

# United States Court of Appeals For the First Circuit

---

No. 14-2357

ANTHONY MCKAY WHYTE,

Petitioner,

v.

LORETTA E. LYNCH,  
Attorney General of the United States,

Respondent.

---

Before

Torruella, Lynch, and Kayatta,  
Circuit Judges.

---

**ORDER OF COURT**  
**Entered: March 21, 2016**

The petition for rehearing is denied. In Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003), the Second Circuit held that Conn. Gen. Stat. § 53a–61(a)(1) is not categorically a crime of violence as defined in 18 U.S.C. § 16(a). It reasoned that a person may cause physical injury under the Connecticut statute by "guile, deception or deliberate omission," Chrzanoski, 327 F.3d at 195, without himself using "physical force" to cause the injury, 18 U.S.C. § 16(a). Petitioner then relied on Chrzanoski and this argument in his opening brief, Brief for Petitioner at 8, 13–16, while the government countered by arguing that the Second Circuit "incorrectly assumed that an individual could be convicted under section 53a–61(a)(1) for injury caused by 'guile, deception, or even deliberate omission,'" Brief for Respondent at 26 (quoting Chrzanoski, 327 F.3d at 195). The Court ultimately adopted Petitioner's reasoning in its opinion.

Now, for the first time, the government argues in its petition for rehearing that causing injury not only involves "physical force" in some abstract sense, but also involves the "use of physical force" by the defendant himself even if the defendant's misconduct was limited to guile, deception, or deliberate omission. Rather than distinguishing the Supreme Court's majority opinion in United States v. Castleman, 134 S. Ct. 1405 (2014), as it did in its brief on appeal, see Brief for Respondent at 22–23, the government now points to Castleman as supporting this argument.

Because this argument was not properly developed by the government in its brief on appeal, the Court never considered it. For purposes of this case only, it was waived. Trull v. Volkswagen of Am., Inc., 187 F.3d 88, 104 (1st Cir. 1999) (new arguments raised for the first time in a petition for rehearing are waived).

By the Court:  
/s/ Margaret Carter, Clerk

cc:  
Virginia Benzan  
Sejal Zota  
Bryan Stuart Beier  
LaTia N. Bing  
Anthony Wray Norwood  
Lisa Morinelli  
Ragini Shah