No. 19-7637

IN THE SUPREME COURT OF THE UNITED STATES

PEDRO ANTHONY ROMERO CRUZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether attempted first degree murder under Virginia law in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5), is a crime of violence under 18 U.S.C. 924(c)(3)(A).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 777 Fed. Appx. 660.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2019. A petition for rehearing was denied on November 12, 2019 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on February 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5), and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and (B)(i), and 2. Judgment 1. The district court sentenced petitioner to 360 months of imprisonment, to be followed by eight years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-4a.

1. Petitioner is a member of a violent criminal organization known as La Mara Salvatrucha, or MS-13. C.A. App. 289. MS-13 is an international street gang involved in a variety of criminal activities, including murder. Ibid. To protect the power, reputation, and territory of MS-13, members are required to use violence, threats of violence, and intimidation. Id. at 290. MS-13 members achieve and enhance their status in the gang by participating in such violent acts. Ibid.

Petitioner was a leader of Park View Locos Salvatruchas, an MS-13 clique operating in northern Virginia. C.A. App. 291-292. He conspired with other MS-13 gang members and associates to murder D.F. Id. at 292. As part of the conspiracy, petitioner and others discussed ambushing D.F. as he emerged from a night class at a high school in Woodbridge, Virginia, and killing him using machetes or a firearm. Ibid. On October 1, 2013, members of the conspiracy

attempted to carry out the murder of D.F. Ibid. Jamie Rosales Villegas, one of petitioner's co-defendants, drove with other MS-13 members and associates to the school where they expected to find and kill D.F. Id. at 253. Villegas and the other gang members brought with them a 12-gauge sawed-off shotgun and two machetes. Id. at 253, 292.

2. a. A federal grand jury in the Eastern District of Virginia charged petitioner with conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5), and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and (B)(i), and 2. Third Superseding Indictment 8, 10 (Indictment).

Section 1959(a)(5) provides that "[w]hoever, * * * for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires to do so," has committed a crime. 18 U.S.C. 1959(a)(5). The conspiracy count in petitioner's indictment charged that he had conspired to commit murder in violation of Virginia law. Indictment 8 (citing Va. Code Ann. §§ 18.2-18, 18.2-32 (2009)).

Section 924(c) establishes a separate offense with a mandatory consecutive term of imprisonment for "any person who, during and in relation to any crime of violence, * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. 924(c)(1)(A). Section 924(c)(3) defines a "crime of violence" as a federal felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "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," 18 U.S.C. 924(c)(3)(B). Petitioner's indictment identified the crimes of violence underlying his Section 924(c) offense as conspiracy to commit murder under Virginia law in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5), with which petitioner was charged, and attempted murder under Virginia law in aid of racketeering, also in violation of 18 U.S.C. 1959(a)(5), with which Villegas and others had been charged in the same indictment. Indictment 9-10.[1]

b. Petitioner moved to dismiss the Section 924(c) charge on the ground that the predicate offenses underlying that charge did

[1] A defendant can be convicted under Section 924(c) without being convicted of or charged with the applicable predicate offense, "so long as the government presents sufficient evidence to prove the predicate offense as an element of the § 924(c)(1) violation." United States v. Anderson, 59 F.3d 1323, 1326 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 999 (1995).

not constitute crimes of violence under Section 924(c)(3). D. Ct. Doc. 568 (Dec. 8, 2015). The district court denied the motion. D. Ct. Doc. 738 (Mar. 8, 2016).

The district court determined that attempted Virginia first-degree murder in aid of racketeering, for which petitioner is liable under principles of co-conspirator liability established in Pinkerton v. United States, 328 U.S. 640 (1946), is a crime of violence under Section 924(c)(3)(A). D. Ct. Doc. 738, at 2, 4, 7. The court rejected petitioner's argument that Virginia first-degree murder (as incorporated by reference into the federal racketeering offense) does not categorically require the exertion of "physical force" because it can be committed by non-violent means. Id. at 4. The court observed that, in Johnson v. United States, 559 U.S. 133 (2010), this Court held that the phrase "'physical force'" in the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), "refers to force exerted by and through concrete bodies" as distinguished from "intellectual force or emotional force," D. Ct. Doc. 738, at 5 (quoting 559 U.S. at 138), and need only be force "capable of causing physical pain or injury to another person," ibid. (quoting 559 U.S. at 140). The district court further observed that, in United States v. Castleman, 572 U.S. 157 (2014), this Court interpreted the phrase "'use of physical force'" in the context of the similarly worded elements clause in 18 U.SC. 921(a)(33)(A) broadly to mean "force that causes pain or injury to another as a

result of purposeful physical action," including, e.g., by poisoning a victim's drink. D. Ct. Doc. 738, at 5.

Under those precedents, the district court explained, "physical force refers only to the force necessary to cause pain or injury to another, including indirect harm, as a result of purposeful physical action by the perpetrator." D. Ct. Doc. 738, at 6. And the court accordingly found that "attempted murder, by means of a firearm or machete such as in the present case, or through starvation or poisoning, * * * qualifies" as a crime of violence. Ibid.

In the alternative, the district court determined that both conspiracy to commit murder and attempted murder are crimes of violence under 18 U.S.C. 924(c)(3)(B), which the court found was not unconstitutionally vague. D. Ct. Doc. 738, at 2, 8-10.

c. Petitioner pleaded guilty to both charges in the indictment, but reserved his right to appeal the district court's order denying his motion to dismiss the Section 924(c) charge. Plea Agreement 1, 3; Judgment 1. The court sentenced petitioner to 120 months of imprisonment on the conspiracy count and a consecutive term of 240 months of imprisonment on the Section 924(c) count, for a total of 360 months of imprisonment, to be followed by eight years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-4a. The court noted that, in United States v. Davis, 139 S. Ct. 2319, 2236 (2019), this Court held

that Section 924(c)(3)(B) is unconstitutionally vague. See Pet. App. 4a. But the court of appeals observed that it had recently determined in United States v. Mathis, 932 F.3d 242 (2019) (4th Cir.), cert. denied, 140 S. Ct. 639 and 140 S. Ct. 640 (2019), that Virginia first-degree murder is not broader than the crime of violence definition in Section 924(c)(3)(A). Pet. App. 4a.

In Mathis, the court of appeals had rejected the argument that Virginia first-degree murder does not categorically require the use of force because it could be accomplished by non-violent, indirect means such as poisoning a victim. 932 F.3d at 264. The Mathis court explained that, in light of Castleman's rejection of a suggested distinction between direct and indirect force, "so long as an offender's use of physical force, whether direct or indirect, could cause a violent result, the force used categorically is violent." Id. at 264-265. And the court of appeals determined that, because Virginia's first-degree murder statute requires the "'willful, deliberate, and premeditated killing of another'" using force that causes physical pain or injury to another person, "irrespective [of] whether that force is exerted directly or indirectly," it is categorically a crime of violence. Id. at 265 (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 4-8) that attempted first-degree murder under Virginia law in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5), is not a "crime of violence"

under 18 U.S.C. 924(c)(3)(A) because it does not have as an element the use, attempted use, or threatened use of physical force. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or implicate any circuit conflict that warrants this Court's review.

1. a. Section 924(c)(1)(A) specifies criminal penalties for "any person who, during and in relation to any crime of violence, * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. 924(c)(1)(A). Under Section 924(c)(3)(A), the term "crime of violence" includes any federal felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). The court of appeals correctly determined that attempted first-degree murder under Virginia law in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5), satisfies Section 924(c)(3)(A).

When the government charges a violation of Section 1959(a) based on a cross reference to a state law, Section 1959(a) requires proof (1) that the defendant committed one of the named violent crimes according to its federal generic definition (e.g., murder); and (2) that the violent crime charged constitutes a violation of that State's law. See, e.g., United States v. Keene, 955 F.3d 391 (4th Cir. 2020). Thus, so long as either the federal generic definition or the relevant state-law definition of the crime would satisfy Section 924(c)(3)(A), the offense is a "crime of violence."

The lower courts here focused on the Virginia crime, but generic federal murder similarly covers any killing "perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being." 18 U.S.C. 1111.

b. Petitioner's primary contention (Pet. 6-8) is that attempted murder in violation of Section 1959(a)(5) cannot qualify as a crime of violence under Section 924(c)(3)(A) because murder can be committed by conduct such as starving a child, which petitioner claims would not involve the use of force. But this Court's precedents refute petitioner's contention that murder does not categorically involve the use of physical force. In Johnson v. United States, 559 U.S. 133 (2010), the Court recognized the breadth of the phrase "physical force" in the ACCA's elements clause, which is worded similarly to Section 924(c)(3)(A), observing that the phrase "plainly refers to force exerted by and through concrete bodies" as distinguished from "intellectual force or emotional force." Id. at 138 (interpreting 18 U.S.C. 924(e)(2)(B)(i)). The Court read "physical force," as that term is used in 18 U.S.C. 924(e)(2)(B), to mean "force capable of causing physical pain or injury to another person." 559 U.S. at 140. And in United States v. Castleman, 572 U.S. 157 (2014), where the Court considered another clause worded similarly to Section 924(c)(3)(A), the Court determined that force may be applied either directly -- through immediate physical contact with the victim -- or indirectly, for instance, by shooting a gun in the victim's

direction, administering poison, infecting them with a disease, or "resort[ing] to some intangible substance" such as a laser beam. 572 U.S. at 170 (citation omitted) (interpreting 18 U.S.C. 921(a)(33)(A)). The Court reasoned that when, for example, a person "'sprinkles poison in a victim's drink,'" the "'use of force' in [that] example is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm." Id. at 171 (citation omitted; second set of brackets in original).

Petitioner's argument that murder by starvation would involve no physical force is therefore misplaced. As the Court observed in Castleman, "[i]t is impossible to cause bodily injury without applying force in the common-law sense." 572 U.S. at 170. Death by starvation entails the use of an inevitable natural or biological force in order to cause death, and appellate courts to address the issue have held that withholding food or medicine from a child is the use of physical force under Johnson. See United States v. Peeples, 879 F.3d 282, 287 (8th Cir.) ("[I]t is the act of withholding food with the intent to cause the dependent to starve to death that constitutes the use of force."), cert. denied, 138 S. Ct. 2640 (2018); United States v. Jennings, 860 F.3d 450, 459-460 (7th Cir. 2017) (withholding food or medicine from an incapacitated person is a use of force), cert. denied, 138 S. Ct. 701 (2018); United States v. Waters, 823 F.3d 1062, 1066 (7th Cir.) ("[W]ithholding medicine causes physical harm, albeit indirectly,

and thus qualifies as the use of force under Castleman."), cert. denied, 137 S. Ct. 569 (2016).

c. Petitioner asserts (Pet. 7), citing United States v. Gomez, 690 F.3d 194 (4th Cir. 2012), that the Fourth Circuit previously distinguished crimes that require the use of physical force and crimes that can result from omission, and that the court "silently abandoned" that approach after this Court determined that Section 924(c)(3)(B) is unconstitutionally vague in United States v. Davis, 139 S. Ct. 2319 (2019). That assertion is incorrect. Gomez predates Castleman, so it cannot stand for the proposition that crimes that can be committed through omission categorically would not involve the use of physical force.

Petitioner also argues (Pet. 8) that Castleman does not control the outcome of his case because it addressed a different statute, namely, the definition of "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9). But Section 924(c)(3)(A) is worded similarly in all relevant respects. See 18 U.S.C. 921(a)(33)(A), and this Court did not suggest any context-specific distinction that would matter here. The Court in Castleman did distinguish the requisite degree of force required for a misdemeanor crime of domestic violence from the degree of force required for a "violent felony" under the ACCA's elements clause. See 572 U.S. 162-168. But the Court in Castleman made no similar distinction about the manner that physical force may be employed. To the contrary, the Court stated that its reasoning was consistent

with its interpretation in Leocal v. Ashcroft, 543 U.S. 1 (2004), of the definition of "crime of violence" under 18 U.S.C. 16 -- which is almost identical to the definition of "crime of violence" in 18 U.S.C. 924(c)(3) -- because a person who causes harm indirectly has made physical force "the user's instrument" as Leocal required. Castleman, 572 U.S. 170-171 (citation omitted); cf., e.g., Waters, 823 F.3d at 1066 (explaining that Castleman "confirmed that 'the act of employing poison knowingly as a device to cause physical harm'" and other indirect means of causing physical harm is "a use of force" for purposes of Sentencing Guidelines § 4B1.2(a)(1) (2014)) (citation omitted).

2. Petitioner contends (Pet. 8-10) that the court of appeals' decision conflicts with decisions of other courts of appeals. Petitioner has identified no conflict that might warrant this Court's review.

Petitioner argues (Pet. 8-9) that the court of appeals' decision conflicts with the Third Circuit's decision in United States v. Mayo, 901 F.3d 218 (2018), which concluded that a Pennsylvania conviction for aggravated assault, in violation of 18 Pennsylvania Consolidated Statutes § 2702(a)(1) (1993), did not necessarily require the use of "'physical force'" because the statute "criminalizes certain acts of omission." 901 F.3d at 230. But the Third Circuit has granted rehearing en banc to consider whether an offense that requires causing injury entails the "use of physical force" under the ACCA, 18 U.S.C. 924(e)(2)(B)(i), which

has a force clause similar to Section 924(c)(3)(A). See Order, United States v. Harris, No. 17-1861 (June 7, 2018). That decision remains pending, and certiorari is therefore not warranted to resolve any difference between the decision below and Mayo.

Petitioner further argues (Pet. 9) that the court of appeals' decision "appears to be in conflict with" the Second Circuit's decision in Chrzanoski v. Ashcroft, 327 F.3d 188 (2003), and the Ninth Circuit's unpublished decision in United States v. Trevino-Trevino, 178 Fed. Appx. 701 (2006). Those decisions, however, predate Castleman and are predicated on reasoning that Castleman rejected: that the indirect application of force, such as poisoning, does not constitute the "use of physical force" or "violent force." See Chrzanoski, 327 F.3d at 195 ("intentional causation of injury does not necessarily involve the use of force"); Trevino-Trevino, 178 Fed. Appx. at 703 ("Logically, one cannot use, attempt to use or threaten to use force against another in failing to do something.").

Castleman makes clear that the reasoning of those decisions was incorrect: by excluding indirect uses of force, those courts read "use of physical force" too narrowly. 572 U.S. 170-171. Castleman has therefore abrogated those decisions, as both the Second and Ninth Circuits have recognized. See, e.g., United States v. Hill, 890 F.3d 51, 59-60 (2d Cir. 2018) (finding that the panel's reasoning in Chrzanoski had been rejected by Castleman, and therefore concluding that a threat to cause harm indirectly

would constitute the threatened use of force), cert. denied, 139 S. Ct. 844 (2019); Arellano Hernandez v. Lynch, 831 F.3d 1127, 1131 (9th Cir. 2016) (observing that Castleman rejected the argument that the use of force does not include indirectly causing an injury, such as by poisoning), cert. denied, 137 S. Ct. 2180 (2017). Accordingly, review by this Court of the question presented is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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