

No. _____

In the
Supreme Court of the United States

MONTELL NELLUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Sentencing Guidelines subject defendants who commit “crimes of violence” to longer imprisonment. Like the U.S. Code (18 U.S.C. § 16(a)), the Sentencing Guidelines define “crime of violence” to mean an offense that “has as an element the use, attempted use, or threatened use of physical force.” U.S.S.G. § 4B1.2(a)(1). The district court increased Petitioner’s sentence based on the court’s conclusion that Petitioner committed “crimes of violence” by violating a statute that prohibits acts causing bodily harm, even though the statute does not identify physical force as an element of the offense. Resolving a question that has divided the courts of appeals and that this Court reserved in *United States v. Castleman*, 134 S. Ct. 1405 (2014), the Seventh Circuit affirmed on the ground that acts causing bodily harm necessarily require physical force. The question presented is:

Whether conviction under a statute prohibiting acts that cause bodily harm is a “crime of violence,” even though the statute does not require physical force as an element of the offense.

RULE 14.1 STATEMENT

Petitioner Montell Nellum was defendant in the district court and appellant in the court of appeals. Respondent United States of America was plaintiff in the district court and appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Montell Nellum respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's order affirming the district court's judgment (App., *infra*, 1a-2a), the district court's judgment (App., *infra*, 3a-10a), and the transcript of the sentencing hearing in the district court (App., *infra*, 11a-16a) are unreported.

JURISDICTION

The Seventh Circuit entered judgment on July 10, 2017. Justice Kagan extended the time for a writ of certiorari until December 7, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions and Sentencing Guidelines involved are reproduced in the Appendix. App., *infra*, 17a-18a.

STATEMENT OF THE CASE

A. Legal Framework

The United States Sentencing Guidelines subject defendants who commit a "crime of violence" to increased prison sentences. *E.g.*, U.S.S.G. § 2K2.1(a); *id.* §§ 2L1.2(b)(2)(E), (b)(3)(E). As is relevant here, the Sentencing Guidelines declare a defendant to be a "career offender" subject to longer imprisonment if (among other requirements) the defendant has prior felony convictions for a "crime of violence." *Id.* § 4B1.1(a). The Guidelines define "crime of violence" to

mean various enumerated offenses, none of which are at issue here, and certain offenses that have “as an element the use, attempted use, or threatened use of physical force against the person of another.” *Id.* § 4B1.2(a)(1).

The term “crime of violence” has widespread importance beyond the Sentencing Guidelines. In the Comprehensive Crime Control Act of 1984, Congress used the term to “defin[e] the elements of particular offenses.” *Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004). As a result, Congress “provided in [18 U.S.C.] § 16 a general definition of the term ‘crime of violence’ to be used throughout the Act.” *Ibid.* Section 16(a)’s definition of “crime of violence” is identical to the definition set forth in section 4B1.2(a)(1) of the Sentencing Guidelines, except that section 16(a) also encompasses physical force against property. See 18 U.S.C. § 16(a) (defining “crime of violence” to mean “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another”). Courts thus subject the two definitions “to the same construction.” *United States v. Gomez-Leon*, 545 F.3d 777, 788 (9th Cir. 2008).

Congress has since incorporated section 16 “into a variety of statutory provisions, both criminal and noncriminal.” *Leocal*, 543 U.S. at 7. The Armed Career Criminal Act, for example, imposes mandatory-minimum sentences on defendants who use or possess a firearm while committing a “crime of violence.” 18 U.S.C. § 924(c)(1)(A). And the Immigration and Nationality Act declares a “crime of violence” to be an “aggravated felony” that makes immigrants deportable. 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii).

This Court has addressed the term “crime of violence” in several cases that are relevant here. *Leocal* held that a state-law conviction for a DUI causing serious bodily injury was not a “crime of violence” under section 16(a) and thus did not permit deportation under the Immigration and Nationality Act. 543 U.S. at 4. The Court explained that section 16(a) “requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner’s crime.” *Id.* at 7. The elements of the underlying state statute required only negligence, not the “higher degree of intent” necessary to constitute a “crime of violence” under section 16(a). *Id.* at 9.

Johnson v. United States, 559 U.S. 133 (2010), next held that a state-law battery conviction was not a “violent felony” under the Armed Career Criminal Act and so could not serve as the predicate for a mandatory-minimum sentence. The Court observed that the statutory definition of “violent felony” is “very similar” to section 16(a)’s definition of “crime of violence,” with both (like the Sentencing Guidelines) requiring “physical force.” *Id.* at 140. The Court thus relied on *Leocal*’s interpretation of section 16(a) in declining to give “physical force” its common-law meaning, under which “the slightest offensive touching” sufficed. *Id.* at 139-40. The Court instead ruled that “‘physical force’ means *violent* force—that is, force capable of causing physical pain or injury to another person.” *Id.* at 140. Because the elements of the underlying state statute required only “the slightest offensive touching,” the defendant’s conviction under that statute was not a “violent felony.” *Id.* at 139-41.

Finally, *United States v. Castleman*, 134 S. Ct. 1405 (2014), held that a state-law conviction for domestic battery constituted a “misdemeanor crime of domestic violence” under a separate provision of the Armed Career Criminal Act, prohibiting the defendant from possessing a firearm. See 18 U.S.C. §§ 921(a)(33)(A)(2), 922(g)(9). Although the elements of the state statute arguably required only offensive touching, conviction under the statute was a “misdemeanor crime of domestic violence” because section 921(a)(33)(A) “incorporated the common-law meaning of ‘force.’” *Id.* at 1410. Distinguishing *Johnson*, the Court explained that “whereas the word ‘violent’ or ‘violence’ standing alone ‘connotes a substantial degree of force,’” “that is not true of ‘domestic violence.’” *Id.* at 1411. *Castleman* emphasized: “Nothing” in its decision “casts doubt” on *Johnson* or circuit-court decisions holding that “mere offensive touching cannot constitute the ‘physical force’ necessary to a ‘crime of violence’” because “‘domestic violence’ encompasses a range of force broader than that which constitutes ‘violence’ *simpliciter*.” *Id.* at 1411 n.4. The Court expressly did “not reach * * * [w]hether or not the causation of bodily injury necessarily entails violent force” and is therefore sufficient to establish a “crime of violence” or “violent felony.” *Id.* at 1413.

B. Factual and Procedural Background

Nellum pleaded guilty to drug trafficking under 21 U.S.C. § 841 and a related firearms-possession charge under 18 U.S.C. § 924(c). App., *infra*, 3a. The Presentence Investigation Report (“Report”) concluded that Nellum was a career offender under section 4B1.1(a) of the Sentencing Guidelines, citing two convictions in Illinois state court for felony domestic

battery under 720 ILL. COMP. STAT. 5/12-3.2(a)(1). D26 at 34-35.¹ That statute provides: “A person commits domestic battery if he or she knowingly without legal justification by any means: (1) Causes bodily harm to any family or household member * * * .” 720 ILL. COMP. STAT. 5/12-3.2(a)(1).

The Report’s career-offender determination increased the sentencing-guideline range on the drug-trafficking charge. D26 at 7; see U.S.S.G. §§ 4B1.1(b), 4B1.1(c)(3). After accounting for Nellum’s acceptance of responsibility, a minimum 60-month sentence for the firearm-possession charge, and other factors, the Report calculated a sentence of 300 months imprisonment. D26 at 26-27.

Nellum objected to the Report’s career-offender designation. D26 at 34; D28. Acknowledging Seventh Circuit precedent holding that domestic-battery convictions are “crimes of violence” (*id.* at 1; *United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016)), Nellum cited contrary decisions from other circuits and observed that “the U.S. Supreme Court hasn’t decided.” D39 at 39. The government conceded that the Seventh Circuit had recognized “a circuit split,” but asserted “no compelling reason to overturn Seventh Circuit precedent.” *Id.* at 40-42. The district court sided with the government because “we follow the Seventh [Circuit] here.” App., *infra*, 12a.

The district court adopted the Report’s sentencing calculation, but sentenced Nellum to a below-guidelines term of 211 months. App., *infra*, 5a, 13a.

¹ “D__” refers to the district court docket number in *United States v. Nellum*, No. 16-cr-10013 (C.D. Ill.). “CA__” refers to the Seventh Circuit docket number in *United States v. Nellum*, No. 17-1694 (7th Cir.).

The court observed that but for the career-offender designation, Nellum’s sentencing-guideline range would have been 123 to 138 months—far lower than the sentence that Nellum received. *Id.* at 12a-13a; see U.S.S.G. Ch. 5, Part A.

Nellum appealed, asking the Seventh Circuit to overrule *Waters* and hold that his domestic-battery convictions were not “crimes of violence” justifying a career-offender sentencing enhancement. CA6 at 5. The government moved for summary affirmance, noting that the “circuit split” that the Seventh Circuit has repeatedly “acknowledged” on this issue did not justify overruling *Waters*. CA8 at 5. The Seventh Circuit granted the government’s motion and summarily affirmed. App., *infra*, 1a-2a. The court followed its “controlling precedent” in *Waters*, but noted that Nellum “preserved the issue for possible further review.” *Id.* at 2a. Pursuant to the Criminal Justice Act, the Seventh Circuit appointed the undersigned counsel of record “for the purpose of timely filing a petition for certiorari.” CA14-15.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for three reasons. First, the courts of appeals are deeply divided with respect to whether conviction under statutes prohibiting acts that cause bodily harm necessarily requires physical force as an element of the offense and thus constitutes a “crime of violence.” Six circuits, including the Seventh Circuit in this case, answer “yes”; three say “no.” The Court should resolve this longstanding circuit split to provide guidance to the lower courts and create uniformity in the law.

Second, this case presents an ideal vehicle to resolve a recurring question that is of substantial im-

portance. The Sentencing Guidelines and the U.S. Code employ the term “crime of violence” in various contexts—as an element of criminal offenses, to calculate prison sentences, and to determine whether foreign citizens may remain in the United States. Resolution of the question presented would therefore have a substantial impact on federal litigation. The question presented is also squarely at issue here: if the Court ruled that Nellum’s state-court convictions are not “crimes of violence,” then Nellum’s sentencing-guideline range would be substantially lower than the sentence that Nellum received.

Third, the Seventh Circuit’s decision is incorrect. The Sentencing Guidelines define “crime of violence” to mean an offense that has physical force as an “element.” The Illinois statute that forms the basis for Nellum’s career-offender designation requires bodily harm, but it does not require physical force. The Seventh Circuit nevertheless implied a physical-force requirement based on the notion that bodily harm can be caused only by physical force. But other circuits have identified many ways in which statutes criminalizing the causation of bodily harm can be violated without any physical force at all. And even if some force were required, this Court made clear in *Johnson* that mere common-law force is insufficient to establish a “crime of violence.” Because the Illinois statute permits conviction based on mere common-law force, the statute cannot support a crime-of-violence determination.

**I. The Courts Of Appeals Are Deeply Divided
As To Whether Convictions Under Statutes
Prohibiting Acts That Cause Bodily Harm
Are Categorically “Crimes Of Violence.”**

The courts of appeals have repeatedly acknowledged a deep “circuit split” regarding whether violations of statutes criminalizing acts that cause bodily harm are necessarily “crimes of violence.” *Waters*, 823 F.3d at 1065; accord, *e.g.*, *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1290 n.5 (9th Cir. 2017) (rejecting decisions from “other circuits [that] have found that statutes which criminalize causation of bodily injury are not crimes of violence”); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir.) (“The circuit courts that have considered whether a person uses physical force in causing an injury through indirect means * * * have reached differing conclusions.”), *cert. denied*, 137 S. Ct. 59 (2016).

1. Like the Seventh Circuit, the Fourth, Sixth, Eighth, Ninth, and Tenth Circuits hold that violations of statutes criminalizing acts that cause bodily harm necessarily require physical force and are therefore crimes of violence or violent felonies. See *United States v. Burns-Johnson*, 864 F.3d 313, 320 (4th Cir. 2017), *cert. denied*, 2017 WL 4574185 (U.S. Nov. 13, 2017); *United States v. Anderson*, 695 F.3d 390, 400 (6th Cir. 2012); *Rice*, 813 F.3d at 706; *Calvillo-Palacios*, 860 F.3d at 1290; *United States v. Ontiveros*, 875 F.3d 533, 536-38 (10th Cir. 2017).

The Sixth Circuit, for example, held that a conviction under an Ohio statute criminalizing acts that cause “physical harm” qualified as a “violent felony.” *Anderson*, 695 F.3d at 400. The court stated: “it does not matter that the Ohio statute at issue does not contain a stand-alone physical force element because

proof of serious physical injury or pain under the statute necessarily requires proof of violent physical force.” *Id.* at 401.

A divided Eighth Circuit panel similarly held that the defendant’s conviction under an Arkansas statute criminalizing acts that “cause physical harm” qualified as a “crime of violence.” *Rice*, 813 F.3d at 706. The majority reasoned that the statute’s causation requirement implicitly “includes the use of physical force as an element.” *Id.*

Other circuits adopting this approach likewise reason that statutes criminalizing acts causing bodily harm implicitly require physical force as an element of the offense. *E.g.*, *De Leon Castellanos v. Holder*, 652 F.3d 762, 764 (7th Cir. 2011) (violation of statute was “crime of violence” because requirement that defendant “caused bodily harm * * * means that [the statute] had as an element the use of physical force”); *Calvillo-Palacios*, 860 F.3d at 1290 (violation of statute requiring causation of “bodily injury” was “crime of violence” because violation “necessarily involve[d] the use of violent, physical force”); *Ontiveros*, 875 F.3d at 538 (violation of statute prohibiting acts causing bodily harm was “crime of violence” under Sentencing Guidelines because statute necessarily required “violent force”).

2. The First, Second, and Fifth Circuits, by contrast, hold that statutes criminalizing acts that cause bodily harm do not require physical force as an element of the offense, precluding violations of those statutes from qualifying as “crimes of violence.” See, *e.g.*, *Whyte v. Lynch*, 807 F.3d 463, 465 (1st Cir. 2015), *rehearing denied*, 815 F.3d 92 (1st Cir. 2016); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 194-96 (2d Cir.

2003); *United States v. Rico-Mejia*, 859 F.3d 318, 322-23 (5th Cir. 2017).

The First Circuit held that violation of a Connecticut statute criminalizing acts that cause “physical injury” did not qualify as an “aggravated felony” because the statute “does not contain as a necessary element the use, attempted use, or threatened use of violent force.” *Whyte*, 807 F.3d at 468-69, 471. In declining to fill that “lexical gap,” the First Circuit noted that the statute “can punish conduct that results in ‘physical injury’ but does not require the ‘use of physical force.’” *Id.* at 469. “For example, a person could intentionally cause physical injury by ‘telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim.’” *Ibid.* (quoting *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006)).

The Second Circuit held that a conviction under the same Connecticut statute at issue in *Whyte* did not qualify as a “crime of violence.” *Chrzanoski*, 327 F.3d at 194-96. Rejecting the government’s assertion that “force is implicit in the statute’s requirement of the intentional causation of physical injury” (*id.* at 193), the court observed that “the intentional causation of injury does not necessarily involve the use of force.” *Id.* at 195. To the contrary, “human experience suggests numerous examples of intentionally causing physical injury without the use of force.” *Id.* at 196. Because “the plain language of the statute does not make use of force an explicit or implicit el-

ement of the crime,” the conviction did not satisfy section 16(a). *Ibid.*²

The Fifth Circuit has “consistently held” that violations of statutes criminalizing acts that cause bodily harm do not qualify as “crimes of violence” because the statutes do not require physical force as an element of the offense. *United States v. Rodriguez-Rodriguez*, 775 F.3d 706, 710-12 (5th Cir. 2015). In *Villegas-Hernandez*, the Fifth Circuit held that a conviction under a Texas statute prohibiting acts that “cause bodily injury” was not a “crime of violence” because a defendant could cause harm “by means *other than* the actual, attempted, or threatened ‘use of physical force against the person of another.’” 468 F.3d at 878-82. The court explained: “There is * * * a difference between a defendant’s causation of an injury and the defendant’s use of force.” *Id.* at 880; see also *United States v. Andino-Ortega*, 608 F.3d 305, 311 (5th Cir. 2010) (conviction under statute prohibiting acts causing “bodily injury” was not “crime of violence” because statute “does not require the use or attempted use of physical force”).

More recently, the Fifth Circuit held that conviction under a statute prohibiting “‘threat[s] to cause death or serious physical injury or substantial property damage’” “cannot constitute a crime of violence” under the Sentencing Guidelines “because it lacks

² The Second Circuit recently distinguished *Chrzanoski* in holding that a Hobbs Act robbery was a “crime of violence,” noting that the Act requires the taking of property “‘by means of actual or threatened force, or violence, or fear of injury.’” *United States v. Hill*, 832 F.3d 135, 138, 142-44 (2d Cir. 2016). Because it explicitly references “force,” the Hobbs Act is distinct from the statutes at issue in *Chrzanoski* and here.

physical force as an element.” *Rico-Mejia*, 859 F.3d at 322. The court again reasoned that “a person could cause physical injury without using physical force.” *Id.* at 321; see also *Rodriguez-Rodriguez*, 775 F.3d at 710-12 (conviction under statute prohibiting threats of “bodily injury” did not qualify as “crime of violence” under the Sentencing Guidelines because “physical force is not a required element of the statute”).

3. This Court’s decision in *Castleman*, though changing the contours of the circuit split, has not resolved it. The Seventh, Eighth, and Ninth Circuits have found that *Castleman* supported their existing precedent, under which statutes criminalizing acts that cause bodily harm are categorically crimes of violence. *Waters*, 823 F.3d at 1066; *Rice*, 813 F.3d at 705-06; *Calvillo-Palacios*, 860 F.3d at 1291.

The Fourth and Tenth Circuits found that *Castleman* required them to change sides on the circuit split. Those courts concluded that the “logic” underlying circuit precedent—which had held that convictions under statutes prohibiting acts that cause bodily harm are not “crimes of violence”—was “no longer good law in light of *Castleman*.” *Ontiveros*, 875 F.3d at 536-38 (abrogating *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005), and *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008)); accord *United States v. Reid*, 861 F.3d 523, 526-29 (4th Cir. 2017) (abrogating *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012)), *cert. denied*, No. 17-6359, 2017 WL 4574355 (U.S. Nov. 13, 2017).

The First Circuit—while reserving the question whether *Castleman* supports the view that “causing injury” necessarily “involves the ‘use of physical

force” (*Whyte*, 815 F.3d at 92)—distinguished *Castleman* because it interpreted 18 U.S.C. § 922(g)(9), not 18 U.S.C. § 16(a). *Whyte*, 807 F.3d at 471. The First Circuit stated that the two statutes “serve different purposes and are doing different work,” so it is reasonable that the “physical force” standard could be satisfied by “mere offensive touching” under section 922(g)(9) but require “violent force” under section 16(a). *Ibid.*³

Finally, the Fifth Circuit held that “*Castleman* does not disturb this court’s precedent regarding the characterization of crimes of violence.” *Rico-Mejia*, 859 F.3d at 322-23. The Fifth Circuit explained: “By its express terms, *Castleman*’s analysis is not applicable to the physical force requirement for a crime of violence, which ‘suggests a category of violent, active crimes’ that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context.” *Id.* at 322. Thus, as the Tenth Circuit recently recognized, the Fifth Circuit continues to hold post-*Castleman* that violations of statutes prohibiting acts that cause bodily harm are not “crimes of violence” because the statutes do not include physical force as an element. *Ontiveros*, 875 F.3d at 537-38.

³ The First Circuit recently held that a conviction for “armed assault with intent to murder” qualified as a “violent felony,” noting that “the intent-to-murder element makes it implausible that a defendant could be convicted under this statute based on an offensive-touching approach.” *United States v. Edwards*, 857 F.3d 420, 425 (1st Cir. 2017), *cert. denied*, 2017 WL 3613361 (U.S. Oct. 2, 2017). In doing so, the court declined to “take sides” over whether “*Castleman*’s physical-force analysis applies equally to [the Armed Career Criminal Act’s] physical-force requirement.” *Id.* at 426.

II. This Case Is An Ideal Vehicle To Resolve A Recurring Issue That Is Of Substantial Importance.

As the numerous courts of appeals’ decisions cited above demonstrate, the question presented here recurs with substantial frequency. Indeed, as we describe above, Congress has used the terms “crime of violence” and “violent felony” as elements of criminal offenses, as factors in calculating criminal sentences, and in determining whether foreign citizens may remain in the United States. The Court’s resolution of the question presented would therefore have wide applicability beyond the particular facts of this case.

The question presented is also of substantial importance. Again, a “crime of violence” or “violent felony” can result in longer prison sentences, mandatory-minimum sentences, or consecutive terms. See 18 U.S.C. §§ 924(c)(1)(A), (c)(1)(D)(ii), (c)(3)(A), (e)(1); U.S.S.G. §§ 2K2.1(a), 2L1.2(b)(2)(E), (b)(3)(E), 4B1.1(a). These designations also carry significant legal consequences under other federal statutes. Under the Immigration and Nationality Act, for example, a “crime of violence” can render an immigrant—including lawful permanent residents—removable from the United States and ineligible for discretionary cancellation of removal. See 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii), 1229b(a)(3).

Finally, this case presents an ideal vehicle to resolve the question that this Court reserved in *Castleman*. Nearly every circuit has addressed the question presented since *Castleman* was decided, so further percolation is unlikely to provide additional information. Nor are there any procedural issues that would preclude the Court from resolving the question presented. To the contrary, if the Court

adopted the view held by the First, Second, and Fifth Circuits, reversal of the Seventh Circuit's decision would necessarily follow. Based on the district court's career-offender determination, Nellum's sentencing-guideline range was enhanced from 123-138 months to 300 months. Thus, had Nellum been sentenced in the First, Second, or Fifth Circuits, his sentencing-guideline range would have been far lower than the 211-month sentence that Nellum received.

III. The Seventh Circuit's Decision Is Incorrect.

1. The Sentencing Guidelines, like 18 U.S.C. § 16(a), define "crime of violence" in relevant part as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). But the Illinois statute upon which Nellum's career-offender designation rests, like the statutes at issue in the circuit split described above, does not identify physical force as an element of the offense. Rather, the statute simply prohibits acts that "[c]ause[] bodily harm." 720 ILL. COMP. STAT. 5/12-3.2(a). Indeed, far from requiring physical force, the statute provides that the requisite bodily harm can be caused "by any means." *Ibid.* Under the Sentencing Guidelines' "plain text," therefore, Nellum's state-law convictions are not "crimes of violence" because the Illinois statute does not require physical force as an element of the offense. *Leocal*, 543 U.S. at 8.

The structure of the Sentencing Guidelines' definition confirms that Nellum's state-law convictions do not qualify as "crimes of violence." The Guidelines, like 18 U.S.C. § 16(a), define "crime of violence" in part by reference to enumerated crimes: "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion,

or the use or unlawful possession of a firearm * * * or explosive material.” U.S.S.G. § 4B1.2(a)(2). The Guidelines sought to capture similar offenses as “crimes of violence” through section 4B1.2(a)(1) by confining that section to offenses that have “physical force” as an element. Section 4B1.2(a)(1) encompasses many offenses that identify “physical force” as an element (*e.g.*, 720 ILL. COMP. STAT. 5/12-6.4(a); 18 U.S.C. § 1512(a)(2)), while excluding offenses that (like the statute at issue here) do not.

The history of the Sentencing Guidelines’ definition supports this interpretation. The Sentencing Commission originally defined “crime of violence” to require force. See *Torres-Miguel*, 701 F.3d at 169 n.2. The Commission later changed the definition “to require resultant injury, but not necessarily use of force.” *Ibid.* Before Nelligan’s sentencing, the Commission “changed the Guidelines definition back to one requiring use of force.” *Ibid.* Therefore, “the Sentencing Commission has repeatedly recognized the important distinction between use of force and injury caused by force.” *Ibid.*

Finally, “[t]he rule of lenity applies to the Sentencing Guidelines.” *United States v. Wing*, 682 F.3d 861, 874 (9th Cir. 2012). Thus, if any ambiguity remains after considering the Guidelines’ text, structure, and history, the rule of lenity dictates that the Court resolve the ambiguity in Nelligan’s favor. See *Leocal*, 543 U.S. at 11 n.8.

2. The Seventh Circuit, like the other circuits with which it has sided, has offered two reasons in support of its interpretation. First, because the Illinois statute at issue here criminalizes acts that cause bodily harm, the Seventh Circuit thought that the statute “necessarily requires proving physical

force.” *Waters*, 823 F.3d at 1064. That logic does not follow.

To begin with, “a crime may *result* in death or serious injury without involving *use* of physical force.” *Torres-Miguel*, 701 F.3d at 168. Courts have offered many examples: the defendant may decline to take an ill victim to a doctor (*Rice*, 813 F.3d at 708 (Kelly, J., dissenting)), provide “the victim a poisoned drink” (*Villegas-Hernandez*, 468 F.3d at 879), or tell “the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim” (*Whyte*, 807 F.3d at 469). Each of these examples would violate the Illinois statute if directed toward a family or household member, but none would require the government to prove that the defendant used physical force.

Even if some force were required to inflict bodily harm, this Court emphasized in *Johnson* that a “violent felony” (and thus a crime of violence) requires “violent force”—a “substantial degree of force” greater than the force required at common law. 559 U.S. at 140. And *Castleman* recognized that “a squeeze of the arm [that] causes a bruise,” though requiring some force, is “*hard to describe * * * as violence.*” 134 S. Ct. at 1412 (emphasis added). As we have said, the Illinois statute does not require any force at all, providing instead that the requisite bodily harm can be caused “by any means.” 720 ILL. COMP. STAT. 5/12-3.2(a). The Illinois statute thus permits conviction based on simple common-law force, such as a squeeze of the arm. Under *Johnson*, therefore, conviction under the Illinois statute is not categorically a “crime of violence.”

Second, the Seventh Circuit thought that *Castleman* resolved the question presented here. *Wa-*

ters, 823 F.3d at 1066. But *Castleman* expressly reserved the question “[w]hether or not the causation of bodily injury necessarily entails violent force.” 134 S. Ct. at 1413. The Court emphasized: “Nothing in today’s opinion casts doubt” on decisions holding that “mere offensive touching cannot constitute the ‘physical force’ necessary to a ‘crime of violence.’” *Id.* at 1411 n.4; see *Whyte*, 807 F.3d at 471 n.6 (“*Castleman* itself was careful to state that its holding was confined to [18 U.S.C. §] 922(g)(9) and should not be interpreted to ‘cast[] doubt’ on decisions ruling that more than a ‘mere offensive touching’ is required to constitute ‘physical force’ under section 16”); *Rice*, 813 F.3d at 707 (Kelly, J., dissenting) (question whether statute prohibiting acts “causing physical or bodily injury * * * necessarily involves the use, threatened use, or attempted use of *violent* force by the defendant * * * could not have been implicitly resolved by *Castleman*, for the majority opinion there explicitly reserved it”).

Nor does *Castleman*’s reasoning support the Seventh Circuit’s view. To be sure, *Castleman* stated that “[i]t is impossible to cause bodily injury without applying force in the common-law sense.” 134 S. Ct. at 1415. *Castleman* thus rejected the notion that “deceiving [the victim] into drinking a poisoned beverage” would not require physical force, explaining that “the common-law concept of ‘force’ encompasses even its indirect application.” *Id.* at 1414. But those statements expressly hinged on the common law’s broader definition of force. See *Rice*, 813 F.3d at 707 (Kelly, J., dissenting) (“*Castleman*’s conclusion that causing bodily injury required the application of physical force was based on this broader definition of ‘physical force,’ as the Court repeatedly emphasized.”).

Castleman held that the defendant’s conviction under a statute prohibiting acts that “cause bodily injury” was a “misdemeanor crime of domestic violence” under 18 U.S.C. § 922(g)(9). 134 S. Ct. at 1408-09. Distinguishing *Johnson*, *Castleman* said that the “physical force” needed for a conviction to qualify as a “misdemeanor crime of domestic violence” “incorporated the common-law meaning of ‘force.’” *Id.* at 1410. *Castleman* explained that “the word ‘violent’ or ‘violence’ standing alone ‘connotes a substantial degree of force.’” *Id.* at 1411. But “that is not true of ‘domestic violence.’” *Ibid.* “‘Domestic violence’ is not merely a type of ‘violence’; it is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context.” *Ibid.*

Like the term “violent felony” in *Johnson*, but unlike the term “domestic violence” in *Castleman*, the word “violence” “stand[s] alone” in the Sentencing Guidelines’ term “crime of violence.” *Castleman*, 134 S. Ct. at 1411. Therefore, while the term “misdemeanor crime of domestic violence” is governed by the common-law concept of ‘force,’ “the federal definition of ‘crime of violence’ that appears in the [Armed Career Criminal Act] and the Sentencing Guidelines is not.” *United States v. Vail-Bailon*, 868 F.3d 1293, 1317 n.5 (11th Cir. 2017) (Rosenbaum, J., dissenting); accord *Rico-Mejia*, 859 F.3d at 322. And again, because the Illinois statute at issue here permits conviction based on mere common-law force, *Johnson* makes clear that Nellum’s convictions under that statute are not “crimes of violence.”

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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