No. 20-7778

IN THE SUPREME COURT OF THE UNITED STATES

GERALD SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction for New York first-degree manslaughter constitutes a "violent felony" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

ADDITIONAL RELATED PROCEEEDINGS

United States District Court (S.D.N.Y.):

United States v. Scott, No. 06-cr-988 (Apr. 16, 2008)

United States v. Scott, No. 10-cv-3448 (Mar. 3, 2011)

United States v. Scott, No. 06-cr-988 (June 2, 2017)

United States v. Scott, No. 06-cr-988 (Jan. 5. 2018)

United States Court of Appeals (2d Cir.):

United States v. Scott, No. 10-3689 (Dec. 19, 2011)

United States v. Scott, No. 18-163 (Nov. 4, 2016)

United States v. Scott, No. 18-163 (Mar. 31, 2020)

United States v. Scott, No. 18-163 (Mar. 2, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-120a) is reported at 990 F.3d 94. A previous opinion of the court of appeals is reported at 954 F.3d 74. The opinion and order of the district court is not reported in the Federal Supplement but is available at 2017 WL 2414796.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2021. The petition for a writ of certiorari was filed on March 31, 2021. 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 Southern District of New York, petitioner was convicted of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951; brandishing a weapon during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 1. The district court sentenced him to 264 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals dismissed petitioner's direct appeal, but the district court subsequently granted a motion to vacate petitioner's sentence and resentenced him to time served, followed by five years of supervised release. Pet. App. 12a-13a; Amended Judgment 2-3. A divided panel of the court of appeals affirmed. Pet. App. 13a-15a. The en banc court of appeals granted rehearing and reversed. Id. at 1a-120a.

1. Petitioner "is a violent criminal, who has repeatedly threatened, and on two occasions taken, human life." Pet. App. 4a. In 1983, petitioner "was convicted of first-degree robbery," in violation of New York Penal Law § 160.15 (McKinney 1975), "during which crime he held a 75-year-old man at knifepoint." Pet. App. 10a. In 1988, petitioner was twice convicted of New York first-degree manslaughter, in violation of New York Penal Law § 125.20(1) (McKinney 1987). See Pet. App. 10a. "On one occasion,

he fatally shot the victim in the head at point-blank range. On the other occasion, he stabbed the victim to death." Ibid.

In September 2006, petitioner "entered a Bronx jewelry store, pointed a gun at the store owner, and ordered him to surrender the contents of his cash register." Pet. App. 10a. "The robbery, and any possible ensuing injury, were thwarted only by the fortuitous intervention of a police officer." Ibid. Petitioner was indicted by a federal grand jury for attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951; brandishing a weapon during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1-3. He pleaded guilty to all three offenses. See Pet. App. 9a-10a.

A conviction for violating Section 922(g)(1) has a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). As relevant here, however, the Armed Career Criminal Act of 1984 (ACCA) specifies a statutory sentencing range of 15 years to life imprisonment if the defendant has three or more convictions for a "violent felony." 18 U.S.C. 924(e)(1). The ACCA defines a "'violent felony'" to include an offense that "has 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) (the elements clause); "is burglary, arson, or extortion," 18 U.S.C. 924(e)(2)(B)(ii) (the offenses clause); or

"otherwise involves conduct that presents a serious potential risk of physical injury to another," ibid. (the residual clause).

At sentencing for petitioner's September 2006 federal crimes, the district court applied the ACCA to the Section 922(g)(1) count because petitioner's prior New York convictions for first-degree robbery and first-degree manslaughter were violent felonies. Pet. App. 11a. For similar reasons, the court found that those convictions classified petitioner as a career offender under the advisory Sentencing Guidelines, which contain a definition of "crime of violence" substantially similar in certain respects to the ACCA's definition of "violent felony." Ibid. (citations omitted); see Sentencing Guidelines §§ 4B1.1(a), 4B1.2(a)(1) (2007). The court imposed a sentence of 180 months of imprisonment on the Section 922(g)(1) count, a concurrent sentence of 151 months of imprisonment on the Hobbs Act count, and a consecutive sentence of 84 months of imprisonment on the Section 924(c)(1) count, to be followed by three years of supervised release. Judgment 2-3.

Petitioner's direct appeal was dismissed as untimely, and a subsequent motion to vacate his sentence under 28 U.S.C. 2255 was rejected as untimely and meritless. Pet. App. 12a & n.12.

2. In 2015, this Court held in Samuel Johnson v. United States, 576 U.S. 591, that the ACCA's residual clause was unconstitutionally vague. Id. at 606. With the court of appeals' authorization, petitioner filed a second motion to vacate his

sentence under Section 2255, contending that his New York convictions for first-degree manslaughter no longer constituted "violent felony" convictions for purposes of the ACCA, on the theory that New York first-degree manslaughter does not have "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); see Pet. App. 12a.

The district court agreed. See Pet. App. 13a. The court explained that New York first-degree manslaughter applies when a person "[w]ith intent to cause serious physical injury to another person * * * causes the death of such person or of a third person." N.Y. Penal Law § 125.20(1) (McKinney 2006); see 2017 WL 2414796, at *2. The court noted that the offense can be committed by an omission -- i.e., the "failure to perform an act as to which a duty of performance is imposed by law." Id. § 15.00(3) (McKinney 2004); see People v. Steinberg, 595 N.E.2d 845, 847 (N.Y. 1992); 2017 WL 2414796, at *2 And the court took the view that such an "act of omission * * * by definition does not involve an act of any kind, let alone the use of force." 2017 WL 2414796, at *2. It thus deemed the ACCA and the Guidelines' career-offender provision inapplicable; calculated a new guidelines range of 121 to 130 months of imprisonment; and resentenced petitioner to time served (approximately 135 months). Pet. App. 13a.

A divided panel of the court of appeals affirmed. 954 F.3d 74. Like the district court, the panel adopted the view that New York first-degree manslaughter is not a violent felony under the ACCA's elements clause or a crime of violence under the career-offender guidelines because it can be committed by omission. Id. at 74-92. Judge Raggi dissented on both the ACCA and the guidelines. Id. at 95-110; see Pet. App. 14a-15a.

3. The en banc court of appeals granted rehearing and reversed. Pet. App. 1a-120a.

a. The court of appeals began by applying the categorical approach, which compares the statutory definition of a crime to the federal definition, to determine whether New York first-degree manslaughter "has 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); Sentencing Guidelines § 4B1.2(a)(1). The court observed that the crime of New York first-degree manslaughter requires proof that the defendant (1) "inten[ded] to cause serious physical injury to another person," N.Y. Penal Law § 125.20(1) (McKinney 2020), and (2) "cause[d] the death" of that person, ibid.; see Pet. App. 15a-16a. And the court reasoned that a defendant whose conduct satisfies those elements categorically "use[s] violent force" because "any death amounting to first-degree manslaughter necessarily results from violent force" that

the defendant intended to cause "at least serious physical injury." Id. at 21a-22a.

The court of appeals explained that the "possibility of a defendant committing the crime by omission warrants no different conclusion." Pet. App. 22a. The court observed that the word "'use' * * * in the context of a use of violent force * * * does not require" that a defendant "take affirmative physical action to initiate or apply the violent force resulting in death." Ibid. (citation omitted). Instead, citing precedent from this Court, the court of appeals recognized that the "'everyday meaning' of the word 'use' requires only that a person 'make use of'" or "'employ'" the violent force for his or her purposes. Ibid. (quoting Smith v. United States, 508 U.S. 223, 228-229 (1993)). And the court recognized that a defendant can "employ" or "make use of" violent force if he is "intent on causing serious physical injury" and "breaches a legal duty to check or redress force already in motion." Id. at 26a. The court additionally emphasized that an "omission -- the breach of a legal duty to act" -- has "a specialized meaning at law, which equates not to inaction, but to action supporting criminal culpability," and that the historical legal understanding of an "omission as action" was part of the "common law background" against which Congress enacted the ACCA. Id. at 24a-25a (citing 2 Wayne R. LaFave, et al., Substantive Criminal Law § 15.4(b), at 717 (3d ed. 2018)). The court observed

that petitioner himself relied on the proposition that omissions could constitute actions as predicate for his argument that the offense of New York first-degree manslaughter can be committed by omission. Id. at 25a.

The court of appeals drew further support from this Court's decision in United States v. Castleman, 572 U.S. 157 (2014), which held that a Tennessee statute criminalizing the knowing or intentional causation of bodily injury "has, as an element, the use or attempted use of physical force," for purposes of the "misdemeanor crime of domestic violence" definition in 18 U.S.C. 921(a)(33)(A); see 18 U.S.C 922(g)(9). The court of appeals observed (Pet. App. 27a-29a) that Castleman had reasoned that the Tennessee statute categorically had as an element the use of force because the "intentional causation of bodily injury necessarily involves the use of physical force." 572 U.S. at 169; see id. at 174 (Scalia, J., concurring in part and concurring in the judgment) ("[I]t is impossible to cause bodily injury without using force capable of producing that result.") (citation omitted). And applying that logic to this case, the court observed that New York first-degree manslaughter similarly has as an element the use of force, because it requires causation of "death (the ultimate physical injury)" by a defendant who intended to cause serious injury. Pet. App. 30a.

The court of appeals further observed that the "logical -- or illogical" implication of petitioner's position is that New York murder would not be a violent felony, because it too can be committed by omission. Pet. App. 7a; see id. at 46a-47a. The court found that result "so far removed from Congress's purpose" as to "preclude finding it plausible that first-degree manslaughter committed by omission cannot be categorically violent." Id. at 47a. And the court noted that six other courts of appeals agreed with its position, see id. at 9a & n.5, 31a, and that the only court of appeals to take a different view after Castleman had decided to reconsider the issue en banc, see ibid.

b. Judge Park filed a concurring opinion joined by four judges "to note the absurdity of the exercise" required by the categorical approach, emphasizing that "any layperson with common sense" would recognize that petitioner's "two convictions for first-degree manslaughter -- one for shooting a man in the face and the other for stabbing a man to death -- count as 'violent felonies' under ACCA" and the parallel career-offender guideline. Pet. App. 55a; see id. at 55a-58a. Judge Menashi filed an opinion concurring in part and concurring in the judgment, agreeing that New York first-degree manslaughter "is a violent felony under the [ACCA] and a crime of violence under the Career Offender Guideline because it has as an element the 'use ... of physical force against the person ... of another,' even though it may be committed by

omission” exclusively because of “specialized, legal meaning” in the common law, established criminal-law principles, and precedent. Id. at 59a (citation omitted); see id. at 59a-71a.

c. Five judges dissented. All five dissenting judges joined the part of an opinion by Judge Leval taking the view that, while petitioner’s “conduct warrants severe punishment” and his ultimate sentence might be “unreasonably lenient,” the rule of lenity precluded application of the ACCA to his convictions for New York first-degree manslaughter. Pet. App. 73a-74a; see id. at 72a-82a. Three dissenting judges joined part of an opinion by Judge Pooler reiterating the original panel majority’s conclusion that New York first-degree manslaughter does not fall within the ACCA because it can be committed by omission. Id. at 85a-109a; see id. at 112a-118a (Judge Pooler reiterating the panel majority’s conclusion that New York first-degree manslaughter is not a crime of violence under the career-offender guideline); id. at 82a-83a (Leval, J., dissenting) (disagreeing on the Guidelines issue).

ARGUMENT

Petitioner renews his contention (Pet. 16-37) that his prior convictions for New York first-degree manslaughter are not violent felonies for purposes of the ACCA. As the en banc Second Circuit explained, that position runs counter to the ACCA’s text, this Court’s precedent, congressional design, and common sense. Pet. App. 15a-49a. Nearly every court of appeals that has considered

the question since this Court's decision in United States v. Castleman, 572 U.S. 157 (2014), has accordingly recognized that the ACCA applies to crimes like the one at issue here, see Pet. App. 9a & n.5, 31a, and the one outlier has indicated that it may reconsider the issue en banc, see ibid. This Court has repeatedly and recently denied certiorari in cases raising similar questions, see pp. 17-18, infra, and should follow the same course here.

1. Under this Court's "categorical approach" to the ACCA, Mathis v. United States, 136 S. Ct. 2243, 2248 (2016), this case turns on whether New York first-degree manslaughter necessarily "has 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). As the en banc court of appeals thoroughly and persuasively explained, it does. Pet. App. 15a-49a.

a. The inclusion of New York first-degree manslaughter as an ACCA violent felony follows directly from both the ordinary and legal understandings of the text of the ACCA's elements clause. A defendant can be convicted of that crime only if he "causes the death of" another person. N.Y. Penal Law § 125.20(1) (McKinney 2020); see Pet. App. 21a. Petitioner acknowledged below that such a death "necessarily results from violent force." Pet. App. 21a. And a convicted defendant necessarily "use[s]" that force, 18 U.S.C. 924(e)(2)(B)(i), because New York law allows conviction only if the defendant caused that death-by-force while

"inten[ding] to cause serious physical injury to another person," N.Y. Penal Law § 125.20(1) (McKinney 2020). "In sum, the causation element of first-degree manslaughter, considered in light of the crime's mens rea element, requires that, in every case, a defendant's knowing and intentional use of violent force be the cause of death." Pet. App. 22a.

That logic is underscored by Castleman, which observed that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." 572 U.S. at 169. As Justice Scalia's concurring opinion observed, "it is impossible to cause bodily injury without using force capable of producing that result." Id. at 174 (citation omitted). And Castleman's reasoning applies equally if the crime is committed by omission. Although the defendant in such a case may not apply force directly to the victim, the defendant nevertheless "use[s]" force in the ordinary sense of that word -- he "employ[s]" or "utilize[s]" it for his desired purposes -- by intentionally taking advantage of the force to seriously injure (and ultimately kill) the victim to whom he owes a legal duty. Pet. App. 22a (citations omitted).

Moreover, the court of appeals recognized that the principle that an omission may under certain circumstances be the equivalent of an affirmative act is well established in criminal law. Pet. App. 33a-37a. "That equivalency" was "originally rooted in common law," and "is now reflected in the Model Penal Code" and "the

enacted laws of most states." Id. at 34a-35a (citing numerous sources); see id. at 35a n.25 (same). Indeed, petitioner's own argument hinges on New York law's express definition of the infinitive "'[t]o act'" as "either to perform an act or to omit to perform an act," N.Y. Penal Law § 15.00(5) (McKinney 2004) (emphasis added), "as to which a duty of performance is imposed by law," id. § 15.00(3). A defendant who does so with the intent to cause serious physical injury -- and in fact causes death -- has "use[d]" force under settled principles of criminal law. 18 U.S.C. 924(e)(2)(B)(i); see Pet. App. 65a-71a (Menashi, J., concurring in part and concurring in the judgment).

b. Petitioner's contrary argument (Pet. 16-37) principally focuses on the assertion (Pet. 17-23) that a criminal omission is not naturally understood as a use of force. But petitioner does not dispute that the victim of a first-degree manslaughter necessarily died as a result of violent force; that the perpetrator of such a crime necessarily intended to cause serious bodily injury; or that the criminal law has long recognized certain omissions as a valid basis for criminal liability. And he offers no sound textual basis for concluding that a defendant who intentionally and volitionally takes advantage of force to seriously injure (and ultimately kill) a victim to whom he owes a duty of care has not "use[d]" that force within the meaning of the ACCA. 18 U.S.C. 924(e)(2)(B)(i). Instead, petitioner embraces the

counterintuitive position that an omission can simultaneously be a criminal act yet not an "active crime[]." Pet. 18 (citation omitted). Nothing in the ACCA supports such a divergent and self-defeating approach to the inclusion of first-degree manslaughter and similar intentional-killing offenses as violent felonies under the ACCA. Pet. App. 25a; see id. at 68a-70a (Menashi, J., concurring in part and concurring in the judgment).

Contrary to petitioner's contention (Pet. 23-24), the court of appeals' references to New York law do not mean that it used New York law to interpret the ACCA. The court instead "look[ed] to state law in identifying the elements of" the relevant crime "but to federal law in determining" whether the crime falls within the ACCA. Pet. App. 15a; see id. at 16a-31a. That approach is fully consistent with this Court's ACCA cases. See, e.g., Curtis Johnson v. United States, 559 U.S. 133, 138 (2010) (noting that, in applying the elements clause of the ACCA, this Court is "bound by [state courts'] interpretation of state law, including [their] determination of the elements of" the relevant offense). Petitioner's contention (Pet. 25) that the equivalence between certain omissions and criminal acts did not emerge until "the late nineteenth century" is also misplaced. That timing underscores the widespread acceptance of the equivalence when Congress enacted the ACCA in 1984 and added the elements clause in 1986, thereby informing the backdrop against which Congress legislated. Pet.

App. 25a-26a, 35a-36a; see, e.g., Quarles v. United States, 139 S. Ct. 1872, 1876-1877 (2019) (interpreting the ACCA against the background of prevailing state law in 1986).

Petitioner further errs in suggesting (Pet. 28-30) that the court of appeals placed too much weight on this Court's decision in Castleman. Although Castleman did not directly discuss omissions as a basis for criminal liability, it addressed a state statute that -- like the New York first-degree manslaughter statute at issue here -- criminalized the knowing or intentional causation of bodily injury. 572 U.S. at 161. Castleman held that such a statute categorically "has as an element, the use * * * of physical force," 18 U.S.C. 921(a)(33)(A)(ii) -- and therefore qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9) -- because "the knowing or intentional causation of bodily injury necessarily involves the use of physical force," Castleman, 572 U.S. at 169; accord id. at 174 (Scalia, J., concurring in part and concurring in the judgment). That holding is directly relevant here, because the ACCA defines "violent felony" in materially identical terms. 18 U.S.C. 924(e)(2)(B)(i).*

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* In Borden v. United States, 141 S. Ct. 1817 (2021), a plurality of this Court distinguished between a "'violent felony'" under the ACCA and a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9) because the statutory definition of the former (but not the latter) includes the phrase "against the person of another," 18 U.S.C. 924(e)(2)(B)(i); see Borden, 141 S. Ct. at 1832-1833. That distinction does not support petitioner's

Petitioner's attempt (Pet. 29-30) to distinguish Castleman's reasoning because its examples of uses of force -- e.g., sprinkling poison in a victim's drink -- involved actions rather than omissions, see 572 U.S. at 171, overlooks the key reasoning of Castleman. The Court explained that the "use of force" in poisoning a drink "is not the act of 'sprinkling' the poison; it is the act of employing poison knowingly as a device to cause physical harm." Ibid. (emphasis added; brackets omitted). And a defendant who intentionally "employ[s]" a force such as starvation or an untreated wound "to cause physical harm" by defying a duty of care likewise "'use[s] * * * force'" within the meaning of the ACCA. Ibid.

Finally, petitioner's reliance (Pet. 35-37) on the rule of lenity is misplaced, because applying ordinary tools of statutory interpretation leaves no "grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended," which is the prerequisite for resort to the rule of lenity. Pet. App. 45a (quoting Castleman, 572 U.S. at 173). Indeed, this Court rejected an appeal to the rule of lenity in addressing a similar question in Castleman. See ibid. It would, moreover, be especially inappropriate to rely on the rule of lenity to adopt an approach that -- as petitioner himself acknowledges

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argument here, which concerns the language regarding "use" of force that appears in both provisions. Borden, 141 S. Ct. at 1833.

(Pet. 20-21 & n.3) -- would exclude from the ACCA even more serious homicide offenses, including first-degree murder, that can likewise be committed by omission.

2. Petitioner does not identify a sound basis for further review of the decision below, which accords with the decisions of several other circuits. Although petitioner alleges (Pet. 10-14) that courts of appeals are divided on the question presented, no conflict warranting this Court's review exists. And petitioner errs in contending (Pet. 30-35) that the decision below conflicts with prior decisions of this Court. The petition should accordingly be denied.

a. Almost every court of appeals that has considered the issue after Castleman has recognized that a crime that can be committed by omission may qualify as a violent felony under the elements clause of the ACCA (or a crime of violence under the parallel provision of the Sentencing Guidelines). And every time a defendant has sought certiorari from one of those decisions, this Court has declined to grant review. See, e.g., United States v. Rumley, 952 F.3d 538, 551 (4th Cir. 2020), cert. denied, 141 S. Ct. 1284 (2021); United States v. Baez-Martinez, 950 F.3d 119, 130-133 (1st Cir. 2020), cert. denied, No. 20-5075 (June 21, 2021); United States v. Sanchez, 940 F.3d 526, 536 (11th Cir.), cert. denied, 140 S. Ct. 559 (2019); United States v. Peeples, 879 F.3d 282, 287 (8th Cir.), cert. denied, 138 S. Ct. 2640 (2018); United

States v. Ontiveros, 875 F.3d 533, 538 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018); United States v. Waters, 823 F.3d 1062, 1066 (7th Cir.), cert. denied, 137 S. Ct. 569 (2016).

The one outlying court of appeals decision since Castleman is the Third Circuit's decision in United States v. Mayo, 901 F.3d 218 (2018), which held that certain Pennsylvania aggravated-assault convictions do not fall within the ACCA's elements clause because that offense can be committed by omission. Id. at 229. Shortly after that decision, however, the Third Circuit sua sponte granted en banc review to reconsider that holding. Order, United States v. Harris, No. 17-1861 (June 7, 2018). The Third Circuit subsequently held Harris in abeyance pending this Court's decision in Borden v. United States, 141 S. Ct. 1817 (2021), which concerned whether offenses that can be committed with a mens rea of recklessness can fall within the elements clause. Docket Entry, Harris, supra, No. 17-1861 (Mar. 17, 2020). Following this Court's decision in Borden, the Third Circuit ordered supplemental briefing in Harris. Order, Harris, supra, No 17-1861 (July 1, 2021). The Third Circuit has not yet decided Harris, and it is possible that the case could be resolved in a way that does not implicate the question presented here. Cf. Pet. 11 n.1. But the Third Circuit's willingness to revisit the holding of Mayo indicates that any shallow circuit conflict on the question at issue here may not persist.

Petitioner errs in suggesting (Pet. 11-13) that several other circuits have decided the question presented in his favor. In a pre-Castleman decision, the Fifth Circuit stated that a crime that can be committed by omission does not fall within the career-offender provision of the Sentencing Guidelines. United States v. Resendiz-Moreno, 705 F.3d 203, 205 (2013). But the en banc Fifth Circuit subsequently overruled that decision in part and stated that because Castleman did not decide the omission issue, it did not have to resolve the issue either. United States v. Reyes-Contreras, 910 F.3d 169, 182 n.25 (2018). And petitioner does not identify any subsequent Fifth Circuit case treating the issue as settled.

The en banc Sixth Circuit stated that Ohio felonious-assault and aggravated-assault crimes did not fall within the career-offender provision of the Sentencing Guidelines because they could be committed by causing "certain serious mental harms without using physical force, as defined in the ACCA and the Guidelines." United States v. Burris, 912 F.3d 386, 399, cert. denied, 140 S. Ct. 90 (2019). That reasoning is not pertinent to the question at issue here, because New York first-degree manslaughter cannot be committed by causing only mental harm; it requires causation of death. N.Y. Penal Law § 125.20(1) (McKinney 2020). Moreover, the Sixth Circuit ultimately upheld the application of the career-offender guideline to the defendant in Burris on other grounds,

see 912 F.3d at 407, meaning that a future panel would likely treat the discussion cited by petitioner as "dictum," id. at 411 (Kethledge, J., concurring in the judgment).

Petitioner also relies (Pet. 12) on the Ninth Circuit's unpublished memorandum decision in United States v. Trevino-Trevino, 178 Fed. Appx. 701 (2006). But that unpublished decision is "not precedent" of the Ninth Circuit. 9th Cir. R. 36-3(a). And the decision predates Castleman, so it is unclear how the Ninth Circuit would resolve the issue presented here. Finally, petitioner contends (Pet. 12-13) that the Fourth Circuit has taken inconsistent positions on the issue. But the Fourth Circuit recently and squarely resolved the issue in United States v. Rumley, supra, relying on Castleman to hold that a Virginia crime requiring the causation of bodily injury categorically falls within the ACCA elements clause. 952 F.3d at 550-551; see id. at 550 ("Following Castleman, it is impossible to intend to cause injury or death without physical force as contemplated under the ACCA.") (citation omitted). And even if the Fourth Circuit's pre-Castleman decision in United States v. Gomez, 690 F.3d 194, 201 (2012), suggested an intracircuit conflict, this Court's intervention would remain unwarranted. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

b. Petitioner's contention (Pet. 30-35) that the decision below conflicts with decisions of this Court is likewise mistaken. Petitioner relies most heavily on Chambers v. United States, 555 U.S. 122 (2009), which held that the crime of failure to report to a penal institution did not qualify as an ACCA predicate under the now-invalidated residual clause. Id. at 128-130. The Court also briefly stated that the failure-to-report offense would not qualify under the ACCA's elements clause. Id. at 127-128. But the Court did not explicitly rely on that particular statement or an omission-based characterization of the crime in resolving the question presented in Chambers, and it did not need to. It is easy to imagine a failure to report to prison that does not involve any use of force whatsoever. But the same is not true of a homicide committed by a defendant who "inten[ds] to cause serious physical injury to another person." N.Y. Penal Law § 125.20(1) (McKinney 2020).

For similar reasons, petitioner derives little support from the Court's holding in Curtis Johnson v. United States, supra, that the ACCA's elements clause does not apply to a battery offense that can be committed "by the merest touching." 559 U.S. at 141; see id. at 139 (explaining that battery covers the "slightest" touching that is merely "offensive" to the victim). While a defendant can commit such a crime in circumstances that do not involve the requisite question of force at all, that is not the

case when a defendant kills a victim by taking advantage of force with the intent to "cause serious physical injury," N.Y. Penal Law § 125.20(1) (McKinney 2020). Petitioner's argument is similarly not supported by the Court's holding in Stokeling v. United States, 139 S. Ct. 544 (2019), that the ACCA elements clause applies to a state robbery offense that has as an element the use of force sufficient to overcome a victim's resistance. See id. at 550-555. A defendant who uses sufficient force to kill a victim while intending to cause serious physical injury uses at least that quantum of force.

The Court's decisions in Voisine v. United States, 136 S. Ct. 2272 (2016), and Leocal v. Ashcroft, 543 U.S. 1 (2004), are also unhelpful to petitioner. Those decisions -- and the Court's recent decision in Borden -- address whether the ACCA and similarly worded statutes apply to crimes that can be committed with reckless or negligent intent. See Borden, 141 S. Ct. at 1824-1825 (plurality opinion) (describing all three cases). But here there is no dispute that New York first-degree manslaughter requires intentional conduct. See Pet. App. 43a-44a ("Under New York law, there is no possibility of committing first-degree manslaughter accidentally, negligently, or even recklessly. Rather, the crime demands more: a defendant must cause death while specifically intending to cause at least serious physical injury to another person.") (footnote omitted).

Finally, the Court's decision in Bailey v. United States, 516 U.S. 137 (1995), is even further afield. In Bailey, the Court held that a defendant does not "'use[]'" a firearm during the commission of another crime within the meaning of 18 U.S.C. 924(c)(1) if he "inert[ly]" possesses the gun during the commission of the other crime. 516 U.S. at 149; see ibid. (explaining that a defendant is not subject to Section 924(c)(1) "merely for storing a weapon near" the proceeds of crime). That analysis has no application here, because a defendant cannot merely possess or store force. Bailey's holding accordingly does not aid petitioner in contending that he did not "use * * * force," 18 U.S.C. 924(e)(2)(B)(i), when he killed two people while intending (at least) to cause them serious bodily harm.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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