

UNPUBLISHEDUNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4121

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDMUND LAVONNE JENKINS,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at
Roanoke. Michael F. Urbanski, Chief District Judge. (7:15-cr-00076-MFU-1)

Argued: January 24, 2018

Decided: March 9, 2018

Before GREGORY, Chief Judge, and KING and HARRIS, Circuit Judges.

Affirmed by unpublished opinion. Judge Harris wrote the opinion, in which Chief Judge
Gregory and Judge King joined.

ARGUED: Fay Frances Spence, OFFICE OF THE FEDERAL PUBLIC DEFENDER,
Roanoke, Virginia, for Appellant. Jean Barrett Hudson, OFFICE OF THE UNITED
STATES ATTORNEY, Charlottesville, Virginia, for Appellee. **ON BRIEF:** Larry W.
Shelton, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER,
Roanoke, Virginia, for Appellant. John P. Fishwick, Jr., United States Attorney, OFFICE
OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

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PAMELA HARRIS, Circuit Judge:

Edmund Lavonne Jenkins pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court sentenced Jenkins as an armed career criminal, finding that Jenkins's prior Virginia convictions for unlawful wounding qualify as "violent felonies" requiring the use, attempted use, or threatened use of violent physical force. Jenkins challenges that determination, arguing that Virginia unlawful wounding offenses may be committed with de minimis or indirect force, and thus do not necessitate the use of violent force under the Armed Career Criminal Act ("ACCA").

We find that Virginia unlawful wounding, by virtue of requiring not only the causation of bodily injury but also the specific intent to maim, disfigure, disable, or kill, necessarily involves the use of violent force or, at minimum, the attempted or threatened use of such force. On that ground, we hold that unlawful wounding qualifies as a violent felony under the ACCA, and affirm the judgment of the district court.

I.

On August 7, 2015, Edmund Jenkins admitted to police during a traffic stop that he had a handgun hidden under his seat. Because he had a prior felony conviction, Jenkins was arrested and charged with possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). Jenkins entered a plea of guilty without a plea agreement.

Jenkins's presentence report ("PSR") recommended that he be sentenced under the ACCA, which applies to defendants who have three or more prior convictions "for a violent felony or a serious drug offense." *See* 18 U.S.C. § 924(e)(1). According to the PSR,

Jenkins had three qualifying convictions: He was convicted in Virginia state court in 1992 for possession with intent to distribute cocaine; in 1993 for Virginia unlawful wounding; and in 1996 for Virginia malicious wounding and aggravated malicious wounding. As a result of Jenkins's ACCA classification, he was subject to a mandatory minimum sentence of 15 years under § 924(e)(1), with a Sentencing Guidelines range of 180 to 188 months.

Jenkins objected to his classification as an armed career criminal, arguing that the Virginia wounding offenses of which he was convicted are not violent felonies under the ACCA. The district court overruled that objection, holding that Virginia unlawful wounding – as well as the aggravated versions of that offense – qualify categorically as violent felonies. The court accordingly adopted the PSR and imposed the mandatory minimum sentence of 180 months' imprisonment.

Jenkins appeals, challenging the district court's determination that unlawful wounding qualifies as a violent felony for purposes of the ACCA.

II.

A.

The Armed Career Criminal Act defines the term “violent felony” as an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i).¹ And for purposes of that provision –

¹ Section 924(e)(2)(B) also includes a “residual clause,” reaching offenses that “involve[] conduct that presents a serious potential risk of physical injury to another.” See 18 U.S.C. § 924(e)(2)(B)(ii). In *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551,

often referred to as the “force clause” – the Supreme Court has defined “physical force” to mean “*violent* force – that is, force capable of causing physical pain or injury to another person.” *Johnson v. United States (Johnson I)*, 559 U.S. 133, 140 (2010) (emphasis in original).

To determine whether unlawful wounding qualifies as a violent felony, we employ the “categorical approach.” See *Taylor v. United States*, 495 U.S. 575, 600–02 (1990).² The categorical approach asks how Virginia law “defines the offense generically,” rather than how any “individual might have committed the offense on a given occasion.” *United States v. Shell*, 789 F.3d 335, 338 (4th Cir. 2015). “In conducting this analysis, we focus on the minimum conduct required to sustain a conviction for the state crime.” *United States v. Doctor*, 842 F.3d 306, 308 (4th Cir. 2016) (internal quotation marks omitted). If even that minimum conduct necessitates the use, attempted use, or threatened use of violent

2557 (2015), the Supreme Court found the residual clause unconstitutionally vague. Accordingly, Jenkins is properly sentenced under the ACCA only if his prior convictions qualify as violent felonies under § 924(e)(2)(B)(i)’s force clause.

² Before the district court, the parties disputed whether Virginia’s unlawful wounding statute is divisible, so that the court could apply the “modified categorical approach” to determine whether the particular offenses for which Jenkins was convicted constitute violent felonies. The modified categorical approach applies when “at least one, but not all” of a divisible statute’s alternative offenses qualifies as a predicate violent felony. See *Descamps v. United States*, 570 U.S. 254, 263–64 (2013). Here, however, neither party takes the position that some but not all of the possible alternative offenses qualify under the ACCA. See Appellant’s Br. at 13–14; Gov’t Br. at 18. Accordingly, as the parties agreed at oral argument, there is no need in this case to employ the modified approach. We instead consider whether the minimum conduct that may be charged as unlawful wounding categorically qualifies as a violent felony under the ACCA’s force clause, and conclude that it does.

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force, then the defendant's prior conviction qualifies as a violent felony under the ACCA's force clause.

Whether the defendant's crime was correctly characterized as a violent felony under the ACCA's force clause is a question of law, which we review de novo. *United States v. Hemingway*, 734 F.3d 323, 331 (4th Cir. 2013).

B.

We begin with the elements of the offense. Virginia defines both unlawful wounding and malicious wounding in a single provision of the Code:

If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

Va. Code Ann. § 18.2-51. The least serious wounding offense of which Jenkins was convicted is unlawful wounding, which requires proof of a bodily injury “*with the intent aforesaid*” – that is, with “the *specific intent* to maim, disfigure, disable or kill the victim of the attack.” *Commonwealth v. Vaughn*, 557 S.E.2d 220, 222 (Va. 2002) (emphasis added) (internal quotation marks omitted).³

³ The other two wounding offenses of which Jenkins was convicted – malicious wounding under § 18.2-51 and aggravated malicious wounding under a related statute, Va. Code Ann. § 18.2-51.2 – require a higher degree of culpability and proof of additional elements. To obtain a conviction for malicious wounding, the government must prove that the injury was caused not only with the specific intent to maim, disfigure, disable or kill but also with malice; and to convict for aggravated malicious wounding, it must prove all of that and additionally that the injury was sufficiently severe to cause permanent physical impairment. See Va. Code. Ann. §§ 18.2-51 (malicious wounding); 18.2-51.2 (aggravated malicious wounding); 2–37 Virginia Model Jury Instructions – Criminal Instruction Nos.

Jenkins contends that these elements do not categorically require violent force because Virginia law defines “bodily injury” as used in § 18.2-51 to include any injury caused by “any means,” which would include injuries caused by de minimis force. Minimal force – for instance, grabbing somebody – does not, according to Jenkins, constitute the type of *violent* physical force described in *Johnson I*. Similarly, Jenkins argues, the infliction of bodily injury through indirect means would satisfy § 18.2-51’s “by any means” language, but would not involve the “use” of force under the force clause.

We disagree. Whatever the strength of such arguments when applied to other offenses, they are defeated here by § 18.2-51’s *mens rea* element, requiring the specific intent to kill or seriously injure the victim. If a perpetrator specifically intends to “maim, disfigure, disable or kill,” then as a practical matter, the means employed toward that end will involve violent force. Put differently, it is not plausible that a conviction requiring an intent to kill or severely injure will rest on conduct that is incapable of fulfilling that intent, unless that conduct is accompanied by an “attempt[]” or “threat[]” to do more serious bodily harm, 18 U.S.C. § 924(e)(2)(B)(i), as delineated by the force clause. *See United States v. Edwards*, 857 F.3d 420, 425 (1st Cir. 2017) (assault with intent to kill, unlike simple assault, satisfies force clause because intent element makes it “implausible” that convictions will involve non-violent force); *Raybon v. United States*, 867 F.3d 625, 632 (6th Cir. 2017) (assault with intent to do great bodily harm satisfies force clause because

G37.050, .100 (2017). We need not examine these offenses further; if, as we conclude, unlawful wounding qualifies categorically as a violent felony, then it follows that the more serious wounding offenses, requiring proof of the same as well as additional elements, also qualify.

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convictions for “nonviolent assault[s]” are not possible when offense “include[s] as an element an intent to do great bodily harm”).

We recently came to a similar conclusion in *United States v. Dinkins*, --- F. App’x ----, No. 16-4795, 2017 WL 6371255, at *2 (4th Cir. Dec. 12, 2017) (unpublished). There, we considered whether a defendant’s conviction for the South Carolina offense of assault and battery with intent to kill satisfied the force clause. In finding that it does, we relied on the offense’s *mens rea* element, requiring specific intent to “commit grievous bodily injury such that, had death occurred, the offense would have been murder.” *Id.* (internal quotation marks and citation omitted). Even in a case in which the “actual injury” inflicted amounts to no more than “a mere offensive touching,” we concluded, when that touching is committed with the intent to cause “the more severe kind of bodily injury imagined by the force clause,” it necessarily involves at least the “attempted or threatened” use of violent force under *Johnson I.* *Id.* at *3.

This straightforward reading of Virginia’s unlawful wounding statute is confirmed by state cases confining its application to acts of violence. For example, the Supreme Court of Virginia, addressing the scope of the “bodily injury” element, has explained that the key “test of the offense” is the “intent with which the result is accomplished,” so that a perpetrator may intend to “maim, disfigure, disable or kill” even with “fists,” but only “*if the force is applied with violence and brutality.*” *Dawkins v. Commonwealth*, 41 S.E.2d 500, 504 (Va. 1947) (emphasis added). What the statute contemplates, in other words, is conduct such as to “gouge out the eye of another with his fingers, stomp another to death with his feet, or bite off a portion of his body.” *Id.*

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Similarly, in a more recent case, a Virginia appeals court explained that “[t]o be guilty [of unlawful or malicious wounding] under Code § 18.2-51, a person must intend to permanently, not merely temporarily, harm another person.” *Johnson v. Commonwealth*, 669 S.E.2d 368, 378 (Va. Ct. App. 2008) (malicious wounding); *see also Worrell v. Commonwealth*, No. 2451-09-1, 2010 WL 5149346, at *1–3 (Va. Ct. App. Dec. 21, 2010) (unlawful wounding). And “striking a person with a fist, standing alone, normally does not suffice to prove an intent to permanently harm.” *Johnson*, 669 S.E.2d at 379. To show intent to *permanently* harm, a defendant’s assault must instead be “attended with . . . circumstances of violence and brutality” – for instance by “approach[ing] an unoffending citizen and deal[ing] him a deadly blow,” or by striking “delicate parts of the body of a defenceless, unresisting man, on the ground.” *Id.* (internal quotation marks and alteration omitted).

We note that Jenkins has cited no Virginia decisions charging unlawful wounding for conduct involving uses of only de minimis or otherwise non-violent force, and our own review has revealed no such decision. Where state law makes clear that an offense may be committed without the use of violent physical force, of course, an absence of illustrative cases charging defendants engaged in non-violent conduct does not undermine that conclusion. *See United States v. Aparicio-Soria*, 740 F.3d 152, 157–58 (4th Cir. 2014) (en banc). Here, however, the absence of illustrative cases confirms our conclusion that Virginia law does not allow for unlawful wounding convictions based on the kinds of non-violent force that Jenkins imagines. As we are not permitted to go beyond a state’s own understanding of its criminal offenses, *see id.*, we conclude that the minimum conduct

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necessary to sustain a conviction for unlawful wounding requires the attempted or threatened use of physical force under the ACCA's force clause.

III.

For the foregoing reasons, we find that Jenkins's prior Virginia convictions for unlawful wounding qualify as "violent felonies" under § 924(e)(2)(B)(i), and that Jenkins was properly sentenced as an armed career criminal. Accordingly, we affirm the judgment of the district court.

AFFIRMED

FILED: March 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4121
(7:15-cr-00076-MFU-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

EDMUND LAVONNE JENKINS

Defendant - Appellant

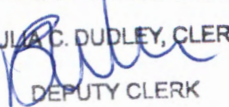
J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

MAR 02 2016

UNITED STATES DISTRICT COURT
Western District of VirginiaJULIA C. DUDLEY, CLERK
BY:  DEPUTY CLERK

UNITED STATES OF AMERICA

V.

EDMUND LAVONNE JENKINS*

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: DVAW715CR000076-001

Case Number:

USM Number: 04290-084

Date of Original Judgment: 2/25/16
(Or Date of Last Amended Judgment)

Fay Spence, FPD

Defendant's Attorney

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☒ pleaded guilty to count(s) One (1)☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §§922(g)(1) and 924(e)	Possession of a Firearm by a Convicted Felon	8/7/2015	One (1)

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/25/2016

Date of Imposition of Judgment

/s/ Michael F. Urbanski

Signature of Judge

Michael F. Urbanski, United States District Judge

Name and Title of Judge

03-01-2016

Date

DEFENDANT: EDMUND LAVONNE JENKINS*
CASE NUMBER: DVAW715CR000076-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

180 months, with 60 months to run concurrently with Roanoke City Circuit Court (Dkt. Nos.: CR96001906-1907) and Roanoke City Circuit Court (Dkt. Nos.: CR15000935-936). Because Jenkins is in federal custody, however, the Bureau of Prisons is required to designate that Jenkins serve five years of this sentence in a Commonwealth of Virginia correctional facility pursuant to 18 U.S.C. 3621 in order for his state and federal sentences to run concurrently. Should the Bureau of Prisons determine that Jenkins not be appropriate and suitable for such a designation under 18 U.S.C. 3621, Jenkins shall serve his fifteen year federal sentence in the Bureau of Prisons, after which the it will be up to the Commonwealth of Virginia to determine whether to give him credit against his state sentences. "In our American system of dual sovereignty, each sovereign - whether the Federal Government or a state - is responsible for the administration of its own criminal justice system. . . . [I]f he serves his federal sentence first, the State will decide whether to give him credit against his state sentences without being bound by what the district court or the Bureau [of Prisons] said on the matter." *Setser v. United States*, 132 S.Ct. 1463 (2012).

☒ The court makes the following recommendations to the Bureau of Prisons:

the Court recommends the defendant serve five years of his sentence at a state facility and that he receive appropriate mental health treatment.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: EDMUND LAVONNE JENKINS*
CASE NUMBER: DVAW715CR000076-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
five (5) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: EDMUND LAVONNE JENKINS*
CASE NUMBER: DVAW715CR000076-001

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SPECIAL CONDITIONS OF SUPERVISION

1. Following release from imprisonment, the court will evaluate defendant's status and determine whether, after incarceration, drug rehabilitation and mental health treatment is necessary and appropriate. If additional rehabilitation is deemed appropriate, the defendant shall participate in a program as designated by the court, upon consultation with the probation officer, until such time as the defendant has satisfied all the requirements of the program.
2. The defendant shall reside in a residence free of firearms, ammunition, destructive devices, and dangerous weapons.
3. The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms, illegal controlled substances and alcohol.

DEFENDANT: EDMUND LAVONNE JENKINS*

CASE NUMBER: DVAW715CR000076-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$0.00	\$0.00
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 13, 1996.

DEFENDANT: EDMUND LAVONNE JENKINS*

Judgment - Page 6 of 6

CASE NUMBER: DVAW715CR000076-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, the total criminal monetary penalties are due immediately and payable as follows:

- A ☒ Lump sum payment of \$ 100.00 immediately, balance payable
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, ☐ F or, ☐ G below); or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F, or ☐ G below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ During the term of imprisonment, payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____, or _____ % of the defendant's income, whichever is greater, to commence _____ (e.g., 30 or 60 days) after the date of this judgment; AND payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ during the term of supervised release, to commence _____ (e.g., 30 or 60 days) after release from imprisonment.
- G ☐ Special instructions regarding the payment of criminal monetary penalties:

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C §§ 3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, 210 Franklin Rd., Suite 540, Roanoke, Virginia 24011, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Any obligation to pay restitution is joint and several with other defendants, if any, against whom an order of restitution has been or will be entered.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

*

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

* * * * *
UNITED STATES OF AMERICA, * CRIMINAL NO. 7:15-CR-00076
Plaintiff, * FEBRUARY 25, 2016 10:11 A.M.
vs. * SENTENCING
 * ROANOKE, VIRGINIA
 *
 *
EDMUND LAVONNE JENKINS, * Before:
 * HONORABLE MICHAEL F. URBANSKI
Defendant. * UNITED STATES DISTRICT JUDGE
* * * * * * WESTERN DISTRICT OF VIRGINIA

APPEARANCES:

For the Plaintiff: ASHLEY BROOKE NEESE, ESQUIRE
United States Attorney's Office
BB&T Building
310 First Street, S.W., Room 906
Roanoke, VA 24008

For the Defendant: FAY FRANCES SPENCE, ESQUIRE
Federal Public Defender's Office
210 First Street, S.W., Suite 400
Roanoke, VA 24014

Court Reporter: Judy K. Webb, RPR
210 Franklin Road, S.W., Room 540
Roanoke, Virginia 24011
(540) 857-5100 Ext. 5333

Proceedings recorded by mechanical stenography,
transcript produced by computer.

1 (Court convened at 10:11 a.m.)

2 THE COURT: Good morning.

3 Please call the case.

4 THE CLERK: This is *United States of America v.*
5 *Edmund Lavonne Jenkins*, Action Number 7:15-CR-76, Defendant 1.

6 THE COURT: This case has been set down today for
7 sentencing.

8 Is the United States ready to proceed?

9 MS. NEESE: We are, Your Honor.

10 THE COURT: Is the defendant ready to proceed?

11 MS. SPENCE: Yes, Your Honor.

12 THE COURT: All right. Okay. Let's recap where we
13 are in this case.

14 Mr. Jenkins pled guilty, without a plea agreement, to
15 a violation of 18, U.S. Code, Section 922(g)(1), and that is
16 that he on or about August 7th -- the indictment charged on or
17 about August 7th, in the Western District of Virginia, he,
18 having previously been convicted of a crime punishable by
19 imprisonment for a term exceeding one year, did knowingly and
20 unlawfully possess a firearm in and affecting interstate
21 commerce.

22 We had a change of plea hearing on October 23rd,
23 2015, at which time the Court accepted the defendant's guilty
24 plea as to Count One.

25 I have read the presentence report and the various

1 sentencing memoranda filed by counsel in this case. I've also
2 had a chance to look at the supplemental memo that the
3 defense -- the legal memo in opposition to the Armed Career
4 Criminal Act enhancement, the supplemental memos filed by the
5 United States, so I think I'm up to speed on the briefing.

6 Now, the issue in this case, obviously, as has been
7 extensively briefed and analyzed, is the issue whether or not
8 Mr. Jenkins has three qualifying felonies, three crimes,
9 either a -- three qualifying crimes -- convictions either as a
10 serious drug offense or a violent felony under 924(e), which
11 would give rise to the 15-year mandatory minimum, and that
12 issue we need to take up.

13 So the first question is: Does the government have
14 any evidence you want to put on on this issue?

15 MS. NEESE: Your Honor, we just had the certified
16 convictions, and we can put those into the record.

17 THE COURT: Okay. He has got four -- the four
18 convictions: the 1993 conviction for the cocaine distribution
19 as an accommodation, a 1993 conviction for unlawful wounding,
20 and two 1997 convictions, one for malicious wounding and one
21 for aggravated malicious wounding, correct?

22 MS. NEESE: That is correct. And I should have
23 stated the indictments and underlying convictions, whether the
24 Court looks at the modified categorical approach, we'll leave
25 that up to you. But we are going to introduce those today as

1 exhibits.

2 THE COURT: Is there any objection to the Court's
3 consideration or to the introduction of those?

4 MS. SPENCE: Not to the introduction, Your Honor. We
5 do object to the Court's consideration, because we do not feel
6 the modified categorical approach applies.

7 THE COURT: I understand, and we will get into that.
8 I will allow their admission. As to which approach I apply,
9 that is yet to be determined.

10 MS. NEESE: Thank you, Your Honor.

11 THE COURT: So we'll allow the admission of those
12 four indictments and four judgments, correct?

13 MS. NEESE: Yes, sir. And just for the record, we
14 tabbed those as Exhibit 1, Exhibit 1-A, Exhibit 2, and
15 Exhibit 3. Thank you.

16 THE COURT: Okay. I guess Exhibit 3, you have both
17 the '97 convictions together?

18 MS. NEESE: The way we did it was, the first two are
19 1 and 1-A, and those are the '97 convictions. And I know
20 they're not in order; it was just how we filed our first
21 sentencing memorandum. So Number 3 is actually the
22 accommodation. Number 2 is the unlawful wounding. And then 1
23 and 1-A --

24 THE COURT: Okay. They'll be admitted.

25 MS. NEESE: Thank you.

1 THE COURT: All right. Now, does the defendant have
2 any evidence that you want to put on on this issue?

3 MS. SPENCE: Not on this issue, Your Honor.

4 THE COURT: Okay. So, we need to hear argument.
5 Let's hear first from the government. Well, let me do this:
6 Yeah, I mean, this goes -- I need to hear argument before we
7 deal with the guidelines, because this goes straight into the
8 guidelines findings, as well as the statutory enhancement.

9 So let's go ahead and have the argument on the
10 application of 924(e) before I make guidelines findings.

11 Let's hear from the government first.

12 MS. NEESE: Your Honor, it is the United States'
13 burden to prove by a preponderance of the evidence that the
14 three underlying convictions and -- or four convictions are
15 predicate under -- predicate convictions under the ACCA.

16 Essentially -- and I'm going to try to go through
17 this. I know it's kind of lengthy, but I want to make sure
18 I'm stating everything on the record to preserve for any
19 potential appellate purposes.

20 But as we know, and as the Court is well aware, the
21 *Johnson* case came out last year and was decided by the Supreme
22 Court, essentially determining that the residual clause was
23 unconstitutional at the time.

24 So now, in this case, we're looking at the force
25 clause for the malicious wounding and/or unlawful wounding

1 convictions that Mr. Jenkins is facing.

2 As the Court is well aware, at this point in time
3 under the statute, if you look at the categorical approach
4 first, you can only look to the elements from the underlying
5 case -- or, excuse me, conviction. And that's, essentially,
6 18.2-51 in this case, both for malicious wounding and unlawful
7 wounding.

8 Now, when you look at the categorical approach, the
9 United States --

10 THE COURT: Or 51.2 for the aggravated malicious
11 wounding.

12 MS. NEESE: Yes, sir.

13 THE COURT: But I think the elements are the same.

14 MS. NEESE: Yes, sir. Thank you.

15 I guess our position --

16 THE COURT: For our purposes.

17 MS. NEESE: That is correct.

18 THE COURT: Right.

19 MS. NEESE: Now, going to the case law at this point
20 in time -- and first off, just arguing, I guess, from the
21 United States' standpoint, this is unlawful wounding and
22 malicious wounding.

23 "Wounding" to us, in and of itself, shows that
24 force -- force has been applied, whether it be attempted
25 force, use of force, and/or threatened use of force. That's

1 one of our arguments.

2 But going to the cases on point, we think there is
3 only two --

4 THE COURT: But the statute says, and this is -- this
5 is the whole rub: The statute says maliciously shoot, stab,
6 cut, or wound any person. "If any person maliciously shoots,
7 stabs, cut, or wound any person, or by any means cause him
8 bodily injury." And I think the defendant's argument focuses
9 on that "or by any means causes him bodily injury." And so I
10 think the rub is right there.

11 I mean, I would agree with you that physical force is
12 necessarily required in the shooting, the stabbing, the
13 cutting, or the wounding. I think that's self-evident. The
14 question is: Does it apply to "or by any means cause him
15 bodily injury"?

16 MS. NEESE: And that's what takes us to our argument
17 under *Candiloro*. First, that's our position. The Fourth
18 Circuit -- yes, it's not a lengthy opinion, because they
19 didn't need to make it lengthy. They just address the "by any
20 means" under that statute, in this unpublished case.

21 We acknowledge it is an unpublished case, we
22 acknowledge it's only guiding precedent, but we do think it is
23 precedent that should be considered here, and highly
24 considered by this Court. Because in *Candiloro*, it
25 essentially states that *Candiloro* was arguing the plain

1 meaning of the phrase "by any means," in the unlawful wounding
2 statute, encompasses conduct that does not involve the use,
3 attempted use, or threatened use of physical force against the
4 person of another.

5 "Although the phrase 'by any means,' standing alone,
6 could possibly be given the broad interpretation *Candiloro*
7 argues for, the phrase has been narrowed by established
8 Virginia precedent." And it goes on to state what they
9 determined at that point in time.

10 Now, we recognize that Ms. Spence and Mr. Jenkins
11 have pointed out the *Lopez-Reyes* case.

12 THE COURT: Yeah. That's where Judge Ellis says he
13 really thinks the Fourth Circuit got it -- he wasn't persuaded
14 by *Candiloro*, and he went the other way, and he found that it
15 was -- that the categorical approach should not apply to the
16 statute. That's what Judge Ellis says in *Lopez-Reyes*.

17 MS. NEESE: Right. And only looking at *Lopez-Reyes*
18 for the categorical approach, because at that point in time,
19 they acknowledged the modified categorical approach. That was
20 before *Descamps*, though.

21 But just talking about the categorical approach, we
22 do acknowledge that that's what Judge Ellis says, and he does
23 point to certain Virginia cases to make his position. But
24 those cases were already in effect at the same time the Fourth
25 Circuit took their position in *Candiloro*, and they determined

1 that "by any means" was not something that was going to say
2 that -- essentially, it did not involve the use, attempted
3 use, or threatened use of physical force, just based on the
4 elements.

5 But then, if the Court is even slightly convinced by
6 the *Lopez-Reyes* case, then we are now taking a position to
7 also use the reasoning set forth in the *Mathis* opinion and
8 also the *McDaniel* opinion that have recently been issued.
9 Because *Lopez-Reyes* was -- I think it was decided in 2013.

10 So --

11 THE COURT: May 10th, 2013.

12 MS. NEESE: That was before the Supreme Court's
13 decision in *Castleman*.

14 Now, we acknowledge that *Castleman* isn't directly on
15 point for the unlawful wounding, malicious wounding. However,
16 the reasoning --

17 THE COURT: *Castleman* was the case that dealt with
18 the misdemeanor conviction of --

19 MS. NEESE: Crime of domestic violence.

20 THE COURT: Crime of domestic violence.

21 MS. NEESE: Yes, sir.

22 THE COURT: *Castleman* really -- I think Justice Kagan
23 wrote *Castleman*, I think. And *Castleman* really doesn't deal
24 with this issue. The majority opinion in *Castleman* doesn't
25 deal with this issue.

1 MS. NEESE: Not necessarily directly. However, the
2 reasoning has been used in other cases, in similar -- not
3 unlawful wounding and malicious wounding, but in similar
4 issues that have come up for whether a crime of violence
5 and/or a violent crime are categorically violent crimes and/or
6 crimes of violence under federal statutes and the sentencing
7 guidelines.

8 So, essentially, as we've stated, we would ask this
9 Court to look at the reasoning set forth in the *Mathis* case
10 and --

11 THE COURT: What *Castleman* says is -- look, both
12 *Castleman* and *Johnson* -- and I'm not talking about 2015
13 *Johnson*, I'm talking about 2010 *Johnson*.

14 MS. NEESE: Yes, sir.

15 THE COURT: In which Justice Scalia, writing for the
16 majority, defines what 924(e) means when it says "violent
17 felony," because *Johnson*, the 2010 *Johnson* case, dealt
18 specifically with the physical force prong and what does
19 physical force mean in 924(e).

20 Both *Castleman* and *Johnson* deal with the definition
21 of physical force, but the way I read Justice Kagan's opinion,
22 it is because they deal with different statutes. *Castleman*
23 dealt with 921(a)(33)(A)(ii), and *Johnson* and our case, this
24 case, deals with 924(e)(2)(B)(i). Because they deal with
25 different statutes, they require different definitions.

1 That's the way I read Justice Kagan's opinion in *Castleman*.

2 *Johnson* requires violent force, as violent force is
3 defined -- I mean, he says -- he says physical force means
4 violent force, capable of producing a bodily injury. That's
5 what Justice Scalia says in *Johnson*. That's what 924(e) says.

6 *Castleman* only requires the common law force
7 definition, which can be touching. Okay? Because he says
8 that's all that is required under the common law. That's what
9 Justice Kagan said, that's all required for a misdemeanor
10 crime of domestic violence.

11 So in *Johnson*, 924(e) requires violent force. In
12 *Castleman*, 922(g) requires only physical force and can involve
13 minor uses of force. So I think they're really different
14 cases, I think *Castleman* and *Johnson* are really different
15 cases. And I think we need to focus on the statutes involved
16 here.

17 So I think *Castleman* is a sideshow and a red herring
18 to the analysis.

19 MS. NEESE: Well, to the analysis, we would
20 respectfully disagree to a certain point, because the way they
21 analyze it, and the arguments that Ms. Spence is making is,
22 essentially, the use of poison, trickery, or sabotage of a
23 vehicle.

24 And the way that the reasoning set forth in
25 *Castleman* -- though, I agree with you it's a different

1 statute. But the reasoning we think is on point, because,
2 essentially, in *Castleman* it states about the poisoning. I
3 think we argued this in our brief. But, essentially, it says
4 that using force -- or unfounded, because in *Castleman*, the
5 Supreme Court found the use of force is not the act of
6 sprinkling the poison itself, but the act of employing
7 poisoning to cause physical harm, even though the physical
8 harm could be caused indirectly, is what the Supreme Court was
9 stating.

10 So we would ask that the Court look to that for
11 reasoning purposes, because other courts, since that decision
12 has come out, has also used that in other circumstances, not
13 directly on point, the same point that *Castleman* did. So
14 that's why we're asking for it to be used --

15 THE COURT: Well, you would argue that *Castleman* is
16 persuasive to discount the analysis that Judge Ellis used in
17 *Lopez-Reyes*, for example, with that case involving the cancer
18 salve.

19 MS. NEESE: Yes, Your Honor.

20 THE COURT: You know, the Virginia Supreme Court case
21 in *Banovitch*. What a bizarre case that is.

22 MS. NEESE: Yes, sir.

23 THE COURT: You know, where the -- the Court actually
24 didn't reach the issue because -- didn't decide that *Banovitch*
25 engaged in malicious wounding, but did it on different

1 grounds. The Virginia Supreme Court said, "There's no malice.
2 We can't find the malice requirement here" in the *Banovitch*
3 case.

4 And then the *Long v. Commonwealth* case, the other
5 case that Judge Ellis relied on, was the pit bull case, said,
6 "Sic 'em. Kill 'em."

7 You would argue that *Castleman*, dealing with a
8 different statute, would suggest that these two cases, *Long*
9 and *Banovitch*, that Judge Ellis gets the analysis wrong.

10 MS. NEESE: That is correct, Your Honor.

11 THE COURT: I understand that argument.

12 MS. NEESE: Yes, sir. So that's why we're saying
13 it's persuasive and we would like to use its analysis in
14 making this determination, because other courts have in other
15 circumstances as well.

16 Now, going back to --

17 THE COURT: And I read Judge Conrad's opinion in
18 *Mathis*, and I don't think -- I mean, it's just a different
19 statute. Similar words, different statute. It's not on all
20 fours.

21 MS. NEESE: Okay. And going back to what you were
22 saying in *Johnson* 2010, as you said, the violent force, that
23 is, force capable of causing physical pain or injury to
24 another, we set forth our analysis as well in our first
25 sentencing memorandum as to why the *Lopez-Reyes* court got it

1 wrong there as well, just because of the pure fact that
2 regardless -- and I guess it goes back to *Castleman*, to a
3 certain extent -- regardless of how the wounding or the
4 maiming, or other types of ways you can commit the crime under
5 18.2-51, you're still causing -- using force, or attempted use
6 of force or threatened use of force to cause a physical harm
7 to someone else.

8 And we think, just looking at the elements on its
9 own, under the categorical approach, there is enough there to
10 show that they are qualified predicate offenses. But I guess
11 that is besides itself if you do look at the modified
12 categorical approach.

13 So then you get to 2014, you get to the *Descamps*
14 decision. I mean, the courts have really made this difficult
15 for us, because we're going back and forth through all these
16 different decisions.

17 THE COURT: I have spent several days thinking about
18 this the issue. Days, not just hours. Days thinking about --
19 reading all these cases, looking at the law, thinking about
20 categorical, thinking about modified categorical, to make sure
21 I get this decision right.

22 I have literally spent days and days. And all of my
23 staff involved in this, all three law clerks have looked at
24 this issue with me. We have spent days and days, because it
25 is an issue that is -- there was a case decided by the Fourth

1 Circuit last week, February 19th, the *Barrett* case was decided
2 on the issue of the application of the categorical versus the
3 modified categorical approach.

4 I mean, this is something that is topical and timely
5 and being dealt with by district courts and courts of appeals
6 every day these days, partly because of the *Johnson* 2015
7 decision with regard to the residual clause being
8 unconstitutional, but also partly because, you know, this
9 penalty is an enhanced penalty and we need to make sure we get
10 it right.

11 MS. NEESE: Yes, sir. We definitely understand that.

12 So going to the *Descamps* decision, as we've talked
13 about, the Supreme Court came out and stated, essentially,
14 that if the underlying statute is divisible or a statute sets
15 out elements in the alternative, and thus, creates multiple
16 versions of that crime, the Court may then apply --

17 THE COURT: How is that different when it says in
18 *Descamps*, as the Fourth Circuit quotes in *Omargharib*, which
19 is, I think, the Fourth Circuit case -- when it says,
20 "multiple versions of the crime," why is that any different
21 than alternate means?

22 Ms. Spence argues that all this 18.2-51 sets out are
23 alternate means for committing the same crime. In *Descamps* --
24 I think that also was Justice Kagan. I think in *Descamps* and
25 the Fourth Circuit recognizes that if it is just alternate

1 means, it is not divisible, it is just one crime. And so is
2 it alternate means or are there different elements?

3 MS. NEESE: Well, Your Honor, that's where we look to
4 the two Eastern District of Virginia opinions. We didn't rely
5 upon *Lee* and *Carter* for purposes of the categorical approach,
6 because under those cases, as Ms. Spence has pointed out in
7 her sentencing memorandum -- or her memorandum regarding this
8 issue, those cases look at the residual clause. So we're not
9 even looking at those cases.

10 THE COURT: No. I think one of them was Judge Hudson
11 and one of them was Judge Smith in the Eastern District. And
12 I think the Judge Smith opinion, which I believe is *Lee*, I
13 just had to set it aside, because at the end of the day, she
14 decides, "I don't have to decide this because the residual
15 clause applies." Well, we can't apply that case because the
16 residual clause is unconstitutional. So you do look to Judge
17 Hudson and *Carter*.

18 MS. NEESE: Right. But we look to *Lee* in a sense
19 that *Lee* also goes to *Carter* to say it has already been
20 determined that this is a divisible statute under *Carter*, and,
21 essentially, we think it is a divisible statute in *Lee* as
22 well. But, yes, sir --

23 THE COURT: Did you look at the Third Circuit's
24 opinion on the issue of the divisibility of this statute? Did
25 you look at the Third Circuit's opinion in *Bushnell v.*

1 *Attorney General?*

2 MS. NEESE: I have not, Your Honor.

3 THE COURT: 547 Fed. Appendix 170, it's decided in
4 2013, where the Third Circuit basically said the same thing
5 that Judge Hudson said in *Carter*?

6 MS. NEESE: I have not, Your Honor. Thank you for
7 pointing that out.

8 THE COURT: He said the same thing. And, however,
9 the Fifth Circuit -- did you look at the Fifth Circuit opinion
10 in *Singh v. Holder*, 568 F.3d 525, where the Fifth Circuit said
11 that 18.2-51, Virginia Code again, defined two offenses,
12 malicious wounding and unlawful wounding, which one could
13 argue suggests that it is not divisible? Did you look at that
14 case?

15 MS. NEESE: I did not, Your Honor. Thank you for
16 pointing those out.

17 THE COURT: It's interesting. I was trying to figure
18 out how in the world did the Third Circuit and the Fifth
19 Circuit get involved in deciding whether the Virginia statute
20 for malicious wounding was divisible or not, and, obviously,
21 because it comes up in the immigration cases where someone is
22 subject to being deported and whether or not they constituted
23 an aggravated felony for those purposes, or something like
24 that. They come up in this immigration context all over the
25 U.S.

1 So two courts of appeals have looked at this issue.
2 The Third Circuit in *Bushnell v. Attorney General* simply
3 says -- it says the same thing that Judge Hudson says in
4 *Carter*, and that is, this statute can be divided into four
5 offenses. I'm not sure I agree with that, but the -- that's
6 what the -- and because what the Third Circuit says is, just
7 like Judge Hudson says in *Carter* is, there's two clauses in
8 the first sentence, and that is the shoot, stab, cut or wound
9 any person. And then there's another clause that says "or by
10 any means cause him any bodily injury." They say that's
11 divisible.

12 And then they say the statute also has an unlawful
13 wounding provision, and those two are divisible in the same
14 way. So it's divisible four ways.

15 I think unlawful wounding is just lesser included of
16 malicious wounding. So be that as it may, that's where the
17 rub is, because the question is whether it's divisible or not.

18 MS. NEESE: I guess that goes to the United States'
19 point if they're arguing this "or by any means" under the
20 categorical approach, then it goes to show that there are two
21 different ways to commit malicious wounding and then two
22 different ways to commit unlawful wounding.

23 We understand your position that it might be a
24 lesser-included offense. But it just needs two different ways
25 that the statute --

1 THE COURT: That's exactly right.

2 MS. NEESE: -- to make it divisible. So that goes to
3 our point --

4 THE COURT: Well, she says "by any means" means
5 "means." "By any means" means "means" that all these things,
6 "stab," "wound," "shoot," "cut," and "by any means" are just
7 means of committing the same offense, and, therefore, it's not
8 divisible, and that Judge Hudson got it wrong in *Carter*, and
9 the Third Circuit got it wrong in *Bushnell*, and maybe the
10 Fifth Circuit got it right in *Singh*. So, what do you say to
11 that argument? Because that's the strength of her argument.

12 MS. NEESE: That's correct, Your Honor, that that's
13 her argument. However, we think that, you know, the decisions
14 in *Carter* and the one you've pointed out to us now in
15 *Bushnell* -- and I have not read that, Your Honor, but if
16 you're indicating it's the same as *Carter*, we're hanging our
17 hat on that, because we think it's already been determined in
18 this circuit, although it be another district court, and also,
19 I guess, by the Third Circuit, it goes to show that this is
20 divisible and you can use the modified categorical approach.
21 I think it's clear --

22 THE COURT: Well, let me ask you this.

23 MS. NEESE: Yes, sir.

24 THE COURT: Let's just assume for the sake of
25 argument that the modified categorical approach applies. Does

1 that get us anywhere in this case?

2 MS. NEESE: Yes, sir. I mean, that puts us well over
3 it.

4 THE COURT: Well, tell me why you say that.

5 MS. NEESE: Well, because if you look at -- just
6 under *Taylor*, all you have to look at is the indictments and
7 the conviction orders.

8 THE COURT: The *Shepard*-approved documents, I've got
9 them, okay? I got those. All right.

10 MS. NEESE: I think those easily put us over the
11 hump, because it proves --

12 THE COURT: Where do you get three qualifying
13 convictions?

14 MS. NEESE: Well, I would first look at the unlawful
15 wounding. We'll take Exhibit Number 2 that we've put in.

16 THE COURT: Well, let's start with the drug charge.

17 MS. NEESE: With the drug charge, okay. If you go to
18 the drug charge -- and let me get that out, Your Honor.

19 THE COURT: It's cocaine as an accommodation, in
20 violation of 18.2-248 of the Virginia code.

21 MS. NEESE: Yes, sir. So, he was originally
22 charged with possession with intent to distribute cocaine,
23 which is a Schedule II controlled substance.

24 It was later amended, as the documents show, and he pled
25 guilty and was convicted of possession with intent to

1 distribute cocaine as an accommodation, as the Court has
2 pointed out to us, and as noted in the PSR.

3 So then if you look at the underlying statute, 18.2-248,
4 and you look to the penalties for as an accommodation, you go
5 to (D), and that takes you to "if such person proves that he
6 gave, distributed, or possessed with intent to give or
7 distribute a controlled substance, classified in either
8 Schedule I or II, as an accommodation," and then it goes on to
9 say it's a classified felony.

10 THE COURT: All right. That's what the code says
11 now. Was it a classified felony when he was convicted in
12 1993?

13 MS. NEESE: Your Honor, honestly, I do not know.
14 I'll have to look back.

15 THE COURT: Shouldn't you know that?

16 MS. NEESE: I should know that. I was looking at it
17 from this standpoint, but that is a position that we need to
18 address.

19 THE COURT: I mean, we have to decide whether it was
20 a classified felony in 1993. Okay.

21 MS. NEESE: That is correct, Your Honor. And if the
22 Court needs additional briefing, we can do that.

23 THE COURT: No, I don't, because I looked at it.

24 MS. NEESE: Okay.

25 THE COURT: I looked at it myself. I went back and

1 looked at the code, I looked at every amendment to this
2 statute. Both before 1993 and thereafter, it remained a
3 classified felony. And both before 1993 and after, classified
4 felony in Virginia it was defined as one to ten years.

5 So this is a serious drug offense under the
6 definition of 924(e). This crime qualifies.

7 So, I mean, if you're doing your homework --

8 MS. NEESE: Yes, sir.

9 THE COURT: -- you know, you can't just look at the
10 way the code is now, you have to go back and look to make sure
11 it was at the time.

12 MS. NEESE: Yes, sir.

13 THE COURT: I did that yesterday -- or the day
14 before, myself, and I'm satisfied that, at the time he was
15 convicted, it was a classified felony punishable by a period
16 of incarceration up to ten years in prison; therefore, it is a
17 serious drug offense under 924(e).

18 That one is out of the way.

19 Ms. Spence may want to argue about that, but at least
20 in my mind, he got one. Okay?

21 Now under modified categorical, where do you get two
22 more?

23 MS. NEESE: Well, then we'll go to unlawful wounding.
24 That's paragraph 28 in the PSR.

25 THE COURT: That's the 1993 conviction?

1 MS. NEESE: That is correct, sir.

2 And, essentially, as we've stated in our supplemental
3 sentencing memorandum, we talked about if you look at the face
4 of the indictment, all of the -- or no, I'm sorry, that just
5 has one charge. If you look at the face of the indictment as
6 to that, it says, in pertinent part, that Mr. Jenkins did
7 unlawfully and feloniously strike and wound Donnie Odell
8 Dooley. I think -- and it doesn't even use the words "by any
9 means." So we don't even get to "by any means."

10 THE COURT: This doesn't implicate "to cause any
11 bodily injury by any means" -- or "by any means cause bodily
12 injury." This just says that he was charged in '93 with
13 unlawfully and feloniously strike and wound Donnie Odell
14 Dooley with the intent to maim, disfigure, disable or kill.

15 MS. NEESE: Correct.

16 THE COURT: And the judgment simply says that he was
17 convicted of that crime.

18 MS. NEESE: Yes, sir. So our argument under that is
19 it unequivocally shows that he did actually strike and wound
20 someone, which is causing -- or using force to cause physical
21 harm. And I don't think that, if you look at the indictment,
22 there's any argument there.

23 THE COURT: Okay. So if I accept your argument on
24 the 1993 malicious wounding, then you've got two. Where do
25 you get the third conviction?

1 MS. NEESE: Well, the third conviction --

2 THE COURT: Under the modified categorical approach.

3 MS. NEESE: Yes, sir. So, then you go to our
4 Exhibits 1 and 1-A. I also looked up whether or not we can
5 prove that these were two separate ones under different
6 occasions; however, I don't know that we can even get there,
7 and I don't think we need to get there. Because if you look
8 at both of the first two, and there's potentially the two
9 under the modified categorical approach, then we only need one
10 of these two to classify. So it looks like both them were on
11 the same day, back on October 12th of 1996.

12 If you're looking at the indictments first for
13 aggravated --

14 THE COURT: They are two different people.

15 MS. NEESE: They are two different people. The one
16 thing I will say --

17 THE COURT: I mean, excuse me, two different victims.

18 MS. NEESE: Two different victims, yes, sir. The one
19 thing I will say, that I do think it might be on the same
20 occasion. And I'm not sure that we have the argument, I don't
21 know. But if you look at the second --

22 THE COURT: All you need is one of these.

23 MS. NEESE: That's correct, Your Honor.

24 THE COURT: So tell me why you think there's
25 enough -- there's nothing in the judgment that helps you.

1 It's all in the indictment.

2 MS. NEESE: It's all in the indictment.

3 THE COURT: So tell me why you think there is
4 something in this indictment. And I think he only pled
5 guilty -- I think he only pled guilty to Count One. So we're
6 only dealing with Count One of the indictments.

7 MS. NEESE: Well, but under *Shepard/Taylor*, you can
8 look at the four corners of the document, so you can look at
9 everything he was charged with to give you context as to what
10 actually happened in Count One of what he pled guilty to.
11 Because if it allows you to look at the four corners of the
12 document, you can look at all the additional information that
13 could subsequently show what actually happened in Count One or
14 give you, as stated, the context of what happened in Count
15 One.

16 But first just going to Count One, it does not use
17 "by any means." So if you're looking at Government's Exhibit
18 1, the 1906 charge, it simply states that he did unlawfully
19 and feloniously and maliciously shoot, wound, or cause bodily
20 injury to Benny Calderon, III, with the intent to.

21 It doesn't use that phrase that Ms. Spence was
22 hanging her hat on for the categorical approach in talking
23 about the "or by any means." So, essentially, it is talking
24 that it is a wounding to this individual. And then you
25 take -- you go down to the other counts and it shows that he

1 shot the individual.

2 THE COURT: Well, I don't know that I could consider
3 the other counts because those were nolle prossed. When I
4 look at the *Shepard* documents, I'm looking at what he was
5 charged with and what he pled guilty to. I mean, I don't know
6 that I can use these other counts where the counts were nolle
7 prossed. I mean, what authority do you have for that?

8 MS. NEESE: Well, I think *Taylor* and *Shepard* set it
9 out. I mean, specifically *Taylor*, in talking about the
10 underlying -- it's what he is charged with. And you can look
11 at everything that's contained within the four corners.

12 Yes, he is only convicted of the aggravated malicious
13 wounding and the malicious wounding, but if you're looking at
14 everything that happened, it shows you in the four corners of
15 those documents what happened to Mr. Calderon.

16 THE COURT: But he didn't agree to Counts Two and
17 Three. This is just a charge by the government, by the
18 Commonwealth. Boy, I just -- I don't know that I agree with
19 you that I can consider for the purposes of the modified
20 categorical approach -- and I haven't -- and I haven't run
21 this down, whether I could consider for the modified
22 categorical approach a charge that he did not agree to, that
23 was nolle prossed. That's an interesting argument. Okay?

24 MS. NEESE: Well, we made that argument because of
25 the fact that you can look at the four corners of the

1 document. But if you just go to specifically --

2 THE COURT: But did *Taylor* and *Shepard* deal with
3 charges that were dismissed as well as charges that were pled
4 guilty to?

5 I just have a hard -- I have a hard time of relying
6 on just an indictment that he didn't plead guilty to for the
7 purposes of the modified categorical approach.

8 I'm not sure that I need to get there in this case,
9 okay? I haven't run that down. But let's look at Count One.

10 MS. NEESE: Yes, sir. So the rest of Count One takes
11 you to "with the intent to maim, disfigure, disable, or kill."
12 And then it talks about "where the victim was seriously
13 injured and was caused to suffer permanent and significant
14 physical impairment." There had to be some type of force that
15 was used to cause this physical harm that is discussed in
16 Count One, and that in and of itself we think --

17 THE COURT: Isn't that really no different than the
18 categorical approach? Isn't -- because you're focusing on
19 injury, you're focusing on harm, and because the element of
20 the statute -- 18.2-51 says an element of the statute is
21 harm -- injury, excuse me, injury, bodily injury, isn't this
22 really the same argument as you make in the categorical
23 approach?

24 MS. NEESE: To a certain extent, Your Honor, yes, it
25 is. But to a certain extent it is not, because it goes so far

1 as to describe what the injury is and that he suffered
2 permanent and significant physical impairment. Those aren't
3 elements, that's just describing how bad this was.

4 THE COURT: Don't you get that by taking poison?

5 MS. NEESE: You could, but then that goes back to our
6 argument under *Castleman* and the other cases that say it
7 doesn't matter how the harm -- whether it's indirectly.
8 You're causing a physical harm to someone and you're using
9 some type of force to get to that physical harm. So that is
10 our position, Your Honor, under the modified categorical
11 approach.

12 But that's just the Count One -- or, excuse me, the
13 Exhibit 1. And then also under Exhibit 1-A, if you're only
14 looking to Count One and you're not looking at the rest of the
15 documents, it does talk about --

16 THE COURT: You would argue, and it's an interesting
17 argument, you would argue that if I'm entitled to refer to
18 Counts Two and Three in each of these indictments, even though
19 they were dismissed, that that really makes it clear that each
20 of these crimes involved shootings, right?

21 MS. NEESE: Yes, Your Honor.

22 THE COURT: And that because they involved shootings,
23 they involved physical force, and that, therefore, applying
24 the modified categorical approach -- modified categorical
25 approach, that either one of these would qualify as the third

1 predicate qualifying conviction, right?

2 MS. NEESE: Yes, sir. That is --

3 THE COURT: I don't know the answer to that question.
4 You got me on that one; that's one that I didn't think about.
5 I just assumed that I could rely, as *Shepard*-approved
6 documents, a plea and judgment that was actually entered, as
7 opposed to one that was nolle prossed.

8 And unless I've got some precedent telling me that I
9 can consider a nolle prossed charge, I'm not inclined,
10 given -- given, if anything, the rule of lenity, I'm not
11 inclined to -- unless there's some support that says under
12 *Taylor* and *Shepard* I can include nolle prossed charges, I'm
13 going to fall back to my understanding and that would be that
14 *Taylor* and *Shepard* talk about actual convictions and either --
15 I think *Taylor* was a jury verdict. *Taylor* was a jury verdict
16 and *Shepard* was a guilty plea. And -- I think. I think
17 that's right. Or maybe *Taylor* was a jury verdict and *Descamps*
18 was a guilty plea.

19 Either way, okay, can you give me any cases that tell
20 me that I can use a nolle prossed charge for the purpose of
21 the modified categorical approach?

22 MS. NEESE: Not right now I can't, and this is why,
23 because when we read --

24 THE COURT: This is a fascinating issue.

25 MS. NEESE: So when we read, I guess, the approach in

1 *Taylor*, it says the underlying charging documents or --

2 THE COURT: *Taylor* was a jury trial, though.

3 MS. NEESE: Right -- or other specifically approved
4 documents. But we're talking about the underlying convictions
5 after --

6 THE COURT: But he wasn't convicted of Counts Two and
7 Three, he is only convicted of Count One. So am I not limited
8 to considering what is in Count One?

9 MS. NEESE: I don't think so. And the reason why I
10 say that is because you can look at all of the underlying
11 charging documents or these other documents that are approved.
12 And if you're looking at the total four corners of the
13 document -- now, granted, I'm not before you today saying I
14 have case law on this issue.

15 THE COURT: Yeah.

16 MS. NEESE: This is our argument, and we could go
17 back and look into the issue further.

18 THE COURT: You know, I appreciate that.

19 MS. NEESE: Yes, sir.

20 THE COURT: Absent some case law, I'm not buying that
21 argument, okay.

22 MS. NEESE: Yes, sir.

23 THE COURT: I have to look to see -- it just seems to
24 me that when you're talking about qualifying convictions under
25 924(e) and using documents to -- *Shepard*-approved documents to

1 establish qualifying convictions, I can only look to the
2 documents that relate to the counts of conviction and not the
3 counts that were nolle prossed. That's just what I think.
4 And particularly given what is at stake here and the rule of
5 lenity, I really think that that's the right approach to take.

6 But you would argue that, even under Count One, it
7 qualifies because of what Count One says.

8 MS. NEESE: Especially the aggravated malicious
9 wounding, yes, sir, and the Exhibit 1, as we just stated --

10 THE COURT: How could a conviction for aggravated
11 malicious wounding not be a violent felony under 924(e)?

12 MS. NEESE: That's our position under the categorical
13 approach. I mean, we don't understand how an aggravated
14 malicious wounding could even be argued not to be a violent
15 felony under that approach.

16 But, essentially, overall we think we've proven by a
17 preponderance of the evidence that Paragraphs 23, 28, and 30
18 within the PSR show at least three qualifying convictions for
19 Armed Career Criminal Act purposes, and thus, he would be
20 deemed to be an armed career criminal.

21 THE COURT: Thank you. Let's hear what Ms. Spence
22 has to say.

23 Good morning.

24 MS. SPENCE: Good morning, Your Honor. I will start
25 with addressing the last question you asked. It is

1 counterintuitive to say aggravated malicious wounding is not
2 a, quote, "violent felony," if you didn't have the definition
3 provided in the statute, as interpreted by *Johnson* in 2010 and
4 *Johnson* in 2015.

5 THE COURT: Well, I don't think *Johnson* 2015 has
6 anything to do with this. All it does is it takes out that
7 part of the statute. We're not under (ii).

8 MS. SPENCE: True.

9 THE COURT: We're not. It's not an enumerated
10 offense. It's not burglary, extortion, use of explosives.
11 And you can't do the residual clause, so we're looking at (i),
12 and that is 924(e)(2)(B)(i). That's where we are.

13 MS. SPENCE: That's right. And congress could have
14 defined violent felony as one in which the defendant
15 intentionally caused bodily injury. They didn't define it
16 that way. They defined it as has an element physical force,
17 which the court interpreted in 2010 to mean violent physical
18 force. Therefore, the indirect force that the *Castleman*
19 related argument would apply is a constructive force. It does
20 not meet that definition of violent physical force.

21 Likewise, indirect harm does not meet that
22 definition. It's an outcome-oriented constructive force, and
23 that is not what the statute requires.

24 THE COURT: What does Justice Scalia mean in *Johnson*
25 2010 when he says in *Johnson* that 'Physical force' means

1 violent force, force capable of causing physical pain or
2 injury to another person"? That's how he defines "physical
3 force" -- excuse me, that's how the court defines "physical
4 force:" "Violent force, force capable of causing physical pain
5 or injury to another person."

6 Doesn't that mean, therefore, that if someone has
7 caused physical injury, that, therefore, by definition it
8 involves physical force, and that, therefore, by definition
9 it's a violent felony?

10 MS. SPENCE: Not necessarily, Your Honor.

11 THE COURT: Tell me why.

12 MS. SPENCE: Back in first year torts, your eggshell
13 plaintiff. There are people that you could touch and their
14 bones break, osteogenesis imperfecta, brittle bones. There
15 are whole series of things where as a person is playfully
16 dodging turns their ankle and falls down the stairs and
17 sustains a serious injury, but physical force was not applied.

18 And there are the actions like cutting the brakes on
19 someone's car, or those other types of things you see in all
20 the TV the shows, that don't involve physical force against
21 the person of another, but they definitely result in injury to
22 another person.

23 They do not require the application of any physical
24 force, much less violent physical force to the person of
25 another.

1 And we may not like it, but that is the way that the
2 Supreme Court has defined force, that that is the definition
3 they've given. And congress is free to change that definition
4 at some point. I'm sure they probably will. But where we
5 stand right now, this is what the law is.

6 As for whether or not -- well, first let me start
7 with the crack cocaine. I have conceded from the beginning,
8 because I knew the 1993 statute did apply as a distribution
9 offense with a penalty of up to ten years. So we haven't
10 contested that as a predicate.

11 THE COURT: So, you would agree that Mr. Jenkins has
12 one predicate qualifying offense under 924(e)?

13 MS. SPENCE: That is correct.

14 THE COURT: A serious drug offense?

15 MS. SPENCE: A serious drug offense. And that is
16 what the calculations -- guideline calculation in my
17 sentencing memorandum was based on, was one prior qualifying
18 offense.

19 We cannot consider malicious wounding a divisible
20 crime or unlawful wounding a divisible crime. I would first
21 note that no Fourth Circuit case has come up with those four
22 little categories that I could find, only district court
23 cases, especially not since *Descamps* or *Omargharib*. And when
24 you have -- as *Omargharib* said, just because there's an "or"
25 between the two parts doesn't change the analysis, if you're

1 just talking about different ways of committing the same
2 crime. What are shooting, wounding, and cutting if not means?

3 And if you look at the way the charge is pled in
4 Count One of Exhibit 1 and 1-A, the 1997 aggravated malicious
5 wounding and malicious wounding charges, they are pled as
6 maliciously shoot, wound, or cause bodily injury.

7 THE COURT: Would you agree that if the modified
8 categorical approach applied -- and I understand that you are
9 not conceding that it does. You don't think it does because
10 you don't think the statute is divisible. Okay? But let's
11 assume for the sake of argument that I found it to be
12 divisible, okay? Would you agree that the 1993 conviction for
13 unlawful wounding would qualify, because all that is mentioned
14 in that indictment is strike and wound. Would you agree that
15 that qualifies as physical force?

16 MS. SPENCE: If the modified categorical approach
17 applied, I would have to agree that that indictment, as
18 written --

19 THE COURT: Okay. Now, let's go to this interesting
20 point that I have, unfortunately, not run down -- I tried to
21 run down everything else -- the issue of whether I can
22 consider as *Shepard* and *Taylor* -- the *Shepard*-approved
23 documents, counts of an indictment that are nolle prossed.

24 MS. SPENCE: No, you cannot, Your Honor. And I
25 wish -- I've run across the case, and I believe it's a Fourth

1 Circuit case --

2 THE COURT: I don't think I can. It just doesn't
3 make sense to me that I could consider as a conviction a
4 charge that -- a charge that was nolle prossed. I just don't
5 that qualifies under *Shepard* and *Taylor*, and I don't have any
6 cases off the top of my head to stand for that proposition,
7 and the government didn't either. But it just seems to me to
8 be wrong.

9 MS. SPENCE: There is a case and it specifically
10 stated that would deprive the defendant of the benefit of a
11 bargain, because by looking at a dismissed or nolle prossed
12 charge, that is not something on which his conviction is
13 based.

14 THE COURT: Okay. So if we applied the modified
15 categorical approach and we just looked at Count One of each
16 of the 1997 convictions, one for aggravated malicious wounding
17 and one for malicious wounding, is there enough there from
18 which the Court can determine that physical force was applied?

19 MS. SPENCE: No, there is not, Your Honor, because
20 injury doesn't equal proof of force. And they've not
21 specified the means, and since -- even if you applied that
22 modified categorical approach, their indictment and their
23 conviction order did not make it plain which, quote, element
24 they would be relying on. And I argue it's because it's not
25 an element, that's just a means of committing the crime.

1 THE COURT: I was going to ask you that. You would
2 therefore -- you're not conceding that shoot, wound, cut, or
3 stab and by any means cause bodily injury are separate
4 elements?

5 MS. SPENCE: No.

6 THE COURT: What about the fact that the Virginia
7 Supreme Court has twice said that they are? The Virginia
8 Supreme Court said in the *Johnson* case, in 1945, and in
9 another case, in 1947, the Virginia Supreme Court said -- let
10 me see; I've got that case right here.

11 It's the *Dawkins* case, in each those cases, the
12 Virginia Supreme Court -- the *Johnson* case is an interesting
13 case. Somebody gets hit with a sledgehammer and his ribs are
14 broken, and so the Court says, well, we've got to look at
15 common law wound. Wound means draws blood. There's no blood
16 drawn, therefore, it doesn't fall within shoot, stab, cut, or
17 wound. And it says does it -- and the Court in that case
18 says, in the *Johnson* case -- I think it's 1945 -- says this:
19 To shoot -- and they're talking about 18.2, the predecessor to
20 the 18.2-51.

21 They say, "To shoot, stab, cut, or wound under the
22 statute comprised distinct offenses, and to cause bodily
23 injury is likewise a distinct offense." And that was cited,
24 with approval, two years later in 1947 by the supreme court.
25 It says this: Maliciously causing bodily injury by any means,

1 with intent to either maim, disfigure, or disable or kill, is
2 a distinct cognate offense subject to the same classification
3 as a felony.

4 So these two cases stand for the proposition that the
5 Virginia Supreme Court views the first line of that statute as
6 having distinct offenses, therefore -- you know, and Judge --
7 it was Judge Hudson in *Carter* doesn't cite these cases. But I
8 found them because the Third Circuit in *Bushnell* cites them.
9 And the Third Circuit in *Bushnell* says, look, the Virginia
10 Supreme Court says this is divisible.

11 And so, therefore -- but your point would come back
12 to -- really, it all comes back to categorical. It is the
13 indictment in 2000 -- in 1996, that he was convicted of in
14 1997, just says "caused bodily injury," and you don't believe
15 that is sufficient for the Court to find physical force was
16 used, correct?

17 MS. SPENCE: That is correct, Your Honor. I would
18 also address that later cases starting with, I believe, one
19 called *Harris*, and then *Bryant v. Commonwealth* in 1949, and
20 then *Campbell v. Commonwealth* in 1989 discussed the
21 development of Virginia's law of malicious and unlawful
22 wounding from originally having been the felony mayhem, which
23 required a wounding, to questioning whether an injury that
24 didn't involve broken skin would be a wound, which in the 1945
25 *Johnson* case, that's when they focused on bodily injury by any

1 other means being different from wounding, to by the time you
2 get to *Bryant* and *Campbell*, they're just saying it doesn't
3 have to be broken skin, any injury is an injury.

4 And they said, "We know that we said before that
5 it's -- you know, that it was a close question and we didn't
6 resolve it because of this difference between injury and
7 wounding, but the bottom line is an unlawful wounding requires
8 an injury and any injury is enough to suffice." And so I
9 would say --

10 THE COURT: But in those later cases they don't say
11 that *Johnson* didn't stand for the proposition that they're not
12 distinct offenses and that they're not elements. It doesn't
13 say those are just means.

14 MS. SPENCE: What they said was it's a distinction
15 that makes no significance either way.

16 THE COURT: It may not for that purpose, but it might
17 for my purposes.

18 MS. SPENCE: It does, Your Honor. But if it doesn't
19 for their purposes, then that shows more than likely that it
20 is a means question rather than an element issue, because an
21 element has to be agreed upon unanimously by the jury in order
22 to support a conviction. The means does not.

23 THE COURT: Well, in fact, the jury instructions
24 support your argument. The model jury instructions in
25 Virginia for unlawful wounding and malicious wounding don't

1 set these two apart. They just, in fact, have a fill in the
2 blank for the means used. I mean, the model jury instructions
3 actually support your argument.

4 MS. SPENCE: Yes, they do.

5 THE COURT: As does the Fifth Circuit in the same
6 case; although, it's not really on point. I mean, it's not
7 determinative. But it's an interesting question.

8 MS. SPENCE: It is, Your Honor. And I would
9 certainly say that even if the modified categorical approach
10 applied, that the 1997 aggravated malicious wounding and
11 malicious wounding convictions don't break it out into
12 elements, and, therefore, you have to look categorically. The
13 whole purpose of both the categorical and the modified
14 categorical approach is to look at the elements of the crime
15 not the underlying facts.

16 THE COURT: Well, the modified categorical approach,
17 as the Supreme Court in the Fourth Circuit teaches, is just a
18 tool to be used to apply the categorical approach.

19 MS. SPENCE: Exactly, not to get to the facts.

20 THE COURT: And the whole point is, I can't be -- in
21 doing this, we can be retrying those earlier cases. We can
22 only look at certain things. We look at the elements under
23 categorical, and then if it is divisible, then you can look at
24 the *Shepard*-approved documents under modified categorical.
25 I've got it. Okay.

1 MS. SPENCE: That's my argument, Your Honor.

2 THE COURT: Thank you.

3 Ms. Neese, would you like to respond in any respect,
4 since the government has the burden here?

5 MS. NEESE: Your Honor, I'll be brief. I just think
6 it's a stretch of the imagination where we're going with these
7 cases that aggravated malicious wounding, malicious wounding,
8 and unlawful wounding are not violent crimes under the
9 statute.

10 THE COURT: Violent felony.

11 MS. NEESE: Violent felonies, I'm sorry, under the
12 statute. Essentially, I mean, they're trying to pick out any
13 little detail and make it into something, like I said, a
14 stretch of the imagination. We can't go to what the
15 underlying facts are, except for the charging documents and
16 things say.

17 THE COURT: Well, what congress says in the statute
18 isn't any little detail. What congress says in the statute is
19 what the law requires.

20 MS. NEESE: Correct, Your Honor. You're correct.

21 THE COURT: It's not a little detail.

22 MS. NEESE: No, you're correct. But, I mean, we're
23 bringing in all types of different hypotheticals in these
24 situations. And the courts are seeing it in many other
25 situations regarding crimes of violence and violent crimes,

1 when just on the face of it aggravated malicious wounding,
2 malicious wounding, and unlawful wounding -- when we talk
3 about it in our office, it is hard pressed for us to say that
4 these things do not -- there's not a force element that is
5 used to commit this physical injury.

6 THE COURT: Have you thought about Justice Scalia's
7 concurrence in *Castleman* and how it applies here?

8 MS. NEESE: Well, Your Honor, I will say this: I
9 have been assigned this case recently. Our appellate chief
10 has been out because her brother passed away recently, and
11 she's been out of the office for two weeks.

12 THE COURT: I didn't know that, and I'm sorry for
13 that.

14 MS. NEESE: I will say that I don't know every
15 detail, so I haven't analyzed each and every instance in this
16 case. And that's why we don't know the Fifth Circuit and the
17 Third Circuit cases. I think none of us cited that for that
18 matter.

19 THE COURT: No.

20 MS. NEESE: So thank you for pointing that out to us.

21 THE COURT: Well, you know, this isn't going to be
22 the place where -- you know, regardless of what happens here,
23 I assume that the court of appeals may get to see this case.
24 And I thought it would at least benefit you all to know all of
25 the things that I found, as I looked at this, to try to get

1 the right result.

2 MS. NEESE: Yes, sir, I completely agree with you.

3 And I guess by a preponderance of the evidence, based on our
4 argument under *Candiloro* and the 2010 *Johnson* opinion of what
5 physical force means, we think categorically they're violent
6 crimes -- or violent felonies, excuse me.

7 And then if you don't see it that way and you go to
8 *Descamps*, we think it's a divisible statute, as we've stated
9 for our reasons, and also for reasons that you've pointed out
10 in additional case law that you found.

11 And we think that if you look at the modified
12 categorical approach, even just looking at the counts that he
13 was convicted of in the indictments, we think that's enough to
14 prove by a preponderance of the evidence that these are
15 violent felonies. Thank you.

16 THE COURT: Thank you.

17 Ms. Spence, I'll give you the last word. Anything
18 else you would like to say? Any additional argument? I think
19 we've gone over it, but is there anything else you would like
20 to say?

21 MS. SPENCE: No, Your Honor. I'm satisfied that the
22 Court understands every aspect of my argument.

23 THE COURT: I do. And I appreciate the work that you
24 all put into this. This is an important issue that is really
25 at the cutting edge of criminal law right now. Both the

1 Supreme Court, the court of appeals, and the district courts
2 are dealing with it.

3 All right. I'm prepared to rule on the issue, all
4 right, and I do so as follows:

5 The defendant pled guilty to a violation of 18,
6 United States Code, Section 922(g)(1), possession of a firearm
7 by a convicted felon.

8 18, United States Code, Section 924(e)(1) provides an
9 enhanced penalty of a mandatory minimum sentence of 15 years
10 if the defendant has three previous convictions for a violent
11 felony or a serious drug offense.

12 The presentence report concludes that Mr. Jenkins has
13 the three qualifying convictions requiring imposition of the
14 15-year mandatory minimum. Probation cites the conviction
15 referenced in paragraph 23 of the PSR for possession with the
16 intent to distribute cocaine as an accommodation, a Class 5
17 Virginia felony in 1993.

18 For the second qualifying conviction, probation cites
19 to Mr. Jenkins' 1993 unlawful wounding conviction, in
20 violation of Virginia Code Section 18.2-51, referenced in
21 paragraph 28 of the PSR.

22 For the third qualifying conviction, probation cites
23 Mr. Jenkins' 1997 convictions for aggravated malicious
24 wounding, in violation of Virginia Code Section 18.2-51.2, and
25 malicious wounding, in violation of Virginia Code 18.2-51, as

1 referenced in paragraph 30 of the PSR.

2 Now, we've heard argument on the issue. The
3 government agrees with the probation officer's assessment, and
4 the defendant does not agree.

5 I approached this matter as follows: 924(e)(2)
6 defines a serious drug offense as being, one, punishable by a
7 maximum term of imprisonment of ten years or more. There's no
8 dispute here that Mr. Jenkins' 1993 cocaine distribution
9 conviction, as an accommodation, meets 924(e)(2)'s serious
10 drug offense definition.

11 Mr. Jenkins was convicted of a violation of
12 distributing cocaine, as an accommodation, which is a Class 5
13 Virginia felony bearing a maximum ten-year term. I went back
14 and looked and made sure that in 1993 it was indeed a Class 5
15 Virginia felony, and that in 1993 it had a maximum penalty of
16 ten years.

17 And I'm convinced, based on my review of the
18 legislative history, reading back at all the amendments to the
19 statute since before 1993, that it did have a maximum ten-year
20 term. Thus, I conclude that Mr. Jenkins' 1993 cocaine
21 distribution conviction is a serious drug offense under
22 924(e), and that, therefore, he has one qualifying conviction
23 under 924(e).

24 The next question to be addressed is whether
25 Mr. Jenkins' 1993 unlawful wounding conviction and his 1997

1 aggravated malicious wounding and malicious wounding
2 convictions qualify as violent felonies within the meaning of
3 924(e) (2) (B). And that's (e) (2) (B) (i), because (ii), is out
4 of the loop.

5 Violent felony is defined in 924(e) (2) (B) in two
6 ways. First, under Subsection (i), it is a felony, that
7 quote, "has an element the use, attempted use, or threatened
8 use of physical force against the person of another," end
9 quote.

10 Subsection 2 enumerates certain crimes not applicable
11 here, such as burglary, arson, extortion, or those involving
12 the use of explosives.

13 The remaining part of the Subsection (ii), the
14 residual clause, was held unconstitutional in the Supreme
15 Court's 2015 *Johnson* decision.

16 So the issue presented here is whether Mr. Jenkins'
17 prior convictions for unlawful wounding, malicious wounding,
18 and aggravated malicious wounding are violent felonies as
19 defined in Subsection (i) -- little I -- based solely on the
20 use of physical force.

21 In order determine whether any of these state law
22 convictions qualify as a violent felony under 18, United
23 States Code, Section 924(e) (2) (B) (i) for consideration of the
24 Armed Career Criminal enhancement, the Supreme Court and the
25 Fourth Circuit Court of Appeals teach that a court should use

1 the categorical approach set forth in *Taylor v. United States*,
2 495 U.S. 575 (1990), and clarified in *Descamps v. United*
3 *States*, 133 S.Ct. 2276, decided in 2013.

4 Under that approach, a court considers only the
5 elements of the statute of conviction rather than the
6 defendant's conduct underlying the offense.

7 The categorical approach focuses solely on the
8 relevant offenses elements, comparing the elements of the
9 prior offense of conviction with the elements of the pertinent
10 federal offense, also referred to as a generic offense.

11 If the elements of the prior offense are the same as
12 or narrower than an offense listed in the federal statute,
13 there is a categorical match. But if the elements of the
14 prior conviction sweep more broadly such that there is a
15 realistic probability that the statute of the offense of prior
16 conviction encompasses conduct outside of the offense
17 enumerated in the federal statute, the prior offense is not a
18 categorical match.

19 Put another way, if the state law crime sweeps more
20 broadly and criminalizes more conduct than the generic federal
21 crime, the prior conviction cannot count as a violent felony
22 under the Armed Career Criminal Act.

23 As I mentioned earlier, under 18, United States Code,
24 Section 924(e) (2) (B) (i), a violent felony is one that, quote,
25 "has as an element the use, attempted use, or threatened use

1 of physical force against the person of another."

2 So applying the categorical approach, the Court needs
3 to examine whether Virginia Code 18.2-51, quote, "has as an
4 element the use, attempted use, or threatened use of physical
5 force against the person of another."

6 In its 19 -- excuse me. In its 2010 *Johnson*
7 decision, the Supreme Court defined the term "physical force,"
8 as that term is used in 924(e)(2)(B)(i). The Court defined
9 physical force as, quote, "violent force capable of causing
10 physical pain or injury to another person," end quote.

11 The question then becomes whether the elements of
12 18.2-51, under the Virginia Code, meet *Johnson's* definition of
13 physical force.

14 Justice Antonin Scalia, who authored the majority
15 opinion in the 2010 *Johnson* case, answered this question in
16 his concurrence in the 2014 *Castleman* decision. There he said
17 the answer to this question was an easy one, quote, "since it
18 is impossible to cause bodily injury without using force
19 capable of producing that result."

20 In other words, because bodily injury is an element
21 of Virginia Code Section 18.2-51, that a conviction of that
22 offense categorically involves the use of physical force
23 defined, as it was in *Johnson*, as, quote, "force capable of
24 causing physical pain or injury."

25 18.2-51 has an element that the defendant caused the

1 victim bodily injury.

2 The first line of the statute reads: "If any person
3 maliciously shoot, stab, cut, or wound any person, or by any
4 means cause him bodily injury with the intent to maim,
5 disfigure, disable, or kill, he shall, except where it is
6 otherwise provided, be guilty of a Class 3 felony.

7 Thus, because a conviction under 18.2-51 has as an
8 element proof of bodily injury, it categorically involves
9 physical force as physical force was defined by Justice Scalia
10 in the majority opinion in 2010 in *Johnson*. I'm bound by
11 *Johnson*. I'm bound by the definition in *Johnson* of physical
12 force, and I believe the conclusion is textually true to the
13 statute and, likewise, true to the 2010 *Johnson's* definition
14 of physical force.

15 Therefore, under the categorical approach,
16 Mr. Jenkins' prior convictions for violations of 18.2-51 and
17 18.2-51.2 for unlawful wounding, malicious wounding, and
18 aggravated malicious wounding all qualify as violent felonies
19 under 924(e) (2) (B) (i).

20 Because I conclude that following the definition of
21 physical force set forth in the *Johnson* decision in 2010
22 requires this conclusion, the categorical approach applies and
23 there really isn't any reason to step next to the modified
24 categorical approach.

25 Now, for what it is worth, I don't believe that the

1 modified categorical approach provides any further guidance in
2 this case, but let me tell you why I think that.

3 The modified categorical approach applies if a state
4 crime consists of multiple alternative elements creating
5 several different crimes, some of which would match the
6 generic federal offense and others that would not.

7 Under this approach, courts may look beyond the
8 statutory text and consult the limited set of documents in the
9 record, the so-called *Shepard* documents, to determine which
10 crime a defendant was convicted of committing. In this way,
11 the modified approach is a tool for implementing the
12 categorical approach.

13 Following the Supreme Court's decision in *Descamps*, a
14 court may apply the modified categorical approach only if the
15 state crime at issue is divisible. A crime is divisible only
16 if it is defined to include potential elements in the
17 alternative, thus rendering opaque which element played a part
18 in the defendant's conviction. Stated differently, crimes are
19 divisible only if they set out elements in the alternative,
20 and thus create multiple versions of the crime.

21 In *United States v. Carter*, 2013 Westlaw 5353055,
22 Eastern District, 2013, the Eastern District of Virginia
23 concluded that 18.2-51 was divisible into the crimes of: (1)
24 malicious wounding, (2) maliciously causing bodily injury, and
25 the lesser included offenses of (3) unlawful wounding, and

1 (4)unlawfully causing bodily injury.

2 The Third Circuit in *Bushnell v. Attorney General*,
3 527 Fed. Appendix 170, (Third Circuit 2013), albeit
4 unpublished, reached the same conclusion. And it relied on
5 two Virginia Supreme Court decisions: *Johnson v.*
6 *Commonwealth*, 184 Va. 409 (1945) and *Dawkins v. Commonwealth*,
7 186 Va. 55 (1947), which held that to shoot, stab, cut or
8 wound is a distinct offense from the "by any means causing
9 bodily injury."

10 These cases compel the conclusion that Virginia
11 recognizes, and has recognized since 1945, that the two
12 portions of the Virginia malicious wounding statute have
13 separate elements and are thus divisible.

14 I would note, however, as the Third Circuit did in
15 *Bushnell*, that the Fifth Circuit in *Singh v. Holder*, 568 F.3d
16 525 -- that's a Fifth Circuit opinion in 2009 -- stated that
17 18.2-51 of the Virginia Code defined two offenses: malicious
18 wounding and unlawful wounding. But the issue of the
19 divisibility of the malicious wounding statute was not before
20 the Court in *Singh*, nor did the Court mention the *Johnson* and
21 *Dawkins* Virginia Supreme Court cases.

22 It is also worth noting on the issue of divisibility,
23 which I think in this case is a close one, that in *Omargharib*
24 *v. Holder*, 775 F.3d 192, Fourth Circuit, 2014, the Fourth
25 Circuit stated that in determining whether a statute is

1 divisible, a court must consider, quote, "how Virginia courts
2 generally instruct juries."

3 And when one looks at the model criminal jury
4 instructions in Virginia on malicious wounding or unlawful
5 wounding, the distinct offenses noted in *Dawkins* and *Johnson*
6 are not present; rather, the instructions have a place to fill
7 in the blank, to list the, quote, "description of overt acts
8 of the defendant that, if true, would constitute a malicious
9 act." Thus, it suggests that the authors of these model
10 instructions read the first sentence of the malicious wounding
11 statute as providing for alternative means as opposed to
12 elements.

13 On balance, however, you know, I am persuaded that I
14 must be guided by what the Virginia Supreme Court has said
15 about the statute. Based on what the Virginia Supreme Court
16 has said in *Dawkins* and *Johnson*, I would conclude that
17 Virginia Code 18.2-51 is divisible.

18 Employing, therefore, the analytical tool of the
19 modified categorical approach, and considering the text of the
20 indictment as *Shepard* teaches, it is clear that the 1993
21 conviction would qualify as a violent felony. There's really
22 no dispute about that.

23 The 1993 indictment states that Mr. Jenkins
24 "unlawfully and feloniously strike and wound Donnie Odell
25 Dooley with the intent to maim, disfigure, disable, or kill."

1 And that plainly requires physical force.

2 So employing the tool of the modified categorical
3 approach, the 2000 -- excuse me, the 1993 conviction would
4 qualify as well.

5 I don't agree, though, that the same can be said of
6 the 1997 convictions, however, if you're in the realm of
7 modified categorical approach. The indictments for aggravated
8 malicious wounding and malicious wounding there simply track
9 the statutory language and don't answer the question of the
10 use of force beyond the text of the statute itself.

11 So where does this leave us? It leaves us right back
12 in the categorical approach, because even if I went down the
13 rabbit's hole of the modified categorical approach in this
14 case and found the statute was divisible, I'm looking at the
15 '97 convictions and they just -- because the indictments in
16 those cases track the statutory language, you're right back
17 into the realm of categorical approach.

18 And I believe this issue is controlled by *Johnson* and
19 the definition of physical force -- the definition of violent
20 felony that the Supreme Court found in *Johnson* as being what I
21 said earlier, and that being violent force capable of causing
22 physical pain or injury to another.

23 In short, I find that the defendant has three
24 qualifying felonies under 924(e) under the categorical
25 approach. I just provided the modified -- my analysis of the

1 modified categorical approach to you for the purposes of your
2 enlightenment and for the purposes of maybe using these
3 precedents on appeal if you want to. I just gave you the
4 benefit of my thinking because I spent some days on this.

5 However, I do believe the categorical approach
6 applies, I don't think you need to get to the modified
7 categorical approach, and I think it applies because of the
8 way the Supreme Court defined physical force in the 2010
9 *Johnson* decision.

10 In short, because the Virginia malicious wounding
11 statute has as an element the causing of bodily injury, and
12 because the United States Supreme Court in *Johnson* defines
13 physical force as set out in 924(e) (2) (B) (i), to be force
14 capable of causing physical injury, the elements of 18.2-51
15 under the Virginia Code categorically meet the definition of a
16 violent felony under 924(e). I therefore find that
17 Mr. Jenkins is subject to the enhanced 15-year mandatory
18 minimum penalty under the Armed Career Criminal statute.

19 With those findings being made, I need to make
20 guidelines findings.

21 The base offense level for this crime under
22 2K2.1(a) (2) is a 24.

23 There is an adjustment that we've just spent the last
24 hour and a half discussing under 4B4 -- excuse me. 4B.1 --
25 no, no -- 4B1.4(b) (3) (B), 4B1.4(b) (3) (B), as an Armed Career

1 Criminal under 18, United States Code, Section 924(e) that
2 bumps the offense level from a 24 to a 33.

3 Does the government move for the third level of
4 acceptance?

5 MS. NEESE: We are, Your Honor.

6 THE COURT: All right. So the total offense level in
7 this case is a 30.

8 We have gone over at length, Mr. Jenkins' prior
9 criminal history. He gets three points for his 1997
10 aggravated malicious wounding and malicious wounding
11 convictions. He gets three points for -- let's see, under the
12 PSR -- hold on one second. Okay. He is given three points
13 for the '97 conviction. The PSR actually says the conviction
14 was in '96, but it really was in '97, in paragraph 30.

15 He gets three points for possession of cocaine,
16 possession of a firearm by a convicted felon, and possession
17 of a firearm while in possession of cocaine, three points for
18 that. That's a '97 conviction. One point for assault and
19 battery, paragraph 32; that's a 2015 conviction. Three points
20 for habitual offender, elude, felony eluding, in paragraph 33.

21 And when you add all those up, that gives him ten
22 criminal history points. Plus, he gets two because he was
23 under a criminal justice sentence. And so that means his
24 criminal history score is a 12, putting him in Criminal
25 History Category V.

1 And that would yield a guideline range of 151 to 188,
2 but because of the mandatory minimum under 924(e), his
3 guideline range is 180 to 188 months.

4 Now, given the Court's guideline findings, which I
5 take it the United States agrees with?

6 MS. NEESE: Yes, Your Honor, we do.

7 THE COURT: And the defendant disagrees with because
8 of my application of the Armed Career Criminal Statute,
9 correct?

10 MS. SPENCE: Yes, Your Honor.

11 THE COURT: And your objection is noted. Okay?

12 MS. SPENCE: Yes.

13 THE COURT: Given that guideline range under the
14 3553(a) factors, what argument does the government have to
15 make for an appropriate sentence in this case?

16 MS. NEESE: Your Honor, just briefly.

17 Under the 3553(a) factors, you look at the history
18 and characteristics of Mr. Jenkins, and, essentially, his
19 criminal history is, what appears to be there for a period of
20 time, not horribly bad because he didn't have any convictions
21 from 1997 until 2015. The problem is, for his argument and
22 would go against the argument that he went so long without
23 convictions, he spent almost that entire time in jail.

24 As soon as he gets out of jail from the aggravated
25 malicious wounding and malicious wounding, and I think the

1 other 1997 conviction, he almost immediately -- I think he
2 gets out September of 2014, and within several months he
3 starts getting charged with numerous offenses.

4 So in paragraphs 54 through 59, granted he was only
5 charged and they were nolle prossed, he had numerous charges
6 in 2015 that he continually received.

7 And then in paragraphs 32 and 33, which he was
8 convicted of, not including this separate offense that's
9 before you today, he was convicted of assault and battery, he
10 was also on probation at the time, and then he was convicted
11 of being a habitual offender and felony eluding.

12 So I don't think he has learned his lesson based on
13 both his history and characteristics and what he continually
14 did after spending, I think, approximately 17 years in jail.

15 Now, granted he was cooperative on the day he was
16 stopped. He did tell the officers about the firearm that he
17 tried to hide under the seat, and he stated it was for
18 protection because, I think as he stated in his acceptance of
19 responsibility, that he had previously -- and I want to make
20 sure I say this correctly. He admitted that he was in
21 possession of the firearm, said he carried it for protection.
22 When questioned as to why he felt the need to protect himself,
23 he answered that he had served time in prison for shooting two
24 individuals. While he was incarcerated in 2011, the victim's
25 family member stabbed him in the face, chest, and the back of

1 his head, and he feels like somebody is coming back for
2 revenge.

3 The problem is, he put himself in that situation
4 because he, as he stated, shot two individuals. So if he
5 feels like he needs protection, he still cannot violate the
6 law and possess a firearm, because he is clearly a convicted
7 felon at that point in time.

8 He must either move to another area, put himself out
9 of a position to need that protection, as he stated, or put
10 himself in another situation. You don't place yourself in a
11 bad position by possessing a firearm and committing additional
12 offenses merely because of something you've done in the past.

13 So we think it's appropriate that he receive --
14 because of your determination that he's an Armed Career
15 Criminal, and because of the guidelines -- we're not asking
16 for an upward enhancement -- or departure, excuse me, or
17 anything else. We think 180 to 188 months is appropriate for
18 Mr. Jenkins, given the circumstances surrounding the stop, his
19 criminal history, and taking everything into consideration,
20 Your Honor.

21 THE COURT: Thank you, Ms. Neese.

22 Ms. Spence?

23 MS. SPENCE: Thank you, Your Honor. I would ask the
24 Court to impose only the mandatory minimum sentence of 180
25 months. That is a gracious plenty under the circumstances of

1 this case, more than sufficient to accomplish the purposes, if
2 it accomplishes them at all.

3 My big concern here is Mr. Jenkins' mental health
4 history. Regrettably, he was never diagnosed until he went to
5 prison in '97 as having mental health problems.

6 Now, his mother is here today, and if called to
7 testify she would state she knew something was wrong. She and
8 her husband had a fairly violent disagreement about whether or
9 not to get him help and get medication. Her husband did not
10 believe in such medication. I think if he had been placed on
11 medication far earlier, his history wouldn't be what we see
12 today.

13 He has been diagnosed at various points in time as
14 possibly schizophrenic or possibly bipolar with schizophrenic
15 tendencies; either way, with paranoia. And there are numerous
16 articles, and I meant to print some off but I was so busy
17 focusing on *Johnson* that I forgot to print the ones on what
18 happens to inmates who suffer from paranoia when they're in
19 prison, especially if they're in solitary confinement, as
20 Mr. Jenkins was for nearly five years.

21 THE COURT: The PSR reflects he had multiple
22 institutional violations while he was in the custody of the
23 Commonwealth.

24 MS. SPENCE: Yes, he did, Your Honor. His last one
25 being in 2012, according to the mental health records that

1 were supplied under seal. And the last three included things
2 such as being in an undesignated area. Not all of these
3 offenses were violent offenses. Early on, they were. That's
4 when he was determined to be in need of mental health
5 counseling and medication.

6 And you can see from the monthly cell checkups, where
7 they would go to the door to check on you in isolation, that
8 his condition deteriorated during that time. He was upgraded
9 from a Level 1 to a Level 2 in the severity of his symptoms of
10 mental illness.

11 Given that, after --

12 THE COURT: Is he taking medication now?

13 MS. SPENCE: Yes, he is, Your Honor. And I believe
14 he was also on it on the date of the stop, which is evidenced
15 by his calm and cooperative manner with the police officers
16 and the calm and pleasant way which he has been in court and
17 in dealing with me throughout these proceedings.

18 There was a brief period, because there was a delay,
19 he was given a 30-day prescription on his release from prison,
20 but it takes -- it took slightly longer to get him into a
21 psychiatrist who could prescribe a new medication, which was
22 actually done on October 29th of 2014.

23 And then there were some adjustments to the
24 medication, because the Blue Ridge Community folks felt like
25 the medication that he had been on, Zyprexa -- no, not

1 Zyprexa. They had him on Zoloft, which is contraindicated for
2 bipolar, and it can cause some of the same symptoms as a manic
3 episode.

4 THE COURT: Paragraph 66 of the PSR reflects the
5 change in his medication.

6 MS. SPENCE: And then he was changed to Zyprexa, and
7 that was roughly March, April of 2015. And that was just a
8 month before this traffic stop where he had the gun and he was
9 cooperative and forthcoming with the officers about it.

10 Granted, the fact that he needs protection, however
11 real that need may actually be, does not mean he can carry a
12 firearm, and he knows that. He knows that now.

13 Unfortunately, the feeling -- the legitimate feeling
14 of the need for protection, combined with the predisposition
15 for paranoid mental illness is not a good combination. But I
16 question whether another 15 years incarceration is going to
17 help with that condition, and that is what concerns me the
18 most.

19 If you consider 1997 to 2014 and the changes in our
20 world that have occurred during those times that he was locked
21 up, even for a person without mental health issues, that would
22 be a heck of an adjustment. And now he is looking at another
23 15. Plus he's got five from the State for a probation
24 violation and the habitual offender and eluding. He got five
25 years total on those charges.

1 I'm asking the Court to consider running at least a
2 portion of this 15 years concurrent with that by designating
3 the state facility as where he starts to serve his federal
4 term.

5 And then that when he goes into federal custody, I
6 would ask that you recommend that he be placed in one of the
7 facilities that has psychiatric hospitalization available on
8 site, such as Devens or Butner or the one in Minnesota,
9 because I would like to see this man's mental health treatment
10 treated properly, not with escalating incidents resulting in
11 solitary that exacerbate his symptoms and result in more
12 escalating incidents. That would be counterproductive.

13 I also note that these institutions have counselors
14 that do a heck of a job in working on the transition back to
15 the community when he is released. And he is going to need
16 all the help he can get.

17 Thank you, Your Honor.

18 Oh, I would also add that he now has a son that was
19 born in December, and so his son will be nearly grown when he
20 gets out. But he has been trying to maintain a relationship.
21 His girlfriend has been bringing the son to the video
22 visitations to see him at the jail, and she intends to try to
23 maintain that relationship with him when he is in the federal
24 system. Thank you.

25 THE COURT: Can I ask you a question about his --

1 looking at paragraph 33 of the PSR with regard to the state
2 sentence he is serving now, it looks like he got three years
3 on the habitual offender charge, which was suspended after he
4 served one year, and five years on the eluding, also suspended
5 after he served one year. So it looks like he only has to --
6 he doesn't have to serve five years in state court.

7 MS. SPENCE: He got three years on his probation
8 violation from the charges that he had gotten released on in
9 2014, the malicious woundings.

10 THE COURT: Okay. And are all those consecutive?

11 MS. SPENCE: Yes, they are.

12 THE COURT: So he has got one year on habitual
13 offender, one year on felony eluding, and then three years
14 probation on the --

15 MS. SPENCE: Violation.

16 THE COURT: The violation.

17 MS. SPENCE: Yes, sir.

18 THE COURT: All consecutive?

19 MS. SPENCE: All consecutive.

20 THE COURT: Okay. All right. Ms. Cilek, is that
21 right?

22 THE PROBATION OFFICER: Yes, Your Honor.

23 THE COURT: Okay. Is he in state custody now serving
24 that time, or is this current federal time he has been
25 awaiting this? How is that working?

1 THE PROBATION OFFICER: He is currently in federal
2 custody.

3 THE COURT: He is in federal custody. He is not
4 getting state credit right now?

5 MS. SPENCE: No.

6 THE COURT: He has been in federal custody since this
7 indictment and going through all this?

8 MS. SPENCE: Yes, sir.

9 THE COURT: So, Ms. Cilek, where is he going to go
10 after this? Does he go to federal custody to serve his time,
11 or does he go back to state custody?

12 THE PROBATION OFFICER: Right now he will stay in
13 federal custody, unless you designate a state facility as to
14 where he is serving his sentence. So he would do all of his
15 federal time and then have --

16 THE COURT: And then have move five more state time?

17 THE PROBATION OFFICER: That's correct.

18 THE COURT: Okay. All right.

19 MS. SPENCE: And I believe that the programming and
20 transition planning that he could receive in the federal
21 system is much better, and by designating the state facility
22 where he would begin serving his sentence would be much better
23 in the long run.

24 THE COURT: Let me hear what the government has to
25 say about that. Thank you, Ms. Spence.

1 He is 41 years old.

2 MS. NEESE: That's correct, Your Honor. In all these
3 cases, though, we argue that these should not be served
4 concurrently for two reasons, mainly -- or two separate
5 issues. First -- and it's nothing against Mr. Jenkins. This
6 is a precedent that we've continually gone by, because the
7 underlying crime in paragraph 33 is an unrelated crime. It
8 has nothing to do with this crime. That is something that he
9 did several months prior to possessing this firearm here, so
10 it has no relation. And, typically, when we say that things
11 can be run -- or when we ask the Court that they be run
12 concurrently, it would be if they are related conduct
13 offenses. It is not.

14 Additionally, for the probation violation, we argue
15 that it not be run concurrent because it is a different
16 violation. He was actually out on terms and conditions placed
17 upon him by the state court. And then he committed that
18 violation involved in that, so he has to go back to that judge
19 and answer to that judge, essentially.

20 THE COURT: And he did.

21 MS. NEESE: Yes, sir.

22 So it is our position -- I understand Ms. Spence's
23 position as well, but for purposes and for precedent purposes,
24 what we typically do is ask that they be run consecutively
25 because they are not related, Your Honor. Thank you.

1 THE COURT: Thank you.

2 Ask the marshal to declare a recess. I want to see
3 probation.

4 (Recess taken from 11:46 a.m. until 11:48 a.m.)

5 THE COURT: All right. I consulted with probation on
6 this issue of consecutive versus concurrent. Ms. Cilek, would
7 you tell the folks what you told me back there, and we'll see
8 if they have any questions they want to ask you.

9 THE PROBATION OFFICER: Your Honor, it's my
10 understanding that his probation was revoked due to the
11 instant offense, so we would consider those to be related.

12 The eluding police and the habitual offender are not
13 related, so we would consider those a separate offense.
14 Therefore, if the Court ran the three years for the probation
15 violation concurrently, then he would serve 12 years,
16 additional years, on the federal sentence and two additional
17 years on the state sentence.

18 THE COURT: Right. But what he would do -- if I
19 agreed with that, what he would do is, he would go back to
20 state custody. He could do that, Mr. Sellers?

21 THE MARSHAL: I mean, if you're asking, Judge, if he
22 could --

23 THE COURT: He could sign a waiver and go back to
24 state custody, couldn't he?

25 THE MARSHAL: No. He is in federal custody. We

1 would have to writ him out, which gets into a whole separate
2 circumstance. We would have to file a detainer, we would have
3 to track him, pick him up from there. It's something I
4 haven't seen very often in my career, Your Honor.

5 THE COURT: Well, the other alternative, then, is if
6 I were to run three of it concurrent with the other two, then
7 what would happen is he would serve -- he would serve 15 years
8 in federal prison and then he would go and serve the remaining
9 two in state prison, right?

10 MS. SPENCE: No, Your Honor. The state prison won't
11 count it until they have him.

12 THE COURT: You know, what's the mechanics,
13 Ms. Spence, if I designate the state facility? What's the
14 mechanics?

15 MS. SPENCE: If you designate the state facility as
16 the place for him to begin serving his term, and if you run
17 only three years of it concurrent, my understanding of what
18 would happen is he would go there for three years, then I
19 don't know if they would keep him to do the state two years or
20 if they would send him on federally and then have to come back
21 for the other two years on the state.

22 And I would just suggest, Your Honor, that even
23 though they could be run consecutively and might normally
24 under other circumstances, that this is a case where
25 exercising the power to run them completely concurrently might

1 be appropriate.

2 MS. NEESE: Your Honor, if I may?

3 THE COURT: Yes, ma'am.

4 MS. NEESE: The one other situation I had, and I
5 cannot remember exactly what happened, but it was essentially
6 how Mr. Sellers from the Marshals Service is talking about it.
7 We had a situation where they were already in federal custody
8 and it did fall back on the state judge as to make a
9 determination if they did not go into state custody at that
10 point in time. The way you-all are working through the
11 mechanics now, it fell back on the state judge to make the
12 determination if it ran concurrent or consecutively.

13 So I think what Ms. Spence is telling you is correct.
14 If you determine that any of the sentence should be run
15 concurrently, he would actually have to go into state custody
16 some way first to serve that in order for the federal sentence
17 to also run concurrent with what the state sentence has
18 already been determined. That's because he is in federal
19 custody.

20 Now, I do not know the mechanics, but I think he
21 would have to go back to the state court judge, essentially,
22 if he serves his federal time first. And that's just my
23 understanding from a past case.

24 THE COURT: All right. Okay. If you would stand up,
25 please, Mr. Jenkins. We've discussed a lot of things, and

1 before I sentence you, I need to hear what you have to say, by
2 way of allocution, that might be helpful to fashioning an
3 appropriate sentence in this case. What would you like to
4 say, sir?

5 THE DEFENDANT: I've made some mistakes in my life.
6 You know, I do stuff because of mental health problems. And
7 I'm sorry, you know, and I'll try to make some changes in my
8 future. You know, and I do got a newborn son that was born
9 recently.

10 THE COURT: All right. Thank you for that,
11 Mr. Jenkins.

12 I am going to sentence you to 180 months in the
13 Bureau of Prisons. I am going to -- on Count One of the
14 indictment, possession of a firearm by a convicted felon.

15 The reason why, 180 months is the mandatory minimum
16 sentence under the Armed Career Criminal Act.

17 I'm going to not impose a fine, restitution.

18 I'm going to impose a \$100 mandatory special
19 assessment.

20 I'm going to put you on five years of supervised
21 release. Three of the five years you have to serve in state
22 time plainly flow from this conviction, so I'm going to run
23 all of your -- I'm going to designate -- I'm going to run all
24 this concurrent, and I'm going designate the state facility
25 where you serve five of these years. So I'm going to run this

1 15 years concurrent with the state sentences you are already
2 serving. All right?

3 Now, I'm going to put you on five years of supervised
4 release.

5 You must report to the district in which the
6 defendant is released within 72 hours of release from the
7 custody of the Bureau of Prisons.

8 You shall not commit another federal, state, or local
9 crime.

10 You cannot buy, sell, use an illegal controlled
11 substance.

12 I'm going to require you to be evaluated once you get
13 out of the Bureau of Prisons to see whether additional drug
14 rehabilitation or mental health counseling is necessary. If
15 further treatment or rehabilitation is necessary, I'm going to
16 require you to participate in a program as designated by the
17 Court, upon consultation with probation, until such time as
18 you satisfy the requirements of the program.

19 I'm going to require drug testing.

20 I'm going to require that you not possess a firearm,
21 ammunition, destructive device, or dangerous weapon.

22 Require you to cooperate in the collection of DNA.

23 All the standard conditions.

24 You cannot live in a residence where there are any
25 firearms, ammunition, destructive devices, or dangerous

1 weapons.

2 I'm going to require that you submit to warrantless
3 search and seizure to ensure compliance with these conditions.

4 \$100 mandatory special assessment.

5 I'm waiving the fine. You don't have the ability to
6 pay a fine.

7 Is there a -- do I need to forfeit the gun, or has
8 that been administratively forfeited, Ms. Neese?

9 MS. NEESE: Your Honor, please give me a second. I
10 do not know that.

11 THE CLERK: There was a notice of forfeiture filed,
12 but I don't know beyond that.

13 THE PROBATION OFFICER: I believe it was, Your Honor,
14 on December 4th.

15 THE COURT: Okay. All right. Well, to the extent
16 that the gun hasn't already been administratively forfeited,
17 I'll order its forfeiture. But to the extent it has --
18 Ms. Cilek says it has -- it doesn't need to be forfeited.

19 I'm going to recommend that Mr. Jenkins get, while he
20 is in the Bureau of Prisons, mental health counseling. And
21 therefore recommend that he serve at a facility where the
22 mental health -- appropriate mental health counseling is
23 available to him.

24 You know, and I understand that reasonable minds can
25 disagree about the running this consecutive or concurrent, but

1 because three of the five of his state years already flow from
2 this federal conviction, and they are related, it makes sense
3 to run those concurrent to me. And it also makes sense, just
4 administratively and the hassle of going back and forth to
5 state and federal prison, to let him run it all concurrently
6 and to designate the state facility.

7 It would be my goal that he goes and that he serves
8 the state time first, then he goes to federal prison where he
9 can benefit from the treatment programs and the counseling
10 that is available in the Bureau of Prisons.

11 That's what I think makes sense in this case.
12 Because at the end of the day, he is going to get out of
13 prison, he is still going to be dealing with these same
14 issues. We need to make sure that he can get what treatment
15 and rehab he can get inside the Bureau of Prisons. And I
16 think that the Bureau of Prisons is the best place for him to
17 have that. So for those reasons, that's why I'm running those
18 concurrent. Okay.

19 Mr. Jenkins, you have a right to appeal this
20 sentence. A notice of appeal must be filed within 14 days of
21 the entry of judgment or 14 days of a notice of appeal by the
22 government.

23 If requested, the clerk will prepare and file a
24 notice of appeal on your behalf.

25 I also advise the defendant of the right of a person

1 who is unable to pay the cost of an appeal to apply for leave
2 to appeal without prepayment of such cost.

3 Let me say this: I realize that application of the
4 Armed Career Criminal enhancement in this case requires a --
5 the 15-year mandatory minimum sentence. I realize that. I
6 believe it is required by not only the text of the Virginia
7 statute, the text of 924(e), but the Supreme Court's opinion
8 in *Johnson*, and how Justice Scalia in that case defined
9 violent felony and how he defined physical force. I believe
10 that is the correct and required holding.

11 I provided you with all the other information, based
12 on my days of work on this case, to assist you all in the
13 inevitable appeal in this case.

14 And regardless of this, Mr. Jenkins, you have had
15 throughout the course of your life a number of violent
16 encounters and a number of indications of shootings and
17 violence on the public. I believe the 180-month sentence is
18 necessary to protect the public, to provide deterrence.

19 I hope that in the Bureau of Prisons you can get
20 mental health counseling so that you can put this chapter of
21 your life behind you and move on.

22 Okay. Is there anything else from the government?

23 MS. NEESE: No, Your Honor. Thank you.

24 THE COURT: Ms. Spence?

25 MS. SPENCE: No, your Honor.

1 THE COURT: All right. Anything, Ms. Cilek?

2 THE PROBATION OFFICER: Did you adopt the presentence
3 report, Your Honor?

4 THE COURT: I adopted the presentence report without
5 change.

6 THE CLERK: Thank you.

7 THE COURT: Okay. Thank you. Anything else from the
8 clerk?

9 THE CLERK: No, sir.

10 THE COURT: All right. Thank you all.

11 Let me say one other thing. I appreciate the manner
12 in which both counsel, the government and the defendant's
13 counsel, have thoughtfully considered and approached the issue
14 of the application of the 924(e) to this case. It is a legal
15 issue that is subject to some debate. I believe I got it
16 right. The Fourth Circuit Court of Appeals may agree or
17 disagree with me, but I appreciate the way counsel have
18 thoughtfully and carefully approached this matter.

19 Ask the marshal to declare a recess.

20 (Court recessed at 12:01 p.m.)

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CERTIFICATE

I, Judy K. Webb, certify that the foregoing is a
correct transcript from the record of proceedings in
the above-entitled matter.

/s/ Judy K. Webb

Date: 4/17/16

MS. NEESE: [91] MS. SPENCE: [40] 2/10 4/3 5/2 31/23 32/7 32/12 33/9 33/11 34/12 34/14 35/15 35/23 36/8 36/18 37/4 38/16 39/13 39/17 40/3 40/7 40/18 40/25 43/20 56/9 56/11 58/22 59/23 60/12 61/5 63/6 63/10 63/14 63/16 63/18 64/4 64/7 64/18 67/9 67/14 73/24 THE CLERK: [4] 2/3 71/10 74/5 74/8 THE COURT: [144] THE DEFENDANT: [1] 69/4 THE MARSHAL: [2] 66/20 66/24 THE PROBATION OFFICER: [7] 63/21 63/25 64/11 64/16 66/8 71/12 74/1	46/22 47/23 55/1 18.2 [1] 37/19 18.2-248 [2] 20/20 21/3 18.2-51 [17] 6/6 14/5 15/22 17/11 27/20 37/20 44/20 44/25 48/3 48/12 48/25 49/7 49/16 50/23 51/17 52/17 54/14 18.2-51.2 [2] 44/24 49/17 180 [5] 56/3 58/17 58/24 69/12 69/15 180-month [1] 73/17 184 [1] 51/6 186 [1] 51/7 188 [3] 56/1 56/3 58/17 19 [1] 48/6 1906 [1] 25/18 192 [1] 51/24 1945 [5] 37/8 37/18 38/24 51/6 51/11 1947 [3] 37/9 37/24 51/7 1949 [1] 38/19 1989 [1] 38/20 1990 [1] 47/2 1993 [21] 3/18 3/19 21/12 21/20 22/2 22/3 22/25 23/24 34/8 35/12 44/17 44/19 45/8 45/14 45/15 45/19 45/20 45/25 52/20 52/23 53/3 1996 [2] 24/11 38/13 1997 [12] 3/20 35/4 36/16 38/14 40/10 44/23 45/25 53/6 55/9 56/21 57/1 61/19 19th [1] 15/1	23 [2] 31/17 44/15 23rd [1] 2/22 24 [2] 54/22 55/2 24008 [1] 1/15 24011 [1] 1/22 24014 [1] 1/18 248 [2] 20/20 21/3 25 [1] 1/7 28 [3] 22/24 31/17 44/21 29th [1] 60/22 2K2.1 [1] 54/22	8 857-5100 [1] 1/23	25/13 29/6 40/3 55/13 60/22 61/11 65/16 68/15 add [2] 55/21 62/18 additional [8] 21/22 25/12 43/10 43/18 58/11 66/16 66/16 70/13 Additionally [1] 65/14 address [3] 7/19 21/18 38/18 addressed [1] 45/24 addressing [1] 31/25 adjustment [2] 54/23 61/22 adjustments [1] 60/23 administratively [3] 71/8 71/16 72/4 admission [2] 4/8 4/11 admitted [2] 4/24 57/20 adopt [1] 74/2 adopted [1] 74/4 advise [1] 72/25 affecting [1] 2/20 after [7] 22/3 30/5 57/14 60/11 63/3 63/5 64/10 again [1] 17/11 against [7] 8/3 33/20 46/8 48/1 48/5 56/22 65/5 aggravated [21] 3/21 6/10 17/23 24/13 26/12 31/8 31/10 31/13 32/1 35/4 36/16 40/10 41/7 42/1 44/23 46/1 46/18 49/18 53/7 55/10 56/24 agree [15] 7/11 11/25 18/5 26/16 26/18 26/22 34/11 35/7 35/12 35/14 35/17 43/2 45/4 53/5 74/16 agreed [2] 39/21 66/19 agreement [1] 2/14 agrees [2] 45/3 56/5 ahead [1] 5/9 albeit [1] 51/3 all [61] 2/12 5/1 11/8 11/9 13/19 14/15 14/19 14/22 14/23 15/22 17/24 19/5 20/6 20/9 21/10 23/4 24/22 25/1 25/2 25/12 30/10 32/6 33/19 35/13 38/12 41/23 42/24 42/24 43/24 44/3 44/3 45/18 49/18 55/6 55/21 59/2 60/2 62/16 63/10 63/18 63/19 63/20 64/7
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