No. 08-6925

IN THE

Supreme Court of the United States

OCTOBER TERM, 2008

CURTIS DARNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, **CURTIS DARNELL JOHNSON**, asks leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed in forma pauperis in accordance with Supreme Court Rule 39, and 18 U.S.C. § 3006A(d)(6). The filing of this petition is a continuation of the representation of the defendant under a Criminal Justice Act appointment of the Office of the Federal Public Defender for the Middle District of Florida by the United States District Court. In accordance with 18 U.S.C. § 3006A(d)(6), no affidavit as required by Supreme Court Rule 39, need be filed.

WHEREFORE, Petitioner, Curtis Darnell Johnson, asks leave to proceed in forma pauperis.

DATED this 20th day of October, 2008.

LISA CALL
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904-232-3039/Fax 904-232-1937

No.

IN THE

Supreme Court of the United States

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CURTIS DARNELL JOHNSON,

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v.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when a state's highest court holds that a given offense of that state does not have as an element the use or threatened use of physical force, that holding is binding on federal courts in determining whether that same offense qualifies as a "violent felony" under the federal Armed Career Criminal Act, which defines "violent felony" as, *inter alia*, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another."

2. Whether this court should resolve a circuit split on whether a prior state conviction for simple battery is in all cases a "violent felony" - a prior offense that has as an element the use, attempted use, or threatened use of physical force against the person of another. Further, whether this court should resolve a circuit split on whether the physical force required is a *de minimis* touching in the sense of "Newtonian mechanics" or whether the physical force required must be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so.

3. Whether the district court lacked the authority to sentence Mr. Johnson as an Armed Career Criminal, given that Mr. Johnson did not admit the predicate offenses for such a classification when he pled guilty.

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, **CURTIS DARNELL JOHNSON**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on May 30, 2008.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-5a) is reported at 528 F.3d 1318. The Court's order denying rehearing and rehearing *en banc* (App., *infra*, 1b) is unreported.

JURISDICTION

The petitioner, **CURTIS DARNELL JOHNSON**, was prosecuted by a one-count indictment in the United States District Court for the Middle District of Florida, for violation of 18 U.S.C. § 922(g)(1). He appealed his sentence to the Eleventh Circuit Court of Appeals invoking the court's jurisdiction under 28 U.S.C. § 1291. His sentence was affirmed by an order entered May 30, 2008. On July 22, 2008, the Eleventh Circuit denied Mr. Johnson's timely filed petition for rehearing and rehearing *en banc*.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 924(e) of Title 18, United States Code, provides in pertinent part that

> 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 . . .
>
> The term "violent felony" means 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 . . .

Section 784.03, Florida Statutes (2002) provides in pertinent part that

(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

In the district court, Petitioner Curtis Darnell Johnson pleaded guilty to being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). Docs 34, 36, 37. The statutory maximum penalty for an unenhanced violation of § 922(g)(1) is 10 years' imprisonment. 18 U.S.C. § 924(a)(2).

The presentence investigation report ("PSR") prepared in Mr. Johnson's case found that Mr. Johnson was an armed career criminal under 18 U.S.C. § 924(e), which provides for a minimum mandatory penalty of 15 years' imprisonment and a maximum of life imprisonment for those defendants convicted under § 922(g)(1) who have at least three prior convictions for violent felonies or serious drug offenses. The conviction at issue in the present appeal is Mr. Johnson's 2002 felony battery conviction. The PSR calculated Mr. Johnson's advisory guidelines under the armed career criminal guideline, USSG §4B1.4, and found that Mr. Johnson's enhanced guideline range was 180

to 188 months' imprisonment.

In his objections to the PSR and at sentencing, Mr. Johnson objected to the application of the armed career criminal enhancement to his sentence. Among these objections was an argument that the government could not prove that his 2002 felony battery conviction was a violent felony, because the statute under which Mr. Johnson was convicted could be violated without force by mere unwanted touching.

Florida has two criminal statutes entitled "felony battery:" one is violated when any offender, having a previous battery conviction, commits simple battery. The fact of the prior conviction enhances the offense from a first-degree misdemeanor – punishable by up to a year in prison – to a third-degree felony. *See* Fla. Stat. § 784.03 (2002). The other felony battery statute applies only in cases in which the battery results in great bodily harm, permanent disability, or permanent disfigurement. *See* Fla. Stat. § 784.041 (2002). Mr. Johnson was convicted of the former, which provides that: "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." Fla. Stat. § 784.03 (2002).

It was eventually conceded in the district court that the government could not prove that Mr. Johnson had been convicted of anything other than unwanted touching. Nevertheless, citing precedent from the Eleventh Circuit addressing a Florida state conviction for battery on a law enforcement officer and whether it was a crime of violence for purposes of the Career Offender guideline – *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005) – the government argued that even unwanted touching would be a violent felony under the Armed Career Criminal Act ("ACCA").

The district court overruled Mr. Johnson's objections to the PSR and found that the 2002

battery conviction was properly classified as a violent felony. It then sentenced Mr. Johnson to 185 months' imprisonment. Mr. Johnson filed a timely notice of appeal.

Two days before the final sentencing hearing in Mr. Johnson's case, the Florida Supreme Court had denied rehearing in *State v. Hearns*, 961 So.2d 211 (Fla. 2007), in which the court had held that the Florida offense of simple battery, because it could be committed by mere unwanted touching did not have as a necessary element the use or threatened use of physical force. On appeal, Mr. Johnson argued that *Glover* and its Eleventh Circuit progeny – which held that all batteries under Florida law were violent felonies or crimes of violence because they necessarily had as an element "the use, attempted use, or threatened use of physical force against the person of another" – were no longer good law as a result of *Hearns*. He also argued that the district court lacked the authority to sentence him as an armed career criminal because the predicate offenses for such a classification had not been admitted at his plea.

On May 30, 2008, in a published opinion, the court of appeals affirmed the judgment of the district court. *See United States v. Johnson*, 528 F.3d 1318 (11th Cir. 2008); App., *infra*, 1a-5a. The court wrote:

> 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. What we held in [*United States v.*] *Llanos-Agostadero* [486 F.3d 1194 (11th Cir. 2007)] does bind us. We follow its holding in concluding that the touching or striking element in the Florida crime of battery satisfies the physical force requirement of the definition of violent felony or crime of violence contained in 18 U.S.C. § 924(e)(2)(B)(i) and in the guidelines provisions that include the same definition, U.S.S.G. § 2L1.2(b)(1) cmt. n.1(B)(iii), and § 4B1.2(a)(1).

Johnson, 528 F.3d at 1321. On July 22, 2008, the Eleventh Circuit denied Mr. Johnson's timely filed

petition for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. WHEN A STATE'S HIGHEST COURT HOLDS THAT A GIVEN OFFENSE OF THAT STATE DOES NOT HAVE AS AN ELEMENT THE USE OR THREATENED USE OF PHYSICAL FORCE, THAT HOLDING IS BINDING ON FEDERAL COURTS IN DETERMINING WHETHER THAT SAME OFFENSE QUALIFIES AS A "VIOLENT FELONY" UNDER THE FEDERAL ARMED CAREER CRIMINAL ACT, WHICH DEFINES "VIOLENT FELONY" AS, *INTER ALIA*, ANY CRIME THAT "HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER."

A. Under Supreme Court Rule 10, the Eleventh Circuit's Decision Conflicts with Holdings from this Court and the Florida Supreme Court, Thus Creating a Compelling Reason for this Court to Grant the Petition for Writ of Certiorari.

In *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005), the court of appeals held that the Florida offense of battery on a law enforcement officer was a crime of violence under the Career Offender provision of the sentencing guidelines. Necessarily implicit in this holding was a finding that the Florida offense of simple battery – even as committed by mere unwanted touching – had as an element "the use, attempted use, or threatened use of physical force against the person of another." *Id.* at 749; 18 U.S.C. § 924(e)(2)(B)(i); USSG §4B1.2(a)(1).[1] In his brief and arguments before the court of appeals, Mr. Johnson argued that *Glover* and its progeny were no longer good law, as a 2007 decision from the Florida Supreme Court, *State v. Hearns*, 961 So.2d 211 (Fla. 2007), had explicitly held that the same offense did ***not*** have as an element the use or threatened use of

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[1]The Florida offense of simple battery is ordinarily a misdemeanor, but it becomes a felony when, as in Mr. Johnson's case, the offender has a prior battery conviction, or the victim of the battery is of a certain status, *e.g.*, a pregnant woman or a law enforcement officer. *See* Fla. Stat. §§ 784.03, 784.045, 784.07.

physical force. He argued that state courts were the ultimate authority on issues of state law, and that federal courts are bound by their interpretations of state law. *See City of Chicago v. Morales*, 527 U.S. 41, 61, 119 S.Ct. 1849, 1861 (1999). He further argued that the Florida Supreme Court in *Hearns* had placed a broad construction on the state's simple battery statute such that the crime of battery could be committed under state law without the use or threatened use of physical force, and that federal courts had no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. *Id.*

The court of appeals held that the *Hearns* decision had no effect on *Glover* and its progeny. *Johnson*, 528 F.3d at 1321. The court wrote that in *Hearns* the Florida Supreme Court was merely interpreting its state's own forcible felony definition, and that that had no application to the panel's interpretation of the federal Armed Career Criminal Act, as "[t]he 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." *Id.*

Mr. Johnson respectfully submits that the holding of the court of appeals – that whether an offense meets the "violent felony" or "crime of violence" definition is purely a question of federal, not state law – is in direct conflict with a long line of cases from this Court holding that in making these determinations as to prior state offenses, federal courts must look to – and accept – state decisional law, especially that which proceeds from the state's highest court, regarding the elements and construction of the offense in question. Mr. Johnson also submits that the court of appeals greatly oversimplified the precise holding of *Hearns*.

In *Hearns,* the Court was called upon to decide whether battery on a law enforcement officer

("BOLEO") was a "forcible felony" for purposes of a state statute that increases criminal sentences for violent career criminals. *Id.* at 212. For purposes pertinent to the issue at hand, "forcible felony" is defined as "any felony which involves the use or threat of physical force or violence against any individual." Fla. Stat. § 776.08[2]; *cf.* 18 U.S.C. § 924(e)(2)(B)(i) (an offense is a violent felony if it "has as an element the use, attempted use, or threatened use of physical force against the person of another."). The Court noted that "[t]he underlying conduct required for simple battery [§ 784.03, Mr. Johnson's offense of conviction] and BOLEO is identical. The only differences are the status of the victim and the penalty imposed." *Id.* at 214.

The Court then applied to the crime of simple battery the so-called "*Perkins*" test. The "*Perkins* test" derives from *Perkins v. State,* 576 So.2d 1310 (Fla. 1991), in which the Court held that:

> [I]n determining whether an offense constitutes a forcible felony, a court may only consider the statutory elements. The particular circumstances are irrelevant.
>
> . . .
>
> [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 218 (emphasis in original).[3] In affirming the judgment of the court of appeals,

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[2]In the panel opinion in Mr. Johnson's case, the panel incorrectly quoted the Florida forcible felony statute, deleting the words "physical force" from the definition. *See Johnson*, 528 F.3d at 1321 (stating that §776.08 "defin[ed] forcible felony to include 'any other felony which involves the use or threat of ***violence*** against any individual.'").

[3]The "*Perkins* test" of the Florida courts is thus a mirror image of the categorical approach mandated by this Court in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143 (1990), for use by federal courts in determining whether certain prior convictions constitute "violent felonies" under the ACCA. Under this approach, federal courts "look only to the fact of conviction and the statutory definition of the prior offense," and do not generally consider the "particular facts disclosed by the record of conviction." *Taylor,* 495 U.S. at 602, 110 S.Ct. 2143.

the Florida Supreme Court noted that the court of appeals had correctly determined that physical force or violence is not a necessary element of the offense of simple battery. *Id* at 216. "Under *Perkins,*" the Florida Supreme Court wrote, "that is the end of the analysis." *Id.*

The Florida Supreme Court assumed that intentionally causing bodily harm to another or intentionally striking another – two of the three ways Florida's battery statute can be violated – involved the use or threat of physical force or violence. *Id.* at 218. The Court found, however, that the remaining way the statute could be violated – unwanted touching – did not have as an element the use or threatened use of physical force. *Id.* In other words, the Court in *Hearns* was not, as the Eleventh Circuit suggests, merely interpreting its own forcible felony definition. *Johnson*, 528 F.3d at 1321. In applying its own statutory elements test, one practically identical to the *Taylor* test used in federal courts, the Florida Supreme Court was required to say what the elements of simple battery were – or were not – under Florida law.

State legislatures and state courts, not federal judges, define the elements of a state criminal offense. *McElroy v. Holloway*, 451 U.S. 1028, 1029, 101 S.Ct. 3019, 3020 (1981) (Rehnquist, J., dissenting). "It is for state courts to determine the elements to be proven to establish criminal liability, and their interpretation is binding on federal courts." *Cole v. Young*, 817 F.2d 412, 416-20 (7th Cir. 1987). Mr. Johnson submits, moreover, that it is past question that when deciding whether a prior state conviction qualifies as a "violent felony" or "crime of violence" for purposes of federal sentence enhancement provisions, federal courts look to how the statutory language defining that offense has been construed by the courts of the state. Two recent examples – one from this Court, and one from the Eleventh Circuit – illustrate this.

In *James v. United States*, 127 S.Ct. 1586 (2007), the question before this Court was

"whether attempted burglary, as defined by Florida law, is a 'violent felony' under ACCA." 127 S.Ct. at 1590. The Court stated that in so deciding 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 1594 (emphasis in original). On its face, Florida's attempt statute requires only that a defendant take "any act toward the commission" of burglary. Fla. Stat. § 777.04(1). Petitioner contended that this broad statutory language swept in merely preparatory activity that posed no real danger of harm to others. *James*, 127 S.Ct. at 1594. This Court was able to reject this contention by looking to decisions of the state's highest court:

> [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."
>
> . . .
>
> 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 1594, 1596 (citation omitted) (emphasis supplied). In other words, the Florida Supreme Court had grafted onto the offense of attempted burglary an element not necessarily required by the statutory language.

When the petitioner in *James* argued that Florida's burglary statute differs from "generic" burglary as defined in *Taylor, supra,* at 598, 110 S.Ct. 2143, because it defines 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, this Court "again turn[ed] to state law in order to answer this question." *James*, 127 S.Ct. at 1600.

> 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. (internal citations omitted).

Similarly, a the Eleventh Circuit was recently called upon to decide whether a conviction for simple battery under Georgia law is a "crime of violence" for purposes of 18 U.S.C. §16(a). *Hernandez v. U.S. Attorney General*, 513 F.3d 1336 (11th Cir. 2008). The petitioner in that case argued that he could be convicted of simple battery under the Georgia battery statute if he put a banana peel in a victim's path, and the banana peel caused the victim to slip, fall, and sustain physical injury or harm. *Id.* at 1342, n.4. The court rejected the argument, noting that "to date Georgia courts have interpreted Georgia's simple battery statute as requiring physical contact. ***We accept the Georgia courts' interpretation of their own battery statute*** . . ." *Id.* (internal citations omitted) (emphasis supplied).

This Court's first important decision interpreting the ACCA explains why the *James* and the *Hernandez* courts felt obliged to look to state court law in reaching their own decisions:

> There [is no] indication that Congress ever abandoned its general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law.

Taylor, 495 U.S. 575, 590, 110 S.Ct. 2143, 2154 (1990). Looking at how a state's highest court has construed the elements of a crime defined by a state statute comports with common sense and is the best way to insure that the congressional requirement of "uniform, categorical definitions" is met.

"It is readily apparent that the highest courts of different states may construe nearly identical statutory language in different ways, and thus mere identity of statutory language does not necessarily indicate identical elements of the offenses, or identical meaning of those elements, as they are defined by comparable statutes." *Franklin v. I.N.S.*, 72 F.3d 571, 583 (8th Cir. 1995) (Bennett, J., dissenting).

Florida's highest court has told us that the Florida offense of simple battery as committed by unwanted touching does not have as an element the use or threatened use of physical force. These are the elements (or lack of them) used to establish criminal liability for simple battery in Florida courts. *See Cole*, 817 F.2d at 416-20 ("It is for state courts to determine the elements to be proven to establish criminal liability, and their interpretation is binding on federal courts"). Contrary to the state court decisions consulted in *James* and *Hernandez*, which served to narrow the application of the statutory language at issue in those cases, *Hearns* ***broadens*** the pertinent statutory language such that the crime of battery can be committed under state law without the use or threatened use of physical force. "[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." *City of Chicago v. Morales*, 527 U.S. at 61, 119 S.Ct. 1861. As a result, 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."

Under Supreme Court Rule 10(b) and (c), the Eleventh Circuit's decision conflicts with holdings from this Court and the Florida Supreme Court which creates a compelling reason for this Court to grant the petition for writ of certiorari.

II. THIS COURT SHOULD RESOLVE A CIRCUIT SPLIT ON WHETHER A PRIOR STATE CONVICTION FOR SIMPLE BATTERY IS IN ALL CASES A "VIOLENT FELONY" - A PRIOR OFFENSE THAT HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER. FURTHER, THIS COURT SHOULD RESOLVE A CIRCUIT SPLIT ON WHETHER THE PHYSICAL FORCE REQUIRED IS A *DE MINIMIS* TOUCHING IN THE SENSE OF "NEWTONIAN MECHANICS" OR WHETHER THE PHYSICAL FORCE REQUIRED MUST BE IN SOME WAY VIOLENT IN NATURE - THAT IS THE SORT OF FORCE THAT IS INTENDED TO CAUSE BODILY INJURY, OR AT A MINIMUM LIKELY TO DO SO.

The Circuits are split on the meaning of physical force in a variety of sentencing provisions (both statutory and guideline), and the amount of deference or reliance to place on a state court's determination and interpretation of its own statutes. The Eleventh Circuit's determination that a Florida conviction for simple battery always has as an element the use, attempted use, or threatened use of physical force is in conflict with a decision from the Fifth Circuit holding that a Florida battery on a pregnant woman offense does not require physical force, and illustrates the difficulty the Circuits are encountering in determining the meaning of physical force, with some Circuits employing a *de minimis* touching in the sense of "Newtonian mechanics" test (the First, Eighth, and Eleventh Circuits) and other Circuits are requiring that the physical force must be in some way violent in nature, or something other than merely *de minimis* touching (Fifth, Seventh, Ninth, and Tenth Circuits). The Circuits are in great need of guidance on the meaning of physical force. This guidance will provide consistency for sentencing courts in determining the appropriate and lawful sentence for thousands of defendants facing enhanced sentences due to prior convictions for offenses that, in some circuits are deemed violent, and other circuits deemed non-violent. Moreover, this guidance will put an end to a conflict that has created unwarranted sentencing disparities based on geography.

A. Violent Felony

A violent felony for purposes of the Armed Career Criminal Act is defined as several enumerated offenses[4] and "any offense under federal, state, or local law 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) (emphasis added). The terms "crime of violence" and "violent felony" are used throughout the sentencing guidelines[5] and in many statutes.[6] Although the definition of these terms is not always identical, most of the definitions contain a similar element-based test for the use, attempted use, or threatened use of physical force against the person of another.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court confronted the meaning of the term "crime of violence" in relation to removal proceedings initiated by the Immigration and Naturalization Service (INS). Under § 237(a) of the Immigration and Nationality Act (INA), "[a]ny alien who is convicted of an aggravated felony . . . is deportable." 66 Stat. 201, 8 U.S.C. § 1227(a)(2)(A)(iii). The INA defines aggravated felony to include, *inter alia*, a "crime of violence" as defined in 18 U.S.C. § 16. Section 16 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 . . . ." 18 U.S.C. § 16(a) (emphasis added). Section 924(c)(3)(A) similarly defines a

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[4] Because simple battery is not one of the enumerated offenses, for this enhancement to apply, the elements of the offense would have to meet the use, attempted use, or threatened use of physical force portion of the definition.

[5] *See, e.g.*, USSG §§2K1.3, 2K2.1, 2L1.2, 2X6.1, 4B1.1, 4B1.2, 4B1.4

[6] *See, e.g.*, 18 U.S.C. §§ 16, 921(a)(33)(A)(ii), 924(c)(3), 924(e), 3156. In fact, a search of all federal statutes reveals over 100 times that the term crime of violence or violent felony is used. Nevertheless, most of the federal statutes refer to the definition of these terms contained in 18 U.S.C. §§ 16, 924(c)(3), 924(e), 3156.

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 . . . ." 18 U.S.C. § 924(c)(3)(A) (emphasis added).

The sentencing guidelines also define a crime of violence in various sections. Throughout each definition, a common component is that the prior offense "has as an element the use, attempted use, or threatened use of physical force against the person [or property] of another." USSG §2L1.2, comment. (n.1(B)(iii))

Because physical force is a term used repeatedly in federal statutes and the sentencing guidelines in relation to a crime of violence and violent felony, this Court's guidance on the meaning of the word would provide great assistance in helping the lower courts treat defendants similarly and fairly.

B. Florida Simple Battery

Mr. Johnson was convicted under section 784.03(1)(a), Florida Statutes, which provides that "[t]he offense of battery occurs when a person actually and intentionally touches or strikes another person against the will of the other." Florida courts have recognized that a battery can be committed even with nominal contact, even slight contact. In *Johnson v. State*, 858 So.2d 1071, 1072 (Fla. 3d Dist. Ct. App. 2003), the Florida appellate court recognized that a defendant could be convicted of a battery on a law enforcement officer (a felony) by spitting on the law enforcement officer. The court characterized this battery as an unwanted touching. *Id.* Nevertheless, the court recognized that spitting on a law enforcement officer "did not amount to the use or threat of use of physical force or violence." *Id.*

This interpretation of Florida's statute was recently reinforced by a Florida Supreme Court

decision. In *State v. Hearns*, 961 So.2d 211 (Fla. 2007), the Florida Supreme Court was called upon to decide whether battery on a law enforcement officer was a "forcibile felony"[7] for purposes of a state statute that increases criminal sentences for violent career criminals. *Id.* at 212. The Court began by examining the elements of a simple battery (the underlying conduct of a battery on a law enforcement officer) and determined that the offense could be "committed with only nominal contact" or "any intentional touching, no matter how slight." *Id.* at 218. Thus, the Court next found that simple battery did not include as an element "'the use or threat of physical force or violence against any individual.'" *Id.* at 216 (quoting Fla. Stat. § 775.082(9)(a)(1) (2002)).

C. The Eleventh Circuit's Holdings

In Mr. Johnson's case the Eleventh Circuit held that the touching element in the Florida crime of battery satisfies the physical force requirement of the definition of violent felony or crime of violence contained in 18 U.S.C. § 924(e)(2)(B)(i) and in the guidelines provisions that include the same definition. *Johnson*, 528 F.3d at 1321. The court reached this holding by relying on circuit precedent: *United States v. Llanos-Agostadero*, 486 F.3d 1194 (11th Cir. 2007); *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005) and *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006). In *Lllanos-Agostadero*, the court recognized that a Florida battery could be committed by just mere touching, but the court found nonetheless that even mere touching constituted physical force. In *Glover*, the Eleventh Circuit set forth the elements of simple battery under Florida law and held that simple battery on a law enforcement officer was a crime of violence under USSG §4B1.2(a). *Glover*, 431 F.3d at 749. Like § 924(e)(2)(B)(i), §4B1.2 defined a crime of violence as, *inter alia*, any

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[7] For purposes pertinent to the issue at hand, "forcible felony" is defined as "any felony which involves the use or threat of physical force or violence against any individual." Fla. Stat. § 775.082(9)(a)(1) (2002).

offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* (quoting USSG §4B1.2(a)(1)).

In *Griffith*, the Eleventh Circuit held that a simple battery under Georgia law (which occurs when a person "[i]ntentionally makes physical contact of an insulting or provoking nature with the person of another) constitutes a crime of domestic violence under 18 U.S.C. § 922(g)(9), which like the Application Note for §2L1.2(b)(1), defined a crime of domestic violence to include, *inter alia*, any offense that "has, as an element, the use or attempted use of physical force." *Griffith*, 455 F.3d at 1340-1345. The Eleventh Circuit rejected the holdings from other Circuits which had reasoned that "the physical force requirement in the ACCA cannot possibly include 'any touching' in the sense of 'Newtonian mechanics' and held that the physical force requirement cannot be satisfied by 'de minimis' touching." *Id.* at 1343 (criticizing the Seventh[8] and Ninth[9] Circuits holdings on the meaning of physical force).

Thus, the Eleventh Circuit's position is that a felony battery (whether due to the status of the victim, pregnant woman or law enforcement officer, or the defendant's prior battery conviction) - a touching of another person against that person's will - no matter how slight and whether or not the touching is offensive, contains the requisite element of physical force against the person of another to qualify as a crime of violence or violent felony.

D. The Fifth Circuit's Conflicting Holding

In direct conflict with the Eleventh Circuit's holding in *Llanos-Agostadero*, the Fifth Circuit held that a Florida battery on a pregnant woman offense could be committed without the use,

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[8] *Flores v. Ashcroft*, 350 F.3d 666, 669-700 (7th Cir. 2003).

[9] *United States v. Belless*, 338 F.3d 1063, 1067-1068 (9th Cir. 2003).

attempted use, or threatened use of physical force. *United States v. Gonzalez-Chavez*, 432 F.3d 334, 338 n.6 (5th Cir. 2005). Examining Florida Statute § 784.045 and a Florida state court's interpretation of the statute, the Fifth Circuit noted that a person could be convicted of the crime merely because the person spit on a pregnant woman; however, although the spitting would be an unwanted touching, "it does not amount to the use or threat of use of physical force or violence." *Id.* (quoting *Johnson*, 885 So.2d at 1072). As such, the Fifth Circuit found that a Florida conviction for battery on a pregnant woman did not contain as an element of the use, attempted use, or threatened use of physical force required under USSG §2L1.2, comment. (n.1)(B)(iii)). The Fifth Circuit's decision in *Gonzalez-Chavez* directly conflicts with the Eleventh Circuit's decision in *Llanos-Agostadero*. Under Supreme Court Rule 10(a), this Circuit conflict creates a compelling reason for this Court to grant the petition for writ of certiorari.

E. Conflicting Circuit Test for Determining Physical Force

In addition to the direct conflict between the Fifth and Eleventh Circuits on whether a Florida battery offense has as an element the use, attempted use, or threatened use of physical force, the Circuits are split on whether the physical force required is a *de minimis* touching in the sense of "Newtonian mechanics" or whether the physical force required must be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so.

1. *De Minimis* Touching

The First, Eighth, and Eleventh Circuits have held that, with reference to varying state battery statutes, that a person cannot make physical contact - particularly of an insulting or provoking nature - with another without exerting some level of physical force. *United States v. Nason*, 269 F.3d 10,

20-21 (1st Cir. 2001) (concluding that a state statute criminalizing "offensive physical contact" requires the use of physical force so that a violation of it qualifies as a crime of domestic violence for 18 U.S.C. § 922(g)(9) purposes); *United States v. Smith*, 171 F.3d 617, 621 n.2 (8th Cir. 1999) (concluding that a state statute that contains "insulting or offense physical contact" as an element requires the use of physical force so that a violation of it qualifies as a crime of domestic violence under 18 U.S.C. § 922(g)(9)); *Llanos-Agostadero*, 486 F.3d at 1197-1198 (holding that a simple battery on a pregnant woman, even if mere touching which is neither offensive or provoking, contains as an element the use of physical force ; thus, the prior conviction qualifies as a crime of violence under USSG §2L1.2(b)(1)(A)); *Griffith*, 455 F.3d at 1341-1345 (holding that, under the plain meaning rule, the physical contact of an insulting or provoking nature made illegal under the Georgia statute satisfies the physical force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)).

In *Griffith*, the Eleventh Circuit defined physical force based on a definition from Black's Law Dictionary. The Eleventh Circuit held that the plain meaning of physical force "is '[p]ower, violence, or pressure directed against a person' ' consisting in a physical action.'" *Griffith*, 455 F.3d at 1342 (quoting Black's Law Dictionary 673 (8th ed. 1999)). Thus, the court reasoned that even a smidgeon of pressure constituted physical force. *Id.* at 1344. The court rejected other Circuits which had criticized this *de minimis* touching approach; rather, the court concluded that the other Circuits were effectively inserting the word "violent" into the definition of physical force and that the approach from other Circuits was at war with common sense. *Id.* at 1343-1345.

2. Physical Force Must Be Violent in Nature

In contrast, the Fifth, Seventh, Ninth, and Tenth Circuits have rejected the *de minimis* touching in the sense of "Newtonian mechanics" test; rather, these Circuits hold that the physical

force required must be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so. *See Gonzalez-Chavez*, 432 F.3d at 338 n.6 (holding that a Florida conviction for aggravated battery on a pregnant woman did not contain as an element of the use, attempted use, or threatened use of physical force required under USSG §2L1.2, comment. (n.1)(B)(iii)); noting that a person could be convicted of the crime merely because the person spit on a pregnant woman (although an unwanted touching), "it does not amount to the use or threat of use of physical force or violence") (quoting *Johnson*, 885 So.2d at 1072); *Flores v. Ashcroft*, 350 F.3d 666, 669-672 (7th Cir. 2003) (holding that any touching did not equate with the physical force required under 18 U.S.C. § 16; otherwise, the throwing of a snowball, spitball, or paper airplane qualified if it reached its target); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1017-1016-1018 (9th Cir. 2006) (explaining that the court had held that conduct involving mere offensive touching did not ride to the level of a "crime of violence;" "we have squarely held that the force necessary to be a crime of violence must actually be violent in nature"); *United States v. Belless*, 338 F.3d 1063, 1067-1068 (9th Cir. 2003) ("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*"); *United States v. Hayes*, 526 F.3d 674, 679-680 (10th Cir. 2008) (acknowledging that battery offenses can vary widely and may include "kissing without consent, touching or tapping, jostling, and throwing water;" the court thought of many "'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").

In *Flores*, the court addressed the meaning of the term physical force. The court acknowledged that every battery "involves 'force' in the sense of physics or engineering, where force means the acceleration of mass." 350 F.3d at 672. The court stated:

> 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 . . . . 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. . . . Suppose someone finds a set of keys that the owner dropped next to his car and, instead of taking them to a lost and found, turns the key in the lock and drives away. One would suppose that to be a paradigm non-violent offense, yet turning the key in the lock requires "physical force" (oodles of dynes) directed against the property (the auto) of another.

Id. (emphasis in original). To avoid collapsing the distinction between violent and non-violent offenses, the court treated the word force "as having a meaning in the legal community that differs from its meaning in the physics community." *Id.* Thus, the court insisted "that the force be violent in nature - the sort that is intended to cause bodily harm, or at a minimum likely to do so." *Id.*

Ths conflict between the Circuits on how to define physical force has created a compelling reason for this Court to grant Mr. Johnson's petition for writ of certiorari. *See* Sup. Ct. R. 10(a).

III. THE DISTRICT COURT LACKED THE AUTHORITY TO SENTENCE MR. JOHNSON AS AN ARMED CAREER CRIMINAL, GIVEN THAT MR. JOHNSON DID NOT ADMIT THE PREDICATE OFFENSES FOR SUCH A CLASSIFICATION WHEN HE PLED GUILTY.

Under the Sixth Amendment, a sentencing court lacks the authority to enhance a defendant's sentence beyond the statutory maximum based on facts that were not proven to a jury beyond a reasonable doubt or expressly admitted by the defendant. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-2363 (2000). This Court has clarified that the term "statutory maximum" as used in *Apprendi* does not refer to the absolute maximum sentence authorized by the legislature for the specific offense, but rather, "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303-304, 124 S. Ct. 2531, 2537 (2004).

In Mr. Johnson's case, his Sixth Amendment rights were violated when the district court sentenced him based on facts that were not found by a jury beyond a reasonable doubt or admitted by him. Mr. Johnson was charged with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) which, under 18 U.S.C. § 924(a)(2), carries a maximum term of imprisonment of ten years. Under the Armed Career Criminal Act, 18 U.S.C. § 924(e), this statutory maximum is increased to life imprisonment with a mandatory minimum of fifteen years imprisonment if the defendant has three previous convictions for a "violent felony" or "serious drug offense." The district court determined Mr. Johnson had three prior convictions that were either a violent felony or serious drug offense – facts not admitted to by Mr. Johnson in his guilty plea – and sentenced him

as an armed career criminal to 185 months' imprisonment.

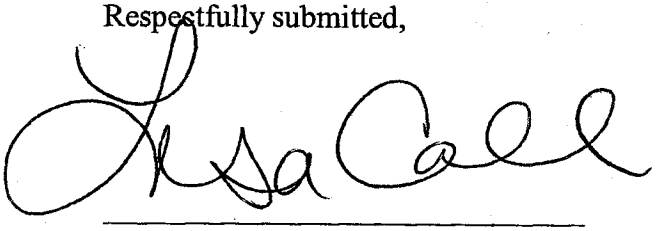
Mr. Johnson does not dispute that in *Apprendi*, this Court excepted from its Sixth Amendment rule the "fact of a prior conviction," given that Apprendi had not challenged the Court's prior decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998). Nor does Mr. Johnson dispute that *Blakely* and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005) (following *Apprendi*) continued to except the "fact of a prior conviction" from the Sixth Amendment rule. *Blakely*, 542 U.S. at 301, 124 S.Ct. at 2536; *Booker*, 543 U.S. at 244, 125 S.Ct. at 756.

Nevertheless, a Justice of this Court has written that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided," and urged that "in an appropriate case, the Court should consider *Almendarez-Torres*' continuing viability," because "[i]nnumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable doubt requirements." *Shepard v. United States*, 544 U.S. 13, 26-27, 125 S.Ct. 1254, 1264 (2005) (Thomas, J., concurring in part and concurring in the judgment). Mr. Johnson, notwithstanding his failure to object in the district court, submits that his is the appropriate case for this Court to "consider *Almendarez-Torres*' continuing viability."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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