

No. ____ - ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

SHAUN CHAPMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents.

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

PETITION FOR WRIT OF *CERTIORARI*

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Question Presented

- A. If a conviction under a statute that prohibits acts that threaten or cause bodily injury necessarily requires physical force as an element of the offense and thus constitutes a “crime of violence”, which is an issue that currently divides the federal courts of appeal?

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**PETITION FOR WRIT OF *CERTIORARI*
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Petitioner, Shaun Chapman, by his attorney Ronald A. Krauss, First Assistant Federal Public Defender in the Office of the Federal Public Defender for the Middle District of Pennsylvania, respectfully petitions for a writ of *certiorari* to review the order entered in this case by the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The decision of the United States Court of Appeals for the Third Circuit is published at 866 F.3d 129, and is included, with the Judgment, in the Appendix. (2a.) Also included is the Court of Appeals' denial of the Petition for Rehearing. (1a.)

JURISDICTION

The Third Circuit entered its judgment on August 4, 2017. By Order of November 14, 2017, the Third Circuit denied a petition for rehearing and the judgment became final. By Order dated January 17, 2017, Justice Alito granted an Application for an extension of time to file until March 14, 2018.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 253 (1998).

STATUTORY PROVISION INVOLVED

Section 876(c) of Title 18 of the United States Code, 18 U.S.C.

§ 876(c), provides as follows:

Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both. If such a communication is addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114, the individual shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 876(c).

STATEMENT OF THE CASE

A. Legal background.

The United States Sentencing Guidelines classify a defendant who has committed a “crime of violence” as a “career offender” if he is at least eighteen years old at the time of the offense and has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a). “Crime of violence,” in turn, is defined in the Sentencing Guidelines to include various enumerated offenses, none of

which are at issue here, and certain offenses that have “as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 4B1.2(a).

This Court has held that “physical force” in the context of the identical clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), is not equivalent to the common law definition of force, under which “even the slightest offensive touching” sufficed. *Johnson v. United States*, 559 U.S. 133, 139-40 (2010). Thus, “the phrase ‘physical force’ means *violent* force—that is, force capable of causing physical pain or injury to another person.” *Id.* at 140 (emphasis in original).

This definition of “physical force” contrasts with the “use or attempted use of physical force” clause in the definition of “misdemeanor crime of domestic violence” used in the statute prohibiting firearm possession of those convicted of such crimes. 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9); *see also United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014). In *Castleman*, the Court clearly distinguished the *violent* force required by Section 924(e) from the less significant force required to constitute a misdemeanor crime of domestic violence: the Court held that, in the latter case, “the common-law meaning of ‘force’ fits perfectly.” 134 S. Ct. at 1410. The Court specifically held that “Congress incorporated the common-law meaning of ‘force’—namely, offensive touching—in

§ 921(a)(33)(A)’s definition of ‘misdemeanor crime of domestic violence.’” *Id.* The Court noted that the common-law meaning of force was not included in the ACCA definition of force. *Id.* The Court also pointed out that it did not reach the question of “[w]hether or not the causation of bodily injury necessarily entails violent force.” *Id.* at 1413.

B. Factual background.

Mr. Chapman—while serving an 11-month term of imprisonment in a federal institution for violating supervised release conditions—handwrote a letter addressed to the prosecutor who handled the revocation proceedings. This letter contained threats directed at the prosecutor as well as a Probation Officer. A few days later, Mr. Chapman met with a prison psychologist and told her that he regretted his actions; in a later FBI interview, Mr. Chapman admitted that he had “made a bad mistake.” A federal Grand Jury issued a one-count indictment charging Mr. Chapman with mailing a threatening letter to a federal official in violation of 18 U.S.C. § 876(c). Mr. Chapman pleaded guilty.

In preparation for sentencing, the Probation Office prepared a presentence report in which Mr. Chapman was designated as a career offender based on his instant offense of mailing threatening communications (18 U.S.C. § 876(c)), and his two prior felony convictions for (1) a threat against the President (18 U.S.C. § 871); and (2) mailing

threatening communications (18 U.S.C. § 876(c)). As a career offender, Mr. Chapman's Guideline range was 77 to 96 months, based on Total Offense Level 21 and Criminal History Category VI.

Mr. Chapman objected to his career offender classification on the ground that his current offense and his prior convictions were not crimes of violence. The District Court overruled his objections and sentenced him to a term of 70 months. Without the career offender enhancement, his Guideline range would be 37 to 46 months based on a Total Offense Level 5 and a Criminal History Category V.

Mr. Chapman appealed, asking the Third Circuit to find that his convictions under Section 876(c) do not qualify as crimes of violence. The Third Circuit rejected Mr. Chapman's arguments that: (i) the statute was indivisible, and thus subject to the categorical approach; and (ii) that a threat to injure does not necessarily require the threat to use violent physical force. *United States v. Chapman*, 866 F.3d 129 (3d Cir. 2017). In so ruling, the Third Circuit relied heavily on this Court's decision in *Castleman*.

REASONS FOR GRANTING A WRIT OF *CERTIORARI*

There are two primary reasons for granting a Writ of *Certiorari* in this case,

First, the courts of appeal are divided regarding whether a conviction under statutes prohibiting acts that threaten or cause bodily injury necessarily requires physical force as an element of the offense and thus constitutes a “crime of violence.” Seven circuits, including the Third Circuit in this case, answer affirmatively; three circuits say “no.” This Court expressly reserved judgment on this issue in *Castleman*. The Court should resolve this circuit split to provide guidance to the lower courts and create uniformity in the law.

Second, the Third Circuit’s opinion in this case regarding a federal statute, 18 U.S.C. § 876(c), is incorrect. The Third Circuit erroneously ruled that the statute is a divisible statute, and so erroneously applied the modified categorical approach, contrary to *Mathis v. United States*, 136 S. Ct. 2243 (2016). Proper application of the categorical approach compels the conclusion that Section 876(c) is not a crime of violence as defined in the Sentencing Guidelines.

This indivisible statute criminalizes mailing a communication with a harmful threat, and specifies two alternative means of satisfying the single threat element: by threat to kidnap or injure. Neither a threat to

kidnap nor a threat to injure necessarily requires physical force. Nevertheless, the Third Circuit incorrectly found that knowingly mailing a communication containing a threat to injure the person of the addressee or of another falls squarely within the career offender enhancement’s definition of “crime of violence.” Without further analysis consistent with *Mathis*, many courts will apply the significant penalties imposed on an armed career criminal or a career offender to any defendant who is convicted of violating Section 876(c).

A. The Courts of Appeal are divided as to whether convictions under statutes prohibiting acts that threaten or cause bodily harm are categorically crimes of violence.

The Third Circuit in this case—along with the Second, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits—held that violations of statutes criminalizing acts that threaten or cause bodily injury necessarily require physical force and are therefore crimes of violence or violent felonies. See *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); *United States v. Reid*, 861 F.3d 523 (4th Cir.), *cert. denied*, 138 S. Ct. 462 (2017); *United States v. Patterson*, 853 F.3d 298 (6th Cir.), *cert. denied*, 138 S. Ct. 273 (2017); *United States v. Jennings*, 860 F.3d 450 (7th Cir. 2017), *cert. denied*, 2018 WL 311740 (U.S. Jan. 8, 2018); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir.), *cert. denied*, 137 S. Ct. 59 (2016);

United States v. Calvillo-Palacios, 860 F.3d 1285, 1290 (9th Cir. 2017); *United States v. Ontiveros*, 875 F.3d 533, 536-38 (10th Cir. 2017).

Meanwhile, the First and Fifth Circuit hold that statutes criminalizing acts that threaten or cause bodily injury do not require physical force as an element of the offense, precluding violations of those statutes from qualifying as “crimes of violence.” See *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015); *United States v. Rico-Mejia*, 859 F.3d 318, 322-23 (5th Cir. 2017).

This Court has expressly reserved the question of whether causation of bodily injury necessarily entails violent force. *Castleman*, 134 S. Ct. at 1413. The Court held only that bodily injury necessarily entails common law force. *Id.* at 1410.

The question that this Petition presents appears with substantial frequency. While this Court has denied petitions for writs of certiorari on this very question, the need to address it becomes more urgent as the lower courts continue to struggle with whether the threat or causation of physical injury equates to use of violent physical force. Moreover, the lower courts are erroneously relying on *Castleman* to answer a question that this Court specifically left undecided in *Castleman*: whether the causation of bodily injury necessarily entails violence force. 135 S. Ct. at 1413.

B. The Third Circuit’s decision is incorrect.

This Court has identified indivisible statutes and has barred extending the modified categorical approach to determine the means by which an indivisible predicate statute was violated. *See Decamps v. United States*, 133 S. Ct. 2276, 2283-86 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2251-54 (2016). In this case, the Third Circuit disregarded the rules for determining whether a statute is divisible, so its ruling cannot be reconciled with *Mathis*.

The Third Circuit summarily concluded that Section 876(c) is a divisible statute setting forth two versions of the crime: (1) knowingly mailing any communication containing any threat to kidnap any person; or (2) knowingly mailing any communication containing any threat to injury the person of the address or of another. The Third Circuit applied the modified categorical approach to conclude that Mr. Chapman was convicted of the “threat to injure” version of the statute. The Court cited *Mathis* and *Decamps*, but did not engage in a substantive analysis.

Contrary to the Third Circuit, this Court held that a statute is indivisible if it sets out various factual means of committing a single element. *Mathis*, 136 S. Ct. at 2249. A statute is not divisible merely because it is disjunctively phrased. *Id.* The issue is whether a jury must make a unanimous finding in order to convict. *Id.* When a statute does not

require juror unanimity on a fact, that fact “is not an element, or an alternative element.” *Descamps*, 133 S. Ct. at 2293.

Section 876(c) does indeed set out a single set of elements to define a single crime, notwithstanding the disjunctive “or” phrasing. It criminalizes the single crime of knowingly mailing a communication containing a harmful threat, and specifies two alternative means of satisfying that single threat element: by threat to kidnap. or by threat to injure. A jury could convict under Section 876(c) with agreement only that the defendant mailed a letter threatening harm, without agreeing about whether that threat of harm involved kidnapping or causing bodily injury. *See e.g. United States v. Havelock*, 664 F.3d 1284, 1295-96 (9th Cir. 2012); *United States v. Lincoln*, 589 F.2d 379, 381 (8th Cir. 1979). Recognizing the single harm element, the First Circuit approved a jury instruction that identified “two essential elements” of the offense, specifically “that [the defendant] knowingly caused the Postal Service to deliver a threatening communication” and “that the threat was in the nature of a threat to kidnap or injure somebody.” *United States v. Bloom*, 834 F.2d 16, 18 (1st Cir. 1987).

Further, proper application of the categorical approach compels a ruling that Section 876(c) is not a “crime of violence.” In dealing with an indivisible statute, a court “must presume that the conviction rested upon

nothing more than the least of the acts criminalized”, and then determine if the least culpable conduct requires the intentional use or threatened use of force against the person of another. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). The least culpable act in Section 876(c) is the threat to kidnap, which can be accomplished without the use of violent physical force. A threat to kidnap may involve intellectual force, emotional force or no force at all, only persuasion; e.g., an adult family friend who falsely tells a child that his parents sent him to take him for ice cream. Indeed, the federal kidnapping offense, 18 U.S.C. § 1201(a), proscribes acts accomplished through inveiglement or decoy. *See United States v. Stands*, 105 F.3d 1565, 1576 (8th Cir. 1997)(upholding kidnapping conviction where “no forcible abduction took place”); *United States v. Boone*, 959 F.2d 1550, 1555 (11th Cir. 1992)(recognizing that a federal kidnapping may be accomplished solely by the seduction of the victim); *United States v. Hughes*, 716 F.2d 234, 239 (4th Cir. 1983)(noting that a kidnapper may use deceit and trickery to accomplish his purpose rather than overt force); *United States v. Hoog*, 504 F.2d 45, 51 (8th Cir. 1974)(concluding that inducing a victim to accept ride and remain in a vehicle by false representations constitutes inveigling or decoying).

Proper application of the categorical approach to Section 876(c) compels the conclusion that it is not categorically a crime of violence.

C. This case presents an ideal vehicle to address the question reserved in *Castleman*.

This case presents an ideal vehicle to address the question reserved in *Castleman*. Petitioner preserved objections to the classification of his offense of mailing threatening communications as a crime of violence in the District Court because the offense does not have as an element the use or threatened use of violent physical force. He argued the precise issue raised here in the Third Circuit, which squarely addressed it. Further, the case arises on direct appeal, avoiding many of the concerns that attend review of habeas claims.

CONCLUSION

WHEREFORE, the Petitioner, Shaun Chapman, respectfully requests that This Honorable Court grant his petition for a writ of *certiorari*.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I, Ronald A. Krauss, Esq., First Assistant Federal Public Defender,
hereby certifies that I am a member of the Bar of this Court.

Respectfully submitted,

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Date: March 14, 2018