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IN THE
SUPREME COURT OF THE UNITED STATES

JESUS RODRIGUEZ,

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

The question presented is the one this Court expressly declined to resolve in *United States v. Castleman*, 134 S. Ct. 1405, 1414 (2014):

Whether the causation of bodily injury necessarily includes the use of violent force.

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PETITION FOR A WRIT OF CERTIORARI

Jesus Rodriguez petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

DECISION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit comprises Appendix A to this petition.

JURISDICTION

The Tenth Circuit entered judgment on February 13, 2018. This petition is filed within 90 days after the entry of judgment, so it is timely under Rule 13.3. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

At issue are the phrases “violent felony” and “physical force,” as those terms were defined by this Court in *Johnson v. United States*, 559 U.S. 133 (2010), and as they appear in 18 U.S.C. § 924(e) (the Armed Career Criminal Act), the latter of which provides:

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that —

(i) 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).

STATEMENT OF THE CASE

Local police in New Mexico discovered Jesus Rodriguez carrying a small handgun in his pants' pocket. Rodriguez was prohibited from possessing the weapon under federal law, because he had been convicted of a felony. *See* 18 U.S.C. § 922(g). Federal prosecutors charged him in the District of New Mexico with unlawfully possessing the .40 caliber handgun, their indictment identifying several felony convictions marring Rodriguez's criminal record. Vol. 1 at 20.¹

After Rodriguez pleaded guilty to the one-count indictment, *id.* at 28, the probation office prepared a presentence report. The report concluded that Rodriguez was subject to the Armed Career Criminal Act, dubbed ACCA, a sentence-boosting statute found at 18 U.S.C. § 924(e). *See id.* at 34; *see also* Vol. 2 (PSR).

ACCA imposes a 15-year minimum sentence for any violation of the felon-in-possession statute, if the defendant has three previous convictions for a "violent felony." *See* § 924(e)(1). ACCA's "elements" clause – the only clause relevant to this appeal – defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year ... that has as an element the use, attempted use, or

¹ Record citations are to the three volumes, and their respective page numbers, of the record transmitted to the court of appeals.

threatened use of physical force against the person of another.” See § 924(e)(2)(B)(i).

Although ACCA declines to define “physical force,” the Supreme Court has held the phrase “means violent force,” or “force capable of causing physical pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 140 (2010). Mere offensive touching will not suffice. See *id.* at 139-42.

Disputing his eligibility for ACCA, Rodriguez challenged two convictions on which the PSR relied (and on which his ACCA-eligibility depended), both convictions arising under the same New Mexico statute. The statute, “aggravated battery against a household member inflicting great bodily harm,” is defined by NMSA § 30-3-16(C).²

Rodriguez argued that no element of the predicate offense(s) actually demanded proof of physical force, since the New Mexico courts have consistently held that a battery may be accomplished by “the least touching of another’s

² Rodriguez has two other convictions under New Mexico’s battery-against-a-household-member statute, but they are unquestionably predicate offenses for ACCA. They occurred under that portion of the statute requiring proof the defendant used a deadly weapon in committing the battery against a household partner. In other words, NMSA § 30-3-16(C) is divisible into two sets of elements, battery against a household member by “use of a deadly weapon” and battery against a household member by “inflicting great bodily harm.” Rodriguez’s employment of a deadly weapon on two occasions categorically made those convictions ACCA predicates. “Employing a weapon that is capable of producing death or great bodily harm or inflicting dangerous wounds in an assault necessarily threatens the use of physical force,” this court said in *United States v. Maldonado-Palma*, 839 F.3d 1244, 1250 (10th Cir. 2016).

person,” that is, by mere offensive touching. Vol. 1 at 41 (quoting New Mexico caselaw). As Rodriguez observed, the New Mexico courts have gone further. They have said that a defendant commits a qualifying battery against a household member even if he “does not touch the victim himself, but instead sets in motion a series of physical events ultimately resulting in the application of force to the victim.” *Id.* at 59-60 (quoting still other New Mexico caselaw).

The district court rejected Rodriguez’s position. In a written ruling issued before the sentencing hearing, the district judge ruled that Rodriguez must be punished under ACCA; he said a battery against a household member satisfies the elements clause. Vol. 1 at 112-18. He rested on the claim that New Mexico law, notwithstanding its liberal interpretation of battery, still requires the victim of the aggravated battery to have suffered “great bodily harm,” and he reasoned that even if the physical-touching element could be satisfied by something other than direct contact, or by mere offensive touching, it remained that the statute “necessarily involves intentional physical contact in a manner that can cause great bodily harm.” *Id.* at 117. Said the district judge: “No matter what the instrumentality of the contact, if the statute is violated by contact that can inflict great bodily harm, disfigurement or death, it seems clear that, at the very least, the statute contains as an element the threatened use of physical force.” *Id.* (internal quotations and citation omitted).

At the formal sentencing, about a month later, the district judge imposed the minimum sentence required by ACCA. Claiming “my hands are tied,” he sentenced Rodriguez to 15 years in prison. Vol. 3 at 38-41.

Rodriguez appealed, prepared to show that the sentencing court misinterpreted controlling circuit law. Specifically, he intended to argue that the judge failed to follow *United States v. Perez-Vargas*, which examined a Colorado statute similar to the New Mexico statute under which Rodriguez was convicted. 414 F.3d 1282 (10th Cir. 2005). Both the New Mexico and the Colorado laws defined a type of battery, and each required the defendant to employ little or no actual force. Instead, the statutes focused on the injury sustained by the victim. *Perez-Vargas* held that if the proscribed injury – in Colorado “bodily injury,” in New Mexico “great bodily harm” – can occur without directly applying physical force, then the statutory elements do not require the use of physical force, in which case a conviction cannot serve as an ACCA predicate. *Id.* at 1286.

Perez-Vargas offered several examples in which a serious injury can occur through the indirect application of physical force, including by administering poison to the victim or by placing a barrier in front of the victim’s car. Either example could cause a serious injury to the victim, yet neither involves the application of direct physical force by the defendant. *Id.*

Like the defendant in *Perez-Vargas*, Rodriguez could readily demonstrate that a conviction under his predicate statute could be achieved with no physical force, much less violent physical force. He could make the identical showing *Perez-Vargas* made. He could show that a conviction under the statute can occur without directly applying physical force. But as Rodriguez was preparing his opening brief, a panel of this court overturned *Perez-Vargas*, in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017). *Ontiveros* held that “*Perez-Vargas*’s logic” was fatally undermined by an intervening decision issued by this Court, *United States v. Castleman*, 134 S.Ct. 1405 (2014). *Perez-Vargas* “is no longer good law,” said *Ontiveros*, 875 F.3d at 536, adding, “ACCA’s phrase ‘use of physical force’ includes force applied directly or indirectly,” *id.* at 538 (quotations and citations omitted). By expanding the meaning of “physical force” to include indirect force, *Ontiveros* toppled *Perez-Vargas* and doomed Rodriguez’s appeal.

Rodriguez filed a preservation brief with the Tenth Circuit. Granting that *Ontiveros* precluded relief, he raised the claim to present it to this Court. In a summary, unpublished order, the Tenth Circuit affirmed Rodriguez’s sentence. It relied entirely on *Ontiveros*. *Ontiveros* said his Court’s decision in *Castleman* changed the parameters of ACCA’s “use of physical force” clause. Despite *Castleman*’s limiting language, the Tenth Circuit concluded its reasoning applied equally to *Ontiveros* (and also to Rodriguez). *Ontiveros*, 875 F.3d at 538.

REASON FOR GRANTING CERTIORARI

The Court should grant certiorari because the circuits are divided over the impact of *Castleman* on the bounds of ACCA's "use of physical force" clause. The Tenth Circuit read *Castleman* to remove any distinction between the misdemeanor and felony definitions of "physical force," ruling that even that doing nothing can constitute the use of violent physical force. The Tenth Circuit's decision in *Ontiveros* represents a complete departure from the other circuits that have considered *Castleman*'s broader applicability. These other circuits ruled either held that (1) *Castleman* is inapplicable to the felony force context or (2) *Castleman* only goes so far as to remove any previous distinction between the direct and indirect application of force.

Before exploring the extent to which *Castleman* has split the circuits, some background is important. This Court has articulated two distinct definitions for the phrase "physical force." In *Johnson*, the Court determined what "physical force" means when used to describe violent felonies. *Johnson*, 559 U.S. at 136. *Johnson* considered, and rejected, the common-law definition of force, satisfied by any nonconsensual physical contact. *Id.* at 139-40. Instead, when used to describe violent felonies, the *Johnson* Court said "physical force" requires "a substantial degree of force" between "concrete bodies." *Id.* This is so because the felony force clause contemplates "active violence" and the common-law definition – which

includes “even the slightest offensive touching” – would be a “comical misfit” and “produce nonsense” if applied. *Id.* at 139-41.

By contrast, in *Castleman*, this Court found that the common-law definition of “physical force” was appropriate in 18 U.S.C. § 922(g)(9), a statute about “misdemeanor crimes of domestic violence.” *Castleman*, 134 S. Ct. at 1413. Relying on the common-law definition, this Court broadened the conduct covered by the misdemeanor statute beyond what was prescribed in *Johnson*. *Id.* at 1414-1415. The common-law definition of “force,” and thus the conduct covered by “misdemeanor crimes of domestic violence,” includes even the indirect application of force and acts such as poisoning. *Id.* Importantly, including such acts was only possible by the adoption of the definition rejected in *Johnson*, a case interpreting ACCA. *See id.* at 1413-1414. Importantly, this Court limited its holding in *Castleman* to the statutory provision and cautioned that its opinion should not be read to influence decisions limiting the felony force clause, as in ACCA. *Castleman*, 134 S. Ct. at 1411 n.4, 1414. Despite this cautionary language, the circuits are split over the impact of *Castleman* on the bounds of the felony force clause.

On one side of the divide, the First and Fifth Circuit Courts of Appeals have held that *Castleman* plays no role when defining “physical force” in the felony context. The Fifth Circuit Court of Appeals explained that it makes little sense to

look to *Castleman* – which concerned the broad, common-law definition of “physical force” – when interpreting the bounds of the more restrictive definition of the phrase used in felony statutes. *United States v. Rico-Mejia*, 859 F.3d 318, 323 (5th Cir. 2017). In the court’s words, “*Castleman*’s analysis is applicable only to crimes categorized as domestic violence, which import the broader common law meaning of physical force.” *Id.* (quoting *Castleman*, 134 S. Ct. at 1411 n.4). As the First Circuit recognized, “*Castleman* itself was careful to state that its holding was confined to section 922(g)(9) [misdemeanor crimes of domestic violence],” said *Whyte v. Lynch*, 807 F.3d 463, 471 (1st Cir. 2015).³

On the other side of the divide, the Second, Third, Fourth, Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals have incorporated *Castleman* to the

³ In *Ontiveros*, the Tenth Circuit stated that the First Circuit Court of Appeals had not ruled on the matter. *Ontiveros*, 875 F.3d at 537 n.2. To be sure, the First Circuit stated in a case subsequent to *Whyte* that “it need not take sides” on whether “*Castleman*’s physical force analysis applies” to the felony force clause. *United States v. Edwards*, 857 F.3d 420, 426 (1st Cir. 2017). But this does not change the holding in *Whyte* which did take a side and elected not to import *Castleman*’s physical-force analysis into the felony force context. *Whyte*, 807 F.3d at 471.

extent that it erases any previous distinction between the direct and indirect application of force.⁴

As the Fourth Circuit held, although *Castleman* expressed “formal reservation[s]” regarding broader applicability of its holding, this hesitation did not prohibit importing *Castleman*’s reasoning into the felony force context. *United States v. Reid*, 861 F.3d 523, 528-39 (4th Cir. 2017). These circuits hold that, because *Castleman* stated the common-law definition of force includes both direct and indirect application, so too does the definition of “physical force” as it appears in the felony force clause. *See id.*

The Tenth Circuit stands alone. It holds that *Castleman* completely changed the legal landscape concerning the felony-force clause. *Ontiveros* ruled not only that *Castleman* cast aside any distinction between direct and indirect application of force, but it also expanded the reach of the felony-force clause to include acts of omission. *Ontiveros*, 875 F.3d at 538. So despite *Castleman*’s explicit reservation—that it was not deciding whether bodily injury requires “physical force” as that term is used in the felony force clause—the Tenth Circuit holds that *Castleman*

⁴ *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016), *United States v. Chapman*, 866 F.3d 129 (3d Cir. 2017), *United States v. Reid*, 861 F.3d 523 (4th Cir. 2017), *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017), *United States v. Jennings*, 860 F.3d 450 (7th Cir. 2017), *United States v. Rice*, 813 F.3d 704 (8th Cir. 2016), *Arellano Hernandez v. Lynch*, 831 F.3d 1127 (9th Cir. 2016), *United States v. Haldemann*, 664 F. App’x 820 (11th Cir. 2016) (unpublished).

decided just that. Under *Ontiveros* all injury is caused by violent physical force. No exceptions apply. No other circuit has read *Castleman* to expand the felony force clause so much.

* * *

This Court should grant certiorari to resolve the division in the circuits over the impact, if any, of *Castleman* on the felony force clause, and determine whether bodily injury necessarily includes the use of violent force.

CONCLUSION

For the reasons set forth above, Rodriguez asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,

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