NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

DONOVAN MUSKETT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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February 3, 2021

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

DONOVAN MUSKETT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTION PRESENTED FOR REVIEW

In the absence of a circuit split, can a single decision from another circuit afford fair warning that the federal circuit in which an individual resides may overrule settled precedent dictating that his conduct is innocent? The Tenth Circuit approved retroactive application of its decision attaching criminal consequences to conduct that was innocent when it took place. Other circuits have permitted retroactive application only of decisions from this Court that resolved a circuit split existing at the time an offense was committed.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

DONOVAN MUSKETT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Aric G. Elsenheimer, Assistant Federal Public Defender for the District of New Mexico, declare under penalty of perjury that I am a member of the bar of this court and counsel for Petitioner Donovan Muskett and that I caused to be mailed a copy of the petition for writ of certiorari to this court by first class mail, postage prepaid, by depositing one copy in an envelope addressed to the Clerk of this Court, in the United States Post Office at 1135 Broadway Blvd. NE, Albuquerque, New Mexico, at approximately 5:00p.m. on the 3rd day of February 2021.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

DONOVAN MUSKETT,

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vs.

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner Donovan Muskett respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit denying him relief under 28 U.S.C. § 2255.

PROCEEDINGS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in *United States v. Muskett*, 10th Cir. No. 17-2123, dated August 14, 2020, is reported at 970 F.3d 1233 (10th Cir. 2020), and attached hereto as Petitioner's Appendix ("Pet. App.") A. The district court order adopting magistrate judge's proposed findings and recommended disposition in *United States v. Muskett,* USDC NM No. 16 CV 596 MCA/SMV, is Pet.App. B. The magistrate judge's proposed findings and

recommended disposition is Pet.App. C. The Tenth Circuit order denying rehearing and rehearing en banc, dated September 11, 2020, is Pet.App. D.

JURISDICTIONAL STATEMENT

The Tenth Circuit entered its order denying rehearing and rehearing en banc September 11, 2020. The district court had jurisdiction under 28 U.S.C. § 2255; the court of appeals had jurisdiction under 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. §1254(1). Pursuant to Supreme Court Rule 13.1 and 13.3, this petition is timely if filed on or before February 8, 2021.

FEDERAL LAWS AT ISSUE

The Fifth Amendment of the United States Constitution provides, in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Under 18 U.S.C. § 924(c)(3)(A), an offense qualifies as a crime of violence if it:

"has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

INTRODUCTION

The court of appeals' decision in this case severely undercuts the due process right to fair warning that particular conduct may have criminal consequences. At the time of Mr. Muskett's assault offense, settled Tenth Circuit precedent dictated that it did not qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A). After his conviction, the court of appeals overturned that precedent. It retroactively applied its new statutory construction to Mr. Muskett and upheld his conviction for conduct that was not criminal when it took place.

As the court of appeals interpreted this Court's jurisprudence, only the flimsiest of warnings is necessary to permit retroactive application of a new judicial construction of a federal criminal statute that attaches criminal consequences to previously innocent conduct. The court of appeals decided Mr. Muskett was fairly warned that his conduct could have criminal consequences by a Ninth Circuit decision, *United States v. Juvenile Female*, 566 F.3d 943 (9th Cir. 2009), and language from *Johnson v. United States*, 559 U.S. 133, 138 (2010), that distinguished "physical" force "exerted by and through concrete bodies" from intellectual or emotional force. Even if he had intensively studied those decisions, Mr. Muskett could not reasonably have foreseen the Tenth Circuit's overruling of its settled precedent dictating that his conduct did not qualify as a crime of violence.

An offense constituted a crime of violence under Tenth Circuit precedent at the time of Mr. Muskett's 2013 offense only if it required the direct use of physical force. As Judge Bacharach explained in his dissent, there was no circuit split on this issue

in 2013; the Ninth Circuit had reached conflicting conclusions and other circuits' jurisprudence was consistent with the Tenth Circuit's. In *Juvenile Female*, the parties did not raise–and the court did not address–whether a crime of violence requires the direct use of physical force, as the Tenth Circuit had held. After this Court's *Johnson* decision, the Tenth Circuit reaffirmed its precedent and other circuits upheld similar precedent. The tide turned only after this Court's decision in *Castleman v. United States,* 572 U.S. 157 (2014).

This case squarely presents the important question of the nature of the fair warning the Due Process Clause requires where, after conduct takes place, courts overrule established precedent dictating that the conduct was lawful. It presents an ideal vehicle for this Court to address whether individuals must apprise themselves of the case law of other circuits with respect to federal criminal law, despite the absence of a requirement that they consult fifty states' laws to ascertain the lawfulness of conduct under state law.

This Court should grant certiorari to address the exceptionally important due process issues presented by this case and provide guidance to the lower courts on the retroactive application of circuit courts' changed constructions of criminal statutes. It should preclude lower courts from discounting the significance of the right to fair warning. As Justice Breyer explained in *Rogers v. Tennessee*, 532 U.S. 451 (2001), "the deepest sentiments of justice" should inform retroactivity determinations. *Id.* at 481 (Breyer, J., dissenting) (quoting Cardozo, J., *The Nature of the Judicial Process* 148-49 (1921)).

PROCEEDINGS BELOW

This case involves a purely legal issue. Petitioner Donovan Muskett pleaded guilty to one count of brandishing a firearm during and in relation to a crime of violence in 2013, in violation of 18 U.S.C. § 924(c). He challenged his conviction under 28 U.S.C. § 2255 on the ground that his underlying offense of federal assault with a dangerous weapon did not qualify as a crime of violence because the § 924(c) residual clause was void for vagueness. This Court subsequently held the § 924(c) residual clause unconstitutionally vague in *United States v. Davis*, – U.S.–, 139 S. Ct. 2319 (2019).

The magistrate judge issued proposed findings and a recommended disposition concluding that even if the § 924(c) residual clause was invalid, Mr. Muskett's assault offense qualified as a crime of violence under § 924(c)(3)(A), the "elements clause." Pet. App. C. The district court adopted the magistrate judge's proposed findings and recommended disposition and denied habeas relief. Pet.App. B.

Mr. Muskett argued on appeal that he lacked fair warning that the court of appeals would overrule its settled precedent dictating that his assault offense was not a crime of violence under the § 924(c) elements clause. In a 2-1 decision, a court of appeals panel rejected his argument. Pet.App. A. It agreed with Mr. Muskett that his offense did not constitute a crime of violence under §924(c)(3)(A) when it occurred because it did not require the direct use of physical force. *Id.* at 8-11. Nonetheless, it decided that he was afforded his right to fair warning because the court's overruling in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), of its applicable precedent

was foreseeable from the holding in *Juvenile Female* that assault with a dangerous weapon was a crime of violence[1] and from this Court's distinction between physical force and intellectual or emotional force in *Johnson*. Pet.App. A at 17, 23-24.

Judge Bacharach dissented, concluding Mr. Muskett could not have foreseen at the time of his 2013 offense that the Tenth Circuit would overrule its precedent and criminalize his previously innocent conduct. *Id.* at 26.[2] He noted that it was neither argued nor addressed in *Juvenile Female* whether crimes of violence require the direct use of physical force and this Court has not required criminal defendants to apprise themselves of the law of other jurisdictions. *Id.* at 37, 42. In the civil liability context, Judge Bacharach pointed out, defendants are entitled to rely on precedent from their own circuit. *Id.* at 37-39. This Court's *Johnson* decision did not afford fair warning to Mr. Muskett; it did it not address the requirement of direct physical force and circuit courts continued subsequently to distinguish between direct and indirect use of force. *Id.* at 32-34.

Mr. Muskett filed a petition for panel rehearing and rehearing en banc in which he argued that *Juvenile Female* and *Johnson* failed to afford the fair warning that due process requires for many of the reasons Judge Bacharach cited. Judge Bacharach cast

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[1] The majority indicated a circuit split existed between the Ninth Circuit and other circuits, but found that even if there was not, the Ninth Circuit's *Juvenile Female* decision "provided some notice to Mr. Muskett." Pet.App. A at 23. As Judge Bacharach explained, because there were two irreconcilable Ninth Circuit decisions with respect to the requirement of direct physical force, neither decision had precedential effect under Ninth Circuit law. *Id.* at 42-43.

[2] Mr. Muskett cites to the page number in the upper right corner of the Tenth Circuit opinion.

the sole vote in favor of rehearing. The petition was denied on September 11, 2020. Pet.App. D.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This Court Should Grant Certiorari to Address the Circumstances that Afford Fair Warning to an Individual that the Circuit in which He Resides May Overrule Precedent in Effect at the Time of his Offense Holding his Conduct Lawful.

1. The Tenth Circuit's expansive application of this Court's retroactivity decision in *United States v. Rodgers*, 466 U.S. 475 (1984), sharply contrasts with that of other circuits. Overruling an Eighth Circuit decision that precluded criminal liability, this Court addressed the retroactivity issue in *Rodgers* in a single sentence, stating that "any argument by respondent against retroactivity to him of our present decision ... would be unavailing since the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable." *Id.* at 484.[3] While other circuits have extended *Rodgers* only to the retroactive application of decisions from this Court resolving a conflict between circuits that existed at the time of an offense, the Tenth Circuit relied on *Rodgers* in support of its conclusion that a single decision of another circuit–even without a conflict between circuits–may provide fair warning that the court of appeals will overrule its own precedent and permit imposition of criminal

[3] As Judge Bacharach pointed out, *Rodgers* did not involve due process or the right to fair warning and this Court has not cited it in the due process context. Pet.App. A at 36.

consequences for conduct that was innocent under circuit precedent at the time it took place.

In *United States v. Qualls*, 172 F.3d 1136 (9th Cir. 1999), the en banc court determined that *Rodgers* required the retroactive application of the felon-in-possession statute in light of this Court's intervening decision in *Caron v. United States*, 524 U.S. 308 (1998). The Ninth Circuit explained that because the circuits had been split on the proper interpretation of the statute when Qualls committed the acts for which he was convicted, the change in the law was foreseeable under *Rodgers*. *Id.* at 1139 n.1. In a separate opinion, four judges partly concurred and partly dissented. They pointed out that the *Rodgers* rule unfairly prevents individuals from relying on controlling decisions upholding the lawfulness of their activities.

> *Rodgers* has the effect of requiring that a citizen look not to the established law of the circuit in which he resides, but to the law of the circuit taking the most expansive view of conduct prohibited by a statute, to determine what conduct he may undertake without risk of criminal prosecution until that point in time when the Supreme Court resolves any interpretative disagreement among the circuits. This can have the effect of restraining for years conduct that the Court may ultimately decide was always perfectly legal.

Id. at 1140 (Hawkins, J., concurring and dissenting). The Tenth Circuit has exacerbated that unfairness by effectively requiring citizens to apprise themselves of every decision from every circuit that calls into question the lawfulness of their conduct.

The Fifth Circuit, like the Ninth Circuit, has determined in light of *Rodgers* that while the Fifth Amendment protects citizens from retroactive application of a

broadened interpretation of criminal statutes that is unforeseeable, a decision from this Court resolving a conflict between circuits that existed at the time of an offense is not unforeseeable. *See United States v. Zuniga*, 18 F.3d 1254, 1259 (5th Cir.), *cert. denied*, 519 U.S. 902 (1996); *United States v. Seals*, 207 Fed.Appx. 489 (5th Cir. 2006) (unpublished).

Post-*Rodgers*, this Court clarified that the existence of "disparate decisions in various Circuits" is merely "a circumstance [that] may be taken into account in determining whether the warning was fair enough." *United States v. Lanier*, 520 U.S. 259, 269 (1997). Criminal statutes may punish only violations "fairly warned of, having been 'made specific' by the time of the charged conduct." *Id.* at 267 (quoting *United States v. Screws*, 325 U.S. 91, 104-05 (1945)).

2. The due process right at issue in this case is critically important. " . . . [T]he notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." *Marks v. United States*, 430 U.S. 188, 191-92 (1977) (citations omitted).

In order to impose criminal consequences for prior conduct, "pre-existing law" must not merely raise questions about whether the defendant will be subject to punishment; it must make apparent the conduct's unlawfulness. *Lanier*, 520 U.S. at 271-72 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The fair warning that due process protects is not "fair warning that the law might be changed." *Rogers v. Tennessee*, 532 U.S. at 470 (Scalia, J., dissenting). Defendants are entitled to "fair

warning of *what constituted the crime at the time of the offense*." *Id.* (emphasis in original). This Court's disapproval in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), of "unexpected and indefensible changes in the law" did not "implicitly approve 'expected or defensible changes.'" *Id.* Under *Bouie*, fair warning of a foreseeable change in judicial interpretation does not "insulate retroactive *judicial* criminalization" any more than it insulates retroactive legislative changes. *Id.* at 470-71 (emphasis in original).

3. The panel based its decision on several erroneous conclusions.

a. The panel relied on a single sentence from *Johnson* in which this Court distinguished "physical" force "exerted by and through concrete bodies" from intellectual or emotional force in deciding Mr. Muskett was fairly warned that the Tenth Circuit could reverse its precedent holding that crimes of violence require the direct use of physical force.[4] Pet.App. A at 8, 10, 17, 18-19 (citing *Johnson I,* 559 U.S. at 138). As Judge Bacharach explained, however, *Johnson* reasonably supported the conclusion that Mr. Muskett's assault offense was not a crime of violence. *Id.* at 33. In rejecting the argument that a slight touching could constitute "physical force," as it did under the common law definition, this Court narrowly interpreted the term "physical force" in the violent felony context to mean "*violent* force–that is, force

[4] In *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005), the court decided that offenses involving the causation of bodily injury by means of a deadly weapon did not require proof of physical force if they could be committed by indirect means such as placing a barrier in front of a car to cause an accident or by use of poison or toxic chemicals. 414 F.3d at 1285-87. The Tenth Circuit reaffirmed the logic of *Perez-Vargas* in *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008). It overruled *Perez-Vargas* in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017).

capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140 (emphasis in original).

As Judge Bacharach also pointed out, after *Johnson*, courts continued to distinguish between direct and indirect uses of force. Pet.App. A at 33-34. *See, e.g., Whyte v. Lynch*, 807 F.3d 463, 469–72 (1st Cir. 2015); *United States v. Torres–Miguel*, 701 F.3d 165, 168–69 (4th Cir. 2012); *United States v. Andino-Ortega*, 608 F.3d 305, 311 (5th Cir. 2010); *United States v. Anderson*, 695 F.3d 390, 404–05 (6th Cir. 2012) (White, J., concurring); *United States v. Fischer*, 641 F.3d 1006, 1010–11 (8th Cir. 2011)(Colloton, J., concurring). The Tenth Circuit continued to cite favorably to *Perez-Vargas* and *Rodriguez-Enriquez* after *Johnson* and never indicated before 2013 that its logic in those earlier cases might be suspect. *See, inter alia*, *United States v. Hanns*, 464 Fed.Appx. 769, 770-71 (10th Cir. 2012) (unpublished); *United States v. Porter*, 643 Fed.Appx. 758 (10th Cir. 2016) (unpublished). District courts likewise relied on *Perez-Vargas* and *Rodriguez-Enriquez* after *Johnson*. *See, e.g., United States v. Corral-Garcia*, 2017 WL 1437330, *6--*10 (D. Kan. 2017) (unpublished); *United States v. Cramer*, 2016 WL 6102337, *2 (D. Neb. 2016) (unpublished); *United States v. Chu*, 2016 WL 6892557, *4-*6 (D. Colo. 2016)(unpublished).[5]

[5] It was only after *Castleman* that the Tenth Circuit questioned the correctness of its prior holdings that offenses such as poisoning that can be committed without the direct use of physical force do not constitute predicate crimes of violence. *See* Pet.App. A at 29. In overruling *Perez-Vargas* and *Rodriguez-Enriquez* in *Ontiveros*, it concluded that their reasoning "is no longer viable in light of" *Castleman*. 875 F.3d at 536. In its *Ontiveros* opinion, the Tenth Circuit collected cases from "almost every circuit" that altered prior constructions of "the 'physical force' requirement as used in a felony crime of violence" based on *Castleman's* reasoning. *Id.* at 537.

b. "Due process, of course, does not require a person to apprise himself of the common law of all 50 States in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his State." *Rogers v. Tennessee*, 532 U.S. at 464. Due process should similarly not require a person to apprise himself of the law of every other federal circuit.

c. The fair warning required in criminal cases has the same objective as the "clearly established" immunity standard in civil cases. *Lanier*, 520 U.S. at 270. An accused offender facing loss of liberty in a criminal case should be entitled to fair warning safeguards at least as stringent as the requirement that an alleged constitutional violation be "clearly established" under similar circumstances to overcome qualified immunity. In the civil context, "neither the Supreme Court nor any federal court of appeals has ever held that liability may attach where settled in-circuit precedent clearly holds the conduct in question to be lawful." Pet.App. A at 17-18 (Bacharach, J., dissenting)(quoting Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. Cal. L. Rev. 455, 487 (2001)).

4. This case presents an ideal vehicle for this Court to clarify the appropriate analysis of the due process right to fair warning. It involves no preservation questions or disputed facts. The majority and dissenting opinions clearly addressed the constitutional issues.

CONCLUSION

This Court should grant certiorari to instruct the lower courts on proper enforcement of criminal defendants' critical right to fair warning of the criminal consequences of their conduct. For all the reasons stated above, Petitioner Donovan Muskett respectfully requests that this Court grant his petition for writ of certiorari.

In the alternative, this Court should grant certiorari, vacate the judgment of the court of appeals, and remand this case for further proceedings.

Respectfully submitted,

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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

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Respondent.

CERTIFICATE OF SERVICE

I, Aric Elsenheimer, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Donovan Muskett, I caused to be mailed one copy of the motion for in forma pauperis and the petition for writ of certiorari by first class mail, postage prepaid, to the Solicitor General, Department of Justice, 950 Pennsylvania Ave. NW, Room 5614, Washington, DC 20530, and to be sent electronic copies of the foregoing by e-mail at supremectbriefs@usdoj.gov, on this 3rd day of February 2021.

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