

No. 17-8881

IN THE SUPREME COURT OF THE UNITED STATES

JESUS RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior convictions for aggravated battery against a household member by inflicting great bodily harm, in violation of N.M. Stat. Ann. § 30-3-16(C) (2004), qualify as "violent felonies" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (B) (i) .

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OPINION BELOW

The order of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 711 Fed. Appx. 486.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2018. The petition for a writ of certiorari was filed on May 9, 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 District of New Mexico, petitioner was convicted on one count of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. The district court sentenced him to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A3.

1. In 2016, petitioner was arrested in Albuquerque, New Mexico, as a fugitive from criminal charges. Presentence Investigation Report (PSR) ¶ 7. A search of petitioner revealed a loaded handgun. PSR ¶ 8.

A federal grand jury returned an indictment charging petitioner with one count of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1-2. Petitioner pleaded guilty, without a plea agreement. PSR ¶¶ 3-4.

2. A conviction for violating 18 U.S.C. 922(g)(1) carries a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1); see Custis v.

United States, 511 U.S. 485, 487 (1994). The ACCA defines a “violent felony” as:

any crime punishable by imprisonment for a term exceeding one year * * * that --

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the “elements clause.” Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court defined “physical force” under the ACCA’s elements clause to “mean[] violent force -- that is, force capable of causing physical pain or injury to another person.” Id. at 140.

The Probation Office determined that petitioner had ten prior adult criminal convictions, resulting in a criminal-history category of VI under the Sentencing Guidelines. PSR ¶¶ 28-39. Given petitioner’s criminal-history category of VI and a total offense level of 30, the Probation Office calculated an advisory sentencing range of 168 to 210 months of imprisonment. PSR ¶ 79. In addition, the Probation Office classified petitioner as an armed career criminal under the ACCA based on three prior New Mexico convictions: (1) a 2008 conviction for aggravated battery against

a household member by inflicting great bodily harm; (2) another 2008 conviction for aggravated battery against a household member by inflicting great bodily harm; and (3) a 2008 conviction for aggravated assault against a household member with a deadly weapon. PSR ¶¶ 10, 28, 30-31, 40.

Petitioner objected to his classification as an armed career criminal, contending that his two convictions for aggravated battery against a household member by inflicting great bodily harm were not "violent felonies" under the ACCA. PSR Addendum 1-2. Under New Mexico law, aggravated battery against a household member "consists of the unlawful touching or application of force to the person of a household member with intent to injure that person or another." N.M. Stat. Ann. § 30-3-16(A) (2004). The statute further provides that a person commits a third-degree felony if he "commits aggravated battery against a household member by inflicting great bodily harm." Id. § 30-3-16(C).¹ Petitioner contended that because aggravated battery may be committed through unlawful touching, his prior offenses did not have as an element "the use, attempted use, or threatened use of physical force against the person of another." PSR Addendum 2.

¹ A person also commits a third-degree felony if he commits aggravated battery against a household member "with a deadly weapon" or "in any manner whereby great bodily harm or death can be inflicted." N.M. Stat. Ann. § 30-3-16(C) (2004). Petitioner treats the statute as divisible into separate offenses for purposes of analysis under the ACCA's elements clause, see Pet. 3 n.2, and the court of appeals did the same, see Pet. App. A1-A2.

The district court overruled petitioner's objection and sentenced him to the statutory minimum of 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A3. It rejected petitioner's contention that New Mexico aggravated battery against a household member by inflicting great bodily harm is not a violent felony under the ACCA. Id. at A2-A3. The court relied on its prior decision in United States v. Ontiveros, 875 F.3d 533 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018). Pet. App. A2-A3. In Ontiveros, the Tenth Circuit applied this Court's decision in United States v. Castleman, 134 S. Ct. 1405 (2014), to hold that an assault statute requiring serious bodily injury necessarily requires the use of physical force and that a conviction under that statute thus qualifies as a "crime of violence" under Sentencing Guidelines § 4B1.2. See 875 F.3d at 536-538. Because the ACCA and the Sentencing Guidelines define "violent felony" and "crime of violence" similarly, the court of appeals in this case reasoned, and petitioner conceded, that circuit precedent foreclosed petitioner's challenge. Pet. App. A2-A3 & n.1.

ARGUMENT

Petitioner contends (Pet. 7-11) that his prior convictions for New Mexico aggravated battery against a household member by inflicting great bodily harm do not qualify as violent felonies

under the ACCA because they do not include as an element the use, attempted use, or threatened use of "physical force" as the Court defined that term in Curtis Johnson v. United States, 559 U.S. 133 (2010). The court of appeals correctly rejected that contention, and its decision does not implicate any continued division among the courts of appeals that warrants this Court's review.

1. The court of appeals correctly determined that petitioner's convictions for New Mexico aggravated battery against a household member by inflicting great bodily harm, in violation of N.M. Stat. Ann. § 30-3-16(C) (2004), qualify as violent felonies under the ACCA. Pet. App. A2-A3.

In Curtis Johnson, this Court held that an offender uses "'physical force'" for purposes of the ACCA 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) (reiterating 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, New Mexico aggravated battery against a household member by inflicting great bodily harm requires not only that an offender unlawfully touch or apply force to another person with intent to injure but also that the offender "inflict[] great bodily harm." N.M. Stat. Ann. § 30-3-16(A) and (C). Because that offense 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 determined that the crime at issue here is a violent felony under the ACCA. Pet. App. A1-A3.

Petitioner's contrary position rests on the premise (Pet. 6) that, under New Mexico law, a conviction for aggravated battery against a household member by inflicting great bodily harm "can occur without directly applying physical force." He contends (Pet. 5) that the use of poison or other "indirect application[s] of physical force" do not satisfy Curtis Johnson's definition of violent force. But this Court has already rejected a similar contention in United States v. Castleman, 134 S. Ct. 1405 (2014).

In Castleman, this Court considered whether a state misdemeanor assault offense requiring causation of bodily injury "ha[d], as an element, the use * * * of physical force" and thus was a "misdemeanor crime of domestic violence" for purposes of

18 U.S.C. 922(g)(9). 134 S. Ct. at 1409 (quoting 18 U.S.C. 921(a)(33)(A)(ii)). The Court concluded that “the knowing or intentional causation of bodily injury necessarily involves the use of physical force.” Id. at 1414; see also id. at 1416-1417 (Scalia, J., concurring in part and concurring in the judgment) (“[I]t is impossible to cause bodily injury without using force ‘capable of’ producing that result.”). The Court also concluded that the “use of force” includes both the direct and indirect causation of physical harm. Id. at 1415.

The Court explained that “physical force” is a broad term encompassing all “force exerted by and through concrete bodies” and that Congress used the modifier “physical” to distinguish physical force from, for example, “intellectual force or emotional force.” Castleman, 134 S. Ct. at 1414 (quoting Curtis Johnson, 559 U.S. at 138). The Court determined that force may be applied directly -- through immediate physical contact with the victim -- or indirectly, for instance, by shooting a gun in the victim’s direction, administering poison, infecting the victim with a disease, or “resort[ing] to some intangible substance, such as a laser beam.” Id. at 1414-1415 (citation and internal quotation marks omitted). The Court reasoned that when, for example, a person “sprinkles poison in a victim’s drink,” the person has used force because the “‘use of force’ in [that] example is not the act of ‘sprinkl[ing]’ the poison; it is the act of employing poison

knowingly as a device to cause physical harm.” Id. at 1415 (citation omitted; second set of brackets in original).

The court of appeals’ decision here follows from Castleman. The classification of New Mexico aggravated battery against a household member by inflicting great bodily harm as a violent felony under the ACCA comports with Castleman’s conclusion that “the knowing or intentional causation of bodily injury necessarily involves the use of physical force.” 134 S. Ct. at 1414. Although New Mexico aggravated battery may be committed through indirect applications of force, see State v. Wynn, 24 P.3d 816, 817-818 (N.M. Ct. App. 2001), the Court in Castleman recognized that such indirect applications constitute “physical force.” 134 S. Ct. at 1414.

2. Petitioner asserts (Pet. 7-11) that the circuits have divided over the application of Castleman to the ACCA’s elements clause and to the analogous elements clause in the Sentencing Guidelines. That is no longer correct.

All but one of the courts of appeals in which the issue could arise have concluded that, in light of Castleman, the indirect use of physical force qualifies as a use of force under the ACCA’s elements clause or analogous statutory or Sentencing Guidelines provisions. See United States v. Ellison, 866 F.3d 32, 37-38 (1st Cir. 2017);² United States v. Hill, 890 F.3d 51, 58-60 (2d Cir.

² Citing Whyte v. Lynch, 807 F.3d 463, 471 (2015), petitioner asserts (Pet. 9) that the First Circuit has held that Castleman does not apply outside the context of 18 U.S.C.

2018); United States v. Chapman, 866 F.3d 129, 134-136 (3d Cir. 2017), cert. denied, 138 S. Ct. 1582 (2018); United States v. Covington, 880 F.3d 129, 134-135 (4th Cir.), cert. denied, No. 17-8628 (May 29, 2018); United States v. Verwiebe, 874 F.3d 258, 261 (6th Cir. 2017), petition for cert. pending, No. 17-8413 (filed Apr. 3, 2018); United States v. Waters, 823 F.3d 1062, 1066 (7th Cir.), cert. denied, 137 S. Ct. 569 (2016); United States v. Rice, 813 F.3d 704, 706 (8th Cir.), cert. denied, 137 S. Ct. 59 (2016); Hernandez v. Lynch, 831 F.3d 1127, 1131 (9th Cir. 2016), cert. denied, 137 S. Ct. 2180 (2017); United States v. Ontiveros, 875 F.3d 533, 536-537 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018); United States v. DeShazor, 882 F.3d 1352, 1357-1358 (11th Cir.), petition for cert. pending, No. 17-8766 (May 1, 2018); United States v. Haight, No. 16-3123, 2018 WL 3077534, at *6 (D.C. Cir. June 22, 2018).

The sole exception is the Fifth Circuit, which suggested in United States v. Rico-Mejia, 859 F.3d 318, 322-323 (2017), that Castleman's reasoning does not apply outside the context of the statute concerning a prior crime of domestic violence that was at issue in Castleman. The Fifth Circuit later reaffirmed that

922(g)(9). Whyte overlooked the relevant passage in Castleman, see 807 F.3d at 468, 471, and in denying rehearing, the court made clear that the government's reliance on Castleman had been waived for that case only, see Whyte v. Lynch, 815 F.3d 92, 92-93 (1st Cir. 2016). The First Circuit later noted that Whyte did not foreclose the argument that Castleman applies in the ACCA context. See United States v. Edwards, 857 F.3d 420, 426 & n.11, cert. denied, 138 S. Ct. 283 (2017).

decision 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 recently 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.

3. Petitioner also asserts (Pet. 7, 10-11) that the Tenth Circuit's decision in Ontiveros, on which the court of appeals relied, see Pet. App. A2-A3, "stands alone" in applying Castleman to find that acts of omission can constitute violent force. That contention lacks support. In Ontiveros, the Tenth Circuit considered whether Colorado second-degree assault, which requires that the offender "cause[] serious bodily injury" to another with intent to cause bodily injury, Colo. Rev. Stat. § 18-3-203(1)(g) (2016), was a "crime of violence" under the elements clause of the Sentencing Guidelines. See 875 F.3d at 535-536. The court expressly agreed with "every circuit that has looked at this issue," aside from the Fifth Circuit, in determining that "Castleman's logic applies to 'physical force' in the context of violent felonies." Id. at 537-538. The court also reasoned that this Court's analysis in Castleman indicated that the "use of force" could be predicated on an omission, as well as an affirmative act. Id. at 538. Although petitioner contends (Pet.

7, 10) that only the Tenth Circuit has concluded that causation of bodily harm necessarily requires force even if the offense can be committed by the failure to act, he identifies no circuit conflict on that point. This Court denied a petition for a writ of certiorari in Ontiveros, 138 S. Ct. 2005 (No. 17-8367), and the same result is warranted here.³

In any event, this case would be a poor vehicle to address the failure-to-act question. The text of the New Mexico statute does not encompass acts of omission. See N.M. Stat. Ann. § 30-3-16(A) (2004) (defining “[a]ggravated battery against a household member” as “the unlawful touching or application of force to the person of a household member with intent to injure that person or another”). Nor does petitioner cite any state decision in which the statute has been applied to an act of omission. See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) (requiring “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic

³ This Court also recently denied several petitions for writs of certiorari presenting the question whether Florida felony battery -- which requires that a person intentionally “touch[] or strike[]” another person against that person’s will and “[c]ause[] great bodily harm, permanent disability, or permanent disfigurement,” Fla. Stat. § 784.041 -- is a violent felony under the ACCA’s elements clause 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). Again, the same result is warranted here.

definition of a crime"). Further review of the decision of the court of appeals is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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