

No. 17-8703

IN THE SUPREME COURT OF THE UNITED STATES

AMED ANTONIO SOLIS-ALONZO, 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 § 784.041(1) (2011), warranted an upward adjustment to petitioner's base offense level under the now-superseded Sentencing Guidelines § 2L1.2(b) (2015).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is not published in the Federal Reporter but is reprinted at 723 Fed. Appx. 863, and is available at 2018 WL 618432.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2018. The petition for a writ of certiorari was filed on April 30, 2018. 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. A13. The district court sentenced him to 45 months of imprisonment, to be followed by three years of supervised release. Id. at A14-A15. The court of appeals affirmed. Id. at A1-A12.

1. Petitioner is a citizen of Honduras. Presentence Investigation Report (PSR) ¶ 4. In 2007, he was removed from the United States to Honduras, but he later returned to the United States without authorization. Ibid. In 2012, while living in Florida, petitioner struck his girlfriend in the head with a beer bottle, causing the bottle to break, and threw the broken bottle at her, inflicting a large gash on her arm. PSR ¶ 24. Petitioner was convicted of Florida felony battery, in violation of Fla. Stat. § 784.041(1) (2011), and, in 2013, was removed from the United States. PSR ¶ 4; PSR Addendum 1-2.

At some point thereafter, petitioner again returned to the United States without authorization. See PSR ¶ 4. In 2015, he was arrested for battery in Palm Beach County, Florida. PSR ¶ 3.

2. In May 2015, 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). Indictment 1. Petitioner pleaded guilty without a plea agreement. Pet. App. A13; PSR ¶ 2.

Under the now-superseded version of the Sentencing Guidelines applicable to 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 was "a crime of violence." Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2015); see PSR ¶ 10. The relevant application note 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)) (2015).

The Probation Office recommended a base offense level of eight under Sentencing Guidelines § 2L1.2(a) (2015) and the 16-level upward adjustment under Sentencing Guidelines § 2L1.2(b)(1)(A) (2015). PSR ¶¶ 9-10. That upward adjustment was based on petitioner's 2012 conviction for Florida felony battery. PSR ¶ 10. The Florida felony battery statute provides that "[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) (2011). With a three-level reduction for acceptance of

responsibility, petitioner's total offense level was 21. PSR ¶¶ 16-18. Combined with petitioner's criminal-history category of IV, the resulting advisory Guidelines range was 57 to 71 months. PSR ¶ 53.

Petitioner objected to the classification of his felony battery conviction as a "crime of violence," arguing that the felony battery statute did not have as an element the use, attempted use, or threatened use of "physical force," as that term was defined in Curtis Johnson v. United States, 559 U.S. 133 (2010). Pet. C.A. App. 15-23. In Curtis Johnson, the Court defined "physical force" under the similarly worded elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2) (B) (i), to "mean[] violent force -- that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140.

The district court overruled petitioner's objection and adopted the Probation Office's guidelines calculation. Pet. C.A. App. 62-63, 68. The court varied downward from the guidelines range and sentenced petitioner to 45 months of imprisonment, to be followed by three years of supervised release. Pet. App. A14-A15; see Pet. C.A. App. 77-78.

3. The court of appeals affirmed. Pet. App. A1-A12.

a. While petitioner's appeal was pending, the en banc court of appeals determined that a Florida felony battery conviction

categorically qualifies as a "crime of violence" under the former version of Sentencing Guidelines § 2L1.2 (2014). United States v. Vail-Bailon, 868 F.3d 1293, 1296 (11th Cir. 2017), cert. denied, No. 17-7151 (June 11, 2018). The court 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." Id. at 1302. The court of appeals declined to adopt the defendant'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 in this Court's Curtis Johnson decision itself. Id. at 1301. "Indeed," the court of appeals 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." Vail-Bailon, 868 F.3d at 1303. 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. (emphasis omitted). 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 1304 (quoting Dominguez v. State, 98 So. 3d 198, 200 (Fla. Dist. Ct. App. 2012)); see id. at 1303-1304. The court of appeals accordingly found that Florida law foreclosed the defendant’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 1305.

b. The court of appeals subsequently affirmed petitioner’s sentence in this case in an unpublished per curiam opinion. Pet. App. A1-A12. As relevant here, the court found petitioner’s argument that his felony battery conviction was not a “crime of violence” under Section 2L1.2 to be foreclosed by Vail-Bailon. Id. at A12. The court reiterated Vail-Bailon’s reasoning that “[b]ecause the measure of force under Johnson is whether the force is ‘capable’ of causing physical pain or injury, proof that the force, in fact, caused the harm necessarily proves that it was ‘capable’ of doing so.” Ibid.

ARGUMENT

Petitioner contends (Pet. 10-16) that his prior conviction for Florida felony battery does not qualify as a “crime of violence” under Sentencing Guidelines § 2L1.2(b)(1)(A) (2015), on the theory that it does not include as an element the use, attempted use, or threatened use of “physical force.” 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. This Court recently denied several petitions for writs of certiorari presenting similar questions concerning whether Florida felony battery is a violent felony under the ACCA's elements clause or a crime of violence under the Guidelines, and the same result is warranted here. See Vail-Bailon v. United States, No. 17-7151 (June 11, 2018); Robinson v. United States, No. 17-7188 (June 11, 2018); Green v. United States, No. 17-7299 (June 11, 2018); Gathers v. United States, No. 17-7694 (June 11, 2018). In addition, this case would be a poor vehicle for addressing the question because it concerns the application of a now-defunct provision of the advisory Sentencing Guidelines and because petitioner's impending release from prison diminishes the practical significance of this case. Finally, contrary to petitioner's suggestion (Pet. 9-10), this petition need not be held pending resolution of Stokeling v. United States, No. 17-5554 (oral argument scheduled for Oct. 9, 2018). As the Court's denial of similar petitions after granting certiorari in Stokeling reflects, the outcome of Stokeling is unlikely to affect the disposition of this case.

1. The court of appeals correctly determined that petitioner's prior conviction for Florida felony battery is a "crime of violence" under the former version of Sentencing Guidelines § 2L1.2 (2015) because it "has as an element the use,

attempted use, or threatened use of physical force.” Id. § 2L1.2 comment. (n.1(B)(iii); see Pet. App. A10-A12.

a. In Curtis Johnson v. United States, 559 U.S. 140 (2010), this Court held that an offender uses “‘physical force’” for purposes of the ACCA, 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, 138 S. Ct. 1204, 1220 (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. Hearn, 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 “cause[] great bodily harm, permanent disability, or permanent disfigurement.” Fla. Stat.

§ 784.041(1) (2011). 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 en banc court of appeals in Vail-Bailon thus correctly determined that under “the plain language of Curtis Johnson” and its “definition of physical force,” Florida felony battery has the “use of force” as an element. 868 F.3d at 1302.

b. Petitioner contends (Pet. 12) that the proper application of Curtis Johnson’s definition of “physical force” “has long divided the circuits.” That is incorrect.

Petitioner relies (Pet. 14-15) on decisions from the First, Second, Fourth, Fifth, and Tenth Circuits, which he asserts have “recognized that causation of harm need not require the use of violent force under Curtis Johnson.” Pet. 14. 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 term “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. 14-15) 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.) (recognizing that United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012), has been abrogated by Castleman), cert. denied, 138 S. Ct. 2588 (2018);¹ United States v. Kendall, 876 F.3d 1264, 1270-1271 (10th Cir. 2017) (recognizing that United States

¹ In United States v. Middleton, 883 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. Id. at 492. Unlike the statute at issue in Middleton, the Florida felony battery statute has no application to “illegal sale[s],” ibid.; it requires a direct touching or striking that inflicts “great bodily harm,” Fla. Stat. § 784.041(1)(b).

v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005), has been abrogated by Castleman), cert. denied, 138 S. Ct. 1582 (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). But the government petitioned for rehearing en banc on the relevant issue, and the court has granted the government's petition. See 6/15/18 Order, Reyes-Contreras, supra (No. 16-41218). The Fifth Circuit's order granting en banc review vacates the panel opinion. See 5th Cir. R. 41.3. The Fifth Circuit now has the opportunity to adopt the uniform views of the other courts of appeals and to resolve any division that may have existed. In any event, the Fifth Circuit's now-vacated panel opinion focused on indirect use of force "without any bodily contact," not on an intentional touching or striking that causes physical injury. Reyes-Contreras, 882 F.3d at 123 (citation and internal quotation marks omitted).

Petitioner acknowledges (Pet. 15) that the courts of appeals "have backtracked" on the holdings 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) (2009), which requires interference with a law enforcement officer that results in "significant bodily injury" to the officer, constitutes a "crime of violence" under Section 4B1.2). More fundamentally, petitioner's attempt to factually distinguish decisions that apply the same legal rule 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 v. United States, 858 F.3d 1069, 1071-1072 (7th Cir.) (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)), cert. denied, 138 S. Ct. 565 (2017).

2. 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 prior version of the Guidelines and because petitioner is unlikely to meaningfully benefit from any decision in his favor.

a. 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 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 especially unwarranted.

b. This case would also be a poor vehicle because, according to the Federal Bureau of Prisons, petitioner is scheduled to be released from his 45-month prison term on November 18, 2018. See U.S. Dep't of Justice, Fed. Bureau of Prisons, Find an Inmate, <https://www.bop.gov/inmateloc> (last visited Aug. 1, 2018) (search for inmate register number 02511-104). It is extremely unlikely that any decision by this Court in petitioner's favor would result in resentencing appreciably in advance of his release date. And because a prisoner who serves too long a term of imprisonment is not automatically entitled to receive credit against his term of supervised release, see United States v. Johnson, 529 U.S. 53, 54 (2000), a decision that does not affect petitioner's release date would not likely benefit him at all. Indeed, even if the district court were to shorten his term of supervised release, petitioner would receive limited practical benefit because he is an alien subject to removal upon completion of his prison sentence. See Pet. App. A16 (directing that petitioner be turned over to the custody of immigration authorities for removal proceedings after completion of his term of imprisonment).

3. Petitioner alternatively contends (Pet. 9-10) that his petition should be held pending this Court's decision in Stokeling,

supra. The question in that case is whether a state robbery statute requiring force sufficient to overcome the victim's resistance contains as an element the type of violent force defined in Curtis Johnson.² The resolution of that question will 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. This Court has accordingly declined to hold several petitions for writs of certiorari raising similar questions concerning whether Florida felony battery is a violent felony under the ACCA's elements clause

² Petitioner's question presented (Pet. i) asks the Court to decide whether

a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" [is] categorically a "crime of violence" as defined in the elements clause of U.S.S.G. § 2L1.2 as an offense "that has [as] an element the use, attempted use, or threatened use of physical force against the person of another," if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.

That question is not presented here because petitioner does not have a prior robbery conviction or any other conviction that requires overcoming a victim's resistance. See PSR ¶¶ 20-25; see also Pet. 4 (noting that "[t]he offense at issue here" is "Florida felony battery").

or a crime of violence under the Sentencing Guidelines. See Vail-Bailon v. United States, cert. denied, No. 17-7151 (June 11, 2018); Robinson v. United States, cert. denied, No. 17-7188 (June 11, 2018); Green v. United States, cert. denied, No. 17-7299 (June 11, 2018); Gathers v. United States, cert. denied, No. 17-7694 (June 11, 2018).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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