No. _____

In the

Supreme Court of the United States

KEVIN FOLSE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Petition for Writ of Certiorari

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Question Presented For Review

New Mexico courts have held that the state's aggravated battery statute can be violated by unlawful touching alone. Unlawful touch that results in bodily injury is an element of aggravated battery. The Tenth Circuit believes such an offense nonetheless has as an element the use, attempted use, or threatened use of violent force against the person of another so as to qualify as a 'crime of violence' as defined in the United States Sentencing Guidelines section 4B1.2(a)(1). This is so the court said, because the potential result of that touch necessarily means a "stepped-up level of unlawful force" has to be used to commit the offense. It did not cite a New Mexico decision to support its view. Does this decision conflict with the decisions of the First and Fourth Circuits that have held causing injury does not categorically mean violent force was used? Does it also conflict with the decisions of the New Mexico courts which have held the prosecution is not required to prove this degree of force was used?

Related Proceedings

United States Court of Appeals for the Tenth Circuit

United States v. Kevin Folse, Case No. 19-2065

Opinion Entered: May 4, 2021

Petition for Rehearing Denied: July 26, 2021

Mandate Entered: August 3, 2021

United States District Court for the District of New Mexico

United States v. Kevin Folse, Case No. 15-CR-2485-JB

Judgment Entered: April 3, 2019

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In the

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KEVIN FOLSE, Petitioner

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Petition for Writ of Certiorari

Kevin Folse petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit's decision in *United States v. Folse*, Case No. 19-2065, affirming Folse's conviction and sentence, was unpublished and is reported at 854 Fed. Appx. 276 (10th Cir. 2021).[1] The district court's memorandum opinion denying Folse's objection to the career offender sentencing enhancement was not published.[2]

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[1] App. 1a-48a. "App." refers to the attached appendix. 'PSR' refers to the probation office's presentence report. The record on appeal contained four volumes. Folse refers to the documents and pleadings in those volumes as Vol. __ followed by the bates number on the bottom right of the page (e.g. Vol. I, 89).

[2] App. 49a - 109a.

Jurisdiction

On May 4, 2021, the Tenth Circuit affirmed Folse's conviction and sentence.[3] Folse filed a petition for rehearing which the court denied on July 26, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Rule 13.1, this petition is timely if filed on or before October 25, 2021.

Pertinent Statutory Provisions

U.S.S.G. § 4B1.1, Career Offender

The federal sentencing guideline provisions involved in this case are § 4B1.1 and § 4B1.2. Section 4B1.1 describes when the career offender enhancement applies:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.2, Definitions of Terms Used in § 4B1.1

Section 4B1.2 defines the terms used in § 4B1.1. As pertinent here it provides:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

[3] App. 1a-48a.

New Mexico Statute

The New Mexico statutory provision addressed in this petition is N.M. Stat. Ann. 30-3-5, which describes the offense of aggravated battery:

A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.

B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

C. Whoever commits aggravated battery inflicting 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 is guilty of a third degree felony.

Statement of the Case

A. District Court Proceedings

In April, 2019, the district court sentenced Folse to a prison term of 360 months. This term was the bottom of the guideline recommended imprisonment range. Vol. I, 695, Vol. IV, 324-25. The probation office's presentence report (PSR) advised the court that Folse was subject to U.S.S.G. § 4B1.1, a sentencing enhancement for "career offenders." In a filed pleading objecting to the PSR's sentencing guideline calculations, Folse argued his previous New Mexico convictions for aggravated battery under N.M. Stat. Ann. § 30-3-5(c), were not qualifying predicate offenses as defined in U.S.S.G. § 4B1.2(a). The district court overruled Folse's objections and sentenced him as a career offender. App. 88a-99a.

B. Tenth Circuit Proceedings

Relying on its precedent, the Tenth Circuit rejected Folse's argument that New Mexico aggravated battery fell outside the force clause. The court conceded the offense can be committed merely by an unlawful touch. App. 37a-43a. It then declared that because the offense requires proof of an intent to injure, the unlawful touch element is satisfied only with "proof of a stepped-up level of unlawful force." App. 43a. No New Mexico decision was cited to support this claim. *Id.* Instead the court referred to its own precedent. The court said that in *United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017), it held that one cannot cause bodily injury without using violent physical force. Since harm or potential harm is an element of the New Mexico offense, the court concluded that according to *Ontiveros*, it could not be perpetrated without using "a stepped-up level" of physical force, greater than an unlawful touch. App. 44a. Although the statute does not require proof that the accused's touch reach a threshold intensity, the panel still held New Mexico aggravated battery has as an element, the use, threatened use or attempted use of violent physical force. App. 45a-45a.

Reasons for Granting the Writ

In New Mexico aggravated battery simply demands evidence that a person touched another without permission. *State v. Kraul*, 90 N.M. 314, 316-17 (Ct. App. 1977) (simply battery is necessary element of aggravated battery). Relying on *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), the Tenth Circuit here rejected a distinction between an element requiring violent physical force and conduct resulting in injury. App. 37a-43a. *Ontiveros* held that *United States v. Castleman*, 572 U.S. 157 (2014) cast aside any distinction between direct and indirect application of force. *Ontiveros*, 875 F.3d at 538. Despite this Court's express disclaimer in *Castleman* that it was not deciding whether bodily injury necessarily requires "physical force" as used in the force clause, the Tenth Circuit held that *Castleman* decided just that. According to the Tenth Circuit then, any injury, irrespective if it was intended, necessarily is caused by violent physical force. App. 43a.

The Tenth Circuit is mistaken. *Johnson v. United States*, 559 U.S. 133 (2010) controls, not *Ontiveros*. The force required to bring an offense within the force clause is strong, physical force. *Johnson,* 559 U.S. at 140. An offense committed by mere touching, like New Mexico aggravated battery, may set events in motion that may cause great bodily harm, but it does not categorically require *Johnson* level force. *See United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012) (offense that results in physical injury, but does not involve the use or threatened use of force, does not meet guidelines crime of violence definition).

To interpret the force clause in *Johnson*, the Court referred to the definition of 'physical force' in Black's Law Dictionary and to Webster's New

International Dictionary's description of 'violent.' 559 U.S. at 140-41. Black's defined 'physical force' as "force consisting in a physical act." *Id.* According to Webster, 'violent' means "moving, acting or characterized by strong physical force." *Id.* Consequently, violent physical force in the force clause means the physical application of strong force. Basic physics, then, is first to define the act being analyzed.

New Mexico cases do not require proof of a willingness to use violent force. All that is asked is evidence that person touched another without permission. The events set in motion by an unwanted touch which may unintentionally cause injury do not create force; it is present in the underlying unlawful touch. And the accused will not necessarily have used violent physical force in the touch, even though it is unlawful. *See e.g. State v. Ortega*, 113 N.M. 437, 440 (Ct. App. 1992) (commenting that contact with another's cane, or paper or any other object held in that person's hand may constitute a battery); *State v. Chavez*, 82 N.M. 569, 571 (Ct. App. 1971) ("defendant's act need not be a direct (that is, immediate) cause" of harm or the likely harm to another). The great bodily harm that results or that could have been inflicted is enough for a jury to find the accused guilty of aggravated battery. *See Chavez*, 82 N.M. at 572 (whether an aggravated battery rises to a felony "depends largely . . . on the nature of the injury inflicted."). Consequently, New Mexico aggravated battery does not match the force clause's definition and Folse's convictions are not crimes of violence.

And yet, according to the Tenth Circuit, so long as physical pain or injury is caused, the movement or action that set in motion the events which caused the harm categorically qualifies as *Johnson* defined physical force. *Ontiveros*, 875 F.3d at 536; *accord Folse*, Att. 44a. This ruling is inconsistent with

Johnson. This Court did not find that the word "physical" in the phrase "physical force" relates to the effect of the force used. It explained that "physical" refers to the mechanism by which the force is imparted to the "person of another." 550 U.S. 140-41. To relate physical force to its effect adds nothing to the force clause definition.

By definition then, it is fundamentally incorrect to assume, as the Tenth Circuit does, that any causation of physical harm, even when done by omission, is accomplished only by the use of violent physical force. *Ontiveros*, 875 F.3d 538. This Court should grant certiorari to resolve the impact, if any, of *Castleman* on the felony force clause and in turn clear up the circuit conflict over whether an offense with an element of bodily injury necessarily also has as an element the use of violent physical force.

* * * * * * * * * * *

A. Because New Mexico courts have explicitly held that only an unlawful touch is required to be guilty of aggravated battery, the offense does not have the use of *Johnson* force as an element.

In New Mexico, aggravated battery is defined as, "the unlawful touching or application of force to the person of another with intent to injure that person or another." N.M. Stat. Ann. § 30-3-5(A). Aggravated battery simply demands evidence that a person touched another without permission. *See State v. Kraul*, 90 N.M. 314, 316-317 (Ct. App. 1977) (simple battery is necessary element of aggravated battery). Battery is the "least touching" of another person in a rude, insolent or angry manner. *State v. Seal*, 415 P.2d 845, 846 (N.M. 1966). That is not the violent force capable of causing pain or injury that constitutes physical force under the elements clause. *Johnson*, 559 U.S. at 138-45; *United States v. Barraza-Ramos*, 550 F.3d 1246, 1249-51 (10th Cir. 2008); *United States v. Hays*, 526 F.3d 674, 678-79 (10th Cir. 2008).

There is a material difference between a touch that may or may not lead to violence, and the actual or threatened use of violent physical force. The latter comes within the ACCA's elements clause; the former does not. Offenses of unwanted touch with only a possibility for violence fell within the guideline's residual clause, which has since been repealed.

In New Mexico, battery is not measured by the physical harm done; it is the unlawfulness of even the slightest touch that matters. An offensive touch can be a battery and it will not necessarily involve force capable of causing pain or injury. In other words, the force of the touch and its consequences are secondary because without the touch one cannot commit a battery. Injury is not a necessary element, nor is contact with the person's body. *State v. Ortega*, 113 N.M. 437, 440-41 (Ct. App. 1992). Because aggravated battery

subsumes battery, in New Mexico unlawful touching, however slight, can never meet the ACCA's level of force.

For example, if you grab a driver through an open truck window to keep him from leaving, you commit battery. *Cf. State v. Hill*, 131 N.M. 195, 198, 200 (Ct. App. 2001) (analyzing if driver instigated battery or was a victim when officer struck driver's arm while truck in gear and drew weapon to keep him from driving off). Perhaps your grab seems to be done with an intent to injure. If so, it becomes an aggravated battery.[4] The same grab may result in the driver losing control and crashing the truck or hitting someone - now there are felony aggravated battery charges. Arguably, the same is true if you grab an officer's baton, "flashlight or weapon" instead of an arm, and spin him around, "causing the officer to fall . . . out a window, into a mine shaft, off a ship, or out of an airplane . . . ." *Ortega*, 113 N.M. at 441. Yet, the actus reus is still the unlawful touch, not the possibilities it creates.

1. By expanding *Castleman* beyond its express parameters, the Tenth Circuit is in conflict with other circuits that have found violent, physical force is active force that does not include mere touching.

A crime committed by mere touching, but that may set events in motion to cause great bodily harm, like New Mexico aggravated battery, does not categorically require a *Johnson* level of force. *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012). In *Johnson* the Court ensured that its definition of force required a "substantial degree of force," or "strong physical force." 559 U.S. at 140. Although this force may be "capable" of causing pain,

[4] New Mexico recognizes the privilege of parental control so that an intent to injure may be a disciplinary tactic and not necessarily a desire to inflict serious physical injury. *State v. Lefevre*, 138 N.M. 174, 177-78 (Ct. App. 2005).

the result is not the determining factor. *See id.* The strength of the force is the important point.

The Tenth Circuit's decisions in *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005) and *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008), comport with this Court's ruling. In these cases the Tenth Circuit held pain or injury alone does not render a crime forceful. *Perez-Vargas*, 414 F.3d at 1285-87; *Rodriguez-Enriquez*, 518 F.3d at 1194; *see also Torres-Miguel*, 701 F.3d at 168 ("of course, a crime may result in death or serious injury without involving the use of physical force."); *United States v. Middleton*, 883 F.3d 485, 490 (4th Cir. 2018) (noting this portion of *Torres-Miguel* survives *Castleman* because there remains an acute distinction between de minimus force discussed in *Castleman* and violent force discussed in *Johnson*); and *id.* (rejecting government's argument that causing injury categorically means violent force was used). De minimus force, such as mere offensive touching, regardless of whether it may lead to injury, will not come within the elements clause because it is not violent. An offense falls within that clause only when it requires proof of an underlying forceful, violent physical act imparted to another's body. *Perez-Vargas*, 414 F.3d at 1285; *Rodriguez-Enriquez*, 518 F.3d at 1194.

In *United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017), the panel overruled *Perez-Vargas*, and *Rodriguez-Enriquez*. It believed that the court's earlier cases did not survive *Castleman*. It said that according to *Castleman* the "use of physical force" in the ACCA's elements clause includes force applied directly or indirectly, such as through poison. 875 F.3d at 536-38 (citing *Castleman*, 572 U. S. at 169-171). The *Folse* panel used *Ontiveros* to find Folse's aggravated battery conviction satisfied the elements clause in

U.S.S.G. § 4B1.2(a)(1). App. at 44a. It ruled that whether harm occurs indirectly, rather than directly, is irrelevant. *Id.* *Ontiveros* is not the reliable authority the *Folse* panel wants it to be. In *Ontiveros*, the court interpreted *Castleman* in a way that puts it in conflict with other circuits. *Castleman* has nothing to do with the characterization of violent felonies. Not only have other circuit courts concluded just that, so too did *Castleman*.

There this Court expressly disavowed any intent to upset the circuits' understanding of the ACCA and its definition of violent felony. 572 U.S. at 164 n.4. "Courts of Appeals have generally held that mere offensive touching cannot constitute the 'physical force' necessary to a 'crime of violence.'" *Id.* "Nothing in today's opinion casts doubt on these holdings, because . . . 'domestic violence' encompasses a range of force broader than that which constitutes 'violence' simpliciter." *Id.* *Castleman* was clear that it was not addressing "force" under *Johnson*'s definition, but rather was interpreting a wholly different statutory phrase. *Id.*

Castleman's analysis is not applicable to the physical force requirement for a crime of violence, which suggests a category of violent, active crimes that have as an element a heightened form of physical force because that requirement is narrower in scope than that applicable in the domestic violence context. The First Circuit, like the Fourth, also recognized that *Castleman* did not alter the definition of force that applies in the felony context. The court commented that "[p]hysical force can mean different things depending on the context in which it appears." *Whyte v. Lynch*, 807 F.3d 463, 470 (1st Cir. 2015). It then held that the context addressed in *Castleman*, the Domestic Violence Gun Ban, can "be satisfied by a 'mere offensive touching' – a standard that casts a far wider net in the sea of state

crime predicates than does *Johnson*'s requirement of 'violent force.'" *Id.* at 471. Therefore, irrespective of *Castleman*, the court found that a Connecticut assault statute that, like New Mexico, can involve causing physical injury, did not require violent physical force. *Id.* at 471. Given the sound reasoning in these opinions, it is difficult to accept that *Castleman* has expressly invalidated the Tenth Circuit's earlier analysis in *Perez-Vargas* and *Rodriguez-Enriquez*.

This Court's recent decision in *Borden v. United States*, 141 S.Ct. 1817 (2021) says as much. There, the Court held that reckless crimes are not violent crimes, even though in *Voisine v. United States*, 136 S.Ct. 2272 (2016), the Court had held that reckless crimes qualify as misdemeanor crimes of domestic violence under 18 U.S.C. § 921(a)(33). 141 S.Ct. at 1832-34. As *Borden* explained, the statute at issue in *Voisine* was textually and contextually different than a violent-crimes provision, and it served different purposes. *Id.* "So again, we see nothing surprising – rather, the opposite – in the two statutes' dissimilar treatment of reckless crimes." *Id.* at 1834. Like *Voisine*, *Castleman* interpreted § 921(a)(33)'s "misdemeanor crime of domestic violence" definition. 572 U.S. at 159. As *Borden* makes clear, that provision is textually and contextually different, and it serves different purposes, than violent-crime provisions like § 4B1.2. 141 S.Ct. at 1832-34. Thus, § 921(a)(33) receives "dissimilar treatment" when compared to violent-crimes provisions like the one at issue here. *Id.* at 1834. For that reason alone, the panel in *Ontiveros* was wrong to overrule *Perez-Vargas* based on *Castleman*. And the *Folse* panel was wrong to rely on *Ontiveros* to hold that the New Mexico aggravated battery statute at issue here qualifies as a crime of violence under § 4B1.2(a)(1). App. 44a.

2. The Tenth Circuit's decision that New Mexico aggravated battery categorically requires "a stepped-up level of unlawful force" conflicts with New Mexico decisions in which the courts have held that aggravated battery can be completed by the slightest offensive touch and is focused on the resulting harm to the person not the force behind the unlawful touching.

Undoubtedly, *Perez-Vargas* and *Rodriguez-Enriquez* should remain binding precedent. If so, then the result here is apparent: New Mexico aggravated battery which is focused on the resulting harm to the person not the force behind the unlawful touching, does not include an element of violent physical force as described by this Court in *Johnson*. *See State v. Chavez*, 82 N.M. 569, 571 (Ct. App. 1971) (whether an aggravated battery rises to a felony "depends largely . . . on the nature of the injury inflicted."). Indeed, contrary to the Tenth Circuit's holding here, no element calls for proof that the accused used violent, physical force to cause or potentially cause harm to another. *See e.g. Ortega*, 113 N.M. at 440 (commenting that contact with another's cane, or paper or any other object held in that person's hand may constitute a battery)[5]; *Chavez*, 82 N.M. at 572 ("defendant's act need not be a direct (that is, immediate) cause" of harm or the likely harm to another). Nor do the New Mexico appellate courts endorse the circuit's that the offense requires proof of a "stepped up level of unlawful force."

[5] A variety of unwanted touchings would come within the aggravated battery statute. For example, a person may bump another into the path of an oncoming bus or train. Another may kick a cane out from under someone who needs it to walk or stand and the fall causes serious injury. As these examples illustrate, harm need not result from a violent physical contact between the accused and another – it can come from any number of acts which do not use violent physical force.

In finding that it does when it doesn't the panel usurped the state's authority to define the elements of criminal offenses and infringed on its courts' authority to interpret its own law. *Johnson*, 559 U.S. at 138 (federal courts "bound by" state courts' interpretation of state law and an offense's elements). The New Mexico legislature deliberately chose to define aggravated battery in terms of causation of harm (results or potential results), rather than the use of force (conduct). By its plain terms, New Mexico's aggravated battery statute does not expect an accused will admit that he used a specific level of force. *See Torres v. Lynch*, 136 S.Ct. 1619, 1629 (2016) (explaining that an element-of-violent-force provision "would not pick up demanding a ransom for kidnapping," as such a crime is defined "without any reference to physical force"). Similarly, New Mexico juries are not asked to decide whether the accused actively employed force. Instead, the jury decides only whether the accused had contact with the victim and whether great bodily harm could have ensued. In other words, there is no "legal requirement" that the accused use, threaten to use, or attempt to use force in order to be found guilty of N.M. Stat. Ann. § 30-3-5(C). *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016). Thus, New Mexico aggravated battery does not match the force clause's definition of crime of violence.

Folse asks this Court to review the Tenth Circuit's decision to bring it in line with *Johnson* and *Borden* as well as the decisions of the New Mexico courts.

Conclusion

Folse requests that this Court grant *certiorari* in this case, vacate the Tenth Circuit's decision, and remand for reconsideration in light of the decision in *Borden*. If a GVR is not appropriate, this Court should grant this Petition and review and reverse the Tenth Circuit's decision in Folse's case.

Respectfully submitted,

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DATED: October 25, 2021

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