Docket No. _____

THE SUPREME COURT OF THE UNITED STATES

JULIAN MOZ-AGUILAR,
also known as Humilde,
also known as Demente,
also known as Tio Felito,

Petitioner

v.

UNITED STATES OF AMERICA

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

PETITION FOR WRIT OF CERTIORARI

John C. Whipple, Esq.
Counsel for Petitioner
A Member of the Bar of this Court
On the Petition
John C. Whipple, Esq.
William J. Munoz, Esq.
WHIPPLE AZZARELLO, LLC
161 Madison Avenue, Suite 325
Morristown, New Jersey 07960
jcwhipple@whippleazzarellolaw.com
973-267-7300

QUESTIONS PRESENTED

18 U.S.C. § 924(c) makes illegal the use or carrying of a firearm during and in relation to any crime of violence. 18 U.S.C. § 924(c)(3)(A) in turn defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened physical force against the person or property of another[.]" In considering if an offense is a crime of violence, a sentencing court must apply either the categorical or modified categorial approach, under which the court must ignore a defendant's actual conduct and instead look strictly at the statutory elements of the offense. If the elements of the offense sweep more broadly than the definition of "crime of violence," it is not a valid predicate offense. The Third Circuit has established a different approach in the context of § 924(c) wherein a sentencing court may perform a conduct-based inquiry to determine whether a defendant's actual conduct met the definition of a crime of violence. In petitioner's case, the Third Circuit applied this approach, determined that defendant's actual conduct met the definition of "crime of violence," and affirmed his § 924(c) conviction. The first Question Presented is:

In applying the categorical or modified categorical approach to § 924(c)(3)(A), must a sentencing court limit its consideration to the elements of an offense or may a sentencing court instead ignore the elements of the crime and review all contemporaneous crimes of conviction to determine whether a defendant *actually* used force in committing the offense?

This case also implicates this Court's rulings on when a sentencing court may find that an offense has an element of "force" such that it qualifies as a crime of

violence under a statute's elements clause. In *Johnson v. United States*, this Court held that the phrase "physical force" meant "violent force" between two concrete bodies that was "capable of causing physical pain or injury[.]" 559 U.S. 133 138-40 (2010). Subsequently, in *United States v. Castleman*, this Court held that in the narrow context of domestic violence, "[i]t is impossible to cause bodily injury without applying force in the common-law sense." 572 U.S. 157, 170 (2014). Circuit courts are split as to whether a statutory element requiring physical injury is sufficient to show that an offense also requires an implied element of physical force, even where the injury could realistically be caused by an omission. The second Question Presented is:

Where an offense's necessary element of physical injury can be satisfied by an omission, is that offense categorically a crime of violence under § 924(c)'s elements clause?

RELATED PROCEEDINGS

The related proceedings below are:

1. United States v. Oliva, No. 16-4232 (3rd Cir.) – Judgement entered on October 16, 2019

2. United States v. Reyes-Villatoro, No. 16-4237 – Judgement entered on October 16, 2019

3. United States v. Ramirez, No 16-4239 – Judgement entered on October 16, 2019

4. United States v. Contreras, No. 16-4252– Judgement entered on October 16, 2019

5. United States v. Palencia, No. 16-4302 – Judgement entered on October 16, 2019

6. United States v. Garcia, No. 16-4321– Judgement entered on October 16, 2019

7. United States v. Flores, No. 16-4381 – Judgement entered on October 16, 2019

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Julian Moz-Aguilar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The unreported opinion of the court of appeals is attached hereto. Pet. App. 004a-021a.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2019. Pet. App. 001a-003a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 924(c)(1)(A) provides in relevant part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii)if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C.§ 924(c)(3)(A) provides in relevant part:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another

INTRODUCTION

Petitioner Julian Moz-Aguilar was sentenced to life plus 120 months' incarceration after being convicted of, among other things, murder in aid of racketeering predicated on a violation of New Jersey's murder statute contrary to 18 U.S.C. §§ 1959(a)(1) and (2). Pet. App. 022a-024a. Relevant to this petition, a defendant is guilty of murder under New Jersey law where "(1) The actor purposely causes death or serious bodily injury resulting in death; or (2) The actor knowingly causes death or serious bodily injury resulting in death[.]" *N.J.S.A* § 2C:11-3. Petitioner was also convicted of using of a firearm during a crime of violence contrary to § 924(c), predicated on the charge of murder in aid of racketeering. Pet. App. 022a. From the outset, petitioner has argued that because New Jersey's murder statute lacks an element requiring the use of force, neither it nor the 18 U.S.C. § 1959(a)(1) and (2) charge for which it served as a basis are valid predicate offenses under § 924(c)'s so-called "elements clause." The elements clause defines a "crime of violence" as a felony that has as an element the use, threatened use, or attempted use of force. § 924(c)(3)(A). Petitioner's position is that because a conviction under New Jersey's murder statute can be sustained without a finding of use of force, it sweeps more broadly than § 924(c)'s definition of "crime of violence," and is therefore not a valid predicate under the "categorical approach" analysis mandated by this

Court. In the elements-clause context, there is a well-developed split among circuit courts as to whether a statutory element requiring injury or death is sufficient to show a silent statutory element requiring force.

In affirming petitioner's conviction, the Court of Appeals for the Third Circuit applied Third Circuit case law prescribing a totally unique formulation of what it referred to as the "modified categorical approach." It is well settled that when a sentencing court considers if an offense is a "crime of violence," it must apply the so-called categorical or modified categorical approach. Both of these approaches require a sentencing court to disregard how a defendant actually committed an offense and to instead look strictly at the elements of the offense to see if it matches the statutory definition of a "crime of violence." However, in the § 924(c) context, the Third Circuit's formulation of the modified categorical approach permits a sentencing court to ignore the elements of the offense and to instead consider a defendant's actual conduct in committing the offense. Applying this deviant approach, the Third Circuit completely disregarded the elements of murder under New Jersey state law, which make no mention of force. Instead, the Third Circuit reviewed petitioner's contemporaneous convictions to determine that he actually used force in committing the offense and that he therefore committed a crime of violence. Pet. App. 011a-012a. The Third Circuit's rule renders it an outlier among Courts of Appeals, which broadly adhere to this Court's mandate that under both the categorical and modified categorical approaches, a sentencing court must look only to the elements of the predicate offense to determine whether it is a crime of violence.

STATEMENT OF THE CASE

On September 19, 2013 petitioner Julian Moz-Aguilar was charged as part of a 26-count indictment against 14 members of the Plainfield Locos Salvatrucha ("PLS") clique of Mara Salvatrucha ("MS-13"). Pet. App. 028a-058a. In particular petitioner was charged with racketeering conspiracy in violation of 18 U.S.C. § 1962(d) (Count 1); murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1) (Count 2); using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count 3); and causing death through use of a firearm in violation of 18 U.S.C. § 924(j) (Count 4). Pet. App. 028a-058a.

The § 1962(d) conspiracy described numerous acts during the pleaded time frame, all potentially attributable to this petitioner as "conspiratorial" acts. Pet. App. 041a-054a. Particularly, petitioner was charged with the murder of a rival gang member Christian Tigsi allegedly at the direction of the gang's leader. Pet. App. 043a. Count 2 alleged that for the purpose of maintaining or increasing his position within PLS, Petitioner murdered Christian Tigsi. Pet. App. 054a-056a. Count 3 charged Petitioner with carrying and using a firearm in connection with the Count 2 murder. Pet. App. 057a. Count 4 charged Petitioner with knowingly causing the death of Christian Tigsi through the use of a firearm. Pet. App. 058a.

Prior to trial, Petitioner moved to dismiss Count 3's § 924(c) charge, arguing that a violation of 18 U.S.C. § 1959(a)(1) based on New Jersey's murder statute was not a valid predicate "crime of violence" under *Johnson v. United States*, 559 U.S. 133 (2010) and related cases. Specifically, Petitioner argued that because New Jersey's murder statute lacks an element requiring the use, threatened use, or attempted use

of force, neither it nor the murder in aid of racketeering charge for which it served as a basis are valid predicate offenses under § 924(c)'s elements clause. Petitioner also argued that the residual clause of § 924(c)(3)(B)) was unconstitutionally vague under *Johnson v. United States,* 135 S. Ct. 2551 (2015) (*"Johnson II")* and since he could not be properly charged under either §§ 924(c)(3)(A) or (B), the § 924(c) count should have been dismissed prior to trial. The District Court denied petitioner's pre-trial motion.

After a jury trial, petitioner was found guilty of Counts 1, 2, 3 and 4 of the indictment. Pet. App 022a. Thereafter, on November 30, 2016, petitioner was sentenced to a mandatory life term on Counts 1, 2 and 4 of the Indictment to run concurrently and a 120-month term on Count 3 to run consecutive to the sentence imposed on Count 1, 2 and 4. Pet. App. 022a-024a. The total sentence of the court was life plus 120 months' imprisonment.

Petitioner appealed his case to the Court of Appeals for the Third Circuit, arguing in part that his conviction under § 924(c) had to be vacated for two reasons: first, the elements clause of § 924(c) could not be satisfied by a conviction for murder in aid of racketeering predicated on New Jersey state-law murder, because that crime could be committed without the sort of violent force required of "crimes of violence" under *Johnson.* Second, defendant argued that the residual clause of § 924(c) was void for vagueness for the same reasons this Court struck down the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), in *Johnson II.* The Third Circuit disagreed, holding:

> Moz-Aguilar was convicted under 18 U.S.C. § 924(c) of discharging a firearm during a "crime of violence," and

> under § 924(j) for causing death in the course of doing so. Those charges arose from the murder of Christian Tigsi. "[T]he determination of whether a particular crime qualifies as a 'crime of violence' under § 924(c) depends upon both the predicate offense . . . and the contemporaneous conviction under § 924(c)." Therefore, we have to "look at all the offenses before the jury to the extent that these offenses shed light on whether physical force was used, attempted, or threatened in committing the predicate offense." "The discharge of a firearm, coupled with resulting personal injury, qualifies as a use of physical force." Christian Tigsi was shot and killed. Accordingly, the element of physical force was present.
>
> [Pet. App. 011a-012a (citing *United States v. Robinson*, 844 F3d 137, 143 (3rd Cir. 2016); *United States v. Galati*, 844 F.3d 152, 155 (2018)]

REASONS FOR GRANTING CERTIORARI

This case presents two important questions: First, it asks whether a sentencing court, when determining if an offense can serve as a predicate under § 924(c)'s elements clause, may look beyond the elements of the offense charged and instead review contemporaneous convictions to determine whether the defendant's actual conduct involved the use, threatened use, or attempted use of force.

The correct answer is certainly "no." This Court has consistently held that sentencing courts must apply either the "categorical approach" or "modified categorical approach" to determine whether an offense is a "crime of violence." *Descamps v. United States,* 570 U.S. 254, 261 (2013). In applying either of those approaches, a sentencing court must consider only the elements of the offense of conviction and may not consider the defendant's underlying conduct in committing the offense. *Id.* The Third Circuit is an outlier among circuit courts in holding that

an inquiry under § 924(c) permits a sentencing court to disregard this elements-focused approach and instead look at a defendant's contemporaneous convictions to determine whether his conduct in committing the proposed predicate offense actually involved force. *United States v. Robinson*, 844 F3d 137 (3rd Cir. 2016); *United States v. Galati*, 844 F.3d 152 (2018). The Third Circuit's conduct-based approach runs directly contrary to this Court's law requiring an elements-based approach to determine whether an offense is a crime of violence under § 924(c) and similarly worded statutes.

This case also asks whether a sentencing court can find that when an offense's elements require a finding of injury, an omission resulting in such an injury is a "use of force" sufficient to satisfy § 924(c)'s elements clause. The answer to this second question is likewise "no." As relevant to this case, § 924(c) makes it illegal to use or carry a firearm during and in relation to any "crime of violence." § 924(c)(3)(A), the "elements clause," provides that a "crime of violence" is a felony that "has as an element the use, attempted use, or threatened physical force against the person or property of another[.]" The word "force" in the context of a crime of violence "suggests a category of violent, active crimes[.]" *Leocal v. Ashcroft*, 543 U. S. 1, 11 (2004). In *Johnson,* this Court held that the word "force" in ACCA's elements clause – phrased almost identically to § 924(c)(3)(A) – means "violent force . . .exerted by and through concrete bodies[.]" 559 U.S. 133 at 138, 140. Later, in *Castleman*, this Court ruled that *Johnson*'s "violent force" meaning was inapplicable in the context of crimes of domestic violence and that a lesser level of "common-law" force was sufficient to

satisfy the "force" requirement for a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). *Castleman*, 572 U.S. at 163. This Court also reasoned that even where an offense lacked a facial element of force, an element of physical injury categorically met this low common-law threshold because "[i]t is impossible to cause injury without applying force in the *common-law* sense." *Id.* at 170 (emphasis added). However, the *Castleman* Court was careful to emphasize the narrow scope of its decision, acknowledging the *Johnson* Court's ruling that applying such a low common-law force requirement outside the domestic violence context was a "comical misfit." *Castleman*, 572 U.S. at 163 (citing *Johnson*, 559 U.S. at 145). In short, *Castleman*'s narrow ruling did not create a rule under which "causation of an injury is the dispositive question for force inquiries under federal law[.]" *Villanueva v. United States*, 893 F.3d 123, 134 (2nd Cir. 2018) (Pooler, J., dissenting). It defies logic and law that a defendant's failure to act constitutes the "active," "violent force" as required by *Leocal* and *Johnson*. *See Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016) (defining use of force as the "act of employing" force).[1] Based on any reasonable

[1] In *Stokeling v. United States*, 139 S. Ct. 544, 548 (2019), this Court addressed the narrow question of whether "a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance necessitates the use of 'physical force' within the meaning of ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i)." In ruling in the affirmative, this Court relied almost exclusively on ACCA's inclusion of robbery as an enumerated offense in its original language. *Id.* at 550-52. *Stokeling* is inapposite here for three reasons. First, this Court's reliance on ACCA's prior inclusion of robbery as an enumerated offense has no parallel here because §924(c) never included robbery as an enumerated offense. Second, this Court's holding in *Stokeling* dealt strictly with robbery. Because the offense at issue in this case is not robbery, the Court's narrow ruling is inapplicable. *See Id.* at 560 (Sotomayor, J., dissenting)("the majority must construe 'physical force' in §924(e)(2)(B)(i) to bear two different meanings – *Johnson*'s and the majority's – depending on the crime to which it is being applied"). Third, as discussed in greater detail below, the instant case hinges on whether an omission is sufficient to constitute a use of force. Because *Stokeling* still requires the active employment of force (albeit to a reduced degree) it lends nothing to the analysis in this case. *Id.* at 553 (majority opinion) ("robbery that must overpower a victim's will . . . necessarily involves a physical confrontation and struggle").

reading of the relevant statutory language and case law, an omission cannot satisfy § 924(c)'s elements clause because it is not a "use" of force.

This case presents an especially good vehicle for resolving both of the questions presented. First, in affirming petitioner's § 924(c) conviction, Third Circuit relied on caselaw that clearly misapplies the modified categorical approach by permitting a sentencing court to ignore the elements of the statute of conviction and instead look to a defendant's conduct in the commission of the offense to determine if it was in fact committed using force. In petitioner's case, rather than determining that physical force was required by the elements of New Jersey's murder statute, the Third Circuit held that because a firearm was used in committing the murder, "the element of physical force *was present*." Pet. App. 012a (emphasis added). This creates a clear split among the circuits as to whether, in the § 924(c) context, a sentencing court may disregard the elements of the offense and instead look to a defendant's actual conduct in determining whether the offense is a crime of violence. More importantly, the Third Circuit's rule contravenes this Court's clear holdings that the categorical and modified categorical approach require an elements-based analysis. *Descamps*, 570 U.S. at 264. A ruling in petitioner's favor would clarify that when analyzing whether an offense is a valid § 924(c) predicate, a sentencing court must not look to a defendant's conduct in a particular instance but instead must strictly limit its inquiry to the crucial question of whether or not force is a necessary element of the crime of conviction.

This case is also a good vehicle for resolving whether, under § 924(c)'s elements clause, an omission can constitute a "use of force." A ruling in defendant's favor would clarify that the categorical and modified categorical approaches are concerned only with whether an offense's elements require the use of force. Regardless of a particular defendant's conduct, if the offense's statutory elements can be satisfied without the use of force, the offense's language sweeps more broadly than § 924(c)(3)(A)'s definition of a crime of violence and is not a valid § 924(c) predicate. The fact that this case hinges on a murder conviction would serve to emphasize the importance of a strictly elements-based approach, without regard to the severity of the result of the offense. Moreover, this Court's ruling could be narrowly tailored. It would not need to address questions of degree or directness of force. Rather, it would only need to address the discrete question of whether an omission resulting in injury is a "use of force" under § 924(c)'s elements clause.

I. Courts of Appeals Are Split on Whether A Conduct-Based Inquiry is Appropriate in Considering § 924(c) Predicate Offenses

Lower courts face a complicated environment thanks to "Congress's repeated, overlapping use of the phrase 'crime of violence' in . . . statutes such as the Armed Career Criminal Act ('ACCA'), 18 U.S.C. § 924(g)(4), the Domestic Violence Offender Gun Ban, 18 U.S.C. § 922(g)(9) (referring to a 'crime of domestic violence'), and the United States Sentencing Guidelines, U.S.S.G. § 2L1.2." *Whyte v. Lynch*, 807 F.3d 463, 467 (1st Cir. 2015).

In § 924(c) and similarly phrased and structured statutes[2], Congress provided two means by which an offense may qualify as a "crime of violence." Although the language varies slightly between the statutes, they share the same two-pronged structure. First, under the so-called "elements clause," a predicate offense is a crime of violence if it has, as an element, the use, threatened use, or attempted use of force. *See* § 924(c)(3)(A). Second, under the now-defunct[3] "residual clause" – a significantly broader catch-all provision – an offense is a crime of violence if it is a felony 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."[4] *See* § 924(c)(3)(B).

In considering whether an offense is a crime of violence, a sentencing court must apply either the categorical or modified categorical approach.[5] *Descamps,* 570 U.S

---

[2] This Court has ruled on numerous federal statutes defining some variation of "crime of violence" and has treated them similarly despite minor linguistic differences. *See e.g. Davis,* 139 S. Ct. at 2328-29 (application of categorical approach to §924(c) informed by application of same to §16)(citing *Leocal,* 543 U. S. at 7. For example, courts have understood these statutes to all require the application of the so-called "categorical approach." *See id.* at 2326.

[3] Over the years, this Court has struck down the residual clauses of various federal statutes as unconstitutionally vague. *See e.g. Johnson II,* 135 S. Ct. 2551 (striking down ACCA residual clause); *Sessions v. Dimaya,* 138 S. Ct. 1204 (2017) (18 U.S.C. § 16(b) residual clause unconstitutionally vague); *United States v. Davis,* 139 S. Ct. 2319 (Section 924(c) residual clause unconstitutionally vague). This vagueness stems from this Court's determination that courts must apply the categorical approach to these residual clauses, which requires courts to ignore a defendant's actual conduct and imagine the "idealized ordinary case of the crime" and then determine the risk of force involved in that hypothetical crime. *Johnson II,* 135 S. Ct. at 2561. This analysis, required by the language of the statute, "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2558.

[4] The residual clause of some statutes, such as ACCA, also includes an "enumerated crimes clause" listing various generic offenses that are considered "crimes of violence." Section 924(c)'s residual clause, however, contains no such list.

[5] Despite slight linguistic variation between the various statutes employing these clauses, this Court has held that courts must apply the "categorical approach" in determining whether a predicate offense qualifies as a crime of violence under both a statute's elements clause and their broadly invalidated residual clauses. *See e.g. Taylor v. United States,* 495 U.S. 575, 600 (1990) (categorical approach applies to ACCA as a whole).

254. Under the categorical approach, "[s]entencing courts may 'look only to the statutory definitions'—i.e., the elements—of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" *Id.* at 261 (quoting *Taylor v. United States,* 495 U. S. 575, 600 (1990)). Under the categorical approach, the "brute facts" underlying the commission of the offense are irrelevant. *See Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). Because the categorical approach asks what the elements of an offense necessarily require in all cases, courts must "presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (quoting *Johnson*, 559 U.S. at 137). If an offense criminalizes a broader range of conduct than the crime-of-violence definition, it is not categorically a "crime of violence." *See Descamps*, 570 U.S. at 261.

In a narrow range of cases where a statute sets forth various elements that may be satisfied in the alternative, at least one of which matches the statutory definition of crime of violence, this Court has approved of the use of the "modified categorical approach." *See Descamps*, 570 U.S. at 257 (citing *Taylor*, 495 U.S. at 602). Under this approach a court may review a limited range of so-called *Shepard*[6] documents for the sole purpose of determining under which of the alternative elements the defendant was convicted. Once the sentencing court determines what "crime, with what elements, a defendant was convicted of[,]" it then applies the categorical

[6] *Shepard v. United States*, 544 U.S. 13, 26 (2005)(permitting review of charging document and plea agreement or plea colloquy).

approach to those pared-down elements. *Mathis*, 136 S.Ct. at 2249. The "modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction." *Descamps*, 570 U.S. at 269. Critically, the modified categorical approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *Descamps*, 570 U.S. at 264. Recently, this Court addressed the distinction between statutory elements and the facts of this case in *Mathis*:

> "Elements" are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction. At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. (We have sometimes called them "brute facts" when distinguishing them from elements). They are circumstances or events having no legal effect or consequence: In particular, they need neither be found by a jury nor admitted by a defendant.
>
> [136 S. Ct. at 2248 (quotations omitted)]

This line of cases clearly resolves the question of whether a sentencing court applying the categorical or modified categorical approach may consider a defendant's actual conduct to conclude an offense is a "crime of violence" under § 924(c)'s elements clause. The foregoing caselaw makes it clear: neither the categorical approach nor the modified categorical approach permits a sentencing court to consider a defendant's underlying conduct. Yet despite this clear prohibition of a conduct-based analysis, there is a circuit split on the issue.

The vast majority of circuit courts hold that § 924(c) requires the faithful application of the categorical or modified categorical approach, depending on an offense's divisibility. *United States v. Douglas*, 907 F.3d 1, 9 n.12 (1st Cir. 2018) ("we have held in several cases that a categorical approach properly applies to the force clause at § 924(c)(3)(A)") (citations omitted); *United States v. Acosta*, 470 F.3d 132, 135 (2nd Cir. 2006) (applying categorical approach to § 924(c)); *United States v. Fuertes*, 805 F.3d 485, 497 (4th Cir. 2015) (both residual clause and elements clause require categorical approach or, if offense is divisible, modified categorical approach); *United States v. Williams*, 343 F.3d 423, 431 (5th Cir. 2003) (categorical approach applies to § 924(c)(3)(A) and (B)); *Evans v. Zych*, 644 F.3d 447, 453 (6th Cir. 2011) (applying modified categorical approach to § 924(c)(3)(A)); *United States v. Jackson*, 865 F.3d 946, 951 (7th Cir. 2017) ("In determining whether an offense is a 'crime of violence' under § 924(c), we employ the categorical approach [to determine if an offense is] a crime of violence as defined in subsection (A) or (B)"), vacated and remanded, 138 S. Ct. 1983 (2018); *United States v. Harper*, 869 F.3d 624, 625 (8th Cir. 2017) ("To determine whether Harper's convictions satisfy the 'force' clause, we apply the 'categorical approach,' and consider only the statutory elements of the offense"); *United States v. Fultz*, 923 F.3d 1192, 1194 (9th Cir. 2019) (applying categorical approach to § 924(c)(3)(A)); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1061-64 (10th Cir. 2018) (applying categorical approach to both clauses of § 924(c)(3)); *United States v. McGuire*, 706 F. 3d 1333, 1336-1337 (11th Cir. 2013)

(applying categorical approach to § 924(c)(3)(A) because it asks a "question of law" that must be answered by reference strictly to the elements of the offense).

More importantly, where the modified categorical approach applies, virtually all circuit courts adhere to this Court's mandate that the modified categorical approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *Descamps*, 570 U.S. at 264. *See United States v. Faust,* 853 F.3d 39, 53 (1st Cir. 2017) (even when examining the *Shepard* documents, the "district court's task is not to fit the facts of the individual defendant's conduct into one of the divisible offenses"; "the question to be answered remains concentrated on the elements of the actual offense of conviction rather than on the specific facts of [the defendant's] conduct"); *United States v. Frates*, 896 F.3d 93, 97 (1st Cir. 2018) ("It is axiomatic that in determining whether a crime fits within the force clause, we look to the elements that comprise the offense, rather than the defendant's conduct in committing the crime"); *United States v. Beardsley*, 691 F.3d 252, 270-71 (2nd Cir. 2012) ("An approach that simply asks whether the conduct underlying the conviction, as disclosed in the charging instruments or the plea colloquy or the jury instructions, is the sort of conduct referenced in the sentence enhancement, is not a modified categorical approach; it is not 'categorical' at all"); *United States v. Allred*, 942 F.3d 641, 648 (4th Cir. 2019) (reiterating that in applying modified categorical approach, sentencing courts are not permitted to consider actual facts of defendant's conviction to determine if they satisfy the force clause); *United States v. Reyes-Contreras*, 910 F.3d 169, 174 (5th Cir. 2018) (court may not use modified categorical approach "to

locate facts supporting a COV enhancement, but only as a tool to identify the elements of the crime of conviction") (quotation omitted); *United States v. Davis*, 751 F.3d 769, 777 (6th Cir. 2014) (modified categorical approach does not permit consideration of facts underlying conviction); *Portee v. United States*, 941 F.3d 263, 266 (7th Cir. 2019) ("Even under the modified categorical approach, we do not consider the facts of what defendant did. We merely consider whether the crime with the selected alternative element required proof he used, attempted to use, or threatened to use physical force against the person of another"); *United States v. Titties*, 852 F.3d 1257, 1266 (10th Cir. 2017) (modified categorical approach used to identify relevant elements, not relevant facts); *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir 2014) (modified categorical approach should focus on the elements, not facts, of crime).

The Third Circuit, on the other hand, rejects this Court's clear precedent and the holdings of its sister courts, and charts its own course in the § 924(c) context. In *United States v. Robinson*, the Third Circuit observed that because the predicate offense and the § 924(c) offense are "contemporaneous and tried to the same jury, the record of all necessary facts are before the district court." 844 F.3d at 141. Thus, disregarding the necessary divisibility analysis, the *Robinson* court determined that "the modified categorical approach is inherent in the district court's consideration of the case because the relevant indictment and jury instructions are before the court." *Id.* at 143. Even more glaringly, the Third Circuit set aside the modified categorical approach's elements-focused inquiry and instead looked to the defendant's actual

conduct in committing the offense. The court concluded that "analyzing a § 924(c) predicate offense in a vacuum is unwarranted when the convictions of contemporaneous offenses, read together, necessarily support the determination that the predicate offense *was committed* with the 'use, attempted use, or threatened use of physical force against the person or property of another.'" *Id.* at 143 (emphasis added). Although the *Robinson* court claimed it was applying the "modified categorical approach," it was doing nothing of the sort. In looking to the defendant's underlying conduct, the Third Circuit's rule vastly exceeds the bounds of the modified categorical approach as set forth by this Court.

In *Galati*, 844 F.3d 152, the Third Circuit expanded the application *Robinson's* conduct-based approach. It reiterated *Robinson's* mischaracterization of the modified categorical approach, stating that "determining whether a particular crime is a crime of violence under § 924(c) requires us to look at all the offenses before the jury to the extent that these offenses shed light on whether physical force *was* used, attempted, or threatened in committing the predicate offense." *Id.* at 152 (emphasis added). The *Galati* court noted that in both *Robinson* and *Galati*, "a jury determined that a firearm had been used in the commission of the offense, [which] indicates the use, attempted use, or threatened use of physical force in the commission of the offense. . . . Thus, on the facts found by the jury, . . . Galati committed a crime of violence." *Id.* at 154-55.

II. Circuit Courts Are Split on Whether An Omission is a Use Of Force Sufficient to Satisfy § 924(c)'s Elements Clause

The application of the categorical or modified categorical approach is often sufficient to resolve the question of whether an offense is "categorically" a crime of violence under the elements clause of § 924(c) and similar statutes. Under the foregoing rule, a court looks to the elements of an offense and, if those elements require a jury to find the use, threatened use, or attempted use of force, the offense satisfies § 924(c)'s elements clause and is a valid predicate offense. However, this analysis has been complicated by two closely related question: First, what kind and degree of "force" is necessary for an offense to qualify as a "crime of violence" and second, may a court find that the use, threatened use, or attempted use of force is an element of an offense when the offense does not actually mention "force" in its statutory language?

In *Johnson*, the Court set forth the degree of force necessary to satisfy the force requirement of ACCA's analogous elements clause, explaining that the term "physical force" as used in ACCA's force clause means something more than the "mere unwanted touching" necessary to prove common law battery. 559 U.S. at 142. Rather, because the term "physical force" contributes to the definition of a "violent felony," it is understood to mean "violent force — that is, force capable of causing physical pain or injury to another person." *Id.* at 140. The *Johnson* Court found it a "comical misfit" to give ACCA's phrase "physical force" the specialized meaning it bore in the common-law definition of battery, which was satisfied by even the slightest offensive touching. *Id.* at 163.

In *Castleman*, this Court addressed the issue of "force" in the narrow context of § 922(g)(9), which prohibited firearm possession by an individual "who has been convicted . . . of a misdemeanor crime of domestic violence." 572 U.S. at 160. The statute in turn defined "misdemeanor crime of domestic violence" as a misdemeanor committed by certain family members or cohabitants that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." *Id.* at 161. The Court first held that, in the domestic violence context, "the requirement of "physical force" is satisfied, for purposes of § 922(g)(9), by the degree of force that "supports a common-law battery conviction." *Id.* at 168. This Court reasoned that "whereas the word 'violent' or 'violence' standing alone connotes a substantial degree of force, that is not true of 'domestic violence.'" *Id.* at 164 (quotation omitted). Moreover, "'[d]omestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Id.* The Court distinguished its holding in *Castleman* from that in *Johnson*, noting that while the common-law definition of "force" was a misfit in the context of ACCA, it fit perfectly in defining a "misdemeanor crime of violence." *Id.* at 163.

As to how this "common-law force" must be "used," the *Castleman* Court declined to distinguish between direct and indirect applications of force and rejected the argument that a defendant could cause bodily injury without the "use of physical force – for example by deceiving the victim into drinking a poisoned beverage, without making contact of any kind." *Id.* at 170 (quotations omitted). The Court relied on *Johnson* for the proposition that "'physical force' is 'simply force exerted by and

through concrete bodies' as opposed to intellectual force or emotional force." *Id.* (quoting *Johnson*, 559 U.S. at 138). It therefore narrowly held that "the *common-law* concept of 'force' encompasses even its indirect application." *Id.* (emphasis added). Based on the foregoing, the Court concluded that "it is impossible to cause bodily injury without applying force *in the common-law sense*." *Id.* (emphasis added).

The *Castleman* Court was careful to note that it did not intend this common-law meaning of force to apply in the broader context of crimes of violence:

> The Courts of Appeals have generally held that mere offensive touching cannot constitute the "physical force" necessary to a "crime of violence," just as we held in *Johnson* that it could not constitute the "physical force" necessary to a "violent felony." . . . Nothing 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 164 n.4]

Critically, although *Johnson* and *Castleman* differ in the degree and directness of force necessary to crimes of violence and domestic violence, they both indicate that "use of force" does not encompass inaction. The *Johnson* Court rejected the notion that "violent force" could mean non-physical force like intellectual force. 559 U.S. at 138. The *Castleman* Court, for its part, reiterated its holding in *Leocal* that "'use' requires active employment[.]" 572 U.S. at 169 n.8.

Thanks in large part to a misreading of *Castleman*'s ruling that "it is impossible to cause bodily injury without applying force *in the common-law sense*[,]" courts are split on whether an omission resulting in injury is a "use of force" in cases of general crimes of violence. *Id.* (emphasis added). Many circuits have applied

Castleman's domestic-violence-specific holding in the context of general crimes of violence which, under *Johnson*, require a greater degree of force – that is, "violent force." 559 U.S. at 140. Those circuits rely on a combination of *Johnson* and *Castleman* for the proposition that that where an offense has an element of physical pain or injury, the offense also inherently requires that not just common-law force, but *violent* force must have been used. Thus, these circuits come to the bizarre circular conclusion that, as long as an offense's elements require physical pain or injury, it is categorically a crime of violence, even where the injury could be caused by minimal contact or even an omission.

The Tenth Circuit, for instance, disregards *Johnson*'s requirement of "violent force" and holds that "[i]f it is *impossible* to commit a battery without applying force, and a battery can be committed by an omission to act, then second-degree assault must also require force." *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017) (interpreting U.S.S.G. § 4B1.2(a)(1)'s nearly identical[7] elements clause) (emphasis in original). Likewise, the Seventh Circuit ignores this Court's holding in *Johnson* and holds that "withholding medicine causes physical harm, albeit indirectly, and thus qualifies as the use of force under *Castleman*." *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016) (considering U.S.S.G. 4B1.2(a)(1)). The Fifth and Eighth Circuits would agree with the Seventh and Tenth's misapplication of *Castleman* and *Johnson*. In *Reyes-Contreras*, the Fifth Circuit overturned a long line of cases which held that "for the use of force to be an element, force must be a

[7] § 924(c)(3)(A) also encompasses threatened, attempted, or actual use of force against the property of another, while U.S.S.G. § 4B1.2(a)(1) does not.

constituent part of a claim that must be proved for the claim to succeed in every case charging that offense." 910 F.3d at 180 (citing *United States v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004) (en banc)). In doing so, the *Reyes-Contreras* court adopted in a general crime-of-violence context *Castleman*'s holding that "[i]t is impossible to cause bodily injury without applying force in the common-law sense" and it implied that a "deliberate omission" is an example of "indirect force." *Id.* at 181 (citing *United States v. Villegas-Hernandez*, 468 F.3d 874, 878-83 (5th Cir. 2006)). The Eighth Circuit has also adopted *Castleman*'s ruling that "it is impossible to cause bodily injury without applying force" in the context of U.S.S.G. § 4B1.2. *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016). In the Fifth, Seventh, Eighth, and Tenth Circuits, New Jersey state-law murder would be categorically considered a crime of violence. Although death caused by an omission (such as starving a child) is sufficient to constitute murder in New Jersey, this passive failure to act would be considered an active "use of force" in these circuits because it ultimately resulted in death.

On the other hand, the First, Third, and Fourth Circuits follow this Court's holdings in *Johnson* and *Castleman* and would clearly reach different results. The Third Circuit, for instance adheres to this Court's clear precedent and declines to "conflate an act of omission with the use of force". *United States v. Mayo*, 901 F.3d 218, 230 (3rd Cir. 2018) (Pennsylvania aggravated assault not a valid predicate under ACCA elements clause because element of serious bodily injury can be satisfied by act of omission like starvation). Other circuits would agree that an omission is not a

use of force even if the omission results in injury. The First Circuit, for example, has declined to adopt *Castleman*'s common-law force threshold outside the crimes of violence context and holds that an element of physical injury does not necessarily require employing the violent force described in *Johnson*. *Whyte,* 807 F.3d 463(in case of identically-phrased 18 U.S.C. § 16(a) elements clause, holding that Connecticut third-degree assault is not categorically a crime of violence). The Fourth Circuit has similarly ruled that a "crime may result in death or serious injury without involving the use of physical force." *United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) (quotations omitted). It is clear that in the First, Third, and Fourth Circuits, New Jersey state-law murder would not be considered a crime of violence under § 924(c)'s elements clause because it can be committed by, which does not involve the "use" of physical force.

THE DECISION BELOW IS INCORRECT

I. The Court of Appeals Erred in Looking to Petitioner's Actual Conduct Instead of Constraining Its Inquiry to the Elements of the Offense

In upholding the District Court, the Third Circuit applied its rule that "the determination of whether a particular crime qualifies as a 'crime of violence' under § 924(c) depends upon both the predicate offense . . . and the contemporaneous conviction under § 924(c)." Pet. App. 011a (quoting *Robinson*, 844 F.3d at 143).[8] In

[8] The Court of Appeals' opinion is silent on whether it based its decision on the residual clause or elements clause of § 924(c). To the extent this Court may find that the Court of Appeals' opinion rested on the now-defunct residual clause, petitioner's § 924(c) conviction must be vacated in light of this Court's decision in *Davis*.

doing so, the Court relied on two cases, *Robinson,* 844 F3d 137, and *Galati*, 844 F.3d 152, that clearly violate this Court's precedent.

As discussed *supra, Robinson* and *Galati* improperly permit a sentencing court to look to a defendant's underlying conduct in determining whether an offense is a valid predicate under § 924(c). That this inquiry is performed in the guise of the "modified categorical approach" in no way negates its impropriety. *See Robinson*, 844 F.3d at 143 ("the modified categorical approach is inherent in the district court's consideration of the case because the relevant indictment and jury instructions are before the court"). However, the approach taken in *Robinson* and *Galati* bears no resemblance to either the categorical or modified categorical approach.[9] Rather, it represents the exact conduct-based analysis this Court has repeatedly rejected as inappropriate under either the categorical or modified categorical approach. *Mathis*, 136 S. Ct. at 2251-52; *Descamps*, 570 U.S. at 261; *Taylor*, 495 U.S. at 600.

The *Robinson* court found the categorical approach was "not necessary"[10] in the § 924(c) context and instead employed a conduct-based approached. It reasoned that because § 924(c) offenses and predicate offenses are tried together, "[t]he jury's determination of the facts of the charged offenses unmistakably shed light on whether

---

[9] Because the Third Circuit's approach bears no resemblance to the actual modified categorical approach, it is irrelevant the court failed to perform the requisite divisibility analysis prior to applying it. The conduct-based inquiry is impermissible regardless of which approach the court purports to apply.

[10] Although the *Robinson* court's conduct-based inquiry is inappropriate in either the categorical or modified categorical context, it bears nothing that this Court recently indicated that § 924(c)'s elements clause called for the categorical approach. *Davis*, 139 S. Ct. at 2328 ("[E]veryone agrees that, in connection with the elements clause, the term 'offense' carries the first 'generic' meaning. . . . The language of the residual clause itself reinforces the conclusion that the term 'offense' carries the same 'generic' meaning throughout the statute").

the predicate offense *was committed* with 'the use, attempted use, or threatened use of physical force against the person or property of another.'" 844 F.3d. at 141 (emphasis added). *Robinson*'s clear focus on how the offense "was committed" flies in the face of this Court's holdings that a sentencing court must disregard the defendant's actual conduct and only consider the elements of the predicate offense. *Mathis*, 136 S. Ct. at 2251-52; *Descamps*, 570 U.S. at 261; *Taylor*, 495 U.S. at 600. *Galati* took the next logical step based on *Robinson*'s conduct-based approach, ruling that "determining whether a particular crime is a crime of violence under § 924(c) requires us to look at all the offenses before the jury to the extent that these offenses shed light on whether physical force *was* used, attempted, or threatened *in committing* the predicate offense." *Id.* at 155 (emphasis added). *Galati*, like *Robinson*, runs directly contrary to this Court's precedent.

In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court recently addressed whether the contemporaneous nature of § 924(c) and predicate offenses permitted the application of a conduct-based approach. The *Davis* Court observed that § 924(c) is somewhat unique among "crime of violence" statutes in that, in contrast to statutes referring to prior convictions, "the government already has to prove to a jury that the defendant committed all the acts necessary to punish him for the underlying crime of violence or drug trafficking crime." 139 S. Ct. at 2327. But this Court ultimately rejected the Government's request for rule permitting a conduct-based inquiry, observing that "it might have been a good idea" for Congress to have written § 924(c) using conduct-based language. *Id.* at 2328. However, Congress did not do so, and "no

matter how tempting, this Court is not in the business of writing new statutes to right every social wrong it may perceive." *Id.* at 2336. Indeed, the *Davis* Court observed that rather than referring to "the specific acts in which an offender engaged on a specific occasion[,]" the word "offense" in § 924(c)'s carries the "'generic' meaning throughout the statute." *Id.* at 2238-39.

A conduct-based inquiry is inappropriate under either the categorical or modified categorical approach. The "brute facts" underlying the commission of the offense are irrelevant. *See Mathis*, 136 S. Ct. at 2251. Instead, under either approach, "[s]entencing courts may 'look only to the statutory definitions'—i.e., the elements—of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" *Descamps*, 570 U.S. at 261 (quoting *Taylor*, 495 U.S. at 600). Despite attempting to pass this new rule off as an application of the "modified categorical approach," it is no such thing. Instead, the *Robinson* and *Galati* courts impermissibly created a new offense-based analysis for § 924(c) that runs directly contrary to the strictly element-based approach set forth by this Court.

In addition to running afoul of this Court's caselaw favoring the categorical approach, the Third Circuit's *Robinson* and *Galati* rulings yield one of the very results the *Davis* Court warned of if it were to permit a conduct-based inquiry in the context of § 924(c)'s residual clause. This Court noted that in 1984, § 924(c) was amended to narrow the scope of covered offenses. Where it had previously prohibited the use of a firearm in connection with "any federal felony," the 1984 amendment narrowed the scope of predicate offenses to "crimes of violence." *Id.* at 2331. But, as this Court

noted in *Davis*, "the case-specific reading would go a long way toward nullifying that limitation and restoring the statute's original breadth. After all, how many felonies don't involve a substantial risk of physical force when they're committed using a firearm – let alone when the defendant brandishes or discharges a firearm?" *Id.* If this Court was concerned that a conduct-specific approach would broaden the intentionally capacious residual clause, certainly that concern is multiplied when such an approach is applied to the significantly narrower elements clause.

Both *Robinson* and *Galati* were wrongly decided, and the lower court's reliance on them was misplaced in the instant case. But for the Third Circuit's impermissible application of a conduct-based inquiry, petitioner's conviction under § 924(c) would not stand. As discussed in greater detail below, New Jersey's murder statute does not have as an element the use, threat, or attempted use of force. Indeed, the court below tacitly acknowledges as much. It did not find that force was an element of the predicate offense, but rather that based on its review of petitioner's conduct, the "element of physical force was *present*." (emphasis added). Pet. App. 12a.

II. Because it May be Committed by Omission and Therefore Categorically Lacks an Element of Force, New Jersey's Murder Statute Does Not Satisfy the Elements Clause of § 924(c)

Given the present circuit split on whether an element of injury necessarily requires force, a conviction for New Jersey state-law murder would be a crime of violence under § 924(c)'s elements clause in some jurisdictions but not in others. Thus, petitioner's conviction would likely fall in the Fifth, Seventh, Eighth, and Tenth Circuits, which consider an element of injury sufficient to show that an offense

necessarily has an element of "physical force." In the First, Third, and Fourth Circuits, defendant's § 924(c) conviction would likely fall because those circuits do not hold that physical injury must necessarily be caused by physical force. This latter group of circuit courts is fully in line with this Court's rulings in *Johnson* and *Castleman*.

The Third Circuit specifically acknowledges that "[p]hysical force and bodily injury are not the same thing." *Mayo*, 901 F.3d at 227. Moreover, the Third Circuit distinguishes *Castleman*'s domestic violence holding from more general "crimes of violence." In fact, *Mayo*'s analysis is a close parallel to this case. In *Mayo*, the Court determined that Pennsylvania's first-degree assault statute was not categorically a crime of violence because, although it required the actual or attempted causation of serious bodily injury, such injury could be inflicted without the use of physical force. *Mayo*, 901 F.3d at 227 (citing *Commonwealth v. Thomas*, 867 A.2d 594 (Pa. Super. Ct. 2005) (first-degree aggravated assault after defendant starved her four-year-old son to death) and *Commonwealth v. Taylor*, 120 A.3d 374 (Pa. Super. Ct. 2015) (affirming conviction under § 2702(a)(1) for defendant's "criminal neglect" of her twin six-year-old children, which included failing to feed and clothe them)).

Under *Mayo*, which is controlling in the Third Circuit, petitioner's § 924(c)(3) conviction must fall. In the Third Circuit, when considering whether an offense qualifies as a crime of violence under a statute's elements clause, the sentencing court must "ignore the actual manner in which the defendant committed the prior offense" and "presume that the defendant did so by engaging in no more than 'the minimum

conduct criminalized by the state statute.'" *Mayo*, 901 U.S. at 225 (quoting *United States v. Ramos*, 892 F.3d 599, 606 (3rd Cir. 2018)). "[T]his academic focus on a hypothetical offender's hypothetical conduct is not, however, an 'invitation to apply legal imagination' to the statute of conviction." *Id.* 225 (quoting *Ramos*, 892 F.3d at 606). "Rather, there must be legal authority establishing that there is a 'realistic probability, not a theoretical possibility, that the State would apply its statute to conduct'" that falls outside of the federal definition of a crime of violence. *Id.* (quoting *Ramos*, 892 F.3d at 606).

In this case, there is a realistic probability that New Jersey would prosecute a defendant for murder based on an omission. *State v. Moore*, 550 A.2d 117 (N.J. 1988) is dispositive of the minimum culpable behavior sufficient to satisfy New Jersey's murder statute. In that case, the defendant, who abused and starved her child, culminating in the child's death, was convicted of murder and sentenced to death at the hands of a codefendant. The murder conviction and death sentence were ultimately vacated due to various procedural errors and because the defendant did not strike the fatal blow on the defendant. *Id.* at 148. However, the New Jersey Supreme Court was clear that a jury could find the defendant guilty of capital murder "[i]f the medical evidence established that [the victim's] death was caused by starvation or her weakened medical condition, or by asphyxiation resulting from her being wrapped and stuffed in a crawl space while alive." *Id.*

New Jersey has also obtained at least one manslaughter conviction for failing to provide a child food and water. *State v. Wright*, 332 A.2d 606 (N.J. 1975) (citing

State v. Wright, 332 A.2d 614 (N.J. Super. App. Div. 1974))(defendant convicted of manslaughter after the death of her infant daughter from malnutrition and dehydration). At the time *Wright* was decided, murder and manslaughter were distinguished only by their *scienter* requirements. *State v. Powell*, 419 A.2d 406, 409 (N.J. 1980) ("a homicide committed intentionally could fit within the categories of first degree murder, second degree murder, voluntary manslaughter or justifiable homicide, depending upon the particular set of facts surrounding the killing.") Thus, starving a child to death in a premeditated fashion would be murder, while doing so with a lesser *mens rea* would be manslaughter – the only difference is the defendant's intent. Because the element of causing death is constant throughout the homicides, so too must be the force required to satisfy that statutory element, regardless of a defendant's intent. It is hardly a flight of fancy to take the view that, had the State been able to prove a more culpable *mens rea*, it would have charged the defendant in *Wright* with murder.[11]

These two cases indicate that there is more than a "realistic probability" that failure to feed a child is sufficient to sustain a conviction for murder in New Jersey. Because starving a child is an act of omission, under the law in the Third Circuit, the offense sweeps more broadly than § 924(c)'s definition of "physical force." *See Mayo*,

[11] It also bears noting that since 94% of state convictions are a result of a guilty plea, "a defendant's inability to find a case illustrating a particular type of conviction does not necessarily indicate that such cases do not exist—rather, it may well reflect the fact that finding such a case would require onerous and unwieldy research into the filings of individual cases, to ascertain whether the particular facts might fit the mold obviously encompassed by the statutory language." *Villanueva*, 893 F.3d 137-38 (Pooler, J., dissenting).

901 F.3d at 230. A violation of New Jersey's murder statute is therefore not a valid predicate offense under the elements clause of § 924(c).

Should this Court choose to address the circuit split regarding whether an omission resulting in injury is a "use of force" sufficient to satisfy § 924(c)'s elements clause, the issue should be resolved in line with *Mayo*'s analysis. Under this Court's precedent, the categorical and modified categorical approaches require a sentencing court to consider whether the least culpable conduct required to satisfy an offense's elements would still constitute a crime of violence. *Moncrieffe*, 569 U.S. at 191. Where an offense criminalizes behavior beyond the federal crime-of-violence definition, the offense is not categorically a crime of violence. *See Descamps* 570 U.S. at 261. In the § 924(c) context, where a defendant can show that an offense's elements did not require a jury to find that he used "violent force," the offense is not a crime of violence and the inquiry should end. Where a crime can be committed by an omission, the analysis is even simpler. In that case, the question is not "does an omission involve a degree force necessary to constitute violent force" and but rather "does an omission constitute a *use* force at all?" Applying case law and common sense, the answer is clearly "no."

Of course, it may seem counterintuitive to determine that murder is not a crime of violence. Indeed, it may be "most likely" that a murder conviction under New Jersey law will be the result of a defendant's use of violent physical force. "But 'most likely' does not satisfy the categorical approach." *Mayo*, 901 F.3d at 230. "Faithful application of the categorical approach at times results in outcomes that

frustrate [the] policy objective." *Id.* at 230 (quoting *Ramos*, 892 F.3d at 619) (alterations in original). An outcome-based analysis, on the other hand, disregards the elements-focused analysis required by the categorical approach. It asks, for example, if an offense with an element requiring injury *by its nature* requires a use of force. This analysis is inappropriate in the context of the elements clause and, moreover, produces the same vagueness and ambiguity that rendered § 924(c)'s residual clause unconstitutional. *Davis*, 139 S. Ct. at 2336.

Thus, especially in cases where a crime was in fact committed violently, sentencing courts must resist the "impulse to decide these cases instinctively, in a way that renders elements clauses just as capacious and chameleon-like as the residual clauses that are now broadly invalid." *Villanueva*, 893 F.3d at 133-134 (Pooler, J., dissenting). Petitioner urges this Court to require sentencing courts to resist that impulse, and to strictly apply the categorical or modified categorical approach, which are "concerned only with the elements of the statute of conviction, not the specific offense conduct of an offender. *Ramos*, 892 F.3d at 606 (citing *Mathis*, 136 S. Ct. at 2251-52). Certainly, it may "appear counterintuitive that a defendant who actually uses physical force against another person when committing a felony does not, by definition, commit a violent crime under the elements clause . . . [b]ut that's the categorical approach for you." *Mayo*, 901 F.3d at 230.

THIS CASE IS A GOOD VEHICLE FOR THE IMPORTANT QUESTION PRESENTED

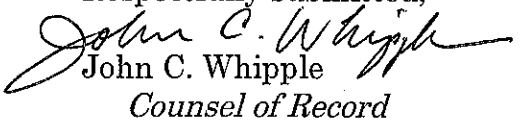
This case is a good vehicle to resolve the first Question Presented because the lower court's caselaw is patently contrary to this Court's precedent. In a sea of close calls and gray areas, this case is cut and dry. The Third Circuit's jurisprudence regarding the application of its so-called modified categorical approach runs contrary to its sister courts and contrary to this Court's caselaw requiring sentencing courts to consider only the elements of an offense to determine if it is a crime of violence. The circuit split can be easily resolved with a ruling that the categorical and modified categorical approaches must be applied to § 924(c) in the same manner they are applied to other similarly-phrased statutes – that is, with a strict focus on the elements and not the facts of the underlying offense.

As to the second Question Presented, this Court could should clarify that *Castleman* does not mean that an element of injury necessarily requires "violent force." More specifically, this Court should clarify that a sentencing court cannot find that an offense categorically has an element of force where the offense's element of injury can be satisfied by an omission.

CONCLUSION

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

Respectfully submitted,



John C. Whipple
Counsel of Record
William J. Muñoz
WHIPPLE AZZARELLO, LLC
161 Madison Ave.
Suite 325
Morristown, NJ 07960
jcwhipple@whippleazzarellolaw.com

January 14, 2020