No. 21-___

IN THE

Supreme Court of the United States

RONALD MICKEL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

II. Whether due process is violated when the defendant is indicted for, and convicted of, an offense that carries a statutory range of zero to ten years, and at sentencing the government seeks to apply enhanced statutory penalties that impose a fifteen-year mandatory minimum sentence?

III. Whether Ohio's domestic violence statute, which criminalizes both physical and non-physical acts, is a violent felony under 18 U.S.C. § 924(e)?

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RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Ohio, and the United States Court of Appeals for the Sixth Circuit:

United States v. Mickel, No. 21-3561 (6th Cir. April 13, 2022).

United States v. Mickel, No. 1:20-CR-159 (N.D. Ohio, June 2, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronald Mickel respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The Sixth Circuit's opinion affirming his conviction and sentence is unpublished but available at 2022 WL 1100459 (6th Cir. April 13, 2022).

JURISDICTION

The court of appeals affirmed Mr. Mickel's conviction and sentence on April 13, 2022. Mr. Mickel received a 60-day extension from this Court on July 11, 2022 to file this petition. This petition is being timely filed since that affirmance. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

I. The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

II. The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

III. The relevant provision of 18 U.S.C. § 922 is as follows:

(g) It shall be unlawful for any person --

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

IV. The relevant provision of 18 U.S.C. § 924 is as follows:

(a)(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be

fined as provided in this title, imprisoned not more than 10 years, or both.

* * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive

device that would be punishable by imprisonment for such term if committed by an adult, that—

(i)has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

V. Ohio Revised Code § 2919.25(A) states: No person shall knowingly cause or attempt to cause physical harm to a family or household member.

VI. Ohio Revised Code § 2901.01(A)(3) states: "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

STATEMENT OF THE CASE

A. Introduction

Petitioner presents three significant questions regarding the application of the Armed Career Criminal Act.

First, this case presents a violation of the Sixth Amendment because during the Petitioner's trial, the government failed to present evidence of a necessary element that Petitioner violated the Armed Career Criminal Act. Relying entirely on this Court's holding

in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Sixth Circuit held there is "no requirement for the government to prove the existence of [Petitioner's] ACCA-qualifying convictions at trial, so the district court did not err when it considered them at sentencing." Pet. App. 5a. As prior convictions are elements of the Armed Career Criminal Act, this Court's holding in *Almendarez-Torres* should be revisited and overruled.

Second, this case presents a violation of due process, as the government failed to provide the defendant adequate notice that the enhanced penalties of the Armed Career Criminal Act would apply to his sentence. The Sixth Circuit held "the enhanced penalty provisions of the [Armed Career Criminal Act] are not elements of the offense, and the government does not need to 'specifically plead ACCA in its indictment.'" Pet. App. 3a. The Sixth Circuit's holding runs afoul of due process and fails to provide him adequate notice under the law.

When the indictment sets forth that a defendant is subject to a statutory penalty range of zero to ten years, and throughout all proceedings prior to, and during trial, the government claims the defendant is subject to that same statutory penalty range, can the government, at sentencing, then seek to impose the enhanced statutory penalties of the Armed Career Criminal Act?

Third, Petitioner was found to be an Armed Career Criminal as a result of his prior convictions under Ohio's domestic violence statute. The state statute criminalizes both physical and non-physical harms. As the statute criminalizes non-physical harms, it is categorically overbroad and does not

qualify as a violent felony under 18 U.S.C. § 924(e)(2)(B).

B. The charges, pretrial matters, and trial

On February 6, 2020, a complaint was filed alleging that Petitioner Ronald Mickel had illegally possessed ammunition, in violation of 18 U.S.C. § 922(g)(1). Pet. App. 6a. On February 12, 2020, he appeared for his initial appearance before the Magistrate Judge. At that hearing, the government identified the charges, stating "[t]he defendant is charged in a criminal complaint with one count in violation of Title 18 United States Code Section 922(g)(1), felon in possession of ammunition. The sentence is a maximum of ten years, $250,000 fine, three years supervision, and a $100 special assessment."

On March 4, 2020, an indictment was returned charging Mr. Mickel with illegally possessing ammunition; the indictment listed both 18 U.S.C. § 922(g)(1) and § 924(a)(2). Pet. App. 7a. At the arraignment on March 11, 2020, the Magistrate once again asked the government to identify the counts in the indictment and the maximum penalty for the offense. The government responded:

> The defendant is charged in a one-count indictment with being a felon in possession of ammunition, in violation of 18 United States Code 922(g)(1) and 924(a)(2). That offense carries with it a maximum term of imprisonment of ten years, a maximum statutory fine of $250,000, a maximum period of supervised release of three years, and a $100 special assessment fee.

Trial commenced on September 21, 2020. By stipulation, the parties agreed that Mr. Mickel had been previously convicted of a felony offense, and further that the ammunition in question had traveled in interstate commerce.

The government's first witness was Adult Parole Authority Officer Daniel Riley. Mr. Riley explained that in November of 2019, Ronald Mickel was being supervised by the Ohio Adult Parole Authority for a state conviction. On November 8, 2019, Mr. Mickel's ex-girlfriend, Jameesha Cobbs, called Officer Riley, reporting that Mr. Mickel was selling drugs out of the home and had a firearm in the house. On November 26, 2019, Officer Riley and another APA officer went to Mr. Mickel's home; officers detained Mr. Mickel and searched the house. During the search, the second officer, Jeff Jones, found 32 rounds of 9mm ammunition inside a suit jacket pocket in the living room closet.

Officer Riley returned to the living room to meet with Officer Jones; he claims he heard Mr. Mickel say, "That's not mine. I found that in the basement when I moved in and moved it up here so nobody would mess with it." No gun was found in the home, and there was no evidence of drug trafficking.

The defense theory presented to the jury was that Mr. Mickel's ex-girlfriend had planted the bullets in the house as a way to get back at Mr. Mickel for ending their relationship. She made the call to Mr. Mickel's APA officer, falsely claiming he had guns in the home and was selling drugs. To support this theory, the defense two witnesses – the landlord Raymond Campana and Lorain Police Officer Efrain Torres.

The jury returned a verdict of guilty to the indicted charge.

C. Sentencing Proceedings

Despite the fact that the indictment charged Mr. Mickel under 18 U.S.C. § 924(a)(2), which carries a statutory range of zero to ten years, the presentence report found Mr. Mickel qualified as an Armed Career Criminal, which carries a statutory range of fifteen years to life. The presentence report claimed Mr. Mickel had four ACCA-qualifying convictions, those all being Ohio domestic violence convictions, as set forth in Ohio Revised Code § 2919.25.

At sentencing, the defense challenged the application of the ACCA enhancement. First, because Mr. Mickel was charged with, and convicted of 18 U.S.C. § 924(a)(2), and not § 924(e), applying the ACCA would violate the due process clause for lack of proper notice. As the indictment charged Mr. Mickel specifically with violation of 18 U.S.C. § 924(a)(2), which delineates a statutory range of zero to ten years, a charge which Mr. Mickel was convicted of at trial, the government could not then seek a statutory sentencing enhancement under § 924(e)(2).

Second, as the government failed to prove at trial that Mr. Mickel had three qualifying convictions under the ACCA, applying the enhancement would violate his rights under the Sixth Amendment.

Third, Mr. Mickel claimed Ohio's domestic violence statute was categorically overbroad and could not qualify as a violent felony under 18 U.S.C. § 924(e). The Ohio statute contains the element "physical harm," yet the statute's legislative history sets forth the element can be met through either

physical or non-physical force. Because the statute can be committed through non-physical acts, it is categorically overbroad and does not categorically qualify as a violent felony.

The district court overruled Mr. Mickel's objections and found the ACCA applied, which imposed a statutory mandatory minimum sentence of 180 months. The district court sentenced Mr. Mickel to 188 months.

D. Proceedings on Appeal

On appeal to the Sixth Circuit, Mr. Mickel challenged his sentence under the Armed Career Criminal Act. The Sixth Circuit affirmed his conviction and sentence. Pet. App. 1a. The Sixth Circuit held "[n]o error resulted from the lack of pretrial notice about the possibility of the ACCA enhancement." Pet. App. 2a. The Court further stated, "Mickel was afforded all the process he was due" as he was permitted to challenge the application of the ACCA at his sentencing hearing. Pet. App. 2a. The Court concluded "the enhanced penalty provisions of ACCA are not elements of the offense, and the government does not need to 'specifically plead [ACCA] in its indictment.' In any event, the indictment's reference to only the general sentencing provision does not prevent the district court from applying ACCA's sentencing provision." Pet. App. 3a.

The Sixth Circuit also found no Sixth Amendment violation by the government failing to prove his predicate convictions beyond a reasonable doubt. The Court held "[t]here was no requirement for the government to prove the existence of Mickel's ACCA-qualifying convictions at trial, so the district

court did not err when it considered them at sentencing." Pet. App. 5a.

The panel further found that Mr. Mickel's domestic violence convictions qualified as violent felonies. The Court found it was bound by its holding in *United States v. Gatson*, 776 F.3d 405, 411 (6th Cir. 2015), and declined to revisit that holding. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

I. This Court should overrule *Almendarez-Torres*

"Any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 n. 10 (2000)). In *Almendarez-Torres*, this Court "recognized a narrow exception to this general rule for the fact of a prior conviction." *Alleyne*, 133 S. Ct. at 2160 n. 1. But subsequent decisions of this Court have cast *Almendarez-Torres* in serious doubt, and that decision now stands as an outlier in the Fifth and Sixth Amendment jurisprudence. *See Alleyne*, 133 S. Ct. at 2160 n. 1; *Apprendi*, 530 U.S. 490 (stressing that *Almendarez-Torres* represented "a narrow exception" to the prohibition on judicial fact-finding to increase a defendant's sentence); *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring); *id.* at 619 (O'Connor, J., dissenting) (recognizing the rules of *Apprendi* and *Almendarez-Torres* are in direct conflict); *Shepard v. United States*, 544 U.S. 13 (2005) (Souter, J., controlling plurality opinion) ("While the disputed fact here can be described as a fact about a

prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute."); *Dretke v. Haley*, 541 U.S. 386, 395-396 (2004) (concluding that the application of *Almendarez-Torres* to the sequence of a defendant's prior convictions represented a difficult constitutional question to be avoided if possible).

This Court has also repeatedly cited authorities as exemplary of the original meaning of the constitution that do not recognize a distinction between prior convictions and facts about the instant offense. *See Blakely v. Washington*, 542 U.S. 296, 301-302 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769),1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872)); *Apprendi*, 530 U.S. at 478-479 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862), 4 Blackstone 369-370)).

In *Alleyne*, this Court applied *Apprendi*'s rule to mandatory minimum sentences, holding that any fact that produces a higher sentencing range – not just a sentence above the mandatory maximum – must be proved to a jury beyond a reasonable doubt. 133 S. Ct. at 2162-63. In its opinion, this Court apparently recognized that *Almendarez-Torres*'s holding remains subject to Fifth and Sixth Amendment attack. *Alleyne* characterized *Almendarez-Torres* as a "narrow exception to the general rule" that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Id.* at 2160 n. 1. But because the parties in

Alleyne did not challenge *Almendarez-Torres*, this Court said that it would "not revisit it for purposes of [its] decision today." *Id.*

The Court's reasoning nevertheless demonstrates that *Almendarez-Torres*'s recidivism exception may be overturned. *Alleyne* traced the treatment of the relationship between crime and punishment, beginning in the Eighteenth Century, repeatedly noting how "[the] linkage of facts with particular sentence ranges . . . reflects the intimate connection between crime and punishment." *Id.* at 2159 ("[i]f a fact was by law essential to the penalty, it was an element of the offense"); *see id.* (historically, crimes were defined as "the whole of the wrong to which the law affixes [ ] punishment … include[ing] any fact that annexes a higher degree of punishment") (internal quotation marks and citations omitted); *id.* at 2160 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted") (internal quotation marks and citation omitted). This Court concluded that, because "the whole of the" crime and its punishment cannot be separated, the elements of a crime must include any facts that increase the penalty. The Court recognized no limitations or exceptions to this principle.

Alleyne's emphasis that the elements of a crime include the "whole" of the facts for which a defendant is punished seriously undercuts the view, expressed in *Almendarez-Torres*, that recidivism is different from other sentencing facts. *See Almendarez-Torres*, 523 U.S. at 243-44; *see also Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") *Apprendi* tried to explain this difference by pointing out that, unlike other facts, recidivism "'does not relate to the commission of the offense' itself[.]" 530 U.S. at 496 (quoting *Almendarez-Torres*, 523 U.S. at 230). But this Court did not appear committed to that distinction; it acknowledged that *Almendarez-Torres* might have been "incorrectly decided." *Id.* at 489; *see also Shepard*, 544 U.S. at 26 n. 5 (acknowledging that Court's holding in that case undermined *Almendarez-Torres*); *Cunningham v. California*, 549 U.S. 270, 291 n. 14 (2007) (rejecting invitation to distinguish between "facts concerning the offense, where *Apprendi* would apply, and facts [like recidivism] concerning the offender, where it would not," because "*Apprendi* itself … leaves no room for the bifurcated approach"). Three concurring justices in *Alleyne* provide additional reason to believe that the time is ripe to revisit *Almendarez-Torres*. *See Alleyne*, 133 S. Ct. at 2164 (Sotomayor, Ginsburg, Kagan, J.J., concurring). Those justices noted that the viability of the Sixth Amendment principle set forth in Apprendi was initially subject to some doubt, and some justices believed the Court "might retreat" from it. *Id.* at 2165. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id.* Reversal of precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 2166. The validity of *Almendarez-Torres* is accordingly subject to reasonable doubt.

Since *Alleyne*, Justices of this Court have continued to advocate for *Almendarez-Torres* to be

overruled. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1254 (2018) (Thomas, J., dissenting) ("[t]he exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered. In my view, if the Government wants to enhance a defendant's sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt."); *Mathis v. United States*, 136 S. Ct. 2243, 2258-59 (2016) (Thomas, J., dissenting) ("I continue to believe that the exception in *Apprendi* was wrong, and I have urged that *Almendarez-Torres* be reconsidered. . . . Consistent with this view, I continue to believe that depending on judge-found facts in ACCA cases violates the Sixth Amendment and is irreconcilable with *Apprendi*); *Descamps v. United States*, 133 S. Ct. 2276, 2295 (2013) (Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned); *United States v. O'Brien*, 560 U.S. 218, 241 (2010) (Thomas, J., dissenting) (advocated against the *Almendarez-Torres* exception, stating "If a sentencing fact either raises the floor or raises the ceiling of the range of punishments to which a defendant is exposed, it is, by definition an element.")

Some legal scholars have gone so far as to conclude that this Court's holdings have effectively overruled *Almendarez-Torres*. *See* Bradley Scott Shannon, *Overruled by Implication*, 33 Seattle U. L. Rev. 151, 164 (2009); Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior Conviction Exception to Apprendi*, 97 Marq. L. Rev. 523 (2014); Amy Luria, *Traditional Sentencing Factors v. Elements of an Offense: The*

Questionable Viability of Almendarez-Torres v. United States, 7 U. Pa. J. Const. L. 1229, 1233-34 (2005); Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 Ohio St. L.J. 1307, 1361 (2007).

Further, following *Alleyne*, the federal circuits have recognized the instability of *Almendarez-Torres*, and struggled with continuing to apply it. *See United States v. Harris*, 741 F.3d 1245 (11th Cir. 2014) ("We recognize that there is some tension between *Almendarez-Torres* on the one hand and *Alleyne* and *Apprendi* on the other."); *United States v. Abrahamson*, 731 F.3d 751 (8th Cir. 2013) ("it is unclear whether *Almendarez-Torres* and its felony exception will remain good law"); *United States v. McDonald*, 745 F.3d 115, 124 (4th Cir. 2014) ("[T]he Supreme Court's recent characterizations of the Sixth Amendment are difficult, if not impossible, to reconcile with *Almendarez-Torres*'s lonely exception to Sixth Amendment protections."); *United States v. Mack*, 729 F.3d 594, 609 (6th Cir. 2013) ("Although *Almendarez-Torres* may stand on shifting sands, the case presently remains good law and we must follow it until the Supreme Court expressly overrules it."); *United States v. Lomax*, 816 F.3d 468, 477-478 (7th Cir. 2016).

Therefore, Petitioner seeks to revisit this Court's holding in *Almendarez*-Torres. Mr. Mickel's case presents an ideal vehicle to resolve his question because the issue was preserved and presented at every stage of the case. Given that Mr. Mickel is serving a mandatory fifteen-year sentence for the illegal possession of ammunition, the facts of his case warrant consideration.

II. This Court should hold that due process is violated when the defendant is indicted for, and convicted of, an offense that carries a statutory range of zero to ten years, and at sentencing the government seeks to apply enhanced statutory penalties that impose a fifteen-year mandatory minimum sentence.

Petitioner was charged by indictment with, and convicted of, 18 U.S.C. § 924(a)(2), which carries a statutory range of zero to ten years. After trial, however, the government sought to enhance his sentence to a statutory range of fifteen years to life under the ACCA. The failure to provide him notice of this enhancement prior to trial violates his right to due process.

The Fifth Amendment's guarantee of due process applies to federal firearms offenses and the application of the ACCA. *See Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, this Court stated, "our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." 135 S. Ct. at 2556 (citing *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983)). *Johnson* went on to say this "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process.

These principles apply not only to statutes defining elements of crimes, but also to statutes

fixing sentences." *Johnson*, 135 S. Ct. at 2557 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). While *Johnson*'s holding excised the now-removed "residual clause," the principles of due process still apply in full force. To permit application of the ACCA's enhanced penalties violates Mr. Mickel's right to due process and invite arbitrary enforcement.

In this case, the government repeatedly and consistently provided Mr. Mickel with notice that he was only subject to a statutory penalty range of zero to ten years, under 18 U.S.C. § 924(a)(2). The indictment specifically charged Mr. Mickel with violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2). Pet. App. 7a. The latter provision delineates that violation of the statute carries a statutory sentencing range of zero to ten years. At his initial appearance and his arraignment, the prosecutor stated his offense carries "a maximum term of imprisonment of ten years." At no time before trial did the government indicate Mr. Mickel may be subject to different statutory penalties or that the Armed Career Criminal Act may apply. Mr. Mickel went to trial and a jury found him guilty of the indictment. Prior to sentencing, the presentence report indicated Mr. Mickel qualified as an Armed Career Criminal, which would thereby increase his statutory sentencing range to fifteen years to life. 18 U.S.C. § 924(e). The government then sought application of the Armed Career Criminal Act at sentencing; the district court agreed and imposed a sentence of 188 months.

While the ACCA does not include a notice requirement, constitutional due process does require that defendants receive "reasonable notice and an

opportunity to be heard relative to the recidivist charge even if due process does not require that notice be given prior to the trial on the substantive offense." *Olyer v. Boles*, 368 U.S. 448, 452 (1962). Other circuits have held that a due process does not require pre-trial notice of the Armed Career Criminal Act. *United States v. Craveiro,* 907 F.2d 260, 264 (1st Cir. 1990).

The instant case presents unique circumstances not seen in similar cases. While *Oyler* held due process does not require pre-trial notice of the Armed Career Criminal Act, the government did provide Mr. Mickel notice that he was not subject to the ACCA's enhanced penalties. The indictment accused Mr. Mickel of violation of 18 U.S.C. § 922(g)(1), being a felon in possession of a firearm, and also 18 U.S.C. § 924(a)(2). Pet. App. 7a. The latter, § 924(a)(2), delineates that the statutory penalty for the offense is "not more than 10 years." At Mr. Mickel's initial appearance and arraignment, the government stated on the record that Mr. Mickel's charges carried a penalty of "a maximum term of imprisonment of ten years." At no time before trial did the government indicate Mr. Mickel was subject to any different statutory penalties or that the ACCA might apply to his case. It was only after months the verdict – upon issuance of the presentence report – that the government changed positions and sought application of the ACCA's enhanced statutory penalties.

Therefore, the government did provide Mr. Mickel with notice that he was not subject to the ACCA's penalties. Here, the government made specific representations to Mr. Mickel that he was not an Armed Career Criminal. By pleading § 924(a)(2) in

the indictment, the government put Mr. Mickel on notice that he was subject to the zero-to-ten-year penalty range. *See Hamling v. United States*, 418 U.S. 87, 117 (1974) (The primary function of charging documents is to "fairly inform[] a defendant of the charge against which he must defend."). To then seek application of the ACCA only after the verdict violates Mr. Mickel's right to due process.

The government's conduct in this case is the type of standardless and arbitrary enforcement this Court warned against in *Johnson*, 135 S. Ct. 2551. *See also Kolender*, 461 U.S. at 357-358. Contrary to the holding in *Oyler*, these facts demonstrate that reasonable notice was not provided and due process has not been satisfied. By the government providing specific notice of the zero-to-ten-year statutory range prior to trial and then seeking the enhanced penalties of the ACCA after trial, the government has failed to provide reasonable notice. The government's actions in this case promote arbitrary enforcement and thus further violate Mr. Mickel's due process. *See Johnson*, 135 S. Ct. 2556; *Kolender*, 461 U.S. at 357-358. Therefore, a grant of certiorari is warranted to address this constitutional violation and prevent violations.

III. Ohio's domestic violence statute, which criminalizes both physical and non-physical acts, is not a violent felony under 18 U.S.C. § 924(e)(2)(B).

Petitioner was found to qualify as an Armed Career Criminal because of his four prior convictions

under Ohio's domestic violence statute. The statute states: No person shall knowingly cause or attempt to cause physical harm to a family or household member. Ohio Revised Code § 2919.25(A). The Sixth Circuit has previously held the statute contains an element of force and therefore constitutes a violent felony, *United States v. Gatson*, 776 F.3d 405 (6th Cir. 2015), and followed *Gatson* in affirming Mr. Mickel's sentence. Pet. App. 4a.

The Sixth Circuit's holding in this case, and in *Gatson*, is incorrect as Ohio's domestic violence statute is categorically overbroad. The critical element is "physical harm," which is not defined by the Ohio's domestic violence statute. Another section of Ohio's Revised Code defines the element "physical harm" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." Ohio Revised Code § 2901.01(A)(3).

Under the due process clause, and this Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015), this element is too broad to qualify as a violent felony under 18 U.S.C. § 924(e)(2)(B). To qualify as a violent felony, the statute must include an element of "physical force," which means "capable of causing physical pain or injury to another." *Johnson*, 559 U.S. at 140. Under Ohio law, the element of "physical harm" can be accomplished without violent physical force. "Physical harm" can be satisfied through both physical and non-physical acts. This conclusion is seen through the legislative history. The Ohio 1974 Committee Comment to Ohio House Bill 511, which created the statutory definition of "physical harm" in the Ohio Revised Code, explained that "in the context of criminal law a

precedent trauma is not viewed as a necessary requirement before it can be held that personal harm is caused or threatened . . .” *See State v. Morrison*, 2007 WL 2702458 at *4 (Ohio App. Dist. 5, September 17, 2007); *State v. Gray*, 2008 WL 5104749 at *10 (Ohio App. Dist. 5, July 16, 2008); *In re Oliver*, 2005 WL 2857710 at *6 (Ohio App. Dist. 5, October 31, 2005). The Committee Comment goes on to state the element can be satisfied when an offender “deliberately, through other than traumatic means, sets out to drive his victim mad or arranges for his victim to contract pneumonia.” *Id.*

The legislative history demonstrates that under Ohio law, the “physical harm” element may be satisfied by non-physical and non-forceful acts, and fails to meet the type of violent force set forth by *Johnson* under the ACCA. Because the Ohio domestic violence statute criminalizes such conduct that is categorically broader than what the Supreme Court requires to constitute force, these statutes do not contain an element of “force” as defined by the 18 U.S.C. § 924(e)(2)(B). The categorical approach requires a reviewing Court to “presume that the conviction rested upon nothing more than the least of the acts criminalized.” *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013).

Mr. Mickel requests this Court grant this petition for writ of certiorari to address whether Ohio’s domestic violence statute is a violent felony under 18 U.S.C. § 924(e)(2)(B).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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