

No. 08-6925

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IN THE  
**Supreme Court of the United States**

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CURTIS DARNELL JOHNSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

\_\_\_\_\_  
**On Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit**

\_\_\_\_\_  
**BRIEF FOR THE PETITIONER**

\_\_\_\_\_  
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## QUESTIONS PRESENTED

I. Whether the element of use of “physical force against the person of another,” as found in the definition of “violent felony” in the Armed Career Criminal Act, requires violence and aggression likely to create a serious potential risk of physical injury, a standard that is not satisfied by the *de minimis* contact required for a non-consensual touching?

II. Is the holding of a state’s highest court, that a given offense of that state does not have as an element “the use or threatened use of physical force,” binding on federal courts in determining whether that same offense qualifies as a “violent felony” that “has as an element the use, attempted use, or threatened use of physical force against the person of another” under § 924(e)(2)(B)(i) of the Armed Career Criminal Act?

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**BRIEF FOR THE PETITIONER**

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**OPINION BELOW**

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 528 F.3d 1318 (11th Cir. 2008), and is reproduced in the Joint Appendix (JA) at 81-87. The district court held a sentencing hearing at which it orally ruled that Petitioner Curtis Darnell Johnson's prior battery conviction under Florida law was a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e). JA 49. The transcript of the sentencing hearing is reproduced at JA 12-27, 38-61.

**JURISDICTION**

The Eleventh Circuit Court of Appeals entered its judgment on May 30, 2008. JA 81-87. The court

denied Mr. Johnson's request for rehearing *en banc* on July 22, 2008. JA 88. Mr. Johnson timely filed a petition for writ of certiorari on October 20, 2008, which this Court granted. 129 S. Ct. 1315 (Feb. 23, 2009). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

Section 924(e) of Title 18 of the United States Code provides, in relevant part,

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

\* \* \* \*

(B) The term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

Florida Statute § 784.03 (2002) provides:

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

(b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, “conviction” means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered.

### **STATEMENT OF THE CASE**

Does the slightest non-consensual touching of another person constitute the “use of physical force” as required for a “violent felony” pursuant to the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(i)? The court below held that it does. That holding is contrary to this Court’s precedent, to the ordinary and natural meaning of “physical force”

in the context of the ACCA, to the better-reasoned decisions of numerous other circuits, and to the legislative history. It is also contrary to the decision of the Florida Supreme Court, which is binding on federal courts, that the Florida crime of battery by touching does not contain the element of “use of physical force.” Mr. Johnson therefore asks this Court to reverse the decision below, which affirmed an ACCA sentence more than five times the advisory guideline range by holding that his prior battery conviction in Florida was a violent felony.

1. Mr. Johnson pleaded guilty to possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). JA 12-13. At sentencing, the government sought to have Mr. Johnson sentenced under the enhanced penalties of the ACCA. It introduced evidence of three prior convictions to support the enhancement. JA 21-22. Mr. Johnson challenged only the use of his 2002 Florida battery conviction, JA 28-32, on the basis that it was not a violent felony within the meaning of the ACCA. JA 19, 21-22.

2. Simple battery is ordinarily a misdemeanor in Florida, but Mr. Johnson’s 2002 simple battery charge was enhanced to a third-degree felony because he had sustained a prior conviction for simple battery in 1989. JA 37; *see* Fla. Stat. § 784.03(2). In Florida, simple battery occurs when a person “[a]ctually and intentionally touches or strikes another person against the will of the other; or [i]ntentionally causes bodily harm to another person.” Fla. Stat. § 784.03(1)(a). “[A]ny intentional touching, no matter how slight, is sufficient to constitute a simple battery.” *State v. Hearn*, 961 So. 2d 211, 218-19 (Fla. 2007). Even touching an object that has an “intimate connection” with another person can

constitute battery under Florida's statute. *Nash v. State*, 766 So. 2d 310, 310 (Fla. App. 2000) (victim's closely-held purse); *Clark v. State*, 783 So. 2d 967, 969 (Fla. 2001) (victim's vehicle). The Florida Supreme Court has held that the underlying conduct required for simple battery and felony battery "is identical," and that when felony battery is based on the commission of simple battery by touching, it does not have as an element "the use or threat of physical force or violence against any individual."<sup>1</sup> *Hearns*, 961 So. 2d at 214, 218-19.

3. The information filed in Mr. Johnson's 2002 battery case charged that he "did actually and intentionally touch or strike [the victim] against the will of said person." JA 37. When he pleaded guilty, he merely stipulated that there was "a factual basis" for the charge. JA 65. During the change-of-plea hearing, at which the court also sentenced Mr. Johnson, there was no mention of how Mr. Johnson committed the battery. JA 62-67. The written judgment reflected a conviction for "Felony Battery (one prior)." JA 28.

4. The state court records introduced at Mr. Johnson's federal sentencing hearing did not prove that Mr. Johnson had been convicted of anything other than battery by unwanted touching in 2002. JA 28-37, 40, 62-67. Mr. Johnson argued that a mere unwanted touching did not constitute "physical force" as Congress intended that term to be used in the ACCA, and that such touching did not involve a serious potential risk of physical injury. JA 45-47; Sealed JA 134-35. Mr. Johnson also argued that any

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<sup>1</sup> The quoted language comes from Florida Statute § 776.08, which defines a "forcible felony." The language is nearly identical to that found in § 924(e)(2)(B)(i).

holding purporting to equate touching with physical force would be directly contrary to the Florida statute, which prohibits touching *or* striking. JA 46-47. “If all touching is itself violent, there wouldn’t be a need to have an ‘or’ [in] the underlying statute. But in fact, there are alternative ways. The definition of striking can be one that necessarily implies some sort of force. Touching does not.” JA 47.

The government argued that, under Eleventh Circuit precedent, the Florida crime of battery always constitutes a crime of violence. JA 40-45. In support of this argument, the government cited *United States v. Glover*, 431 F.3d 744, 749 (11th Cir. 2005), which held that battery on a law enforcement officer is a “crime of violence” under the career offender guideline, United States Sentencing Guideline Manual (“U.S.S.G.”) § 4B1.1. As with the violent felony definition in § 924(e)(2)(B)(i), a prior conviction is a “crime of violence” under U.S.S.G. § 4B1.1 if it is a felony that “has 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)(1).

The district court overruled Mr. Johnson’s objections. It accepted the government’s arguments and the probation officer’s position that “[o]ne cannot physically touch or be physically touched without the use of force” and that “touching someone against their will does in fact present a serious potential risk of physical injury.” JA 47-49. The court sentenced Mr. Johnson to 185 months’ imprisonment, five months more than the fifteen-year mandatory minimum required by the ACCA. JA 57. But for the ACCA enhancement, Mr. Johnson faced a statutory maximum of ten years (18 U.S.C. §§ 922(g), 924(a)(2)), and his advisory guideline imprisonment

range would have been twenty-seven to thirty-three months.<sup>2</sup>

5. Mr. Johnson appealed, arguing that the Florida Supreme Court's recent decision in *Hearns* was binding on federal courts, thereby abrogating Eleventh Circuit precedent holding that simple battery under Florida law necessarily involves the use of physical force. JA 83. Mr. Johnson also argued that the Florida crime of battery by mere non-consensual touching did not "involve[] conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B)(ii). The Eleventh Circuit agreed with Mr. Johnson on the latter point, as its decision quoted § 924(e)(2)(B)(i), then stated "[i]f battery under Florida law fits within that description, it is a violent crime for ACCA purposes; if not, then not." JA 82. Nevertheless, the court affirmed the district court's decision.

In upholding Mr. Johnson's sentence, the Eleventh Circuit ruled that its precedent finding the Florida offense of battery by touching or striking to be a crime of violence was not undermined by the Florida Supreme Court's ruling in *Hearns*. JA 81-87. "The issue of whether the federal Armed Career Criminal Act applies to the state law defined crime of battery is a federal question, not a state one. For that reason, nothing that the Florida Supreme Court said in *Hearns* about that state's violent career criminal statute binds us." JA 85.

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<sup>2</sup> The guideline calculation in the presentence report included a six-level increase based on the 2002 battery conviction being a "crime of violence." Sealed JA 96-97; U.S.S.G. § 2K2.1(a)(4)(A). Absent that increase, Mr. Johnson's advisory guideline range would be twenty-seven to thirty-three months.

## SUMMARY OF ARGUMENT

I. A battery committed by the slightest non-consensual touching is not a violent felony. Under § 924(e)(2)(B)(i) of the ACCA, a violent felony is one that has *as an element* the use, attempted use, or threatened use of *physical force* against the person of another. The term “physical force” is being interpreted here in the context of a severe sentencing enhancement statute, not in the context of an equation of the laws of physics. When it is being used to define a “violent felony,” the ordinary and natural meaning of the term “physical force” logically requires that the criminal act be violent, aggressive, and likely to create a serious potential risk of physical injury. Crimes such as murder and rape fit within that definition. A battery that can be committed merely by an unwanted tap on the shoulder does not.

Such a common-sense, contextual interpretation of “physical force” finds strong support in this Court’s decisions construing the ACCA and the nearly identical definition of “a crime of violence” in 18 U.S.C. § 16(a). It is further bolstered by dictionary definitions—both legal and non-legal—that routinely equate force and physical force with violence and injury. The majority of circuit courts correctly reason that the “use of physical force” in the context of a violent felony or a crime of violence means more than force in the Newtonian mechanics sense. The legislative history of the ACCA further shows that Congress’ intent was to target only the very worst offenders, that small group comprising the country’s toughest criminals and superfelons, not to target persons who commit garden-variety local crimes such as battery by touching. Finally, if, after examining the plain language and context of the statute, the

decisions of this Court and of the circuit courts, and the legislative history, any doubt remains as to the definition of the term “physical force,” the rule of lenity compels that doubt be resolved in Mr. Johnson’s favor.

II. The Florida Supreme Court is the final authority on the interpretation of Florida statutes. That court has squarely held that the offense of battery does not categorically contain the “use or threat of physical force” as an element because the crime can be committed by touching. The Florida Supreme Court’s determination that a Florida conviction for battery by touching does not contain as an element “use of physical force” must be respected and followed by federal courts when deciding whether a Florida battery conviction constitutes a violent felony under the ACCA. At a bare minimum, that determination provides persuasive guidance in determining whether battery by touching is a violent felony under the ACCA.

## ARGUMENT

### **BATTERY BY TOUCHING IS NOT A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT BECAUSE IT DOES NOT HAVE AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER.**

An unwanted tap on the shoulder is a violent offense under the Eleventh Circuit’s reading of the Armed Career Criminal Act, which defines a “violent felony” as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). Although a tap on the shoulder may

be “force” under the laws of Newtonian mechanics, this case turns not on the scientific meaning of force, but on the legal meaning of “physical force” as used to define a “violent felony.”

The context in which physical force must be examined is the Florida crime of battery by the slightest unwanted touching. *See* Fla. Stat. § 784.03; *State v. Hearn*, 961 So. 2d 211 (Fla. 2007). The elements of the battery offense, as charged herein, are that Mr. Johnson “did actually and intentionally touch or strike [the victim] against the will of said person.” JA 37. Because Mr. Johnson was charged in the disjunctive, and there was no evidence in the record as to whether the crime was committed by touching or striking, the issue here is whether battery by touching is a violent felony.

Mr. Johnson argued below that a battery by mere unwanted touching does not have as an element the use of physical force as required by the ACCA. The courts below disagreed, relying on Eleventh Circuit precedent that any touching or striking satisfies the element of physical force. JA 47-49, 85-86. The majority of circuits, however, support Mr. Johnson’s position. *See* Part I.B., *infra*. In fact, three of those circuits have also ruled, contrary to the decision below, that the Florida offense of battery does not categorically contain the element of physical force precisely because it can be premised on touching. *United States v. Barraza-Ramos*, 550 F.3d 1246, 1250-51 (10th Cir. 2008) (holding that the Florida crime of felony aggravated battery, “premised on a violation of § 784.03’s prohibition on intentionally touching a person against her will *or* striking a person against her will, does not have as an element the use, attempted use, or threatened use of physical force against another person”); *United States v.*

*Luque-Barahona*, 272 F. App'x 521, 523 (7th Cir. 2008) (same; government conceded felony battery in Florida does not always include the element of use of physical force against another); *United States v. Gonzalez-Chavez*, 432 F.3d 334, 338 n.6 (5th Cir. 2005) (same; holding Florida offense of battery on a pregnant woman can be committed without the use of physical force, *e.g.*, by spitting).

The majority of the circuits follow the better-reasoned approach to defining the term “physical force” and resolving the conflict over whether the Florida battery statute “has as an element the use, attempted use, or threatened use of physical force against the person of another.” See 18 U.S.C. § 924(e)(2)(B)(i). Physical force must be defined in terms of its plain meaning, *i.e.*, its ordinary and natural meaning, and in the context of the words surrounding it. See *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). This includes “the term to be defined, ‘violent felony,’ which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence.” *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.). Hence, physical force is best defined in terms of violence and aggression that is likely to create a serious potential risk of physical injury. The legislative intent behind the ACCA favors such a definition.

The Florida Supreme Court applied this reasoning in holding that Florida’s crime of battery does not categorically include the element of the use or threat of physical force because it can be committed by the slightest unwanted touching. Federal courts are bound by that decision in determining the applicability of § 924(e)(2)(B)(i) when the purported predicate offense is the Florida crime of battery.

**I. THE ELEMENT OF “PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER,” AS FOUND IN THE DEFINITION OF “VIOLENT FELONY” IN THE ACCA, REQUIRES VIOLENCE AND AGGRESSION LIKELY TO CREATE A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY, A STANDARD THAT IS NOT SATISFIED BY THE *DE MINIMIS* CONTACT REQUIRED FOR A NON-CONSENSUAL TOUCHING.**

Although this case represents the first in which this Court will interpret the first clause of the violent felony definition of the ACCA—§ 924(e)(2)(B)(i) (“the physical force clause”)—insight into that clause can be gleaned from this Court’s prior decisions, from the ordinary and natural meaning of the terms contained in the physical force clause in light of their statutory context, and from the better-reasoned decisions of the majority of the circuits. Those insights lead to the conclusion that the use of physical force against the person of another, in the context of a violent felony, requires violence and aggression likely to create a serious potential risk of physical injury. The legislative history comports with this meaning.

**A. The ordinary and natural meaning of “physical force” in the context of the ACCA requires violence and aggression likely to create a serious potential risk of physical injury.**

1. This Court analyzed the element of the use of physical force in *Leocal v. Ashcroft* in the context of 18 U.S.C. § 16(a), which defines a “crime of violence” as “an offense that has as an element the use, attempted use, or threatened use of physical force

against the person or property of another.”<sup>3</sup> The Court began its analysis with the “language of the statute,” recognizing that the statutory language must be considered “in its context and in light of the terms surrounding it.” 543 U.S. at 8, 9 (citing *Bailey v. United States*, 516 U.S. 137, 143, 144 (1995), and *Smith v. United States*, 508 U.S. 223, 229 (1993)). In so doing, “we must give words their ‘ordinary or natural’ meaning.” *Leocal*, 543 U.S. at 9 (quoting *Smith*, 508 U.S. at 228). The *Leocal* Court stated that the term “use”—as in “use . . . of physical force *against the person or property of another*”—“requires active employment.” *Id.* (citing *Bailey*, 516 U.S. at 145). “Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the ‘violent’ crimes Congress sought to distinguish for heightened punishment and other crimes.” *Id.* at 11.

In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term “crime of violence.” The ordinary meaning of this term, combined with § 16’s emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses.

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<sup>3</sup> The question in *Leocal* was whether the Florida crime of driving under the influence of alcohol (“DUI”) and causing serious bodily injury was a “crime of violence.” *Leocal*, 543 U.S. at 3-4. Ultimately, this Court held that DUI and causing serious bodily injury was not a crime of violence under § 16(a) or (b), the latter of which defines crime of violence as any other felony 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.” *Id.* at 10-11.

*Id.* at 11 (emphasis added).<sup>4</sup> *Leocal* thus illustrates that offenses that have as an element the use of physical force against another person are purposeful, violent, active crimes.

This Court shed further light on this matter in *Begay v. United States*, 128 S. Ct. 1581 (2008), when discussing the types of crimes the ACCA was created to target:

In our view, DUI differs from the example crimes—burglary, arson, extortion, and crimes involving the use of explosives—in at least one pertinent, and important, respect. The listed crimes all typically involve *purposeful*, *“violent,”* and *“aggressive”* conduct. That conduct is such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim. Crimes committed in such a *purposeful, violent, and aggressive* manner are “potentially more dangerous when firearms are involved.” And *such crimes are “characteristic of the armed career criminal, the eponym of the statute.”*

*Id.* at 1586 (internal citations omitted; emphasis added).

The words “violent” and “aggressive” appear together five times in the majority opinion in *Begay*. *Id.* at 1586, 1588. Additionally, Justice Scalia observed that “[c]rimes that include as an element the use . . . of physical force against the person of another are all embraced . . . by the requirement of

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<sup>4</sup> See also *Jones v. United States*, 527 U.S. 373, 389 (1999) (“Statutory language must be read in context and a phrase gathers meaning from the words around it.”) (internal quotation marks omitted).

purposeful, violent, and aggressive conduct[.]” *Id.* at 1591 (Scalia, J., concurring) (internal quotation marks omitted). Justice Alito added that the physical force clause “includes offenses that have as an element the use or threatened use of violence.” *Id.* at 1595 (Alito, J., dissenting). Further, “purposeful, ‘violent,’ and ‘aggressive’ conduct” was the key to recognizing that the offense of failure to report was not a violent felony in *Chambers v. United States*, 129 S. Ct. 687, 691-92 (2009).

2. Violence and aggression are consistent with the ordinary and natural meaning of the use of physical force against the person of another. That meaning, however, simply cannot be said to include the minimal pressure involved in a slight touching. This is especially so given that the phrase in which the term “physical force” is used—“the use, attempted use, or threatened use of physical force against the person of another”—is an elemental part of the definition of a “violent felony.” To hold otherwise would place an extraordinary and unnatural meaning on the term “physical force,” thereby leading to unwarranted results. *Cf. Hearn*s, 961 So. 2d at 218-19.

Violence, which ordinarily involves the serious potential risk of physical injury, is obviously consistent with a “violent felony,” the term that “physical force” is being used to define. *See Leocal*, 543 U.S. at 11; *Doe*, 960 F.2d at 225. When the ordinary and natural meaning of the term “physical force” is considered in the context in which that term is used, it is evident that violent and aggressive force is also “likely to create ‘a serious potential risk of physical injury[.]’” *Begay*, 128 S. Ct. at 1585. As this Court recognized in *Begay*:

[I]f Congress meant clause (ii) to include *all* risky

crimes, why would it have included clause (i)? A crime which has as an element the “use, attempted use, or threatened use of physical force” against the person (as clause (i) specifies) is likely to create “a serious potential risk of physical injury” and would seem to fall within the scope of clause (ii).

*Id.* The “physical force” required to constitute a “violent felony” is thus naturally associated with violent, aggressive conduct likely to create a serious potential risk of physical injury, not with the slightest non-consensual touching.

3. That ordinary and natural meaning of “physical force” is confirmed by dictionary definitions. The edition of Black’s Law Dictionary in effect when the ACCA was enacted defined “physical force” as “[f]orce applied to the body; actual violence.” *Black’s Law Dictionary* 1032 (5th ed. 1979) (“*Black’s 5th*”). The current edition defines physical or actual force as “[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim” and force as “[p]ower, violence, or pressure directed against a person or thing.” *Black’s Law Dictionary* 673 (8th ed. 2004) (“*Black’s 8th*”). The word “violence” is also commonly found in other dictionary definitions of force. *See, e.g.*, 6 *Oxford English Dictionary* 34 (2d ed. 1989) (“*OED*”) (“*spec. in Law: Unlawful violence offered to persons or things.*”); *Random House Unabridged Dictionary* 748 (2d ed.1993) (“*Random House*”) (“*Law. Unlawful violence threatened or committed against persons or property.*”); *Webster’s Third New International Dictionary* 887 (1986) (“*Webster’s International*”) (“power, violence, compulsion, or constraint exerted upon or against a person or thing”; synonymous with “violence, compulsion, coercion, duress, constraint, restraint:

force is a general term for exercise of strength or power, esp. physical, to overcome resistance”).

Just as the words “violent” and “violence” are commonly used to define “force,” the word “force”—with modifiers such as strong, extreme, intense, destructive, injurious—is used to define the words “violent” and “violence.” Thus, for example, “violent” is commonly defined as “[c]haracterized by the doing of harm or injury; accompanied by the exercise of violence”; “[c]haracterized by the exertion of great physical force or strength” (19 *OED* 656); “acting with or characterized by uncontrolled, strong, rough force”; “caused by injurious or destructive force”; “intense force, effect, etc.; severe; extreme” (*Random House* 2124); “characterized by extreme force” (*Webster’s International* 2554). The edition of Black’s in effect at the time the ACCA was enacted defined the term “violent offenses” as “[c]rimes characterized by extreme physical force, such as murder, forcible rape, and assault and battery by means of a dangerous weapon.” *Black’s* 5th 1408.

The same edition of Black’s defined “violence” as “[u]njust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage, or fury. . . . Physical force unlawfully exercised; abuse of force; that force which is employed against common right, against the laws, and against public liberty. . . . The exertion of any physical force so as to injure, damage, or abuse.” *Id.* (internal citations omitted). Other common definitions of violence include “[t]he exercise of physical force so as to inflict injury on, or cause damage to, persons or property; action or conduct characterized by this; treatment or usage tending to cause bodily injury or forcibly interfering with personal freedom” (19 *OED* 654); “swift and intense force”; “rough or injurious physical force,

action, or treatment” (*Random House* 2124); “exertion of any physical force so as to injure or abuse” (*Webster’s International* 2554).

The words “force,” “violent,” and “violence” thus have similar definitions. The word “touch,” on the other hand, has quite a different definition, that being “[t]o put the hand or finger, or some other part of the body, upon, or into contact with (something) so as to feel it”; “to exercise the sense of feeling upon” (18 *OED* 295). It would defy the ordinary and natural meaning of physical force, in the context of a violent felony, to equate it with such nonviolent acts.

In sum, this Court’s decisions and the ordinary and natural meaning of physical force in the context of a violent felony demonstrate that the force must be aggressive, violent, and likely to create a serious potential risk of physical injury. The majority of the circuits are in agreement with this definition of physical force.

**B. The better-reasoned circuit opinions show that physical force should be read to require violent, aggressive conduct likely to create a serious potential risk of physical injury.**

1. Judge Easterbrook has provided perhaps the most cogent and persuasive explanation of why the “use of physical force” must be read to mean more than the minimal contact required for the slightest touch. See *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003). Addressing the difference between nonviolent touching and violent, injurious force in the context of the physical force clause of 18 U.S.C. § 16, Judge Easterbrook wrote:

Section 16(a) refers to the “use of physical force”. Every battery entails a touch, and it is

impossible to touch someone without applying *some* force, if only a smidgeon. Does it follow that every battery comes within § 16(a)? No, it does not. Every battery involves “force” in the sense of physics or engineering, where “force” means the acceleration of mass. A dyne is the amount of force needed to accelerate one gram of mass by one centimeter per second per second. That’s a tiny amount; a paper airplane conveys more. (A newton, the amount of force needed to accelerate a kilogram by one meter per second per second, is 100,000 dynes, and a good punch packs a passel of newtons.) Perhaps one *could* read the word “force” in § 16(a) to mean one dyne or more, but that would make hash of the effort to distinguish ordinary crimes from violent ones. How is it possible to commit *any* offense without applying a dyne of force?

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To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word “force” as having a meaning in the legal community that differs from its meaning in the physics community. The way to do this is to insist that the force be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so. . . . Otherwise “physical force against” and “physical contact with” would end up meaning the same thing, even though these senses are distinct in law. This is not a quantitative line (“how many newtons makes a touching violent?”) but a qualitative one. An offensive touching is on the “contact” side of this line, a punch on the “force” side[.]

*Flores*, 350 F.3d at 672 (internal citations omitted).

The Ninth Circuit employed similar reasoning in concluding that a conviction under Wyoming's battery statute did not constitute a crime of domestic violence under 18 U.S.C. § 922(g)(9). *United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003). The Wyoming statute defines battery as “unlawfully touch[ing] another in a rude, insolent or angry manner or intentionally, knowingly or recklessly caus[ing] bodily injury to another.” *Id.* at 1067. The court explained:

Any touching constitutes “physical force” in the sense of Newtonian mechanics. Mass is accelerated, and atoms are displaced. Our purpose in this statutory construction exercise, though, is to assign criminal responsibility, not to do physics. As a matter of law, we hold that the physical force to which the federal statute refers is not *de minimis*.

*Id.* at 1067-68. Therefore, a rude touching is not the use or attempted use of physical force. *Id.* at 1068. “The phrase ‘physical force’ in the federal definition . . . means the violent use of force against the body of another individual.” *Id.*

The Tenth Circuit followed *Flores* and *Belless* when it construed Wyoming's battery statute in the context of § 922(g)(9). *United States v. Hays*, 526 F.3d 674, 677-79 (10th Cir. 2008). The court added:

Indeed, one can think of any number of “touchings” that might be considered “rude” or “insolent” in a domestic setting but would not rise to the level of physical force discussed above. For example, in the midst of an argument, a wife might angrily point her finger at her husband and he, in response, might swat it away with his hand. This touch might very well be considered “rude” or “insolent” in the context of a vehement

verbal argument, but it does not entail “use of physical force” in anything other than an exceedingly technical and scientific way. Similarly, “indirect” contact such as throwing “a snowball, spitball, or paper airplane,” or water at one’s spouse or domestic partner, without causing harm or injury, could be considered rude or insolent touching under the Wyoming statute. *See Flores*, 350 F.3d at 669. We doubt this kind of contact was the type of crime of “domestic violence” that Congress had in mind when it passed § 922(g)(9).

*Id.* at 679 (footnote omitted). The Tenth Circuit noted that it “may be correct from a scientific perspective” to conclude that any touching requires some level of physical force. *Id.* at 681. Nonetheless, the court held that “‘physical force’ in a ‘crime of violence,’ must, from a legal perspective, entail more than mere contact. Otherwise, *de minimis* touchings could give federal statutes, like § 922(g)(9), an overly broad scope and impact.” *Id.*

In other cases, the Fifth and Tenth Circuits have recognized that “[f]orce,’ as used in the definition of a ‘crime of violence,’ is ‘synonymous with destructive or violent force.’” *United States v. Venegas-Ornelas*, 348 F.3d 1273, 1275 (10th Cir. 2003) (quoting *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001)). The Fourth Circuit has noted that battery by kissing without consent, touching, tapping, jostling, or throwing water upon another does not require the use, attempted use, or threatened use of physical force. *United States v. Simms*, 441 F.3d 313, 315 (4th Cir. 2006).

Finally, the D.C. Circuit in *United States v. Mathis*, 963 F.2d 399 (D.C. Cir. 1992), recognized that robbery committed “by sudden or stealthy seizure or

snatching” did not constitute a “violent felony” under § 924(e)(2)(B)(i). The court first noted that the ACCA created one category of crimes against the person and a second category of crimes against property. *Id.* at 405. The court then explained that “[a] brief examination of the legislative history of this definition of violent felonies against the person reveals that Congress intended that the penalty enhancement provision apply primarily to career criminals who have committed violent crimes.” *Id.* The court concluded that “when Congress amended the enhancement provision to cover all violent felonies that have ‘as an element the use, attempted use, or threatened use of physical force against the person of another,’ 18 U.S.C. § 924(e)(2)(B)(i) (1988), it did not intend to include felonies in which the use of force was *de minimis*[.]” *Id.* at 407.

2. The circuits on the other side of the split do not consider the ordinary and natural meaning of the term “physical force” in the context of defining a violent felony, do not address this Court’s precedent on violent felonies/crimes of violence, and do not discuss the extensive legislative history demonstrating the intended scope of the ACCA. The only such courts to have applied any analysis to the term “physical force”—*United States v. Nason*, 269 F.3d 10 (1st Cir. 2001), and *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006)<sup>5</sup>—did so in the context

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<sup>5</sup> In Mr. Johnson’s case, the Eleventh Circuit considered itself bound by its earlier decision in *United States v. Llanos-Agostadero*, 486 F.3d 1194 (11th Cir. 2007). JA 85-86. *Llanos-Agostadero* followed the decisions in *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005), and *Griffith* without engaging in any independent analysis. 486 F.3d at 1197-98. In *Glover*, the defendant did not argue that Florida’s felony battery on a law enforcement officer was not a crime of violence. Instead, he

of § 922(g)(9)'s definition of a “crime of domestic violence,” *i.e.*, a misdemeanor that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon[.]” 18 U.S.C. § 921(a)(33)(A). Each court’s analysis relied on incomplete definitions of physical force taken from Black’s. The partial definition used by the courts— “[f]orce consisting in a physical act,” *Nason*, 269 F.3d at 16; “[p]ower, violence, pressure directed against a person’ ‘consisting in a physical act,’” *Griffith*, 455 F.3d at 1342—omitted the qualification that “physical force” is “esp[ecially] a violent act directed against a robbery victim.” *Black’s Law Dictionary* 656 (7th ed.1999) (“*Black’s 7th*”); *Black’s 8th* 673. *Cf. Hays*, 526 F.3d at 677 (quoting the entire definition of “physical force” as well as the definition of “force” and finding, “[c]onsistent with these definitions” and the decision in *Leocal*, “that ‘physical force’ means more than mere physical contact; that some degree of power or violence must be present in that contact to constitute ‘physical force’”). Moreover, neither court acknowledged the definition of physical force that was current when § 922(g)(9) was enacted: “Force applied to the body; actual violence.” *Black’s Law Dictionary* 1147 (6th ed. 1990).<sup>6</sup>

Furthermore, although both courts noted that Black’s defined “force” as “[p]ower, violence, or

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argued that a jury, rather than the district court, should have determined that the offense was a crime of violence. 431 F.3d at 747, 749. The Eleventh Circuit held as a matter of law, without any explanation or analysis, that the battery offense constituted a crime of violence under U.S.S.G. § 4B1.2. *Id.* at 749. The only Eleventh Circuit opinion with analysis for this case, then, is *Griffith*.

<sup>6</sup> The same definition existed when the ACCA was enacted. *Black’s 5th* 1032.

pressure directed against a person or a thing,”<sup>7</sup> they chose to exclude “violence” when discussing the meaning of physical force. *Griffith*, 455 F.3d at 1343-44 (“Reaching the *Belless* result in this case would alter the scope of § 922(g)(9) by effectively inserting the word ‘violent’ into the operative definition contained in § 921(a)(33)(A)(ii)”); *id.* at 1345 (“If Congress had meant to say ‘violent physical force’ it easily could have done so.”); *id.* at 1342 (holding that “[a] person cannot make physical contact—particularly of an insulting or provoking nature—with another without exerting some level of physical force.”); *Nason*, 269 F.3d at 20 (holding that “offensive physical contacts . . . invariably emanate from the application of some quantum of physical force, that is, physical pressure exerted against a victim. Therefore, offensive physical contacts with another person’s body categorically involve the use of physical force[.]”) (citation omitted).

Both courts thus relied on an incomplete definition of physical force to read the idea of violence out of “crime of domestic violence”—the term physical force was defining. See *Leocal*, 543 U.S. at 11 (“In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term “crime of violence.”); *Doe*, 960 F.2d at 225 (“we must read the definition in light of the term to be defined, ‘violent felony’”); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016, 1018 (9th Cir. 2006) (requiring that physical force be violent and active in context of § 16; stating that the “assumption—that a ‘crime of violence’ need not actually be ‘violent’ in nature—is clearly irreconcilable with *Leocal*”). Further, even

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<sup>7</sup> See *Nason*, 269 F.3d at 16 (citing *Black’s* 7th 656); *Griffith*, 455 F.3d at 1342 (citing *Black’s* 8th 673).

though the word “violent” does not appear in the residual clause of the ACCA, this Court in *Begay* had no difficulty in finding that DUI was not a violent felony because it was not “associated with a likelihood of future violent, aggressive, and purposeful ‘armed career criminal’ behavior[.]” 128 S. Ct. at 1588.<sup>8</sup>

In an attempt to buttress their conclusions, both *Griffith* and *Nason* pointed to the “close neighbor” of the statutory provision they were interpreting. *Griffith*, 455 F.3d at 1342; *Nason*, 269 F.3d at 16-17. Section 922(g)(8)(C)(ii) creates a firearm disability for anyone subject to a court order that “by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner or child *that would reasonably be expected to cause bodily injury.*” 18 U.S.C. § 922(g)(8)(C)(ii) (emphasis added). Both courts asserted that the emphasized language in § 922(g)(8)(C)(ii) indicated that if Congress had intended the term “physical force” as used in § 922(g)(9) to include only force that is violent or likely to cause physical injury, it knew how to say so. *Griffith*, 455 F.3d at 1342-43; *Nason*, 269 F.3d at 16-17. In making this textual argument, the courts relied, *id.*, on the so-called “*Russello* presumption,” whereby when “Congress includes particular language in one section of a statute but omits it in another section of the *same Act*, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or

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<sup>8</sup> Although the Eleventh Circuit decided *Griffith* in 2006, the court never discussed *Leocal*. Both *Griffith* and *Nason* were decided prior to *Begay*; hence, neither circuit had the benefit of this Court’s further explication of the meaning of a violent felony.

exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (emphasis added).

The *Russello* presumption does not assist in construing § 922(g)(9), however, because, unnoted by either the *Griffith* or the *Nason* court, these two sections were not part of the same Act. Section 922(g)(8)(C)(ii) was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994; § 922(g)(9) was enacted as part of the Omnibus Consolidated Appropriations Act of 1997. See Pub. L. No. 103-322, § 110401, 108 Stat. 1796, 2015 (1994); Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-372 (1996).

Further, neither *Griffith* nor *Nason* acknowledged that § 922(g)(9) uses the term “physical force” to refer to the statutory elements of potential predicate crimes, while § 922(g)(8)(C)(ii) uses the term to refer to actual conduct prohibited by a restraining order. “A party seeking a restraining order must make a persuasive showing of irreparable harm[.]” *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977). Congress, then, quite logically could have concluded that for the new firearms disability it was creating in § 922(g)(8)(C)(ii) to pass legal muster, it was necessary for any restraining order causing such a disability to explicitly prohibit conduct that “would reasonably be expected to cause bodily injury.”

In short, the reasons advanced by the First and Eleventh Circuits for finding that physical force equates to the slightest pressure or touching do not withstand reasoned scrutiny. On the other hand, the analysis of the majority of the circuits—that violent felonies/crimes of violence must have as an element the use of violent, destructive, aggressive, and/or injurious force—is consistent with the ordinary and

natural meaning of physical force in the statutory context. This definition of physical force is also consistent with the legislative history.<sup>9</sup>

**C. The legislative intent behind the Career Criminals Amendment Act of 1986 was to target the very worst offenders, a category in which mere touchers were not included.**

In the original 1984 version of the ACCA, the predicate offenses for the enhancement were “robbery or burglary, or both.” 18 U.S.C. App. § 1202 (1982 ed. Supp. III). In 1986, Congress amended the ACCA to expand the predicate offenses to include serious drug offenses and violent felonies. *See* Subtitle I of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-39 to -40 (1986) (entitled “Career Criminals Amendment Act of 1986”). The House and Senate Subcommittees heard lengthy testimony regarding this amendment.<sup>10</sup> That testimony, together with the action Congress took based on it, demonstrates that offenses with *de minimis* force and no intent to injure, such as battery

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<sup>9</sup> Neither *Nason* nor *Griffith* considered the ACCA or its legislative history.

<sup>10</sup> *See* Hearing Before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, 99th Congress, 2nd Session, on S. 2312 (A Bill to Amend Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Relating to Armed Career Criminals, to include a Serious Drug Offense and any Crime of Violence as an Offense Subject to Enhanced Penalties), May 14, 1986, Serial No. J-99-107 (“May 14, 1986 Senate hearing”); Hearing Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 99th Congress, 2nd Session, on H.R. 4639 and H.R. 4768 (Armed Career Criminal Legislation), May 21, 1986, Serial No. 96 (“May 21, 1986 House hearing”).

by the slightest unwanted touching, are not the type of offenses Congress intended to serve as ACCA predicates.

First, Congress clearly intended the ACCA to target the “very worst offenders”;<sup>11</sup> “superfelons”;<sup>12</sup> “this country’s most hardened felons” and “toughest criminals”<sup>13</sup>—the ones who commit “serious violent crimes”<sup>14</sup> such as “rape and murder.”<sup>15</sup> As David Dart Queen, Deputy Assistant Secretary for Enforcement, U.S. Department of the Treasury, testified before the Senate Subcommittee:

S. 2312 is an important piece of legislation which applies a logical, commonsense definition of violence. We cannot limit our efforts against violence to just the burglar and the robber. The same message must go out to the rapist, the gangland enforcer, or to any professional violent offender.

May 14, 1986, Senate hearing at 20. Given that the Florida crime of felony battery can be committed by mere unwanted touching, with no injury, intent to injure, or likelihood of injury, one would be hard-pressed to characterize an offender convicted of such

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<sup>11</sup> Representative Ron Wyden, May 21, 1986 House hearing at 8.

<sup>12</sup> James West, U.S. Attorney, Middle District of Pennsylvania, Senator Arlen Specter, May 14, 1986 Senate hearing at 18, 19.

<sup>13</sup> Senator Arlen Specter, May 21, 1986 House hearing at 43, 44.

<sup>14</sup> Representative Bill McCollum, May 21, 1986 House hearing at 7.

<sup>15</sup> Representative Wyden, May 14, 1986 Senate hearing at 5; May 21, 1986 House hearing at 8.

a crime as one of society's very worst offenders, one of this country's most hardened felons and toughest criminals, a superfelon, or a professional violent offender.

Second, "prioritiz[ing] offenses"<sup>16</sup>—a key to tailoring the 1986 amendment—further militates against categorizing *de minimis*, noninjurious force offenses as predicates for enhanced sentencing under the ACCA. As observed by Representative William J. Hughes, Chairman of Subcommittee on Crime, "[w]e could make a case . . . to include all crimes, but obviously we do not have the resources[.]" May 21, 1986 House hearing at 26. Representative Ron Wyden stated that the amendment should be drafted so that "garden variety local crimes and property matters" would not be included. *Id.* at 12. On the other hand, he explained, "[i]t doesn't make much sense to say that a referral under that act is possible for a three time bank robber but not a habitual offender with prior convictions for rape or murder." *Id.* at 8, 10. Rape and murder were the two forcible crimes most consistently referred to throughout the hearings. *See, e.g.*, May 21, 1986 House hearing at 8, 10, 46, 51; May 14, 1986 Senate hearing at 5, 7-10, 12, 20, 27, 48, 50, 56, 57.

Crimes requiring no more than *de minimis*, noninjurious force, such as Florida's battery-by-touching offense, are the type of "garden variety local crimes" that Congress did not intend to serve as predicates for the ACCA. *See* May 21, 1986 House hearing at 12. Such offenses are simply too far removed from the violent, injurious, forcible crimes Congress intended to be included as ACCA

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<sup>16</sup> Representative William J. Hughes, May 21, 1986 House hearing at 11.

predicates, *e.g.*, murder and rape. *Id.* at 8, 10; *see also* Senator Arlen Specter, May 21, 1986 House hearing at 46 (“Obviously, the statute can be greatly more effective if it is amended—as the Department of Justice urges—to apply to career criminals whose prior offenses may be murder, rape, or heroin smuggling.”).

Third, it is clear that simple battery was not meant to be covered by the ACCA amendment. Deputy Assistant Attorney General James Knapp, who testified before both the House and Senate Subcommittees on behalf of the United States Department of Justice, made this point in his testimony, which was instrumental in fashioning the ACCA into the form in which it now stands.<sup>17</sup> Mr. Knapp specifically endorsed the language contained in H.R. 4768 that eventually became the physical force clause. He stated that “[t]he bill would not cover misdemeanors against a person like simple assault or battery—that aspect we endorse[.]” May 21, 1986 House hearing at 15; *see also id.* at 21.

The Florida felony battery offense of which Mr. Johnson was convicted requires the same element as simple misdemeanor battery—nothing more than the slightest non-consensual touching. Fla. Stat. § 784.03(1)(a); JA 28-37. His offense was enhanced because of a prior misdemeanor battery conviction.

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<sup>17</sup> The bills that were before both Houses at the time Mr. Knapp testified were similar in that they did not have the examples that now are included in § 924(e)(2)(B)(ii), that is, burglary, arson, extortion, and use of explosives. *See, e.g.*, May 21, 1986 House hearing at 15, 23. Mr. Knapp suggested those examples, as well as changes to the language of the serious drug offense provision that were adopted, and clarification of the definition of “felony” to ensure that the federal definition be used. *See id.* at 15, 27; May 14, 1986 Senate hearing at 10.

Fla. Stat. § 784.03(2); JA 28, 37. Surely, persons whose crimes require as an element nothing more than a slight touch of another person against that person's will are not in the same category as murderers, rapists, gangland enforcers, or professional violent offenders. Congress never intimated otherwise. Indeed, interpreting the physical force clause to encompass nominal contact would "blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Leocal*, 543 U.S. at 11.

**D. If any doubt remains, that doubt must be resolved in favor of defining physical force as violent, aggressive, and likely to create a serious potential risk of physical injury.**

The ACCA has generated numerous circuit splits and five decisions from this Court in the last four years.<sup>18</sup> Consistent with these decisions and common sense, the term "physical force" should be read to

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<sup>18</sup> See *Chambers v. United States*, 129 S. Ct. 687 (2009) (holding that crime of failing to report to prison does not constitute a "violent felony" within meaning of residual clause); *United States v. Rodriguez*, 128 S. Ct. 1783 (2008) (interpreting meaning of terms "maximum term of imprisonment," "law," and "offense" in context of definition of "serious drug offense"); *Begay v. United States*, 128 S. Ct. 1581 (2008) (holding that crime of driving under influence is not a violent felony within meaning of residual clause); *James v. United States*, 550 U.S. 192 (2007) (holding attempted burglary falls within residual clause of § 924(e)(1)(B)(ii)); *Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding that "a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented").

require violent, aggressive acts likely to create a serious potential risk of physical injury. *Cf. First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989) (observing that “the most fundamental guide to statutory construction [is] common sense”).

In defining physical force to include the slightest touching, the decision below sets out the minority view of what constitutes a violent felony for purposes of the ACCA. To the extent that this minority view allows for any doubt as to the plain meaning of physical force, the rules of strict construction and of lenity require the doubt be resolved in favor of Mr. Johnson by finding that the use of physical force against the person of another must be aggressive, violent, and likely to create a serious potential risk of physical injury. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion) (“Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”); *United States v. Granderson*, 511 U.S. 39, 54 (1994) (“In these circumstances—where text, structure, and history fail to establish that the Government’s position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in Granderson’s favor.”); *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (“If any [ambiguity] did [survive], however, we would choose the construction yielding the shorter sentence by resting on the venerable rule of lenity, rooted in ‘the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should’”) (internal citation omitted); *Dowling v. United States*, 473 U.S. 207, 213 (1985) (stating that “when assessing the reach of a federal criminal

statute, . . . we typically find a ‘narrow interpretation’ appropriate”); *Dean v. United States*, 129 S. Ct. 1849, 1861 (2009) (Breyer, J., dissenting) (observing that “the rule of lenity [has] special force in the context of mandatory minimum provisions”).

One of the policies upon which the rule of lenity is founded is that fair notice must be given “to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.” *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). A statute mandatorily and severely enhancing punishment due to a prior conviction for a violent felony that necessarily involves the use of physical force against another person gives fair warning that violent, aggressive, injurious conduct, such as murder or rape, will trigger the enhanced punishment. It does not, however, give fair warning that slight non-consensual touching will likewise trigger the enhancement. To the extent that any ambiguity exists, then, the issue must be resolved in Mr. Johnson’s favor. See *United States v. Lanier*, 520 U.S. 259, 266 (1997) (stating that “the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered”).

**II. FEDERAL COURTS DECIDING WHETHER THE FLORIDA OFFENSE OF BATTERY CONSTITUTES A “VIOLENT FELONY” PURSUANT TO § 924(e)(2)(B)(i) BECAUSE IT “HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER” ARE BOUND BY THE FLORIDA SUPREME COURT’S DETERMINATION THAT BATTERY BY TOUCHING DOES NOT CONTAIN SUCH AN ELEMENT.**

State courts, being the ultimate expositors of state law, define the elements of their criminal offenses. Federal courts are bound by the construction placed on a state’s statutes by the courts of that state. Therefore, when the Florida Supreme Court held that the Florida battery statute does not have as an element the use or threat of physical force or violence when charged under the touching prong, that construction of that statute became binding on federal courts.

**A. In *State v. Hearn*, the Florida Supreme Court held that the offense of battery by touching does not have as an element the use or threat of physical force or violence.**

In Florida, “any intentional touching of another person against such person’s will is technically a criminal battery.” *D.C. v. State*, 436 So. 2d 203, 206 (Fla. App. 1983) (citing Fla. Stat. § 784.03). Also, in Florida, “injury is not an element” of simple battery. *Jackson v. State*, 533 So. 2d 888, 888 (Fla. App. 1988). Against this backdrop of battery law, the Florida Supreme Court was called upon in *State v. Hearn*, 961 So. 2d 211 (Fla. 2007), to determine whether

battery on a law enforcement officer (“BOLEO”) was a “forcible felony.” This determination required the state’s highest court to examine the elements of battery to decide if they included “physical force.” The Florida Supreme Court held that physical force was not a necessary element of battery because it could be committed by touching. *Id.* at 218-19.

A “violent career criminal” (“VCC”) in Florida is one who has been convicted three times of certain enumerated felonies, including any “forcible felony.” *See* Fla. Stat. § 775.084(1)(d)(1). A “forcible felony” is defined as certain other enumerated felonies or “any other felony which involves the use or threat of physical force or violence against any individual.” Fla. Stat. § 776.08. The defendant in *Hearns* argued that he did not qualify for VCC sentencing because one of his prior convictions, for BOLEO, was not an enumerated felony or otherwise a “forcible felony.” 961 So. 2d at 213.

Florida’s test for determining whether an offense qualifies as a “forcible felony” is virtually identical to the categorical approach mandated by this Court for use by federal courts in determining whether a prior conviction constitutes a “violent felony” under the ACCA. Like the federal courts, in Florida “a court may only consider the statutory elements. The particular circumstances are irrelevant.” *Id.* at 213 (citing *Perkins v. State*, 576 So. 2d 1310, 1313 (Fla. 1991)); *see also Taylor v. United States*, 495 U.S. 575, 602 (1989) (stating that the courts “look only to the fact of conviction and the statutory definition of the prior offense”); *Shepard*, 544 U.S. at 17 (stating that the courts do not generally consider the “particular facts disclosed by the record of conviction”). Applying this test, the *Hearns* Court stated:

[F]or an offense to be a forcible felony under

section 776.08, the “use or threat of physical force or violence” must be a *necessary element* of the crime. If an offense may be committed without the use or threat of physical force or violence, then it is not a forcible felony.

*Hearns*, 961 So. 2d at 215.

In considering the challenge *Hearns* presented to his BOLEO conviction, the Florida Supreme Court noted that “[t]he underlying conduct required for simple battery and BOLEO is identical. The only differences are the status of the victim and the penalty imposed.” 961 So. 2d at 214.<sup>19</sup> Applying the statutory elements test, the Florida Supreme Court concluded that BOLEO was not a forcible felony. Simply put, BOLEO committed by intentional touching does not have as an element the use or threat of physical force or violence. *Id.* at 218-19.

In reaching its conclusion, the Florida Supreme Court rejected the state’s argument that “any intentional touching” or “any physical contact” sufficed to make BOLEO a forcible felony. *Id.* at 218. The court noted that any intentional touching sufficed to constitute a simple battery and that “BOLEO, like battery itself, may be committed with only nominal contact.” *Id.* at 218-19. The court then observed that a ruling that any intentional touching constituted a forcible felony “could lead to potentially outrageous results. For example, tapping a law enforcement officer on the shoulder without consent would constitute a forcible felony. A child shooting a spitball at a school police officer would be guilty of a

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<sup>19</sup> The analysis in *Hearns* is equally applicable to Mr. Johnson’s case because simple battery also becomes a felony when a person has a prior conviction for battery. See Fla. Stat. § 784.03(2).

forcible felony. The possibilities are limited only by the imagination.” *Id.* at 219.

**B. The Florida Supreme Court’s definitive ruling, based on a categorical analysis, that Florida’s felony battery statute does not have as an element the use or threatened use of physical force because it can be charged and committed by touching, is binding on federal courts.**

1. It is well-settled that state courts “have the final authority to interpret . . . that State’s legislation.” *Garner v. Louisiana*, 368 U.S. 157, 169 (1961). “Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state.” *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *accord Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) (stating that “the views of the state’s highest court with respect to state law are binding on the federal courts.”). This Court, in fact, “repeatedly has held that state courts are the ultimate expositors of state law.” *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *id.* (stating that “we accept as binding the Maine Supreme Judicial Court’s construction of state homicide law”). There is thus “no doubt that we are bound by a state court’s construction of a state statute.” *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993); *see also Watson v. Buck*, 313 U.S. 387, 401 (1941) (“The Florida Supreme Court . . . under our dual system of government has the last word on the construction and meaning of statutes of that state”). This, of course, includes state courts’ construction of the elements of their criminal statutes. *Jackson v. Virginia*, 443 U.S. 307, 324 n.16 (1979) (stating that the state law defines “the substantive elements of the

criminal offense” by which sufficiency of the evidence is determined).

In *James*, the question before this Court was “whether attempted burglary, as defined by Florida law, is a ‘violent felony’ under ACCA.” *James*, 550 U.S. at 195. This Court stated that in deciding this question, it would only “consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.” *Id.* at 202. This Court thus looked to the elements of attempted burglary, as defined by the Florida Supreme Court, to reject the petitioner’s contention that Florida’s attempt statute, Florida Statute § 777.04(1), required only that a defendant take “any act toward the commission” of burglary:

[W]hile the statutory language is broad, the Florida Supreme Court has considerably narrowed its application in the context of attempted burglary, requiring an “overt act directed toward entering or remaining in a structure or conveyance.”

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Given that *Florida law, as interpreted by that State’s highest court*, requires an overt act directed toward the entry of a structure, we need not consider whether the more attenuated conduct encompassed by such laws presents a potential risk of serious injury under ACCA.

*Id.* at 202, 205-06 (citation omitted; emphasis added). In other words, the Florida Supreme Court grafted onto the offense of attempted burglary an element not necessarily required by the statutory language, and

this Court applied the Florida law as it was defined by the Florida Supreme Court.

When the petitioner in *James* argued that Florida's burglary statute differed from "generic" burglary as defined in *Taylor*, 495 U.S. at 598, because it defined a "dwelling" to include not only the structure itself, but also the "curtilage thereof" and thus fell outside the confines of the violent felony definition, the Court "again turn[ed] to state law in order to answer this question." *James*, 550 U.S. at 212-13.

The Florida Supreme Court has construed curtilage narrowly, requiring "some form of an enclosure in order for the area surrounding a residence to be considered part of the 'curtilage' as referred to in the burglary statute." Given this narrow definition, we do not believe that the inclusion of curtilage so mitigates the risk presented by attempted burglary as to take the offense outside the scope of clause (ii)'s residual provision.

*Id.* at 213 (internal citations omitted).

The Court's methodology for resolving *James* in this regard points the way to the proper resolution of Mr. Johnson's case as well, that is, by way of the Florida Supreme Court's decision in *Hearns*. The Florida Supreme Court has held that the crime of felony battery in Florida, where the battery is committed in the same manner as simple battery, does not have as "a necessary element of the crime" the "use or threat of physical force or violence." *Hearns*, 961 So. 2d at 215. Under this Court's well-settled precedent noted above, that decision definitively establishes that the elements of battery by touching in Florida do not include "physical force." The Florida Supreme Court's construction of its state

statute must be respected and followed by federal courts. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (“[Federal courts] have no authority to construe the language of a state statute more narrowly than the construction given by that State’s highest court.”).

Further, the Florida Supreme Court applied an elements test to its statute, just as *Taylor* requires federal courts to do, and the reasoning in *Hearns* is consistent with the majority of the federal circuits in interpreting physical force in the context of federal enhancement statutes. *See* Part I.B., *supra*.<sup>20</sup> The Florida Supreme Court relied on the ordinary and natural meaning of physical force. The examples it used of conduct that constitutes battery, but that does not involve the use of physical force—“tapping a law enforcement officer on the shoulder without consent” and “shooting a spitball at a school police officer”—are enough, under the elements test, to determine that felony battery by touching is not a violent felony. 961 So. 2d at 219. Moreover, as “outrageous,” *id.*, as these examples are, there exists in Florida “a realistic probability, not a theoretical possibility,” *James*, 550 U.S. at 208 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)), that a felony conviction will arise due to such conduct. *See, e.g., S.D.W. v. State*, 746 So. 2d 1232, 1234 (Fla. App. 1999) (juvenile committed felony battery on a school employee when she “intentionally made contact” with

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<sup>20</sup> For example, Judge Easterbrook’s reasoning in *Flores* was similar to that of the Florida Supreme Court in *Hearns*. He, too, relied on the elements of the state statute and the common usage of the terms “physical force” and “touch” to arrive at his conclusion that the Indiana battery conviction was not categorically a crime of violence for purposes of § 16(a). *Flores*, 350 F.3d at 669-70, 672.

vice-principal's arm, as she attempted to go by vice-principal);<sup>21</sup> *C.B. v. State*, 979 So. 2d 391, 395 (Fla. App. 2008) (spitting on another person is battery);<sup>22</sup> *Mohansingh v. State*, 824 So. 2d 1053, 1053 (Fla. App. 2002) (same); *Spivey v. State*, 789 So. 2d 1087, 1088-89 (Fla. App. 2001) (same); *Wolk v. Seminole County*, 276 F. App'x 898, 900 (11th Cir. 2008) (a brother pushing his sister's hands out of his face during an argument gave the police probable cause to arrest him for battery);<sup>23</sup> *Nash v. State*, 766 So. 2d 310, 310 (Fla. App. 2000) (upholding battery

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<sup>21</sup> Disapproved on other grounds, *N.C. v. Anderson*, 882 So. 2d 990 (Fla. 2004).

<sup>22</sup> Indeed, spitting appears to be a common form of battery under various state and federal laws. See, e.g., *Commonwealth v. Cohen*, 771 N.E.2d 176, 178 (Mass. App. 2001) (“We are in accord with other jurisdictions holding that an intentional and unconsented spitting on another constitutes a criminal battery.”) (citing, e.g., *Jackson v. State*, 485 S.E.2d 832 (Ga. App. 1997); *People v. Peck*, 633 N.E.2d 222 (Ill. App. 1994); *State v. Sampsel*, 997 P.2d 664 (Kan. 2000)); *United States v. Lewellyn*, 481 F.3d 695, 699 (9th Cir. 2007) (“We agree with these courts that intentionally spitting on another person is an offensive touching that rises to the level of simple assault under the theory of assault as an attempted or completed battery. We therefore hold that intentionally spitting on another person falls within the ambit of “assault” under 18 U.S.C. § 113(a)(5).”). Surely, Congress did not intend for spitters to be on the same level as rapists, murders, and other superfelons.

<sup>23</sup> Other examples include nonconsensual tickling, *Commonwealth v. Hartnett*, 892 N.E.2d 805, 815 (Mass. App. 2008); touching and squeezing a flight attendant's buttocks, *United States v. Bayes*, 210 F.3d 64, 68-69 (1st Cir. 2000); and touching the nape of a person's neck, *Perkins v. Commonwealth*, 523 S.E.2d 512, 513 (Va. App. 2000).

conviction where “appellant intentionally touched the victim’s closely-held purse against her will”).<sup>24</sup>

The Florida Supreme Court’s holding in *Hearns*—that the Florida crime of battery by touching does not have as an element the use or threatened use of physical force—is binding on federal courts. The *Hearns* decision has the added virtue of being in consonance with common sense and with the reasoning of the majority of the federal circuits to have considered whether mere touching satisfies the physical force element of a crime of violence/violent felony definition. Accordingly, Mr. Johnson’s 2002 battery conviction was not for a crime that “has as an element the use, attempted use, or threatened use of physical force against the person of another,” and the decision below warrants reversal.

2. Should this Court, however, find that *Hearns* is not determinative of the issue presented here, then at the very least *Hearns* should be considered highly persuasive on the issue of whether battery under Florida law constitutes a “violent felony” for ACCA purposes. This is especially so given that the pertinent statutory language of the state “forcible felony” and federal “violent felony” provisions is virtually identical, and that, “in interpreting a federal statutory term, a court may devise a federal rule by reference to state law.” *Nehme v. I.N.S.*, 252 F.3d

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<sup>24</sup> The law in many other states is the same. *See, e.g., Impson v. State*, 721 N.E.2d 1275, 1279, 1285 (Ind. App. 2000) (upholding battery conviction where defendant did not touch victim, but “made a smacking motion at [that person], knocking [his] glasses from his face”; ruling that the act of knocking glasses from victim’s face supported defendant’s battery conviction because glasses were so intimately connected with victim as to be “regarded as part of the person for purposes of the battery statute”).

415, 423 (5th Cir. 2001); *see also Riley v. Kennedy*, 128 S. Ct. 1970, 1985 (2008) (stating that “the prerogative of the Alabama Supreme Court to say what Alabama law is merits respect in federal forums”). “Given the close similarity between the Federal and State statutes under consideration and the common purpose served by the two statutes, it is consistent with sound principles of statutory construction, that the statutes be construed harmoniously.” *Art Masters Associates, Ltd. v. United Parcel Service*, 567 N.E.2d 226, 230 (N.Y. 1990). The decision in *Hearns*, then, at a minimum points the way to resolution of the circuit split because the better-reasoned view is that Congress did not intend the slightest touch to subject a person to the severe repercussions of being sentenced as an armed career criminal.

## CONCLUSION

The Eleventh Circuit held that the Florida crime of battery, which can be committed by the slightest touching of another person against that person’s will, is a violent felony under the ACCA because it “has as an element the use, attempted use, or threatened use of physical force against the person of another” within the meaning of § 924(e)(2)(B)(i). Defining physical force to include the slightest non-consensual touching, unaccompanied by violence, aggression, or any risk of injury, defies the ordinary, natural, and contextual meaning of that term, as well as the legislative intent behind this severe enhancement provision. Physical force, in the context of a violent felony, requires aggressive, violent conduct that is likely to create a serious potential risk of physical injury. The Florida crime of battery by touching does not categorically require such conduct. The Florida

Supreme Court has so held in a well-reasoned opinion.

In light of the foregoing, Mr. Johnson respectfully requests that the judgment of the Eleventh Circuit be reversed.

Respectfully submitted,

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