No.

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER BRIAN COSIMANO,

Petitioner,

v.

UNITED STATES

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eleventh Circuit erred by finding that Florida's First-Degree Premeditated Murder Statute is categorically a crime of violence for purposes of 18 U.S.C. § 924(c) when the Florida statute allows for passive acts of omission to result in a conviction?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that all parties appear in the caption of the case on the cover page, except one co-defendant from the lower proceeding that has a related case identified below, and include:

Petitioner Christopher Brian Cosimano

Respondent United States

Co-Defendant Michael Mencher

RELATED CASES

Michael Dominick Mencher v. United States, Supreme Court of the United States, No. 22-6132, Writ of Certiorari filed on November 17, 2022, and placed on the docket November 22, 2022.

PROCEEDINGS BELOW

1. Middle District of Florida case number 8:18-cr-00234-MSS-MAP, *United States of America v. Christopher Brian Cosimano, Michael Dominick Mencher, Allan Burt Guinto, Erick Richard Robinson and Cody James Wesling*, judgment rendered December 2, 2019, and attached as Appendix B. Prior to the Judgment, on January 28, 2019, the district court denied a motion to dismiss relating to the issues raised in this Petition. The order is attached as Appendix C.
2. United States Court of Appeals for the Eleventh Circuit case number 19-14841, *United States of America v. Christopher Brian Cosimano, Michael Dominick Mencher*, not reported, but opinion found at 2022 WL 3642170, at *1 (11th Cir. Aug. 24, 2022). Opinion affirming lower court entered August 24, 2022, attached as Appendix A.

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United States of America v. Christopher Brian Cosimano, Michael Dominick Mencher, Allan Burt Guinto, Erick Richard Robinson and Cody James Wesling, 8:18-cr-00234-MSS-MAP (M.D. Fla. January 28, 2019) (Order denying Motion to Dismiss entered on Docket Entry 237).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion and Judgment on August 24, 2022. No petition for rehearing was filed. An extension to file this Petition was granted extending the deadline to December 22, 2022 under number 22A458. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This petition involves the definition of "crime of violence" for purposes of 18 U.S.C. § 924(c) in relation to Florida's First-Degree Premeditated Murder statute § 782.04(1)(a)(1), Fla. Stat.

STATEMENT OF THE CASE

Jurisdiction arises in this matter due to a federal question concerning the interpretation of 18 U.S.C. §924(c). This appeal arises from a five co-defendant nine-count Second Superseding Indictment that charged Conspiracy to Commit Murder in

Aid of Racketeering Activity (Count 1), Murder in Aid of Racketeering Activity (Count 2), Assault with a Dangerous Weapon in Aid of Racketeering (Count 6), and Use of a Firearm During and in Relation to a Crime of Violence, (Counts 3, 4, and 7). The predicate "crime of violence" for Count 3 of the Second Superseding indictment was the murder in aid of racketeering charged in Count 2, which in turn was based on a violation of § 782.04(1)(a)(1), Fla. Stat., Florida's first-degree murder statute.

On October 3, 2018, co-defendant Wesling filed a Motion to Dismiss arguing that the District Court should dismiss the Count 3 charge for use of a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c), because Florida's statute allowed for passive acts of omission to result in a conviction. Petitioner and his co-defendant Mencher also joined in the Motion. The Government opposed the Motion to Dismiss, the court subsequently denied the Motion on January 28, 2019.

This matter proceeded to trial. At the close of the government's case, Petitioner moved for a judgment of acquittal arguing, in part, that first-degree murder could not serve as the predicate crime of violence for Count 3 under 18 U.S.C. § 924(c). The court denied the motion.

Petitioner was convicted of Counts One through Four. On motion of the Government, the District Court later dismissed Count Four. Petitioner was sentenced to 120 months imprisonment on Count One, to run concurrent with a sentence of life imprisonment on Count Two, and a Sentence of 120 months on Count Three to run consecutive to the sentences on Counts One and Two. Judgment was entered on December 2, 2019.

A Notice of Appeal was timely filed by Petitioner on December 4, 2019 that addressed, in part, that Florida's first-degree murder statute could not serve as the predicate crime of violence for Count 3 under 18 U.S.C. § 924(c) because passive acts of omission could result in a conviction. The Eleventh Circuit Court of Appeals affirmed the judgment of the District Court.

This Petition arises from a circuit split regarding whether passive acts of omission to result in a conviction, such as those encompassed by Florida's first-degree murder statute, could serve as the predicate crime of violence under 18 U.S.C. § 924(c).

REASONS FOR GRANTING THE PETITION

Pursuant to United States Supreme Court Rule 10(a), this petition should be granted because the Third Circuits opinion in *United States v. Oliver*, 728 Fed. Appx. 107 (3rd Cir. 2018) conflicts with the Eleventh Circuit's opinion in this matter, as well as several other Eleventh Circuit opinions, about the definition of "crime of violence." In addition, pursuant to Rule 10(c) this petition raises an important question of federal law that has not been, but should be, settled by this Court.

A. 18 U.S.C. § 924(c) and "crimes of violence"

18 U.S.C. § 924(c) proscribes the use of a firearm in relation to a crime of violence or drug trafficking crime. A long line of cases have addressed how and whether various predicate offenses can qualify as "crimes of violence" as contemplated in 18 U.S.C. § 924(c).

18 U.S.C. § 924(c) defines the term "crime of violence" as a felony that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). The first of those two clauses is typically referred to as the "elements" or "force" clause and the second is referred to as the "residual clause." *United States v. Green*, 981 F.3d 945, 951 (11th Cir. 2020). Prior to the instant case proceeding to trial, the Supreme Court held that the residual clause is unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019). The question of whether the predicate offense at issue qualifies as a "crime of violence" must therefore be determined pursuant to the elements clause.

B. The categorical approach

When addressing whether a certain offense qualifies as a "crime of violence" or "violent felony" under the elements clause, courts must employ what has come to be termed the "categorical approach." *Id.* Under the categorical approach, as applied to the elements clause, a court must consider the least culpable conduct that is punished under the statute at issue and determine if the statute requires the proof of the use, attempted use, or threatened use of physical force against the person of another. *Curtis Johnson v. United States*, 559 U.S. 133, 137, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). If a conviction for the underlying offense is possible without proof of attempted, threatened, or actual use of violent force, then a conviction for the

underlying offense cannot qualify as a violent felony, even if the actual offense at issue involved the use of violent force. The categorical approach thereby "requires the government to establish, beyond a reasonable doubt and without exception, an element involving the use, attempted use, or threatened use of physical force against a person for every charge under the statute." *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014).

C. "Physical Force"

While 18 U.S.C. § 924(c) does not define "physical force," the Supreme Court has held "the phrase 'physical force' means violent force -- that is, force capable of causing physical pain or injury to another person." *Curtis Johnson*, 559 U.S. at 140. This Court has further held that, to qualify as "physical force" under 18 U.S.C. § 924(c), the force must be: (1) "physical," in that it must be "exerted by and through concrete bodies"; (2) "violent," in that it must be "capable of causing physical pain or injury to another"; and (3) "use[d]," which requires "the knowing or intentional application of force." *Hylor v. United States*, 896 F.3d 1219, 1222 (11th Cir. 2018) (quotations omitted).

Since deciding *Curtis Johnson*, the Supreme Court addressed the use of indirect physical force determination in a hypothetical poisoning scenario. In that case, *United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014), the Court provided that:

> "use of force" in [the poisoning] 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. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter. Under *Castleman's* logic, after all, one could say that pulling the trigger on a gun is not a "use of force" because it is the bullet, not the trigger, that actually strikes the victim.

Id. at 171.

D. Florida's murder statute

Florida Statutes broadly define the offense of first-degree premeditated murder as "[t]he unlawful killing of a human being...[w]hen perpetrated from a premeditated design to effect the death of the person killed or any human being." § 782.04(1)(a)(1), Fla. Stat. Given that broad definition, the statute seems to allow for the offense to be committed without the use of physical force, including passive acts of omission.

The Eleventh Circuit has previously considered the question of whether the Florida offense of attempted first-degree murder qualified as a violent felony under the elements clause for purposes of the Armed Career Criminal Act. *Hylor, supra*, 896 F.3d 1219. In that case, the defendant presented a scenario in which a person is convicted of first-degree murder under Florida law for surreptitiously poisoning a victim. *Id.* at 1222. The defendant asserted that such an act would not involve the

threatened, attempted, or actual use of physical force. The Eleventh Circuit reasoned, however, that "[p]oisoning someone is a physical, as opposed to an 'intellectual' or 'emotional,' use of force because it involves force 'exerted by and through concrete bodies.'" *Id. citing Curtis Johnson*, 559 U.S. at 140. The Court further found "administering poison to kill someone is an intentional act that is 'capable of causing physical pain or injury.'" *Id. quoting United States v. Deshazior*, 882 F.3d 1352, 1357 (11th Cir. 2018). It further noted "[t]rue, poisoning someone does not involve the "direct application of violent force," but "[t]hat the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter." *Id.* at 1223 *(quoting Castleman*, 134 S.Ct. at 1415). The Court thereby held that attempted first-degree murder under Florida law was categorically a violent felony. *Id. see also United States v. Jones*, 906 F.3d 1325 (11th Cir. 2018) (adhering to *Hylor* and holding that the Florida offense of second-degree murder is categorically a violent felony for purposes of the ACCA).

However, additional passive and omitted acts could also trigger the Florida statute. As Mr. Cosimano set out in the District Court and to the Eleventh Circuit, a defendant would commit the offense of Florida first-degree murder in the "leaving the swimmer behind" scenario. In that scenario, the defendant and the victim take a boat several miles offshore. While offshore, the victim willingly jumps in the water and goes for a swim. While the victim is in the water, the defendant develops a premeditated intent to drive the boat away and leave the swimmer behind, knowing that the swimmer would surely drown before he could ever reach land. In that

scenario, the defendant commits the offense with passive inaction that does not involve the use of force of any kind. At no point in that scenario is force "exerted by and through concrete bodies."

Another scenario in which the Florida first-degree murder statute can be violated without the use of physical force is the intentional starvation of an infant. That factual scenario led to a first-degree murder conviction in at least one Florida case, *State of Florida v. Ruby Stephens*, Case 2014-CF-009880-A (Fla. 10th Jud. Cir., Polk Co.). As heinous as the starvation of an infant is, it simply does not involve the use of physical force. In the intentional starvation scenario, no force is exerted through a concrete body. On the contrary, it is actually the *omission* of a type of force – the feeding of the child – that results in the offense.

The Eleventh Circuit has found that the fact that a state murder offense can be committed by the starvation of a child does not exclude the offense as a crime of violence. *United States v. Sanchez*, 940 F.3d 526, 535 (11th Cir. 2019) (*citing United States v. Waters*, 823 F.3d 1062, 1064, 1066 (7th Cir. 2016); *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017); *United States v. Peeples*, 879 F.3d 282, 287 (8th Cir. 2018)).

However, not all Circuits agree. *See United States v. Oliver*, 728 Fed. Appx. 107 (3rd Cir. 2018) (analyzing whether a state statute for aggravated assault constituted a "crime of violence" under ACCA's similar definition). In *Oliver*, the Third Circuit stated that "individuals who have failed to provide food, medical care, or proper supervision have been convicted of aggravated assault in circumstances

involving no act of physical force." Therefore, the court reasoned, since acts of omission or inaction could be included in the state's statutory definition of aggravated assault, the statute swept more broadly than ACCA's similar definition of violent felony. *Id.* at 111-112 (citing to cases involving convictions for failing to provide medical care to children and failing to feed children).

E. Application and Analysis

Under the Eleventh Circuit's analysis, every offense that results in death would necessarily be a crime of violence. Mr. Cosimano respectfully submits that reaching such a conclusion would require an overbroad employment of the categorical approach. Indeed, concluding that any offense that results in death necessarily involves the use of physical force would nullify the use of the categorical approach in any case involving death. Had the Supreme Court intended for the categorical approach to have such a sweeping effect, it would have likely reached that conclusion in *Castleman*, if not also in *Curtis Johnson*.

In the poisoning scenario at issue in *Castleman*, the Court found that the administration of poison was an indirect form of force. *Castleman*, 572 U.S. at 171. Abandoning a swimmer on the high sea example, on the other hand, involves no such indirect force. On the contrary, it is the omission of any force that results in murder in those situations. As set forth above, while intentional starvation would require an intent to cause the victim's body to shut itself down, it simply does not involve the exertion of force "by and through concrete bodies."

Given Florida law's broadly written first-degree premeditated murder statute, the offense can be committed without the use of physical force. As a result, when analyzed under the categorical approach, the Florida statute is overbroad for purposes of 18 U.S.C. § 924(c), because it fails to require that the least culpable conduct proscribed under the statute include intent to use or threaten to use "physical force against the person of another." For that reason, the predicate offense charged in Count Three was not a qualifying "crime of violence" under 18 U.S.C. § 924(c). The District Court, consequently, erred in denying Mr. Cosimano's motions to dismiss and for a judgment of acquittal on that count.

CONCLUSION

If the decision of the Eleventh Circuit Court of Appeals remains in place, the categorical approach will be rendered meaningless and a conflict between circuits will exist regarding the categorical approach's application. The Court should grant Petitioner's petition for a writ of certiorari. The Court should reverse the Eleventh Circuit's determination and reverse the decision to deny Petitioner's motions for dismissal and judgment of acquittal.

Dated: December 22, 2022.

Respectfully Submitted,

/s/ Brian Lucas Shrader

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