University of Miami Law Review

Volume 65
Number 4 *Volume 65 Number 4 (Summer 2011) Eleventh Circuit Issue*

Article 8

7-1-2011

Forcing The Issue: An Examination Of *Johnson V. United States*

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I. INTRODUCTION

"[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish . . . ."

—Judge Learned Hand, 1945[1]

"Any review of Supreme Court decisions will reveal numerous cases in which the Justices disagreed about the meaning of what appeared on the surface to be simple legislative language."[2] Additionally, in situations where there is disagreement on the meaning of statutory language, the Supreme Court has held that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."[3] How-

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1. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

2. Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. MIAMI L. REV. 375, 378 (1992).

3. Lamie v. U.S. Trustee, 540 U.S. 526, 538 (2004).

ever, the Supreme Court's opinion in *Johnson v. United States*[4] goes against these ideals.

The *Johnson* case involved Florida's battery statute.[5] Under that statute, battery can be committed through mere touching.[6] The issue before the Court was whether a prior conviction for battery by touching constituted a violent felony and thus could be used for sentence enhancement under the Armed Career Criminal Act ("ACCA").[7]

The Supreme Court's reversal of the Eleventh Circuit Court of Appeals in *Johnson* resolved a long-standing circuit split over the statutory meaning of "physical force."[8] Unfortunately, the reasoning for the reversal was tenuous—based on a dictionary definition rather than the well-defined common law meaning or the legislative history—in opposition to Congress's intent in enacting the ACCA.

While the ACCA has long been a heavily debated issue, most points of contention involve the interpretation of the residual clause.[9] The residual clause involves an analysis of what crimes present a "serious potential risk."[10] This casenote does not join that discussion; rather, it addresses a new and important question surrounding the ACCA—the physical force clause.

Prior to the *Johnson* decision, there was a circuit split over whether the requisite physical force to be considered a violent felony under the ACCA included *de minimis* touching or whether the physical force must be violent in nature.[11] The Supreme Court, falling on the side of the split that requires violent force, reversed the Eleventh Circuit.[12] However, Justice Scalia, writing for the majority, failed to follow well-established canons of statutory interpretation, as well as his own advice in previous decisions.

This casenote will discuss the errors in Justice Scalia's opinion and

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4. 130 S. Ct. 1265 (2010).

5. FLA. STAT. § 784.03 (2009).

6. § 784.03.

7. 18 U.S.C. § 924(e) (2006).

8. *See Johnson*, 130 S. Ct. at 1271.

9. For an in-depth review of the residual clause, *see* David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209 (2010).

10. 18 U.S.C. § 924(e)(2)(B)(ii) (2006).

11. *See, e.g.*, United States v. Smith, 171 F.3d 617 (8th Cir. 1999); United States v. Nason, 269 F.3d 10 (1st Cir. 2001); United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006); United States v. Llanos-Agostadero, 486 F.3d 1194 (11th Cir. 2007) (holding that *de minimis* touching is sufficient to qualify a crime as a violent felony); *see also* Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003); United States v. Belless, 338 F.3d 1063 (9th Cir. 2003); United States v. Gonzalez-Chavez, 432 F.3d 334 (5th Cir. 2005); United States v. Hayes, 526 F.3d 674 (10th Cir. 2008) (holding that physical force must be violent in nature to qualify as a violent felony).

12. *Johnson*, 130 S. Ct 1265.

why the Eleventh Circuit was correct in its interpretation of the ACCA. Part II will discuss the history of the ACCA. Part III will discuss the circuit split, as well as the Supreme Court's previous interpretations of the ACCA. Part IV will discuss the facts of the *Johnson* case, the reasoning behind the Eleventh Circuit's decision, and why the Supreme Court reversed. Part V will analyze the correct and incorrect aspects of Justice Scalia's opinion and propose recommendations for how the consequences of the *Johnson* decision should be resolved. Part VI concludes.

II. THE HISTORY OF THE ARMED CAREER CRIMINAL ACT

The ACCA allows for enhanced sentencing if a person is found in possession of a weapon and has had three prior convictions for "violent felonies." The statute has been a continuous problem among the circuits.[13] According to the ACCA, for any person who violates 18 U.S.C. § 922(g) and has three previous convictions for violent felonies or serious drug offenses, the *minimum* sentence is fifteen years and the maximum sentence is life.[14] This is a large leap from the statutory maximum of ten years for an unenhanced violation of § 922(g).

An enhanced sentence under the ACCA cannot be suspended or probationary. However, pursuant to a 1994 amendment, the individual may be considered for parole during this sentence.[15] The only exception to the mandatory minimum sentence applies where the defendant has provided the government with substantial assistance, such as with a plea agreement in exchange for testimony against another individual.[16]

The ACCA was originally introduced as the Career Criminal Life Sentence Act of 1981 ("CCLSA"). It proposed a mandatory life sentence for anyone who committed robbery or burglary three times.[17] The bill was amended and passed into law as the Armed Career Criminal Act of 1984.[18] The version of the Act that was passed into law requires a person to violate a federal law prohibiting felons from possessing firearms.

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13. *See, e.g.*, *Smith*, 171 F.3d 617; *Nason*, 269 F.3d 10; *Ashcroft*, 350 F.3d 666; *Belless*, 338 F.3d 1063; *Gonzalez-Chavez*, 432 F.3d 334; *Griffith*, 455 F.3d 1339; *Llanos-Agostadero*, 486 F.3d 1194; *Hayes*, 526 F.3d 674.

14. 18 U.S.C. § 922(g) (2006). This section makes it a crime for any felon to ship, transport, possess, or receive firearms in or affecting interstate or foreign commerce.

15. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110510(a) (1994) ("Section 924(e)(1) of title 18, United States Code, is amended by striking 'and such person shall not be eligible for parole with respect to the sentence imposed under this subsection'").

16. *See* CHARLES DOYLE, CONG. RESEARCH SERV., R41449, ARMED CAREER CRIMINAL ACT (18 U.S.C. 924(E)): AN OVERVIEW 3 (2010).

17. S. 1688, 97th Cong. § 2 (1981).

18. 18 U.S.C. § 924(e) (2006).

It also reduced the mandatory sentence to fifteen years.[19]

It is speculated that the supporters of the ACCA wanted the minimum fifteen-year sentence imposed on anyone who committed robbery or burglary three times, but, to address federalism concerns, Congress had to tie the conviction to a federal law.[20] In 1986, the ACCA was broadened to its present wording to include convictions of violent felonies and serious drug offenses.[21]

The term "violent felony" is defined by the ACCA as any crime punishable by imprisonment for more than one year that: (1) has an element of use, attempted use, or threatened use of physical force against another person; or (2) is burglary, arson, extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[22]

Moreover, the assessment of a particular crime involves examining how the law defines the offense and not how the individual committed it on a particular occasion.[23] This standard, known as the categorical approach, created confusion, and the courts did not have any guidance for determining what amount of physical force was required to consider a crime a violent felony. The Supreme Court's opinion in *Johnson v. United States*[24] attempted to clarify the requisite threshold of physical force.

III. THE "PHYSICAL FORCE" CIRCUIT SPLIT

It is unsurprising that much debate has surrounded the ACCA; where federal sentencing statutes are triggered by state law, there is bound to be some turmoil since the wording of the elements of a particular crime will vary state to state. In addition to the inconsistency between states, many state statutes include variants of what constitutes a

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19. *Id.*

20. James G. Levine, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines*, 46 HARV. J. ON LEGIS. 537, 547 (2009).

21. *Id.* (citing H.R. Rep. No. 99-849, at 6 (1986)).

22. 18 U.S.C. § 924(e)(2)(B) (2006).

23. *See* Taylor v. United States, 495 U.S. 575 (1990):

> We think the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense. This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

24. 130 S. Ct. 1265 (2010).

particular crime. This is especially true among state battery statutes, which may or may not include offensive touching as an element.

The problem with such statutes is that if a court considers offensive touching a "use or attempted use of physical force," then a conviction for such touching can be used as a predicate offense for sentence enhancement under the ACCA. On the contrary, if the court believes touching does not involve physical force, then a conviction for such touching does not count as one of the three permissible violent felonies.

The Supreme Court prescribed the formal categorical approach in *Taylor v. United States*[25] to determine whether a crime constitutes a violent felony under the ACCA. Using a formal categorical approach, a sentencing court may only look at the statutory definition of the prior offenses but not the facts underlying those convictions.[26] "This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of [the crime]."[27] Cases falling into that "narrow range" use a modified categorical approach, but the application of this approach caused confusion among the circuits.[28]

Additionally, prior to *Johnson v. United States*,[29] there was a circuit split over whether the requisite physical force included *de minimis* touching or whether the physical force must be violent in nature. The First, Eighth, and Eleventh Circuits held that battery committed by *de minimis* touching was sufficient to constitute a violent felony because it required some level of physical force in the sense of "Newtonian mechanics."[30] In contrast, the Fifth, Seventh, Ninth, and Tenth Circuits rejected this test and held that the physical force required must be violent force.[31]

The Eleventh Circuit expressly denounced the "violent physical force" view of other circuits in *United States v. Griffith*[32] as going

25. 495 U.S. 575 (1990).

26. *Id.* at 601.

27. *Id.* at 602.

28. *See, e.g.*, United States v. Roseboro, 551 F.3d 226 (4th Cir. 2009); United States v. Dismuke, 593 F.3d 582 (7th Cir. 2010).

29. 130 S. Ct. at 1265.

30. United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006); *see also* United States v. Smith, 171 F.3d 617 (8th Cir. 1999); United States v. Nason, 269 F.3d 10 (1st Cir. 2001); United States v. Llanos-Agostadero, 486 F.3d 1194 (11th Cir. 2007).

31. *See, e.g.*, Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003); United States v. Gonzalez-Chavez, 432 F.3d 334 (5th Cir. 2005); United States v. Belless, 338 F.3d 1063 (9th Cir. 2003); United States v. Hayes, 526 F.3d 674 (10th Cir. 2008).

32. *Griffith*, 455 F.3d at 1345 (comparing *Flores*, 350 F.3d at 666):

> If Congress had meant to say "violent physical force" it easily could have done so. By reading into a statutory provision a restrictive word in order to guard against an absurd result that it admits has little or no basis in the real world, the *Flores* court

against common sense. In that case, Judge Carnes defended the court's position as following the intent of Congress.[33] In justification of the *de minimis* test, the *Griffith* opinion cites 18 U.S.C. § 922(g)(8), which restricts firearm possession for individuals subject to a court order that prohibits "the use, attempted use, or threatened use of physical force . . . that would reasonably be expected to cause bodily injury."[34] Next, the opinion concludes that, based on the language of the aforementioned subsection, Congress knew how to limit "physical force" to something more than *de minimis* force if it intended to do so.[35] Finally, the Eleventh Circuit held that where Congress does not include a limiting phrase, a court cannot assume Congress intended physical force to mean violent physical force.[36]

The Eleventh Circuit has remained consistent in defending the *de minimis* test in similar cases involving the United States Sentencing Guidelines.[37] The United States Sentencing Guidelines were created to provide federal judges with fair and consistent sentencing ranges to consult.[38] They explicitly aim to further Congress's intent in enacting the Comprehensive Crime Control Act of 1984,[39] which includes the ACCA.[40] Similar to the ACCA's definition of "violent felony," the U.S. Sentencing Guidelines define "crime of violence" as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another."[41]

Courts have recognized that the definitions of "crime of violence" and "violent felony" are virtually identical,[42] and decisions addressing one provide guidance for determination of the other. In *United States v. Glover*[43] and *United States v. Llanos-Agostadero*,[44] the Eleventh Circuit considered Florida's battery statute and whether it could be considered a "crime of violence" under the definition set forth in the U.S. Sentencing

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forced itself to what could be described as an absurd result in the case before it. In doing so, it produced a decision that supplies, in the words of the concurring judge, a good example for those who criticize our system of law (court decisions) as "not tethered very closely to common sense."

33. *Id.* at 1342.

34. *See id.* (citing 18 U.S.C. § 922(g)(8)(C)(ii)).

35. *Id.*

36. *Id.* at 1345.

37. *See, e.g., id.*; United States v. Harris, 305 F. App'x 552 (11th Cir. 2008).

38. An Overview of the United States Sentencing Commission, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview_20101122.pdf (last visited Feb. 5, 2011).

39. Pub. L. No. 98-473, 98 Stat 1976 (1984).

40. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A (2010).

41. *Id.* § 4B1.2(a)(1).

42. *See, e.g.*, United States v. Rainey, 362 F.3d 733, 734 (11th Cir. 2004).

43. 431 F.3d 744 (11th Cir. 2005).

44. 486 F.3d 1194 (11th Cir. 2007).

Guidelines. In both cases, without much discussion, the court held that battery under Florida's law is a crime of violence.[45]

The Eleventh Circuit maintained its position on the *de minimis* test of physical force, and the circuit split continued until March 2010 when the Supreme Court reversed the Eleventh Circuit's determination of what amount of physical force constituted a violent felony under the ACCA.

IV. *JOHNSON V. UNITED STATES*

The Supreme Court's opinion in *Johnson v. United States*[46] is novel, as it is the first time the Court has addressed the physical force clause of the ACCA.[47] Additionally, the opinion resolved a long-standing circuit split and changed the interpretation courts use for enhancing sentences of repeat offenders. Falling on the opposing side of the circuit split, the Supreme Court reversed the Eleventh Circuit because the majority believed the appropriate definition was that of a dictionary, as opposed to congressional intent or common-law.

A. *The Trial of Curtis Johnson*

The case began when Curtis Johnson pleaded guilty to knowingly possessing ammunition, which violated 18 U.S.C. § 922(g) because he was a previous felon.[48] The indictment specified five prior felony convictions, including aggravated battery and burglary of a dwelling in October 1986, and battery in May 2003.[49] Based on Johnson's criminal history, the government sought an enhanced sentence under the ACCA.[50]

At the sentencing hearing, Johnson conceded that the felonies committed in 1986 were violent felonies under the ACCA, but he objected to the classification of his 2003 conviction as a violent felony.[51] Johnson's 2003 Florida conviction was for violating Florida's battery statute which occurs when a person "actually and intentionally touches or strikes another person against the will of the other; or intentionally causes bodily harm to another person."[52]

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45. *Glover*, 431 F.3d 744; *Llanos-Agostadero*, 486 F.3d 1194.

46. 130 S. Ct. 1285 (2010).

47. Brief for Petitioner at 12, Johnson v. United States, 130 S. Ct. 1265 (2010) (No. 08-6925), 2009 WL 1510257 at *9.

48. *Johnson*, 130 S. Ct. at 1268.

49. *Id.*

50. *Id.*

51. *Id.*

52. FLA. STAT. § 784.03 (2009).

Under Florida law, battery is a misdemeanor of the first degree.[53] However, if a person has a prior conviction for battery and subsequently commits another battery, that person has committed a felony of the third degree.[54] Therefore, had it not been for Johnson's previous battery conviction, the second conviction in 2003 would have been a misdemeanor and he would not have been subject to the enhanced sentence under the ACCA.

The charging document in Johnson's felony battery case stated that he "did actually and intentionally touch or strike the victim against the will of said person . . . ."[55] However, the record from that conviction does not state what the actual act was, and Johnson argued that the government could not prove that his actions included the requisite physical force to be considered a violent felony.[56] The trial judge rejected Johnson's argument, and Johnson was convicted and sentenced under the ACCA in the United States District Court for the Middle District of Florida.[57]

B. *The Eleventh Circuit's Decision*

On appeal, the Eleventh Circuit followed its prior decisions and rejected Johnson's contention that the crime of battery under Florida law is not *necessarily* a violent one under the ACCA.[58] The court stated that either the Florida law fits the ACCA's description of violent felony or it doesn't, making it clear that the court was not willing to bend in its view of the definition.[59]

In an attempt to divert the court from its decisions in *Llanos-Agostadero*[60] and *Glover*,[61] Johnson directed the court's attention to a recent case, *State v. Hearns*.[62] In *Hearns*, the Supreme Court of Florida held that battery on a law enforcement officer was not a "forcible felony" and therefore not subject to sentencing under Florida's state statute for enhanced sentences for career criminals.[63]

Johnson contended that the decision in *Hearns* was inconsistent with *Llanos-Agostadero* and *Glover*, and the Eleventh Circuit had to fol-

53. *Id.*
54. *Id.*
55. Brief for the United States at 5, Johnson v. United States, 130 S. Ct. 1265 (2010) (No. 08-6925), 2009 WL 3663947 at *7.
56. Brief for Petitioner, *supra* note 47, at 10.
57. United States v. Johnson, 528 F.3d 1318, 1319 (11th Cir. 2008).
58. *See id.* at 1319—20.
59. *Id.*
60. United States v. Llanos-Agostadero, 486 F.3d 1194 (11th Cir. 2007).
61. United States v. Glover, 431 F.3d 744 (11th Cir. 2005).
62. 961 So. 2d 211 (Fla. 2007).
63. *See id.* (discussing FLA. STAT. § 775.084 (2009)).

low the holding in *Hearns* because it must yield to interpretation of state law by the highest court of that state.[64] Johnson's argument proved unsuccessful and the Eleventh Circuit refused to follow *Hearns* in this case for two reasons.

First, the court conceded that if state law is clarified in a way that is inconsistent with one of its earlier decisions it could not be bound to follow the earlier decision.[65] However, the court stated that it was still bound to follow its prior precedent because the decision in *Llanos-Agostadero* came out nineteen days after *Hearns*.[66] Additionally, the court rejected the idea that the prior panel may have overlooked the *Hearns* decision.[67]

The second reason the court declined to follow the holding in *Hearns* was because the *Llanos-Agostadero* case, similar to the *Johnson* case, involved the *federal* law definition of violence as applied to Florida's battery law,[68] and therefore, could not have been overruled by *Hearns*. The court stated that the *Hearns* decision would have been binding if Johnson's case involved interpreting Florida's enhancement statute as opposed to the federal ACCA.[69] Finally, the Eleventh Circuit rejected all other arguments made by Johnson:

> His contention that the definition of felony for ACCA purposes does not include a misdemeanor that became a felony only because of a state recidivist statute is foreclosed by the Supreme Court's recent decision in *United States v. Rodriquez*, 128 S. Ct. 1783 (2008). His contention that the district court lacked the authority to sentence him as an armed career criminal because he did not admit in his guilty plea to the facts necessary to being one is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). And his contention that his sentence of 185 months for being an armed career criminal in possession of ammunition violates the Cruel and Unusual Punishment Clause of the Eighth Amendment is foreclosed by *United States v. Lyons*, 403 F.3d 1248, 1257 (11th Cir. 2005) . . . .[70]

In response to the Eleventh Circuit's decision, Johnson filed a petition for a writ of certiorari in October 2008. The Supreme Court granted certiorari on two issues.[71] First, the Court agreed to review the issue

64. United States v. Johnson, 528 F.3d 1318, 1320 (11th Cir. 2008).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1321.

69. *See id.* (referring to FLA. STAT. § 775.084).

70. *Id.* at 1322 (internal parallel citations omitted).

71. Questions Presented Report, http://www.supremecourt.gov/qp/08-06925qp.pdf (document identifying which questions the Supreme Court agreed to review in Johnson v. United States).

raised by the *Hearns* decision.[72] Specifically, it agreed to address 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 ACCA.[73] Second, the Court granted certiorari to resolve the circuit split on whether a prior conviction for simple battery is in all cases a "violent felony," and which physical force test the courts should apply in determining whether a crime is violent under the ACCA.[74]

C. *The Supreme Court's Reversal*

Johnson's case was argued before the Supreme Court in October 2009 and was decided on March 2, 2010.[75] Justice Scalia delivered the opinion of the Court and Chief Justice Roberts, Justices Stevens, Kennedy, Ginsburg, Breyer, and Sotomayor joined.[76] Justice Alito filed a dissenting opinion and Justice Thomas joined.[77]

The majority opinion began by addressing the first question presented for review. The Supreme Court agreed with the Eleventh Circuit and declined to follow *Hearns* because the meaning of physical force under the ACCA is a question of federal law, not state law.[78] The Court concluded, however, that it is bound by the Florida Supreme Court's interpretation of determining the elements of Florida's battery statute.[79]

Thus, the Supreme Court is bound by the Florida Supreme Court's holding in *Hearns* that the elements of the battery statute are disjunctive; Florida battery can be proven in one of three ways: the defendant intentionally caused bodily harm, the defendant intentionally struck, or the defendant merely actually and intentionally touched the victim.[80] Furthermore, if a defendant is being prosecuted under the element of touching the victim, this can be satisfied by any intentional contact, "no matter how slight."[81]

The Court concluded that since the record from Johnson's felony battery conviction did not state exactly what the acts were, the district

72. *Id.*
73. *Id.*
74. *Id.*
75. Johnson v. United States, 130 S. Ct. 1265 (2010).
76. *Id.*
77. *Id.*
78. *Id.* at 1269.
79. *Id.*
80. *Id.* (citing State v. Hearns, 961 So. 2d 211, 218 (Fla. 2007)).
81. *Id.* (citing *Hearns*, 961 So. 2d at 211).

court was correct in concluding that the conviction rests on the least of the acts under the statute—actually and intentionally touching.[82]

The more important issue in the case was whether the term "force" in the ACCA refers to its general usage definition or to its technical definition from common-law.[83] At common-law, the element of "force" could be satisfied by even the slightest offensive touching.[84] However, the Court stated that "[a]lthough a common-law term of art should be given its established common-law meaning," this does not apply to a statutory word if that common-law meaning does not fit.[85]

The Court concluded that the common-law definition does not fit in reference to the ACCA because at common-law *all* battery was a misdemeanor.[86] The Court continued by stating that "[it] 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."[87] According to the Court, there is no reason to define violent felony by reference to a nonviolent misdemeanor definition.[88]

Furthermore, referring to modern dictionaries, the Court considered the definition of the word "force." The more general usage means "strength or energy; active power; vigor; often an unusual degree of strength or energy," "power to affect strongly in physical relations," or "power, violence, compulsion, or constraint exerted on a person."[89] Additionally, "physical force" is defined as "force consisting in a physical act, esp. a violent act directed against a robbery victim."[90] The Court thought these definitions suggested a degree of power not satisfied by battery through mere touching.[91]

Thus, the main holding is that in the context of a statutory definition of "violent felony," the phrase "physical force" means violent force—that is, force capable of causing physical pain or injury to another person.[92] To prevent a continued circuit split, the Court made sure to broaden its holding by stating that its interpretation of the physical force clause applied to the statutory category of violent felonies, not just the crime of battery.[93]

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82. *Id.*
83. *Id.* at 1270.
84. *Id.* (citing Lynch v. Commonwealth, 109 S.E. 427, 248 (1921)).
85. *Id.*
86. *Id.* at 1271.
87. *Id.* at 1271–72.
88. *Id.* at 1272.
89. *Id.* at 1270 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 986 (2d ed. 1954)).
90. *Id.* (citing BLACK'S LAW DICTIONARY 717 (9th ed. 2009)).
91. *Id.*
92. *Id.* at 1271.
93. *See id.*

The Court also rejected the government's contention that since section 922 forbids the possession of firearms by a person subject to a court order explicitly prohibiting the "use, attempted use or threatened use . . . that would *reasonably be expected to cause bodily injury*," and this language is absent in section 924, it must mean that mere touching suffices.[94] Specifying that physical force must give rise to bodily injury in one section does not prove the case is the same where physical force lacks the qualification in a different section.[95]

The Government asked the Court to remand the case back to the Eleventh Circuit for consideration of whether Johnson's felony battery conviction was a violent felony under the residual clause of the ACCA but the Court refused.[96] The basis of this decision was that the Government disclaimed any reliance on the residual clause at sentencing.[97] Additionally, both parties briefed the residual clause and the Eleventh Circuit determined that Johnson's conviction could be considered a violent felony only if it satisfied the physical force clause.[98] Thus, the Eleventh Circuit's strict defense of the *de minimis* test essentially precluded remand for any other reason.

Consequently, the Supreme Court set aside Johnson's sentence and remanded the case for further proceedings consistent with its opinion.[99]

V. ANALYSIS: USING TOO MUCH FORCE

In the opinion of the Court, Justice Scalia clarified an important element of ACCA cases—the use of the categorical approach. However, the rationale for the rest of the opinion was misguided for three main reasons. First, the interpretation should have been guided by the well-defined common law meaning, as opposed to the dictionary definition. Second, the legislative history compels an interpretation contrary to that of the majority opinion. Finally, the opinion disregards standard canons of statutory interpretation.

A. *The Modified Categorical Approach: An Appropriate Clarification*

One important aspect of the *Johnson* decision is the clarification of the modified categorical approach. As previously mentioned, many circuits were using the modified categorical approach inappropriately. For

94. *Id.* at 1272.
95. *See id.*
96. *Id.* at 1274.
97. *Id.*
98. *Id.* (citing United States v. Johnson, 528 F.3d 1318, 1320 (11th Cir. 2008)).
99. *Id.* at 1274.

example, a court could look at a trial record to determine if the crime committed was a violent felony, or the court could look at the documents to determine if the individual acted violently when he committed the crime. These two inquiries may seem very similar, but the second inquiry goes beyond the sentencing court's allowable fact finding scope.

The *Johnson* decision clarifies that where a criminal statute can *only* be violated in a violent way, a conviction for that crime qualifies as a violent felony under the ACCA. The sentencing court can only make factual inquiries when "the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not."[100]

When using the modified categorical approach, the sentencing court may consult the trial record only to "determine which statutory phrase was the basis for the conviction."[101] Furthermore, it is clear from *Johnson* that if a review of the permissible documents does not clarify which portion of the statute served as the basis of the conviction then that particular offense cannot qualify as a violent felony.

B. *Physical Force Does Not Equal Violent Force*

Although the Supreme Court may have appropriately clarified the modified categorical approach, its decision that physical force means violent force in the context of the ACCA was flawed. In addition to the numerous errors that Justice Alito discusses in his dissent,[102] a closer look at the ACCA's legislative history provides further proof that the majority made the wrong decision and the Eleventh Circuit's decision was justified.

1. The Force of the Common Law Definition

It is well established that the interpretation of well-defined words and phrases in the common law carries over to statutes dealing with the same or similar subject matter.[103] Additionally, common-law meanings are assumed to apply even in statutes dealing with new and different subject matter, to the extent they appear fitting and in the absence of evidence to indicate contrary meaning.[104] Furthermore, "When Congress selects statutory language with a well-known common-law meaning, we

100. *Id.* at 1273.

101. *Id.*

102. *Id.* at 1274–78 (Alito, J., dissenting).

103. *See, e.g.*, Gilbert v. United States, 370 U.S. 650 (1962).

104. *See, e.g.*, Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

generally presume that Congress intended to adopt that meaning."[105]

Both the majority and dissent recognize that the term "force" was well-defined at common-law and that it included even the slightest offensive touching.[106] Therefore, following standard canons of statutory interpretation, this should have been an easy decision—force must mean even the slightest touching—but this is not how the majority decided. The majority refused to follow the common-law definition because it said the meaning did not fit. However, the opinion never explains why the common-law meaning does not fit, and, since there is nothing in the ACCA to suggest that Congress meant something other than the accepted common-law meaning, it should have been used.[107]

The majority also rejects the *de minimis* definition because at common-law battery was a misdemeanor, not a felony. This reasoning is flawed. At common-law, felonies were originally violations of the feudal obligation binding lord and vassal[108] and, with the exception of petty larceny, were punishable by death.[109] Furthermore, it is likely that the *only* common law felonies were murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny.[110] The term felony was generally connected with the idea of capital punishment and whenever a statute made any new offense a felony, the law implied that the punishment would be death by hanging, as well as forfeiture of property.[111]

Today, the division between felonies and misdemeanors is not as clear. Even as early as the 1800's, scholars recognized that the common-law distinction between felonies and misdemeanors was not the same as the evolving American law.[112] "In several of the States all offences subject to death or imprisonment are made felonies; all others are misdemeanors. In some states the distinction is abolished absolutely."[113] Today, the term felony is generally used to describe any crime that is punishable by more than one year in prison,[114] and as with the *Johnson*

105. *Johnson*, 130 S. Ct. at 1274 (Alito, J., dissenting).

106. *See id.* at 1270 (majority opinion); *see also id.* at 1274 (Alito, J., dissenting).

107. *See*, McComb, 331 U.S. 722.

108. AMERICAN TECHNICAL SOCIETY, LIBRARY OF AMERICAN LAW AND PRACTICE 196 (1919).

109. *Id.* at 197.

110. FRANCIS WHARTON & WILLIAM DRAPER LEWIS, A TREATISE ON CRIMINAL LAW 29 (10th ed. 1896).

111. JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 484 (2d ed. 1858).

112. WHARTON & LEWIS, *supra* note 110, at 28:

> Felonies, in England, as distinguished from misdemeanors, comprised originally every species of crime which occasioned the forfeiture of lands and goods; but though this distinction, originally based on the supposed heinousness of the crime, is still nominally recognized, its continuance, which conducting to much technical difficulty, is productive of not good, and its abolition is only a question of time.

113. *Id.* at 29.

114. BLACK'S LAW DICTIONARY 694 (9th ed. 2009).

case, it is not uncommon for misdemeanors to be kicked up to felony status based on the number of commissions, not the conduct involved.

If the majority is willing to include Johnson's battery conviction, which would have originally been a misdemeanor under Florida law, as a violent *felony*, then its logic is self-defeating. Therefore, the *Johnson* majority's rationale that common-law misdemeanors and felonies must be treated the same as current day crimes was unfounded.

2. JUSTICE SCALIA'S INAPPROPRIATE USE OF THE DICTIONARY

Rather than relying on the well-defined common-law meaning of physical force, Justice Scalia relies almost entirely on *Webster's New International Dictionary* and *Black's Law Dictionary*. This is not the first time Justice Scalia has relied on such tools, and scholars have criticized him for his inconsistent use of dictionary definitions.[115] A common theme in these critiques is that "Justice Scalia's use of dictionaries as a tool of textualism appears instrumental indeed, invoked only when it produces the desired result."[116] He relies on dictionary definitions where they can be read to narrow governmental power but rejects them in other cases where reliance on them would result in a broadening of governmental power.[117]

Justice Scalia has long emphasized the importance of interpreting statutes based on their "ordinary meaning," but which of the many meanings of a word is *the* ordinary meaning is unclear. He announced his theory of ordinary meaning and its connection to dictionary definitions in his dissent in *Chisom v. Roemer*.[118] In that case, like in his opinion in *Johnson*, Justice Scalia cited the second edition of Webster's New International Dictionary as his main support and treated it as conclusive.[119] Also similar to his opinion in *Johnson*, Justice Scalia's dissent in *Chisom* relies on the second edition of Webster's Dictionary,[120] rather than the more up-to-date third edition which was published in 1961.[121] He also ignores other definitions that do not support the side that he is advocating.

Conversely, Justice Scalia rejected the use of Webster's and Black's in *Bowen v. Massachusetts*.[122] In *Bowen*, the Supreme Court

115. *See* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998).

116. *Id.* at 321.

117. *Id.* at 319.

118. 501 U.S. 380 (1991).

119. Aprill, *supra* note 115, at 316.

120. *Chisom*, 501 U.S. at 410 (Scalia, J., dissenting).

121. WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1961).

122. 487 U.S. 879 (1988).

was faced with the task of interpreting the statutory meaning of "money damages" and "adequate remedy."[123] Justice Scalia castigated the majority's interpretation because the terms "damages," "specific relief," and "adequate remedy" have been "used in the common law for centuries, and have meanings well established by tradition."[124] He goes on to criticize the majority for using the common-law meaning for interpretation of one term but not for the other.[125]

Subsequently, in his dissent in *Moskal v. United States*,[126] Justice Scalia used dictionaries but not in the same manner he used them in *Johnson*; he used them to support the argument that the specialized legal meaning was the correct statutory interpretation. He argued that the "layman's understanding" should not be the governing criterion for determining the meaning of a term.[127] Quoting Justice Jackson, Justice Scalia further argued that when a statute uses a term that has a specialized meaning relevant to the statutory construction before the Court, it is that meaning that prevails:

> Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.[128]

Nevertheless, Justice Scalia cites to Black's in *Johnson*.[129] Yet, this does not aid his argument. Black's "defines 'force' as 'power, violence,

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123. *Id.*

124. *Id.* at 918 (Scalia, J., dissenting).

125. *Id.* at 927 (citations omitted):

> This novel approach completely ignores the well-established meaning of "adequate remedy," which refers to the adequacy of a remedy for a particular plaintiff in a particular case rather than the adequacy of a remedy for the average plaintiff in the average case of the sort at issue. Although the Court emphasizes that the phrase "money damages" should be interpreted according to the "ordinary understanding of the term as used in the common law for centuries," it appears to forget that prescription when it turns to the equally ancient phrase "adequate remedy." Evidently, whether to invoke "ordinary understanding" rather than novel meaning depends on the task at hand.

126. 498 U.S. 103 (1990).

127. *Id.* at 121 (Scalia, J., dissenting) ("Even on the basis of a layman's understanding, therefore, I think today's opinion in error. But in declaring that understanding to be the governing criterion, rather than the specialized legal meaning that the term 'falsely made' has long possessed, the Court makes a mistake of greater consequence.").

128. *Id.* (quoting Morissette v. United States, 342 U.S. 246 (1952)).

129. Johnson v. United States, 130 S. Ct. 1265, 1270 (2010) (citing BLACK'S LAW DICTIONARY 717 (9th ed. 2009)).

or pressure directed against a person or thing.' And it defines 'physical force' as 'force consisting in a physical act, esp. a violent act directed against a robbery victim.'"[130] While Black's says that force can mean a violent act, there are many other ways the word can be used.

Furthermore, Black's definition for physical force supports the Eleventh Circuit's decision because, while the definition does say that an example of physical force is a violent act directed against a robbery victim, it does not define *all* physical force as violent. In fact, its general definition is merely "force consisting in a physical act," which clearly encompasses battery by touching.

Exclusive of the ability to select from among various dictionary definitions, a major flaw in the Supreme Court's use of dictionaries in opinions is the lack of a relationship to statutory meaning. Using a dictionary definition to interpret statutes results in a decision that is ignorant of the context in which the words are used.

In *Smith v. United States*,[131] Justice Scalia criticized the majority for relying on the dictionary to interpret the word "use." He stated that it is a "fundamental principal of statutory construction (and, indeed, of language itself) that the [dictionary defined] meaning of a word cannot be determined in isolation" because there are many ways in which a word can be used.[132] Thus, while using a dictionary may aid in statutory interpretation, it should not be the final step; the best way to know the true meaning of the statute is to look at the legislative history.

3. The Importance of the Legislative History

"Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history."[133] A sample study found that Justice Scalia interprets statutes in light of statutory purpose in approximately 72% of cases, but he only cites to legislative history less than 9% of the time and this is sometimes only to refute the majority's interpretation of the history.[134] Unfortunately, the Court did not consider legislative history in *Johnson*, even though the Court has reviewed legislative history in cases interpreting the residual clause of the ACCA.[135] If the legislative history had been considered, the decision

130. *Id.*

131. 508 U.S 223, 241 (Scalia, J., dissenting).

132. *Id.* at 241–42.

133. Connecticut National Bank v. Germain, 503 U.S. 249, 255 (1992) (Stevens, J., concurring).

134. Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 Miss. L.J. 129, 170–71 (2008).

135. *See, e.g.*, Begay v. United States, 553 U.S. 137 (2008); Taylor v. United States, 495 U.S. 575 (1990).

might have turned out differently.

The legislative history of the ACCA supports Justice Alito's dissenting argument that "it is apparent that the ACCA uses 'violent felony' as a term of art with a broader meaning than the phrase may convey in ordinary usage."[136] When Senator Specter introduced the CCLSA (the predecessor to the ACCA) to the Senate, he referred to robberies and burglaries as the "most vicious forms of street crime in this country."[137] However, neither crime necessarily fits the *Johnson* majority's definition of violent crime because, while violence may be involved, neither robbery nor burglary *requires* violent force as an element. In fact, the congressional record discusses that physical injury during robberies occurs only about 30 percent of the time.[138]

Moreover, when Senator Specter introduced the 1986 amendment, it was originally intended to include a conviction for a "crime of violence or a serious drug offense."[139] A crime of violence was defined 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*"[140] or "any other offense that is a felony and 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."[141]

Although the wording of the amendment was changed, the transition from only punishing crimes of robbery and burglary to the introduction of an amendment that includes damage to property shows Congress intended for "physical force" to encompass crimes that do not necessarily pose a risk of potential injury.

More convincingly, the legislative history suggests that Congress's aim was to include as many criminals as possible under the ACCA for three reasons. First, Congress wanted to address the backlog in the courts due to repeat offenders.[142] Second, the threat of a harsh sentence to a wide range of criminals would act as a deterrent.[143] Finally, applying the ACCA to all habitual offenders could be used as leverage for testimony or assistance to the United States attorneys to convict the worst of the habitual offenders.[144]

The original introduction of the ACCA to Congress included a dis-

136. Johnson v. United States, 130 S. Ct. 1265, 1275 (2010) (Alito, J., dissenting).
137. 127 CONG. REC. 22,669 (1981).
138. *Id.* at 22,670.
139. 132 CONG. REC. 7698 (1986).
140. *Id.* (emphasis added).
141. *Id.* (emphasis added).
142. 127 CONG. REC. 22,670 (1981).
143. 132 CONG. REC. 7697 (1986).
144. *Id.*

cussion about the burden that repeat offenders are on the criminal justice system.[145] As a result of the backlog, the jails holding defendants awaiting trial become severely overburdened, "resulting in more crimes by defendants on bail and decreasing the deterrent effect on others."[146] This results in "excessive plea bargaining and unduly short sentences,"[147] leaving the criminals to commit more crimes and further burden the justice system.

Moreover, in enacting the CCLSA, Congress found that "many repeat offenders cannot reasonably be rehabilitated and, unless incarcerated for life, will commit further felonies."[148] Essentially, Congress was concerned with getting habitual offenders off of the streets permanently.

Senator Specter introduced the 1986 amendment because "the time [had] come to broaden that [career criminal] definition so that we may have a greater sweep and more effective use of this important statute."[149] Additionally, he stated that the original act had worked exactly as planned and should be expanded.[150]

> Local prosecutors use the law in two ways. First, district attorneys refer these toughest criminals to the U.S. attorney for prosecution in Federal courts, which can provide more swift and certain trial and sentencing. Second, district attorneys use the mere prospect of such referral and the extremely stiff penalties to get a favorable guilty plea at a local level. I believe that this "leveraging" effect is one of the most important aspects of the statute.[151]

Congress believed that this leveraging effect could be used more effectively if it was expanded to include more crimes. Therefore, since getting criminals off of the streets and assisting the U.S. attorneys in doing so are the two main ideas behind the ACCA, it makes sense that a broad reading of the statute, to include as many criminals as possible, is appropriate.

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145. 127 CONG. REC. 22,670 (1981):

> [I]n some large urban jurisdictions, the criminal justice systems are so severely overloaded as to be incapable of combating this epidemic of armed robberies and burglaries by career criminals . . . . Where the justice system is overwhelmed by the volume of crime and cases, the results are disastrous. For example, in New York City, there were 539,000 felony complaints in 1979. Arrests were made in only 105,000 cases, 1 in 5. Of those arrested only 16,000 — less than 1 in 5 — were indicted and 12,000 were convicted. Thus, only 1 in 10 arrests resulted in a finding of guilt. Of 12,000 convicted, only 4,000 were sentenced to imprisonment. That is only about 4 percent of those arrested.

146. *Id.*

147. *Id.*

148. *Id.* at 22,671.

149. 132 CONG. REC. 7697 (1986).

150. *Id.*

151. *Id.*

4. More Canons of Statutory Interpretation

It is well established that if "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."[152] The residual clause, which follows the physical force clause, includes any crimes that present a "serious potential risk of physical injury to another."[153] In dissent, Justice Alito correctly recognized that because Congress did not include the same limiting phrase in the physical force clause, the Court should presume that Congress did not intend for any limitation to apply to the term "physical force."[154]

Moreover, courts should not construe different terms within the same statute to embody the same meaning,[155] and a court must, if possible, give effect to every clause and word of a statute.[156] The majority held that in the context of the ACCA, physical force means violent force—"force capable of causing physical pain or injury to another person."[157] Based on the majority's interpretation of the meaning of "physical force," the clause would be unnecessary because the physical force clause would have the same meaning as the residual clause—conduct that poses a serious potential risk of physical injury to another.

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the court, absent a clearly expressed congressional intention to the contrary, to regard each as effective.[158] Therefore, since the majority's interpretation assumes the intent from a non-existent limiting phrase which renders the physical force clause ineffective, the Court's decision was erroneous.

C. *Critics and the Rule of Lenity Issue*

Critics of a broad reading of the ACCA will argue that the rule of lenity prevents such a reading. However, the Supreme Court has stated that its "unwillingness to soften the import of Congress' chosen words even if [it] believe[s] the words lead to a harsh outcome is longstanding. It results from 'deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a

152. Russello v. United States, 464 U.S. 16, 23 (1983).
153. 18 U.S.C. § 924(e)(2)(B)(ii) (2006).
154. *See* Johnson v. United States, 130 S. Ct. 1265, 1275 (2010) (Alito, J., dissenting).
155. *See Russello*, 464 U.S. at 23.
156. *See* Negonsott v. Samuels, 507 U.S. 99 (1993).
157. *Johnson*, 130 S. Ct. at 1267.
158. *See* Andrus v. Glover Constr. Co., 446 U.S. 608 (1980).

bill.'"[159]

Moreover, the rule of lenity cannot be invoked in this case because "that venerable rule is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute."[160] "The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable."[161] Since the Court did not review everything available to it in an effort to determine the statutory meaning, and since reviewing the legislative history would have made the statute's meaning clear, critics cannot argue that the rule of lenity is required to resolve an ambiguity.

D. *The Future of the ACCA—Senator Specter's Final Attempt*

During finalization of this case note, and in response to the Court's decision, Senator Specter proposed an amendment to the ACCA on December 17, 2010 because,

> [d]espite the best efforts of Federal prosecutors to enforce section 924(e) for the safety of the community, there have been numerous instances in which armed career criminals have not been sentenced consistent with congressional intent due to the precedent that has significantly narrowed the applicability of section 924(e) and prevented judges from exercising their historic discretion and judgment.[162]

The text of section 924(e)(2) was to be amended to completely remove the term "violent felony" from the ACCA.[163] Additionally, the physical force clause was to be amended to include "the use, attempted use, or threatened use of physical force, *however slight*, against the person of another individual."[164] The amendment also proposed a separation of the "burglary, arson, or extortion" clause and the "serious potential risk of injury" clause.[165]

Based on these proposals, it is clear that the Supreme Court's decision in *Johnson* went against Congress's intent. The proposed qualifying phrase "however slight" to the physical force clause includes battery by touching. Following the discussion above, these proposed amendments should not come as a shock; however there are a few concerns with the wording of the proposed amendment.

First, the bill included a proposal to eliminate the categorical approach:

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159. United States v. Locke, 471 U.S. 84 (1985).
160. Smith v. United States, 508 U.S. 223, 239 (1993) (internal quotation marks omitted).
161. *Id.*
162. Armed Career Criminal Sentencing Act of 2010, S. 4045, 111th Cong. § 2 (2010).
163. *Id.* at § 3.
164. *Id.* (emphasis added).
165. *Id.*

> In determining whether a person shall be sentenced to imprisonment for the mandatory minimum term of years under [the Act], the court – (I) is not limited to the elements of the statute of conviction and shall consider the facts of the previous conviction as presented in the judicial records of the previous conviction, the presentence report, or any other reliable evidence presented to the court; and (II) shall determine whether the person has such previous convictions by a preponderance of the evidence.[166]

The problem with completely eliminating the categorical approach is that is raises Sixth Amendment concerns. While the modified categorical approach restricts courts to review facts only in an effort to determine an issue of law, unfettered discretion of the courts to review facts of previous convictions and make a determination "by a preponderance of the evidence" may violate a defendant's right to trial by jury. This was the concern of the Supreme Court in *Apprendi v. New Jersey*.[167]

In *Apprendi,* the Court struck down a state mandatory sentence enhancement scheme and stated that, "when a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'"[168] Therefore, if Senator Specter's 2010 bill had passed, it is likely that the court system would be flooded with cases involving Sixth Amendment issues.

In addition to the Sixth Amendment concerns, it is impractical to require a court to review the trial documents for every offense, especially when the wording of the statute of conviction is clear. This would violate principles of judicial economy and would often be futile since the records often fail to provide a complete picture. A more practical and sound approach for Congress would be to remain silent on this particular issue. The Supreme Court has already laid out the modified categorical approach for when the elements of a state statute are disjunctive and this is how it should remain.

The Armed Career Criminal Sentencing Act of 2010 was introduced late in the 111th Congress and died in committee.[169] Senator Specter, the driving force behind this bill, and the many before it, recently lost his seat after 30 years in Congress.[170] Therefore, it is unclear whether this bill will be reintroduced in the 112th Congress. The

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166. *Id.* at § 4.

167. 530 U.S. 466 (2000).

168. *Id.* at 495.

169. Armed Career Criminal Sentencing Act of 2010, S. 4045, 111th Cong. § 2 (2010), http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s4045:.

170. Huma Khan et al., *Longtime Senator Arlen Specter Loses Bid for Sixth Term to Congressman Joe Sestak*, ABC NEWS, May 18, 2010, http://abcnews.go.com/Politics/2010_Elections/arlen-specter-defeated-joe-sestak-pennsylavnia-senate-seat/story?id=10679176.

amendments to subparagraph (B) of the ACCA, proposed by Senator Specter, are necessary to fix the damage caused by the *Johnson* decision.

VI. CONCLUSION

It is not uncommon for Congress to draft a statute that is open to interpretation. In such situations, many readers of the statute will likely come to different conclusions about what the statute actually means. This is why sometimes, in an absence of clear congressional intent, it is necessary for the Supreme Court to interpret the meaning of the statute to create precedent for the lower courts.

However, the justices are not immune from reading different meanings into an ambiguous statute. Therefore, standard canons of statutory interpretation are imperative to the creation of consistent precedent. When these canons of interpretation do not sufficiently clarify the meaning, it is important to look at the legislative history to determine congressional intent.

Justice Scalia's opinion in *Johnson* was not only inconsistent with standard canons of statutory interpretation; he also failed to use tools to determine congressional intent. If he had considered all of the materials available, rather than merely considering the dictionary, Johnson's 2003 conviction would have been considered a violent felony.

It is clear from the legislative history that the Eleventh Circuit was correct in its interpretation of the Armed Career Criminal Act and use of the *de minimis* test. However, since the Supreme Court reversed, Congress needs to amend the ACCA to make the intent more clear and to counteract the narrowing effects the Court has created.