UNITED STATES OF AMERICA, Plaintiff-Appellee/Cross-Appellant, v. BRYANT LOVE, Defendant-Appellant/Cross-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
7 F.4th 674; 2021 U.S. App. LEXIS 23401
Nos. 20-2131 & 20-2297
August 6, 2021, Decided
February 24, 2021, Argued

Editorial Information: Subsequent History

Rehearing denied by, En banc, Rehearing denied by **United States v. Love**, 2021 U.S. App. LEXIS 29853 (7th Cir. Ind., Oct. 4, 2021).

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}Appeals from the United States District Court for the Northern District of Indiana, Hammond Division. No. 2:17CR2-001 - Philip P. Simon, Judge.United States v. Love, 2017 U.S. Dist. LEXIS 163402, 2017 WL 4385444 (N.D. Ind., Oct. 3, 2017)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee (20-2297): David E. Hollar, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Hammond, IN.
For BRYANT LOVE, Defendant - Appellant (20-2297): Russell W. Brown, Jr., Attorney, KING, BROWN & MURDAUGH, LLC, Merrillville, IN.
For UNITED STATES OF AMERICA, Plaintiff - Appellant (20-2131): Jennifer Chang, Attorney, David E. Hollar, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Hammond, IN.
For BRYANT LOVE, Defendant - Appellee (20-2131): Russell W. Brown, Jr., Attorney, KING, BROWN & MURDAUGH, LLC, Merrillville, IN.

Judges: Before FLAUM, MANION, and KANNE, Circuit Judges.

CASE SUMMARY Indiana law required prosecutor to prove defendant touched police officer in rude, insolent, or angry manner and to prove it resulted in bodily injury. If touching resulted in bodily injury, it was capable of causing bodily injury. Defendant's 2015 conviction for Indiana Class D battery resulting in bodily injury was ACCA predicate.

OVERVIEW: HOLDINGS: [1]-It was self-evident in the strict sense that physical force which resulted in bodily injury was capable of causing bodily injury, and there was no reason why Indiana's definition of "bodily injury" for these purposes was lower than the low threshold for the ACCA's "physical force" as interpreted by Curtis Johnson and Stokeling; [2]-Indiana battery resulting in "bodily injury" was enough to satisfy the ACCA.

OUTCOME: Judgment reversed and remanded.

LexisNexis Headnotes

Criminal Law & Procedure > Sentencing > Ranges
Criminal Law & Procedure > Sentencing > Imposition > Factors

APPENDIX A. 09049027

Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies
Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Penalties

A violation of 18 U.S.C.S. § 922(g)(1) causes a default sentencing range of 0 to 10 years. 18 U.S.C.S. § 924(a)(2). But the ACCA increases the penalty to a 15-year mandatory minimum if the defendant had three previous convictions for violent felonies or serious drug offenses, 18 U.S.C.S. § 924(e)(1).

Civil Rights Law > Prisoner Rights > Restoration of Rights
Criminal Law & Procedure > Postconviction Proceedings > Clemency
Criminal Law & Procedure > Postconviction Proceedings > Expungement

18 U.S.C.S. § 921(a)(20) says that if a defendant received restoration of his civil rights following a prior conviction, and that restoration does not expressly say he may not possess firearms, then that prior conviction does not count as an ACCA predicate: Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. This anti-mousetrapping provision applies if the state sent defendant a document stating that his principal civil rights have been restored, while neglecting to mention the continuing firearms disability.

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
Evidence > Procedural Considerations > Burdens of Proof > Allocation

Defendant had the burden to prove by a preponderance of the evidence that his rights were restored. Although the appellate court reviews application of the ACCA de novo, it reviews underlying factual findings for clear error.

Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies

As the question of whether a prior offense was a violent felony under the ACCA is a question of law, the appellate court reviews de novo.

The ACCA's elements clause in part defines "violent felony" to be any crime punishable by imprisonment for more than 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).

Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies

The appellate court generally employ the categorical approach to determine whether a prior felony satisfies the ACCA's elements clause. That is, we consider whether the elements of the prior felony required the prosecution to prove defendant used, attempted to use, or threatened to use physical force against the person of another. When a statute sets out alternative elements rather than alternative means or facts to satisfy a single element, the statute is divisible and the appellate court applies the modified categorical approach. The appellate court glances at limited documents in the prior case to determine which alternative element formed the basis of the conviction.

Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies

Under either approach, the appellate court does not consider the factual details about what defendant

actually did to deserve the prior conviction. After all, the ACCA's elements clause defines "violent felony" in terms of elements, not in terms of actual factual details. So the appellate court does not consider what defendant actually did. Instead, it considers the minimum elements a prosecutor had to prove to support a conviction under the State's criminal statute.

Governments > Legislation > Effect & Operation > Operability

We consider the version of the State's criminal statute in effect at the time of the offense.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Aggravated Offenses > Elements

Under Ind. Code § 35-4-2-1(a)(2)(A): (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is: 2) a Class D felony if it results in bodily injury to:(A) a law enforcement officer or a person summoned and directed by a law enforcement officer while the officer is engaged in the execution of the officer's official duty. Indiana (then and now) defined "bodily injury" as "any impairment of physical condition, including physical pain, Ind. Code 35-31.5-2-29.

Governments > Legislation > Interpretation
Civil Procedure > Federal & State Interrelationships

The meaning of physical force in 18 U.S.C.S. § 924(e)(2)(B)(i) is a question of federal law. But the appellate court is bound by Indiana's determination of the elements of its criminal statute.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Armed Robbery > Elements

It is true that a statute that allows conviction for a mere unwanted touch does not satisfy the ACCA's elements clause. But the type of force a statute of prior conviction must categorically require to satisfy the ACCA's elements clause is not much more severe than mere unwanted or offensive touching. In the Supreme Court concluded that the ACCA's elements clause covers robbery offenses that depend on the criminal overcoming the victim's resistance. This holds true even if the resistance is merely slight, weak, and feeble. The force required for common-law robbery (and for Florida robbery) is sufficient under the elements clause. Mere snatching of property from another without overcoming any resistance does not satisfy robbery statutes requiring force to overcome resistance.

Insurance Law > General Liability Insurance > Coverage > Bodily Injuries

It is self-evident in the strict sense that physical force which resulted in bodily injury was capable of causing bodily injury. (Force that actually causes injury necessarily was capable of causing that injury and thus satisfies the federal definition.).

Criminal Law & Procedure > Sentencing > Imposition > Factors

So, at law, the difference between ordinary crimes involving mere contact and violent crimes involving physical force is not a matter of quantity but of quality. Flores marked this line with reference to intent and likelihood: The way to avoid collapsing the distinction between violent and non-violent offenses is to insist that the force be violent in nature-the sort that is intended to cause bodily injury, or at a minimum likely to do so. While mere touching is not enough to show physical force, the threshold is not a high one;

a slap in the face will suffice.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Aggravated Offenses > Elements

Stokeling reaffirmed that physical force means force capable of causing physical pain or injury.

Opinion

Opinion by: MANION

Opinion

Manion, Circuit Judge. Bryant Love pleaded guilty to multiple drug counts and a felon-in-possession count. The government proposed three prior offenses to trigger the Armed Career Criminal Act's 15-year mandatory minimum sentence: 1) 1994 Illinois armed robbery; 2) 2009 federal distribution of crack cocaine; and 3) 2015 Indiana Class D battery resulting in bodily injury.

Love argued the ACCA should not apply for two reasons. First, he claimed**{2021 U.S. App. LEXIS 2}** he received a "restoration of rights" letter without an express reference to guns after he was released on the 1994 Illinois armed robbery conviction. Second, he argued his 2015 Indiana Class D battery-resulting-in-bodily-injury conviction was not a crime of violence under the ACCA.

The judge held the armed robbery conviction was an ACCA predicate but agreed with Love that the battery-resulting-in-bodily-injury conviction was not, as a categorical matter, a "violent felony," so Love did not have three ACCA predicates so he was not an armed career criminal. The judge sentenced Love to 96 months on each count, to be served concurrently. Love and the government both appeal.

Love argues the judge was wrong about the armed robbery conviction but right about the battery-resulting-in-bodily-injury conviction, and he argues the judge was wrong about two other sentencing issues. The government argues the exact opposite. We agree with the government and reverse and remand.

I. Background

Love sold crack to a confidential informant a few times. Officers searched his apartment and found crack in the kitchen. They also found two guns and ammunition in a hutch in an adjoining room. About 15 feet separated**{2021 U.S. App. LEXIS 3}** the drugs from the guns. Love pleaded guilty to three drug counts and one felon-in-possession count (18 U.S.C. § 922(g)(1)).

A violation of 18 U.S.C. § 922(g)(1) causes a default sentencing range of 0 to 10 years. 18 U.S.C. § 924(a)(2). But the ACCA increases the penalty to a 15-year mandatory minimum if the defendant had three previous convictions for violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1).

The government proposed three ACCA predicates: 1) 1994 Illinois armed robbery; 2) 2009 federal distribution of crack cocaine; and 3) 2015 Indiana Class D battery resulting in bodily injury. Both parties agree that the 2009 federal drug conviction satisfies the ACCA. The judge held the armed robbery conviction satisfies the ACCA but the battery-resulting-in-bodily-injury conviction does not. So Love was not considered an armed career criminal and the judge did not apply the mandatory

minimum.

The judge found Love possessed a loaded firearm "in connection with" drug trafficking. So the judge applied USSG § 2K2.1(b)(6)(B)'s four-level enhancement. This produced a guidelines range of 57 to 71 months. The judge also considered Love's eight pending charges-some "very distressing"-as 18 U.S.C. § 3553(a) sentencing factors. The judge noted Love's "shocking drum beat of criminal behavior."

The judge sentenced**{2021 U.S. App. LEXIS 4}** Love to 96 months on each count, concurrent. Both parties appeal. Love argues the judge was wrong about the armed robbery conviction. He claims he was "mousetrapped" after that conviction, so it cannot count as an ACCA predicate. Love also argues the judge erred in holding that he possessed a firearm "in connection with" drug trafficking and erred in considering the facts underlying the eight pending charges. The government argues the judge was wrong about the battery-resulting-in-bodily-injury conviction.

II. Mousetrapping?

Love argues that his 1994 Illinois armed robbery conviction does not count as an ACCA predicate. On appeal, his only argument regarding this prior conviction is that the district judge made an erroneous finding of fact.

Section 921(a)(20) says that if a defendant received restoration of his civil rights following a prior conviction, and that restoration does not expressly say he may not possess firearms, then that prior conviction does not count as an ACCA predicate: "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement,**{2021 U.S. App. LEXIS 5}** or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20). This "anti-mousetrapping provision" applies if "the state sent [defendant] a document stating that his principal civil rights have been restored, while neglecting to mention the continuing firearms disability ... ." *Buchmeier v. United States*, 581 F.3d 561, 566-67 (7th Cir. 2009).

Love had the burden to prove by a preponderance of the evidence that his rights were restored. *United States v. Foster*, 652 F.3d 776, 793 (7th Cir. 2011). Love acknowledges that although we review application of the ACCA *de novo*, we review underlying factual findings for clear error. *Kirkland v. United States*, 687 F.3d 878, 882-83 (7th Cir. 2012).

The district judge presented a thorough review of the evidence. He considered the testimony of the Assistant Chief Record Officer for the Illinois Department of Corrections. The judge also considered a transcript offered by Love of the testimony of an Illinois DOC lawyer in a different case. The judge considered the lack of a stipulation about Love's receipt of any discharge letter. He considered the lack of testimony from Love himself about any notice he received regarding restoration of rights following the subject prior conviction. Love never presented any notice allegedly given to him. The judge also carefully considered**{2021 U.S. App. LEXIS 6}** and rejected Love's invocation of the "presumption of regularity" doctrine. The judge determined that the most persuasive proof came from the Record Officer, who said it was *not* the practice of the institution that discharged Love to provide restoration-of-rights letters, and who said no such letter was found in Love's DOC file. So the judge concluded Love had not demonstrated that he received a notice about the restoration of his civil rights that failed to mention a continuing firearms limitation.

On appeal, Love invites us to re-weigh the evidence. But our review of the facts is limited to clear error, and we do not see any here. So Love's 1994 Illinois armed robbery conviction counts as an ACCA predicate.

III. 2015 Indiana Class D battery resulting in bodily injury

Relying on our decision in *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), and the Supreme Court's decision in *Curtis Johnson v. United States*, 559 U.S. 133, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010), the district court determined that Love's conviction under the version of Indiana Code 35-42-2-1(a)(2)(A) applicable in 2013 did not satisfy the ACCA's elements clause. The government appeals. As the question of whether a prior offense was a violent felony under the ACCA is a question of law, we review *de novo. United States v. Lockett*, 782 F.3d 349, 352 (7th Cir. 2015).

After the Supreme Court struck down the ACCA's residual clause as unconstitutionally**{2021 U.S. App. LEXIS 7}** vague in *Samuel Johnson v. United States*, 576 U.S. 591, 606, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), the only way Love's 2015 conviction for Indiana Class D battery resulting in bodily injury qualifies as an ACCA predicate is if it satisfies the ACCA's elements clause, which in relevant part defines "violent felony" to be any crime punishable by imprisonment for more than 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).

We generally employ the categorical approach to determine whether a prior felony satisfies the ACCA's elements clause. *Mathis v. United States*, 136 S. Ct. 2243, 2247, 195 L. Ed. 2d 604 (2016); *Descamps v. United States*, 570 U.S. 254, 260-61, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). That is, "we consider whether the elements of the prior felony required the prosecution to prove defendant used, attempted to use, or threatened to use physical force against the person of another." *Portee v. United States*, 941 F.3d 263, 266 (7th Cir. 2019). When a statute sets out alternative elements rather than alternative means or facts to satisfy a single element, the statute is divisible and we apply the modified categorical approach. *United States v. Ker Yang*, 799 F.3d 750, 753 (7th Cir. 2015). We glance at limited documents in the prior case to determine which alternative element formed the basis of the conviction. *Id.; Shepard v. United States*, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005).

Under either approach, we do not consider the factual details about what defendant actually did to deserve the prior conviction. After all, the**{2021 U.S. App. LEXIS 8}** ACCA's elements clause defines "violent felony" in terms of *elements*, not in terms of actual factual details. So we do not consider what defendant actually did. Instead, we consider the minimum elements a prosecutor had to prove to support a conviction under the State's criminal statute. We consider the version of the State's criminal statute in effect at the time of the offense. *See United States v. Bennett*, 863 F.3d 679, 680 (7th Cir. 2017).

Here, the parties agree Love was convicted of a Class D felony under Indiana Code 35-42-2-1(a)(2)(A). The offense occurred in 2013, when that statute said:

> (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
>
> .....
>
> (2) a Class D felony if it results in bodily injury to:
>
> (A) a law enforcement officer or a person summoned and directed by a law enforcement officer while the officer is engaged in the execution of the officer's official duty ... .Ind. Code 35-42-2-1(a)(2)(A).

Indiana (then and now) defined "bodily injury" as "any impairment of physical condition, including physical pain." Ind. Code 35-31.5-2-29.

The meaning of "physical force" in § 924(e)(2)(B)(i) is a question of federal law. *Curtis Johnson*, 559 U.S. at 138. But we are bound by Indiana's determination of the elements of its criminal statute. *Id.*

Love's basic**{2021 U.S. App. LEXIS 9}** argument is that Indiana's touching element here can be accomplished by a mere unwanted touch. It is true that a statute that allows conviction for a mere unwanted touch does not satisfy the ACCA's elements clause. In *Curtis Johnson*, the Supreme Court rejected the contention that "physical force" in the ACCA incorporated the common-law view that "force" is satisfied by even the slightest offensive touching. *Curtis Johnson*, 559 U.S. at 139-40. Instead, the Court held that "physical force" in the ACCA's elements clause means "*violent* force": "We think it clear 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." *Id.* at 140.

But the type of force a statute of prior conviction must categorically require to satisfy the ACCA's elements clause is not much more severe than mere unwanted or offensive touching. In *Stokeling v. United States*, 139 S. Ct. 544, 555, 202 L. Ed. 2d 512 (2019), the Supreme Court concluded that the ACCA's elements clause covers robbery offenses that depend on the criminal overcoming the victim's resistance. This holds true even if the resistance is merely slight, weak, and feeble. *Id.* at 553. The force required for common-law robbery (and for Florida robbery)**{2021 U.S. App. LEXIS 10}** is sufficient under the elements clause. *Id.* at 551. Mere snatching of property from another without overcoming any resistance does not satisfy robbery statutes requiring force to overcome resistance. But grabbing a victim's fingers and peeling them back to steal money constitutes robbery under such a statute. And that minor level of force also satisfies the ACCA's elements clause.

The *Stokeling* Court embraced Justice Scalia's *Castleman* concurrence, which observed that the "'hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling'" relied on by the *Castleman* majority as satisfying *Curtis Johnson*'s definition of "physical force" in the elements clause do not bear "'any real resemblance to mere offensive touching, and all of them are capable of causing physical pain or injury.'" *Stokeling*, 139 S. Ct. at 554 (quoting *United States v. Castleman*, 572 U.S. 157, 182, 134 S. Ct. 1405, 188 L. Ed. 2d 426 (2014) (Scalia, J., concurring)).

We summarized *Curtis Johnson* and *Stokeling* as requiring "more than the simple offensive touching that the common law would have called for, but the requirement to show 'force sufficient to overcome a victim's resistance' is not a demanding one." *Klikno v. United States*, 928 F.3d 539, 547 (7th Cir. 2019) (internal citation omitted).

The problem with Love's argument that Indiana's touching element here can be accomplished by a**{2021 U.S. App. LEXIS 11}** mere unwanted touch is that it fails to account for the element of "bodily injury" required for his crime of prior conviction. Class B misdemeanor battery only required "knowingly or intentionally" touching "another person in a rude, insolent, or angry manner." Ind. Code 35-42-2-1(a). But that was not Love's crime. Love's crime was Class D felony battery, which by the terms of its elements had to result in "bodily injury." Ind. Code 35-42-2-1(a)(2)(A). It is self-evident in the strict sense that physical force which *resulted* in bodily injury was *capable* of causing bodily injury. *Douglas v. United States*, 858 F.3d 1069, 1071 (7th Cir. 2017) ("[F]orce that *actually* causes injury necessarily was capable of causing that injury and thus satisfies the federal definition."). We see no reason why Indiana's definition of "bodily injury" for these purposes is lower than the low threshold for the ACCA's "physical force" as interpreted by *Curtis Johnson* and *Stokeling*. True, Indiana had a heightened level of battery-Class C felony-for rude, insolent, or angry touching resulting in "serious bodily injury," which Indiana defines in dramatic terms. Ind. Code 35-42-2-1(a)(3). But this does nothing to undermine the conclusion that Indiana battery resulting in "bodily injury" is enough to satisfy the ACCA.

Both the district judge and{**2021 U.S. App. LEXIS 12**} Love rely on *Flores*.

Flores demonstrates that "physical force" in 18 U.S.C. § 16 (comparable to 18 U.S.C. § 924(e)(2)(B)(i)) is not a simple matter of Newtonian physics.

Newton's second law measures force as equal to mass times acceleration (F = m a). A "dyne" is the amount of force needed to accelerate one free gram by one centimeter per second per second. A "newton" is 100,000 dynes, "and a good punch packs a passel of newtons." *Flores*, 350 F.3d at 672.

But *Flores* and *Curtis Johnson* teach that "physical force" in these recidivist laws is not the same as physical force in Newton's laws. Otherwise, every crime involving a fraction of a dyne as an element would involve "physical force" and would be a "violent crime." This would "make hash of the effort to distinguish ordinary crimes from violent ones." *Id.* So, at law, the difference between ordinary crimes involving mere contact and "violent crimes" involving "physical force" is not a matter of quantity but of quality. *Id.*

Flores marked this line with reference to intent and likelihood: The way to avoid collapsing the distinction between violent and non-violent offenses "is to insist that the force be violent in nature-the sort that is intended to cause bodily injury, or at a minimum likely to do so."**{2021 U.S. App. LEXIS 13}** *Id.*

Curtis Johnson cited *Flores* favorably and adhered to the logic of its distinctions. But *Curtis Johnson*, in a manner of speaking, lowered the bar: "We think it clear 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." *Curtis Johnson*, 559 U.S. at 140.

As we have said: "While mere touching is not enough to show physical force, the threshold is not a high one; a slap in the face will suffice." *United States v. Duncan*, 833 F.3d 751, 754 (7th Cir. 2016).

Stokeling reaffirmed that "physical force means force capable of causing physical pain or injury." *Stokeling*, 139 S. Ct. at 553 (internal quotation marks omitted). Stokeling asked the Court to adopt a new, heightened understanding of "physical force" as meaning force that is "reasonably expected to cause pain or injury." *Id.* at 554. But the *Stokeling* Court followed the *Curtis Johnson* Court and rejected that interpretation: "*Johnson* ... does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality." *Id.* 1

Here, Indiana law required the prosecutor to prove Love touched a police officer**{2021 U.S. App. LEXIS 14}** in a rude, insolent, or angry manner and to prove that this resulted in bodily injury. If the touching *resulted* in bodily injury, then by definition the touching was *capable* of causing bodily injury. And that is enough for the ACCA. So Love's 2015 conviction for Indiana Class D battery resulting in bodily injury counts as an ACCA predicate.

IV. Conclusion

Love committed three ACCA-predicate offenses. Both parties agree that the 2009 federal drug conviction predicates the ACCA. The district judge committed no reversible error in determining the 1994 Illinois armed robbery conviction predicates the ACCA. But he erred in determining that the 2015 Indiana Class D battery-resulting-in-bodily-injury conviction does not predicate the ACCA. So Love must be re-sentenced under the ACCA.

Love raised two other sentencing issues. He argued the judge erred by departing upward from the guidelines based on other pending criminal charges and without giving specific, written reasons for the departure. He also argued the judge erred by imposing the four-level USSG § 2K2.1(b)(6)(B) enhancement even though the government failed to show Love used or possessed a firearm "in

connection with" another felony.

In response, the government{**2021 U.S. App. LEXIS 15**} argues that if we agree with it about the ACCA, then we need not reach these other two issues. The government also argues Love would lose on these two issues anyway.

Love made no reply to the argument that we need not address the other two issues if he must be resentenced under the ACCA. Even at oral arguments, the government reiterated its position that we need not reach these two issues if we agree with it on the ACCA, and still Love made no reply. So we decline to reach these two issues.

We reverse and remand for resentencing under the ACCA.

Footnotes

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See also Yates v. United States, 842 F.3d 1051, 1052 (7th Cir. 2016) ("*Curtis Johnson* stated that the sort of 'force' that comes within the elements clause is 'force capable of causing physical pain or injury to another person.'"); *Duncan*, 833 F.3d at 756 ("[N]either *Flores* nor *Curtis Johnson* holds that a crime involving actual or threatened infliction of only pain or minor injury cannot qualify as a violent felony. A fear of a slap in the face is sufficient under *Curtis Johnson.* The fact that § 35-42-5-1(2) requires a fear of only 'bodily injury' instead of 'moderate' or 'severe' bodily injury therefore does not exclude it from counting as a violent felony under the ACCA."); *Colon v. United States*, 899 F.3d 1236, 1239 (11th Cir. 2018) ("[A] felony battery conviction under the Indiana statute necessarily requires that the defendant use 'force capable of causing physical pain or injury.'"); *United States v. Vail-Bailon*, 868 F.3d 1293, 1301-02 (11th Cir. 2017) ("According to Vail-Bailon, because the Supreme Court included a pinpoint cite to page 672 of the *Flores* decision and because, among other things, the discussion on page 672 includes the articulation of a 'likelihood' test, then that means the Supreme Court was signaling to the reader that it had not actually adopted the 'capability' test it had just expressly announced, but instead it was incorporating a 'likelihood' test that it never bothers to mention. For several reasons, we are not persuaded.").

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 2:17CR2-PPS
	)	
BRYANT LOVE,	)	
	)	
Defendant.	)	

OPINION AND ORDER

Bryant Love has entered a plea of guilty to three counts of distribution of, or possession with intent to distribute, cocaine base, and one count of being a felon in possession of a firearm. [DE 107.] I held an initial sentencing hearing at which the parties presented evidence and argument on several objections to the presentence investigation report. [DE 122.] Afterward, the parties briefed two significant disputes. After delays associated with the COVID-19 pandemic, the final sentencing hearing occurred on June 15, 2020. This opinion sets out my analysis of the two principal objections to the PSR. Other issues were resolved on the record at the sentencing hearing.

The PSR determined that Love was subject to sentencing as an armed career criminal pursuant to 18 U.S.C. §924(e) and U.S.S.G. §4B1.4(b). [DE 115 at ¶24.] The enhancement is premised on Love having at least three prior convictions for a violent felony or serious drug offense, or both, which were committed on different occasions. The enhancement is significant. Section 924(e) would impose a minimum term of

APPENDIX B

imprisonment of 15 years and a corresponding increase in the offense level under the sentencing guidelines. The probation officer has flagged as qualifying priors a 2009 conviction for distribution of crack cocaine [DE 115 at ¶39], a 1994 conviction for armed robbery [*Id.* at ¶33], and a 2015 conviction for battery resulting in bodily injury [*Id.* at ¶41]. Love challenges the armed robbery and battery convictions as predicate offenses under the armed career criminal provision.

1994 Armed Robbery Conviction

Section 921(a)(20) provides that a prior conviction for which the defendant "has had civil rights restored" does not count as a predicate offense "unless such...restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." In *Buchmeier v. United States*, 581 F.3d 561, 566-67 (7th Cir. 2009) (en banc), the Seventh Circuit held that this "anti-mousetrapping provision" applies if "the state sent [the defendant] a document stating that his principal civil rights have been restored, while neglecting to mention the continuing firearms disability[.]" If the state restores some civil rights by operation of law "without sending the ex-prisoner a notice, then the final sentence of §921(a)(20) does not require a firearms reservation; there is no document in which the reservation would be included, no risk that the ex-prisoner will be misled into thinking that he is entitled to possess firearms." *Id.* at 567.

When a defendant invokes the §921(a)(20) escape hatch, he bears the burden of proving, by a preponderance of the evidence, that his rights have been restored. *United States v. Ross*, 565 Fed.Appx. 505, 511 (7th Cir. 2013); *United States v. Foster*, 652 F.3d 776,

793 (7th Cir. 2011); *Gant vs. United States*, 627 F.3d 677, 682 (7th Cir. 2010). In *Ross*, the sentencing court heard testimony from Edward Huntley, Special Litigation Counsel for the Illinois Department of Corrections, about the DOC's practices with restoration-of-rights notices, and Huntley "provided a sample of the discharge letter that the Department used in 1997," which contained restoration-of-rights language but did not warn of the continuing firearms disability. *Id.* at 508. Because the parties stipulated that Ross believed the letter he actually received pertaining to his prior convictions in a particular year "was like the sample letter," the Circuit held that those convictions "could not be used as predicate offenses." *Id.* at 508, 511.

By constrast, in *Foster*, 652 F.3d at 793, the Seventh Circuit found that the defendant had not "muster[ed] sufficient evidence to prove that Illinois restored his civil rights." Foster had only a "vague recollection that he received a letter restoring his civil rights." *Id.* Unable to submit the letter itself, Foster relied on evidence that he voted and served on a jury after his release, but Illinois automatically restores the right to vote after a sentence expires, and does not suspend a felon's right to serve on a jury, so those facts were not sufficient to meet Foster's burden. In *Gant*, 627 F.3d at 682-83, the defendant had offered several versions of a restoration of rights letter and government witnesses concluded the letters were fake. This understandably damaged Gant's credibility about having received a letter, and the Circuit affirmed the district court's conclusion that Gant failed to establish receipt of a notice.

What is the evidence offered here? Kendy Elberson, the Assistant Chief Record Officer for the Illinois DOC, testified at the September 12 hearing that Love's record shows that he completed this sentence for armed robbery when he was discharged on June 29, 1999 from Graham Correctional Center, where he was placed for a parole violation. Elberson testified that GCC is not currently in the practice of sending out a restoration of rights letter, and that she had spoken with an individual who was a counselor at GCC from 1998 forward and indicated that historically GCC did not send such letters out. Elberson also offered the opinion that any written discharge letter would have been given to the inmate in person as he left the facility, rather than mailed, and that no such letter is reflected in Love's master file as was required by an applicable DOC directive.

Also at the September 12 hearing, Love offered a transcript of the January 2013 testimony in the *Ross* case by Edward Huntley, the DOC lawyer, who testified that, pursuant to both written policy and actual practice, the DOC has not kept copies of restoration of rights letters provided to discharging offenders since early 1992. Huntley identified a series of IL-DOC directives that, upon notification of discharge, made the Community Services Supervisor responsible for notifying a releasee of restoration of his rights. Huntley also identified three IL-DOC form notices on discharge from parole and offered testimony as to their dates of use. The form he identified as used between 1992 and 2004 contained some restoration of rights language, but omitted any notice of a continuing firearm disability.

Even without consideration of the fact that this witness was not subject to cross-examination by the government in our case, I don't find Huntley's testimony from *Ross* particularly helpful for Bryant Love. Huntley's testimony is only barely relevant to the question whether Bryan Love was provided with any of the three form notices when he was discharged from his 1994 sentence in June 1999. I note that the language of the directives Huntley testified about does not require notice of restoration of rights to be given in writing, or using any particular form. Finally, the directives defendant Ross relied on with witness Huntley governed Community Services. But Love did not complete his sentence while released into the community on supervision. Instead Love's sentence was completed by his release from a prison after a revocation. This supports skepticism that the IL-DOC directives Huntley identified had any application to Love's case.

Further, unlike *Ross*, here we don't have any stipulation as to Love's receipt of any discharge letter. Defense counsel reports that Love asserts that he received a restoration of rights letter in the mail at his home address. [DE 124 at 3, citing PSR objection DE 116 at 3.] But there has been no testimony from Bryant Love about any notice he received as to the restoration of rights upon his discharge from GCC in June 1999. In his related PSR objection, Love contends that "the letter he provided to probation is a duplicate of the letter he received." [DE 116 at 3.] I contacted PO Andrew Koelndorfer about this reference, and he has provided me with the documents he says Love submitted. They are copies of two of the sample notices used in *Ross*, one

marked "Pre-2004" and the other "2004 - 2009". These are discharge letters that lack any reference to firearms. But again, we have not heard any testimony from Love, only this indefinite non-testimonial assertion.

In Love's post-hearing memorandum, he argues that the "undisputed evidence" is that he was advised that his civil rights were restored when he was discharged from this sentence. [DE 124 at 3.] That strikes me as a bold statement, indeed. It is based solely on Huntley's testimony from *Ross*, which frankly doesn't connect all the dots to support a conclusion that a particular form would have been mailed to Love at home in the circumstances of his discharge in June 1999. Love also contends that if Ms. Elberson is right, and his discharge notice was given verbally, that the "only reasonable inference" is that it would have been consistent with the letter he thinks he's established as the norm at the time. [DE 124 at 4.] This strikes me as a speculative reach, and not enough to satisfy his burden of proof.

Finally, Love invokes the "presumption of regularity" doctrine in support of a finding that he would have received a notice that addressed restoration of rights (but not the continuing ban on firearms). [DE 124 at 4.] For this he cites *United States v. Zuniga*, 767 F.3d 712 (7th Cir. 2014), in which a similar argument was *rejected* by the Seventh Circuit because there was evidence that IL-DOC did not regularly engage in adherence to established procedures in providing such discharge notices. Because I don't think Mr. Huntley's 6-year-old testimony is sufficient to connect all the dots to

establish a procedure that would and should have provided a particular discharge notice to Love in June 1999, I don't think Love gets the benefit of the presumption.

In sum, Love has not met his burden with respect to his objection invoking the anti-mousetrapping provision of §921(a)(20). The most persuasive proof comes from witness Kendy Elberson, that it was not the practice of the institution Love was discharged from to provide restoration of rights letters, and no such letter is found in Love's DOC file. I would credit her much more specific testimony in this case over the general and somewhat inconclusive testimony of Edward Huntley offered in a different case some years ago. Because Love has not demonstrated that he received a notice about the restoration of his civil rights that failed to mention the continuing firearms disability, the objection is overruled.

2015 Indiana Felony Battery Conviction

Loves fares better on the second issue – whether his 2015 battery conviction meets the "elements" test for a "violent felony" for purposes of the Armed Career Criminal Act. The issue is whether the crime of battery under Indiana law has as an element "the use, attempted use, or threatened use of physical force against the person of another," within the meaning of §924(e)(2)(B)(i).

The parties agree that Love's conviction was under Indiana Code §34-42-2-1(a)(2)(A) which in 2013 prohibited "knowingly or intentionally touch[ing] another person in a rude, insolent, or angry manner" and which "results in bodily injury." Ordinarily, a conviction under this provision of the Indiana Code is a misdemeanor. *Id.*

But the offense is elevated to a low grade felony if the victim of the battery is a public safety official, like a police officer. [DE 124 at 6-7; DE 125 at 6-7.] Love's 2015 conviction under this provision of the Indiana Code was against a police officer.

Indiana law has clearly established that "bodily injury" includes any impairment of physical condition, including physical pain. *Bailey v. State*, 979 N.E.2d 133, 136 (Ind. 2012). Indiana has "created a very low threshold for 'bodily injury' while maintaining a much more rigorous standard for 'serious bodily injury.'" Id. at 137. Additionally, any contact, however slight, may constitute battery. *Jimpson v. State*, 721 N.E.2d 1275, 1285 (Ind. Ct. App. 2000) (knocking one's glasses off is a battery even if the touching is a trifle). Indeed, even touching another person's clothing can suffice. *Id.*, citing *Stokes v. State*, 115 N.E.2d 442, 443 (1953). By contrast, the Supreme Court has construed "physical force" for ACCA purposes to mean "force capable of causing physical pain or injury to another," requiring the potential to cause such injury, but not an expectation of causing pain or injury. *Stokeling v. United States*, 139 S.Ct. 544, 553-54 (2019); *Curtis Johnson v. United States*, 559 U.S. 133, 140.

The government contends that the answer to Love's objection is simple: the elements of felony battery include both a touching and resulting bodily injury, meeting the elements test under the ACCA requiring the use of physical force against another. [DE 125 at 7.] If that seems a bit too facile, that's because it is. Indeed, the Seventh Circuit has held to the contrary. *See Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003). *Flores* treats the Indiana battery statute as subject to categorical analysis: "Indiana's

battery statute, by contrast, separates into distinct subsections the different ways to commit the offense...Thus it is possible to focus on 'the elements' of that crime...without encountering any ambiguity, and thus without looking outside the statutory definition."[1] The *Flores* court concluded that a class A misdemeanor conviction under I.C. §35-42-2-1(a)(1)(A), including the same touching and bodily injury elements as Love's conviction (minus the law enforcement victim), "cannot properly be classified as a crime of violence." *Id.* at 672.

Flores' treatment of Indiana's bodily injury element is a bit scant, but finds the element insufficient under the ACCA because Indiana law's bar for this element is set so low that it doesn't require the degree of force that the ACCA "elements" clause contemplates. *Id.* at 669-70. The clincher is the Supreme Court's later decision in *Curtis Johnson*, 559 U.S. at 140, in which the Supreme Court actually cites *Flores* on this very point. In *Curtis Johnson*, the Supreme Court held that a Florida simple battery conviction did not satisfy §924(e)(1) because "even slight contact could support a conviction under the statute." *United States v. Duncan*, 833 F.3d 751, 753 (7th Cir. 2016), citing *Curtis Johnson*, 559 U.S. at 145. *Flores* and *Curtis Johnson* carry the day for Love here.

The government's attempt to distinguish *Flores* is unpersuasive. The government argues that the "key" to *Flores* is "the fact that the Indiana battery-with-bodily-injury

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[1] In *Flores*, the court analyzed 18 U.S.C. §16(a) , which mirrors the ACCA "elements" provision and is interpreted in the same way.

offense does not require intent to injure[.]" [DE 125 at 7-8.] I don't see that as the "key" to the pertinent *Flores* analysis. That observation is merely offered in *Flores* to distinguish Indiana's law from battery laws in other states that *have* been found to constitute crimes of violence.[2] In light of *Flores*, Love's battery conviction does not satisfy the "elements" clause of §924(e)(2)(B)(i) because the way Indiana construes the elements of touching and of bodily injury does not meet the *Curtis Johnson* standard of "physical force" within the meaning of the "elements" clause. I therefore sustain Love's objection to the 2015 battery conviction as a violent felony, and as a result find that Love is not an armed career criminal for purposes of §924(e)(2)(B)(i).

ACCORDINGLY:

Based on my rulings on his objections to the presentence investigation report, Bryant Love is not an armed career criminal subject to sentencing enhancements under 18 U.S.C. §924(e) and U.S.S.G. §4B1.4(b).

SO ORDERED.

ENTERED: June 22, 2020

/s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT

[2] The same assertion about the "key" to *Flores* is made in *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016), in a distinguishable context. There, the Circuit holds that an Indiana robbery conviction – requiring putting the victim in fear of bodily injury – qualified under the "elements" clause as an ACCA "violent felony." The significance of the "intent to injure" idea in *Duncan* is that "proof that the robber put the victim in fear" logically establishes "that the robber was prepared to use 'physical force' as defined by *Curtis Johnson*." *Duncan*, 833 F.3d at 756.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 4, 2021

Before

JOEL M. FLAUM, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

Nos. 20-2131 & 20-2297

UNITED STATES OF AMERICA, *Plaintiff-Appellee/Cross-Appellant,*	Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.
v.	No. 2:17-CR2-001
BRYANT LOVE, *Defendant-Appellant/Cross-Appellee*	Philip P. Simon, *Judge.*

ORDER

On consideration of the Petition for Rehearing and Petition for Rehearing En Banc filed in the above-entitled cause by Defendant-Appellant/Cross-Appellee on September 17, 2021, no judge of the court having called for a vote on the Petition for Rehearing En Banc and all the judges on the original panel having voted to deny the Petition for Rehearing,

IT IS HEREBY ORDERED that the Petition for Rehearing and Petition for Rehearing En Banc are DENIED.*

*Circuit Judges Thomas L. Kirsch II, and Candace R. Jackson-Akiwumi did not participate in the consideration of these petitions.

APPENDIX C