SUPREME COURT OF THE UNITED STATES

No. 08–6925

CURTIS DARNELL JOHNSON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 2, 2010]

JUSTICE ALITO, with whom JUSTICE THOMAS, joins, dissenting.

The Armed Career Criminal Act (ACCA) defines a "violent felony" to mean, among other things, "any crime punishable by imprisonment for a term exceeding one year . . . 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 classic definition of the crime of battery is the "intentional application of unlawful force against the person of another." *Ante,* at 5 (citing 2 W. LaFave & A. Scott, Substantive Criminal Law §7.15, p. 301 (1986 and Supp. 2003); Black's Law Dictionary 173 (9th ed. 2009)). Thus, the crime of battery, as traditionally defined, falls squarely within the plain language of ACCA. Because I believe that ACCA was meant to incorporate this traditional definition, I would affirm the decision of the Court of Appeals.

I

The Court starts out in the right direction by noting that the critical statutory language—"the use, attempted use, or threatened use of physical force against the person of another," 18 U. S. C. §924(e)(2)(B)(i)—may mean either (a) the use of violent force or (b) the use of force that is

sufficient to satisfy the traditional definition of a battery. See *ante*, at 4–5. The Court veers off course, however, by concluding that the statutory language reaches only violent force.

The term "force," as the Court correctly notes, had a well-established meaning at common law that included even the "slightest offensive touching." *Ante,* at 5. See also *Respublica* v. *De Longchamps*, 1 Dall. 111, 114 (O. T. Phila. 1784) ("[T]hough no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal d[e]finition of Assault and Battery. . ."); 3 W. Blackstone, Commentaries on the Laws of England 120, 218 (1768) (hereinafter Blackstone). This approach recognized that an offensive but nonviolent touching (for example, unwanted sexual contact) may be even more injurious than the use of force that is sufficient to inflict physical pain or injury (for example, a sharp slap in the face).

When Congress selects statutory language with a well-known common-law meaning, we generally presume that Congress intended to adopt that meaning. See, *e.g.*, *United States* v. *Turley*, 352 U. S. 407, 411 (1957) ("We recognize that where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning"); *Morissette* v. *United States*, 342 U. S. 246, 263 (1952); *United States* v. *Carll*, 105 U. S. 611, 612–613 (1882). And here, I see nothing to suggest that Congress meant the phrase "use of physical force" in ACCA to depart from that phrase's meaning at common law.

On the contrary, other standard canons of statutory interpretation point to the same conclusion. "[W]here 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 exclusion." *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (internal quotation marks omitted). In 18 U. S. C. §924(e)(2)(B)(ii)—the clause immediately following the clause at issue in this case—the term "violent felony" is defined as including any crime that "involves conduct that presents *a serious potential risk of physical injury to another*." (Emphasis added.) Because Congress did not include a similar limitation in §924(e)(2)(B)(i), we should presume that it did not intend for such a limitation to apply.

The language used by Congress in §922(g)(8)(C)(ii) further illustrates this point. This provision criminalizes, among other things, the possession of a firearm by a person who is subject to a court order that "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*." (Emphasis added.) Although §922(g)(8)(C)(ii) was not enacted until eight years after §924(e)(2)(B)(i), see *ante*, at 9, the former provision is nevertheless instructive. If Congress had wanted to include in §924(e)(2)(B)(i) a limitation similar to those in §924(e)(2)(B)(ii) and §922(g)(8)(C)(ii), Congress could have easily done so expressly.

II

The Court provides two reasons for refusing to interpret 18 U. S. C. §924(e)(2)(B)(i) in accordance with the common-law understanding, but neither is persuasive.

A

The Court first argues that §924(e)(2)(B)(i) must be read to refer to "violent" force because that provision defines the term "violent felony." *Ante*, at 6. But it is apparent that ACCA uses "violent felony" as a term of art with a wider meaning than the phrase may convey in ordinary

usage. ACCA specifically provides that burglary and extortion are "violent felon[ies]," §924(e)(2)(B),(ii), and we have held that ACCA also reaches the crime of attempted burglary, *James* v. *United States*, 550 U. S. 192 (2007). All of these offenses may be committed without violent force,[1] and it is therefore clear that the use of such force is not a requirement under ACCA. Instead, ACCA classifies crimes like burglary and extortion as violent felonies because they often lead to violence. As we have put it, these crimes create "significant risks of . . . confrontation that might result in bodily injury," *id.*, at 199, and offensive touching creates just such a risk. For example, when one bar patron spits on another, violence is a likely consequence. See *United States* v. *Velazquez-Overa*, 100 F. 3d 418, 422 (CA5 1996) ("If burglary, with its tendency to cause alarm and to provoke physical confrontation, is considered a violent crime under 18 U. S. C. §16(b), then surely the same is true of the far greater intrusion that occurs when a child is sexually molested"); *United States* v. *Wood*, 52 F. 3d 272, 276 (CA9 1995) (same).

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[1] For the purposes of ACCA, burglary is defined as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor* v. *United States*, 495 U. S. 575, 598 (1990). See also *James*, 550 U. S., at 197, 198, 202–203 (attempted burglary under Florida law requires "overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein" and that the "defendant fail in the perpetration or be intercepted or prevented in the execution of the underlying offense" (internal quotation marks omitted)). Although we have not defined extortion under ACCA, the Hobbs Act defines it as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or *fear*, or under color of official right." 18 U. S. C. §1951(b)(2) (emphasis added); see also *James, supra,* at 223–224 (SCALIA, J., dissenting) (defining extortion in ACCA as "the obtaining of something of value from another, with his consent, induced by the wrongful use or threatened use of force against the person *or property of another*" (emphasis added)).

B

The Court's only other reason for rejecting the common-law definition is the fact that battery at common law was a misdemeanor. The Court reasons that "[i]t is unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor." *Ante,* at 7 (citing 4 Blackstone 216–218 (1769), and ALI, Model Penal Code §211.1, Comment, p. 175 (1980)). The Court does not spell out why Congress' selection of this term would be unlikely, but I assume that the Court's point is that Congress is unlikely to have decided to treat as a violent felony an offense that was regarded at common law as a mere misdemeanor. This argument overlooks the significance of the misdemeanor label at common law, the subsequent evolution of battery statutes, and the limitation imposed by 18 U. S. C. §924(e)(2)(B).

At common law, the terms "felony" and "misdemeanor" did not have the same meaning as they do today. At that time, imprisonment as a form of punishment was rare, see *Apprendi* v. *New Jersey*, 530 U. S. 466, 480, n. 7 (2000); most felonies were punishable by death, see *Tennessee* v. *Garner*, 471 U. S. 1, 13 (1985); and many very serious crimes, such as kidnaping and assault with the intent to murder or rape, were categorized as misdemeanors. See *United States* v. *Watson*, 423 U. S. 411, 439–440 (1976) (Marshall, J., dissenting). Since that time, however, the term "felony" has come to mean any offense punishable by a lengthy term of imprisonment (commonly more than one year, see *Burgess* v. *United States*, 553 U. S. 124, 130 (2008)); the term "misdemeanor" has been reserved for minor offenses; and many crimes that were misdemeanors at common law have been reclassified as felonies. And when the relevant language in ACCA was enacted, quite a few States had felony battery statutes that retained the common-law definition of "force." See Fla. Stat.

§784.07(2)(b) (1987) (making simple battery of a police officer a felony); Idaho Code §18–915(c) (Lexis 1987) (same); Ill. Crim. Code §12–4(b)(6) (1988) (same); La. Stat. Ann. §§14:33, 14:43.1 (West 1986) (sexual battery punishable by more than one year's imprisonment); N. M. Stat. Ann. §40A–22–23 (1972) (battery of a police officer a felony); see also Kansas Stat. Ann. §21–3413(b) (Supp. 1994) (simple battery of corrections officers a felony).[2]

ACCA's mechanism for identifying the battery convictions that merit treatment as "violent felon[ies]" is contained in 18 U. S. C. §924(e)(2)(B), which provides that an offense committed by an adult is not a "violent felony" unless it is "punishable by imprisonment for a term exceeding one year." Consequently, while all convictions under battery statutes that track the common-law definition of the offense satisfy the requirements of §924(e)(2)(B)(i)—because they have "as an element the use, attempted use, or threatened use of physical force against the person of another"—not all battery convictions qualify as convictions for a violent felony because §924(e)(2)(B) excludes any battery conviction that was not regarded by the jurisdiction of conviction as being sufficiently serious to be punishable by imprisonment for more than one year. There is nothing extraordinary or unlikely about this approach.

III

The Court's interpretation will have untoward consequences. Almost half of the States have statutes that reach both the use of violent force and force that is not

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[2] These state statutes show that Congress, by using a term of art, "force," did not adopt a meaning "peculiar . . . [to the] definition of a misdemeanor," see *ante*, at 7, and, therefore, they are relevant in determining whether touching involves the use of force under ACCA. See *ante*, at 7, n. 1.

violent but is unlawful and offensive.[3] Many of the States classify these batteries as felonies or make them punishable by imprisonment for more than one year.[4] Although the great majority of convictions under these statutes are,

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[3]Ariz. Rev. Stat. Ann. §13–1203(A) (West 2001); Cal. Penal Code Ann. §242 (West 2008); *People* v. *Pinholster,* 1 Cal. 4th 865, 961, 824 P. 2d 571, 622 (1992); D. C. Code §22–404(a) (2001); *Ray* v. *United States*, 575 A. 2d 1196, 1199 (D. C. 1990); Fla. Stat. Ann. §784.03(1)(a) (2007); Ga. Code Ann. §16–5–23(a) (2007); Idaho Code §18–903 (Lexis 2004); Ill. Comp. Stat., ch. 720, §5/12–3(a) (West 2009); Ind. Code §35–42–2–1(a) (2004); Iowa Code §708.1 (West 2009); Kan. Stat. Ann. §21–3412(a) (2007); La. Stat. Ann. §14:33 (West 2007); *State* v. *Schenck*, 513 So. 2d 1159, 1165 (La. 1987); Me. Rev. Stat. Ann., Tit. 17–A, §207(1)(A) (2006); Md. Crim. Law Code Ann. §§3–201(b), 3–203(a) (Lexis Supp. 2009); *Kellum* v. *State*, 223 Md. 80, 84–85, 162 A. 2d 473, 476 (1960); Mass. Gen. Laws, ch. 265, §13A(a) (West 2008); *Commonwealth* v. *Campbell*, 352 Mass. 387, 397, 226 N. E. 2d 211, 218 (1967); Mich. Comp. Laws Ann. §§750.81(1), (2) (West 2004); *People* v. *Nickens*, 470 Mich. 622, 627–628, 685 N. W. 2d 657, 661 (2004); Mo. Rev. Stat. §565.070(5) (West 2000); Mont. Code Ann. §45–5–201(1)(c) (2009); N. H. Rev. Stat. Ann. §631:2–aI(a) (West 2007); N. M. Stat. Ann. §30–3–4 (Supp. 2009); N. C. Gen. Stat. Ann. §14–33(a) (Lexis 2007); *State* v. *West*, 146 N. C. App. 741, 744, 554 S. E. 2d 837, 840 (2001); Okla. Stat. Ann., Tit. 21, §642 (West 2002); *Steele* v. *State*, 778 P. 2d 929, 931 (Okla. Crim. App. 1989); R. I. Gen. Laws §11–5–3(a) (Lexis 2002); *State* v. *Coningford*, 901 A. 2d 623, 630 (R. I. 2006); S. C. Code Ann. §22–3–560(A) (Supp. 2009); *State* v. *Mims*, 286 S. C. 553, 554, 335 S. E. 2d 237 (1985) *(per curiam);* Tenn. Code Ann. §39–13–101(a)(3) (2003); Tex. Penal Code Ann. §22.01(a) (West Supp. 2009); Va. Code Ann. §18.2–57(A) (Lexis 2009); *Wood* v. *Commonwealth*, 149 Va. 401, 404, 140 S. E. 114, 115 (1927); Wash. Rev. Code §9A.36.011 *et seq.* (2008); *State* v. *Stevens*, 158 Wash. 2d 304, 311, 143 P. 3d 817, 821 (2006); W. Va. Code Ann. §61–2–9(c) (Lexis 2005).

[4]See Iowa Code §§708.1, 708.2(5) (2009); Kan. Stat. Ann. §§21–3412(a), 21–3412a, 3413(b), 3448(b) (2007); La. Stat. Ann. §§14:34.2(B)(2), 14:34.3(C)(2) (Supp. 2010), 14:34.5(B)(2); 14:35.3(E) (2007); Md. Crim. Law Code Ann. §§3–201(b), 3–203(a), (b) (Supp. 2009); Mass. Gen. Laws, ch. 265, §13A(a) (2008); Mich. Comp. Laws Ann. §750.81(4) (West 2004); Mo. Rev. Stat. §§565.070.1(5), 565.070.4 (2000); Okla. Stat. Ann., Tit. 21, §642 (West 2002), §644 (West Supp. 2010).

no doubt, based on the use of violent force, the effect of the Court's decision will be to take all these convictions outside the scope of ACCA—unless the Government is able to produce documents that may properly be consulted under the modified categorical approach and that conclusively show that the offender's conduct involved the use of violent force, see *ante,* at 10–11. As the Government notes, however, this will often be impossible because, in those States in which the same battery provision governs both the use of violent force and offensive touching, charging documents frequently simply track the language of the statute, and jury instructions often do not require juries to draw distinctions based on the type of force that the defendant employed. See Brief for United States 42–43.

In addition, the Court's interpretation of the term "physical force" may hobble at least two federal statutes that contain this identical term. Under 18 U. S. C. §922(g)(9), a person convicted of a "misdemeanor crime of domestic violence" may not lawfully possess a firearm, and the term "misdemeanor crime of domestic violence" is defined as applying only to crimes that "ha[ve], as an element, the use or attempted use of *physical force*, or the threatened use of a deadly weapon." §921(a)(33)(A) (emphasis added). As we recently explained, Congress recognized that "'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies,'" and Congress therefore enacted this provision to keep firearms out of the hands of such abusers. *United States* v. *Hayes*, 555 U. S. ___, ___ (2009) (slip op., at 10). Cases of spousal and child abuse are frequently prosecuted under generally applicable assault and battery statutes, *ibid*., and as noted, the assault and battery statutes of almost half the States apply both to cases involving the use of violent force and cases involving offensive touching. As a result, if the Court's interpretation of the term "physical force" in ACCA is applied to §922(g)(9), a great

many persons convicted for serious spousal or child abuse will be allowed to possess firearms.

Under 8 U. S. C. §1227(a)(2)(E), an alien convicted of a "crime of domestic violence" is subject to removal, and the term "crime of domestic violence" is defined as an offense that, among other things, has "as an element the use [or] attempted use . . . of physical force." 18 U. S. C. §16(a). Accordingly, if the Court's interpretation of the term "physical force" is applied to this provision, many convicted spousal and child abusers will escape removal, a result that Congress is unlikely to have intended.

* * *

For all these reasons, I believe that the Court's decision is incorrect, and I therefore respectfully dissent.