No. 21-

IN THE

Supreme Court of the United States

MALIK SAUNDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether all criminal offenses that require proof of an intentional causation of injury or death, including those which may be committed by way of culpable omissions—such as the withholding of food or medical attention—categorically involve the "use . . . of physical force against the person of another," and therefore qualify as predicate "crimes of violence" under Section 4B1.2(a)(1) of the U.S. Sentencing Guidelines.

STATEMENT OF RELATED CASES

- *United States v. Jones, et al. (including Malik Saunders)*, No. 15-Cr-153-06, U.S. District Court for the Southern District of New York. Judgment entered February 16, 2018.

- *United States v. Malik Saunders*, No. 18-491, U.S. Court of Appeals for the Second Circuit. Judgment entered July 8, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Malik Saunders petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's order affirming Petitioner's conviction and sentence is reported at *United States v. Saunders*, 852 Fed. App'x 46 (2d Cir. July 8, 2021), and is included in the Appendix at Pet. App. A.1-4.[1] Excerpts from Petitioner's sentencing proceeding before the United States District Court for the Southern District of New York are included in the Appendix at Pet. App. B.

JURISDICTION

The District Court had jurisdiction over this case pursuant to 18 U.S.C. 3231. The Second Circuit had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. 1291. On July 8, 2021, a two-judge panel of the Second Circuit affirmed the District Court's judgment. On July 19, 2021, this Court Ordered that, in cases where the relevant lower court judgment was issued prior to July 19, 2021, the deadline to file a petition for a writ of certiorari is extended to 150 days from the date of that judgment. This Court's jurisdiction is now invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the documents provided in the attached appendix; "A." refers to the record on appeal; "Br." refers to Petitioner's brief on appeal; "Resp. Br." refers to the government's brief on appeal; and "Reply Br." refers to Petitioner's reply brief on appeal.

RELEVANT STATUTES AND SENTENCING GUIDELINES

U.S.S.G. 4B1.1

Under Section 4B1.1(b) of the U.S. Sentencing Guidelines, criminal defendants who qualify as "Career Offenders" are subject to certain offense level and criminal history category enhancements.

U.S.S.G. 4B1.1(a) provides that a defendant is a "Career Offender" if:

(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;

(2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and

(3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. 4B1.2(a)

U.S.S.G. 4B1.2(a) defines a "crime of violence" as "any offense under federal or state law, punishable by a term exceeding one year," that:

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

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, extortion, or the use or unlawful possession of a firearm . . . or explosive material[.]

New York P.L. 120.05(1)

Section 120.05(1) of the New York State Penal Law provides that "[a] person is guilty of assault in the second degree" when, "[w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person[.]"

INTRODUCTION

Prior to this Court's determination, in *Johnson v. United States*, 576 U.S. 591 (2015), that the "residual clause" of the Armed Career Criminal Act ["ACCA"], 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, state criminal statutes requiring proof of nothing more than the intentional causation of injury or death were properly considered to be ACCA "violent felony" predicates. Since *Johnson*, Congress has not amended Section 924(e)(2)(B)(ii) or the analogous residual clause provided under 18 U.S.C. 16(b) (which was found to be unconstitutionally vague in *Sessions v. Dimaya*, --- U.S. ----, 138 S.Ct. 1204 (2018)), and in 2016 the U.S. Sentencing Commission deleted the "Career Offender" residual clause previously set forth under U.S.S.G. 4B1.2(a)(2). Amdt. 798 (effective Aug. 1, 2016). As a result, many crimes that once qualified as predicate "violent felonies" or "crimes of violence" under federal law can no longer be considered as such unless they satisfy the "elements clause" definitions provided under Sections 924(e)(2)(B)(i), 16(a), U.S.S.G 4B1.2(a)(1), and other similar provisions. These clauses define predicate violent felonies or crimes of violence as those which require, as an element, "the use, attempted use, or threatened use of physical force against the person of another."[2]

In recent years, prosecutors have attempted to shoehorn state criminal statutes that do not categorically require proof of a defendant's use of force into the still-valid elements clause definitions, with mixed results. For example, the Second

[2] Section 16(a) also applies to offenses involving the use of force "against . . . the property of another."

Circuit recently held that this Court's analysis of "misdemeanor crimes of domestic violence" ["MCDVs"] in *United States v. Castleman* applies in the context of defining ACCA violent felonies and U.S.S.G. 4B1.2(a)(1) crimes of violence, and that "the 'knowing or intentional causation of bodily injury necessarily involves the use of force'" regardless of whether a particular crime may be committed by way of affirmative acts or culpable omissions. *United States v. Scott*, 990 F.3d 94, 100 (2d Cir. 2021) (quoting *Castleman*, 572 U.S. 157, 169 (2014)). Relying on this recent precedent, the Second Circuit rejected Petitioner's argument that his prior conviction of second-degree assault, in violation of New York Penal Law ("P.L.") 120.05(1), was not a U.S.S.G. 4B1.2(a)(1) "crime of violence." Like the Second Circuit, the First, Seventh, Eighth, Tenth, and Eleventh Circuits have also relied on *Castleman* to equate omissions with "use[s]. . . of force against the person of another." In stark contrast, the Third, Fifth, Sixth, and Ninth Circuits have held that injuries caused by a defendant's intentional failure to act do *not* categorically involve the use of force, and the Third and Fifth Circuits have specifically found that *Castleman*'s analysis of MCDVs does *not* apply in the context of defining violent felonies or crimes of violence. The Fourth Circuit has issued contradictory opinions regarding the question presented herein. It does not appear that the D.C. Circuit has addressed the issue.

This Court's intervention is needed to resolve this entrenched conflict. Until the question presented in this petition is resolved, criminal defendants who have previously been convicted of crimes involving the intentional causation of injury or

death that may be accomplished by way of culpable omissions will be subject to the U.S. Sentencing Guidelines' "Career Offender" enhancements, or not, depending on the federal circuit in which they are sentenced. Moreover, because interpretations of U.S.S.G. 4B1.2(a)(1) are applied to analogous elements clauses, including Sections 16(a), 924(c)(3)(A), and 924(e)(2)(B)(i) of Title 18, a resolution of the question presented will also bring much-needed uniformity to cases involving immigration removals and mandatory minimum prison sentences.

STATEMENT OF THE CASE

I. Proceedings Before the District Court

On April 11, 2017, Saunders pleaded guilty to one count of conspiring to distribute and possess with the intent to distribute narcotics, in violation of 21 U.S.C. 846 and 841(b)(1)(A), and one count of using and carrying a firearm during and in relation to a narcotics conspiracy, in violation of 18 U.S.C. 924(c)(1)(A)(i). A.96-106.

In advance of Saunders's sentencing, the U.S. Probation Office filed a presentence report ("PSR") in which it alleged that Saunders was a "Career Offender" under U.S.S.G. 4B1.1. PSR ¶ 36. The Probation Office explained that Saunders "was at least 18 years old at the time of the instant offense of conviction; the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." *Ibid.* With respect to Saunders's prior convictions, the PSR specifically noted that: (1) in

2002 Saunders was convicted in the Bronx County Supreme Court of assault in the second degree; and (2) in 2009 Saunders was convicted the United States District Court for the Southern District of New York of conspiring to distribute and possess with the intent to distribute crack cocaine. PSR ¶¶ 53, 59.

In his sentencing memorandum, Saunders argued that he was not a "Career Offender" because, "[w]hile [he] certainly has a prior conviction for a 'controlled substance offense,' . . . [he] *does not* have a second controlled substance[] or [] crime of violence[] conviction." A.111 (emphasis in the original). Saunders argued that his 2002 conviction "for Assault in the Second Degree, in violation of [P.L.] 120.05(1)," does not qualify as a predicate "crime of violence" because that particular subsection prohibits the intentional causation of a serious physical injury to another person without specifying the means by which such injury must be caused.[3] A.111-12. In support, Saunders cited *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), in which the Second Circuit held that Connecticut's third-degree assault statute—which applies where a defendant, "[w]ith intent to cause physical injury to another person, . . . causes such injury to such person or to a third person"—does not qualify as a "crime of violence" under Section 16(a). A.112. Because "human experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient," Saunders argued that P.L. 120.05(1) does not require, as an element, the

[3] The government subsequently filed a "Certificate of Disposition," issued by the Bronx County Supreme Court, to confirm that Saunders's prior assault conviction fell under subsection (1) of P.L. 120.05. A.125.

use of physical force against the person of another. A.112 (quoting *Chrzanoski*, 827 F.3d at 196). In response, the government argued that P.L. 120.05(1) offenses must in all cases involve a defendant's use of force against the person of another because "the Supreme Court has recently explained that '[i]t is impossible to cause bodily injury without applying force in the common-law sense.'" A.119 (quoting *Castleman*, 572 U.S. at 170).

Saunders was sentenced on January 23, 2018. After hearing oral arguments, the district court held that P.L. 120.05(1) does qualify as a predicate "crime of violence" and that Saunders is therefore a "Career Offender" under U.S.S.G. 4B1.1(a). Pet. App. B.58-59. The district court explained that, "taking into account the *Castleman* case, I understand the argument that [*Castleman*] was—it related to a misdemeanor, but when you look at the elements of the offense, the elements were consistent with the elements here[.]" *Ibid.* The district court's ruling had the effect of raising Saunders's criminal history category from Category IV to Category VI. Pet. App. B.49-50.

With reductions for acceptance of responsibility and timely notice of intent to plead guilty under U.S.S.G. 3E1.1, the district court determined that Saunders was subject to a total Guidelines offense level of 34. (This aspect of the district court's calculation was not affected by the "Career Offender" provisions. Pet. App. B.50.) As such, by raising Saunders's criminal history category to Category VI, the district court's finding that P.L. 120.05(1) categorically requires the "use . . . of force against the person of another" had the effect of increasing Saunders's advisory sentencing

range from 210-262 months' imprisonment to 262-327 months' imprisonment.[4] Pet. App. B.60.

After considering the Guidelines and various other factors, the district court sentenced Saunders to a total effective sentence of 228 months' imprisonment on both counts, to be followed by five years of supervised release. A.178. Saunders is currently serving his sentence in the FCI Schuylkill facility in Minersville, Pennsylvania.

II. Proceedings Before the Second Circuit

A. Saunders's Argument on Appeal

Saunders appealed his sentence to the Court of Appeals for the Second Circuit. Among other issues, Saunders argued that the district court erroneously sentenced him as a "Career Offender" because, under New York law, a P.L. 120.05(1) offense may be established though proof of a defendant's culpable omission—such as the failure to provide food or medical attention—and therefore does not require proof of the use of physical force against another person.

"Unlike other New York assault crimes," Saunders noted that P.L. 120.05(1) "is entirely silent as to the means by which a victim's injury must be caused." Reply Br.2 (citing P.L. 120.05(2), (4), (4-a), (5), 120.10(1), and 120.11). *See also* Br.23 (noting that "the *means* by which a defendant causes a serious physical injury [under P.L. 120.05(1)] is immaterial to his or her guilt or innocence."). In addition,

[4] Pursuant to Section 924(c)(1)(A)(1) and U.S.S.G. 5G1.2(a), an additional 60 months of consecutive imprisonment was required as to Saunders's second count of conviction. *See* PSR ¶¶ 97-99.

Saunders noted that "New York courts have confirmed that the causation of a 'serious physical injury' may be established though acts of omission, which do not involve any degree of direct or indirect force." Br.18-19. Finally, Saunders cited the Second Circuit's prior decision in *Chrzanoski*, in which the court had previously recognized "a difference between the causation of an injury and an injury's causation by the use of physical force." Br.23 (quoting 327 F.3d at 194).

In response, the government argued that *Chrzanoski* "is inconsistent with the Supreme Court's reasoning in *United States v. Castleman*." Resp. Br.13. According to the government, *Castleman*'s analysis of MCDVs applies in the context of defining "crimes of violence," and the "use . . . of force" required under U.S.S.G. 4B1.2(a) therefore "encompasses the knowing or intentional causation of bodily injury, even if the injury itself is caused . . . by omission." Resp. Br.15.

In his reply brief, Saunders noted that the *Castleman* majority "explicitly distinguished the 'force' required to establish a MCDV from the 'force' required to establish a 'violent felony[.]'" Reply Br.4 (citing 572 U.S. at 162-68). Moreover, Saunders argued, "the majority opinion in *Castleman* does not even mention the possibility of injuries caused by 'omissions,' and Justice Scalia's concurring opinion . . . [specifically] argued *against* the adoption of a 'physical force' standard that would encompass 'a wide range of nonviolent and even *nonphysical* conduct,' including 'acts of omission.'" Reply Br. 6 (quoting 572 U.S. at 181).

B. The Second Circuit's Ensuing Back-and-Forth Regarding the Issue Raised in Saunders's Appeal

Saunders's appeal was submitted to the Second Circuit on June 17, 2019. Docket 18-491, ECF No. 134. On March 31, 2020, the Second Circuit held, in *United States v. Scott*, 954 F.3d 74, 78 (2d Cir. 2020) [hereinafter "*Scott I*"], that the crime of first-degree manslaughter under New York State law is *not* a U.S.S.G. 4B1.2(a)(1) "crime of violence" or a "violent felony" under Section 924(e)(2)(B)(i), "because it can be committed by complete inaction and therefore without the use of force[.]"

The manslaughter statute at issue in *Scott I*—P. L. 125.20(1)—requires proof that a defendant, "[w]ith intent to cause serious physical injury to another person, . . . causes the death of such person or of a third person." *See* 954 F.3d at 80. It differs from the statute at issue in this case—P.L. 120.05(1)—only in that it requires proof of causation of death, rather than a serious physical injury. In light of that statutory language, and in light of the fact that "[t]he New York Court of Appeals has clearly and emphatically asserted on two occasions that New York first-degree manslaughter may be committed by a defendant's failure to act," the *Scott I* majority determined that P.L. 125.20(1) does not require, as an element, the use of force against the person of another. *Id.*, at 81-82 (citing *People v. Steinberg*, 79 N.Y.2d 673, 584 N.Y.S.2d 770 (1992), and *People v. Wong*, 81 N.Y.2d 600, 601 N.Y.S.2d 440 (1993)). Moreover, the *Scott I* majority held, "to the extent that it may be seen as a close question whether 'use of physical force' includes crimes committed by omission, the burden is on the government to show that a prior conviction counts

as a predicate offense," and "the rule of lenity . . . requires construing that ambiguity in the defendant's favor." *Id.*, at 87.

In a dissenting opinion, the Honorable Reena Raggi emphasized the violent nature of the *Scott* appellant's prior crimes. *Id.*, at 95. With respect to the relevant legal question at hand, Judge Raggi noted that other sections of the New York Penal Law, including second-degree murder under P.L. 125.25, may also be committed by way of omission. *Id.*, at 96. "Rather than start down a path leading so far from the violent reality of homicide crimes," Judge Raggi concluded that P.L. 125.20(1) must categorically involve use of physical force, as required under U.S.S.G. 4B1.2(a)(1) and Section 924(e)(2)(B)(i). *Ibid.* In addition, Judge Raggi argued, "there is no reason here for application of the rule of lenity" because "*Castleman* leaves no ambiguity about the necessary use of physical force to commit a homicide crime[.]" *Id.*, at 104 n.13.

Three months after *Scott I* was decided, the government filed a petition for rehearing, and the Second Circuit quickly granted *en banc* review. Docket 18-163, ECF Nos. 126, 128. During that period, the court continued to withhold decision on Petitioner's appeal. On March 2, 2021, the *en banc* Second Circuit reversed *Scott I*. In an opinion authored by Judge Raggi, the *en banc* majority began by emphasizing the violent nature of the appellant's prior crimes. *United States v. Scott*, 990 F.3d 94, 98-99 (2021), *cert. denied* No. 20-7778 (Oct. 18, 2021) [hereinafter "*Scott II*"]. With respect to the relevant legal issue at hand, the *Scott II* majority held that the arguments set forth in the *Scott I* majority opinion were "foreclosed by . . .

Castleman[.]" *Id.*, at 100. Despite the "possibility of New York first-degree manslaughter being committed by omission," the *Scott II* majority reasoned that when the term "use" "is being construed in relationship to 'physical force,' a defendant's use of such force does not depend on *his* having forceful contact—or indeed any physical contact—with his injured victim." 990 F.3d at 100, 111 (emphasis in the original). Instead, according to the *en banc* majority, "what matters [under *Castleman*] is that the defendant must have knowingly and intentionally caused an injury that can result only from the use of physical force." *Id.*, at 111.

Five of the eight judges who joined in Judge Raggi's opinion for the majority also joined in a concurring opinion authored by the Honorable Michael H. Park, the stated purpose of which was "only to note the absurdity" of the "so-called 'categorical approach,'" which forbids sentencing judges from making consequential findings of fact relating to criminal defendants' prior convictions. *Id.*, at 125. Without addressing the fundamental purpose the categorical approach is intended to serve, and without proposing a constitutionally acceptable alternative, the *Scott II* concurrence conclusively states that "the categorical approach perverts the will of Congress, leads to inconsistent results, wastes judicial resources, and undermines confidence in the administration of justice." *Id.*, at 126. *Compare Descamps v. United States*, 570 U.S. 254, 269 (2013) (discussing the categorical approach's "Sixth Amendment underpinnings.").

In a dissenting opinion authored by the Honorable Pierre N. Leval, five Judges of the Second Circuit agreed that the rule of lenity should have precluded the application of a mandatory minimum sentence under ACCA based on the *Scott* appellant's prior P.L. 125.20(1) conviction. 990 F.3d at 133-38. In a separate dissenting opinion authored by the Honorable Rosemary Pooler, three Judges agreed that "a crime committed by omission—definitionally, no action at all—cannot possibly be a crime involving physical, violent force," and that P.L. 125.20(1) is therefore not an ACCA violent felony *or* a U.S.S.G. 4B1.2(a)(1) "crime of violence." *Id.*, at 138.[5] Judge Pooler's dissent explained that the *en banc* majority's reliance on one line in *Castleman* ("the knowing or intentional causation of bodily injury necessarily involves the use of physical force," 572 U.S. at 169) "fails to account for what the Supreme Court repeatedly emphasized—that *Castleman's* holding was specific to its statutory and legal context and was in no way meant to reverse or abrogate *Johnson*'s interpretation of physical force." *Id.*, at 140-41. "Indeed," Judge Pooler noted that "the *Castleman* Court explicitly stated that it 'd[id] not reach' the general issue of '[w]hether or not the causation of bodily injury necessarily entails *violent* force.'" *Id.*, at 141 (quoting 572 U.S. at 167) (emphasis added). Moreover, Judge Pooler noted that all of the factual scenarios outlined in *Castleman* "require *some* action on the part of the defendant," whereas "[h]ere, we instead consider a situation where the defendant does nothing at all in the face of a legal duty to act,

[5] Judge Pooler "agree[d] with the majority that the [elements] clause in the Guidelines is subject to the same analysis as the [elements] clause of the ACCA." 990 F.3d at 149.

allowing an unprovoked set of circumstances to reach its fatal or injurious conclusion." *Id.*, at 142 (emphasis in the original).

C. The Second Circuit's Application of *Scott II* to Analogous "Elements Clause" Provisions, and the Decision Below

Following the *en banc* decision in *Scott II*, the Second Circuit held, in *Thompson v. Garland*, 994 F.3d 109, 111-12 (2d Cir. 2021), that New York P.L. 120.05(1)—the statutory provision at issue in this case—qualifies as a predicate "crime of violence" under 18 U.S.C. 16(a). Citing to *Castleman* and *Scott II*, the *Thompson* panel determined that, "[a] person who causes serious physical injury with the intent to do so, . . . necessarily uses physical force." *Id.*, at 112. Subsequently, in *United States v. Brown*, 2 F.4th 109, 111-12 (2d Cir. 2021), the Second Circuit held that, following *Scott II* and *Thompson*, P.L. 120.05(1) must *also* qualify as a predicate crime of violence under U.S.S.G. 4B1.2(a)(1).

On July 8, 2021, the surviving members of the panel to which this case was submitted on June 17, 2019 issued a Summary Order affirming the District Court's judgment in all respects. Pet. App. A.1-4. In dispensing with Petitioner's claim that P.L. 120.05(1) does not qualify as a U.S.S.G. 4B1.2(a)(1) crime of violence, the two-judge panel held that "[o]ur recent decision in *United States v. Brown* forecloses Saunders's argument." Pet. App. A.3.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The need for resolution of the question presented is clear. Following this Court's decision in *Castleman*, the Second Circuit and five other circuits have concluded that the "common-law sense" of the term "use of physical force" applies in the context of defining crimes of violence and/or violent felonies. 572 U.S. at 170. As such, those courts have held that all criminal statutes requiring proof of an intentional causation of injury or death, including those which may be committed by way of culpable omissions, categorically involve the "use of force against the person of another." Four circuits disagree, and one circuit has issued contrary binding opinions.

The Second Circuit's view is wrong. This Court's precedents make it clear that language cannot be interpreted apart from its context. In addition, this Court has repeatedly confirmed that the MCDV statute at issue in *Castleman* is distinguishable from provisions defining crimes of violence and violent felonies. The majority in *Castleman* explicitly declined to decide the issue raised in this petition, and it did not address the possibility of crimes that may be committed by way of omission. Moreover, this Court's post-*Castleman* jurisprudence confirms that the terms defining MCDVs are distinct from those defining crimes of violence and violent felonies.

This case is an appropriate vehicle to decide the question presented. There is no dispute that Petitioner was previously convicted of a "controlled substance offense," A.111, and that his status as a "Career Offender" under U.S.S.G. 4B1.1

therefore depends on whether his prior P.L. 120.05(1) conviction qualifies as a predicate "crime of violence" under U.S.S.G. 4B1.2(a)(1). If this petition were to be granted, and if Saunders were to prevail before this Court, the absence of a "Career Offender" criminal history category enhancement would dramatically reduce his Guidelines sentencing range.

I. There is an entrenched circuit split regarding the question presented.

A. Like the Second Circuit, the First, Seventh, Eighth, Tenth, and Eleventh Circuits have held that the intentional causation of injury or death, even if accomplished by way of omission, categorically involves the use of force.

Like the Second Circuit below, the First, Seventh, Eighth, Tenth, and Eleventh Circuits have applied *Castleman*'s MCDV analysis to "elements clause" provisions defining crimes of violence and violent felonies. As such, these courts have determined that, even outside the context of MCDVs, it is impossible to intentionally cause bodily injury or death without "us[ing]" violent physical force.

In *United States v. Báez-Martinez*, the First Circuit noted that "common sense and the laws of physics support [the] position" that "crimes [which] can be completed by omission fall outside the scope of the [ACCA elements] clause." 950 F.3d 119, 131 (1st Cir. 2020). For example, the First Circuit described how a series of culpable omissions could lead to murder-by-starvation: "The human body is a highly organized organic system that requires input (energy in the form of food) to sustain itself. Without that input, the body naturally tends toward a state of disorder and eventually death as a result of entropy. . . . 'Force' has nothing to do

with it." *Ibid*. *However*, the First Circuit concluded that, under *Castleman*, it was required to hold otherwise. *Ibid.* While recognizing that "[t]he Supreme Court did not expressly consider the problem of omissions" in *Castleman*, the First Circuit nevertheless concluded that *Castleman's* "categorical pronouncement that '[i]t is impossible to cause bodily injury without applying force in the common-law sense'" applies to the ACCA elements clause. *Id.*, at 132 (quoting 572 U.S. at 170).

In *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016), the Seventh Circuit cited *Castleman* for the proposition that "withholding medicine causes physical harm, albeit indirectly, and thus qualifies as the use of force" under U.S.S.G. 4B1.2(a)(1).

In *United States v. Peeples*, 879 F.3d 282, 286-87 (8th Cir. 2018), the Eighth Circuit held that Iowa's attempted murder statute, which applies to "any act" that the defendant "expects to set in motion a force or chain of events which will cause or result in the death of another person," qualifies as a "crime of violence" under U.S.S.G. 2K2.1(a)(4).[6] While the appellant in *Peeples* argued that the Iowa statute would apply to a "care-giver [who] fail[s] to provide sustenance to a dependent," the Eighth Circuit equated the issue of culpable omissions with indirect uses of force. *Id.*, at 287-88. Citing to *Castleman*, the Eighth Circuit reasoned that the act of withholding food with the intent to cause death "constitutes [a] use of force," and

[6] The commentary to U.S.S.G. 2K2.1 provides that the term "crime of violence" under 2K2.1(a)(4) "has the meaning given that term in [U.S.S.G.] 4B1.2(a)." Cmt. 1.

that "[i]t does not matter that the harm occurs indirectly as a result of malnutrition." *Id.*, at 287.

In *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017), the Tenth Circuit held that "*Castleman*'s logic applies to 'physical force' in the context of [ACCA] violent felonies." Therefore, although one may be convicted of second-degree assault under Colorado law for "a failure to act," the Tenth Circuit held that the statute's physical injury requirement satisfies the need for proof of a defendant's use of physical force. *Ibid.*

Finally, in *United States v. Sanchez*, 940 F.3d 526, 534 (11th Cir. 2019), the Eleventh Circuit held that New York P.L. 125.25(1)—which applies when a defendant intentionally kills another person, whether by way of an affirmative act or omission—qualifies as an ACCA violent felony under Section 924(e)(2)(B)(i). "[B]ased on *Castleman*," the Eleventh Circuit explained that "intentionally withholding food or medicine with the intent to cause bodily injury or death constitutes a use of force[.]" *Id.*, at 536.

B. In defining crimes of violence and violent felonies, the Third, Fifth, Sixth, and Ninth Circuits have distinguished omissions from uses of force.

In stark contrast to the *Scott II* majority and the First, Seventh, Eighth, Tenth, and Eleventh Circuit decisions cited above, the Third, Fifth, Sixth, and Ninth Circuits have held that culpable omissions do not constitute "use[s] . . . of force against the person of another."

In *United States v. Mayo*, 901 F.3d 218, 226 (3d Cir. 2018), the Third Circuit held that Pennsylvania's aggravated assault statute, which requires proof of an intentional causation of bodily injury but does *not* require proof "that a defendant engaged in any affirmative use of 'physical force,'" is not a violent felony under Section 924(e)(2)(B)(i). In rejecting the government's arguments under to *Castleman*, the Third Circuit specifically noted that "*Castleman* did not answer whether causing serious bodily injury without any affirmative use of force would satisfy the volent physical force requirement of the ACCA." *Id.*, at 228. In addition, the *Mayo* court noted that the Seventh Circuit's decision in *Waters* (*see supra*, at 17) and the Eighth Circuit's decision in *Peeples* (*see supra*, at 17-18) each "conflate an act of omission with the use of force, something that *Castleman*, even if it were pertinent, does not support." *Id.*, at 230.

In *United States v. Resendiz-Moreno*, 705 F.3d 203, 205-06 (5th Cir. 2013), the Fifth Circuit held that Georgia's first-degree child cruelty statute, which requires proof that a defendant "deprive[d] [a] child of medicine or [committed] some other act of omission," is not a "crime of violence" under U.S.S.G. 2L1.2(b)(1)(A)(ii).[7] In a subsequent *en banc* decision, the Fifth Circuit held that Missouri's voluntary manslaughter statute qualifies as a "crime of violence" even though it may be committed by way of an "indirect" use of physical force. *United States v. Reyes-Contreras*, 910 F.3d 169, 180-82 (5th Cir. 2018). In so holding, the

[7] Like U.S.S.G. 4B1.2(a)(1), the commentary to U.S.S.G. 2L1.2 defines a "crime of violence" as one that has "as an element the use, attempted use, or threatened use of physical force against the person of another." Cmt. n. 1(B)(ii).

Fifth Circuit did not disturb its prior determination that *omissions* do not involve the "use" of physical force. *See also United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017) (finding that a statute which may be committed by way of "acts [or] omissions causing injury to a child" is not a "crime of violence" under Section 16(a)). Moreover, the *en banc* majority specifically noted that "*Castleman* does not address whether an omission, standing alone, can constitute the use of force." 910 F.3d at 181 n.25.

In *Dunlap v. United States*, the Sixth Circuit held that a divisible Tennessee statute prohibiting, among other things, the "failure to protect [a] child or adult from an aggravated assault," does not qualify as an ACCA "violent felony" because it "does not involve the attempted or threatened use of force as an element." 784 Fed. App'x 379, 389 (6th Cir. 2019) (citing *Mayo*, 901 F.3d at 227).

Finally, in *United States v. Trevino-Trevino*, the Ninth Circuit held that North Carolina's involuntary manslaughter statute, which may be committed by way of "a culpably negligent act or omission" is not a "crime of violence" under 2L1.2(b)(1)(A)(i) because (among other reasons) "one cannot use, attempt to use[,] or threaten to use force against another in failing to do something." 178 Fed. App'x 701, 703 (9th Cir. May 4, 2006) (unpublished).[8]

[8] Unpublished rulings may provide evidence of a circuit split. *See, e.g., Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000).

C. The Fourth Circuit has issued contradictory opinions regarding the question presented.

The Fourth Circuit has reached diametrically opposite conclusions with respect to the question presented. For example, in *United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012), the court held that a child abuse statute encompassing certain culpable omissions does not require the use of physical force. Subsequently, in *United States v. Middleton*, 883 F.3d 485, 489-90 (4th Cir. 2018), the court held that an involuntary manslaughter statute which requires proof that a victim was killed as a result of the defendant's conduct does not necessarily require the use of physical force. While the government relied on *Castleman* to argue that it is impossible to cause a bodily injury or death "without applying force in the common-law sense," the *Middleton* panel found that this argument "ignores the distinction between de minimus force . . . and violent force" while also "erroneously conflat[ing] the *use* of violent force with the *causation* of injury." *Id.*, at 489-90 (emphasis in the original).

In *United States v. Rumley*, however, the Fourth Circuit relied on *Castleman* to hold that Virginia's "unlawful wounding" statute—prohibiting the causation of bodily injury with the intent to maim, disfigure, disable, or kill—qualifies as an ACCA "violent felony." 952 F.3d 538, 548-49 (4th Cir. 2020). Notably, *Rumley* did not purport to overrule *Gomez* or *Middleton*. Indeed, *Rumley* does not even mention those precedents. Moreover, the Honorable Diana Gribbon Motz wrote a concurring opinion in *Rumley* "to express [her] skepticism that omissions constitute violent force," while specifically noting that it is "an issue we need not reach given that

Rumely has not shown a realistic probability that omissions would be prosecuted under the [unlawful wounding] statute." *Id.*, at 551-52.

II. The Second Circuit's interpretation of the "use . . . of force against the person of another," in the context of defining crimes of violence and violent felonies, is wrong.

The Second Circuit's holding in this case was based on its recent decision in *Brown*, 2 F.4th 109, which was in turn governed by the *Scott II* majority opinion. Pet. App. A.3.

Assuming that subsection (1) of New York's manslaughter statute, P.L. 125.20, "would apply . . . in circumstances where a defendant engaged in no physical action at all," the *Scott II* majority determined that "the elements of the crime would still *necessarily* involve a defendant's use of force." 990 F.3d at 107 (emphasis in the original). The *en banc* majority explained that "[t]his conclusion is compelled" by *Castleman*, in which "[t]he Supreme Court . . . stated that the 'knowing or intentional causation of bodily injury *necessarily* involves the use of physical force.'" *Id.*, at 111 (quoting 572 U.S. at 169) (emphasis added in *Scott II*). But in relying on *Castleman* to find that, even in the context of defining a crime of violence or a violent felony, the causation of physical injury or death must always involve a defendant's use of physical force, the *Scott II* majority disregarded crucial aspects of this Court's precedents.

A. There is an important difference between the "use of physical force" involved in misdemeanor crimes of domestic violence and the use of violent physical force "against the person of another" required to establish crimes of violence and violent felonies.

In *Smith v. United States*, 508 U.S. 223, 229 (1993), this Court emphasized that "[l]anguage . . . cannot be interpreted apart from context." In addition, this Court confirmed that, "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Id.*, at 228. *See also Perrin v. United States*, 444 U.S. 37, 42 (1979). These two cannons of construction have continued to shape this Court's analysis of provisions that mirror or resemble the U.S.S.G. 4B1.2(a)(1) elements clause.

For example, in *Bailey v. United States*, this Court held that, in deciding whether a defendant "use[d]" a firearm during and in relation to a crime of violence or drug offense under 18 U.S.C. 924(c)(1), the government is required to prove "an *active employment* of the firearm by the defendant[.]" 516 U.S. 137, 143 (1995) (emphasis in the original).[9] In so holding, this Court specifically noted that the word "use" "must be given its ordinary or natural meaning" and must be read within the context of "its placement and purpose in the statutory scheme." *Id.*, at 145 (internal quotations omitted).

The unanimous opinion in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) also confirms that, "when interpreting a statute that features as elastic a word as 'use,'"

[9] In rejecting the "nonactive nature" of the government's preferred reading of "use," the unanimous Court in *Bailey* cited various dictionary definitions which "imply action and implementation." *Id.*, at 145, 149.

courts should "construe language in its context and in light of the terms surrounding it." In holding that the *Leocal* petitioner's prior DUI offense was not a crime of violence under Section 16(a), this Court emphasized that "we ultimately are determining the meaning of the term 'crime of violence,'" and that "[t]he ordinary meaning of this term, combined with [Section] 16's emphasis on the use of physical force against another person . . . , suggests a category *of violent, active crimes*[.]" *Id.*, at 11 (emphasis added).

Begay v. United States, 553 U.S. 137, 144-46 (2008) involved an interpretation of the ACCA "residual clause," Section 924(e)(2)(B)(ii), which was later held to be unconstitutional in *Johnson*, 576 U.S. 591. However, in finding that the New Mexico crime of driving under the influence of alcohol is not a "violent felony," this Court emphasized the fact that the "example crimes" enumerated under the residual clause "all typically involve purposeful, 'violent,' and 'aggressive' conduct." *Id.*, at 144-45. *See also Chambers v. United States*, 555 U.S. 122, 128 (2009) (noting that the crime of "failure to report" "amounts to a form of inaction," which is "a far cry" from the purposeful, violent, and aggressive crimes described in *Begay*.).

In *Johnson v. United States*, 559 U.S. 133 (2010), this Court held that a battery statute prohibiting the "actual[] and intentional[] touch[ing]" of another did not qualify as a "violent felony" under the ACCA elements clause. Interpreting the term "physical force" according to its "ordinary meaning," this Court noted that "[t]he adjective 'physical' . . . plainly refers to force exerted by and through concrete

bodies," while the generally applicable definition of "force" involves such things as "active power" and "violence, compulsion, or constraint exerted upon a person." *Id.*, at 138-39.[10] In applying these ordinary meanings, the *Johnson* majority specifically rejected the "specialized legal usage of the word 'force'" as it is used to describe the common-law crime of battery. *Id.*, at 139. Noting that the "common-law term of art" does not fit within the framework of defining a "violent felony," this Court confirmed: "[W]e do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense." *Id.*, at 139-40 (internal quotation omitted).

B. *Castleman* further reinforces the notion that language derives meaning from its context.

In *Castleman*, this Court held that "the common-law meaning of 'force'" applies to the MCDV definition provided under 18 U.S.C. 921(a)(33). 572 U.S. at 162-63. Reading that statute within its particular context—preventing those previously convicted of domestic violence misdemeanors from possessing firearms—the *Castleman* majority emphasized that "the very reasons we gave for rejecting [the common-law] meaning in defining a 'violent felony' [in *Johnson*] are reasons to embrace it in defining a 'misdemeanor crime of domestic violence.'" *Id.*, at 163. This Court further explained that "'domestic violence' encompasses a range of force broader than that which constitutes 'violence' *simpliciter*." *Id.*, at 164 n.4. Applying this specialized, common-law meaning of "force" to the petitioner's prior domestic

[10] Among other sources, the *Johnson* majority cited Black's Law Dictionary (9th ed. 2009), which defines "physical force" as "force consisting in a physical act[.]" *Id.*, at 139.

violence conviction, the *Castleman* majority determined that, in the context of defining MCDVs, "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." *Id.*, at 169. *See also Stokeling v. United States*, --- U.S. ----, 139 S.Ct. 544, 554 (2019) ("In *Castleman*, the Court noted that for purposes of a statute focused on domestic-violence misdemeanors, crimes involving relatively minor uses of force that might not constitute violence in the generic sense could nevertheless qualify as predicate offenses.") (internal quotations omitted); *Reyes-Contreras*, 910 F.3d at 180 ("*Castleman* interpreted a statutory provision in the context of domestic violence and distinguished its broad definition of 'force' in that context from its use in other statutes.").

In a concurring opinion, Justice Scalia argued that "*nonphysical* conduct . . . cannot possibly be relevant to the meaning of a statute requiring 'physical force[.]'" 572 U.S. at 181 (emphasis in the original). In addition, Justice Scalia argued that the types of intentional injuries described in the majority opinion would *also* qualify as "use[s] of force" under the ACCA elements clause. *Id.*, at 175. The majority opinion did not address Justice Scalia's statement regarding nonphysical conduct, and it expressly "d[id] not decide" whether "physical force" should have the same meaning in the MCDV and violent felony contexts. *Id.*, at 170. *See also Mayo*, 901 F.3d at 228 ("*Castleman* avowedly did not contemplate the question before us."); *Scott II*, 990 F.3d at 114 (*en banc* majority conceding that *Castleman* did not "address[] crimes that can be committed by omission.").

Yet a bare majority of the circuit courts that have addressed the question presented in this petition have held that *Castleman*'s discussion of the "common-law sense" of the term "use of force" applies not only to MCDVs but also to crimes of violence and violent felonies. *See Báez-Martinez*, 950 at 131 (First Circuit considering itself bound by *Castleman* to reject "common sense and the laws of physics"). In so holding, these circuits have ignored the clear distinction drawn by the *Castleman* majority between MCDV "use[s] of force" and violent felonies—which (unlike MCDVs) involve the use of *violent* physical force "against the person of another." In addition, these circuits have effectively adopted as binding law the portion of Justice Scalia's concurring opinion in which he argued that the intentional causation of injury necessarily involves the use of violent physical force, despite the fact that the *Castleman* majority explicitly "d[id] not decide" that issue. 572 U.S. at 170. At the same time, these circuits ignore Justice Scalia's admonition that "*nonphysical* conduct . . . cannot possibly be relevant to the meaning of a statute requiring 'physical force.'" *Id.*, at 181.

These circuits are wrong. The *Castleman* majority adhered to precedent and reinforced the idea that language must be read within its context and "its placement and purpose in the statutory scheme." *Bailey*, 516 U.S. at 145. The *Castleman* majority emphatically did not address the question of whether *omissions* can be said to involve the use of force—much less the use of "*violent* force" against the person of another, which is required in this context. *Johnson*, 559 U.S. at 140. *See also Báez-Martinez*, 950 F.3d at 132 (recognizing that "[t]he Supreme Court did

not expressly consider the problem of omissions—like starving a child—when it decided *Castleman*."). Nevertheless, the Second Circuit below, like the First, Seventh, Eighth, Tenth, and Eleventh Circuits, has "conflate[d] . . . act[s] of omission with the use of force, something that *Castleman*, even if it were pertinent [in this context], does not support." *Mayo*, 901 F.3d at 230.

C. This Court's post-*Castleman* jurisprudence supports the petitioner's reading of U.S.S.G. 4B1.2(a)(1).

Since *Castleman* was decided, this Court has had occasion to confirm (again) that the statutory terms defining MCDVs are distinguishable from provisions defining crimes of violence and violent felonies.

In *Voisine v. United States*, --- U.S. ----, 136 S.Ct. 2272, 2279 (2016), this Court held that misdemeanor assault crimes involving a *mens rea* of recklessness may qualify as MCDVs. Given the unique purpose of the MCDV statute ("to prohibit domestic abusers convicted under run-of-the-mill misdemeanor domestic assault and battery laws from possessing guns"), this Court reasoned that the word "use" "is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." *Id.*, at 2278-79.

But in *Borden v. United States*, --- U.S. ----, 141 S.Ct. 1817 (2020), this Court declined to extend *Voisine* to the ACCA's elements clause. The *Borden* majority emphasized the significant textual difference between Section 924(e)(2)(B)(i), which involves the use of force directed "against the person of another," and the MCDV statute, which does not. *Id.*, at 1833. In addition, this Court confirmed that "context

and purpose distinguish the two statutes." *Id.*, at 1834. Specifically, the MCDV provision at issue in *Castleman* and *Voisine* "adds misdemeanant domestic abusers to a long list of people (including felons, substance abusers, and the mentally ill) disqualified from possessing a gun," whereas the ACCA is intended to enhance custodial punishments for defendants with multiple prior convictions for felonies involving violent conduct or narcotics trafficking. *Id.*, at 1834.[11] Thus, because the term "violent felony" "informs [this Court's] construction" of ACCA's statutory language, and because the statutory phrase "'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual," this Court concluded that the "logic" of *Voisine* does not apply to Section 924(e)(2)(B)(i). *Id.*, at 1825, 1830.

In *Scott II*, the Second Circuit *en banc* majority initially focused its attention on the specific facts of the appellant's prior convictions,[12] and then went on to hold that the appellant's arguments regarding culpable omissions in the context of defining violent felonies and crimes of violence were "foreclosed by . . . *Castleman*." 990 F.3d at 98-99, 100. By studiously avoiding the distinctions this Court has drawn

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[11] The Guidelines "Career Offender" provisions at issue in this case are intended to prescribe "a prison sentence 'at or near the maximum term authorized for categories of' adult offenders who commit their third felony drug offense or violent crime." *United States v. LaBonte*, 520 U.S. 751, 752 (1997) (quoting 28 U.S.C. 994(h)).

[12] Because the categorical inquiry relates to "how the law defines the offense and not . . . how an individual offender might have committed it on a particular occasion," *Begay*, 553 U.S. at 141, courts should "ignor[e] the particular facts of the case." *Mathis v. United States*, --- U.S. ----, 136 S.Ct. 2243, 2248 (2016).

between MCDVs and crimes of violence, the *Scott II* majority went so far as to hold that the rule of lenity could not apply in that case because of "*Castleman*'s clear pronouncement that a defendant 'necessarily' uses physical force in committing a crime involving the intentional causation of injury." *Id.*, at 121. In contrast, those circuit court Judges who recognize the relevant contextual differences between MCDVs and crimes of violence or violent felonies have rightly determined that culpable omissions do not categorically involve the use of violent physical force against the person of another. *See Mayo*, 901 F.3d at 226-30. *See also Scott II*, 990 F.3d at 142-43 (Pooler, J., dissenting) ("A common example of a crime by omission is a guardian who lets a child die of a severe food allergy after the child consumes the dangerous food with no provocation from the guardian." . . . While "the guardian would likely be guilty of first-degree manslaughter and be punished accordingly . . . the guardian did not engage in a physically violent act or use 'a substantial degree of force.'") (quoting *Johnson*, 559 U.S. at 140).

III. This case presents an ideal vehicle for resolving the existing circuit split.

It has never been disputed that Petitioner was previously convicted of a "controlled substance offense" as defined by U.S.S.G. 4B1.2(b). *See* PSR ¶ 59; A.111. It is also undisputed that Petitioner was previously convicted of second-degree assault under New York P.L. 120.05(1). A.125. As such, the question of whether he

qualifies as a "Career Offender" is entirely dependent on whether 120.05(1) qualifies as a "crime of violence" under U.S.S.G. 4B1.2(a)(1).[13]

Under New York law, P.L. 120.05(1) does not require proof of a defendant's affirmative conduct. In *People v. Miranda*, 204 A.D.2d 575, 612 N.Y.S.2d 65 (App. Div. 2d Dept. 1994)—a case involving "allegations of the defendant's failure to obtain medical care for the complainant"—the Appellate Division of the New York Supreme Court held that the prosecution met its burden of proving the defendant's guilt of first-degree assault. The *Miranda* Court specifically noted that "the absence of evidence that the defendant committed any affirmative act contributing to the abuse of her infant son did not render the evidence legally insufficient to sustain the assault charges." *Id.*, at 575. This holding was supported by *Steinberg*, 79 N.Y.2d 673, in which the New York Court of Appeals upheld an appellant's conviction under P.L. 125.20(1), which "requires proof that [a] defendant, with intent to cause serious physical injury, caused death[.]"[14] *Id.*, at 680. The prosecution's "theory" in *Steinberg* "was that [the] defendant performed both acts of commission (striking [his child]) and acts of omission (failure to obtain medical care), each with intent to cause serious physical injury, and that such acts caused [his child's] death." *Ibid.* In rejecting the appellant's argument that "only a person with medical expertise can form the requisite intent to cause serious physical injury to a child by failing to

[13] The government has never claimed that P.L. 120.05(1) would qualify as one of the generic enumerated offenses listed under U.S.S.G. 4B1.2(a)(2).

[14] Section 125.20(1) differs from P.L. 120.05(1), only in that the intentional causation of injury must result in death, rather than a serious physical injury.

obtain medical care," the unanimous Court of Appeals noted that "[t]he Penal Law provides that criminal liability may be based on an omission," and that "[p]arents have a nondelegable affirmative duty to provide their children with adequate medical care." *Id.*, at 678, 680. *See also Wong*, 81 N.Y.2d at 606 (affirming P.L. 120.20(1) convictions where the prosecution's "case rested on the theory that [both] defendant[s] w[ere] independently liable" for the death of an infant "because one of them had shaken the baby while the other had stood by and failed to intervene.").

As such, petitioner's status as a "Career Offender" is entirely dependent on the narrow, important, and unresolved question of whether crimes involving the intentional causation of injury or death, including those that may be committed by way of culpable omissions, categorically involve the use of violent physical force against the person of another.

CONCLUSION

The Court should grant the instant petition for a writ of certiorari.

Dated: December 6, 2021
New York, New York

Respectfully submitted,

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APPENDIX

APPENDIX A

18-491-cr
United States v. Saunders

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the eighth day of July, two thousand twenty-one.

PRESENT[*]: JOSÉ A. CABRANES,
REENA RAGGI,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee, 18-491-cr

v.

MALIK SAUNDERS, also known as Dog, also known as Malek Saunders, also known as Malek Sanders, also known as Malik Sanders,

Defendant-Appellant,

DEAN JONES, also known as Korrupt, MAXWELL SUERO, also known as Polo, TROY WILLIAMS, also known as Light, also known as Timothy Williams, RALPH HOOPER, also known as Rizzo, also known as Riz, DEQUAN PARKER, also known as Sin, also known as Sincere, RICHARD GRAHAM, also known as Porter, KAHEIM

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[*] Circuit Judge Ralph K. Winter died before the filing of this summary order; the appeal is being decided by the remaining members of the panel, who are in agreement. *See* 2d Cir. IOP E(b).

ALLUMS, also known as Os, also known as "O," DARNELL FRAZIER, YONELL ALLUMS, also known as Unk,

Defendants.

FOR APPELLEE: Thomas McKay, Karl N. Metzner, Won S. Shin, Assistant United States Attorneys, for Audrey Strauss, United States Attorney for the Southern District of New York, New York, NY.

FOR DEFENDANT-APPELLANT: Lucas Anderson, Rothman, Schneider, Soloway & Stern, LLP, New York, NY.

Appeal from a February 16, 2018 judgment of conviction and sentence of the United States District Court for the Southern District of New York (Vernon S. Broderick, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and hereby is **AFFIRMED**.

Defendant-Appellant Malik Saunders appeals a judgment of the District Court sentencing him principally to 228 months of imprisonment and five years of supervised release following his guilty plea to one count of conspiracy to distribute and possess with the intent to distribute controlled substances, in violation of 21 U.S.C.§§ 841(a)(1), (b)(1)(A) and 846, and one count of using, carrying and possessing a firearm during and relation to a drug trafficking crime, in violation of 18 U.S.C. § 924 (c)(1)(A)(i). Saunders contends that, in determining his sentence, the District Court (1) erroneously classified him as a "career offender" under the advisory United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") based in part on his prior conviction for second-degree assault under New York Penal Law ("NYPL") § 120.05(1); (2) abused its discretion in denying his request for a hearing on disputed issues regarding his role in the drug conspiracy and the quantity of drugs involved; and (3) violated his rights under the Fifth and Sixth Amendments of the United States Constitution by applying an enhanced Guidelines sentencing range based on alleged facts neither admitted by Saunders nor found by a jury. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

The District Court found that "career offender" offense level enhancements applied under the Guidelines because Saunders had "at least two prior felony convictions of either a crime of

violence or a controlled substance offense"[1]—*i.e.*, a "controlled substances" conviction for conspiracy to distribute crack cocaine and a "crime of violence" conviction for second degree assault under NYPL § 120.05(1). Saunders contends on appeal that his conviction under NYPL § 120.05(1) does not qualify as a "crime of violence" because it does not satisfy U.S.S.G. § 4B1.2(a)(1) (the "Force Clause"). The Force Clause defines a "crime of violence" to include any offense which "has an element the use, attempted use, or threatened use of physical force against the person of another."[2] Saunders argues that NYPL § 120.05(1) may be violated by omission, and therefore does not categorically require the use or threatened use of physical force. Our recent decision in *United States v. Brown* [3] forecloses Saunders's argument. In *Brown*, we rejected an interpretation of the Force Clause substantially identical to the one proposed by Saunders and squarely held that "NYPL § 120.05(1) is a 'crime of violence' under the force clause of U.S.S.G. § 4B1.2(a)(1)."[4] We conclude, therefore, that the District Court correctly determined that Saunders was a "career offender" under the Guidelines.

We need not evaluate the District Court's decision not to hold a hearing because we agree with the government that any arguable error was harmless. Because Saunders was a career offender convicted of a crime with a statutory maximum of life in prison, his Guidelines offense level, after application of a three-level reduction for acceptance of responsibility granted by the District Court, was a minimum of 34,[5] *i.e.*, the offense level the District Court in fact calculated. Therefore, as the government notes, the District Court declined to hold a hearing on sentencing enhancements that ultimately "did not affect the Guidelines range or the sentence imposed."[6]

Finally, we conclude that the District Court did not violate Saunders's constitutional rights by considering facts neither admitted by him nor found by a jury. Saunders's argument to the contrary rests principally on the Supreme Court's holding in *Apprendi v. New Jersey*[7] that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

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[1] U.S.S.G. § 4B1.1(a).

[2] U.S.S.G. § 4B1.2(a)(1).

[3] ---F.4th---, No. 18-2063-CR, 2021 WL 2583444 (2d Cir. June 24, 2021).

[4] *Id.*, at *2.

[5] *See* U.S.S.G. § 4B1.1(b)(1). On appeal, Saunders does not argue that the District Court should have granted him any additional reductions.

[6] Appellee's Br. at 19.

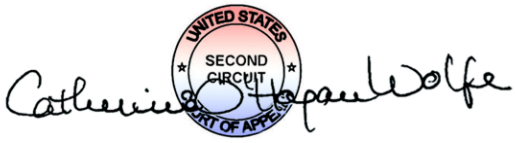
[7] 530 U.S. 466 (2013)

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[8] It is undisputed that the District Court did not rely on the facts at issue to increase Saunders's sentence beyond any otherwise applicable statutory maximum (or to raise any otherwise applicable statutory minimum).[9] Rather, the District Court relied on the disputed facts to compute Saunders's sentencing range under the Guidelines, which are *advisory*[10] and therefore do not legally mandate the imposition of a sentence within any particular range. It is true, as Saunders emphasizes, that the Guidelines provide helpful benchmarks in determining the reasonableness of sentences, but we are unpersuaded by Saunders's suggestion that this function of the Guidelines undermines the sentencing judge's traditional "authority to find facts relevant to sentencing by a preponderance of the evidence."[11]

CONCLUSION

We have considered all of Saunders's arguments on appeal and consider them to be without merit. For the foregoing reasons, we **AFFIRM** the February 16, 2018 judgment of conviction and sentence of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



[8] *Id.* at 490.

[9] *See Alleyne v. United States*, 570 U.S. 99, 103 (2013) (holding *Apprendi* standard of proof applies to facts that increase mandatory minimum sentence); *United States v. Thomas*, 274 F.3d 655, 664 (2d Cir. 2001) (en banc) (holding "*Apprendi* does not apply where the sentence imposed is not greater than the prescribed statutory maximum for the offense of conviction").

[10] *See, e.g.*, *United States v. Boooker*, 543 U.S. 220, 245 (2005) (holding Guidelines advisory).

[11] *United States v. Garcia*, 413 F. 3d 201, 220 n.15 (2d Cir. 2005).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, New York, N.Y.

v. 15 Cr. 153(VSB)

MALIK SAUNDERS,

Defendant.

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January 23, 2018
4:25 p.m.

Before:

HON. VERNON S. BRODERICK,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
Interim United States Attorney for
the Southern District of New York
BY: THOMAS A. McKAY, JR.
Assistant United States Attorney

RICHARD B. LIND
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Attorneys for Defendant

THE COURT: The timing.

MR. McKAY: It's about the timeliness and the government's resources. And all of those things I just described are reasons why he doesn't get the third point, he should not get the third point in this case.

THE COURT: I understand that. And, you know, but for, I think, Mr. Williams, I -- I had not factored in Mr. Williams. I understand that they are not directly -- they are not necessarily similarly situated, in other words, precisely similarly situated, I should say, but in light of Mr. Williams getting that third point, I understand the timing, it was within the two weeks, Mr. Saunders was in the two weeks, and I would give Mr. Saunders the third point here.

With regard to the career offender issue, which I think is the last disputed issue that the parties have, as I understand -- well, now it is a little different because before I gave Mr. Saunders the third point, the calculation for the guideline level would have been the same, whether -- other than criminal history, I think would have been the same, it would have been a 34 versus -- it would have been a 34 if he was a criminal -- I think the -- my recollection is that if you do the calculations as a career offender for life, it would be 37. Is that right?

MR. McKAY: Yes, your Honor.

THE COURT: Mr. Saunders has a 34 plus 3 which is 37,

so they both start out at a 37. So the issue then becomes, you know, it is the -- so it seems to me that the role adjustment, am I correct, would bring it down to -- if it is -- because the 37 is the amount before you do the role adjustment.

MR. McKAY: You mean the acceptance adjustment?

THE COURT: The acceptance adjustment. Sorry. Yes. And that that -- the level is the same whether you calculate him as a career offender or by the drug amounts, because otherwise it would have been a 34 plus 4, which is 38.

MR. McKAY: Your Honor, I just, if you give me one second, because I think the acceptance points come after you calculated the base offense level otherwise. So if whether it is 37 without the career offender or 37 with the career offender, you are going to end up at 34 as an offense level. However, because there was a 924(c) count, there is a special table, and that table keys to the number of acceptance points, so I just want to look and make sure, if you just give me one second.

THE COURT: Okay.

(Pause)

MR. LIND: Judge, I'm not trying to interrupt you, but my calculation under the guideline is 34.

THE COURT: 34.

MR. LIND: The adjusted offense level.

THE COURT: Yes, but we are just trying to figure out

if he is a career criminal, the fact there is a 924(c) would make the career criminal -- I am just trying -- what I am trying to figure out is whether the career criminal aspect matters other than with regard to Mr. Saunders' criminal history, in other words, whether or not, if I calculate him as a career criminal, whether it is a higher offense level than the level 34.

MR. McKAY: So, your Honor, I think this is the calculation. So assuming he is a career offender, the offense level is 37, minus 3 for acceptance, which is 34; criminal history of VI results in a guidelines range on Count One of 262 to 327, to be followed by 60 months on Count Two.

THE COURT: Okay, again --

MR. McKAY: If he is a career offender.

THE COURT: Okay. So the delta, though, is the criminal history category IV versus VI.

MR. McKAY: Yes. And if he is a IV, it is still offense level 34 after you factor acceptance, but the range is 210 to 262 plus 60. And I wanted to check whether that table I referenced in 4B1.1(c)(3) applies, because if he is a career offender, it is the greater of the otherwise applicable range for that table, but the range in that table is lower here, so that doesn't apply.

THE COURT: Okay. All right. So the reason why I raised the issue is I don't -- whether or not, based upon my

decision that Mr. Saunders is entitled to the third point, the offense levels end up being the same, again, whether he is a career criminal or not. So the issue is whether or not he is a criminal history category IV or criminal history category VI. That doesn't change the legal argument that we have with regard to the -- I think it is the assault conviction that we are talking about, assault in the second.

So let me ask this: Mr. McKay, as part of the documents that you provided, was one of them the plea allocution from the assault?

MR. McKAY: I think it was, your Honor. I don't have it in front of me, but I had actually pulled it up on my phone during a break.

MR. LIND: I have it.

THE COURT: You do have it?

MR. McKAY: I think we also supplied the judgment of conviction, which had the statutory subsection.

THE COURT: Which had the 120.05(1).

MR. McKAY: Correct.

MR. LIND: Let me just make sure. I definitely have the plea allocution, Judge. I will look for the . . .

MR. McKAY: And to the extent the court doesn't have it, it is document 425-1 on the docket.

THE COURT: Okay.

MR. LIND: Can I just have one moment, Judge?

THE COURT: Sure.

MR. LIND: For some reason I have the plea allocution, Judge, but I don't have the certificate.

(Pause)

THE COURT: I have the allocution. I just want to make sure that it was provided to you.

MR. LIND: Yes, but I also have the certificate.

THE COURT: Oh, okay. All right.

MR. LIND: It is 425-1. And it shows it is .05(1).

THE COURT: .05(1), yeah. Thank you.

All right. So let me hear from the government with regard to career offender. Specifically I think the issue is, the legal issue is whether or not the assault in the second -- under 125.05(1) is that he can be considered a career offender.

MR. McKAY: Right. So the question is, does it have an element of the use of force? And the statute requires that, with the intent to cause serious physical injury, the defendant causes such injury to a person, and that such injury is serious physical injury. The Supreme Court said in *Castleman*, in a statute that talked about bodily injury, not serious physical injury, that you can't do that without applying force. So I think the application of force in this more significant content is clear. There are several Second Circuit opinions. There is the *Walker* case, there is the more recent case of *Morris*, which the court -- I think it's a 2012 case the court has identified,

that finds that Subsection (2) of this same statute, which requires a lesser injury, just physical injury, not serious physical injury, but by means of a deadly weapon, that that is a crime of violence. So I think the question is, how would it be different that if you don't have a deadly weapon, but you have to cause a more serious injury, how could that be done without the use of force? And I think the answer is these hypotheticals that have cropped up in some of the litigation about this, about poisoning someone, applying an indirect type of force like that.

But *Castleman* said that poisoning someone, drugging someone, although indirect, actually is a type of force. The Second Circuit's opinion in *Kriznosky* -- I'm sure I am saying that wrong, I will spell it for you later if I can -- did have the benefit of *Castleman* in 2003 when it decided that a misdemeanor Connecticut statute could be violated by means of drugging. And the Second Circuit explains that in the very recent decision in *Hill*. I think Mr. Lind has now conceded that *Kriznosky* is no longer good law. He did so in a footnote in his second submission. The Second Circuit case in *Morris* said the same thing, that these hypotheticals about poisoning, they don't -- they do still require some degree of force. So I think it is relatively straight forward. The statute requires intent to cause serious physical injury and actual causation of physical injury. The way you do that is through applying an

element of force.

THE COURT: How should I view, because technically assault in the second is a divisible offense that permits me to -- permits the submission of Shepherd documents, and so how should I view -- in other words, I understand when it's a categorical issue and it is just that one statute -- off the record.

(Discussion off the record)

THE COURT: How do I view the Shepherd documents in light of this? Because when you look at the allocution, you know, and the resulting injury, the victim of the assault was, I think, hit, went to the ground, was kicked, rendered unconscious, and then was in a coma for a while.

MR. McKAY: So I think sort of counterintuitively the court can't consider that as a matter of fact he was beaten into a coma. What you have got to look at are the elements. But what the Shepherd documents allow you to do is look at which particular way this crime was satisfied. And so if we didn't have the plea transcript or the judgment of conviction specifying it was Subsection (1), you would also have to look at Subsection (2) and (3) and (4), and actually you would probably choose the least of those offenses. Here, because we have the Shepherd documents, we are looking at Subsection (1) alone.

THE COURT: All right. Thank you.

Mr. Lind.

MR. LIND: Judge, the government has consistently relied on two cases, both of which are readily distinguishable, one of which is the *Walker* case, your Honor, which is applied Subsection 120.05(2).

THE COURT: Let me ask you this: Is the government correct that 120.05(2) involves only physical injury and not serious physical injury?

MR. LIND: Right. It's only physical injury. But it is "by means of a deadly weapon or a dangerous instrument." In other words, the use of force is an element of the crime, whereas 120.05(1) is not an element of the crime. That's exactly what the subject said in *Walker*. I am, in part, quoting, "In *Walker*, the circuit held that New York Penal Law 120.05(2) applying to intentional infliction of physical injury caused 'by means of a deadly weapon or dangerous instrument' qualifies as a crime of violence under the Armed Career Criminal Act ("ACCA") because, among other reasons, 'to cause injury by means of a deadly weapon or dangerous instrument is necessarily to use physical force.'" You don't have that in 125.01.

THE COURT: But how, then -- well, how, then, do you distinguish the Supreme Court's decision where they said that poisoning would qualify as use of force?

MR. LIND: Are we talking about the *Castleman*

decision?

THE COURT: Yes.

MR. LIND: Is that what you are talking about?

THE COURT: Yes.

MR. LIND: I am going to get to it right now, Judge. The *Castleman* decision is equally inapposite since it was limited to the meaning of a misdemeanor crime of domestic violence, a misdemeanor crime of domestic violence, as defined under 18 U.S.C. 922(g)(9).

As our circuit recently observed, and this is on October 26, 2017, *Williams v. The United States*, do you want me to give the --

THE COURT: I just need to know what the proposition is that you are citing.

MR. LIND: "The *Castleman* decision does not squarely address the violent felony definition of ACCA." That's precisely what it says.

THE COURT: Yes, but it doesn't specifically address that. But in appellate-speak, right, that doesn't -- that doesn't preclude me from looking at *Castleman* and saying, well, again, and here, as indicative of where the court might come out. In other words, I think what the -- well, were they saying that we are not going to consider it as dispositive on this rule or what did they actually say in the *Williams* case.

MR. LIND: They basically said what I just quoted,

Judge.

And here I want to go back to what the Supreme Court has in fact itself said in *Castleman*, recognized as much in its reasoning, "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 explained, domestic violence, misdemeanor crime of domestic violence, encompasses a range of force broader than that which constitutes violence implicit here."

So what I am saying, Judge, *Castleman* and certainly *Walker* is distinguishable, but *Castleman* is also distinguishable when we are talking about the use of force in connection with a misdemeanor domestic violence crime rather than a serious felony under New York State law or under federal law. So it is readily distinguishable on that ground.

THE COURT: Okay. All right. Mr. McKay and then --

MR. McKAY: Your Honor, with respect to Mr. Lind distinguished *Castleman* because it is talking about the definition of a misdemeanor crime of violence, but that definition is "has as an element the use of physical force." The definition we are talking about "has an an element the use of physical force." It is the same definition, different --

same operative language for a different crime.

He talked about how there are certain misdemeanor domestic violence statutes or the domestic battery statute at issue in *Johnson* in the 2010 case that could be violated by the mere offense of touching. But Mr. Lind has not identified -- and I would be very surprised if he could -- a New York State case that found that a mere offense of touching satisfied assault in the second degree under Subsection (1) with intent to cause serious physical injury and actually caused serious physical injury. That's not what a mere offense of touching does. He hasn't identified a manner in which you can violate this statute with something less than physical force, and so it meet the 4B1.2 definition.

THE COURT: Although, I guess if the offense of touching was injecting someone with something, wouldn't -- again, I understand the *Castleman* argument.

MR. McKAY: Right. I think the Second Circuit specifically addressed those types of hypotheticals in the *Hill* case, and it said that we don't have to rely on hypotheticals or flights of fancy. We have to rely on actual cases how the statute is impliedly practiced, and I haven't seen the case -- Mr. Lind hasn't identified one -- how some mere offense of touching could be assault in the second degree under Subsection (1).

MR. LIND: But the government hasn't identified it

either where -- something, you know, along the same lines. The government has the burden of showing that here. The government --

THE COURT: Well, it is not a question, right? It is a legal issue. So the issue is how do I interpret the case law that the parties have identified to me. I think the issue about whether or not -- in other words, what would qualify and what wouldn't, that is done by analogy, in other words, by pointing to cases. In other words, look, I think that the government could have pointed to assault second cases, I think that they would be plentiful, under Subsection (1), where people are -- without a weapon, where people are beaten into a coma or beaten so that they have to spend substantial amounts of time in the hospital, in other words, the serious bodily injury aspect of it. I think what Mr. McKay was saying, I think this is correct, that I have not seen either in my own research or the parties haven't presented to me cases where assault in the second, Subsection (1) has been found where there is either a poison case, although I am not saying there would be, but where the touching was where there was *de minimis* physical force that was utilized that caused substantial serious bodily injury.

So I think based, upon the cases and taking into account the *Castleman* case, I understand the argument that it was -- it related to misdemeanor, but when you look at the

elements of the offense, the elements were consistent with the elements here, I find that the assault in the second, subsection (1), does qualify as a violent offense such that it would be counted in the calculation of whether or not Mr. Saunders should be considered a career criminal here.

So I think that was the last disputed issue that there was.

So, as I read it, that means that the guideline for the violation of 21 U.S.C. 1846 is 2D1.1. As I mentioned, I do find that the amounts, when you convert them into marijuana, do amount between 10,000 and 30,000 kilograms, as we discussed earlier, based upon a conservative review of the evidence.

I have discussed I do not find that a four-level role adjustment is appropriate here. I believe that a three-level role adjustment is appropriate, which brings the offense level up to 37 for the reasons previously stated.

Now, however, as I mentioned, I do believe that Mr. Saunders does qualify as a career criminal and, as I have indicated, I do find that assault in the second, subsection (1), is a crime of violence and should be considered as such under the guidelines.

So that doesn't affect the offense level, as I think we have discussed. The offense level will be still 34, because I did grant Mr. Saunders a three-level, and I do grant Mr. Saunders three levels off for acceptance of responsibility,

which results in a level 34. So the issue is the criminal history category, which becomes a criminal history category VI, and therefore the guideline range, and I believe I have this correct, for Count One is 262 to 327 months' imprisonment, to be followed by a mandatory consecutive term of 60 months' imprisonment, which I think, by my calculation, results in a guideline range of 322 to 387 months.

Is that accurate?

MR. McKAY: I think so, your Honor.

THE COURT: Just the math. I understand you don't agree with the calculation.

MR. LIND: Yes.

THE COURT: The fine range is I think 40,000 to $10 million, and Mr. Saunders faces a minimum of five years of supervised release.

Now, with regard to departures, I understand that I have the ability and authority to depart, and I have considered whether there are any applicable departures that are warranted here. And so while I understand I have the authority, I don't find that there are any grounds warranting a departure.

Let me hear from the parties with regard to sentencing.

Let me hear from the government.

MR. McKAY: Thank you, your Honor.

THE COURT: And since we have been through this -- we