

No. 08-6925

IN THE
Supreme Court of the United States

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 AMICUS CURIAE OF THE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL’s mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice.

SUMMARY OF ARGUMENT

The case presents the question whether the element of “physical force against the person of another,” as set forth in the definition of “violent felony” in the Armed Career Criminal Act (“ACCA”), requires a showing of violent and aggressive conduct likely to create a serious potential risk of injury, or instead, as the court of appeals held, can be satisfied by any *de minimis* contact, such as a non-consensual

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

touching. The NACDL supports Petitioner's argument that the court of appeals' holding is contrary to the text and legislative history of the ACCA, this Court's precedents, and the better-reasoned decisions of other circuits. As Petitioner has demonstrated, for purposes of the definition of "violent felony" in the ACCA, the phrase "physical force" requires conduct that is violent, aggressive, and likely to create a serious potential risk of physical injury. Batteries that involve *de minimis* physical contact do not meet this standard.

In this *amicus curiae* brief, the NACDL offers a supplemental rationale for the adoption of Petitioner's construction of the physical force element of the ACCA: the rule of lenity. As this Court repeatedly has admonished, the rule of lenity is a time-honored rule of strict construction that requires the resolution of ambiguities in criminal statutes in favor of the defendant. This Court also has long recognized that application of the rule of lenity promotes the fair and equitable administration of the criminal justice system. The rule of lenity has special force here because the ACCA imposes a mandatory minimum sentence for violations of its prohibitions. Failure to apply the rule in circumstances like this one creates the risk that a defendant will serve a mandatory minimum sentence for conduct that Congress simply did not intend to reach.

In some recent cases, this Court has stated that the rule of lenity is triggered only in the event of a "grievous" statutory ambiguity. In other cases during this same period of time, however, the Court has not demanded such an elevated showing of ambiguity. Rather, it has indicated that the rule of lenity applies whenever the language of a statute does not clearly

and unambiguously support the Government's interpretation. The NACDL respectfully submits that this line of precedent conforms to the rule's origins as a principle of strict construction and better serves the rule's purpose of promoting fairness in the enforcement of the nation's criminal laws. Because the physical force element of the ACCA does not clearly and unambiguously apply to the conduct at issue here, the rule of lenity requires that the statute be construed in Petitioner's favor.

ARGUMENT

I. Under The Rule Of Lenity, Ambiguities In The Prohibitions And Penalties Imposed By Criminal Statutes Are Construed In Favor Of The Defendant To Foster Fairness And Uniformity In The Administration Of The Criminal Justice System.

In determining both the scope of a criminal statute and the penalties it authorizes, the rule of lenity demands resolution of ambiguities in favor of the defendant. *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Bifulco v. United States*, 447 U.S. 381, 387 (1980). This "time-honored interpretive guideline" has long been central to the fair and consistent enforcement of the nation's criminal laws. *Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (describing rule of lenity as a "venerable" principle of construction of criminal statutes); William Blackstone, *Commentaries on the*

Laws of England 88 (describing the rule as one of strict construction).²

A. Faithful Application Of The Rule Of Lenity Promotes Fairness And Uniformity In The Criminal Justice System.

This Court repeatedly has observed that the rule of lenity serves three fundamental goals in the administration of our criminal justice system: “to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts....” *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

In ensuring that the public is on notice of the meaning of a criminal statute, the rule of lenity “reflects the law’s insistence that a criminal statute provide ‘fair warning...of what the law intends to do if a certain line is passed.’” *Dean v. United States*, 129 S. Ct. 1849, 1860 (2009) (Breyer, J., dissenting)

² The rule of strict construction - now known as the rule of lenity - emerged in American courts in *United States v. Wiltberger*, 18 U.S. 76 (1820). In *Wiltberger*, Chief Justice John Marshall, writing for the Court, rejected the government's expansive reading of a criminal statute and instead applied the rule of strict construction. The Court explained: “The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.” *Id.* at 95.

(quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)). Justice Holmes captured this core purpose of the rule of lenity when, more than half-a-century ago, he wrote: “To make the warning fair [in a criminal statute], so far as possible the line should be clear.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931). The rule of lenity’s requirement of intelligible demarcations in a criminal statute “vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.” *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion); *see also Bass*, 404 U.S. at 348 (The rule of lenity reflects “instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should”) (internal quotations omitted).

Equally important is the rule of lenity’s ability to prevent selective or arbitrary enforcement of criminal statutes. *Kozminski*, 487 U.S. at 952. The rule of lenity accomplishes this objective by “fostering uniformity in the interpretation of criminal statutes.” *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). In the same vein, the rule of lenity has the salutary effect of “generat[ing] greater objectivity and predictability” in the construction and application of criminal laws. William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-79 (1999).

As to the maintenance of the proper balance among legislatures, prosecutors, and courts, *Kozminski*, 487 U.S. at 952, the rule of lenity recognizes that, in our system of government, it is the province of the Congress, not the executive or the

judiciary, to define the contours of criminal activity. *Bass*, 404 U.S. at 348. If the legislature has not clearly and unambiguously expressed its intent that a criminal statute should reach certain conduct, then neither a prosecutor nor a court can fill that void and, on their own initiative, expand the statute's scope. *See Santos*, 128 S. Ct. at 2025 (rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead").

B. The Rule Of Lenity Has Special Force In Interpreting Criminal Statutes That Impose A Mandatory Minimum Sentence.

The rule of lenity has the same force in construing a statute that increases the punishment for specified conduct as it does in construing whether the statute reaches that conduct in the first place. That is, the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco*, 447 U.S. at 387; *see also Bell v. United States*, 349 U.S. 81, 83 (1955) (rule of lenity "resolve[s] doubts in the enforcement of a penal code against the imposition of a harsher punishment"); *Ladner v. United States*, 358 U.S. 169, 178 (1958) (rule of lenity applies to ambiguities in a statute that would "increase the penalty...place[d] on an individual").

Accordingly, the rule of lenity plays a special role in interpreting statutes, like the ACCA, that impose mandatory minimum sentences. In the Sentencing Reform Act of 1984, Congress instructed courts to

impose a sentence that is “not greater than necessary,” 18 U.S.C. § 3553(a) – unless “otherwise specifically provided,” *id.*, § 3551(a), and to consider the particular factual circumstances of an individual case to better tailor a defendant’s sentence. *Id.*, § 3553(a). These commands are consistent with the longstanding federal sentencing practice of considering “every convicted person as an individual and every case as [] unique.” *Gall v. United States*, 128 S. Ct. 586, 598 (2007) (internal quotations omitted). Statutes imposing mandatory minimum sentences are an exception to these normal sentencing rules. See *Harmelin v. Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (“Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion....”). Thus, an overly-broad interpretation of a statute imposing mandatory minimum sentences may trammel on Congress’ general policy favoring individualized sentencing. As Justice Breyer recently pointed out, “where a mandatory minimum sentence is at issue, [the rule of lenity’s] application...will likely produce an interpretation that hews more closely to Congress’ sentencing intent.” *Dean*, 129 S. Ct. at 1860 (Breyer, J., dissenting). In particular, if a trial court construes the statute expansively so that additional penalties are imposed, it runs the risk of ensnaring in the statute “individuals whom Congress would not have intended to punish so harshly.” *Id.* at 1861. The rule of lenity limits this risk by requiring that ambiguities in statutes that impose mandatory minimum sentences be resolved in the defendant’s favor. *Id.*

C. In Keeping With Its Origins And Purpose, The Rule Of Lenity Should Apply To All Ambiguous Criminal Statutes, Not Just Those That Are Grievously Ambiguous.

Over the past two decades, this Court has not been consistent in describing the degree of ambiguity that must be present in a statute before the rule of lenity is triggered. In some cases, the Court has said that “grievous ambiguity or uncertainty in the statute” is required for the rule of lenity to apply. *Dean*, 129 S. Ct. at 1849 (internal quotations omitted); *see also Muscarello v. United States*, 524 U.S. 125, 139 (1998); *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *Chapman v. United States*, 500 U.S. 453, 463 (1991). In a slew of other cases, however, the Court has not required such an elevated showing. Instead, it has applied the rule of lenity simply upon concluding that the statute was ambiguous, without suggesting that the ambiguity need rise to the level of “grievous.” *See Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 408-09 (2003) (rule of lenity should be applied when there is “any ambiguity” or if there are “two rational readings” of a criminal statute); *United States v. Granderson*, 511 U.S. 39, 54 (1994) (“[W]here 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 [defendant’s] favor.”); *see also Santos*, 128 S. Ct. at 2025 (applying rule without noting the criminal statute satisfied any heightened degree of ambiguity); *United States v. R.L.C.*, 503 U.S. at 305 (same). In short, there now are two conflicting lines

of rule-of-lenity precedent: one that confines the rule's application to exceptional ambiguities and another that applies the rule to standard ambiguities.

As scholars have explained, the second line of precedent, under which the rule of lenity comes into play when the statute does not clearly and unambiguously support the government's harsher reading, better captures the origins and purposes of the rule. See Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420, 2424-25 (2006) (noting criticism of "grievous ambiguity" standard); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 922 (2004) ("For lenity to serve its purpose of enhancing criminal law's democratic responsiveness, the rule must be given more teeth..."); Bryan Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 Loy. U. Chi. L.J. 639, 668 (2000) ("Instead of waiting until the end of the interpretive process to invoke the rule of lenity, however, courts should use the rule of lenity as both part of the textualist interpretive process and as a general principle of strict construction of criminal statutes."). Like other attempts to truncate the rule of lenity, the concept of "grievous ambiguity" threatens to uproot the rule from its rightful place as a "presupposition of our law [and] reduce [it] to a historical curiosity." *Holloway v. United States*, 526 U.S. 1, 21 (1999) (Scalia, J., dissenting).

The simple ambiguity standard respects the rule of lenity's position as a presupposition of our law. Under that standard, the rule forms a critical "background principle" against which criminal statutes must be interpreted. *United States v. X-*

Citement Video, Inc., 513 U.S. 64, 71 (1994). Like other tools of statutory construction, the rule of lenity seeks to honor legislative intent. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Scheidler*, 537 U.S. at 404 n.8; *Crandon*, 494 U.S. at 158; *Ladner*, 358 U.S. at 178. If that intent is not clearly and unambiguously expressed, then under the principle of strict construction on which the rule of lenity is predicated, the rule resolves the ambiguity by mandating that “the tie must go to the defendant.” *Santos*, 128 S. Ct. at 2025.

II. The Rule Of Lenity Precludes Application Of The Physical Force Element Of The ACCA To The Conduct At Issue In This Case.

Ultimately, no matter the degree of ambiguity required, the rule of lenity precludes application of the “physical force” element of the ACCA to the conduct at issue in this case.

The ACCA defines a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” 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.

18 U.S.C. § 924(e)(2)(B). It is undisputed that subsection (ii) is inapplicable here. The critical issue thus is the meaning of the phrase “physical force” in subsection (i): specifically, does it demand that the

force be violent in nature or does any *de minimis* force come within the ambit of the provision? As Petitioner demonstrates, the ordinary meaning of the statutory language, read in context and in light of the ACCA's legislative history, plainly contemplates that "physical force" will be limited to acts of violence and aggression creating a serious risk of physical injury. But at a minimum, subsection (i) does not clearly and unambiguously support the Government's construction. Accordingly, the rule of lenity prohibits application of ACCA's mandatory minimum sentence to Petitioner.

Florida's battery statute requires proof that the defendant "actually and intentionally touches or strikes another person against the will of the other." Fla. Stat. § 784.03(1)(a).³ As construed by Florida courts, mere intentional touching, "no matter how slight," is sufficient to constitute battery. *State v. Hearn*, 961 So.2d 211, 218-19 (Fla. 2007). Thus, tapping another person without permission or shooting a spitball at another person constitutes battery in Florida. *Id.* at 219.

As Petitioner has shown, it is, at best, ambiguous whether Congress intended for the ACCA to encompass conduct like tapping or spitballs within the statute's definition of violent felony. This Court's recent decision in *Begay v. United States*, 128 S. Ct. 1581 (2008), is instructive. In that case, the Court addressed whether the crime of driving while under

³ The crime of battery is normally a misdemeanor in Florida, but became a felony here because of Petitioner's prior battery conviction. See Fla. Stat. § 784.03(1)(a), (2).

the influence of alcohol fell within subsection (ii)'s residual clause, which applies to circumstances that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.” *Id.* at 1582. In construing the residual clause, the Court in *Begay* looked for guidance to subsection (i)—the provision of the ACCA at issue in this case, which, as indicated above, applies to “the use, attempted use, or threatened use of physical force against the person of another.” The Court stated that subsection (i) applies to conduct that is “likely to create ‘a serious potential risk of physical injury.’” *Id.* at 1585. Because batteries in the form of mere touching and spitballs are not likely to cause physical injury, the element of “physical force,” as construed by this Court in *Begay*, would not cover such batteries. That the Court in *Begay* posited such a construction of the physical force element of the ACCA suggests that the statute is at least sufficiently ambiguous to trigger application of the rule of lenity.

The legislative history of the ACCA also supports Petitioner’s interpretation of the statute and, hence, the application of the rule of lenity. This history indicates that Congress did not intend for the ACCA to reach crimes that fail to pose a serious threat of injury. As one circuit described it:

The legislative history of the amendment supports the conclusion that Congress was primarily concerned with broadening the scope of the provision to encompass truly serious crimes. We conclude 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*....

United States v. Mathis, 963 F.2d 399, 407 (D.C. Cir. 1992). On this reasoning, because it is possible to commit felony battery in Florida with *de minimis* force, the ACCA could not possibly cover every felony battery under Florida law.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court addressed parallel language in another statute, 18 U.S.C. § 16, which, like the ACCA, has a physical force clause.⁴ The issue in *Leocal* was whether Florida’s crime of driving under the influence of alcohol and causing serious bodily injury was a “crime of violence” under § 16. *Leocal*, 543 U.S. at 3-4. The Court held that it was not. It explained:

[W]e 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....

Id. at 11. *Leocal* thus buttresses Petitioner’s argument that the physical force element of the

⁴ 18 U.S.C. § 16 provides:

The term “crime of violence” means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or....

ACCA requires violent contact. At a minimum, it shows that the rule of lenity precludes the ACCA's application here, where only *de minimis* touching is necessary for conviction.

It is also significant for purposes of the rule of lenity that, all told, five circuit courts have interpreted the element of "physical force" in ACCA and other similar statutes to require the force to be violent or destructive in nature. See *Mathis*, 963 F.2d at 407 ("We conclude that when Congress amended the [ACCA] to cover all violent felonies..., it did not intend to include felonies in which the use of force was *de minimis*..."); *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001) (requiring in context of 18 U.S.C. § 16, the physical force to be violent or destructive); *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (requiring, in the context of 18 U.S.C. § 16, the force "to be violent in nature – the sort that is intended to cause bodily injury, or at a minimum likely to do so."); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1018 (9th Cir. 2006) (requiring physical force be violent and active in context of § 16); *United States v. Hays*, 526 F.3d 674, 677, 681 (10th Cir. 2008) ("[T]he Supreme Court and both this circuit and others have suggested 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'"; holding that the Wyoming battery statute did not require physical force and thus was not a crime of domestic violence under 18 U.S.C § 922(g)(9)). The court of appeals decision in this case is the minority – and, we submit incorrect – view. While not dispositive, *Reno v. Koray*, 515 U.S. 50, 64-65 (1995), the circuit split itself suggests that the physical force

element of the ACCA is ambiguous when applied to the conduct at issue here.

Finally, invocation of the rule of lenity here would help avoid the pernicious consequences of an overly expansive application of a severe mandatory minimum sentence, in lieu of an alternative reading of the statute that would result in a more limited sentence. Based on its view that Petitioner qualified for enhancement under ACCA, the district court sentenced Petitioner to 185 months' imprisonment – a sentence that, while near the bottom of the statutory range, was far greater than Petitioner would have faced without the enhancement. Had Petitioner not been treated as an “armed career criminal,” he would have been subject to 18 U.S.C. § 922(g)'s unenhanced statutory maximum of ten years, 18 U.S.C. § 924(a)(2), and his advisory guideline imprisonment range would likely have been between twenty-seven to thirty-three months. *See* Petitioner's Brief at pp. 6-7. Before the district court chose the harsher alternative, it was required to ensure that, in keeping with the rule of lenity, Congress spoke in “language that is clear and definite.” *Jones v. United States*, 529 U.S. 848, 858 (2000) (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). The district court failed to conduct the inquiry that the rule of lenity requires. That inquiry reveals that Petitioner is serving a harsher sentence in the face of the patent statutory ambiguity as to whether the ACCA's definition of “violent felony” was meant to include all felony battery convictions, even those based on *de minimis* physical contact. Application of the rule of lenity here thus would rectify that arbitrary and severe sentencing result.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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