APPENDIX

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11737

D.C. Docket No. 1:15-cr-20970-DMM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWIN DESHAZIOR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 20, 2018)

Before JORDAN and JILL PRYOR, Circuit Judges, and REEVES,[*] District Judge.

REEVES, District Judge:

[*] The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Edwin Deshazior appeals his 180 month sentence following his conviction for being a felon in possession of a firearm. He argues that he should not have received a fifteen-year mandatory minimum sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §§ 924(e)(1) and 924(e)(2)(B), because he did not have three prior convictions for violent felonies under the act and because his prior felony convictions were not alleged in his indictment. After careful review, we affirm.

I.

Miami-Dade police officers found Edwin Deshazior in possession of a Smith & Wesson Model 10-8 revolver and four .38 caliber rounds of ammunition on December 6, 2015. He subsequently pleaded guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). The Probation Office prepared a Presentence Investigation Report ("PSI") which indicated that Deshazior was subject to a fifteen-year statutory mandatory minimum sentence under the ACCA based on the following prior felony convictions under Florida law: (i) a 1989 conviction for sexual battery (Fla. Stat. § 794.011(3) (1989)); (ii) a 1989 conviction for aggravated assault (Fla. Stat. §§ 784.011, 784.021 (1989)); (iii) a 1993 conviction for attempted sexual battery (Fla. Stat. §§ 794.011(3), 777.011 (1991)); (iv) a 1993 conviction for kidnapping (Fla. Stat. §§ 787.01, 775.087 (1991)); and (v) a 2005 conviction for resisting an officer

with violence (Fla. Stat. § 843.01 (2005)).

Deshazior objected, arguing that his prior convictions did not constitute violent felonies under the ACCA. He further contended that his sentence could not be enhanced based on these prior convictions because they were not alleged in the indictment. The district court overruled Deshazior's objections and sentenced him to serve the statutory mandatory minimum term of 180 months, followed by five years of supervised release. This appeal followed.

II.

The ACCA requires that a fifteen-year mandatory minimum sentence be imposed on defendants convicted of felon in possession offenses who also have three prior convictions for violent felonies and/or serious drug offenses. 18 U.S.C. § 924(e)(1). The ACCA defines a "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [(the "elements clause")]; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives [(the "enumerated offenses clause")], or otherwise involves conduct that presents a serious potential risk of physical injury to another [(the "residual clause")][.]

18 U.S.C. § 924(e)(2)(B). Sexual battery, aggravated assault, attempted sexual battery, kidnapping, and resisting an officer with violence do not appear in the enumerated offenses clause. And after *Johnson v. United States*, 135 S. Ct. 2551

(2015), the residual clause no longer applies. As a result, this case turns on whether three of Deshazior's prior felony convictions constitute violent felonies under the ACCA's elements clause. 18 U.S.C. § 924(e)(2)(B)(i).

We review *de novo* whether a defendant's prior convictions qualify as violent felonies under the ACCA. *United States v. Hill*, 799 F.3d 1318, 1321 (11th Cir. 2015) (citing *United States v. Petite*, 703 F.3d 1290, 1292 (11th Cir. 2013)). Constitutional challenges to a defendant's sentence are also reviewed *de novo*. *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013) (citing *United States v. Paz*, 405 F.3d 946, 948 (11th Cir. 2005)).

A. Aggravated Assault

Deshazior's argument that aggravated assault under Fla. Stat. § 784.021 is not a violent felony is foreclosed by our prior precedent. In *Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1337-38 (11th Cir. 2013), we held that Fla. Stat. § 784.021 qualifies as a violent felony under the ACCA's elements clause. *Turner* is binding in this circuit "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting *en banc*." *United States v. Sneed*, 600 F.3d 1326, 1332 (11th Cir. 2010) (citing *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001)).

Deshazior argues that *Turner* is not controlling because it incorrectly applied *United States v. Palomino Garcia*, 606 F.3d 1317, 1334-36 (11th Cir. 2010), which

held that, for purposes of the Sentencing Guidelines, crimes that can be accomplished with a *mens rea* of recklessness do not involve the "use of physical force." We recently rejected a similar argument, explaining that "even if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it." *United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) (holding that a Florida conviction for aggravated assault is a crime of violence under U.S.S.G. § 2K2.1(a)(2) cmt. n.1); *see also In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016). Thus, Deshazior's 1989 conviction for aggravated assault constitutes a violent felony under the ACCA.

B. Resisting an Officer with Violence

Deshazior's argument that resisting an officer with violence under Fla. Stat. § 843.01 is not a violent felony is also foreclosed by prior precedent. We previously held that Fla. Stat. § 843.01 qualifies as a violent felony under the ACCA's elements clause. *See Hill*, 799 F.3d at 1322-23; *United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012).

Deshazior contends that these cases were wrongly decided because the least act criminalized by the statute includes conduct which does not involve the "use of physical force," and so the statute is overbroad and cannot be used to enhance a defendant's sentence under the ACCA. *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013); *Descamps v. United States*, 133 S. Ct. 2276, 2290 (2013).

Specifically, Deshazior argues that resisting an officer with violence can be accomplished by "wiggling and struggling." *State v. Green*, 400 So. 2d 1322, 1323 (Fla. Dist. Ct. App. 1981).

Again, however, we have previously rejected Deshazior's argument. In *Romo-Villalobos*, we reviewed the Florida cases Deshazior has cited, and found that they did not establish that *de minimis* force, such as wiggling and struggling, was sufficient to establish violence under § 843.01. *See Romo-Villalobos*, 674 F.3d at 1249-50. As we noted with respect to *Turner*, *supra*, *Romo-Villalobos* is binding in this circuit "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting *en banc*." *Sneed*, 600 F.3d at 1332 (citing *Smith*, 236 F.3d at 1300 n.8). Accordingly, Deshazior's 2005 conviction for resisting an officer with violence is a conviction for a violent felony under the ACCA.

C. Sexual Battery

Deshazior next argues that his 1989 conviction for sexual battery and his 1993 conviction for attempted sexual battery are not convictions for violent felonies under the ACCA's elements clause. As a provisional matter, he argues that the government failed to establish that he was convicted of sexual battery in 1989 because it did not provide the judgment pertaining to that charge. *See United States v. Day*, 465 F.3d 1262, 1266 (11th Cir. 2006); *United States v. Spell*, 44 F.3d

936, 939-40 (11th Cir. 1995). However, he concedes that the government did properly establish that he was convicted of attempted sexual battery in 1993, and that the same ACCA analysis applies to both offenses. As a result, we need not resolve this issue, and will proceed to examine the sexual battery conviction.

The Florida sexual battery statute, Fla. Stat. § 794.011, sets out a list of applicable definitions. It defines "sexual battery" as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." Fla. Stat. § 794.011(1)(h). In *United States v. Harris*, 608 F.3d 1222, 1226 & n.3 (11th Cir. 2010), we accepted the government's concession that this definition, which was incorporated in the Florida statute for lewd or lascivious battery, does not require as an element the use, attempted use, or threatened use of physical force, because it can be accomplished by "union . . . with the sexual organ of another". Under Florida law, this means "contact." *Harris* does not drive the result here because we only accepted the government's concession for purposes of that case, and because the statute under consideration regarding Deshazior's conviction also requires that the sexual battery be accomplished with the use or threatened use of a deadly weapon.

The remaining sections of Fla. Stat. § 794.011 specify that a conviction for "sexual battery" is a different degree of felony, carrying a different punishment,

depending on various factors, such as the victim's age, the victim's physical and mental state, and whether the perpetrator threatened, coerced, or drugged the victim, or used or threatened to use a deadly weapon in the process of committing the sexual battery. *See* Fla. Stat. § 794.011(2)-(10).

Florida courts have treated the various sections of § 794.011 as distinct crimes with different elements, and the Florida Standard Jury Instructions provide different instructions for the different sections of § 794.011. *See Gould v. State*, 577 So. 2d 1302 (Fla. 1991); *Shaara v. State*, 581 So. 2d 1339 (Fla. Dist. Ct. App. 1991); Fla. Std. Jury Instr. 11.1-11.6(a) (1989). Accordingly, § 794.011 essentially defines "multiple crimes" and is divisible. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). Because the statute is divisible, we employ the modified categorical approach to "determine which statutory phrase was the basis for the conviction." *Descamps*, 133 S. Ct. at 2283-84 (quoting *Johnson*, 559 U.S. at 144). Once we have determined under which statutory phrase the defendant was necessarily convicted, we use the categorical approach to analyze whether that phrase requires the use, attempted use, or threatened use of physical force as required by the ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i). *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014).

The information for Deshazior's 1989 sexual battery conviction indicates that he was charged under Fla. Stat. § 794.011(3) for sexual battery with a deadly

weapon, to wit: a handgun. The prosecution must prove four elements beyond a reasonable doubt for an individual to be convicted under this provision: (i) sexual battery, (ii) upon a person twelve years of age or older, (iii) without that person's consent, and (iv) with the use or threatened use of a deadly weapon, or actual physical force likely to cause serious personal injury. *See* Fla. Stat. § 794.011(3); Fla. Std. Jury Instr. 11.2 (1989). Because Deshazior was charged with sexual battery with a deadly weapon, the use or threatened use of a deadly weapon is an essential element of the crime of his conviction. *See Holloway v. State*, 668 So. 2d 627, 628 n.5 (Fla. Dist. Ct. App. 1996); *Ellis v. State*, 608 So. 2d 514, 515 (Fla. Dist. Ct. App. 1992); *Stradley v. State*, 554 So. 2d 1200 (Fla. Dist. Ct. App. 1989).

The issue presented here is whether sexual battery with the use or threatened use of "a deadly weapon" can be accomplished without "the use, attempted use, or threatened use of physical force." 18 U.S.C. § 924(e)(2)(B)(i). If it can, then the statute is overbroad, and cannot be used to enhance a defendant's sentence under the ACCA. *See Descamps*, 133 S. Ct. at 2290. If it cannot, then the statute qualifies as a violent felony under the ACCA. The Supreme Court has explained that "'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another." *Johnson*, 559 U.S. at 140. In deciding whether an element requires the use of such force, we focus on the least culpable conduct criminalized by the statute. *Moncrieffe*, 569 U.S. at 191. However, we resist

engaging in "florid exercise[s] of legal imagination" which "pose highly improbable ways" of violating the statute. *United States v. Vail-Bailon*, 868 F.3d 1293, 1307 (11th Cir. 2017) (en banc).

The jury instructions for sexual battery under Fla. Stat. § 794.011(3) at the time of Deshazior's offense provide that "[a] weapon is a 'deadly weapon' if it is used or threatened to be used in a way likely to produce death or great bodily harm." Fla. Std. Jury Instr. 11.2 (1987). The jury instructions for aggravated battery under Fla Stat. § 784.045 similarly provide that "[a] weapon is a 'deadly weapon' if it is used or threatened to be used in a way likely to produce death or great bodily harm." Fla. Std. Jury Instr. 8.4 (1989); *see also Smith v. State*, 969 So. 2d 452, 454-55 (Fla. Dist. Ct. App. 2007). In the aggravated battery context, Florida courts have held that a "deadly weapon" may include bleach "sloshed" into a victim's face, *id.* at 455, and a large dog given a command to "sic" the victim. *Morris v. State*, 722 So. 2d 849, 850-51 (Fla. Dist. Ct. App. 1998)

Deshazior offers two related arguments in support of his position that, for purposes of the Florida sexual battery statute, the use or threatened use of "a deadly weapon" does not require the use, attempted use, or threatened use of "physical force." First, he argues that a defendant could satisfy this element by committing a sexual battery with a "deadly weapon" that does not require the direct application of "physical force," such as poison, anthrax, or a chemical

weapon. Second, heeding our warning not to engage in "florid exercise[s] of legal imagination," *Vail-Bailon*, 868 F.3d at 1307, he argues that under existing Florida law a defendant could satisfy the "deadly weapon" requirement by sloshing bleach into the victim's face, or commanding his dog to "sic" the victim. Deshazior contends that doing so would not involve the use of "*violent* force—that is, force capable of causing physical pain or injury to another." *Johnson*, 559 U.S. at 140. We disagree.

When a statute requires the use of force "capable of causing physical pain or injury to another person," *id.*, whether that use of force "occurs indirectly, rather than directly (as with a kick or punch), does not matter." *United States v. Castleman*, 134 S. Ct. 1405, 1415 (2014). Poisoning someone, "sloshing" bleach in a victim's face, or saying the word "sic" to a dog may not involve the direct application of violent force. However, neither does pulling the trigger of a gun. *Id.* Instead, in each instance, the actor knowingly employs a device to indirectly cause physical harm—from a bullet, a dog bite, or a chemical reaction. *See id.*

The force initiated in each of Deshazior's examples constitutes "physical force" under the ACCA because it is "capable of causing physical pain or injury." *Vail-Bailon*, 868 F.3d at 1301. Because it does not matter whether that use of force occurs indirectly rather than directly, we reject Deshazior's argument that a defendant can use or threaten to use "a deadly weapon" under Fla. Stat. §

794.011(3) without using, attempting to use, or threatening to use "physical force." 18 U.S.C. § 924(e)(2)(B)(i).

Accordingly, a conviction for sexual battery with a deadly weapon under Fla. Stat. § 794.011(3) is a conviction for a violent felony under the ACCA's elements clause. Deshazior has three qualifying prior felony convictions under the ACCA. As a result, we need not address whether his prior felony conviction for kidnapping under Fla. Stat. § 787.01 is also a qualifying violent felony.

D. Prior Convictions Not Alleged in the Indictment

Finally, Deshazior argues that enhancing his sentence based on his prior convictions was unconstitutional, because his prior convictions were not alleged in his indictment nor proved to a jury beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000). As we have previously explained, "*Almendarez–Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), forecloses [this] argument." *United States v. Sparks*, 806 F.3d 1323, 1350 (11th Cir. 2015). The district court could enhance Deshazior's sentence based on his prior convictions for violent felonies, even though the prior convictions were not identified in his indictment.

III.

Under this Court's prior precedent, Florida convictions for aggravated assault and resisting an officer with violence are categorically violent felonies

under the ACCA. Sexual battery with a deadly weapon under Fla. Stat. § 794.011(3) is also a violent felony under the ACCA. Because Deshazior had three qualifying predicate felony convictions, the district court did not err by enhancing his sentence under the ACCA. Accordingly, his sentence is **AFFIRMED.**

APPENDIX B

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
EDWIN DESHAZIOR

JUDGMENT IN A CRIMINAL CASE

Case Number: **15-20970-CR-MIDDLEBROOKS**
USM Number: **11008-104**

Counsel For Defendant: **Katherine Carmon**
Counsel For The United States: **Anne McNamara**
Court Reporter: **Maggie Rubio, RPR**

The defendant pleaded guilty to count(s) One.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. §§922(g)(1) and 924(e)(1)	Possession of a firearm and ammunition by a convicted felon	12/06/2015	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **4/12/2016**

Donald M. Middlebrooks
United States District Judge

Date: 4/13/16

DEFENDANT: **EDWIN DESHAZIOR**
CASE NUMBER: **15-20970-CR-MIDDLEBROOKS**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED EIGHTY (180) MONTHS as to Count One. This sentence is to run concurrent to any sentence subsequently imposed in State Case No. F15-24955.**

The court makes the following recommendations to the Bureau of Prisons:

1. **The defendant be designated to a facility in or as close to South Florida as possible.**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **EDWIN DESHAZIOR**
CASE NUMBER: **15-20970-CR-MIDDLEBROOKS**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS as to Count One**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **EDWIN DESHAZIOR**
CASE NUMBER: **15-20970-CR-MIDDLEBROOKS**

SPECIAL CONDITIONS OF SUPERVISION

Anger Control / Domestic Violence - The defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: **EDWIN DESHAZIOR**
CASE NUMBER: **15-20970-CR-MIDDLEBROOKS**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **EDWIN DESHAZIOR**
CASE NUMBER: **15-20970-CR-MIDDLEBROOKS**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

No. 16-50022

In the United States Court of Appeals For the Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE GUSTAVO RICO-MEJIA,
aka Juan Gustavo Rico-Mejia,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLEE USA'S PETITION FOR PANEL REHEARING

The United States of America, by and through the United States Attorney for the Western District of Texas, files this petition for panel rehearing,[1] and would show the Court as follows:

[1] Each of the nine U.S. Attorney's offices which serve this Court have reviewed, and support, this petition.

STATEMENT OF THE REHEARING ISSUE

Whether this Court unnecessarily narrowed the scope of *United States v. Castleman*, 134 S. Ct. 1405 (2014) and, in so doing, created an inter-circuit and intra-circuit split.

STATEMENT OF THE CASE

This is a § 1326 illegal re-entry case on *de novo* review in which Rico-Mejia challenged the use of his prior Arkansas conviction for terroristic threatening to enhance his advisory guideline sentencing range. *See* ARK. CODE ANN. § 5-13-301(a)(1) (2007)("§ 5-13-301").

The PSR's offense level computations for Rico-Mejia began with the § 2L1.2 base offense level 8 to which a 16-level, crime of violence ("COV") enhancement was added because of his 2007 § 5-13-301 conviction. PSR ¶¶ 10, 15, 16. His adjusted offense level of 24 was reduced to a total offense level of 21 after a 3 level reduction for acceptance of responsibility was applied. PSR ¶¶ 20, 22, 23, 24. Rico-Mejia's offense level score of 21 in combination with his criminal history category II, resulted in an advisory guideline sentencing range of 41 to 51 months. PSR ¶ 30, 51.

Prior to sentencing, Rico-Mejia untimely objected to the 16-level COV enhancement arguing that the underlying statute "does not have as an element, the use, attempted use, or threatened use of physical force against another." (ROA.215) (*Defendant's Objection To Presentence Report* at 4). At sentencing, Rico-Mejia argued that the

Arkansas statute was overbroad because it permitted threats to property and did not require the use or threatened use of force. (ROA.156-159.160-161).

Although the district court denied Rico-Mejia's objection and calculated his advisory guideline sentencing range using the 16-level enhancement, it explicitly based its sentencing decision on a § 3553 analysis of Rico-Mejia's criminal history. (ROA.173. 176). The issue on appeal was whether the Arkansas statute was a USSG § 2L1.2, "use of force" crime of violence ("COV"). *See* USSG § 2L1.2(b)(1)(A)(ii). This Court held it was not. *United States v. Rico-Mejia*, 2017 WL 568331 at *3 (5th Cir. Feb. 10, 2017).

ARGUMENT AND AUTHORITIES

Panel Rehearing Is Necessary To Correct The Conflict Created By This Court's Unduly Restrictive Interpretation Of *Castleman*.

Panel rehearing is appropriate to bring points of law or fact which the petitioner believes have been overlooked or misapprehended by the panel to the Court's attention. *See* Fed. R. App. P. 40(a)(2). The Government now seeks review of this panel's narrow interpretation of *Castleman* as limited solely to domestic violence statutes because it conflicts with precedent in this, and other, Circuits. Government thus requests the Court reconsider this portion of the opinion:

> By its express terms, *Castleman's* analysis is applicable only to crimes categorized as domestic violence, which import the broader common law meaning of physical force. *Castleman* is not applicable to the physical force requirement for a crime of violence, which "suggests a category of violent, active crimes" that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context. 134 S. Ct. 1411 n.4. Accordingly, *Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence, and

> § 5–13–301(a)(1)(A) cannot constitute a crime of violence under § 2L1.2(b)(1)(A)(ii) because it lacks physical force as an element. *See Herrera*, 647 F.3d at 175.

United States v. Rico-Mejia, 2017 WL 568331 at *3 (5th Cir. Feb. 10, 2017).

The panel's reliance upon *Castleman* was not necessary to support its ultimate holding. To resolve this case, the Court need only have held that the Arkansas statute did not pass categorical muster because it allows for the use of force against property. *United States v. Rico-Mejia*, ___ F.3d ___, 2017 WL 568331, at *2 (5th Cir. Feb. 14, 2017). The language quoted above can thus be "deleted without seriously impairing the analytical foundations of the holding and being peripheral, may not have received the full and careful consideration of the court that uttered it." *United States v. Bernel-Aveja*, 844 F.3d 206, 212-213, n.32 (5th Cir. 2016) quoting *United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014); *see Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004)(same).

Ordinarily, this issue might not be a matter for serious concern. However in the instant case, the Court's narrow interpretation of *Castleman* as limited to cases involving domestic violence arguably conflicts with the high Court's opinion, and explicitly conflicts with *Castleman's* interpretation and application as expressed by seven other Circuits and within the Fifth Circuit itself.

Certainly, in *Castleman* the definition of what constitutes a "use of force" for categorical purposes arose in the domestic violence context of a single statutory provision—18 U.S.C. § 922(g)(9). However, the high Court construed "physical force"

broadly to encompass all "force exerted by and through concrete bodies" and that the modifier "physical" was used by Congress to distinguish physical force from, for example, "intellectual force or emotional force." *Castleman*, 134 S. Ct. at 1414 quoting *Johnson v. United States*, 559 U.S. 133, 138 (2010). It then determined that force may be applied directly through immediate physical contact with the victim *or* indirectly—for example, 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." *Castleman*, 134 S. Ct. at 1414-1415 (citation and internal quotation marks omitted). In particular, the Supreme Court rejected the notion that "sprinkl[ing] poison in a victim's drink," cannot be the "use of 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." *Castleman*, 134 S. Ct. at 1415 (citation omitted; second set of brackets in original). Fairly read, *Castleman* thus stands for the proposition that "the use of force" can also encompass indirect, ostensibly non-violent conduct.

At issue here is whether, as this panel observed, *Castleman* is limited to the domestic violence context. *See Rico-Mejia*, 2017 WL 568331 at *3. The Government maintains it is not because *Castleman* defined "the use of force" as the "degree of force that supports a common-law battery conviction." *Castleman*, 134 S. Ct. at 1413.[2] Any

[2] The Arkansas terroristic threat statute, like the "common law" assault and battery statutes discussed in *Castleman*, has long been held to apply to domestic violence situations. *Bates v. Bates*, 793

common law offense that mandates such force would thus fall within *Castleman's* ambit. This logical conclusion did not escape Justice Scalia who observed in his concurrence that the addition of a common law "use of force" definition to an already-crowded definitional field actually expanded the meaning of "use of force." *See Castleman*, 134 S. Ct. at 1417-1418, 1420 (Scalia, J. concurring). As Justices Alito and Thomas added: "'The decision in this case turns on the meaning of the phrase 'has, as an element, the use ... of physical force.'" 18 U.S.C. § 921(a)(33)(A)(ii)." *Id.* at 1422 (Alito, J. and Thomas, J. concurring).

Federal circuit courts have broadly applied *Castleman* to non-domestic violence statutes. *See United States v. Hill*, 832 F.3d 135 (2d Cir. 2016) (Hobbs Act robbery); *United States v. Rice*, 813 F.3d 704 (8th Cir. 2016)(Arkansas second degree battery); *Arellano Hernandez v. Lynch*, 831 F.3d 1127 (9th Cir. 2016) (California attempted criminal threats statute); *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017)(Colorado robbery statute); *United States v. Haldemann*, 664 F. App'x 820 (11th Cir. 2016)(Wisconsin substantial battery statute); *United States v. Redrick*, 841 F.3d 478 (D.C. Cir. 2016) (Maryland robbery with a deadly weapon statute). The Second, Seventh, Eighth, Ninth, Tenth, Eleventh,

S.W.2d 788, 790 (Ark. 1990); *see, e.g., Rodriguez v. State*, 449 S.W.3d 306, 309 (Ark. Ct. App. 2014). ("All 'housemates' are protected by statutes prohibiting battery, Ark. Code Ann. §§ 5–13–201 to –203 (1987 & Supp.1989); assault, Ark. Code Ann. §§ 5–13–204 to –207 (1987); harassment, Ark. Code Ann. § 5–71–208 (1987); harassing communications, Ark. Code Ann. § 5–71–209 (1987); and terroristic threats, Ark. Code Ann. § 5–13–301 (1987.").

Under Arkansas law, a prior § 5-13-301 conviction also qualifies as "another felony involving the use of threat of violence to another person," to allow for enhanced penalties as an "aggravating circumstance." *Parker v. State*, 779 S.W.2d 156, 369 (Ark. 1989).

and DC Circuits have also relied upon *Castleman* to reject the notion that the "use of force" must always be direct and physically violent. *See Hill*, 832 F.3d at 142 (holding Hobbs Act robbery is a COV under § 924(c)(3)(A)); *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016) (holding Illinois domestic battery conviction qualified as a § 4B1.2 COV and affirming that poisoning and withholding medicine qualified as the use of force); *Winston*, 845 F.3d at 878 (holding Arkansas second degree battery is an ACCA violent felony); *Rice*, 813 F.3d 705-706 (holding Arkansas second degree battery is a § 4B1.2 COV because "harm occurs indirectly, rather than directly (as with a kick or punch), does not matter"); *Arellano Hernandez*, 831 F.3d at 1131 (holding California attempted criminal threats statute is categorical 18 U.S.C. § 16(a) COV and specifically criticizing 5th Circuit's poison does not equal use of force theory); *Harris*, 844 F.3d at 1265, 1267-1268 (10th Cir. 2017)(holding Colorado robbery statute is an ACCA violent felony even though it can be accomplished by threats or intimidation); *Haldemann*, 664 F. App'x at 821-822 (holding Wisconsin substantial battery statute is a § 4B1.2 COV "because intentional use of indirect force to cause substantial bodily harm still qualifies as a use of violent force within the meaning of § 4B1.2's elements clause."); *Redrick*, 841 F.3d at 484-485 (D.C. Cir. 2016) (holding Maryland robbery with a deadly weapon statute is an ACCA violent felony and rejecting argument that poison, an "open flame," or "lethal bacteria" could be used without requisite physical force because doubtful

"these weapons could be administered without at least some level of physical force.").[3] *Rico-Mejia* thus creates a Circuit split.

Other panels of this Circuit have also relied upon *Castleman* to reject the original "use of force" analysis expressed in *Vargas-Duran* and *Villegas-Hernandez*. *See United States v. Howell*, 838 F.3d 489, 499-500 (5th Cir. 2016)(relying upon both *Castleman* and *Voisine* to reject *Vargas-Duran's* statement that "the use of force encompasses only intentional conduct" and holding that the Texas assault by strangulation is a § 4B1.2 COV even though it encompasses a mens rea of recklessness). In *Howell*, this Court acknowledged that the Supreme Court in *Voisine* interpreted *Castleman's* discussion of "force" to include "reckless assaults, no less than the knowing and intentional ones we addressed in *Castleman* to satisfy [the use of force] definition." *Howell,* 838 F.3d at 500 quoting *Voisine v. United States*, 136 S. Ct. 2272, 2278, n.55 (2016).

Still other Fifth Circuit panels have utilized *Castleman* as generally applicable to define the "use of force." United *States v. Briceno*, ___ F. App'x ___, 2017 WL 945484 at n.17 (5th Cir. 2017)(characterizing *Castleman* as a case "holding that poisoning a victim by giving them a poisoned beverage was a crime that involved physical force"); *United States v. Pascacio-Rodriguez*, 749 F.3d 353, 359, n.36 (in the course of deciding whether conspiracy to commit murder is a § 2L1.2 crime of violence, characterizing

[3] Relying upon its prior precedent, the Fourth Circuit expressed doubt, but did not reach the issue of, whether *Castleman* "abrogated the distinction…between the use of force and the causation of injury." *See United States v. McNeal*, 818 F.3d 141, 156 n.10 (4th Cir. 2016).

Castleman as defining the term "physical force" in the ACCA in reference to its "established common-law meaning"). It is difficult at best to harmonize these interpretations of *Castleman* with that in the instant case.

Recent Fifth Circuit decisions have also essentially incorporated *Castleman's* notion that the "use of force" does not always require the explicit use of direct physical force. *See United States v. Mendez-Henriquez*, 847 F.3d 214, (5th Cir. 2017) (California offense of maliciously and willfully discharging a firearm at an occupied motor vehicle is a § 2L1.2 "use of force" COV); *United States v. Buck,* ___ F.3d ___, 2017 WL 444780 at *4 (5th Cir. Feb. 1, 2017) (holding Hobbs Act robbery by intimidation a § 16(a), use of force, COV even though "an individual could be convicted under the Hobbs Act for nothing more than threatening some future injury to the property of a person who is not present."); *United States v. Steele*, ___ F. App'x ___, 2016 WL 6818847 (5th Cir. Nov. 16, 2016) (after *Mathis* holding that 18 U.S.C. § 876 is a use of force COV); *Howell*, 838 F.3d at 490 (Texas conviction for assault by strangulation is a § 4B1.2(a)(1) use of force COV); *see also United States v. Brewer*, ___ F.3d ___, 2017 WL 671999 at *3 (5th Cir. Feb. 17, 2017)(issued after *Rico-Mejia* and holding without resort to *Castleman* that federal bank robbery statute is a § 4B1.2 COV because "robbery by intimidation must involve at least an implicit threat to use force…even if there is no express threat…of direct physical force made.").

Nevertheless, the impact of the panel's *Castleman* language is reflected by the post-*Rico-Mejia* 28(j) letters filed in pending Fifth Circuit appeals—particularly those in

which defendants challenged the use of prior Texas robbery convictions to enhance the sentencing penalties. *See*, *e.g.*, *United States v. Deal*, No. 16-20133. For example, *Rico-Mejia* has been cited for the proposition that "the distinction in this Court's cases between causing injury and using violent force is alive and well." *See Brief for Appellant Noel Lerma*, No. 16-41467 at 26 (using *Rico-Mejia* to support contention that Texas aggravated robbery statute is not a use of force § 2L1.2 COV).

For all these reasons, excising the portion of this Court's opinion discussing *Castleman* is appropriate. To do so, would still permit consideration of a future case in which the legal issue is squarely before the Court and where *Castleman* is necessary to a holding. The Government therefore respectfully requests that the *Castleman* paragraph be deleted from the panel's decision.

CONCLUSION

For all the foregoing reasons, the United States requests that this Court grant its petition for rehearing in all things.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2017 I filed this document with the Fifth Circuit of Appeals using the CM/ECF filing system, which will cause a copy of this document to be delivered to Appellant Jose Gustavo Rico-Mejia's attorney of record, AFPD Donna F. Coltharp, Esq.

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ATTACHMENT 1

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United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Jose Gustavo RICO-MEJIA, also known as
Juan Gustavo Rico-Mejia, Defendant-Appellant

No. 16-50022
|
Filed February 10, 2017

Synopsis

Background: After pleading guilty to illegal reentry into the United States, defendant was sentenced in the United States District Court for the Western District of Texas, No. 2:15-CR-68-1, to 41 months' imprisonment and three years of supervised release, and he appealed.

Holdings: The Court of Appeals held that:

[1] defendant's prior conviction under Arkansas law for terroristic threatening did not include physical force as an element, and thus conviction did not qualify as crime of violence, and

[2] district court's error in determining that 16-level crime of violence enhancement applied to defendant was not harmless.

Vacated and remanded.

West Headnotes (5)

[1] Sentencing and Punishment

Illegal reentry defendant's prior conviction under Arkansas law for terroristic threatening did not include physical force as an element, and thus conviction did not qualify as crime of violence for purposes of sixteen-level sentencing enhancement; even if conduct in prior case involved threat to kill, a person could cause physical injury without using physical force, for example, by using poison. Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326; Ark. Code Ann. § 5-13-301(a)(1); U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[2] Sentencing and Punishment

District court's error in determining that 16-level crime of violence enhancement applied to illegal reentry defendant based on his prior conviction for terroristic threatening under Arkansas law was not harmless; defendant was sentenced to 41 months' imprisonment, which was lowest end of incorrectly calculated guideline range, top of actual sentencing range was at most 21 months, and district court's statement that it had considered "everything else about this case" was too vague to establish that it was uninfluenced by its erroneous guideline calculation. Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326; Ark. Code Ann. § 5-13-301(a)(1); U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[3] Sentencing and Punishment

While a district court undoubtedly commits procedural error in improperly calculating the guideline range, that error can be considered harmless provided that the sentence did not result from the error.

Cases that cite this headnote

[4] Sentencing and Punishment

One way to demonstrate that the sentence was not imposed as a result of a guidelines error, such that the error would be considered harmless, is to show that the district court considered the correct guideline range and

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subsequently indicated that it would impose the same sentence even if that range applied.

Cases that cite this headnote

[5] Sentencing and Punishment

Where the district court does not consider the correct guideline range, a determination of harmlessness requires the proponent of the sentence to convincingly demonstrate both: (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing.

Cases that cite this headnote

Appeal from the United States District Court for the Western District of Texas, USDC No. 2:15-CR-68-1

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Before STEWART, Chief Judge, and KING and DENNIS, Circuit Judges.

Opinion

PER CURIAM:

***1** Jose Gustavo Rico-Mejia pleaded guilty to illegal re-entry into the United States. The district court sentenced Rico-Mejia to 41 months of imprisonment and three years of supervised release. In making its sentencing determination, the district court imposed a sixteen-level enhancement for a past conviction under Arkansas law, on the grounds that it qualified as a "crime of violence." *See* U.S.S.G. § 2L1.2(b)(1)(A)(ii). For the reasons that follow, we VACATE and REMAND for resentencing.

I.

On January 21, 2015, Rico-Mejia was charged by indictment with illegally reentering the United States after deportation, in violation of 8 U.S.C. § 1326. On March 25, 2015, Rico-Mejia pleaded guilty without benefit of a plea agreement. A probation officer compiled his pre-sentence report ("PSR"). Applying the 2014 edition of the U.S. Sentencing Guidelines ("Guidelines"), the PSR recommended a base offense level of eight pursuant to U.S.S.G. § 2L1.2(a). The PSR also recommended a sixteen-level enhancement due to Rico-Mejia's September 14, 2007 conviction for terroristic threatening in violation of Arkansas code § 5–13–301(a)(1)—a felony in Arkansas that the PSR deemed to be a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii).[1] Rico-Mejia was given a three-level reduction for acceptance of responsibility, resulting in a total offense level of 21. Pursuant to the Guidelines, that offense level, combined with a criminal history category of II, resulted in a recommended sentencing range of 41 to 51 months' imprisonment.

[1] All references to the Sentencing Guidelines refer to the 2014 version applicable in this case.

At the December 17, 2015 sentencing hearing, Rico-Mejia objected to the sixteen-level enhancement, arguing that his prior state conviction did not constitute a crime of violence within the meaning of § 2L1.2 because "terroristic threatening" is not an enumerated crime of violence and does not have "as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2, cmt. n.1(B)(iii) (2014). Accordingly, Rico-Mejia contended that he should only have received a four-level increase. The district court disagreed and sentenced him to 41 months of imprisonment and three years of supervised release, a sentence at the bottom end of the sentencing range. The district court acknowledged that the Arkansas statute could be violated by threats not involving physical force, but overruled Rico-Mejia's objection because the conduct actually charged in his case involved a threat to kill, which the district court believed to necessarily import an element of physical force. The sentencing judge also noted that he had "considered everything else about this case, including the conviction as well as the other [available] information concerning this particular defendant," and

that the sentence he chose "would be the same sentence that I would pronounce even if I would have sustained the Defendant's objection to the Guideline Enhancement." Rico-Mejia appealed, challenging the sixteen-level crime of violence enhancement.

***2** We first address whether the district court erred in imposing a sixteen-level sentencing enhancement pursuant to § 2L1.2(b)(1)(A)(ii). Finding that the district court did err, we progress to examine whether that error was harmless.

II.

Section 2L1.2 of the Guidelines states that the offense level for unlawfully entering or remaining in the United States is increased by sixteen if the defendant has previously been convicted of a "crime of violence." U.S.S.G. § 2L1.2(b)(1)(A)(ii). As the district court's characterization of Rico-Mejia's prior offense is a question of law, we review it de novo. *United States v. Herrera*, 647 F.3d 172, 175 (5th Cir. 2011) (citing *United States v. Hernandez–Galvan,* 632 F.3d 192, 196 (5th Cir. 2011)).

According to the Guidelines, a "crime of violence" consists of:

> [A]ny of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other 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.

U.S.S.G. § 2L1.2, cmt. n.1(B)(iii) (2014). This court has interpreted this provision to mean that a prior offense qualifies as a crime of violence if that offense "(1) has physical force as an element, or (2) qualifies as one of the enumerated offenses." *Herrera*, 647 F.3d at 175 (quoting *United States v. Gomez–Gomez*, 547 F.3d 242, 244 (5th Cir. 2008) (en banc), *superseded by regulation on other grounds, as recognized in United States v. Diaz–Corado*, 648 F.3d 290, 294 (5th Cir. 2011)). Because "terroristic threatening" is not included in the list of enumerated offenses above, we must now determine whether Rico-Mejia's conviction for terroristic threatening includes physical force as an element.

[1] On appeal, Rico-Mejia argues that the district court erred in increasing his offense level by sixteen pursuant to § 2L1.2(b)(1)(A)(ii), contending that his prior Arkansas conviction for "terroristic threatening" does not constitute a crime of violence, since a person could "cause death or serious physical injury" even without using physical force and because the offense includes property damage while crimes of violence only involve injuries to people. In support of this contention, he cites *United States v. Johnson*, 286 Fed.Appx. 155, 157 (5th Cir. 2008) (per curiam), an unpublished decision in which we held that a conviction for terroristic threatening under the same Arkansas statute did not qualify as a violent felony under 18 U.S.C. § 924(e)(2)(B)(i). There, we reasoned that even though the conduct in that case involved a threat to kill, a person could cause physical injury without using physical force. *Id.*; *see also United States v. Villegas–Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) ("There is ... a difference between a defendant's causation of injury and the ... use of force."); *United States v. De La Rosa–Hernandez*, 264 Fed.Appx. 446 (5th Cir. 2008) (per curiam) ("As in *Villegas*, a defendant could violate [the California Terroristic Threats law], for example, by threatening either to poison another or to guide someone intentionally into dangerous traffic, neither of which involve 'force', as that term is defined by our court.").

***3** The Government responds that these cases have been overruled by *United States v. Castleman*, —— U.S. ——, 134 S.Ct. 1405, 1414, 188 L.Ed.2d 426 (2014), which held that a defendant's guilty plea to having "intentionally or knowingly cause[d] bodily injury" to the mother of his child constituted "the use of physical force" required for a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33)(A). The Government points out that as part of the Supreme Court's reasoning in that decision, it applied a definition of "use of physical force" that was

much broader than that described in the above cases—one that could involve harm caused both directly and indirectly and that would include administering poison or similar actions. *Id.* at 1413–15.

Arkansas law decrees that a person is guilty of first-degree terroristic threatening if:

> (A) With the purpose of terrorizing another person, the person threatens to cause death or serious physical injury or substantial property damage to another person; or
>
> (B) With the purpose of terrorizing another person, the person threatens to cause physical injury or property damage to a teacher or other school employee acting in the line of duty.

Ark. Code Ann. § 5–13–301(a)(1). To determine whether a given prior conviction qualifies for a Guidelines enhancement, courts use either (1) the categorical approach or (2) the modified categorical approach. *United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016) ("[W]e have generally used the categorical and modified categorical approaches in applying the federal sentencing Guidelines."). The district court in this instance determined that the Arkansas statute was divisible under the modified categorical approach, and, accordingly, referred to the charging document to conclude that physical force was an element of terroristic threatening.

The Supreme Court's decision in *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 2248–57, 195 L.Ed.2d 604 (2016) addressed when and how courts may use the modified categorical approach in the context of federal sentencing. *See also Hinkle*, 832 F.3d at 574 (noting that although *Mathis* did not explicitly involve the federal sentencing Guidelines, it was nonetheless controlling in this circuit as concerns application of the modified categorical approach in the context of those Guidelines). This court has observed that *Mathis* "instructs that there is a difference between alternative elements of an offense and alternative means of satisfying a single element," and that when a court confronts an alternatively-phrased statute, it must first "determine whether listed items in a statute are elements or means." *Id.* at 575 (internal quotation marks and citation omitted).

At the sentencing hearing, the district court responded to Rico-Mejia's argument that physical force was not an element of the previous conviction because a conviction could be obtained under § 5–13–301(a)(1) without proof that a defendant threatened to use physical force by asking, "[H]ow else would you threaten to kill someone unless you're going to use some type of force to bring about death, the actual killing? You can't wish somebody dead, right?" The answer to the district court's question is provided by the analysis set forth in *Johnson*, *Villegas–Hernandez*, and *De La Rosa–Hernandez*. These cases clarify that even if the district court correctly resorted to the modified categorical approach, § 5–13–301(a)(1)(A) cannot constitute a crime of violence under § 2L1.2(b)(1)(A)(ii) because it lacks physical force as an element.

The Government's contention regarding *Castleman* must be rejected. By its express terms, *Castleman*'s analysis is applicable only to crimes categorized as domestic violence, which import the broader common law meaning of physical force. *Castleman* is not applicable to the physical force requirement for a crime of violence, which "suggests a category of violent, active crimes" that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context. 134 S. Ct. 1411 n.4. Accordingly, *Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence, and § 5–13–301(a)(1)(A) cannot constitute a crime of violence under § 2L1.2(b)(1)(A)(ii) because it lacks physical force as an element. *See Herrera*, 647 F.3d at 175.

III.

***4** **[2]** The Government also contends that even if the district court erred in determining that the sixteen-level enhancement applied, that error was harmless because of the district court's admonition that it would have imposed the same sentence even if it had sustained Rico-Mejia's objection to that enhancement.

The district court indicated that it considered multiple factors in imposing Rico-Mejia's sentence, including: (1) the PSR; (2) Rico-Mejia's personal characteristics; (3) the 18 U.S.C. § 3553(a) sentencing factors; (4) "the serious nature of the offense" and "particularly the quick turn-around between his last deportation from this country, and then his re-entry." The district

court then indicated that it also had considered Rico-Mejia's conviction history—which included convictions for driving while intoxicated, a previous illegal entry, and terroristic threatening—and the sentences imposed pursuant to those prior convictions. The district court also indicated that it did not consider arrests that did not lead to convictions. The district court then concluded that to "promote respect for our laws, to discourage future criminal misconduct, which ... is important considering his extensive criminal history, the quick turn-arounds in violation of our Immigration laws, including this one," it was pronouncing the same sentence it would have pronounced even if the it had sustained Rico-Mejia's objection to the sixteen-level enhancement. The district court further added that "even if [terroristic threatening] wasn't a crime of violence, it could still be used as a conviction and considered as a factor for sentencing and promoting and considering public safety issues, as well as respect for our laws."

[3] **[4]** While a district court undoubtedly commits procedural error in improperly calculating the Guidelines range, *see United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012), that error can be considered harmless provided that the sentence did not result from the error. *United States v. Tzep–Mejia*, 461 F.3d 522, 526–27 & n.6 (5th Cir. 2006). One way to demonstrate that the sentence was not imposed as a result of the Guidelines error is to show that the district court considered the correct Guidelines range and subsequently indicated that it would impose the same sentence even if that range applied. *Id.* at 526 & n.6.

[5] However, where the district court does not consider the correct guidelines range, a determination of harmlessness requires the proponent of the sentence to "convincingly demonstrate[ ] both (1) that the district court would have imposed the same sentence had it not made the error and (2) that it would have done so for the same reasons it gave at the prior sentencing." *United States v. Ibarra–Luna,* 628 F.3d 712, 714 (5th Cir. 2010). This court has noted that such a showing involves a heavy burden, requiring the proponent to "point to evidence in the record that will convince [the appellate court] that the district court had a particular sentence in mind and would have imposed it, notwithstanding the error." *Richardson*, 676 F.3d at 511 (quoting *Ibarra–Luna*, 628 F.3d at 717, 718) (internal quotation marks omitted). As there is no explicit or particularized statement from the district court showing that it calculated or considered the correct Guidelines range, our harmless error analysis must take place in the more demanding *Ibarra–Luna* scenario.

***5** The Government points to several pieces of evidence in an effort to carry its burden. These include the various considerations listed by the district court in imposing the sentence and the district court's statement that it had "considered everything else about this case," which the Government argues would include Rico-Mejia's objection and the suggested sentencing range of 8–14 months contained within it.

Meanwhile, Rico-Mejia points to the facts that (1) the difference between his actual sentencing range and possible lesser sentencing ranges is significant (at least 20 months)[2], and (2) his sentence corresponded precisely to the bottom of the incorrectly calculated sentencing range. Rico-Mejia draws a parallel between his situation and the situation of the defendant in *United States v. Martinez–Romero*, 817 F.3d 917 (5th Cir. 2016), where the lowest end of the improperly calculated guideline range became the defendant's precise sentence, an occurrence which the court refused to attribute to "mere serendipity." *Id.* at 926. Key to the court's decision was the recognition that, despite the district court's "multitude of reasons" for its choice of sentence, a review of the record disclosed "no indication that the court's decision to select the exact low and high ends of the improper range was independent of the erroneous calculation that called the court's attention to that range in the first instance." *Id.* Accordingly, the court's choice to impose a guidelines sentence at precisely the bottom of the range was found to be influenced by the erroneous Guidelines calculation, even though the district court stated several times that it would have imposed the same sentence regardless of error. *Id.* at 925.

2 Rico-Mejia avers that the highest his sentencing range could be without the sixteen-level enhancement is 15 to 21 months, based on a categorization of his prior conviction as an aggravated felony. Yet even in advancing this argument he maintains that the correct range is 8–14 months.

The facts of this case are similar to those of *Martinez–Romero* in two key ways. Both cases involve: (1) sentences that correspond precisely to the bottom of an erroneous guidelines calculation; (2) statements by the district court regarding criminal history and willingness to impose sentences regardless of error in guideline

calculation.[3] The key potential difference between them relates to the presence of evidence to indicate that the court's decision to select precisely the bottom of the recommended Guidelines range was independent of the erroneous calculation. In *Martinez–Romero* there was no such evidence at all. *Id.* at 926. Here, there is some inferential evidence to be accounted for—although the district court never explicitly stated that it had calculated the Guidelines range that would have applied absent the sixteen-level upward adjustment, it did say that it had considered "everything else about this case," and Rico-Mejia's preferred calculation was included with his objection to the PSR. The combination of these facts could support the inference that the district court was not influenced by the incorrect calculation, but rather chose its sentence from among alternatives solely for the reasons it stated.

3 Indeed, the court in *Martinez–Romero* stated no less than three times "that even if the 16-level enhancement for the attempted kidnapping was incorrect, it would nonetheless impose the same 46-month sentence." *Martinez–Romero*, 817 F.3d at 925.

***6** This potential distinction notwithstanding, we hold that the Government's reference to the district court's vague and unparticularized statement as the basis for a speculative inference that the district court considered alternative ranges that it did not calculate is insufficient to carry its heavy burden under *Richardson*. 676 F.3d at 511. This is especially true in light of the district court's choice to impose a sentence that corresponded precisely to the bottom of the erroneous guidelines range, which constitutes evidence that the range impacted the district court's decision. *See Martinez–Romero*, 817 F.3d at 925–26. Moreover, the district court's other statements at the sentencing hearing do nothing to prove that the erroneous Guidelines calculation did not impact the sentence ultimately imposed. Accordingly, and akin to the situation in *Martinez–Romero*, we find that the Government is unable to convincingly show that the sentence imposed on Rico-Mejia was uninfluenced by the erroneous Guidelines calculation, such that we are "convince[d] ... that the district court had a particular sentence in mind and would have imposed it, notwithstanding the error." 676 F.3d at 511; *see also Ibarra–Luna,* 628 F.3d at 718–19.

IV.

On these facts, the Government has failed to meet its heavy burden to convincingly demonstrate that the district court would have imposed the same sentence regardless of its erroneous calculation. We therefore VACATE Rico-Mejia's sentence and REMAND to the district court for resentencing.

All Citations

--- F.3d ----, 2017 WL 568331

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APPENDIX D

NO. 16-41218

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

FREDIS ALBERTO REYES-CONTRERAS,
also known as Alberto Contreras-Romero,
Defendant-Appellant.

On Appeal from the United States District Court
For the Southern District of Texas
McAllen Division, Case No. 7:16-cr-606-1

UNITED STATES' PETITION FOR REHEARING EN BANC

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STATEMENT OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

1. The Honorable Micaela Alvarez, United States District Judge

2. United States of America, Plaintiff-Appellee

3. Fredis Alberto Reyes-Contreras, Defendant-Appellant

4. Counsel for Plaintiff-Appellee:

    a. United States Attorney Ryan K. Patrick;
    b. Assistant United States Attorney Carmen Castillo Mitchell, Chief, Appellate Division;
    c. Assistant United States Attorney Katherine L. Haden (appellate counsel);
    d. Assistant United States Attorney Alexandro Benavides; (trial counsel); and
    e. Assistant United States Attorney Kristen Joy Rees (trial counsel).

5. Counsel for Defendant-Appellee:

    a. Federal Public Defender Marjorie A. Meyers;
    b. Assistant Federal Public Defender Kathryn Shephard (appellate counsel); and
    c. Assistant Federal Public Defender Norman E. McInnis (trial counsel).

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

s/ Katherine L. Haden
KATHERINE L. HADEN
Assistant United States Attorney

STATEMENT REQUIRED BY RULE 35(b)

En banc review is warranted to correct erroneous Fifth Circuit precedent that is in conflict with *United States v. Castleman*, ___U.S.___, 134 S.Ct. 1405 (2014), and every other circuit court on a question of exceptional importance. *Castleman* eliminated the distinction between direct and indirect physical force in determining whether a misdemeanor domestic violence offense under 18 U.S.C. § 922(g)(9) has the use of force as an element. The Fifth Circuit stands alone among all other circuits in holding that *Castleman* does not abrogate the direct versus indirect use of force distinction for crimes of violence or violent felonies articulated in earlier decisions. [1] *United States v. Rico-Mejia*, 859 F.3d 318, 322-23 (5th Cir. 2017).

[1] *See United States v. Ellison*, 866 F.3d 32, 37-39 (1st Cir. 2017); *United States v. Hill*, 832 F.3d 135, 143-44 (2d Cir. 2016); *United States v. Chapman*, 866 F.3d 129, 133 (3d Cir. 2017), *petition for cert. docketed*, No. 17-8173 (March 20, 2018); *United States v. Reid,* 861 F.3d 523 (4th Cir.), *cert. denied,* 138 S.Ct. 462 (2017); *United States v. Verweiebe*, 874 F.3d 258, 261 (6th Cir. 2017); *United States v. Jennings*, 860 F.3d 450, 458-59 (7th Cir. 2017), *cert. denied*, 138 S.Ct. 701 (2018); *United States v. Rice,* 813 F.3d 704 (8th Cir. 2016); *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1291 (9th Cir.2017); *United States v. Ontiveros*, 875 F.3d 533, 537-38 (10th Cir. 2017); *United States v. DeShazior,* 882 F.3d 1352 (11th Cir. 2018); *United States v. Redrick,* 841 F.3d 478 (D.C. Cir. 2016), *cert. denied,* 137 S.Ct. 2204 (2017), *reh'g denied,* 138 S.Ct. 724 (2018).

The panel held that it was bound to follow *Rico-Mejia* under the rule of orderliness. *United States v. Reyes-Contreras*, 882 F.3d 113, 123 (5th Cir. 2018).[2] Reconsideration of this issue by the full Court is therefore necessary to secure and maintain uniformity of court decisions on an important recurring question that affects the application of the Sentencing Guidelines and certain statutes.

[2] The panel opinion is attached as "Appendix A".

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United States Sentencing Guidlines

NO. 16-41218

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

FREDIS ALBERTO REYES-CONTRERAS,
also known as Alberto Contreras-Romero,
Defendant-Appellant.

On Appeal from the United States District Court
For the Southern District of Texas
McAllen Division, Case No. 7:16-cr-606-1

UNITED STATES' PETITION FOR REHEARING EN BANC

STATEMENT OF THE ISSUE

Whether the indirect application of physical force qualifies as a "use of force" within the meaning of the Sentencing Guidelines' definition of a "crime of violence."

STATEMENT OF THE CASE

On April 10, 2016, authorities arrested Reyes-Contreras, a 46-year old native of Honduras, near Abram, Texas, after he waded across the Rio Grande River. ROA.123-24; PSR ¶4.[3] He subsequently pled guilty to being found in the United States unlawfully after having been deported, in violation of 8 U.S.C. § 1326(a) and (b). ROA.11, 62, 69, 124; PSR ¶2.

The United States Probation Officer (USPO) calculated a Sentencing Guidelines range of 41 to 51 months' imprisonment, based on a total offense level (TOL) of 21 (contingent upon the court granting a one-level reduction for timely acceptance of responsibility) and a criminal history category (CHC) of II. ROA.126, 133; PSR ¶¶22, 58. The USPO applied a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii) (2015), because Reyes-Contreras had a prior conviction for voluntary manslaughter that qualified as an enumerated "crime of violence." ROA.125; PSR ¶15.

[3] The appellate record ("ROA") is cited by the page number, which is referenced next to "16-41218" in the lower right corner of the document. Information in the August 9, 2017, revised Presentence Investigation Report ("PSR") is cited by both the appellate record page number and paragraph number.

The USPO reported that Reyes-Contreras was indicted in Missouri for "Murder Second Degree" and "Armed Criminal Action" (ACA), after beating his brother-in-law to death with a baseball bat. ROA.114, 128; PSR ¶28. He later pled guilty to voluntary manslaughter and ACA and was sentenced to ten years' imprisonment. ROA.112-13, 128; PSR ¶28. Reyes-Contreras also had numerous convictions and encounters with immigration and law enforcement officials that were not assessed criminal history points. ROA.127, 130, 135; PSR ¶¶25-27, 30-35, 72.

Reyes-Contreras disputed the classification of his voluntary manslaughter conviction as a "crime of violence." He contended that the Missouri statute is indivisible, and when viewed in its entirety, it does not fit the generic definition of "manslaughter," an enumerated "crime of violence" in U.S.S.G. § 2L1.2 cmt. 1(B)(iii).[4] ROA.90-91. Reyes-Contreras conceded that the first subsection of the voluntary manslaughter statute fits the generic definition of manslaughter, but contended that the second

[4] Under U.S.S.G. § 2L1.2 cmt. 1(B)(iii) (2015), a "crime of violence" means one of several enumerated crimes (including manslaughter), or "any other 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." Section 2L1.2 was amended in 2016 to eliminate the "crime of violence" enhancement, although such enhancement remains applicable to career offenders. *See* U.S.S.G. § 4B1.2(a).

subsection criminalizing assisted self-murder does not. ROA.90-91.[5] Reyes-Contreras did not address whether his conviction satisfies the "use of force" "crime of violence" definition since the PSR was silent on that point. ROA.90-92.

At sentencing, defense counsel reiterated his objection, and argued alternatively, that even if the Missouri statute is divisible, the government failed to establish which subsection applied. ROA.81. The district court overruled the objection, concluding that the statute is divisible and that the state court records show Reyes-Contreras was convicted under the first subsection of Missouri's voluntary manslaughter statute. ROA.80-82. The court adopted the USPO's Guidelines calculations and imposed 41 months' imprisonment. ROA.80, 88, 138.

[5] Missouri's voluntary manslaughter statute covers two offenses:

> (1) Caus[ing] the death of another person under circumstances that would constitute murder in the second degree . . . , except that he caused the death under the influence of sudden passion arising from adequate cause; or
>
> (2) Knowingly assist[ing] another in the commission of self-murder.

Mo. Rev. Stat. § 565.023 (2006).

A panel of this Court vacated Reyes-Contreras's sentence and remanded for resentencing. *United States v. Reyes-Contreras*, 882 F.3d 113, 125 (5th Cir. 2018). The panel reached several conclusions that are only marginally relevant to this petition. First, it applied *Mathis v. United States*, 136 S.Ct. 2243 (2016), and determined that the Missouri voluntary manslaughter statute is divisible. *Id.* at 119. Nonetheless, the panel concluded that it could not determine from the state court documents which subsection of the voluntary manslaughter statute applied to Reyes-Contreras's conviction. *Id.* at 121-22. Because Reyes-Contreras was indicted for second-degree murder and pled guilty to voluntary manslaughter, the panel could not consider his indictment to discern that he was convicted of generic voluntary manslaughter. *Id.* The panel held that the Missouri statute as a whole does not qualify as generic manslaughter or murder because assisted self-murder is generally treated as a distinct offense. *Id.* at 122.

The panel then turned to the critical argument here: whether the assisted suicide subsection of the Missouri statute requires the use of

physical force under § 2L1.2's "crime of violence" definition.[6] *Id*. Reyes-Contreras argued that said provision requires "the use of destructive or violent force as distinguished from causing bodily injury through . . . indirect means." *Id*. at 123. The government countered that the Supreme Court's decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014), abrogated earlier Fifth Circuit decisions drawing a line between using direct force and indirect force. *Reyes-Contreras*, 882 F.3d at 123.

The panel decided that the Court "already held that *Castleman* does not abrogate [previous] decisions on the use of force under the Guidelines." *Id*. (citing *United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017)). The panel recognized "that many circuits have . . . expanded *Castleman* to state that indirect causation of bodily injury may warrant a ['crime of violence'] enhancement." *Id*. at 123. However, it concluded that "*Castleman* does not on its own terms make this expansion," and because *Rico-Mejia* declined to extend *Castleman*, it remains binding under the rule of orderliness. *Id*. The panel ruled that assisting in self-murder "can—*but need not*—involve the application of physical force." *Id*.

[6] Although the parties did not address whether the Missouri voluntary manslaughter statute has the use of force as an element in the district court, they addressed the issue on appeal—recognizing this Court can affirm on any ground found in the record. *See Reyes-Contreras*, 882 F.3d at 122 n.14.

(emphasis in original) (illustrating as indirect force, entering into a suicide pact with a friend and handing him the weapon). Hence, the voluntary manslaughter statute, when viewed in its entirety, does not have the "use of force" as an element. *Id.*

Concurring in the judgment, Judge Jones agreed that *Rico-Mejia* was binding, but wrote separately to explain why the *Rico-Mejia* panel erred in holding that *Castleman* does not abrogate the Fifth Circuit's "direct force" requirement for crimes of violence. *Id.* at 125. Judge Jones agreed that "*Castleman* does not alter the degree of force this circuit requires to satisfy the 'crime of violence' requirement." *Id.* at 126. However, she opined that once it is determined that the degree of force is sufficient, *Castleman* instructs that it "'does not matter' whether 'the harm occurs indirectly, rather than directly.'" *Id.* (quoting *Castleman*, 134 S.Ct. at 1415). *Castleman* rejected the argument that "*indirect* application of violent force" does not involve the use of force. *Id.* at 125 (emphasis in original). Accordingly, Judge Jones called for the en banc Court to reconsider *Rico-Mejia*, noting that "[e]very other circuit to address this issue has applied *Castleman*'s direct-indirect analysis in the 'crime of violence' or 'violent felony' context[.]" *Id.* at 126-27.

ARGUMENT

A. *Rico-Mejia* Should Be Overruled

1. Before *Castleman*, this Court Narrowly Construed the "Crime of Violence" "Use of Force" Definition in Sentencing Guidelines and 18 U.S.C. § 16(a) [7]

Before *Castleman*, this Court held that an offense stated in result-oriented terms, such as causing bodily injury, lacks the use of force as an element because it can be committed without the direct application of force to the victim. *See United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (Texas assault, which is phrased in terms of intentionally, knowingly, or recklessly causing bodily injury, lacks force as an element because it can be committed without using direct physical force against the victim); *United States v. Vargas-Duran*, 356 F.3d 598, 605-06 n.10 (5th Cir. 2004) (en banc) (noting "[t]here is . . . a difference between a defendant's causation of bodily injury and the defendant's use of force[,]" in holding that intoxication assault is not a "crime of violence"

[7] Section 16(a) defines "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" The "crime of violence" definitions in U.S.S.G. § 2L1.2 cmt.1(B)(iii)(2015) and U.S.S.G. § 4B1.2(a)(1) are identical, except they omit reference to "property of another." Likewise, "violent felony" is defined, in relevant part, as any crime that "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)(2)(B) (Armed Career Criminal Act, "ACCA").

under § 2L1.2); *see also United States v. Calderon-Pena*, 383 F.3d 254, 260-61 (5th Cir. 2004) (en banc) (Texas child endangerment lacks the use or attempted use of physical force as an element to qualify as a "crime of violence" under § 2L1.2 because it does not require violent bodily contact or the infliction of bodily injury); *but see id.* at 269-71 (Smith, J. dissenting) (stating that the "crime of violence" enhancement should extend to applications of force that are subtle or indirect, and that the majority went too far in its mention of bodily contact).

Relevant here, the *Villegas-Hernandez* panel rejected the government's argument that intentionally causing injury necessarily implicates force for purposes of 18 U.S.C. § 16(a), but it did so while explicitly recognizing that its understanding of the term "use of force" was narrower than "it arguably could be." 468 F.3d at 879 & n.6. It read signals from *Calderon-Pena* as meaning that intentional causation of bodily injury was broad enough to cover "a number of acts, without use of 'destructive or violent force.'" *Id.* at 879. The Court listed examples to include "making available to the victim a poisoned drink while reassuring him the drink is safe; or telling the victim he can safely back his car out

while knowing an approaching car driven by an independently acting third party will hit the victim." *Id.*

2. *Castleman* Rejected the Distinction Between Direct and Indirect Applications of Force

In *Castleman*, the Supreme Court examined whether the defendant's prior Tennessee conviction qualified as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 924(a)(33)(A)(ii). *Castleman*, 134 S.Ct. at 1413-14. Such crime was defined as an offense that has "as an element, the use or attempted use of physical force. . . ." *Id.* at 1413. Castleman pleaded guilty to "intentionally or knowingly causing bodily injury" to the mother of his child. *Id.* The Court determined that the use of physical force is inherent in "causing bodily injury." *Id.* at 1414-15. The Court explained that "'physical force' is simply 'force exerted by and through concrete bodies,' as opposed to 'intellectual force or emotional force.'" *Id.* at 1414 (quoting *Johnson v. United States*, 559 U.S. 133, 138 (2010)). Breaking it down, the Court reasoned: "a 'bodily injury' must result from 'physical force'" and the application of that force "is a 'use' of force." 134 S.Ct. at 1414-15.

Castleman instructed whether the force is applied directly or indirectly is of no consequence. *Id.* Force may be applied directly through

immediate physical contact with the victim or indirectly, such as 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 1415. (citation and internal quotation marks omitted). The Court reasoned when a person "sprinkles poison in a victim's drink," he or she has used force because the "'use of force' . . . 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.* It does not matter that the harm occurred indirectly rather than directly "(as with a kick or punch)." *Id.* To conclude otherwise, "one could say that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim." *Id.*; *accord United States v. DeShazior,* 882 F.3d 1352, 1357-58 (11th Cir. 2018) (the use of physical force is used when "the actor knowingly employs a device to indirectly cause physical harm."); *Hill v. United States*, 877 F.3d 717, 720 (7th Cir. 2017) (A person applies force by applying "energy to bring about an effect on the would-be victim."); *United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017) ("A defendant uses physical force whenever his volitional act sets into motion a series of events that results in the application of a 'force capable

of causing physical pain or injury to another person.'") (internal citation omitted).

Although *Castleman* reserved deciding whether the causation of bodily injury, a term defined broadly under Tennessee law to include offensive touching, would necessitate "violent" force under *Johnson*'s definition of that phrase in ACCA,[8] its reasoning regarding direct and indirect force did not rest on any distinction regarding the requisite degree of force. *See United States v. Reid*, 861 F.3d 523, 528-29 (4th Cir.), *cert. denied*, 138 S.Ct. 462 (2017). Indeed, sister circuits have consistently agreed that the use of direct or indirect physical force capable of causing physical pain or injury to another person qualifies as a "crime of violence" or "violent felony" under *Johnson* and *Castleman*. *See Deshazior*, 882 F.3d at 1357-58; *United States v. Benton*, 876 F.3d 1260, 1262-63 (10th Cir. 2017); *Reid*, 861 F.3d at 529; *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1291 (9th Cir. 2017); *United States v. Rice*, 813 F.3d 704, 705-06 (8th Cir. 2016).

[8] *Johnson* defined "violent force" under ACCA as "force capable of causing physical pain or injury to another person." 559 U.S. at 140. *Johnson*'s definition of "violent force" also applies to crimes of violence. *See United States v. Mendez-Henriquez*, 847 F.3d 214, 221-22 (5th Cir.), *cert. denied*, 137 S.Ct. 2177 (2017) (treating both definitions interchangeably because of identical language).

After *Castleman*, the Supreme Court further held that "[r]eckless assaults, no less than the knowing or intentional ones we addressed in *Castleman*, satisfy" the use of force provision in § 921(a)(33)(A)(ii), defining misdemeanor crimes of domestic violence. *Voisine v. United States*, 136 S.Ct. 2272, 2278 (2016). The Court explained that the "use" of force must be volitional and not the result of an involuntary act. *Id*. at 2278-79; *see Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (holding the "use" of force must entail more than negligent or accidental conduct).

The least culpable act under the statute for which Reyes-Contreras was convicted is knowingly assisting another in self-murder. *See* Mo. Rev. Stat. § 565.023.1(2). Thus, the defendant must knowingly assist in causing the death of another. "Because it is impossible to cause bodily injury without force, it would also be impossible to cause death without force." *United States v. Peeples*, 879 F.3d 282, 287 (8th Cir. 2018); *accord In re Irby*, 858 F.3d 231, 236 (4th Cir. 2017); *see generally Hill*, 877 F.3d at 720 (noting that *Johnson* "refers to murder as the paradigm of an offense that comes within the elements clause of § 924(e)"). Indeed, Judge Jones noted that the Court should "uphold the sentence enhancement here because . . . assisted suicide, has the 'use of force' as an element and

should be designated as a 'crime of violence' under *Castleman*." *Reyes-Contreras*, 882 F.3d at 125 n.2.

3. *Castleman* Undercuts Reasoning of this Court's Decisions

This Court's analysis in *Villegas-Hernandez* and *Vargas-Duran* cannot be squared with *Castleman*. Nevertheless, the Court in *Rico-Mejia* held (without much analysis or acknowledging a circuit split) that *Castleman* applies only in the context of the misdemeanor domestic violence crime defined in § 921(a)(33)(A) because the physical force required for a crime of violence "is narrower in scope than that applicable in the domestic violence context." 859 F.3d at 322.

But *Castleman* is not so easily dismissed. *Rico-Mejia* confuses two distinct questions in its cursory treatment of *Castleman*: (1) whether the statute has the requisite degree of force to qualify as a "crime of violence;" and (2) whether the term "use of force" requires the direct application of force to a victim, so that a statute turning on the results of conduct does not qualify as a "crime of violence." *See Reyes-Contreras*, 882 F.3d at 126 (Jones, J. concurring). To be sure, *Castleman* acknowledged that Courts of Appeals have generally held that "mere offensive touching," as encompassed by the misdemeanor domestic violence crime, does not meet

the necessary degree of physical force for a "crime of violence," and that nothing in the opinion cast doubt on those holdings. 134 S.Ct. at 1411 n.4. However, *Castleman* instructed that "if the degree of force is sufficient, it 'does not matter' whether 'the harm occurs indirectly, rather than directly.'" *Reyes-Contreras*, 882 F.3d at 126 (Jones, J. concurring) (quoting *Castleman*, 134 S.Ct. at 1415).

Thus, although *Castleman* does not alter the requisite degree of force to satisfy the "crime of violence" enhancement, it abrogates cases "holding that indirect applications of force are distinct and insufficient." *Id*. *Rico-Mejia,* therefore, erred in holding that *Castleman* does not disturb this Court's "direct force" requirement for crimes of violence.

Rico-Mejia is also incompatible with earlier intra-circuit decisions applying *Voisine* outside the realm of misdemeanor domestic violence cases. *See Mendez-Henriquez*, 847 F.3d at 221-22 (relying on *Voisine*, not *Vargas-Duran*, in ruling that § 2L1.2's "use of force" provisions only require that the predicate conduct is volitional); *United States v Howell*, 838 F.3d 489, 501 (5th Cir. 2016) (finding that *Voisine* substantially undercut *Vargas-Duran* in holding that a reckless assault categorically

qualified as a "crime of violence" under § 4B1.2), *cert. denied,* 137 S.Ct. 1108 (2017).

4. The Fifth Circuit is the Outlier on this Issue

Every other circuit has extended *Castleman*'s reasoning regarding direct and indirect physical force outside the context of misdemeanor crimes of domestic violence: **First Circuit**—*United States v. Ellison*, 866 F.3d 32, 37-39 (1st Cir. 2017) (§ 4B1.2); **Second Circuit**—*United States v. Hill*, 832 F.3d 135, 142-44 (2d Cir. 2016) (18 U.S.C. § 924(c)(3)(A) and (j)(1)); **Third Circuit**— *United States v. Chapman*, 866 F.3d 129, 133 (3d Cir. 2017) (§ 4B1.2), *petition for cert. docketed*, No. 17-8173 (March 20, 2018); **Fourth Circuit**—*United States v. Covington*, 880 F.3d 129, 133-135 (4th Cir. 2018) (§ 4B1.2); *Reid*, 861 F.3d at 525-27 (ACCA); *cf. United States v. Middleton*, 883 F.3d 485, 497-99 (4th Cir. 2018) (holding there still must be a causal link between the indirect force applied and bodily injury; finding that link absent in an involuntary manslaughter statute that could be violated by supplying alcohol to a person who later dies in a car accident); **Sixth Circuit**—*Verweiebe*, 874 F.3d at 261 (§ 4B1.2); **Seventh Circuit**—*Jennings*, 860 F.3d at 458-59 (ACCA and § 4B1.2); *Hill*, 877 F.3d at 719-20 (ACCA); **Eighth Circuit**—*Peeples*, 879 F.3d at

286-87 (§ 4B1.2); *Rice*, 813 F.3d at 705-06 (§ 4B1.2); **Ninth Circuit**—*United States v. Studhorse*, 883 F.3d 1198, 1204-06 (9th Cir. 2018) (§ 16(a)); *Calvillo-Palacios*, 860 F.3d at 1291 (§ 2L1.2); **Tenth Circuit**—*Benton*, 876 F.3d at 1262-63 (§ 4B1.2*)*; *Ontiveros*, 875 F.3d at 538 (ACCA); **Eleventh Circuit**—*DeShazior,* 882 F.3d at 1357-58 (ACCA); **D.C. Circuit**—*Redrick,* 841 F.3d at 484 (ACCA).

B. Reasons for Granting En Banc Review

Rehearing en banc is necessary to secure and maintain uniformity in court decisions. *Rico-Mejia* and *Reyes-Contreras* conflict with *Castleman* and the authoritative decisions of all other circuit courts. Furthermore, *Rico-Mejia*'s narrow reading of *Castleman* is incompatible with earlier decisions extending *Voisine* (*Castleman*'s companion case) outside of the domestic violence context. *See Mendez-Henriquez*, 847 F.3d at 221-22; *Howell*, 838 F.3d at 499-500. These prior decisions provide a reasonable intra-circuit foothold for treating *Castleman* similarly.

En banc review is warranted to ensure the law is predictable and applied consistently. Notably, this Court has underscored the importance of predictability and consistency in the law. *See Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 363 (5th Cir. 2009) (en banc) (The Court should "look

to the opinions of other circuits for persuasive guidance, always chary to create a circuit split." It should also review "all that has been said and held by the Supreme Court.").

Moreover, this appeal raises "a question of exceptional importance" because it impacts this Court's jurisprudence in many areas, including how the Court construes the definition of "crime of violence" under § 16(a),[9] § 924(c)(3), § 2L1.2 cmt. 1(B)(iii) (2015), § 2L1.2 cmt. 2 (2016), § 4B1.2(a)(1), and the parallel definition of "violent felony" under § 924(e)(2)(B). Any offense that could possibly involve only indirect force will be exempted as a predicate for sentence enhancements, thereby hindering the ability of prosecutors to use convictions for violent crimes to enhance sentences.

The distinction between direct and indirect force defies common sense and allows the most morally repugnant crimes, including murder, to escape classification as a "crime of violence" or "violent felony" while many less serious crimes are so classified. *See In re Irby*, 858 F.3d at 237 (The Supreme Court has stated repeatedly that murder has no

[9] Statutes incorporating § 16(a)'s definition include 18 U.S.C. §§ 16, 25(a)(1), 924(c)(3), 931(a)(1), and 8 U.S.C. § 1101(a)(43)(F) (incorporated in 8 U.S.C. § 1326(b)(2) and § 2L1.2 cmt. 3(A) (2015)).

comparison "'in terms of moral depravity and of the injury to the person' given its 'severity and irrevocability.'") (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)); *see also Chapman*, 866 F.3d at 136 (The "direct force" requirement "allows no room for murder or voluntary manslaughter to qualify as crimes of violence because both offenses can be committed without the perpetrator striking the victim[,]" undermining "Congress's goal of imposing 'substantial prison terms' on repeat violent offenders.'") (quoting § 4B1.1 cmt. background). Sentencing law should not turn on fine "reality-defying distinctions" to support exempting an offense as a "crime of violence" just because the offense may involve indirect force. *Verwiebe*, 874 F.3d at 261.

C. This Case is Solid Vehicle for En Banc Review

The government would not typically view a case involving the interpretation of a now-superseded Sentencing Guidelines provision as an appropriate vehicle for en banc review, particularly given that such a case would generally not be suitable for Supreme Court review. *See Braxton v. United States*, 500 U.S. 344, 348 (1991). Several factors, however, warrant en banc review here. First, the concurring opinion in this case called for en banc review of the question presented, and

suggested that the Section 2L1.2 context was not an impediment. *Reyes-Contreras*, 882 F.3d at 125 n.2. Second, given the frequency this issue arises in a broad range of cases, and this Court's status as an outlier among the courts of appeals, it is important to address the issue as soon as possible. *See Villegas-Hernandez*, 468 F.3d at 878-82 (adhering to precedent construing "crime of violence" definitions in both statutes and Guidelines). Lastly, although the government would support *sua sponte* en banc review of the issue in any suitable pending case, it has not identified a better vehicle for quick resolution of the issue.

CONCLUSION

This Court should grant the government's petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Katherine L. Haden, Assistant United States Attorney, hereby certify that on, April 5, 2018, an electronic copy of the Appellee's Petition for Rehearing En Banc was served by notice of electronic filing via this court's ECF system upon opposing counsel, Assistant Federal Public Defender Kathryn Shephard.

Upon notification that the electronically-filed petition has been accepted as sufficient, and upon the Clerk's request, twenty (20) paper copies of this petition will be placed in the United States Mail, postage prepaid, addressed to the Clerk. *See* 5th Cir. R. 25.2.1, 31.1, 35.2; 5th Cir. ECF filing standard E(1).

s/ Katherine L. Haden
KATHERINE L. HADEN
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 35(b)(2) because it contains 3,898 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook, 14 point font for text and 12 point font for footnotes.

3. This petition complies with the privacy redaction requirement of 5th Cir. R. 25.2.13 because it has been redacted of any personal data identifiers.

4. This petition complies with the electronic submission of 5th Cir. R.25.2.1, because it is an exact copy of the paper document.

5. This petition is free of viruses because it has been scanned for viruses with the most recent version of Trend Micro scanning program.

s/ Katherine L. Haden
KATHERINE L. HADEN
Assistant United States Attorney

APPENDIX A

Panel Slip Opinion

882 F.3d 113
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Fredis Alberto **REYES–CONTRERAS**, also known as Alberto Contreras–Romero, Defendant–Appellant.

No. 16-41218
|
Filed: 02/06/2018

Synopsis

Background: Defendant was convicted, on his guilty plea, in the United States District Court for the Southern District of Texas, Micaela Alvarez, J., of illegal reentry and was sentenced to 41-months' imprisonment under 16-level crime-of-violence enhancement for prior Missouri voluntary manslaughter conviction. Defendant appealed.

Holdings: The Court of Appeals, Jerry E. Smith, Circuit Judge, held that:

[1] Missouri manslaughter statute was divisible;

[2] Court of Appeals could not look to indictment to determine which subsection of Missouri manslaughter statute defendant was convicted of;

[3] elements of Missouri manslaughter statute were not sufficiently similar to elements of generic manslaughter;

[4] prior conviction for Missouri manslaughter did not qualify for 16-level crime-of-violence enhancement;

[5] conviction did not qualify for crime-of-violence enhancement based on conviction for a crime having as an element the use of force; and

[6] district court's erroneous application of 16-level crime-of-violence enhancement was not harmless.

Vacated and remanded.

Edith H. Jones, Circuit Judge, filed separate concurring opinion.

West Headnotes (18)

[1] Sentencing and Punishment
⇦ Crime of violence

To qualify as an enumerated crime for purposes of 16-level enhancement for crime-of-violence under Sentencing Guidelines provision governing unlawfully entering or remaining in the United States, the statute of conviction must match the generic offense; under this categorical approach, the court must ignore the facts of the case and ask whether the elements of the

crime of conviction and the elements of the generic crime are sufficiently similar. U.S.S.G. §§ 2L1.2, 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[2] Sentencing and Punishment
⇦ Crime of violence

For purposes of determining whether a defendant's conviction constitutes an enumerated crime for purposes of 16-level crime-of-violence enhancement under Sentencing Guidelines provision governing unlawfully entering or remaining in the United States, when a defendant pleads guilty, the elements of a crime of conviction are those things he necessarily admits in his plea. U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[3] Sentencing and Punishment
⇦ Crime of violence

For purposes of determining whether a defendant's conviction constitutes an enumerated crime for purposes of 16-level crime-of-violence enhancement under Sentencing Guidelines provision governing unlawfully entering or remaining in the United States, if a statute is divisible, federal court employs the modified categorical approach and looks to certain documents such as the indictment, jury instructions, or plea agreements and colloquies to determine which subsection of the statute was the basis for conviction, and then compares the elements of that subsection with the elements of the generic crime, but if the statute lists means of fulfilling a single offense, it is indivisible and must be taken as a whole instead of using the facts of the offense to narrow the statute. U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[4] Sentencing and Punishment
⇦ Offense or adjudication in other jurisdiction

To determine whether an alternatively phrased statute lays out elements or means, for purposes of determining whether statute is divisible as would warrant modified categorical approach for determining whether a conviction under the statute constitutes an enumerated crime for purposes of 16-level crime-of-violence enhancement under Sentencing Guidelines provision governing unlawfully entering or remaining in the United States, a federal court looks first to state-court decisions, second to the statute itself, and finally to a limited permissible list of documents such as the indictment, jury instructions, and plea agreement and colloquy, and

if none of those sources definitively answers the question of divisibility, then the court must consider the statute as a whole. U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[5] Sentencing and Punishment

⇦ Offense or adjudication in other jurisdiction

Missouri manslaughter statute was divisible, and thus district court could use modified categorical approach to determine whether conviction under the statute warranted 16-level crime of violence enhancement under Sentencing Guidelines provision governing unlawfully entering or remaining in the United States; Missouri statute on lesser-included offenses delineated first subsection of statute, which prohibited causing death of another person under circumstances that would constitute murder where the death was caused under influence of sudden passion arising from adequate cause, as lesser-included offense of second degree murder, but did not delineate second subsection, which prohibited assisting another in the commission of self-murder, and to convict a defendant of voluntary manslaughter as lesser-included offense, jury needed to unanimously find elements of first subsection without any consideration of second subsection. Mo. Ann. Stat. §§ 565.023, 565.023.1(1); U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[6] Criminal Law

⇦ Nature of crime in general

"Elements" are the constituent parts of a crime's legal definition, the things the prosecution must prove to sustain a conviction.

1 Cases that cite this headnote

[7] Sentencing and Punishment

⇦ Crime of violence

Under modified categorical approach for determining whether crime of conviction is enumerated crime supporting Sentencing Guidelines crime-of-violence enhancement, documents such as the indictment, jury instructions, or plea agreements and colloquies may be used solely as a tool to identify the elements of the crime of conviction and not to identify facts supporting the enhancement. U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[8] Sentencing and Punishment

⇦ Crime of violence

When crime in indictment is different from crime pleaded,

exception to general rule that a federal court cannot use an indictment to narrow the subsection of conviction for purposes of determining whether prior conviction warrants 16-level crime-of-violence enhancement under Sentencing Guidelines provision governing unlawfully entering or remaining in the United States is where the plea references a lesser-included offense, allowing the indictment to clarify the ambiguity in the plea. U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[9] Sentencing and Punishment

Offense or adjudication in other jurisdiction

Although Missouri manslaughter, which defendant was convicted of, on his guilty plea, was divisible and could warrant 16-level crime of violence enhancement under Sentencing Guidelines provision governing unlawfully entering or remaining the United States, under modified categorical approach, court could not look to indictment charging defendant with second-degree murder to determine which subsection of Missouri voluntary manslaughter defendant was previously convicted for; the guilty plea did not reference a lesser included offense. Mo. Ann. Stat. §§ 565.023, 565.023.1(1); U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[10] Sentencing and Punishment

Offense or adjudication in other jurisdiction

Elements of Missouri manslaughter statute, which prohibited causing death of another person under circumstances that would constitute murder where the death was caused under influence of sudden passion arising from adequate cause, and prohibited knowingly assisting another in the commission of self-murder, were not sufficiently similar to elements of generic crime, and thus 16-level crime-of-violence enhancement under Sentencing Guidelines provision governing unlawfully entering or remaining in the United States, based on defendant's prior Missouri manslaughter conviction, was not warranted; although first provision criminalized generic manslaughter, knowingly assisting another in self-murder was not generic murder. Mo. Ann. Stat. § 565.023; U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[11] Sentencing and Punishment

Crime of violence

For the use of force to be an element of crime of conviction, as required for 16-level crime-of-violence enhancement under Sentencing Guidelines provision governing unlawfully entering or remaining in the United States to apply, force must be a constituent part of a claim that must be proved for the claim to succeed in every case charging that offense. U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[12] Sentencing and Punishment

⇦ Offense or adjudication in other jurisdiction

Assisting in self-murder did not require use of force, and thus defendant's prior conviction under Missouri manslaughter statute, which prohibited causing death of another person under circumstances that would constitute murder where the death was caused under influence of sudden passion arising from adequate cause, and prohibited knowingly assisting another in the commission of self-murder, did not qualify for 16-level crime-of-violence enhancement under Sentencing Guidelines provision governing unlawfully entering or remaining in the United States; indirect causation of bodily injury did not constitute use of force, and assisting in self murder could be committed without any bodily contact, let alone violent or forceful contact. Mo. Ann. Stat. § 565.023; U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[13] Sentencing and Punishment

⇦ Crime of violence

To qualify for crime-of-violence enhancement under Sentencing Guidelines provision governing unlawfully entering or remaining in the United States for a crime having as an element the use of force, use of a dangerous instrument or deadly weapon must be more than mere possession and must include at least threatening physical force. U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[14] Sentencing and Punishment

⇦ Offense or adjudication in other jurisdiction

Because, under Missouri law, possession that bolsters a defendant's confidence to commit a felony is sufficient for conviction of armed criminal action, the statute governing offense of armed criminal action criminalizes more than the "use" of force under the Federal Sentencing Guidelines, and thus conviction under the statute is not sufficient to qualify for crime-of-violence enhancement

based on conviction for a crime having as an element the use of force under the Guidelines provision governing unlawfully entering or remaining in the United States. Mo. Ann. Stat. § 571.015; U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[15] Criminal Law

Sentencing and Punishment

To show that error in Federal Sentencing Guidelines calculation is harmless, the government must demonstrate both that the district court would have imposed the same sentence for the same reasons and that it was not influenced by an erroneous Guidelines calculation. U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[16] Criminal Law

Sentencing and Punishment

District Court's erroneous application of 16-level crime-of-violence enhancement for defendant convicted of illegal reentry, based on his prior conviction for voluntary manslaughter in Missouri, resulting in Sentencing Guidelines range of 41 to 51 months, was not harmless; District Court sentenced Defendant to 41 months' imprisonment, proper range was 15 to 21 months, and even though record strongly supported that District Court would think that range was too low given its statement that then-forthcoming 2016 amendment to Guidelines, which would have lowered range to 21 to 27 months, would not adequately address the type of conviction of record, it never stated that it would impose the same 41-month sentence absent any error. Immigration and Nationality Act § 276, 8 U.S.C.A. §§ 1326(a), 1326(b); Mo. Ann. Stat. § 565.023; U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

[17] Criminal Law

Sentencing and Punishment

To show that district court would have imposed the same sentence for the same reasons, as required for erroneous Federal Sentencing Guidelines calculation to be harmless, a district court need not use "magic words," but it must be evident that it would have imposed the same sentence absent the error. U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[18] Criminal Law

Sentencing and Punishment

District Court's erroneous application of 16-level crime-

of-violence enhancement for defendant convicted of illegal reentry, based on his prior conviction for voluntary manslaughter in Missouri, resulting in Sentencing Guidelines range of 41 to 51 months, was not harmless; District Court did not provide a basis for chosen sentence independent of the erroneously calculated range. Immigration and Nationality Act § 276, 8 U.S.C.A. §§ 1326(a), 1326(b); Mo. Ann. Stat. § 565.023; U.S.S.G. § 2L1.2(b)(1)(A)(ii).

Cases that cite this headnote

Appeal from the United States District Court for the Southern District of Texas, Micaela Alvarez, U.S. District Judge

Attorneys and Law Firms

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Marjorie A. Meyers, Federal Public Defender, Kathryn Shephard, Federal Public Defender's Office, Southern District of Texas, Houston, TX, Timothy William Crooks, Houston, TX, for Defendant–Appellant.

Before JONES, SMITH, and PRADO, Circuit Judges.

Opinion

JERRY E. SMITH, Circuit Judge

Fredis **Reyes–Contreras** pleaded guilty of illegal reentry under 8 U.S.C. § 1326(a) and (b). Because he had been convicted of manslaughter in Missouri, the court applied the sixteen-level crime-of-violence ("COV") enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii). **Reyes–Contreras** appeals the enhancement, claiming that Missouri's manslaughter statute is non-generic under *Mathis*. Though we find that the statute is divisible and could warrant an enhancement under the modified categorical approach, the documents of conviction do not indicate the subsection of conviction, so as required by our caselaw we vacate and remand for resentencing.

I.

Reyes–Contreras was apprehended after illegally crossing from Mexico. Because he had been deported, he was charged with illegal reentry under 8 U.S.C. § 1326(a) and (b). He admitted to being a citizen of Honduras and entered a guilty plea with no plea agreement. He claims he entered illegally because a gang in Honduras threatened his life if he did not pay them money.

A criminal record check revealed two Missouri convictions from 2006: one for voluntary manslaughter in the first degree and a second for armed criminal

action. An immigration check showed that **Reyes–Contreras** had been deported in 2012.

Given the above information, the presentence report ("PSR") assigned **Reyes–Contreras** a base offense level of 8 under U.S.S.G. § 2L1.2(a)[1] and applied a 16–level COV enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii). Two levels were subtracted for acceptance of responsibility, and a third level for timely acceptance was subtracted at the sentencing hearing, leaving **Reyes–Contreras** at a level of 21.

The PSR assigned four criminal history points, three for the Missouri convictions and one for a 2001 conviction that was later subtracted because it was more than ten years old. That yielded a Category II criminal history. The Guidelines range for the offense was 41–51 months, and the district court sentenced **Reyes–Contreras** to 41 months.

***118** At issue is the sixteen-level enhancement for a COV given the Missouri conviction for voluntary manslaughter. **Reyes–Contreras** was seen striking the victim—his brother-in-law—on the head with a baseball bat, causing death. **Reyes–Contreras** contends he committed the offense in defense of his younger brother because his brother-in-law had attacked his brother with a knife.

Reyes–Contreras was charged with second degree murder, a Class A felony. The indictment includes the fact that **Reyes–Contreras** caused the death of another by striking him with a baseball bat. **Reyes–Contreras** pleaded guilty of voluntary manslaughter, a Class B felony. The plea includes neither an elaboration of the facts nor the subsection of conviction. Because the Missouri manslaughter statute criminalizes generic manslaughter in subsection (1) as well as knowingly assisting another in self-murder in subsection (2), **Reyes–Contreras** asserts that the statute is indivisible and overbroad under *Mathis*. **Reyes–Contreras** preserved his objection to the enhancement, so our review is de novo. *United States v. Rodriguez*, 711 F.3d 541, 548 (5th Cir. 2013) (en banc).

II.

A.

[1] **[2]** The Guidelines establish that a COV enhancement applies to an enumerated list of crimes, including manslaughter, and to offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2 cmt. 1(B)(iii). To qualify as an enumerated crime, the statute of conviction must match the generic offense. *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 2247, 195 L.Ed.2d 604 (2016); *Taylor v. United States*, 495 U.S. 575, 598, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). Under this categorical approach, the court must ignore the facts of the case and ask whether the elements of the crime of conviction and the elements of the generic crime are sufficiently similar. *Mathis*, 136 S.Ct. at 2248. When a defendant pleads

guilty, the elements are those things he necessarily admits in his plea. *Id.*

[3] If a statute is divisible, we employ the modified categorical approach and look to certain documents to determine which subsection of the statute was the basis for conviction. *Shepard v. United States*, 544 U.S. 13, 25, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). We then compare the elements of that subsection with the elements of the generic crime. But if the statute lists means of fulfilling a single offense, it is indivisible and must be taken as a whole instead of using the facts of the offense to narrow the statute. *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 2290, 186 L.Ed.2d 438 (2013).

B.

The Missouri voluntary manslaughter statute, MO. ANN. STAT. § 565.023, reads as follows[2]:

> 1. A person commits the crime of voluntary manslaughter if he:
>
> (1) Causes the death of another person under circumstances that would constitute murder in the second degree under subdivision (1) of subsection 1 of section 565.021, except that he caused the death under the influence of sudden passion arising from adequate cause; or
>
> ***119** (2) Knowingly assists another in the commission of self-murder.
>
> 2. The defendant shall have the burden of injecting the issue of influence of sudden passion arising from adequate cause under subdivision (1) of subsection 1 of this section.
>
> 3. Voluntary manslaughter is a class B felony.

Second degree murder under MO. ANN. STAT. § 565.023.1(1) has the following elements[3]:

> 1. A person commits the crime of murder in the second degree if he:
>
> (1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person ....

The parties do not dispute that manslaughter as defined in subsection (1) is a COV meeting the elements of generic manslaughter.[4] **Reyes–Contreras** contends that the statute is indivisible and cannot be generic because of the criminalization of assisting another in self-murder in subsection (2). He further asserts that subsection (2) lacks as an element the use of force such that it does not qualify under the alternative definition of a COV.

C.

[4] To determine whether an alternatively phrased statute lays out elements or means, we follow *Mathis* and look first to state-court decisions, second to the statute itself, and finally to a limited

permissible list of documents such as the indictment, jury instructions, and plea agreement and colloquy. If none of those sources definitively answers the question of divisibility, then *Taylor*'s demand for certainty has not been met, and we must consider the statute as a whole. *Mathis*, 136 S.Ct. at 2256–57.

[5] We conclude that Missouri's manslaughter statute is divisible. There is no state highest-court decision definitively saying that, but the statutory framework and state caselaw as a whole convincingly demonstrate that subsection (1) and subsection (2) manslaughter are offenses with distinct elements. [5]

1.

Divisibility is first seen in the statutory scheme. The provision on lesser-included offenses, MO. ANN. STAT. § 565.025.2(2), [6] delineates subsection (1) voluntary manslaughter as a lesser-included offense of ***120** second-degree murder. [7] It does not so list voluntary manslaughter as a whole or under subsection (2). Thus the statutory structure establishes manslaughter under subsections (1) and (2) as separate crimes requiring different elements, given that only one is included in the section on lesser-included offenses.

[6] When voluntary manslaughter under subsection (1) is charged as a lesser-included offense, there are accompanying instructions specifying what the jury must find. This satisfies the *Mathis* criteria, 136 S.Ct. at 2256, that a statute identify "which things must be charged." State caselaw lays out these instructions, showing that to convict a defendant of voluntary manslaughter as a lesser-included offense, the jury must unanimously find the elements of subsection (1) without any consideration of subsection (2). [8] Because the jury must find every element of subsection (1), standing alone, to convict, subsection (1) must contain elements that are distinct from subsection (2). [9]

2.

Missouri state-court opinions also discuss voluntary manslaughter in a way that treats it as divisible. For example, "[a] person commits the crime of voluntary manslaughter if he" satisfies each element under subsection (1). [10] The court ends there full-stop with no mention of alternative means or a discussion of subsection (2). Taking state law as a whole, then, *Taylor*'s "demand for certainty" is met that the voluntary manslaughter statute sets out two separate offenses.

III.

Even though the statute is divisible, we must be able to discern whether the generic subsection (1) manslaughter formed the basis of **Reyes–Contreras's** conviction. If he was convicted under the statute as a whole or under subsection (2), the enhancement

cannot apply unless subsection (2) is generic or has as an element the use of force. *See United States v. Neri–Hernandes*, 504 F.3d 587, 589 (5th Cir. 2007).

A.

[7] Under *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), we may use the "modified categorical approach" and look to "a limited class of documents" such as the indictment, jury instructions, or plea agreements and colloquies to determine the crime of conviction. *Mathis*, 136 S.Ct. at 2249; *see also Shepard*, 544 U.S. at 26, 125 S.Ct. 1254. Those may be used solely "as a tool to identify the elements of the crime of conviction" and not to identify facts supporting a COV enhancement. *Mathis*, 136 S.Ct. at 2253; *see also Descamps*, 133 S.Ct. at 2285.

Reyes–Contreras's indictment shows that he was charged with second-degree murder (Count One) and armed criminal action (Count Two). The indictment makes ***121** no mention of a lesser-included offense or of manslaughter as a separate offense. Count One does reflect that **Reyes–Contreras** "knowingly or with the purpose of causing serious physical injury to [the victim] caused [his death] by striking him with a baseball bat." His conviction, however, merely states "voluntary manslaughter first degree."

At sentencing, the district court stated it was clear which subsection formed the basis of conviction because the judgment shows "voluntary man-slaughter first degree." There is, however, no such crime; there is only voluntary manslaughter with two subsections ungraded by degree. *See* MO. ANN. STAT. § 565.023. The district court stated that the degrees were defined in MO. ANN. STAT. § 565.025.[11] That section, however, delineates lesser-included offenses of first-and second-degree murder. Although it does state that "voluntary manslaughter under subdivision (1) of subsection 1 of section 565.023" is a "lesser degree" offense of second-degree murder, MO. ANN. STAT. § 565.025, it nowhere defines subsection (1) manslaughter as "first degree." Thus, the district court's reliance on this language in the plea is misguided.

B.

[8] As a general rule, we cannot use an indictment to narrow the subsection of conviction if it is for a crime different from the crime pleaded. *United States v. Turner*, 349 F.3d 833, 836 (5th Cir. 2003). The general rule in *Turner* was explained further in *Neri–Hernandes* and *Bonilla.* In *Neri–Hernandes*, 504 F.3d at 590, we stated broadly that "the district court cannot use the indictment to pare down the statute of conviction to determine under which subsection [the defendant] pleaded guilty" if the defendant never pleaded to the crime in the indictment. *Accord Bonilla*, 524 F.3d at 652.

There is an exception where the plea references a lesser-included offense, allowing the indictment to clarify the ambiguity in

the plea. For example, in *United States v. Martinez–Vega*, 471 F.3d 559, 563 (5th Cir. 2006), the court looked to an indictment charging a different crime from the judgment because the defendant pleaded to "*the* lesser charge contained in the Indictment." The indictment was used to clarify to which crime the judgment referred.

Similarly, in *United States v. Hernandez–Borjas*, 641 Fed.Appx. 367 (5th Cir. 2016) (per curiam), the indictment charged a crime different from the crime of conviction. But the court looked to the indictment because the conviction was "pursuant to a guilty plea to '*the* lesser charge contained in the Indictment.' " *Id.* at 372 (quoting *Martinez–Vega*, 471 F.3d at 562). Though the indictment did not spell out a lesser-included offense, its language tracked the elements of a particular subsection, and it provided the necessary context to look to state law to discover that only one lesser-included offense was possible. Thus, "the indictment [was] relevant to ascertain the meaning of '*the* lesser included offense.' " *Id.*

[9] Neither **Reyes–Contreras's** indictment nor his plea refers to a lesser-included offense. It is clear from Missouri law that subsection (1) is the only possible offense in the judgment, in light of the elements and crime in the indictment. Moreover, the use of "first degree" in the ***122** judgment seems to indicate an intention to narrow down the subsection.

This is not enough to allow us to look to the indictment. The court in *Bonilla*, 524 F.3d at 653 n.4, expressly distinguished *Martinez–Vega* on the ground that "*the* lesser charge was made clear from the judgment, and was found by the court as actually being charged in the original indictment." In contrast, in *Bonilla*, the disposition did not "refer back to a lesser offense in the original indictment." *Id.* [12] Because there is no ambiguity in the judgment requiring us to cross-reference the indictment, we consider the statute as a whole.

IV.

The statute as a whole can support the enhancement if subsection (2) manslaughter is generic or if it contains as an element the use of force. Neither obtains.

A.

[10] The government posits that the entire statute is generic because subsection (1) is undisputedly generic manslaughter, and subsection (2) should be considered generic murder. The government does not try to fit subsection (2) into generic manslaughter, which would be difficult given the generic definition adopted by this circuit. [13]

Assisting another in self-murder is not generic murder. Though assisted suicide historically was considered murder, LAFAVE, § 15.6(c), many states now treat it as a separate offense or as part of manslaughter, *id.* & nn.30–31. If a defendant actively participates or directly causes the death of another, a murder conviction can

still lie. *Id.* & n.33. The statutes defining assisted suicide, however, are similar to Missouri's and do not delineate the specific role played by the defendant under the assisted-suicide provision. *Id.* at n.31. The MPC also contains a separate section dealing with "Causing or Aiding Suicide" as a crime separate from murder and manslaughter. MODEL PENAL CODE § 210.5. Thus although some conduct can warrant a conviction under either assisted suicide or murder, the two are treated as separate crimes. Further, this circuit has not adopted a generic definition of murder, and this is not the proper case in which to do so.

B.

[11] **[12]** Nor does assisting in self-murder require the use of force as defined by this circuit.[14] For the use of force to be an element, force must be a "constituent part of a claim that must be proved for the claim to succeed" in every case charging that offense.[15] Citing ***123** *Vargas–Duran*, 356 F.3d at 599, **Reyes–Contreras** defines use of force as requiring the use of destructive or violent force as distinguished from causing bodily injury through even indirect means. The government stakes the position that indirect force is sufficient, asserting that *United States v. Castleman*, —— U.S. ——, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014), overruled Fifth Circuit precedent requiring destructive or violent force by interpreting the use-of-force clause in 18 U.S.C. § 921(a)(33)(A)(ii) to encompass the common-law definition, which includes offensive touching and indirect applications of force.

Castleman interpreted a provision in the context of domestic violence and expressly distinguished its broad definition of "force" in that context from its use in other statutes.[16] "In defining a *violent* felony [under 18 U.S.C. § 924(e)(1)], we held, the phrase physical force must mea[n] *violent* force." *Castleman*, 134 S.Ct. at 1410 (internal quotation marks omitted) (quoting *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)). The Court also clarified that its opinion was tailored to domestic violence and was not meant to cast doubt on circuit-court opinions interpreting COV in other contexts. *Id.* at 1411 n.4.

A post-*Castleman* panel, in *United States v. Rico–Mejia*, 859 F.3d 318 (5th Cir. 2017), has already held that *Castleman* does not abrogate our decisions on the use of force under the Guidelines, binding us by the rule of orderliness. *Teague v. City of Flower Mound, Tex.*, 179 F.3d 377, 383 (5th Cir. 1999). "By its express terms, *Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence .... Accordingly, *Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence." *Rico–Mejia*, 859 F.3d at 322–23.

Our precedent includes *Calderon–Pena*, 383 F.3d at 260, in which the en banc court expressly held that an offense that can be committed without "any bodily contact (let alone violent or forceful contact) ... does not qualify for the sixteen-level enhancement." Assisting in self-murder is just such an

offense. It "can—*but need not*—involve the application of physical force." *Id.* For example, a man was charged under Missouri's voluntary-manslaughter statute for entering a suicide pact with a friend even though his only action was to hand his friend the weapon.[17] Therefore subsection (2) manslaughter is not a crime that has use of force as an element.

The government rightly points out that many circuits have rejected this view and have expanded *Castleman* to state that indirect causation of bodily injury may warrant a COV enhancement. But *Castleman* does not on its own terms make this expansion, and a previous panel declined to interpret it as doing so, thus binding us. *See United States v. Tanksley*, 848 F.3d 347, 350 (5th Cir. 2017).

V.

[13] The government advances the alternative position that if this panel reverses the enhancement for the manslaughter conviction, **Reyes–Contreras's** conviction for armed criminal action can ***124** support the enhancement as a crime having as an element the use of force. The statute reads, "Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action." MO. ANN. STAT. § 571.015. Missouri further defines "dangerous instrument" as "any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." MO. ANN. STAT. § 556.061(9).[18] We have determined that, to qualify for the COV enhancement, use of such an instrument must be more than mere possession but must include at least threatening physical force. *United States v. Velasco*, 465 F.3d 633, 640 (5th Cir. 2006).

[14] Because, under Missouri law, possession that bolsters a defendant's confidence to commit the felony is sufficient for conviction of armed criminal action, the statute criminalizes more than the "use" of force under the Guidelines. *State v. Jones*, 479 S.W.3d 100 (Mo. 2016). "Armed criminal action under section 571.015.1 does not require that the defendant actually attack or threaten an imminent attack with the weapon." *Id.* at 108. Rather, a defendant who commits a burglary with a gun in hand is guilty if the weapon "bolster[ed] his confidence," even though no one sees him, no one is threatened, and the gun is not used to breach the threshold. *Id.* at 109. That is because the words "aid" and "assistance" sweep in more conduct than does "use" alone, *id.* at 107, and make the statute broader than permitted for a COV having the use of force as an element.

VI.

[15] **[16]** The district court's error in the Guidelines calculation was not harmless. To show that error is harmless, the government must demonstrate both that

the district court would have imposed the same sentence for the same reasons and that it was "not influenced by an erroneous Guidelines calculation." *United States v. Castro–Alfonso*, 841 F.3d 292, 298 (5th Cir. 2016).

[17] To show that it would have imposed the same sentence, a district court need not use "magic words," but it must be evident that it would have imposed the same sentence absent the error. *United States v. Shepherd*, 848 F.3d 425, 427 (5th Cir. 2017). The court considered the Guidelines range given the sixteen-level enhancement, mitigating circumstances, and the Guidelines range under the then-forthcoming 2016 amendments that would have lowered the range from 41–51 months to 21–27 months. The court stated that the 2016 Guidelines did not "adequately address the type of conviction that we have on the record here" and sentenced **Reyes–Contreras** to the low end of the erroneously calculated Guidelines range. Given the eight-level enhancement for armed criminal action, the proper range is 15–21 months. Though the record strongly supports that the district court would think this too low, given that it saw the amended range as too low, it never stated that it would impose the same 41–month sentence absent any error.[19] The government thus ***125** fails to establish harmless error on the first prong.

[18] Even if the evidence were sufficient to find that the court would have departed upward from the proper range, the government also fails to carry its burden to show that the chosen sentence was not influenced by the erroneous calculation.

> [I]t is a stretch to say that the court's choice of the same parameters as the improperly calculated guidelines range in this case were mere serendipity. While the court expressed a multitude of reasons for imposing a sentence above the properly calculated range, we can find no indication that the court's decision ... was independent of the erroneous calculation that called the court's attention to that range in the first instance.

Martinez–Romero, 817 F.3d at 926; *see also United States v. Ibarra–Luna*, 628 F.3d 712, 717 (5th Cir. 2010). Because the district court did not provide a basis for the chosen sentence independent of the erroneously calculated range, the error was not harmless.

The judgment of sentence is VACATED and REMANDED for resentencing.

EDITH H. JONES, Circuit Judge, concurring in the judgment

The rule of orderliness binds us to follow a prior published opinion that renders a *res nova* interpretation of a Supreme Court decision. This rule requires my concurrence here, but I write separately to explain why

I believe that a prior panel erred in holding that *United States v. Castleman*, —— U.S. ——, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014) does not abrogate our circuit's "direct force" requirement for "crimes of violence." *See United States v. Rico–Mejia*, 859 F.3d 318, 322–23 (5th Cir. 2017) ("*Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence."). For the following reasons, *Rico–Mejia* decided this issue incorrectly and should be reconsidered. [1]

Under the Sentencing Guidelines for illegal reentry, a "crime of violence" includes offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2 cmt. 2. [2] The key issue here is whether the *indirect* application of violent force—e.g., administering a deadly poison—qualifies as the "use of force." Unfortunately, this court has indicated that such indirect applications of force do not qualify. *See United States v. Villegas–Hernandez*, 468 F.3d 874, 879 n.6 (5th Cir. 2006) (concluding that this circuit had rejected a view of "use of force" encompassing "tricking a person into consuming poison") (quoting *United States v. Calderon–Pena*, 383 F.3d 254, 270 (5th Cir. 2004) (Smith, J., dissenting)).

Castleman rejected the direct versus indirect force distinction and dismissed a defendant's claim that poisoning is not the "use of force":

> The "use of force" in Castleman's example is not the act of "sprinkl[ing]" the poison; it is the act of employing poison knowingly as a device to cause physical ***126** harm. *That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter.* Under Castleman's logic, after all, one could say that pulling the trigger on a gun is not a "use of force" because it is the bullet, not the trigger, that actually strikes the victim.

Castleman, 134 S.Ct. at 1415 (emphasis added). Justice Sotomayor's analysis in *Castleman* is common sense.

Rico–Mejia held that *Castleman* applies only in the context of the misdemeanor crime of domestic violence defined in 18 U.S.C. § 921(a)(33)(A): "By its express terms, *Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence." 859 F.3d at 322. This confuses the different legal questions discussed in *Castleman.* Certainly, *Castleman* held that the misdemeanor crime of domestic violence encompasses "the slightest offensive touching"—that is, the degree of force necessary for common-law battery. *Castleman*, 134 S.Ct. at 1410 (quoting *Johnson v. United States*, 559 U.S. 133, 139, 130 S.Ct. 1265, 1270, 176 L.Ed.2d 1 (2010)). The Court included a footnote acknowledging that "[t]he Courts of Appeals have generally held that mere offensive touching cannot constitute the 'physical force' necessary to a 'crime

of violence.' " *Castleman*, 134 S.Ct. at 1411 n.4. And the Court explained that "[n]othing in today's opinion casts doubt on these holdings, because—as we explain—'domestic violence' encompasses a range of force broader than that which constitutes 'violence' *simpliciter.*" *Id.* (emphasis in original).

But the requisite degree or "range" of force is an issue entirely separate from whether that force is applied directly or indirectly. As *Castleman* specified, if the degree of force is sufficient, it "does not matter" whether "the harm occurs indirectly, rather than directly." *Id.* at 1415. Thus, though *Castleman* does not alter the degree of force this circuit requires to satisfy the "crime of violence" enhancement, it ought to abrogate our decisions holding that indirect applications of force are distinct and insufficient.

Every other circuit to address this issue has applied *Castleman*'s direct-indirect analysis in the "crime of violence" or "violent felony" context. *See United States v. Ellison*, 866 F.3d 32, 37 (1st Cir. 2017) (Barron, J.) (finding "no argument as to why the logic of *Castleman* is inapplicable" to the "crime of violence" analysis); *United States v. Hill*, 832 F.3d 135, 144 (2d Cir. 2016) (Livingston, J.) (relying on *Castleman* to determine that Hobbs Act robbery constitutes a "crime of violence"); *United States v. Chapman*, 866 F.3d 129, 133 (3d Cir. 2017) (Greenaway, J.) (holding that *Castleman* "rejected the contention that knowingly or intentionally poisoning another person does not constitute a use of force"); *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017) (Niemeyer, J.) (holding that *Castleman* precludes the "argument that the phrase 'use of physical force' excludes *indirect* applications") (emphasis in original); *United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017) (Sutton, J.) (relying on *Castleman* to reject the claim that "tripping somebody into oncoming traffic, or for that matter perpetrating a sarin gas attack, would not be a crime of violence"); *Hill v. United States*, 877 F.3d 717, 720 (7th Cir. 2017) (Easterbrook, J.) (citing *Castleman* to hold that "administering poison" satisfies the "use of force" requirement for a "violent felony"); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016) (Murphy, J.) (relying on *Castleman* to hold that second degree battery "includes the use of physical force as an element"); *United States v. Calvillo–Palacios*, 860 F.3d 1285, 1291 (9th Cir. 2017) (O'Scannlain, J.) ("*Castleman* explicitly rejected the poison hypothetical frequently ***127** employed by other circuits"); *United States v. Benton*, 876 F.3d 1260, 1263 (10th Cir. 2017) (Briscoe, J.) (relying on *Castleman* to hold that aggravated assault with a deadly weapon is a "crime of violence"); *United States v. Haldemann*, 664 Fed.Appx. 820, 822 (11th Cir. 2016) (per curiam) (relying on *Castleman* to hold that "whether that use of force occurs indirectly, rather than directly, by way of the defendant's actions is of no consequence"); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016) (Silberman, J.) (relying on *Castleman* to reject the poison hypothetical).

When every other circuit interprets a Supreme Court decision in one way,

and we interpret it another, it is worth considering whether we are mistaken. *Rico–Mejia* devoted a mere three sentences to distinguishing *Castleman*, and the opinion did not acknowledge the circuit split. Because this court stands alone in holding the nonsensical position that murdering someone with poison is not a "crime of violence," it is time to take another look.

All Citations

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Footnotes

1 **Reyes–Contreras** was sentenced under the 2015 version of the Guidelines.

2 **Reyes–Contreras** was convicted under the 1984 version of the statute. Minor linguistic amendments were enacted in 2017, updating "crime" to "offense," changing "he" to "he or she," and adding "the offense of" before "voluntary manslaughter" in section 3.

3 This statute was similarly amended in 2017, changing "crime" to "offense" and "he" to "he or she."

4 *See United States v. Bonilla*, 524 F.3d 647, 654 (5th Cir. 2008) (laying out the generic definition of manslaughter). *Bonilla* looked to the Model Penal Code ("MPC") and LaFave's treatise. LaFave defines voluntary manslaughter as "intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing." *Id.* (quoting 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 15.2, at 491 (2d ed. 2003)). The MPC likewise defines manslaughter as "a homicide which would otherwise be murder" but is "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." *Id.* (quoting MODEL PENAL CODE § 210.3(1)(b)). These definitions are substantially similar to Missouri's definition of manslaughter under subsection (1).

5 *See United States v. Perlaza–Ortiz*, 869 F.3d 375, 379–80 (5th Cir. 2017); *see also United States v. Mendez–Henriquez*, 847 F.3d 214, 219 (5th Cir.) (finding state supreme court case referencing the statutory sections to be "persuasive[ ]" in the absence of definitive supreme court caselaw), *cert. denied*, —— U.S. ——, 137 S.Ct. 2177, 198 L.Ed.2d 245 (2017).

6 This section was transferred to § 565.029 in 2017.

7 The difference between second-degree murder and voluntary manslaughter is that, for voluntary manslaughter, the defendant must inject evidence of sudden passion and adequate cause. MO. ANN. STAT. §§ 565.021.1(1), 565.023.2. Second-degree murder is a Class A felony, while voluntary manslaughter is a Class B felony. *Id.* §§ 565.021.2, 565.023.3.

8 *See, e.g.*, *State v. Neal*, 304 S.W.3d 749, 754 (Mo. Ct. App. 2010).

9 *United States v. Reyes–Ochoa*, 861 F.3d 582, 586 (5th Cir. 2017) (" 'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' " (quoting *Mathis*, 136 S.Ct. at 2248)).

10 *Patrick v. Purkett*, No. 4:07CV00974, 2010 WL 2926230, at *4 (E.D. Mo. July 20, 2010).

11 "And just to be clear, what I'm saying is that this judgment does show under which statute he was—or subsection he was convicted because it does show the voluntary man-slaughter first degree. And the statute 565.025 differentiates which section of the Voluntary Manslaughter would constitute first degree, and that is only Subsection 1."

12 The court also noted that *Martinez–Vega* was subject to plain-error review, unlike *Bonilla*, where review was de novo. That is given, however, only as a secondary reason for the distinction; the court does not rely on this difference to make its first distinction tenable. *See Bonilla*, 524 F.3d at 653 n.4.

13 *Bonilla* defines voluntary manslaughter as "intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing." 524 F.3d at 654 (quoting WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 15.1 490 (2d ed. 2003)) (emphasis omitted).

14 The government suggests plain-error review applies because **Reyes–Contreras** did not preserve this objection. But the district court did not impose the enhancement on this ground, so there was no basis for an objection. **Reyes–Contreras's** arguments regarding the use of force anticipate our authority to affirm on any basis found in the record, and we review them de novo.

15 *United States v. Vargas–Duran*, 356 F.3d 598, 605 (5th Cir. 2004) (en banc) (quoting BLACK'S LAW DICTIONARY 538 (7th ed. 1999)); *see also United States v. Calderon–Pena*, 383 F.3d 254, 257 (5th Cir. 2004) (en banc) ("[T]he statute of conviction, not the defendant's underlying conduct, is the proper focus.").

16 The Court noted that domestic violence is "a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Castleman*, 134 S.Ct. at 1411.

17 *Man Arrested After Friend Kills Himself*, COLUM. DAILY TRIB. (June 17, 2009, 12:20 PM).

18 This definition was moved to § 556.061(20) in 2017.

19 *See United States v. Martinez–Romero*, 817 F.3d 917, 925 (5th Cir. 2016) (explaining that the court stated three times that it would impose the same sentence regardless of error).

1 The result of the following analysis would mean that we uphold the sentence enhancement here because subsection (2) of MO. REV. STAT. § 565.023.1, which criminalizes assisted suicide, has the "use of force" as an element and should be designated a "crime of violence" under *Castleman.*

2 The same "use of physical force" language appears in the definition of "crime of violence" for the career offender enhancement under U.S.S.G. § 4B1.2(a)(1).

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