

NO. _____

OCTOBER TERM, 2017

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY KENDALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(a) The Question Presented for Review Expressed in the Terms and Circumstances of the Case.

Through the career offender enhancement in the United States Sentencing Guidelines (USSG), §4B1.1, the advisory guideline range of punishment is increased significantly for defendants convicted of a felony crime of violence and who have at least two prior felony convictions for crimes of violence or serious drug offenses.

The Tenth Circuit holds felony violations of 18 U.S.C. §111(a) *are not* crimes of violence because §111(a) can be violated without using violent physical force. In the instant case, the Tenth Circuit held a violation of §111(a) resulting in “bodily injury,” punishable pursuant §111(b), is a crime of violence because the fact bodily injury results means violent physical force was involved.

Is the Tenth Circuit’s decision that a violation of 18 U.S.C. §111(a) and (b) is a crime of violence error in light of the fact the degree of force and the degree of intent required to commit a violation of §111(a) and (b) is no greater than the degree of force and intent required for a violation of §111(a)?

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

<u>TABLE OF CONTENTS</u>	
	<u>Page</u>
(a) <u>The Question Presented for Review Expressed in the Terms and Circumstances of the Case</u>	1
(b) <u>List of all Parties to the Proceeding</u>	2
(c) <u>Table of Contents and Table of Authorities</u>	2
(d) <u>Reference to the Official and Unofficial Reports of any Opinions</u>	5
(e) <u>Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked</u>	5
(f) <u>The Constitutional Provisions, Statutes and Rules which the Case Involves</u>	5
(g) <u>Concise Statement of the Case</u>	7
(h) <u>Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ</u>	10
(i) <u>Appendix</u>	15
<u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	10, 13
<i>United States v. Castleman</i> , 134 S.Ct. 1405 (2014)	13, 14
<i>United States v. Dominguez-Maroyoqui</i> , 748 F.3d 918 (9th Cir. 2014)	12
<i>United States v. Fernandez</i> , 837 F.2d 1031 (11th Cir. 1988)	12
<i>United States v. Hernandez–Hernandez</i> , 817 F.3d 207 (5th Cir. 2016)	9
<i>United States v. Kendall</i> , 876 F.3d 1264 (10th Cir. 2017)	5, 9, 13, 14, 15
<i>United States v. Perez-Vargas</i> , 414 F.3d 1282 (10th Cir. 2005)	13
<i>United States v. Romero-Hernandez</i> , 505 F.3d 1082 (10th Cir. 2007)	12
<i>United States v. Sommerstedt</i> , 752 F.2d 1494 (9th Cir. 1985)	12
<i>United States v. Thomas</i> , 643 F.3d 802 (10th Cir. 2011)	11

DOCKETED CASES

<i>United States v. Ama</i> , 684 Fed.Appx. 736, 2017 WL 1325247 (10th Cir. 2017)	11, 12, 14
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<i>United States v. McIntosh</i> , No. 16-3259, 676 Fed.Appx. 792, 793–95, 2017 WL 343516 (10th Cir. Jan. 24, 2017)	12
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FEDERAL STATUTES

18 U.S.C. § 111	1, 6, 8, 9, 10, 11, 12, 13, 14
18 U.S.C. § 922(g)(9)	13
18 U.S.C. § 3231	7
28 U.S.C. § 1254(l)	5

FEDERAL RULES

Rule 14.1(f)	15
Rule 14.1(g)(i)	15
Rule 29.4(a)	5
Rule 29.4(b) & (c)	5

CONSTITUTIONAL PROVISIONS

None.

SENTENCING GUIDELINES

U.S.S.G § 4B1.1	1, 7, 10
U.S.S.G § 4B1.2	7, 8, 10

MISCELLANEOUS

None.

(d) Reference to the Official and Unofficial Reports of any Opinions

United States v. Kendall, 876 F.3d 1264 (10th Cir. 2017).

United States v. Anthony Kendall, No. 16-6344, 2017 WL 6273210 (10th Cir. filed Dec. 11, 2017).

(e) Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.

(i) Date of judgment sought to be reviewed.

The Opinion of which review is sought was filed December 11, 2017.

(ii) Date of any order respecting rehearing.

Rehearing was not sought;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, §1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

(v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

None;

(2) Statutes Involved:

Title 18, United States Code, §111

(a) In General.-Whoever-

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced Penalty.-Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

(3) Rules Involved:

United States Sentencing Guidelines §4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

United States Sentencing Guidelines §4B1.2, Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

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

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of a judgment entered by a United States Court of Appeals. The jurisdiction of the district court below was based originally on an alleged violation of the laws of the United States. The United States District Court for the Western District of Oklahoma has original jurisdiction over offenses against the laws of the United States which occur in that district. Title 18, United States Code, Section 3231.

Facts Material to Consideration of Question Presented

On February 2, 2016, a one count Indictment was returned by a federal grand jury naming Anthony Kendall as the only defendant. The Indictment alleged Mr. Kendall “did knowingly and feloniously, assault, resist, oppose, impede, intimidate, and interfere with” a correctional officer while engaged in the performance of his duties “and did thereby inflict bodily injury,” a violation of 18 U.S.C. §111(a)(1) and (b). Mr. Kendall entered a plea of guilty to the charge. A Presentence Report was ordered by the district court.

The Presentence Report concluded Mr. Kendall qualified as a career offender due to the instant offense qualifying as a crime of violence as well as his prior convictions in the District of Columbia for assault on a police officer and aggravated assault knowingly while armed. As a result, Mr. Kendall’s advisory guideline range of imprisonment was calculated at 151-188 months.

Mr. Kendall objected to application of the career offender enhancement arguing the instant offense of conviction and his District of Columbia convictions for assault and battery on a police officer and aggravated assault knowingly while armed were not crimes of violence as defined by USSG §4B1.2. The Government responded in support of the career offender classification.

The district court overruled Mr. Kendall's objection to the career offender enhancement. Without the career offender enhancement Mr. Kendall's advisory guideline range would have been 30 to 37 months' imprisonment. The district court sentenced Mr. Kendall to imprisonment for 180 months to run consecutively to his undischarged sentence of imprisonment. Mr. Kendall timely appealed the district court's career offender ruling to the United States Court of Appeal for the Tenth Circuit.

The Tenth Circuit affirmed the district court's finding that a conviction pursuant to 18 U.S.C. §111(a) and (b) and Mr. Kendall's District of Columbia convictions for assault on a police officer and aggravated assault knowingly while armed were crimes of violence for purposes of the career offender enhancement. *United States v. Kendall*, 876 F.3d 1264 (10th Cir. 2017). As it concerns 18 U.S.C. §111(a) and (b), the Tenth Circuit held the statute was divisible as a whole, but subsection 111(a) was indivisible and the court presumed for purposes of its decision subsection 111(b) was also indivisible. *Id.* at 1269. Based on this ruling, the Tenth Circuit held the requirement of "bodily injury" pursuant to subsection 111(b) required greater force than an assault prohibited by subsection 111(a). *Id.* at 1270, *citing United States v. Hernandez–Hernandez*, 817 F.3d 207, 215 (5th Cir. 2016). As a result, the force

required to commit a violation of 111(a) and (b) is the equivalent of “violent physical force” as required by *Johnson v. United States*, 559 U.S. 133 (2010). *Id.* at 1270.

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

The career offender sentencing guideline defines a career offender as a defendant who at the time of conviction for the instant offense (1) is at least 18 eighteen years old; (2) whose instant conviction is a crime of violence or controlled substance offense; (3) and who had previously been convicted of two prior crimes of violence or controlled substances offenses. *USSG § 4B1.1(a) (2015)*. Relevant here, a crime of violence is defined as an offense punishable by imprisonment in excess of a year that “has as an element, the use, attempted use, or threatened use of physical force against the person of another . . .” *USSG § 4B1.2(a)(1) (2015)*. The dispositive issue in this case is whether a conviction pursuant to 18 U.S.C. §111(a)(1) and (b) qualifies as a crime of violence under the force clause of the career offender guideline.

In *Curtis Johnson v. United States*, this Court clarified what “physical force” in the force clause of the Armed Career Criminal Act (ACCA) requires: “Physical force” means “*violent* force” – that is “strong physical force” which is “capable of causing physical pain or injury to another person.” 559 U.S. 133, 140 (2010) (emphasis in original). The requirement of “violent force” also applies to crimes of

violence under the force clause of the career offender guideline. *United States v. Thomas*, 643 F.3d 802, 805 (10th Cir. 2011).

Section §111(a)(1) and (b), of Title 18, United States Code, prohibit the following conduct:

Whoever - (a)(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties . .

. . shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both

(b) Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon . . . or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

The statute does not define “bodily injury.”

The Tenth Circuit holds a violation of subsection 111(a) is not a crime of violence. *United States v. Ama*, 684 Fed.Appx. 736, 2017 WL 1325247 (10th Cir. 2017). In *Ama*, the Tenth Circuit reiterated its prior holding that “§111 creates three distinct offenses.”

Section 111(a) proscribes two: (1) a misdemeanor simple assault that does not involve actual physical contact, and (2) a felony assault that involves actual physical contact or the intent to commit certain felonies, but does not result in bodily injury or involve the use of a deadly or dangerous weapon. *United States v. Hathaway*, 318 F.3d 1001, 1006–09

(10th Cir. 2003). Section 111(b) proscribes the third: a felony assault that involves a weapon or results in bodily injury. *Id.* at 1008.

Id. at 740. The Circuit held §111(a)(1) was not divisible “because ‘forcibly assaults, resists, opposes, impedes, intimidates, or interferes’ are not elements, but alternative means of committing the actus-reus element of the offense.” *Id.* at 741. As it concerns the level of force inherent in §111(a)(1) prosecutions, the Circuit held “the term ‘forcibly,’ even if it extends to all six of the means enumerated in § 111(a)(1), does not necessitate the level of force required in *Johnson I.*” *Id.* at 741, *citing United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 921 (9th Cir. 2014). The Circuit further observed in *Ama* that “an offense may be forcible even in the absence of physical force.” *Id.*, *citing United States v. Romero-Hernandez*, 505 F.3d 1082, 1089 (10th Cir. 2007). The Circuit cited a number of cases in which convictions pursuant §111(a) were committed without violent physical force.¹

Assuming the Tenth Circuit is correct in its determination §111 as a whole is divisible, the Tenth Circuit’s holding in Mr. Kendall’s case that the “bodily injury” sentencing element in subsection 111(b) increases the amount of force used to

¹ “[S]pitting and throwing liquid substances on a federal employee, *United States v. McIntosh*, No. 16-3259, 676 Fed.Appx. 792, 793–95, 2017 WL 343516, *1–2 (10th Cir. Jan. 24, 2017) (unpublished); chasing after and bumping into a federal employee so long as “some amount of force” is used, *United States v. Fernandez*, 837 F.2d 1031, 1035 (11th Cir. 1988); and jolting a federal employee’s arm, again, so long as “some amount of force” is used, *United States v. Sommerstedt*, 752 F.2d 1494, 1495–96 (9th Cir. 1985). *Ama*, 684 Fed.Appx. at 741-742.

Johnson's “violent physical force” level is not supported by the statute or case law. Without a statutory definition of “bodily injury,” there is no basis for the Tenth Circuit to conclude the sentencing element in §111(b) requires an additional level of force that equals “violent physical force.” Bodily injury can result from the amount of force deemed insufficient to qualify a violation of §111(a) as a crime of violence in *Ama*.

The Tenth Circuit rejected Mr. Kendall’s argument that even though bodily injury is an element of the offense pursuant to §111(b), the addition of that element does not change the fact the offense can be committed by means that do not require the requisite “violent physical force.” The enhancement element of §111(b) focuses on the result of the act, not the means by which it is inflicted. The Tenth Circuit used this Court’s decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014), to abrogate its prior ruling in *United States v. Perez-Vargas*, 414 F.3d 1282, 1285-86 (10th Cir. 2005), in which the court held indirectly causing a bodily injury does not involve the use of physical force. *Kendall*, 876 F.3d at 1271.

In *Castleman*, this Court reversed the Sixth Circuit’s decision that a misdemeanor conviction for a crime of domestic violence under 18 U.S.C. §922(g)(9), requires the same degree of force as a violent felony. *Id.* at 1409-1410. The Court held the common-law meaning of force - “even the slightest offensive touching” - was a perfect fit in the context of a “misdemeanor crime of domestic violence.” *Id.* at

1410. In reaching its decision, the Court noted “it is impossible to cause bodily injury without applying force” and “the knowing or intentional application of force is a ‘use’ of force.” *Id.* at 1415. Importantly, this Court declined to equate “bodily injury” with violent “physical force.” *Id.* at 1413.

The Court cautioned its ruling in *Castleman* had no effect on the determination whether a felony offense qualified as a crime of violence. *Id.* at 1411 n. 4. *Castleman* did not diminish the requirements that a felony crime of violence involve not only a higher degree of force but also a higher degree of intent. Under the Tenth Circuit’s decision in *Kendall*, a conviction for throwing a liquid on a correctional officer resulting in bodily injury is a crime of violence for purposes of the career offender provision no matter how the injury resulted. This result obtains even though the amount of force behind the act is no different from that where no bodily injury results and such act is not deemed a felony crime of violence. *Ama, supra*. Further, this result obtains when the degree of intent does not differ from that required where no bodily injury results. *Id.*

The essential elements in this case allow a conviction under §111(a)(1) and (b) without the use, attempted use, or threatened use of “violent physical force.” As a result, Mr. Kendall’s conviction pursuant to 18 U.S.C. §111(a)(1) and (b) does not

qualify as a crime of violence and application of the career offender enhancement was error.

(i) Appendix.

- (i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Kendall, 876 F.3d 1264 (10th Cir. 2017)

- (ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

- (iii) Any order on rehearing:

None;

- (iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

- (v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

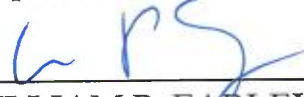
- (vi) Other appended materials:

None.

CONCLUSION

For the foregoing reasons, Mr. Anthony Kendall respectfully requests a Writ of Certiorari issue to review the Opinion entered December 11, 2017, of the United States Court of Appeals for the Tenth Circuit in Case Number 16-6344.

Respectfully submitted,



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