

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 2018

FRANCISCO HEREDIA-SILVA,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

Pursuant to Title 18, United States Code, § 3006A(d)(6) and Rule 39 of this Court, Petitioner, Francisco Heredia-Silva, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of fees or costs and to proceed in forma pauperis.

Gutierrez-Torres is represented by counsel appointed per the Criminal Justice Act of 1964, Title 18, United States Code, § 3006A(d)(6). The Ninth Circuit Court of Appeals appointed undersigned counsel to represent Heredia-Silva.

Respectfully submitted,

Dated: November 17, 2018

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Question Presented

Should this court resolve the split between the Fifth Circuit and the Ninth about whether California terrorist threats convictions under California Penal Code Section 422 are crimes of violence. Compare *United States v. Villavicencio-Burruel*, 608 F.3d 556 (9th Cir. 2010) (holding that Section 422 is a crime of violence), with *United States v. Cruz-Rodriguez*, 625 F.3d 274 (5th Cir. 2010) (Section 422 is not a crime of violence).

List of Parties

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page.
A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED
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Petitioner, Francisco Heredia-Silva, asks for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered May 31, 2017.

Opinion Below

The decision of the court of appeals, *United States v. Heredia-Silva*, 735 F. App'x 344 (9th Cir. 2018), is attached as Appendix A.

Jurisdiction

The Ninth Circuit decided Heredia-Silva's case on August 21, 2018. This petition is being filed within 90 days. The Court has jurisdiction under 28 U.S.C.

§ 1254(1).

Involved Federal Law

8 U.S.C. Section 1326(d) allows illegal entry after deportation defendants to challenge the validity of the underlying removal:

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.

Heredia-Silva's argument regards whether his prior California conviction for terrorist threats is a crime of violence under the federal definition, 18 U.S.C. Section 16:

The term “crime of violence” means—

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The federal definition for a crime of violence defines what offenses are “aggravated felonies” 8 U.S.C. Section 1101(a)(43)(F):

- (F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

Statement of the Case

In 1998, Francisco Heredia-Silva pled guilty to violating California's terrorist threat statute, Penal Code Section 422.¹ Heredia-Silva is not a citizen of the United States. The Immigration Service removed Heredia-Silva as an aggravated felon based upon the Section 422 conviction in 2000 and he has been excluded or removed at least five more times since.²

On October 15, 2016, Border Patrol arrested Heredia-Silva a mile north of the United States-Mexico border in the Southern District of California. The United

¹ California Penal Code Section 422. Punishment for threats

(a) Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

(b) For purposes of this section, "immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

(c) "Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

² Clerk's Record ("CR") 17 (Government's Trial Brief, p.4).

States then charged Heredia-Silva with illegal entry after deportation.³ Heredia-Silva moved to dismiss the charge under 8 U.S.C. Section 1326(d)⁴ arguing that Section 422 is not an aggravated felony and therefore Heredia-Silva's underlying removal was invalid. The district court denied the motion and, after a brief bench trial, found Heredia-Silva guilty.

The Appeal

Heredia-Silva appealed to the Ninth Circuit and asked it to address the circuit split. The Ninth Circuit declined:

Heredia-Silva contends that his prior conviction for making terrorist threats under California Penal Code § 422 is not a “crime of violence” for purposes of 8 U.S.C. § 16(a). He argues, therefore, that the district court erred by denying his motion to dismiss the information under 8 U.S.C. § 1326(d). As Heredia-Silva concedes, this argument is foreclosed. See *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1132 (9th Cir. 2016) (“[A]pplying our precedent, section 422 is categorically a crime of violence.”). Heredia-Silva’s request that we sua sponte call for en banc review of this precedent is denied.⁵

³ 8 U.S.C. § 1326.

⁴ Limitation on collateral attack on underlying deportation order. In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.

⁵ *United States v. Heredia-Silva*, No. 17-50209, 2018 U.S. App. LEXIS 23368, at *1 (9th Cir. Aug. 21, 2018).

Reasons to Grant the Writ

Heredia-Silva was deported from the United States because of his terrorist threat conviction under California Penal Code Section 422.⁶ If Heredia-Silva's case had happened in the Fifth Circuit, not the Ninth, he would not have been deportable as an aggravated felon for his Section 422 conviction because terrorist threats in California do not require the use of force and are not violent. Heredia-Silva's petition presents a divided question of law which, if favorably resolved for Heredia-Silva, would invalidate his deportation in the Ninth Circuit.⁷

A. The conflict: does Section 422 require the "use of force?"

In *United States v. Villavicencio-Burruel*,⁸ the Ninth Circuit held that Section 422 is a crime of violence and an aggravated felony under the illegal entry guidelines. After *Villavicencio-Burruel*, the Fifth Circuit held that Section 422 was not an aggravated felony because it punished threats that resulted in harm rather than requiring the use of force. See *United States v. Cruz-Rodriguez*, 625 F.3d 274,

⁶ Heredia-Silva was only deportable on the charges alleged in the notice to remove. See *Al Mutarreb v. Holder*, 561 F.3d 1023, 1029 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)); see also *Cardoso-Tlaseca v.. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006) (holding that an alien's prior "possession conviction cannot sustain the removal order because it was not alleged in the [Notice to Appear]").

⁷ *United States v. Aguilera-Rios*, 769 F.3d 626, 631 (9th Cir. 2014) (because California firearms law lacked an antique exception, it was not a categorical match for the federal definition and prior removal predicated on the California statute, while in accordance with governing law at the time, was invalidated and the prior removal could not serve as a Section 1326 predicate.)

⁸ *United States v. Villavicencio-Burruel*, 608 F.3d at 563.

276 (5th Cir. 2010) (per curiam). The Ninth Circuit has rejected the Fifth Circuit’s analysis.⁹

B. Cruz-Rodriguez was correctly decided.

18 U.S.C. Section 16 defines when a crime of violence has occurred. In *Leocal v. Ashcroft*,¹⁰ this Court held that, for purposes of 18 U.S.C. Section 16, crimes of violence are actively violent crimes. Indirect injuries that do not involve some kind of active physical assault are not “violent” because the root meaning of the word “violent” is a physical force.

California Penal Code section 422 protects victims of what is only emotional injury rather than a bodily injury coordinate with violence such as those that “try to instill fear in others,” without the use of violence to cause physical injury. *People v. Wilson*, 112 Cal. Rptr. 3d 542, 554 (Cal. Ct. App., 2010). The Legislature intended to cover offenses that involved solely “fear and intimidation” because such acts deserve condemnation, too. *People v. Solis*, 109 Cal. Rptr. 2d 464, 473 (Cal. Ct. App. 2001). This extends Section 422 beyond simply protecting “individuals from the fear of violence” and toward protecting them from having their feelings hurt in some were the threat. *Virginia v. Black*, 538 U.S. 343, 360 (2003) (explaining why true threats may be punished even if the speaker does not intend to carry out the threat). But inflicting “fear” or “mental terror” on another still only results in an

⁹ *Arellano Hernandez v. Lynch*, 831 F.3d at 1131.

¹⁰ *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004).

emotional response, and, when accomplished by threatening only to indirectly use force against another, it does not rise to the level of active, aggressive, violent force necessary for a crime of violence.

C. United States v. Castleman¹¹ does not resolve the conflict

In Castleman, this Court held that indirect uses of force still qualified as crimes of violence in the context of what constituted a misdemeanor crime of domestic violence.¹² But from its outset, Castleman notes that its construction is outside of and different than 18 U.S.C. Section 16's definition of a crime of violence.¹³ Drug addicts, the mentally incompetent, aliens present on nonimmigrant visas and so on are prohibited from possessing guns.¹⁴ When Castleman found that the Tennessee domestic violence conviction qualified (under the modified categorical approach) as "misdemeanor crime of domestic violence" it did so by holding even indirectly caused harms – harms physically instantiated by the victim themselves such as taking poison or walking into oncoming traffic – are still crimes of domestic violence because this law is meant to be broad and the right to possess a gun is one of those rights that maybe the government can take away and maybe it cannot.¹⁵

¹¹ *United States v. Castleman*, 572 U.S. 157, 134 S. Ct. 1405 (2014).

¹² *United States v. Castleman*, 572 U.S. at 170.

¹³ *Id.* at 163.

¹⁴ *Id.*

¹⁵ *Id.* at 1414.

Castleman held that Section 922(g)(9) permitted convictions for “caus[ing] a slight, nonserious physical injury with conduct that cannot be described as violent.” Noting that it had previously declined to apply the common law definition of “force” to a § 16(a)-type definition, Castleman held that for § 922(g)(9) “the common-law meaning of ‘force’ fits perfectly” because “[t]he very reasons we gave for rejecting that meaning in defining a ‘violent felony’ are reasons to embrace it in defining a ‘misdemeanor crime of domestic violence.’”¹⁶ Domestic violence is not just a type of violence; it is a “term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context.”¹⁷ Most important, Castleman noted that the Courts of Appeal and the Board of Immigration Appeals have held that § 16(a) requires “violent force” and 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.* at 1412 n.4. In other words, Castleman unequivocally held that § 16(a) and a “misdemeanor crime of domestic violence” have two separate definitions—that § 16(a) requires “violent force,” while a Castleman misdemeanor crime of domestic violence simply requires any force.

Castleman does not reach the Fifth Circuit’s *Cruz-Rodriguez* decision because Castleman construed a different statute with a different sweep and a different

¹⁶ *Id.* at 1410.

¹⁷ *Id.* at 1411.

purpose. Section 16(a) requires violence.

D. The Circuits are not going resolve this on their own.

Cruz-Rodriguez held that California Penal Code Section 422 is not a crime of violence under section 2L1.2 and relied on its reasoning in a prior unpublished case, *United States v. De La Rosa-Hernandez*, 254 F. App'x 446, 448-49 (5th Cir. 2008) (unpublished). In *De La Rosa-Hernandez*, the court recognized that it would be permissible under the statute to cause harm or injury to another (and, by extension, threaten to cause harm or injury) without using any sort of force, let alone destructive or violent force. So, for example, the defendant could threaten "either to poison another or to guide someone intentionally into dangerous traffic, neither of which involve force." *Id.* at 449. Because Section 422 required only that a defendant threaten to commit a crime that would result in injury, but did not require that the threatened criminal act involve the direct use of violent force, it was not a crime of violence under the Guidelines. *Id.* at 449.

Conclusion

The Court has a declared circuit split before it. Heredia-Silva presents a simple vehicle for resolving it. Certiorari review is appropriate.

Dated: November 17, 2018

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