No. 19A280

IN THE

Supreme Court of the United States

SEAN GREGORY MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Sean Mitchell was sentenced under the Armed Career Criminal Act (ACCA) to a mandatory minimum sentence of 15 years in prison. If the ACCA had not applied, he would have been subject to the 10-year statutory maximum sentence otherwise applicable to 18 U.S.C. § 922(g) offenses.

The parties disagreed about two prior convictions under Virginia Code § 18.2-51, and whether they were ACCA "violent felonies." Violent felonies for purposes of the ACCA include any prior conviction 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)(i).

Virginia Code § 18.2-51 prohibits the intentional causation of bodily injury to another person "by any means."

The question presented is:

> Whether a criminal statute that prohibits the intentional causation of bodily injury to another "by any means," including omissions, is a violent felony for purposes of the Armed Career Criminal Act.

PARTIES TO THE PROCEEDINGS

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

TABLE OF CONTENTS

Question Presented. i

Parties to the Proceedings. ii

Table of Contents. iii

Table of Authorities. v

Index to Appendix. vii

Opinions Below. 1

Jurisdiction. 1

Statutory Provisions Involved. 1

Statement of the Case. 2

A. Background and District Court Proceedings. 2

B. The Fourth Circuit's Decision. 3

Reasons for Granting the Petition. 5

I. The Fourth Circuit's Decision Conflicts with the Text of § 924(e)(2)(B)(i), This Court's Relevant Precedent, and Decisions by Other Circuits. 5

A. This Court in *Johnson* Interpreted the Force Clause Definition of "Violent Felony" in § 924(e)(2)(B)(I) to Require "Violent Physical Force" Exerted Through Concrete Bodies. 5

B. Virginia Code § 18.2-51 Can Be Violated "By Any Means," Including Omissions, Which Is Broader than Violent Physical Force Under *Johnson*. 9

1. The Virginia Statute Can Be Violated by Omission. 9

2. Because The Statute Can be Violated by Omission, The Decision Below That It is a Force Clause Predicate Conflicts With *Johnson*. 11

C. There Is a Circuit Split on Whether Omissions Can Satisfy the Force Clause.. 13

D. *United States v. Castleman* Left Open the Question of Whether the Causation of Injury by Omission Requires Force Within the Meaning of *Johnson*.. 15

II. This Case Provides an Excellent Vehicle for Deciding the Important Question Presented.. 16

Conclusion. 17

TABLE OF AUTHORITIES

Cases

Biddle v. Commonwealth, 141 S.E.2d 710 (Va. 1965) 9, 10

Chrzanoksi v. Ashcroft, 327 F.3d 188 (2d Cir. 2003). 14

Davis v. Commonwealth, 335 S.E.2d 375 (Va. 1985). 9, 16

Descamps v. United States, 133 S. Ct. 2276 (2013). 6

Glover v. United States, 531 U.S. 198, 203 (2001) 17

Johnson v. United States, 559 U.S. 133 (2010). . . . . *passim*

Long v. Commonwealth, 379 S.E.2d 473 (Va. Ct. App. 1989). 11

Mathis v. United States, 136 S. Ct. 2243 (2016). 5, 6

People v. Miranda, 612 N.Y.S.2d 65, 66 (1994). 14

Taylor v. United States, 495 U.S. 575 (1990). 10

United States v. Aparicio-Soria, 740 F.3d 152 (4th Cir. 2014) (en banc). 10, 11

United States v. Castleman, 572 U.S. 157 (2014). 15, 16

United States v. Covington, 880 F.3d 129 (4th Cir. 2018) 16

United States v. Diaz-Ibarra, 522 F.3d 343 (4th Cir. 2008). 6

United States v. Gomez, 690 F.3d 194 (4th Cir. 2012). 14

United States v. James, 718 F. App'x 201 (4th Cir. 2018). 4

United States v. Jenkins, 719 F. App'x 241 (4th Cir. 2018). 4

United States v. Jones, __ F.3d __, 2019 WL 418015 (4th Cir. 2019). 6

United States v. Lassend, 898 F.3d 115 (1st Cir. 2018). 14

United States v. Mayo, 901 F.3d 218 (3d Cir. 2018) 13

United States v. Middleton, 883 F.3d 485 (4th Cir. 2018). 15-16

United States v. Oliver, 728 F. App'x 107 (3d Cir. 2018). 9, 13, 16

United States v. Pritchett, 733 F. App'x 128 (4th Cir. 2018). 4

United States v. Reyes-Contreras, 910 F.3d 169 (5th Cir. 2018) (en banc). 15

United States Torres-Miguel, 701 F.3d 165 (4th Cir. 2012). 15-16

Constitutional Provisions, Statutes, and Rules

18 U.S.C. § 922(g). 1, 3, 5, 15

18 U.S.C. § 924(a). 3

18 U.S.C. § 924(e) (Armed Career Criminal Act). . . . . *passim*

18 U.S.C. § 3231. 1

18 U.S.C. § 3742. 1

28 U.S.C. § 1254. 1

Virginia Code § 18.2-51. . . . . *passim*

Other Authorities

Brief of Capital Area Immigrants' Rights Coalition as Amicus Curiae, *United States v. James*, 4th Cir. No. 17-4111, Doc. 57 (March 29, 2018). 10

INDEX TO APPENDIX

Opinion, *United States v. Mitchell*, 774 F. App'x 138 (4th Cir. 2019).. 1

PETITION FOR WRIT OF CERTIORARI

Petitioner Sean Mitchell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, which is unpublished, appears at Pet. App. 1-2 and at 774 F. App'x 138 (4th Cir. 2019).[1]

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 18 U.S.C. § 3742. That court issued its opinion and judgment on July 31, 2019. No petition for rehearing was filed. An extension of time in which to file the petition for a writ of certiorari was granted to and including December 30, 2019, in Application No. 19A280 on September 11, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Armed Career Criminal Act provides:

> (e) (1) In the case of a person who violates section 922(g) of this title and has three previous convictions. . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, . . . , that – . . .

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[1] "Pet. App." refers to the appendix attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; . . .

18 U.S.C. § 924(e).

2. Virginia Code § 18.2-51 provides:

> If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

STATEMENT OF THE CASE

This case arises from the sentencing of petitioner Sean Mitchell in federal court. The district court held that Mr. Mitchell qualified for the armed career criminal sentencing enhancement, over defense objection on the basis that his prior convictions in Virginia state court should not count as predicates. Mr. Mitchell's sentencing guideline range without the enhancement would have been 46 to 57 months in prison with a 120-month statutory maximum, but instead the range was calculated to be 188 to 235 months in prison, with a 15-year statutory mandatory minimum. The district court sentenced Mr. Mitchell to serve 180 months in prison, the Armed Career Criminal Act mandatory minimum.

A. Background and District Court Proceedings.

The statement of facts entered with the guilty plea showed the following. Newport News, Virginia, police officers in June 2016 detected the scent of marijuana from the bedroom window of an apartment. The police knocked on the door, smelled marijuana, and detained the two men who had opened the door, including petitioner

Sean Mitchell. The police obtained a search warrant while they detained the men, searched the apartment pursuant to the warrant, and located in Mr. Mitchell's bedroom a loaded handgun, approximately 22 grams of marijuana, and 3.3 grams of cocaine base. C.A.J.A. 21-22.

A federal grand jury charged Mr. Mitchell with one count of possession of a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). C.A.J.A. 8. Mr. Mitchell pled guilty. C.A.J.A. 11-20 (plea agreement), 21-23 (statement of facts). A probation officer prepared a presentence investigation report. C.A.J.A. 91-111. The probation officer concluded that Mr. Mitchell "is an armed career criminal and subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e)." C.A.J.A. 96.

Following briefing and argument, the district court overruled Mr. Mitchell's objection and held that his prior convictions under Virginia Code § 18.2-51 are "violent felonies" within the meaning of the force clause of the Armed Career Criminal Act, and that Mr. Mitchell therefore was subject to a 15-year mandatory minimum sentence under § 924(e) rather than a 10-year statutory maximum under the standard penalty provision applicable to § 922(g)(1) convictions, § 924(a)(2). C.A.J.A. 77. The district court sentenced Mr. Mitchell to serve 180 months in prison, the ACCA mandatory minimum, and Mr. Mitchell appealed.

B. The Fourth Circuit's Decision.

On direct appeal to the United States Court of Appeals for the Fourth Circuit, Mr. Mitchell argued that he should not be sentenced under the Armed Career Criminal

Act, § 924(e), because his convictions under Virginia Code § 18.2-51 are not predicate violent felonies within the meaning of the force clause, § 924(e)(2)(B)(i). Pet. App. 1.

The Fourth Circuit affirmed the district court, and upheld Mr. Mitchell's 15-year sentence. Pet. App. 2. The court of appeals held:

> Mitchell contends that, because § 18.2-51 includes the phrase "by any means cause ... bodily injury," a defendant can commit unlawful wounding by means other than violent force, such as nonviolent force or omission rather than action. But Mitchell, by his own admission, does not cite any Virginia case where an unlawful wounding conviction rested on an act of nonviolent force or omission. Moreover, we conclude that, because unlawful wounding requires "the specific intent to maim, disfigure, disable or kill," it is not plausible that a conviction will rest on conduct that is incapable of fulfilling that intent, unless that conduct is accompanied by an attempt or threat to do more serious bodily harm. *See United States v. Pritchett*, 733 F. App'x 128 (4th Cir.), cert. denied, —— U.S. ——, 139 S. Ct. 850, 202 L.Ed.2d 616 (2018) (argued but unpublished) [*sic*]. We decline Mitchell's request to revisit our decision in *James*.

Pet. App. 2.[2]

The Fourth Circuit therefore held that a statute prohibiting the causation of bodily injury that can be violated by omission, among "any means," Va. Code § 18.2-51, satisfies the ACCA force clause if that conduct is accompanied by intent "to do more serious bodily harm." Pet. App. 2.

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[2] It likely that the court of appeals intended to cite *United States v. James*, 718 F. App'x 201 (4th Cir. 2018) (argued but unpublished), an earlier decision about the same Virginia statute. *See also United States v. Jenkins*, 719 F. App'x 241 (4th Cir. 2018) (argued but unpublished).

REASONS FOR GRANTING THE PETITION

This case presents a excellent vehicle to decide whether a criminal statute that prohibits the intentional causation of bodily injury to another "by any means" – including an omission – falls within the force clause of the Armed Career Criminal Act. The Fourth Circuit's decision below conflicts with *Johnson v. United States*, 559 U.S. 133 (2010), decisions by other courts of appeals, and the text of § 924(e).

I. The Fourth Circuit's Decision Conflicts With the Text of § 924(e)(2)(B)(i), This Court's Relevant Precedent, and Decisions by Other Circuits.

A. This Court in *Johnson* Interpreted the Force Clause Definition of "Violent Felony" in § 924(e)(2)(B)(i) to Require "Violent Physical Force" Exerted Through Concrete Bodies.

Section 924(e)(1) of Title 18, the Armed Career Criminal Act, provides that "a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another . . . shall be fined under this title and imprisoned not less than fifteen years[.]"

The "force clause" of § 924(e)(2)(B) defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another[.]"

In determining whether a prior offense qualifies as a "violent felony," courts are required to employ the categorical approach. *E.g., Mathis v. United States*, 136 S. Ct.

2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013). Courts "look only to the statutory definitions – *i.e.*, the elements – of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a violent felony. *Descamps*, 133 S. Ct. at 2283. Under the categorical approach, a prior offense can qualify as a violent felony only if *all* the criminal conduct covered by a statute – including "the most innocent conduct" – matches or is narrower than the definition. *E.g.*, *United States v. Diaz-Ibarra*, 522 F.3d 343, 348 (4th Cir. 2008). In other words, a court must focus on the "minimum conduct" necessary for a violation of the statute. *See, e.g., United States v. Jones*, __ F.3d __, 2019 WL 418015, at *5 (4th Cir. 2019) ("To decide whether a particular state offense includes the use, attempted use, or threatened use of violent physical force, we are entitled to turn to the relevant state court decisions to discern the minimum conduct required to sustain a conviction for that offense.").

The court of appeals held that convictions under Virginia Code § 18.2-51 qualify as violent felonies under the ACCA's force clause. Pet. App. 2. To qualify under the force clause, such convictions must include "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)(i). "Physical force" in this context – the definition of "violent felony" under the Armed Career Criminal Act – is defined as "violent force," meaning "strong physical force," that is "capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. The word "physical," the Court noted, "plainly refers to force exerted by and through concrete bodies[.]" *Id.* at 138.

The *Johnson* Court observed that there are at least two understandings of the term "force" that are potentially relevant for purposes of the force clause definition of violent felony, and then chose between them. The Court noted that common law battery requires "force" that could be satisfied by "even the slightest offensive touching." *Johnson*, 559 U.S. at 139. The Court explicitly rejected this common law definition of the word "force" for purposes of defining ACCA "violent felonies," holding that "force" in this context "means *violent* force." *Id.* at 140.

The Court explained:

> Even by itself, the word "violent" in § 924(e)(2)(B) connotes a substantial degree of force. Webster's Second 2846 (defining "violent" as "[m]oving, acting, or characterized, by physical force, esp. by extreme and sudden or by unjust or improper force; furious; severe; vehement . . ."); 19 Oxford English Dictionary 656 (2d ed.1989) ("[c]haracterized by the exertion of great physical force or strength"); Black's 1706 ("[o]f, relating to, or characterized by strong physical force"). When the adjective "violent" is attached to the noun "felony," its connotation of strong physical force is even clearer. *See id.*, at 1188 (defining "violent felony" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon"); *see also United States v. Doe*, 960 F.2d 221, 225 (C.A.1 1992) (Breyer, C.J.) ("[T]he term to be defined, 'violent felony,' . . . calls to mind a tradition of crimes that involve the possibility of more closely related, active violence").

Id. at 140-41.

Convictions under Virginia Code § 18.2-51 (sometimes colloquially referred to as malicious or unlawful wounding) should not categorically qualify as "violent felonies" under the force clause because the statute can be violated without the use or

threat of *violent physical force*, *Johnson*, 559 U.S. at 140-41 (emphasis added), in that the statute can be violated "by any means," Virginia Code § 18.2-51.

The Virginia statute provides:

> [i]f any person maliciously shoot, stab, cut, or wound any person or *by any means* cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony [malicious wounding]. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony [unlawful wounding].

Va. Code § 18.2-51 (emphasis added).[3] The Fourth Circuit held that this statute categorically satisfies the ACCA force clause because the intent element establishes that it is "not plausible" to violate the statute without engaging in "conduct [that] is accompanied by an attempt or threat to do more serious bodily harm." Pet. App. 2.

Because the minimum conduct penalized by the Virginia statute does not require the use of violent physical force, or any force at all, the Fourth Circuit's decision conflicts with *Johnson*. Specifically, the statute, which by its own explicit terms can be violated "by any means," does not require the use of force "exerted by and through concrete bodies." *Johnson*, 559 U.S. at 138.

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[3] It does not matter in this case whether the Virginia statute is divisible between the two different classes of felony, because Mr. Mitchell was convicted of the less serious offense, colloquially called unlawful wounding. C.A.J.A. 98, 99.

B. Virginia Code § 18.2-51 Can Be Violated "By Any Means," Including Omissions, Which is Broader than Violent Physical Force Under *Johnson*.

The decision of the court of appeals conflicts with this Court's decision in *Johnson* because Virginia Code § 18.2-51 does not require sufficient violent physical force to fall within the force clause as interpreted in *Johnson*.

1. The Virginia Statute Can Be Violated by Omission.

One category of conduct that would constitute "any means" under Virginia Code § 18.2-51 that is not violent "physical force" within the meaning of the force clause of § 924(e) and *Johnson* includes omissions, such as the withholding of food, water, or medicine from a dependent child, or anyone else as to whom one has a duty of care. *Cf. Biddle v. Commonwealth*, 141 S.E.2d 710, 714 (Va. 1965) (noting that if death results from malicious omission of duty, it is murder, but if not willful, it is manslaughter). Omissions require no "force" whatsoever – neither violent, nor de minimis, nor indirect force. *See United States v. Oliver*, 728 F. App'x 107 (3d Cir. 2018) ("While there is no doubt that physical pain sufficient to constitute serious bodily injury under § 2702(a)(1) can occur as a result of an omission, *Johnson*'s ACCA violent felony definition requires the use or attempted use of physical force exerted by or through 'concrete bodies.'").

Applying the categorical approach, the elements of § 18.2-51 are so broad that one can violate the statute by using no physical force at all. Specifically, homicide resulting from the "malicious omission of the performance of a duty" is an example of conduct that meets the elements of § 18.2-51, but does not require the use of force in the commission of the offense. *See Davis v. Commonwealth*, 335 S.E.2d 375, 378 (Va.

1985); *accord Biddle*, 141 S.E.2d at 714 (stating that "if death is the direct consequence of the malicious omission of the performance of a duty, such as of a mother to feed her child, this is a case of murder"). If Virginia murder can be caused by omission, then so can unlawful wounding under Virginia Code § 18.2-51. In other words, one can cause "any bodily hurt whatsoever" with the requisite intent through the failure to provide, for example, food or medicine to a child or an invalid as to whom one has a duty of care, and thereby violate Virginia Code § 18.2-51.

This argument is premised on the elements of § 18.2-51 rather than citation to a published Virginia case in which a defendant was convicted of this specific offense based upon an omission.[4] But that does not matter. The categorical approach requires an analysis of the *elements* of an offense, not the factual circumstances in which prosecutors have obtained convictions. *E.g.*, *United States v. Aparicio-Soria*, 740 F.3d 152, 157-58 (4th Cir. 2014) (en banc) (holding that categorical approach turns on analysis of elements of offense, not probability that conduct that falls within statute would be charged); *see also id.* at 154 ("As required by the categorical approach, our analysis is restricted to 'the fact of conviction and the statutory definition of the prior offense.'" (quoting *Taylor v. United States*, 495 U.S. 575, 603 (1990))).

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[4] In an amicus brief filed in the *James* litigation in the Fourth Circuit, the Capital Area Immigrants' Rights Coalition provided news articles and docket numbers for Virginia state cases in which it appears that Virginia courts have imposed criminal liability for malicious wounding and possibly unlawful wounding on the basis of omissions. Unfortunately, those state criminal cases did not result in published judicial decisions. *See* Brief of Capital Area Immigrants' Rights Coalition as Amicus Curiae, *United States v. James*, 4th Cir. No. 17-4111, Doc. 57 (March 29, 2018). The malicious wounding conviction appears (from news reports contained with the amicus brief) to have been based on the withholding of food from a child. *Id.* at 21.

Just like the offense of murder in Virginia, the elements of § 18.2-51 can be satisfied either by commission or omission. The language of the statute – "by *any* means" – necessarily includes omissions. *Long v. Commonwealth*, 379 S.E.2d 473, 475 (Va. Ct. App. 1989) (noting that § 18.2-51, "by its explicit terms, does not contain a limitation upon the means employed"). "And that ends the inquiry," *Aparicio-Soria*, 740 F.3d at 158, because offenses that can be committed through omission categorically do not require the use of violent physical force.

2. Because The Statute Can be Violated by Omission, The Decision Below That It is a Force Clause Predicate Conflicts with *Johnson*.

Because the Virginia statute criminalizes the intentional *causation* of bodily injury, the court of appeals concluded it must require the *use* of "force" and therefore be a "violent felony." The Fourth Circuit stated: "we conclude that, because unlawful wounding requires 'the specific intent to maim, disfigure, disable or kill,' it is not plausible that a conviction will rest on conduct that is incapable of fulfilling that intent, unless that conduct is accompanied by an attempt or threat to do more serious bodily harm." Pet. App. 2. But specific intent to do bodily harm does not require as an element that a defendant use "physical force" to do so.

The causation of injury was the part of the *Johnson* Court's analysis in determining what "violent" means: "We think it clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140.

That "violent" force may be force that can cause injury, however, does not answer the question of whether a statute requires any physical force at all. This is where the Fourth Circuit went astray, ignoring the ACCA statutory language at issue, "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). In *Johnson*, the Court held that "physical force" that can cause injury must therefore be *violent physical force*, meeting the § 924(e) definition of "violent felony."

In this case, though, the Fourth Circuit untethered this analysis from its textual mooring. The court of appeals below assumed that "it is not plausible that a conviction will rest on conduct that is incapable of fulfilling that intent, unless that conduct is accompanied by an attempt or threat to do more serious bodily harm." Pet. App. 2. But an omission with even the worst intent – the withholding of insulin or water with the intent to kill, for example – is still not "physical force."

The Fourth Circuit held that "any means" under Virginia Code § 18.2-51 that can cause bodily injury must therefore be "violent physical force" within the meaning of the ACCA force clause. The court of appeals inferred the use of physical "force" from intent. That is, rather than assuming "violent" from the causation of injury, in this case the Fourth Circuit assumed "force." But the Virginia statute's plain language says it can be violated by "any means." "Any means" includes omissions, rather than actions. Omissions are by definition not "physical force."

The plain language of the "by any means" element in Virginia Code § 18.2-51 encompasses omissions. The decision below conflicts with *Johnson*, and with the text

of § 924(e)(2)(B) requiring there be an element of the use, attempted use, or threatened use of "physical force."

C. There is a Circuit Split On Whether Omissions Can Satisfy the Force Clause.

There is a circuit split on whether criminal assault statutes that can be violated by omission satisfy the force clause. The Fourth Circuit's decision below conflicts with the Third Circuit, which has held that statutes that be violated by way of an omission cannot satisfy the force clause of the ACCA. *See United States v. Oliver*, 728 F. App'x 107 (3d Cir. 2018).

The Third Circuit explained:

> While there is no doubt that physical pain sufficient to constitute serious bodily injury under § 2702(a)(1) can occur as a result of an omission, *Johnson*'s ACCA violent felony definition requires the use or attempted use of physical force exerted by or through "concrete bodies." *Johnson*, 559 U.S. at 138. Under this binding definition, physical force is not used "when no act [is done]...." *United States v. Harris*, 205 F.Supp.3d 651, 671 (M.D. Pa. 2016). So, "when the act has been one of omission, ... there has been no force exerted by and through concrete bodies," *id.*, and thus, physical force as defined in *Johnson* has not been used. *See United States v. Resendiz-Moreno*, 705 F.3d 203, 204-05 (5th Cir. 2013) (holding that first-degree child cruelty under Georgia law is not a "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A)(ii) because the offense could be committed "by depriving [a] child of medicine or by some other act of omission *112 that does not involve the use of physical force").

Oliver, 728 F. App'x at 111-12; *see also United States v. Mayo*, 901 F.3d 218, 229 (3d Cir. 2018) (concluding that Pennsylvania aggravated assault does not qualify as a violent felony because "Pennsylvania case law establishes that a person violates § 2702(a)(1) by causing 'serious bodily injury,' regardless of whether that injury results

from any physical force, let alone the type of violent force contemplated by the ACCA.") (citation omitted).

The Second Circuit earlier reached the same conclusion about causation of bodily injury in *Chrzanoksi v. Ashcroft*, 327 F.3d 188, 192 (2d Cir. 2003), in which it interpreted a Connecticut assault statute. As the *Chrzanoksi* Court observed, "human experience suggests numerous examples of intentionally causing injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient." 327 F.3d at 196; *see also United States v. Lassend*, 898 F.3d 115, 127 n.12 (1st Cir. 2018) (recognizing that withholding of medicine could be the basis of an assault charge). Other examples include a parent who withholds medicine from a sick child, or who withholds food from a child. *People v. Miranda*, 612 N.Y.S.2d 65, 66 (1994) (reinstating assault charges in part because New York "Penal Law provides that criminal liability may be based on an omission to act where there is a legal duty to do so, and parents have a nondelegable affirmative duty to provide their children with adequate medical care" (citations omitted)).

Similarly, the Fourth Circuit has found that the offense of child abuse in Maryland is not a crime of violence because "a defendant may be found guilty of physical child abuse by committing an affirmative act *or by neglecting to act*, neither of which necessarily requires the use of physical force against a child." *United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012) (emphasis added). Each of these are examples of *omission*, not *commission*, not even commission by indirect means.

D. *United States v. Castleman* Left Open The Question of Whether The Causation of Injury By Omission Requires Force Within the Meaning of *Johnson*.

The Court in *United States v. Castleman*, 572 U.S. 157 (2014), did not answer the question of whether causation of bodily injury by omission requires the use of violent physical force sufficient to satisfy *Johnson*'s interpretation of that phrase for purposes of the ACCA.

The Court in *Castleman*, 572 U.S. at 163, held that the phrase "physical force" in the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9) has a different meaning than "physical force" in the ACCA, as discussed in *Johnson*, supra. Rather, slight touching as in common law battery convictions would suffice for § 922(g)(9). 572 U.S. at 164. The Court also observed that the administration of poison would constitute common law "force" and the use of force, albeit indirectly, just as pulling the trigger of a gun is indirect. *Id.* at 170-71. This may have settled the question of indirect force and the force clause, but it does not speak to not omissions.

Castleman does not foreclose Mr. Mitchell's omission argument. The en banc Fifth Circuit in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), expressly noted that *Castleman* "does not address whether an *omission*, standing alone, can constitute the use of force, and we are not called on to address such a circumstance today." *Id.* at 181 n.25 (emphasis added). The Fourth Circuit similarly recognizes that *Castleman* did not settle this issue. *See United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) ("*Castleman* did not however abrogate the causation aspect of *Torres-Miguel* that 'a crime may result in death or serious injury without

involving the use of physical force.'" (citing *United States v. Covington*, 880 F.3d 129, 134 n.4 (4th Cir. 2018) and quoting *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012)) (*Torres-Miguel* abrogated on other grounds by *Castleman*).

The Third Circuit in *Oliver* noted the existence a circuit split, or at least confusion among the lower courts after *Castleman*: "Two of our sister courts have reached the opposite conclusion, holding that acts of omission can constitute a use of force under *Castleman*." 728 F. Appx at 112 n.7. "These courts, however, conflate indirect force, which *Castleman* held was sufficient to satisfy the use of force, with omissions." *Id.*

In other words, Mr. Mitchell's argument with regard to omissions does not rely on the distinction between direct and indirect uses of force. That is, it remains true that an offense can *result* in injury without the *use* of force in the context of an omission (in contrast to indirect force, such as poison). *See, e.g.*, *Davis v. Commonwealth*, 335 S.E.2d 375, 378 (Va. 1985) (murder by omission). A parent who withholds food from an infant, resulting in injury or possibly death, has not used physical force at all, even indirectly.

II. This Case Provides an Excellent Vehicle for Deciding the Important Question Presented.

This case provides an excellent vehicle for deciding the question presented. The issues of whether prior convictions under this particular Virginia statute are ACCA violent felonies was preserved and litigated below. It was the only issue in the case. The issue is also dispositive. Both lower courts decided the prior convictions were ACCA force clause predicates, and therefore Mr. Mitchell has a 15-year mandatory

minimum sentence under 18 U.S.C. § 924(e). If the Virginia statute is not categorically a violent felony, then he will be subject to a 10-year statutory maximum.

This procedural posture also demonstrates the critical importance of the issue. Any issue that leads to an additional five years in prison, and raises the statutory minimum and maximum sentences, is maximally important. The Court has observed that "[a]uthority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice." *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) (noting that "our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.").

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion, *United States v. Mitchell*, 774 F. App'x 138 (4th Cir. 2019)

774 Fed.Appx. 138 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1.
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Sean Gregory MITCHELL, Defendant - Appellant.

No. 18-4888
|
Submitted: July 18, 2019
|
Decided: July 31, 2019

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Raymond A. Jackson, District Judge. (4:16-cr-00082-RAJ-LRL-1)

Attorneys and Law Firms

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Before DIAZ and FLOYD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

***139** Sean Gregory Mitchell appeals his 15-year sentence for being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1) (2012). The district court concluded that Mitchell had three previous convictions that qualified as predicate violent felonies or serious drug offenses under the Armed Career Criminal Act, ("ACCA"), 18 U.S.C. § 924(e) (2012), thereby requiring the district court to impose a mandatory minimum sentence of 15 years. *See* 18 U.S.C. § 924(e)(1). On appeal, Mitchell contends that he is not an armed career criminal because his two convictions for unlawful wounding, in violation of Va. Code Ann. § 18.2-51 (2014), are not predicate violent felonies. Because we conclude that Virginia unlawful wounding is a violent felony under the ACCA, we affirm.

We review de novo whether a district court correctly characterized a defendant's prior conviction as a violent felony under the ACCA's force clause. *United States v. Winston*, 850 F.3d 677, 683 (4th Cir. 2017). The ACCA defines the term "violent felony," in relevant part, as an offense that is punishable by a term of imprisonment exceeding one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another" ("force clause"). 18 U.S.C. § 924(e)(2)(B)(i).

> To determine whether a state crime qualifies as a violent felony under the ACCA's force clause, we apply the categorical approach[ ]. Under the categorical approach, we examine whether a state crime has as an element the use, attempted use, or threatened use of physical force against the person of another, and do not consider the particular facts underlying the defendant's conviction. The Supreme Court has defined the term physical force as used in the ACCA as violent force—that is, force capable of causing physical pain or injury to another person. Accordingly, if the elements of a crime can be satisfied by de minimis physical contact, the offense does not qualify categorically as a violent felony.

United States v. Burns-Johnson, 864 F.3d 313, 316 (4th Cir.), *cert. denied*), —— U.S. ——, 138 S. Ct. 461, 199 L.Ed.2d 339 (2017) (citations and internal quotation marks omitted). In determining whether a state crime is a violent felony under the force clause, we rely on the state courts' interpretation

of the offense, looking to the minimum conduct required for a conviction and assessing the realistic probability of a state convicting a defendant for that conduct. *Id.*

Virginia defines both unlawful wounding and malicious wounding in a single provision of its code:

> If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

Va. Code Ann. § 18.2-51. Unlawful wounding requires proof of a bodily injury with "the specific intent to maim, disfigure, disable or kill the victim of the attack." *Commonwealth v. Vaughn*, 263 Va. 31, 557 S.E.2d 220, 222 (2002) (internal quotation marks omitted). Mitchell contends that, because § 18.2-51 includes the phrase "by any means cause ... bodily injury," a defendant can commit unlawful wounding by means other than violent force, such as ***140** nonviolent force or omission rather than action. But Mitchell, by his own admission, does not cite any Virginia case where an unlawful wounding conviction rested on an act of nonviolent force or omission. Moreover, we conclude that, because unlawful wounding requires "the specific intent to maim, disfigure, disable or kill," it is not plausible that a conviction will rest on conduct that is incapable of fulfilling that intent, unless that conduct is accompanied by an attempt or threat to do more serious bodily harm. *See United States v. Pritchett*, 733 F. App'x 128 (4th Cir.), *cert. denied*, —— U.S. ——, 139 S. Ct. 850, 202 L.Ed.2d 616 (2018) (argued but unpublished). We decline Mitchell's request to revisit our decision in *James*.

We conclude that the district court correctly determined that Virginia unlawful wounding is a violent felony under the ACCA's force clause. The district court thus properly imposed the 15-year mandatory minimum sentence required by 18 U.S.C. § 924(e)(1), and we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

All Citations

774 Fed.Appx. 138 (Mem)

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