raley, 506 U.S. 20, 31 (1992) (explaining that "it [is] appropriate to assign a proof burden to the defendant" on collateral review). To meet that burden, a defendant may point either to the sentencing record or to any case law in existence at the time of his sentencing proceeding that shows that it is more likely than not that the sentencing court relied on the now-invalid residual clause, as opposed to the enumerated-offenses or elements clauses. See United States v. Driscoll, 892 F.3d 1127, 1135 (10th Cir. 2018); Br. in Opp. at 7-13, Casey, supra (No. 17-1251). Such a showing is necessary because Samuel Johnson "does not reopen all sentences increased by the Armed Career Criminal Act, as it has nothing to do with enhancements under the elements clause or the enumerated-crimes clause." Potter v. United States, 887 F.3d 785, 787 (6th Cir. 2018) (emphasis omitted).

Here, the court of appeals observed that the district court "did not require [petitioner] to show that the Residual Clause played a role in his sentencing." Pet. App. 9a. Indeed, petitioner conceded in the district court that the record does not reveal which clause (or clauses) of the ACCA were used to enhance his sentence, see 1 C.A. ROA 12, 83, and he made no effort to meet his burden in the court of appeals, see Pet. C.A. Reply Br. 18-21. As the government explained in the court of appeals, see Gov't

[2] We have served petitioner with a copy of the government's brief in opposition in Casey. That brief is also available on the Court's electronic docket.

C.A. Br. 26-30, that failure provides an independent basis for affirmance. Petitioner's failure to establish that he likely was sentenced under the ACCA's residual clause thus precludes relief in the context of this Section 2255 action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

DAVID P. BURNS
Acting Assistant Attorney General

DANIEL J. KANE
Attorney

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