

No. 17-7151

IN THE SUPREME COURT OF THE UNITED STATES

EDDY WILMER VAIL-BAILON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior state conviction for felony battery, in violation of Fla. Stat. § 784.041(1) (2007), warranted a 16-level upward adjustment to petitioner's base offense level under the now-superseded Sentencing Guidelines § 2L1.2(b) (2014).

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-26a) is reported at 868 F.3d 1293. The opinion of a panel of the court of appeals (Pet. App. 27a-35a), which was vacated upon the grant of rehearing en banc, is reported at 838 F.3d 1091. The order of the district court (Pet. App. 39a-44a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2017. On November 28, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari

to and including December 27, 2017, and the petition was filed on December 20, 2017. 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 Florida, petitioner was convicted of illegally reentering the United States after removal following a felony conviction, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. 3a-4a. The district court sentenced him to 37 months of imprisonment, to be followed by three years of supervised release. Id. at 40a-41a. A panel of the court of appeals vacated the sentence and remanded. Id. at 33a. The court of appeals then granted rehearing en banc, vacated the panel decision, and affirmed petitioner's sentence. Id. at 13a.

1. Petitioner is a citizen of Guatemala. Pet. App. 4a. In 2007, while living in Florida, petitioner attacked his wife after an argument, choking and punching her, telling her "[y]ou destroyed my life" and "I will kill you," and -- when she attempted to flee -- "grabb[ing] her by the hair and dragg[ing] her back to the house while repeatedly punching her in the head and face." Id. at 12a n.17 (citation omitted); Presentence Investigation Report (PSR) ¶¶ 23, 34. Petitioner was convicted of Florida felony battery, in violation of Fla. Stat. § 784.041(1) (2007), and in 2008 was removed from the United States. Pet. App. 4a.

At some point thereafter, petitioner returned to the United States without authorization. See PSR ¶¶ 5-6. In 2014, he was arrested for driving with a suspended license in Palm Beach County, Florida. PSR ¶ 5.

2. In July 2014, a federal grand jury charged petitioner with one count of illegally reentering the United States after removal following a felony conviction, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. 36a. Petitioner pleaded guilty, pursuant to a plea agreement. PSR ¶¶ 1-2.

Under the now-superseded version of the Sentencing Guidelines applicable at the time of petitioner's sentencing, the base offense level for an illegal-reentry offense received a 16-level increase if the offense was committed after the defendant had been removed following a conviction for a felony that is "a crime of violence." Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2014); see PSR ¶ 12. The relevant application notes stated that the term "[c]rime of violence" included "any * * * offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2014).

The Probation Office recommended a base offense level of eight under Sentencing Guidelines § 2L1.2(a) and the 16-level upward adjustment under Sentencing Guidelines § 2L1.2(b)(1)(A). PSR ¶¶ 11-12. That upward adjustment was based on petitioner's 2007

conviction for Florida felony battery. PSR ¶ 12. With a three-level reduction for acceptance of responsibility, petitioner's total offense level was 21. PSR ¶¶ 18-20. Combined with petitioner's criminal-history category of I, the resulting advisory Guidelines range was 37 to 46 months. PSR ¶ 56.

The district court adopted the Probation Office's report and sentenced petitioner to 37 months of imprisonment, to be followed by three years of supervised release. Pet. App. 40a-41a.

3. A divided panel of the court of appeals initially vacated petitioner's sentence and remanded to the district court for resentencing. Pet. App. 27a-35a. The panel majority determined that felony battery under Fla. Stat. § 784.041 (2007) does not qualify as a "crime of violence" under Sentencing Guidelines § 2L1.2. Pet. App. 29a. Under Florida law, "[a] person commits felony battery if he or she: (a) [a]ctually and intentionally touches or strikes another person against the will of the other; and (b) [c]auses great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1). The panel majority construed the "use of physical force" under the relevant Guidelines provision to require force of "the sort that is intended to cause bodily injury, or at a minimum likely to do so." Pet. App. 31a (quoting Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003) (emphasis omitted)). And it concluded that Florida felony battery did not require such force on the theory that it may be

accomplished by intentional touching that results in unintentional and unlikely bodily injury. Ibid.

Judge Siler, sitting by designation, dissented. Pet. App. 34a-35a. He observed that the panel majority had used the wrong definition of “physical force” and should instead have followed this Court’s decision in Curtis Johnson v. United States, 559 U.S. 133, 140 (2010), and interpreted the term to mean “force capable of causing physical pain or injury to another person.” Pet. App. 34a (citation omitted). And Judge Siler determined that Florida felony battery qualifies as a “crime of violence” under that definition, because the statute requires “great bodily harm” and therefore necessarily requires force that is “capable of causing physical pain or injury.” Ibid. (citations omitted).

4. The court of appeals granted the government’s petition for rehearing en banc, vacated the panel’s decision, and affirmed petitioner’s sentence. Pet. App. 13a.

a. The court of appeals first explained that this Court’s decision in Curtis Johnson “articulates the standard we should follow in determining whether an offense calls for the use of physical force, and th[e] test is whether the statute calls for violent force that is capable of causing physical pain.” Pet. App. 8a-9a. The court declined to adopt petitioner’s alternative definition of force that is “likely to cause” injury, which was based on “words found in a cited circuit court decision” but not

repeated by the Curtis Johnson Court itself. Id. at 8a. "Indeed," the court added, "to our knowledge, no court has ever defined physical force to mean force that is 'likely to cause pain.'" Ibid.

The court of appeals next determined that, "[b]y its plain terms, felony battery in violation of Florida Statute § 784.041 requires the use of physical force as defined by Curtis Johnson." Pet. App. 9a. The court explained that Florida felony battery requires the intentional use of force "that causes the victim to suffer great bodily harm" and that such force is necessarily "capable of causing pain or injury." Ibid. The court also observed that Florida courts have repeatedly held that felony battery "cannot be committed without the use of physical force or violence," under a definition of "physical force" that requires "more than mere touching." Id. at 10a (quoting Dominguez v. State, 98 So. 3d 198, 200 (Fla. Dist. Ct. App. 2012)); see id. at 9a-10a. The court accordingly found that Florida law foreclosed petitioner's argument that "it is possible for an offender to violate Florida Statute § 784.041 by engaging in conduct that consists of no more than a slight touch or nominal contact." Id. at 11a.

The court of appeals rejected petitioner's efforts to portray the Florida statute more broadly by postulating "farfetched hypotheticals" involving "relatively benign conduct combined with

unlikely circumstances and a bizarre chain of events that result in an unforeseeable injury”: for example, tapping someone who is startled and falls down a staircase; tickling someone who falls out of a window; or applying lotion to the skin of someone who has an unknown but severe allergy. Pet. App. 11a-12a. The court found “no support in Florida law for the idea” that Florida felony battery “is designed to criminalize the conduct described in the proffered hypotheticals.” Id. at 12a. It also noted that petitioner had not “shown that prosecution under Florida Statute § 784.041 for the conduct described in the hypotheticals is a realistic probability.” Ibid. (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).¹

b. Judge Wilson and Judge Rosenbaum issued separate dissents. Pet. App. 13a, 18a. Judge Wilson, joined by Judge Rosenbaum and three other judges, disagreed with the majority’s reading of Curtis Johnson’s “capable of causing physical pain or injury” language and the majority’s interpretation of Florida law,

¹ The court of appeals additionally rejected petitioner’s invocation of Leocal v. Ashcroft, 543 U.S. 1 (2004), in which this Court had determined that merely accidental conduct could not qualify as a crime of violence under 18 U.S.C. 16. Pet. App. 13a. The court of appeals explained that the concern “that a defendant might be convicted * * * after engaging in accidental or at most negligent conduct” is absent here. Ibid. “[B]y its terms,” the court noted, the Florida felony battery statute “requires an intentional use of force -- a touch or a strike -- that is against the victim’s will and that causes the victim to suffer great bodily harm.” Ibid. (emphasis omitted)

and would have decided the case on the theory that “[a] mere touching that happens to cause great bodily harm is still just a mere touching” that does not require the necessary degree of physical force under Curtis Johnson. Id. at 15a-16a & n.3 (citation omitted); see id. at 17a-18a. Judge Rosenbaum, joined in part by two other judges, endorsed Judge Wilson’s reading of Curtis Johnson and of Florida law, and detailed, inter alia, her disagreement with the majority’s determination that, under Florida law, “felony battery cannot be committed by mere touch.” Id. at 22a; see also id. at 23a-25a (arguing that the Florida intermediate courts of appeals had misapplied the state supreme court’s decision in State v. Hearn, 961 So. 2d 211 (2007)).²

ARGUMENT

Petitioner renews his contention (Pet. 12-34) that he was ineligible for a 16-level enhancement under Sentencing Guidelines § 2L1.2(b)(1)(A) (2014), on the theory that his Florida conviction for felony battery does not qualify as a “crime of violence” under the Sentencing Guidelines. Petitioner’s challenge to his sentence is now moot because he has been released from prison. And even

² Judge Rosenbaum further argued that the “use of physical force” requires the intent to cause physical harm, not just the intent to make the unwanted physical contact. Pet. App. 19a-21a. Although she acknowledged that “one conceivable reading of Leocal is that it requires only an intent to touch, not an intent to harm,” she believed that this Court’s later decision in Voisine v. United States, 136 S. Ct. 2272 (2016), required the further belief that harm is likely to result. Pet. App. 21a.

assuming the case presents a live controversy, the decision of the court of appeals was correct and does not implicate any division among the courts of appeals that warrants this Court's review. Nor, in any event, would a case concerning the application of a now-defunct provision of the advisory Sentencing Guidelines be suitable for this Court's review of the question presented.³

1. This case is moot because petitioner's 37-month term of imprisonment has already expired. According to the Federal Bureau of Prisons, petitioner was released on March 15, 2017. See Fed. Bureau of Prisons, Find an Inmate, <https://www.bop.gov/inmateloc> (last visited Apr. 18, 2018) (search for register number 05494-104). Because petitioner's Guidelines challenge affects only the length of his sentence rather than his underlying conviction, the case became moot on that date. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

The completion of a criminal defendant's sentence will not normally moot an appeal challenging the conviction because

³ Other pending petitions for writs of certiorari present similar questions whether Florida felony battery is a violent felony under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i), or a crime of violence under analogous provisions of the Sentencing Guidelines. See Green v. United States, No. 17-7299 (filed Dec. 20, 2017); Robinson v. United States, No. 17-7188 (filed Dec. 20, 2017); Gathers v. United States, No. 17-7694 (filed Feb. 2, 2018).

criminal convictions generally have “continuing collateral consequences” beyond just the sentences imposed. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But a “presumption of collateral consequences” does not extend beyond criminal convictions. Id. at 12. Therefore, when a defendant challenges only the length of his term of imprisonment, his completion of that prison term moots an appeal, unless the defendant can show that the challenged action continues to cause “collateral consequences adequate to meet Article III’s injury-in-fact requirement,” id. at 14, and that those consequences are “likely to be redressed by a favorable judicial decision,” id. at 7 (citation omitted).

Petitioner has not made that showing here. The only portion of petitioner’s sentence to which he is still subject is his term of supervised release. And in United States v. Johnson, 529 U.S. 53, 54 (2000), this Court held that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. The Court in Johnson recognized that a prisoner who has been incarcerated beyond his proper term of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner’s term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so “if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.” 529 U.S. at 60 (citation omitted). But, as the Third

Circuit has explained, “[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant’s] term of supervised release * * * is so speculative” that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009).⁴

Furthermore, the absence of any injury to petitioner that could be redressed by this Court deprives him of the “personal stake” necessary to seek its review. Camreta v. Greene, 563 U.S. 692, 701-703 (2011). Accordingly, the Court lacks jurisdiction to entertain the petition for a writ of certiorari and no relief in this Court would be appropriate.

2. Even assuming that this case presents a live controversy, the decision of the court of appeals is correct and

⁴ Other courts of appeals, including the Eleventh Circuit, have concluded that the possibility that the sentencing court would exercise its discretion to reduce a defendant’s supervised-release term is sufficient to prevent his sentencing challenge from becoming moot upon completion of his prison term. See Tablada v. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008), cert. denied, 560 U.S. 964 (2010); Levine v. Apker, 455 F.3d 71, 77 (2d Cir. 2006); Dawson v. Scott, 50 F.3d 884, 886 n.4 (11th Cir. 1995). Those decisions, however, failed to address this Court’s decision in Johnson. The government did not contest the Eleventh Circuit’s precedent on mootness below. But because mootness is jurisdictional, see Already, LLC v. Nike, Inc., 568 U.S. 85, 90-91 (2013), the need for this Court to resolve the mootness question at a minimum makes this case a poor vehicle for considering the underlying Guidelines-interpretation question.

does not implicate any disagreement among the courts of appeals that would warrant this Court's review.

a. Petitioner first challenges (Pet. 12-17, 31-33) the court of appeals' definition of the "physical force" necessary for an offense to qualify as a "crime of violence" under the Sentencing Guidelines. The court, however, correctly determined that petitioner's prior conviction for Florida felony battery is a crime of violence because it "has as an element the use, attempted use, or threatened use of physical force." Pet. App. 5a (quoting Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2014)).

In Curtis Johnson v. United States, 559 U.S. 140 (2010), this Court held that an offender uses "'physical force'" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i), when he uses "violent force -- that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140; see Sessions v. Dimaya, No. 15-1498, 2018 WL 1800371 (Apr. 17, 2018) (noting that "this Court has made clear that 'physical force' means 'force capable of causing physical pain or injury'" (quoting Curtis Johnson, 559 U.S. 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 "[t]he most 'nominal contact,' such as a 'tap on the shoulder without consent'" -- does not categorically require such force. 559 U.S. at 138 (quoting

State v. Hearns, 961 So. 2d 211, 219 (Fla. 2007) (brackets and ellipses omitted)).

Application of Curtis Johnson's definition of "force" to the different offense at issue here, however, yields a different result. In contrast to the offense at issue in Curtis Johnson, Florida felony battery requires not only that an offender intentionally touch or strike another person against that person's will, but also that the offender "[c]ause[] great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1)(b) (2007). Because Florida felony battery requires force that actually causes great bodily injury, it necessarily requires "force capable of causing physical pain or injury" under Curtis Johnson, 559 U.S. at 140 (emphasis added). The court of appeals thus correctly applied "the plain language of Curtis Johnson" and its "definition of physical force" to determine that the crime has the "use of force" as an element. Pet. App. 9a.

Petitioner does not dispute (Pet. 31-33) that force that causes "great bodily harm" is "capable of causing physical pain or injury." Instead, he contends (Pet. 32) that this Court did not mean to adopt the definition of "physical force" that it recited in Curtis Johnson, under which the force's "capability of causing pain or injury" is determinative. Petitioner first postulates (ibid.) that the definition announced in Curtis Johnson required a different result in Curtis Johnson itself, on the theory that

the touching required for the simple battery offense at issue there theoretically was "capable of causing great bodily harm." But the relevant inquiry depends on whether the use of physical force is an element of the crime, not on "the possible consequences of the offense" in a particular case, as petitioner asserts (ibid.). See Curtis Johnson, 559 U.S. at 142; see also Sentencing Guidelines § 2L1.2 comment. (n.1(B)(iii)) (2014). Here, the Florida felony battery statute includes the element of "[c]aus[ing] great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1). The simple battery statute at issue in Curtis Johnson did not. Thus, while the elements of the offense at issue in Curtis Johnson did not require proof of circumstances in which injury was possible, the elements of the offense here do.

Petitioner next posits (Pet. 33) that Curtis Johnson "approvingly cited" a circuit court decision, Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003), that articulated -- in language that does not appear in Curtis Johnson itself -- a requirement of a likelihood of causing bodily injury. The court of appeals correctly rejected that argument, explaining that "[i]t is a safe operating assumption that when the Supreme Court articulates a standard, it actually means the words it has used to set out that standard, not words found in a cited circuit court decision." Pet. App. 8a; see id. at 9a & n.16 (noting that the author of the Flores opinion had subsequently made clear that "the capability standard

announced in Curtis Johnson controls the inquiry”) (citing Douglas v. United States, 858 F.3d 1069, 1071-1072 (7th Cir.), cert. denied, 138 S. Ct. 565 (2017)).

b. Petitioner contends (Pet. 13) that the proper application of Curtis Johnson’s definition of “physical force” “has long divided the circuits.” That is incorrect.

Petitioner relies on (Pet. 15-16) decisions from the First, Second, Fourth, Fifth, and Tenth Circuits, which he asserts (Pet. 15) have “recognized that causation of harm need not require the use of violent force under Curtis Johnson.” But with one exception, each of those circuits has taken a contrary position following this Court’s decision in United States v. Castleman, 134 S. Ct. 1405 (2014).

Castleman held that the phrase “use of physical force” as used in 18 U.S.C. 922(g)(9) encompasses the indirect application of force leading to physical harm. See 134 S. Ct. at 1414-1415; see also id. at 1416-1417 (Scalia, J., concurring in part and concurring in the judgment) (explaining that “it is impossible to cause bodily injury without using force ‘capable of’ producing that result”). In light of Castleman, the First, Second, Fourth, and Tenth Circuits have all retreated from the decisions that petitioner cites (Pet. 15-16) for his argument that “violent force is measured by the degree or quantum of force, not the resulting harm.” See United States v. Edwards, 857 F.3d 420, 426 n.11 (1st

Cir.) (suggesting that Whyte v. Lynch, 807 F.3d 463, 469 (1st Cir. 2015), is inconsistent with Castleman), cert. denied, 138 S. Ct. 283 (2017); United States v. Hill, 832 F.3d 135, 143-144 (2d Cir. 2016) (recognizing that Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003), has been abrogated by Castleman); United States v. Covington, 880 F.3d 129, 134 (4th Cir. 2018) (recognizing that United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012), has been abrogated by Castleman);⁵ United States v. Kendall, 876 F.3d 1264, 1270-1271 (10th Cir. 2017) (recognizing that United States v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005), has been abrogated by Castleman), cert. denied, No. 17-8177 (Apr. 16, 2018).

The sole exception is the Fifth Circuit's decision in United States v. Rico-Mejia, 859 F.3d 318 (2017), which the Fifth Circuit recently reaffirmed in United States v. Reyes-Contreras, 882 F.3d 113 (2018). Judge Jones concurred in the judgment in Reyes-

⁵ In United States v. Middleton, 993 F.3d. 485 (2018), the Fourth Circuit held that South Carolina involuntary manslaughter, which applies where the defendant kills another person unintentionally while acting with "reckless disregard of the safety of others," is not a violent felony under the ACCA. Id. at 489 (citation omitted). The court noted that the statute had been applied to a defendant who sold alcohol to high school students who then shared the alcohol with another person who drove while intoxicated, crashed his car, and died. Ibid. The Fourth Circuit concluded that conduct leading to bodily injury through so "attenuated a chain of causation" did not qualify as a use of violent force. Unlike the statute at issue in Middleton, the Florida felony battery statute has no application to "illegal sale[s]," id. at 492; it requires a direct touching or striking that inflicts "great bodily harm," Fla. Stat. § 784.041(1).

Contreras, noting that the Fifth Circuit is now the lone outlier and that the Fifth Circuit should reconsider its flawed Rico-Mejia decision en banc. See id. at 126-127. The government recently filed a petition for rehearing en banc in Reyes-Contreras, and the Fifth Circuit should be given the opportunity to bring its precedent in line with the uniform views of the other courts of appeals. In any event, the Fifth Circuit's decisions have focused on indirect use of force "without any bodily contact," not on an intentional touching or striking that causes physical injury. Id. at 123 (citation and internal quotation marks omitted). Thus, as the court of appeals recognized in this case, "no court" since Curtis Johnson has adopted petitioner's position and "defined physical force to mean force that is 'likely to cause pain.'" Pet. App. 8a.

Petitioner acknowledges (Pet. 17) that the courts of appeals "have backtracked" on the decisions he cites in support of his position, but he nonetheless contends that they "have done so only in cases involving the intentional or knowing causation of harm" or in cases addressing indirect applications of force such as the administration of poison. To begin with, not all of the relevant decisions have required the intentional causation of harm. See, e.g., Kendall, 876 F.3d at 1267 (concluding that D.C. Code § 22-405(c) (2001), which requires interference with a law enforcement officer that results in "significant bodily injury" to the officer,

constitutes a "crime of violence" under Sentencing Guidelines § 4B1.2). More fundamentally, petitioner's attempt to factually distinguish decisions that apply the same legal rule as the decision below does not suggest a circuit conflict. At bottom, petitioner identifies no decision holding that "use of physical force" means anything other than what this Court said it meant in Curtis Johnson: "force capable of causing physical pain or injury to another person." 559 U.S. at 140 (citation omitted). Nor does petitioner identify any decision holding that a state statute similar to Florida's felony battery statute falls outside of the definition of a "crime of violence." See Douglas, 858 F.3d at 1071-1072 (determining that Indiana's felony battery statute, which requires offensive touching and "serious bodily injury," qualifies as a "crime of violence" under 18 U.S.C. 924(e) (2) (B) (i)).⁶

c. Petitioner separately contends (Pet. 33-34) that the court of appeals erred in determining that Florida case law did

⁶ This Court recently granted a petition for a writ of certiorari raising the question whether a state statute requiring force sufficient to overcome the victim's resistance contains as an element the type of violent force defined in Curtis Johnson. See Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018). The resolution of that question would not affect this case, however, because it turns on whether force sufficient to overcome resistance is force capable of causing injury -- not on whether force that actually causes injury is capable of causing injury. There is accordingly no need to hold this petition pending the Court's decision in Stokeling.

not support his broad construction of the Florida felony battery statute to encompass various hypothetical scenarios involving mere touches that lead to catastrophic injuries. He further contends (Pet. 18-25) that the courts of appeals are divided over the showing required to establish “a realistic probability” that a State “would apply its statute to conduct that falls outside” a particular federal definition of a crime. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007). This Court recently denied a petition for a writ of certiorari raising a similar argument, see Castillo-Rivera v. United States, 138 S. Ct. 501 (Dec. 4, 2017) (No. 17-5054), and it should do the same here. The court of appeals did not apply Duenas-Alvarez in a way that implicates any circuit division.

As a general matter, to determine whether a prior conviction supports a sentencing enhancement like the one provided in Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2014), courts employ a “categorical approach” under which they compare the definition of the state offense with the definition of “crime of violence” under federal law. See, e.g., Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). In evaluating the definition of a state offense, courts must look to the “interpretation of state law” by the State’s highest court. Curtis Johnson, 559 U.S. at 138. If the definition of the state offense is broader than the relevant federal definition, the prior state conviction does not qualify.

Mathis, 136 S. Ct. at 2248. This Court has cautioned, however, that the categorical approach “is not an invitation to apply ‘legal imagination’ to the state offense; there must be ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside’” the federal definition. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (quoting Duenas-Alvarez, 549 U.S. at 193); see Taylor v. United States, 495 U.S. 575, 602 (1990) (holding that the categorical approach is satisfied if the “statutory definition [of the prior conviction] substantially corresponds to [the] ‘generic’ [definition]”).

Petitioner contends (Pet. 21) that the courts of appeals have divided over the application of Duenas-Alvarez’s “realistic probability” test. He asserts (Pet. 21-23) that, in the Fifth Circuit’s view, a defendant establishes the requisite probability only by demonstrating that the State actually prosecutes the nonqualifying conduct under the relevant statute. In contrast, according to petitioner (Pet. 19-20), the First, Third, Sixth, Ninth, and Tenth Circuits have taken the position that the “realistic probability” test is satisfied if a state statute on its face defines an offense more broadly than the federal crime.

To the extent any such division exists, this case does not implicate it. The court of appeals here explained that, “[b]y its plain terms, felony battery in violation of Florida Statute

§ 784.041 requires the use of physical force as defined by Curtis Johnson.” Pet. App. 9a. In other words, the court determined that the state statute was not overbroad on its face. See id. at 5a-9a. The court then bolstered its application of Curtis Johnson by looking to Florida case law, explaining that its determination was consistent with state decisions confining the Florida felony battery statute to actions taken with sufficient physical force or violence. See id. at 9a-11a. Only then did the court reject petitioner’s counterargument that the Florida felony battery statute could be “applied to penalize freak accidents,” id. at 12a -- an argument it rejected not because the statute “is newly enacted, infrequently charged, or has not generated many reported decisions,” Pet. 34, but because Florida law does not appear to cover those sorts of “freak accidents” at all, Pet. App. 12a. See Gov’t C.A. En Banc Br. 44-46 (explaining that Florida limits offenses based on proximately caused injuries) (citing, e.g., Tipton v. State, 97 So. 2d 277, 281 (Fla. 1957)).

The court of appeals thus did not “squarely” hold that “a defendant must in all [categorical approach] cases point to a state court decision to illustrate the state statute’s breadth,” as petitioner asserts (Pet. 23). Indeed, petitioner acknowledges (Pet. 23-24 & n.5) that prior Eleventh Circuit decisions had stated that an overbroad statute itself can create a realistic probability of prosecution under Duenas-Alvarez. See, e.g., Vassell v. U.S.

Attorney General, 839 F.3d 1352, 1362 (11th Cir. 2016). And petitioner acknowledges (Pet. 23-24) that the court in this case did not expressly adopt the contrary view.⁷

Accordingly, the decision here does not implicate any disagreement among other circuits involving the application of Duenas-Alvarez to statutes that are overbroad on their face. And for similar reasons, the resolution of the Duenas-Alvarez question in petitioner's favor would not change the outcome of the case, because the court of appeals' decision rests in the first instance on a straightforward application of Curtis Johnson to the text of the Florida felony battery statute.

3. In addition, this case would be a poor vehicle for considering the question presented because petitioner's challenge to his sentence rests on a claim about the proper interpretation of a now-defunct version of the Sentencing Guidelines.

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

⁷ Petitioner notes (Pet. 28) that one Board of Immigration Appeals decision suggested that the decision below "implicitly reject[ed]" the Eleventh Circuit's prior decisions applying Duenas-Alvarez. See In re Aspilaire, A098 517 544, 2017 WL 5377562, at *5 (B.I.A. Sept. 18, 2017). But a suggestion in a parenthetical in an unpublished Board of Immigration Appeals decision does not mean that the Eleventh Circuit took a definitive position on the question.

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

Indeed, the Guidelines provision at issue here exemplifies that process. Effective November 1, 2016, the Sentencing Commission adopted an amendment to Section 2L1.2 that eliminates any need to categorize a defendant’s pre-removal conviction as a crime of violence. See Sentencing Guidelines App. C, Amend. 802. Section 2L1.2 now provides offense-level enhancements for prior convictions that are based primarily on the sentence imposed for those convictions. Although a similar definition of “crime of violence” still exists under Sentencing Guidelines § 4B1.2, the Court’s review of the interpretation of a superseded version of Section 2L1.2 is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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