

No. ____ - ____

**IN THE
SUPREME COURT OF THE UNITED STATES**

MELVIN MCGREGOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether poisoning satisfies the element of “use of physical force against the person of another” in the definition of “violent felony” under the Armed Career Criminal Act?

TABLE OF CONTENTS

QUESTION PRESENTED	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT ON WHETHER THE USE OF POISON SATISFIES THE ELEMENT OF “USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER” IN THE DEFINITIONS OF “VIOLENT FELONY” AND “CRIME OF VIOLENCE.”	6
A. The circuits disagree on whether the use of poison is the “use of physical force against the person of another” and so qualifies as a “violent felony” or “crime of violence.”	7
B. This Court’s precedent does not determine that poisoning is violent force.	9
C. Use of poison is not a violent felony under <i>Johnson</i>	12
CONCLUSION	13
APPENDIX	A1

TABLE OF AUTHORITIES

Cases

<i>In re Irby</i> , 858 F.3d 231 (4 th Cir. 2017)	8, 10
<i>Johnson v. United States</i> , --- U.S. ---, 135 S.Ct. 2551 (2015) [<i>Johnson II</i>]	4
<i>Johnson v. United States</i> , 559 U.S. 133 (2010) [<i>Johnson I</i>]	passim
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004).....	12
<i>United States v. Castleman</i> , 134 S.Ct. 1405 (2014).....	9, 10, 11
<i>United States v. De La Rosa-Hernandez</i> , 264 F.App'x 446 (5th Cir. 2008)	8
<i>United States v. Doe</i> , 960 F.2d 221 (1 st Cir. 1992).....	12
<i>United States v. Edwards</i> , 857 F.3d 420 (1st Cir. 2017).....	3, 5, 6, 9
<i>United States v. Haldeman</i> , 664 Fed. App'x 820 (11th Cir. 2016)	9, 10
<i>United States v. Hill</i> , 832 F.3d 135 (2d Cir. 2016).....	8, 9
<i>United States v. McGregor</i> 650 F.3d 813 (1st Cir. 2011).....	1
<i>United States v. Rodriguez-Enriquez</i> , 518 F.3d 1191 (10th Cir. 2008)	7
<i>United States v. Winston</i> , 845 F.3d 876 (8th Cir. 2017)	8, 10

Constitutional Provisions

U.S. Const. Amend. V	1
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U.S. Const. Amend. VI	1
-----------------------------	---

United States Sentencing Guidelines

U.S.S.G. § 2K2.1	6, 8, 9, 10
U.S.S.G. § 2L1.2.....	6, 7
U.S.S.G. § 4B1.2.....	6, 8, 9, 10

Federal Statutes

18 U.S.C. § 1513.....	8
18 U.S.C. § 16.....	3, 6, 8, 9
18 U.S.C. § 1951.....	8
18 U.S.C. § 921.....	3, 11
18 U.S.C. § 922.....	passim
18 U.S.C. § 924.....	passim
28 U.S.C. § 1254.....	1
8 U.S.C. § 1326.....	7

State Statutes

720 Ill.Comp.Stat. § 5/12-3.....	8
California Penal Code § 422	9
California Penal Code §664.....	9
M.G.L. c. 265 § 18.....	3
M.G.L. c. 265 § 15B	3
Wis.Stat. § 940.19.....	9

Other Authorities

- Annica Barcenilla et al., *Carpal Tunnel Syndrome and its Relationship to Occupation: A Meta-Analysis*, 51 *Rheumatology* 250 (2012)..... 12
- Jacob Atsmon, *Thallium Poisoning in Israel*, 320(5) *The Am. J. of the Medical Sc.* 327 (2000)..... 13
- Richard W. Siegler, David W. Nierenberg, & William F. Hickey, *Fatal Poisoning from liquid Dimethylmercury: A Neuropathologic Study* 30.6 *Human Pathology* 720 (1999) 12

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Melvin McGregor, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The unpublished judgment of the United States Court of Appeals for the First Circuit is included in the Appendix at A2. The district court's written rulings of law on whether Mr. McGregor qualified as an Armed Career Criminal are included in the Appendix at A4 and are reported at *United States v. McGregor*, 229 F. Supp. 3d 77 (D. Mass. 2017). A transcript of the re-sentencing hearing, A10, and the judgment, A24, also are included in the Appendix. An earlier opinion of the First Circuit providing additional background is included in the Appendix at A31 and is reported at *United States v. McGregor*, 650 F.3d 813 (1st Cir. 2011).

JURISDICTION

The court of appeals affirmed the judgment of the district court on January 18, 2018. This petition is being filed within 90 days of the entry of judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

U.S. Const. Amend. V.

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.

U.S. Const. Amend. VI.

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.

18 U.S.C. § 924(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--

(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

18 U.S.C. § 924(c).

(1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than ten years . . .

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

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

18 U.S.C. § 16(a).

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another

18 U.S.C. § 921(a)(33)(A).

Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that--

- (i) is a misdemeanor under Federal, State, or Tribal [tribal] law; and
- (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

M.G.L. c. 265 § 18(b).

Whoever, being armed with a dangerous weapon, assaults another with intent to rob or murder shall be punished by imprisonment in the state prison for not more than twenty years. Whoever, being armed with a firearm, shotgun, rifle, machine gun or assault weapon assaults another with intent to rob or murder shall be punished by imprisonment in state prison for not less than five years and not more than 20 years.

STATEMENT OF THE CASE

On January 18, 2017, Mr. McGregor was re-sentenced to a mandatory minimum sentence of 15 years incarceration on a charge of being a felon in possession of a firearm, in violation of 18 U.S.C., § 922(g)(1) and the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). A24. Necessary to that outcome was a determination that Mr. McGregor's prior conviction under Massachusetts law for armed assault with intent to murder, M.G.L. c. 265, § 18(b), qualified as a "violent felony" under the ACCA. A4. The First Circuit, consistent with its earlier decision in *United States v. Edwards*, 857 F. 3d. 420 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 283 (2017), affirmed the sentence and rejected Mr. McGregor's argument that armed assault with intent to

murder is not categorically a violent felony because it can be committed by poisoning, which does not entail the use of violent physical force. A2.

Background and Proceedings Below

On July 12, 2007, following a traffic stop, a firearm and ammunition were located in an electronic “hide” in the vehicle Mr. McGregor was driving. He was placed under arrest. A35.

On September 19, 2007, a federal grand jury indicted Mr. McGregor on one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). A36

On April 8, 2008, Mr. McGregor moved to suppress all evidence obtained as a result of the seizure and search of the car he was driving, relying on the Fourth Amendment to the Constitution of the United States. The district court denied the motion by written order dated December 17, 2008. A36.

Mr. McGregor entered a conditional guilty plea on May 6, 2009, reserving the right to appeal the denial of his motion to suppress. A36.

On October 1, 2009, the district court found that Mr. McGregor qualified as an “armed career criminal” under 18 U.S.C. § 924(e) and, accordingly, sentenced him to 188 months in prison, to be followed by three years of supervised release. A mandatory \$100 special assessment was also imposed. A36.

Mr. McGregor Appealed. On May 27, 2011, this Court affirmed the judgment of the district court. *See United States v. McGregor*, 650 F.3d 813 (1st Cir. 2011).

On June 22, 2016, Mr. McGregor filed a motion to vacate pursuant to 28 U.S.C. § 2255, arguing that his prior Massachusetts convictions for assault and battery with a dangerous weapon (“ABDW”) and armed assault with intent to murder no longer qualified as “violent felony” predicates under the ACCA in the wake of the Supreme Court’s decision in *Johnson v. United*

States, 135 S. Ct. 2551 (2015). On October 5, 2016, the district court granted the motion and vacated his sentence.

Initially scheduled as a re-sentencing, the district court held a hearing on December 22, 2016, during which the parties debated Mr. McGregor's then-current status as an armed career criminal. The district court postponed the re-sentencing and took the matter under advisement.

On January 10, 2017, the district court issued a Memorandum and Order in which it found that Mr. McGregor continued to qualify as an Armed Career Criminal. A4. Specifically, the district court noted, the PSR had identified four potential predicate offenses:

1. Possession with Intent to Distribute a Class A Controlled Substance;
2. Possession with Intent to Distribute a Class A Controlled Substance;
3. Assault and Battery with a Dangerous Weapon; and
4. Armed Assault with Intent to Murder; Assault and Battery with a Dangerous Weapon

There was no challenge to the drug offenses. The district court found that both ABDW and armed assault with intent to murder continued to qualify as violent felony predicates.

At the re-sentencing hearing on January 18, 2017, the district court sentenced Mr. McGregor to the mandatory minimum ACCA sentence of 180 months imprisonment, followed by 3 years of supervised release. (The \$100 special assessment had already been paid). A24. Mr. McGregor appealed.

While the appeal was pending, the First Circuit decided *United States v. Windley*, 864 F.3d 36, 39 (1st Cir. 2017), which held that Massachusetts ABDW does not qualify as a "violent felony." The First Circuit also decided *United States v. Edwards*, 857 F.3d 420 (1st Cir. 2017), which held that armed assault with intent to murder was a "violent felony."

On January 18, 2018, the First Circuit summarily affirmed Mr. McGregor’s sentence, citing *Edwards*. A2.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT ON WHETHER THE USE OF POISON SATISFIES THE ELEMENT OF “USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER” IN THE DEFINITIONS OF “VIOLENT FELONY” AND “CRIME OF VIOLENCE.”

The First Circuit rejected Mr. McGregor’s argument that Massachusetts armed assault with intent to murder is not categorically a violent felony because it can be accomplished by poisoning. This Court should grant certiorari to address whether the use of poison satisfies the element of “use of physical force against the person of another” in the definition of “violent felony” under the Armed Career Criminal Act. The Federal Courts of Appeals are divided on the issue of whether a use of poison is a “use of physical force against the person of another” as that phrase is understood in the context of a “violent felony” under ACCA, and in the context of a “crime of violence” enhancement under the United States Sentencing Guidelines, §§ 2L1.2, 4B1.2, & 2K2.1, 18 U.S.C. § 924(c),¹ and the statutory definition of “crime of violence” under 18 U.S.C. § 16(a).

A wide range of state offenses used as federal predicates present the issue of whether an act of poisoning is encompassed by the definitions of “violent felony” or “crime of violence.” The issue implicates serious liberty interests. The ACCA provides an enhanced 15 year mandatory minimum sentence, and up to life imprisonment, for anyone guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), who had previously been

¹ 18 U.S.C. § 924(c) provides for a 5-year mandatory minimum consecutive sentence for anyone who uses, carries or possesses a firearm in furtherance of a crime of violence or a drug trafficking crime.

convicted of three serious drug and/or violent felonies. 18 U.S.C. § 924(e). Without the ACCA enhancement, the statutory maximum sentence for a violation of § 922(g)(1) is ten years.

A. The circuits disagree on whether the use of poison is the “use of physical force against the person of another” and so qualifies as a “violent felony” or “crime of violence.”

The Tenth Circuit in *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008) found that a Colorado assault two (drugging a victim) conviction did not qualify as a crime of violence under the then-current United States Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). At the time, USSG § 2L1.2(b)(1)(A)(ii) provided for a 16-level enhancement of the offense level of a defendant convicted of illegal reentry of a deported alien previously convicted of an aggravated felony (8 U.S.C. § 1326(a)(1), (a)(2), (b)(2)) where the defendant was previously convicted of a crime of violence.² Under the application note to then-current § 2L1.2, a prior offense is a crime of violence where, *inter alia*, it has “as an element the use, attempted use, or threatened use of physical force against the person of another.” USSG § 2L1.2 cmt. n.1(B)(iii).³ The Tenth Circuit held that injury effected by chemical action on the body, such as in poisoning or exposure to hazardous chemicals, should not be understood as caused by physical force. Rather, physical force in the crime of violence context should be understood as mechanical, as in where kinetic energy is transferred to the body of the victim, for example when someone is struck by a fist, bat or projectile. *Rodriguez-Enriquez*, 518 F.3d at 1194.

The Fifth Circuit likewise found that a 16-level enhancement under USSG § 2L1.2(b)(1)(A)(ii) was error because the defendant’s prior conviction for Arkansas terroristic

² USSG § 2L1.2 was amended in 2016 to eliminate the 16 level enhancement, and include a 2 level enhancement for sustaining three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses. See USSG §§ 2L1.2(b)(2)(E), (b)(3)(E) (2016).

³ The same language appears in the current definition of “crime of violence” under § 2L1.2 at Application Note 2.

threatening was not a crime of violence where it did not have physical force as an element. *United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017). Under Arkansas law, a person is guilty of first degree terroristic threatening if, with the purpose of terrorizing another, the person threatens to cause death, serious physical injury, or substantial property damage to another, or threatens physical injury or property damage to a teacher or other school employee. Ark. Code Ann. § 5-13-301(a)(1). *Rico-Mejia* concluded that the Arkansas statute lacks physical force as an element, relying on earlier precedent that threatening to poison another, for example, does not involve force. *Rico-Mejia*, 859 F.3d at 321-23 (citing *United States v. De La Rosa-Hernandez*, 264 F.App'x 446 (5th Cir. 2008)).

Along with the First Circuit, the Second, Fourth, Seventh, Eighth, Ninth and Eleventh Circuits have concluded, to the contrary, that the use of poison is a use of violent force. The cases consider a wide variety of prior convictions in determining whether the offenses involved “have as an element the use, attempted use or threatened use of physical force against the person of another” and so satisfy the “crime of violence” or “violent felony” force clause requirement as it appears in the contexts of 18 U.S.C. § 924(c)(3), ACCA, the career offender Guideline provision USSG § 4B1.2(a)(1), USSG § 2K2.1(a)(3), and 18 U.S.C. § 16(a). All acknowledge that satisfying the requirement entails that the force in question be violent force under this Court’s precedent in *Johnson v. United States*, 559 U.S. 133 (2010). See *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016) (Hobbs Act robbery, 18 U.S.C. § 1951(b)(1), is crime of violence under 18 U.S.C. 924(c)(3)(A)); *In re Irby*, 858 F.3d 231 (4th Cir. 2017) (retaliatory murder, 18 U.S.C. § 1513(a)(1)(B), is crime of violence under 18 U.S.C. 924(c)(3)(A)); *United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016) (Illinois enhanced domestic battery, 720 Ill.Comp.Stat. § 5/12-3.2, is crime of violence under USSG § 4B1.2(a)(1)); *United States v. Winston*, 845 F.3d

876 (8th Cir. 2017)(Arkansas 2d degree battery, Ark. Code Ann. § 5-13-202(a)(2), is violent felony under ACCA); *United States v. Rice*, 813 F.3d 704 (8th Cir. 2016)(Arkansas 2d degree battery is crime of violence under USSG 2K2.1); *Arellano Hernandez v. Lynch*, 831 F.3d 1127 (9th Cir. 2016)(California attempted criminal threat, California Penal Code §§ 422, 664 is crime of violence under 18 U.S.C. § 16(a)); *United States v. Haldeman*, 664 Fed. App'x 820 (11th Cir. 2016) (Wisconsin substantial battery, Wis.Stat. § 940.19(2), is crime of violence under USSG § 4B1.2(a)(1)).

B. This Court's precedent does not determine that poisoning is violent force.

The Courts of Appeals that have concluded that a “violent felony” or “crime of violence” encompasses poisoning have relied upon the reasoning in this Court's opinions in *Johnson v. United States*, 559 U.S. 133 (2010) and *United States v. Castleman*, 134 S.Ct. 1405 (2014). However, it does not follow from the reasoning in these opinions that poisoning is violent force.

The First Circuit in *Edwards* noted that *Johnson* said that violent force must be “capable of causing physical pain or injury.” It reasoned that the force required to apply poison to a victim “is still force with just that capability.” *Edwards*, 857 F.3d at 427.

Both the First and the other circuits have additionally relied upon this Court's rejection in *Castleman* of the contention that sprinkling poison is not a use of common-law force. *Castleman*, 134 S.Ct at 1414-15. *Castleman* rejected that contention on the ground that whether harm occurs directly or indirectly does not matter in determining whether there is a use of force. *Id.*; see *Edwards*, 857 F.3d at 426 (“the ‘use of force’ in the poison example, our judicial superiors explained, ‘is the act of employing poison knowingly to cause physical harm,’ and it does not matter whether it occurs directly or indirectly); *Hill*, 832 F.3d at 143-44 (in § 924(c) “crime of violence” context, rejecting contention that threatening to poison does not involve

threatened use of physical force in light of *Castleman*'s reasoning that use of physical force can encompass acts undertaken to cause physical harm even if the harm occurs indirectly, rather than directly); *In re Irby*, 858 F.3d at 235-36 (same); *Waters*, 823 F.3d at 1066 (in context of finding crime of violence under USSG § 4B1.2(a)(1), reasoning that under *Castleman* the act of employing poison to cause physical harm is a use of force); *Haldeman*, 664 Fed. App'x at 822 (same); *Rice*, 813 F.3d at 706 (in context of finding crime of violence under USSG § 2K2.1, same); *Arellano Hernandez*, 831 F.3d at 1131 (in finding crime of violence under 18 U.S.C. § 16(a), same); *Winston*, 845 F.3d at 878 (in finding violent felony under ACCA, same).

Johnson and *Castleman*, however, do not settle the issue of whether poisoning satisfies the element of “the use, attempted use, or threatened use of physical force against the person of another” in the ACCA’s force clause or in “crime of violence” contexts. In *Johnson*, this Court distinguished the concept of common-law force, which encompasses “even the slightest offensive touching” from “force” in the ACCA’s force clause. Unlike common-law force, in the context of violent felony, “physical force” means *violent* force – that is, force capable of causing physical pain or injury to another person.” *Johnson*, 559 U.S. at 140. The Court did *not* say, however, that all force capable of causing physical pain or injury to another counts as violent force in the violent felony context. In other words, while the Court found that being capable of causing physical pain or injury to another person is a necessary condition of violent force, it did not find that being capable of causing physical pain or injury to another person is a sufficient condition for violent force. Contrary to the First Circuit’s syllogistic reasoning then, the conclusion that application of poison is violent force does not follow from *Johnson*’s holding that violent force is force capable of causing physical pain or injury to another person, and the fact that poison is capable of causing physical pain or injury to another person.

In *Castleman*, this Court interpreted the phrase “has, as an element, the use or attempted use of physical force” in 18 U.S.C. § 921(a)(33)(A), which defines “misdemeanor crime of domestic violence” for the purposes of 18 U.S.C. § 922(g)(9). Section 922(g)(9) forbids firearm possession by those convicted of a misdemeanor crime of domestic violence. The Court found that, unlike in the context of ACCA, the meaning of “force” in § 921(a)(33)(A) incorporates the common-law meaning of “force,” which includes offensive touching. *Castleman* said that the very reasons in *Johnson* for *rejecting* the common-law meaning of “force” in defining a “violent felony” provided the reasons for *accepting* it in the misdemeanor crime of domestic violence context. *Castleman*, 134 S.Ct. at 1410. *Castleman* found that the common-law concept of force included its indirect application, and that it is impossible to cause bodily injury without applying force in the common-law sense. *Id.* at 1414-15. It concluded that the “use of force” in, for example, sprinkling poison, is the act of employing poison knowingly to cause physical harm, and whether the harm occurs indirectly or directly does not matter. *Id.* at 1415.

Castleman’s firm, express distinction between the meaning of force in the context of the definition of a misdemeanor crime of domestic violence and the meaning of force in the context of the definition of a violent felony shows that its interpretation of force for purposes of § 922(g)(9) cannot be imported into the understanding of force under ACCA. As *Johnson* stressed, force under ACCA is *violent* force. *Castleman* found, in contrast, that force under § 921(a)(33)(A) encompassed offensive touchings. *Castleman* explicitly underlined the limits of its interpretation of “force,” saying that it was *not* deciding the question of whether or not the causation of bodily injury necessarily entails violent force. *Id.* at 1413, 1414. This reservation indicates that the proper understanding of *Johnson*’s holding that violent force is force capable of

causing physical pain or injury to another person is that the Court was there providing a necessary, rather than a necessary and sufficient, condition for violent force.

C. Use of poison is not a violent felony under *Johnson*.

Johnson explained that the common-law meaning of force, which encompasses offensive touchings, is inapplicable in the ACCA context. *Johnson*, 559 U.S. at 139-140. Where the common-law meaning does not fit, and the context is one in which the statutory definition of “violent felony” is implicated, the Court looked to the ordinary meaning of “violent.” *Id.* at 140-141 (citing and quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)). *Johnson* quoted dictionary definitions characterizing violent force as “extreme and sudden,” “furious, severe, vehement,” and “characterized by the exertion of great physical force or strength.” *Id.* It cited the description of “violent felony” in *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.) (“[T]he term to be defined, ‘violent felony,’ . . . calls to mind a tradition of crimes that involve the possibility of more closely related, active violence.”).

The ordinary meaning of violent force does not encompass all force capable of causing physical pain or injury. For example, repetitive cashier work is capable of causing repetitive stress injuries, such as carpal tunnel syndrome, yet repetitive cashier work would not be characterized as involving violent force. See Annica Barcenilla et al., *Carpal Tunnel Syndrome and its Relationship to Occupation: A Meta-Analysis*, 51 *Rheumatology* 250 (2012). Lightly shaking the hand of someone whose fingers were recently broken is also capable of causing pain or physical injury, yet a light handshake would not qualify as violent force.

Poisoning likewise need not have the sudden, furious character of violent force, as opposed to a slow and/or more cumulative effect, as for example from dimethylmercury, thallium or the release of gas into a house. See Richard W. Siegler, David W. Nierenberg, & William F. Hickey, *Fatal Poisoning from liquid Dimethylmercury: A Neuropathologic Study*

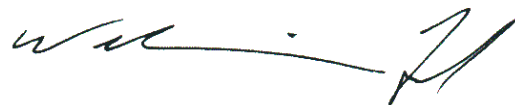
30.6 Human Pathology 720 (1999) (physical symptoms began two months after poisoning); Jacob Atsmon, *Thallium Poisoning in Israel*, 320(5) The Am. J. of the Medical Sc. 327 (2000) (after likely repeated exposure from business associate, nonspecific gastrointestinal symptoms appeared after 12-14 hours, neurological signs within several days, and chronic effects in 2 to 4 weeks); *Commonwealth v. Lednum*, 75 Mass. App. Ct. 722, 916 N.E.2d 416 (2009) (uncapping natural gas line and releasing gas into house where people were sleeping constituted assault by means of a dangerous weapon). Ordinary language does not equate what is harmful, or even extremely harmful, force with violent force. A “violent felony” under the ACCA, then, should not encompass the use of poison.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. This Court should vacate the judgment of the First Circuit Court of Appeals and remand the case for resentencing.

Respectfully Submitted,

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