Terri Wood, OSB #883325
Law Office of Terri Wood
730 Van Buren Street
Eugene, Oregon 97402
541-484-4171
fax: 541-485-5923
email: contact@terriwoodlawoffice.com

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, PLAINTIFF, -VS- BILLY SMITH, DEFENDANT	CR No. 6:16-cr-003XXX Memorandum of Law in Support of Objection to Application of the Career Offender Guideline Enhancement

Introduction

The Career Offender guideline enhancement, USSG §4B1.1, would apply to the drug crime charged in this case, provided Mr. Smith has two prior convictions for "crimes of violence." The parties are in apparent agreement that the pivotal conviction is his 2006 conviction by way of guilty plea to the Oregon crime of Assaulting a Public Safety Officer, ORS 163.208 (hereafter referred to as "APSO"). The charging document in that case tracks the statutory language, and alleges that he knowingly caused physical injury to a person he knew to be a corrections officer who was then acting in the course of official duty.

In *Johnson v. United States,* 135 SCt 2551 (2015)(hereafter, *Johnson-2015*), the Supreme Court invalidated the "residual clause" of the Armed Career Criminal Act ("ACCA"), leaving only the force element clause and the enumerated crimes to define predicate "crimes of violence." The Career Offender Guideline, specifically USSG §4B1.2 (hereafter "COG"), prior to its 2016 amendment, likewise defined predicate "crimes of violence" by an identically worded residual clause, force element clause, and a somewhat different set of enumerated crimes. Post *Johnson-2015*, all courts of appeals to address the issue but one have held or assumed that the COG's residual clause is also invalid. *See, e.g., United States v. Benavides,* 617 Fed.Appx. 790 (9th Cir. 2015)(accepting government's concession that this provision of the guideline is invalid).

Thus, to receive the Career Offender enhancement, Mr. Smith's APSO conviction must satisfy either the "enumerated crimes" prong or the "force element clause" of the COG. Because the ACCA's force element clause, 18 USC 924(e)(2)(B)(i), is identical to the COG force element clause, the courts have applied interchangeably decisions interpreting the ACCA and COG's identical terms. *See, United States v. Crews,* 621 F3d 849, 856 (9th Cir. 2010)(*overruled on other grounds, Johnson-2015, supra*).

The Guidelines Commission amended the COG effective August 2016, in light of *Johnson-2015*. The amendment (1) deleted the residual clause; (2) expanded the list of enumerated crimes and, as pertinent here, moved "aggravated assault" from the list in its Commentary, to this list of enumerated crimes in the text of the guideline; but (3) did not alter the wording of the force element clause. "Aggravated assault" is the only type of assault enumerated as a crime of violence by the COG. Because Mr. Smith's instant drug offense was committed before August 2016, he has a right under the *Ex Post Facto* Clause to be sentenced under the previous version of the guideline if the result is less severe. *Peugh v. United States,* 133 S.Ct. 2072 (2013).

Given this Court's decision in *United States v. Dunlap*, 162 F.Supp.3d 1106 (D. Oregon 2016), that a similar Oregon felony assault crime satisfied the force element clause of the ACCA and COG, this memorandum first explains why Oregon's APSO "causation of physical injury" does not match the force element clause of the guideline. In so doing, this memorandum presents additional arguments not made by the defense in *Dunlap.*[1] The memorandum concludes with the simpler, "enumerated crimes" issues, discussing: (1) Supreme Court precedent, and other circuit's decisions holding that prior to August 2016, crimes that were merely listed in the Commentary were not enumerated crimes of violence under the COG; and (2) that Oregon's APSO, defined by simple assault on a protected class of victim, does not meet the generic definition of "aggravated assault," and thus is not an enumerated crime under the COG as amended in 2016.

That said, the Guidelines' historic recognition of "aggravated assault"—generically defined as the knowing causation of serious physical injury—as an enumerated crime rather than a force element clause "crime of violence"— underscores the merit of Mr. Smith's position that his ASPO conviction does not qualify as a predicate conviction under the force element clause, at least for purposes of the Career Offender enhancement. See discussion, *infra*, beginning on page 22.

I. The Elements of APSO Do Not Match the "Force Element Clause."

A. Oregon's APSO statute incorporates the common-law's view of "force" as any direct or indirect action resulting in physical injury, including acts of omission, thereby criminalizing conduct outside the scope of USSG 4B1.2(a)(1).

USSG 4B1.2(a)(1) defines "crime of violence" to be any felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another."

[1] This assertion is based solely on review of Dunlap's sentencing letter.

ORS 163.208(1) provides: "A person commits the crime of assaulting a public safety officer if the person intentionally or **knowingly causes physical injury** to the other person, knowing the other person to be a peace officer, corrections officer, youth correction officer, parole and probation officer, animal control officer, firefighter or staff member, and while the other person is acting in the course of official duty." (Emphasis supplied, as alleged in Smith charging document). This crime enhances the misdemeanor crime of Assault in the Fourth Degree, ORS 163.160(1)(a), when committed either intentionally or knowingly against the identified class of victims, to a Class C felony.

The plain language of the statute does not include the use, attempted use, or threatened use of physical force as an element; rather, the crime is proven by causation of physical injury, which can be done with or without the use of violent force against the person of another. *See also, United States v. Gomez-Hernandez,* 680 F3d 1171, 1178 (9th Cir. 2012)("[T]he threat or use of violence is not an element of the Model Penal Code's definition of aggravated assault, or a majority of state statutes."); USSG §4B1.2 (listing "aggravated assault" in the Commentary as an example of a residual clause offense, and as of August 2016, as an enumerated crime of violence after deletion of the residual clause, discussed further, *infra*); *Crews, supra* (examining Oregon's second-degree assault crime using the residual clause test of the Career Offender guideline, not the force element clause).

"'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant," *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016)(citation omitted). Under Oregon law, "the gravamen of the fourth-degree assault charge [is] the unlawful and knowing causation of physical injury." *State v. Teagues*, 281 Or App 182,

193-194 (2016)(where victim fell and skinned her knee, State required to present evidence "regarding any particular action by defendant that could have caused the skinned knee."). The jury is not required to find the defendant threatened or used force to convict under Oregon law, only that the defendant did any act or omission it views as a cause in fact of the resulting injury.

Mathis concerned the comparison of elements of an ACCA predicate conviction to the elements of a generic enumerated crime of violence. However, the Supreme Court's definition of "element," and categorical method of comparison governs the determination of whether an indivisible predicate conviction satisfies the force element clause. *See, Johnson v United States*, 559 U.S. 133 (2010)(discussing application of the categorical and modified categorical approach for determining whether a divisible predicate conviction satisfied the force element clause of the ACCA); *Lopez-Valencia v. Lynch*, 798 F3d 863, 867-68 (9th Cir. 2015).

"The comparison of elements that the categorical approach requires is straightforward when a statute sets out a single (or "indivisible") set of elements to define a single crime. The court then lines up that crime's elements alongside those of the generic offense and sees if they match." *Mathis*, *supra* at 2248. Oregon's element of causation of physical injury does not match the use of physical force element for violent felonies, and indeed sweeps more broadly. *See, e.g., State v. Hendricks,* 273 Or App 1, 8 (2015), *rev. den.*, 358 Or 794 (2016)(the elements of fourth-degree assault "contemplate a vast array of actions resulting, either directly or indirectly, in physical injuries.").

The broad causation element of Oregon assault is identical to that found in the common

law's definition of battery,[2] and the Model Penal Code's definition of assault, §211.1. The Model Penal Code's definition of simple assault differs from the common law by excluding offensive touching as the harmful result; the Code requires causation of "bodily injury," defined in §210.0(2) as "physical pain, illness or any impairment of physical condition." This includes injury "caused indirectly, as, for example, by exposing another to inclement weather or by non-therapeutic administration of a drug or narcotic," meaning it is "unnecessary to make special provision for occasioning these harms, as some existing statutes have done." Model Penal Code §211.1, Comment at 187-188 (1980); *cf., Hendricks, supra.*

Causation extends to conduct that creates a situation in which the victim injures himself, such as telling a blind man walking toward a precipice that all is clear ahead, thus intentionally causing him to fall and hurt himself; or by a simple omission to act where there is a duty to act. Substantive Criminal Law, §16.2.Battery, *supra.* Oregon case law recognizes causation of physical injury proven by failure to act. *See, e.g., State v. English,* 269 Or App 395 (2015)(defendant caused physical injury to child by failing to keep a dog that had bitten others in the past away from the child; here, the conduct was done recklessly, not knowingly).

The defense is mindful that this Court reached a contrary determination in *United States v. Dunlap*, 162 F.Supp.3d 1106 (D. Oregon 2016)(involving a different Oregon assault statute, but with the same cause and result elements, and the ACCA). It is necessary to examine Supreme Court precedent in some depth to understand why the Court should reconsider and resolve the issue in favor of Mr. Smith.

[2] Common law battery has three basic elements: (1) the defendant's conduct (act or omission); (2) mental state; and (3) the harmful result to the victim, which may be either bodily injury or offensive touching. It is a "cause-and-result" type crime, "sometimes defined briefly as the unlawful application of force to the person of another." Substantive Criminal Law, §16.2.Battery, *Wayne R. LaFave* (2d ed., Westlaw On-line).

In *Johnson v United States*, 559 U.S. 133 (2010), the Supreme Court undertook interpretation the force element clause of the ACCA, 18 USC §924(e)(2)(B)(i), worded identical to the Career Offender guideline at issue. The question was whether Florida's battery statute, elevated from a misdemeanor to a felony based on recidivism, met that criteria for an ACCA predicate conviction. The Florida Supreme Court had held the battery statute could be proven by three alternative acts: "It can prove that the defendant '[i]ntentionally caus[ed] bodily harm,' that he 'intentionally str[uck]' the victim, or that he merely '[a]ctually and intentionally touche[d]' the victim." 559 U.S. at 136–37. Because nothing in the record disclosed which of these acts Johnson committed, the Court examined "the least of these acts," i.e., "actually and intentionally touching another person." *Id.,* at 137. The Florida Supreme Court had interpreted that "substantive element" as "satisfied by *any* intentional physical contact, 'no matter how slight.'" *Id.,* at 138 (emphasis original).

Johnson began the analysis by examining dictionary definitions of "force," including "Black's Law Dictionary . . .[that] defines 'force' as '[p]ower, violence, or pressure directed against a person or thing.' And it defines 'physical force' as '[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim.' " *Id.,* at 139. The Court concluded these definitions "suggest a degree of power that would not be satisfied by the merest touching." *Id.* The Court then turned to the definition of "force" as used "in describing one of the elements of the common-law crime of battery, which consisted of the intentional application of unlawful force against the person of another." *Id.*(citing 2 W. LaFave & A. Scott, Substantive Criminal Law §7.15(a)). Explaining that "[t]he common law held this element of 'force' to be satisfied by even the slightest offensive

touching,"[3] the Court refused to apply the common-law meaning of use of force to the ACCA's definition of "violent felonies":

> [W]e 'do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense,' *Gonzales v. Oregon,* 546 U.S. 243, 282, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (Scalia, J., dissenting). Here we are interpreting the phrase 'physical force' as used in defining not the crime of battery, but rather the statutory category of 'violent felon[ies].' 559 U.S. at 139–40 (some citations omitted).

Johnson held that the force element clause required the use of "violent, active . . . force—that is, force capable of causing physical pain or injury to another person." *Id.* at 141. The Court noted that the term "physical force" by its plain meaning connotes "*violent* force." *Id.* at 142 (referring to the dictionary definitions at the start of its analysis). The Court provided additional guidance for what it meant by "*violent* force":

> Even by itself, the word 'violent' in §924(e)(2)(B) connotes a substantial degree of force. Webster's Second 2846 (defining 'violent' as '[m]oving, acting, or characterized, by physical force, esp. by extreme and sudden or by unjust or improper force; furious; severe; vehement . . .'); 19 Oxford English Dictionary 656 (2d ed.1989)('[c]haracterized by the exertion of great physical force or strength'); Black's 1706 ('[o]f, relating to, or characterized by strong physical force'). When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer. See *id.,* at 1188 (defining 'violent felony' as '[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon'); see also *United States v. Doe,* 960 F.2d 221, 225 (C.A.1 1992) (Breyer, C.J.) ("[T]he term to be defined, 'violent felony,' . . . calls to mind a tradition of crimes that involve the possibility of more closely related, active violence"). 559 U.S. at 140–41.

In sum, the Supreme Court in *Johnson* did the following:

(1) Squarely rejected the common-law's meaning of "force" constituting misdemeanor battery to give meaning to the force element clause of the ACCA, *id.,* at 139-141.

[3] Actually, the "application of unlawful force" element was distinct from the resulting harm element at common law, which could be either offensive touching or bodily injury. See note 1, *supra.*

In contrast, Oregon's APSO incorporates the broad sweep of cause-and-result from common-law battery. *See, e.g., Hendricks, supra; English, supra,* and as previously discussed. This is not to say that one cannot be convicted of simple assault in Oregon by using violent physical force that results only in "physical injury," rather than "serious physical injury".[4] But causation is not restricted to the use of violent force, such that the causation element of misdemeanor assault in Oregon does not "line up" and "match" the federal force element clause, as required by *Mathis.* For example, knowingly inflicting a tiny scratch from a slight pinch to the skin to a person who by chance was a hemophiliac would knowingly cause physical injury under Oregon law. *See also, State v. Hart*, 222 Or App 285, 290-291 (2009)(The skin is "an organ of the body" and its "protective function is impaired when the skin sustains a laceration").

(2) Interpreted the ACCA's force element to require the use of active, violent force against the person of another, capable of causing physical pain or injury, *id.,* at 141-142.

In contrast, Oregon's APSO can be proven by "a vast array of actions resulting, either directly or indirectly, in physical injuries," *Hendricks, supra* (preventing a person from breathing for up to five seconds, by covering her nose and mouth, impaired her respiratory function and thereby constituted "physical injury"). Furthermore, nothing in *Johnson* suggests that the Court intended to define "physical pain or injury" in reliance on the common-law misdemeanor battery's "bodily injury" element or Oregon's similar "physical injury" element. "There is no reason to define 'violent felony' by reference to a nonviolent misdemeanor." *Id.,* at 141.[5]

[4] Defined in ORS §161.615(8), and including "injury which creates a substantial risk of death" or protracted disfigurement or impairment of the function of any bodily organ.

[5] "[E]ven today a simple battery—whether of the mere-touching or bodily-injury variety—generally is punishable as a misdemeanor. It is unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor." *Johnson,* at 141.

(3) Expressly characterized the three alternative acts that constituted battery under the Florida statute as distinct "substantive elements" of a divisible statute, *id.,* at 136-138.

This last point is critical to analyzing Oregon's APSO statute, because it contains only the substantive elements of intentionally or knowingly causing physical injury—similar to the Florida battery statute's substantive element of intentionally causing bodily injury—but no element requiring the active use of violent force against another, by striking or any other means, to cause that injury. The Ninth Circuit has addressed the force element clause for "crimes of violence" under other provisions of the guidelines, and recognized in *dicta* that "a defendant may 'cause' an injury through an omission," which would not satisfy the force element clause. *See, United States v. Grajeda-Ramirez,* 348 F3d 1123, 1125 (9th Cir. 2003)(overruled on other grounds by subsequent case law requiring more than reckless conduct to constitute a crime of violence). Assault in Oregon can likewise be proven by omission. *See, English, supra*.

While *Johnson* recognized "intentionally struck," "intentionally touched," and "intentionally caused bodily injury" as distinct "substantive elements" of the Florida statute, *id.,* at 138, the Court did not reach the issue of whether the causation of bodily injury element of the statute satisfied the ACCA's force element clause. Nonetheless, the importance of the Court's characterization of it as a distinct element is underscored by *Mathis*: "[A] a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same; and indeed, we have previously insisted on that point with reference to ACCA's elements-only approach." 136 SCt at 2255.

Johnson expressly rejected the Government's contention that interpreting the force element clause more narrowly than the common law would "undermine its ability to enforce the firearm disability in §922(g)(9) for persons who previously have been convicted of a 'misdemeanor crime

of domestic violence'," calling that prediction "unfounded," because "[t]he issue is not before us, so we do not decide it." *Id.,* at 143-144. Fast forward to *United States v. Castleman,* 134 SCt 1405 (2014), where the Court did confront and decide precisely that issue, holding that the common-law crime of battery's interpretation of "use of physical force" did apply in that misdemeanor context.

In *Castleman* the predicate conviction was a Tennessee domestic violence crime defined as the defendant having "intentionally or knowingly cause[d] bodily injury to" the mother of his child. The issue before the Court was the federal definition of a "misdemeanor crime of domestic violence" found in 18 USC §921(a)(33)(A); specifically, "the meaning of one phrase in this definition: 'the use . . . of physical force'." 124 SCt at 1409.[6]

The Court granted review to resolve a circuit split—but not the circuit split that exists as to whether the substantive element of causing physical injury is identical to the substantive element of using physical force that defines violent felonies, discussed *infra.* The Sixth Circuit *Castleman* majority had held that the degree of physical force required by §921(a)(33)(A)(ii) was the same as required by *Johnson* under §924(e)(2)(B)(i) for "violent felon[ies]." 695 F.3d 582, 587 (2012). The Court of Appeals found that Castleman's conviction did not qualify as a "misdemeanor crime of domestic violence" because he could have been convicted for "caus[ing] a slight, non-serious physical injury with conduct that cannot be described as violent." 695 F.3d, at 590. The Supreme Court observed:

> The Sixth Circuit's decision deepened a split of authority among the Courts of Appeals. Compare, *e.g., United States v. Nason,* 269 F.3d 10, 18 (C.A.1 2001)(§922(g)(9) "encompass[es] crimes characterized by the application of *any* physical force"), with *United States v. Belless,* 338 F.3d 1063, 1068 (C.A.9 2003)

[6] 18 USC §921(a)(33)(A) defined the federal predicate conviction as a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon" against persons having various domestic relationships to the defendant.

> (§ 922(g)(9) covers only "the violent use of force"). We granted certiorari to resolve this split, 570 U.S. ——, 134 S.Ct. 49, 186 L.Ed.2d 962 (2013), and now reverse the Sixth Circuit's judgment. 134 SCt at 1410.

The Supreme Court resolved the issue near the outset of its opinion: "[A]bsent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.' Seeing no 'other indication' here, we hold that Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in §921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence'." 134 SCt at 1410(citation omitted). The Court went on to discuss at length why it rejected application of *Johnson's* interpretation of "use of physical force" to that same phrase in the definition of "misdemeanor crime of domestic violence". In so doing, the Court again emphasized why the common-law meaning of "force" in the misdemeanor crime of battery has no application to the ACCA's definition of "violent felony," *id.* at 1410-13. Each of the Court's reasons counsel against a finding that Oregon's APSO statute, because it is based on a misdemeanor assault very similar to common law battery, is a "violent felony":

> [First, w]hereas it was "unlikely" that Congress meant to incorporate in the definition of a "'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor," *Johnson,* 559 U.S., at 141, it is likely that Congress meant to incorporate that misdemeanor-specific meaning of "force" in defining a "misdemeanor crime of domestic violence." *Id.*, at 1411.

Oregon's APSO incorporates this misdemeanor-specific concept of "force" from common-law. *See, e.g., Hendricks, supra* (touching by covering the victim's nose and mouth for up to five seconds is a misdemeanor assault)*; English, supra,* and as previously discussed in this memorandum.

> Second, whereas the word "violent" or "violence" standing alone "connotes a substantial degree of force," *id.,* at 140, that is not true of "domestic violence." "Domestic violence" is not merely a type of "violence"; it is a term of art encompassing acts that one might not characterize as "violent" in a nondomestic context. See Brief for National Network to End Domestic Violence et al. as *Amici Curiae* 4–9; DOJ, Office on Violence Against Women, Domestic Violence

> (defining physical forms of domestic violence to include "[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling"), online at http://www.ovw.usdoj.gov/domviolence.htm. *Id.*

Similarly, simple assault in Oregon could be established by any act of hitting, slapping, shoving, grabbing, pinching or hair pulling—no matter how slight or painless by itself—that distracted a victim, causing a slip and fall that resulted in physical injury. *See, Teaques, supra* (noting absence of proof as to "any particular action by defendant that could have caused the skinned knee" to victim who fell down)*; State v. Jones,* 229 Or App 734 (2009)(defendant pulled the victim back towards him, causing her to fall and injure herself). In *United States v. Dominquez-Maroyoqui,* 748 F.3d 918, 921 (9th Cir. 2014)(holding felony assault on a federal officer is not a crime of violence under the force element clause because it does not require violent force, but rather is satisfied by "at least some form of assault . . . [involving] any force whatsoever"), the Ninth Circuit gave as an example of force not rising to the requisite level "chasing a prosecutor down the street and bumping into him". However, if that act caused the prosecutor to fall and scrape his knee, that would prove the requisite assault under Oregon law. *See Teaques, supra; Hart, supra.* Furthermore, causing a victim to slip, fall, and sustain injury need not be caused by such direct means, rather than indirectly, *Hendricks, supra,* such as knowingly distracting a person about to walk into harm's way.

> A third reason for distinguishing *Johnson* 's definition of "physical force" is that unlike in *Johnson*—where a determination that the defendant's crime was a "violent felony" would have classified him as an "armed career criminal"—the statute here groups those convicted of "misdemeanor crimes of domestic violence" with others whose conduct does not warrant such a designation. Section 922(g) bars gun possession by anyone "addicted to any controlled substance," §922(g)(3); by most people who have "been admitted to the United States under a nonimmigrant visa," §922(g)(5)(B); by anyone who has renounced United States citizenship, §922(g)(7); and by anyone subject to a domestic restraining order, §922(g)(8). Whereas we have hesitated (as in *Johnson*) to apply the Armed Career Criminal Act to "crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals,' " *Begay v. United States,* 553

> U.S. 137, 146, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), we see no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with the others whom § 922(g) disqualifies from gun ownership. *Id.* at 1412.

Likewise, finding Oregon's APSO statute—as well as other felony assaults defined by misdemeanor assault plus an enhancement element with no bearing on force or physical injury[7]--to be a "violent felony" under the force element clause of either the ACCA or Career Offender guideline produces highly punitive consequences for relatively minor acts of violence. Given that defendants who knowingly drive while intoxicated and cause an accident that results in the maiming or slaughter of innocents, are routinely convicted of reckless aggravated assaults or manslaughter which, due to the *mens rea* element are not "violent felonies," the rule of lenity counsels against qualifying defendants who have at worst knowingly caused minor injuries as violent felons.[8]

[7] E.g., So-called "felony assault four," ORS 163.160(3)(a)-(d), elevating misdemeanor assault to felony status if witnessed by a minor child, or the victim is pregnant, or the defendant has certain predicate convictions.

[8] The Oregon definition of the *mens rea* "knowingly" as applied to the crime of assault is *sui generis.* Oregon does not follow the Model Penal Code, §2.02(2)(b), in that an assault committed "knowingly" does NOT require the defendant to know he is causing an injury. *State v. Barnes*, 329 Or 327, 986 P.2d 1160, 1166-67 (Or. 1999). Under *Barnes,* a knowing assault requires awareness of the "assaultive nature" of the conduct, but applies no *mens rea* to the resulting physical injury. As the Oregon Court of Appeals noted recently, the phrase "assaultive nature" has never been defined. *English,supra*. The holding in *Barnes* is consistent with Oregon statutes, which divide all material elements into one of three categories: *mens rea*, conduct, and circumstance or result. ORS 161.085 & 161.095. The mental state of "knowingly" does not apply to results, like physical injury, as a matter of law. ORS 161.085(8). In contrast, recklessly, intentionally and with criminal negligence can all apply to results. ORS 161.085(7), (9) & (10). In sum, when a defendant is convicted of a knowing assault in Oregon, unlike perhaps every other state, there is simply no requirement that he knows he is causing an injury. This is a key distinction from Ninth Circuit case law finding assault convictions that involve some variation of "a willful attempt to inflict injury upon the person of another," *United States v. Juvenile Female*, 566 F.3d 943 (9th Cir. 2009), *quoting United States v Chapman*, 528 F.3d 1215, 1219-1920 (9th Cir. 2008), to be crimes of violence.

Castleman also commented on the underlying district court decision. The district court had reasoned the element of causing physical injury in the Tennessee statute was not the same as the requisite "use of physical force" element in the §921(a)(33)(A), because "one can cause bodily injury 'without the use of physical force'," for example by poisoning the victim." The Supreme Court rejected that reasoning—although unnecessary to its holding—stating "the common-law concept of 'force' encompasses even its indirect application. . . . It is impossible to cause bodily injury without applying force in the common-law sense." Id. at 1414-15.[9]

Even if that language in *Castleman* is not mere *dicta*, the Supreme Court specifically cautioned that its conclusion had no application to the "violent force" required under the ACCA: "Whether or not the causation of bodily injury necessarily entails violent force—a question we do not reach—mere offensive touching does not. See *Johnson,* 559 U.S., at 139–140," *Id.,* at 1413. That section of *Johnson* starts with dictionary definitions of "force," characterized as active strength, energy or power directed against a person, and concludes with dictionary definitions of "violent," characterized by the exertion of great or extreme physical force or strength against another. None of the many descriptions and examples of "violent force" in *Johnson* include physical pain or injury caused by an act of deception, omission, or what *Castleman* noted might not be considered "violent" in a non-domestic setting: "[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling," *id.,* at 1411.

Johnson held that the force element clause required the use of "violent, active . . . force—that is, force capable of causing physical pain or injury to another person." *Id.* at 141 (emphasis

[9] That statement may not be completely accurate, because common-law battery is a "cause and result" statute, meaning that an act of deception or distraction leading to self-inflicted injury, or a failure to act resulting in injury—rather than an active use of force—will suffice. Substantive Criminal Law, §16.2.Battery, *supra.*

supplied). Thus, *Johnson* instructs that causation of injury describes the quantum of "force" required—not the acts that qualify as the "use of violent force," i.e., not the entire meaning of "force" itself as an element. *Castleman* resolved only the circuit split over the quantum of force required for the federal definition of misdemeanor crime of domestic violence, holding that offensive touching would suffice. The Court expressly reserved decision on whether the criminal act—causation of bodily injury—necessarily equates with the use of violent force. Read together, *Johnson* and *Castleman* make clear that "violent force" is not "the common-law concept of 'force'," and that misdemeanor "bodily injury" is unlikely to equate with the quantum of "force" required for "violent felonies. *See also, e.g., United States v. Castillo-Marin*, 684 Fed 914, 923 (9th Cir. 2012)("We have made clear that the force required under the element prong of the §2L1.2 crime of violence definition 'must actually be violent in nature.'" USSG. §2L1.2 has the same definition of the element test as 4B1.2, *see* Application Note 1(B)(iii)).

This Court, in *Dunlap*, misapprehended the *dicta* from *Castleman* as having decided the issue of whether a statute that has as an element the causation of physical injury meets the criteria of having as an element the use of "violent force". 162 F.Supp.3d at 1117. *See also, e.g., United States v. Garcia-Santana,* 774 F3d 528, 540-41 (9th Cir. 2014)(limiting *Castleman* to its holding regarding interpretation of misdemeanor crime of violence, and refusing to rely on it to answer a different question of statutory construction that was not at issue there). *Dunlap* also appears to have overlooked the similarities between the meaning of "bodily injury" under Tennessee law and "physical injury" under Oregon law—both including physical pain or impairment of physical condition—and the Supreme Court's admonition that while "these forms of injury do necessitate force in the common-law sense," whether or not these forms of injury "necessitate violent force, under *Johnson's* definition of that phrase" is "a question we do not decide." 134 SCt at 1414. The

defendant in *Dunlap* failed to argue this vital distinction between the *use of* violent force and the quantum of force required to meet the definition of violent force. Rather, the defendant asserted only that the quantum or "level of force required for conviction [under Oregon's third-degree assault statute] falls below the level of 'violent force' required by *Johnson,*" *id.,* at 1117.

Dunlap also did not address the circuit split over whether crimes defined by the element of causation of physical injury—versus the element of use of physical force—meet the federal definition of violent felonies. For example, in *United States v. Garcia*, 470 F3d 1143 (5th Cir. 2006), the Court examined a Colorado statute similar to Oregon's assault statutes, i.e., having the element of "knowingly or recklessly causes bodily injury to another person." The Court explained:

> On its face, the Colorado assault statute, and in turn the elements of the crime, does not require any use, or threatened or attempted use, of physical force. *See id.* §18-3-204; *see also United States v. Perez-Vargas,* 414 F.3d 1282, 1286 (10th Cir.2005) (recognizing that there are several examples of third-degree assault in Colorado that would not use or threaten the use of physical force, such as intentionally placing a barrier in front of a car to cause an accident or intentionally exposing someone to hazardous chemicals). Where some (though not all) methods of violating a statute do not require the use, attempted use, or threatened use of physical force against the victim, "the statute therefore does not have, *as an element,* the use of physical force against the person of another." *United States v. Sarmiento-Funes,* 374 F.3d 336, 341 (5th Cir.2004).

Garcia, 470 F.3d at 1147. The Fifth Circuit has reached the same result in examining Texas assault statutes that only require the defendant cause physical injury, without having the use of force as an element. E.g., *United States v. Vargas-Duran*, 356 F3d 598, 604-605 (2004).

The Second Circuit has joined the Fifth and Tenth Circuits on this issue, rejecting the Government's argument that Connecticut's third-degree assault statute requiring intentional causation of physical injury implied use of force as an element. *Chrzanoski v. Ashcroft*, 327 F3d 118, 193-195 (2nd Cir. 2003)("Petitioner responds that there is a 'difference between the causation of an injury and an injury's causation by the 'use of physical force.' We agree."). Similarly, the Fourth Circuit, in *United States v. Gomez*, 690 F3d 194 (2012) held that Maryland's child abuse

statute, requiring causation of physical injury without an express requirement of using physical force, was not a crime of violence.

More recently, other courts have recognized that *Castleman* did not decide and has little bearing on whether causation of injury matches the element of use of violent force. *United States v. McNeal*, 818 F3d 14, 156 & n.10 (4th Cir. 2016); *Whyte v. Lynch,* 807 F3d 463, 470-471 (1st Cir. 2015)(reading *Johnson* and *Castleman* together to conclude that state assault conviction requiring only that a defendant cause physical injury did not have use of violent force as an element); *United States v. Fennell,* 2016 WL 4702557 (N.D. Tex., September 8, 2016). Other courts have reached contrary conclusions. See, e.g., *United States v. Rice,* 813 F3d 704 (8th Cir. 2016) and at 706-708 (Kelly, J., *dissenting*; surveying other circuits decisions).

The defense herein has found only one Ninth Circuit decision since *Garcia-Santana*, *supra,* that discusses *Castleman*. In *Arellano Hernandez v. Lynch,* 831 F3d 1127 (9th Cir. 2016), the Court adhered to its prior precedent that conviction under the California criminal threats statute was a "crime of violence" as defined under 18 U.S.C. §16(a). The California statute requires a person to "willfully threaten to commit a crime which will result in death or great bodily injury to another" and to be "so unequivocal, unconditional, immediate and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat." The Ninth Circuit rejected conflicting authority from the Fourth and Fifth Circuits that reasoned the statute was not categorically a crime of violence under the element test, because one could threaten to poison another which is not use of "force." The Ninth Circuit observed "this reasoning has been rejected by the Supreme Court" in *Castleman,* as well as its own earlier decision in *United States v. De La Fuente,* 353 F3d 766, 770-71 (9th Cir. 2003)(concluding that a threat of anthrax poisoning

constituted a "threatened use of physical force" because defendant's letters threatened death by way of physical contact with anthrax spores).

The Ninth Circuit's acknowledgment of *Castleman's dicta* in *Arellano Hernandez* falls far short of holding that a state statute requiring only that the defendant cause physical injury is a crime of violence under the ACCA or Career Offender guideline. Furthermore, while a defendant can cause physical injury through deception or an act of omission, it is impossible to willfully threaten to cause imminent death or great bodily injury by those means—the element at issue in *Arellano Hernandez.* Finally, 18 USC §16(a)'s definition of "crime of violence" includes misdemeanor offenses—not just felonies—meaning that *Castleman's dicta* equating misdemeanor use of force with causing physical injury should be given deference in that context.

B. Oregon's APSO is proven by causation of "physical injury" otherwise punishable as a misdemeanor, and has been construed to include injuries far less than what would be caused by the use of "violent force," and by as little force as "offensive touching."

Johnson held that the force element clause required the use of "violent, active . . . force—that is, force capable of causing physical pain or injury to another person." *Id.* at 141 (emphasis supplied). Although the Court did not further define the degree of pain or injury in its decision, it did describe violent force as being powerful, severe, furious, and characterized by the exertion of great physical force; and mentioned murder, forcible rape, and assault and battery with deadly weapons as examples of "violent felonies." *Id.,* at 140-141. *Castleman* expressly reserved decision on whether the criminal act—causation of bodily injury in the common-law misdemeanor sense—necessarily equates with the use of violent force. *Id.,* at 1413. It is also significant that the COG requires causation of serious bodily injury for a felony assault to qualify as an "aggravated assault" enumerated crime, discussed *infra.*

Oregon's definition of "physical injury," which the defendant must "cause" to commit assault, encompasses injuries below the threshold of injuries resulting from violent force. *See Johnson, supra,* citing with approval *Flores v. Ashcroft,* 350 F3d 666, 670 (2003)(violent force is greater than "a squeeze of the arm [that] causes a bruise" or "the snowball [that] causes a yelp of pain"). "Physical injury" is defined by ORS 161.015(6) as "impairment of physical condition or substantial pain." Causing an officer to suffer a headache that lasted probably an hour or so constitutes "physical injury." *State ex rel. Juvenile Dept. of Multnomah County v. Greenwood*, 107 Or App 678, 681 (1991); *State v. Teitsworth*, 257 Or App 309, 313 (2013)(citing and reaffirming this holding from *Greenwood*). A scratch or scratches may constitute physical injury. *See State v. Rice,* 48 Or App 115, 118, *rev. den.,* 289 Or 741 (1980). The skin is "an organ of the body" and its "protective function is impaired when the skin sustains a laceration," in this case a half-inch cut to the back of the head, even though there was no evidence that the victim experienced pain from the injury. *State v. Hart*, 222 Or App 285, 290-291 (2009). Impairment of the protective function of the skin is shown by a scrape to the back about one inch wide by four inches long, caused when the defendant pulled the victim back towards him, causing her to fall and strike her back on some exercise equipment. *State v. Jones,* 229 Or App 734 (2009). Preventing a victim from breathing for up to five seconds by covering her nose and mouth impaired her respiratory function and thereby constituted "physical injury." *Hendricks, supra*.

Hendricks evinces how broadly Oregon courts have construed "physical injury," to reach conduct that—in terms of use of physical force—requires no more than offensive touching under the common law, i.e., the placing of one's hand over the nose and mouth up to five seconds. Offensive touching that distracts a victim, causing an accident that results in a small cut or abrasion, impairs the protective function of the skin and constitutes "physical injury" under Oregon

law. *Rice, supra; Hart, supra. Johnson* holds that a statute that includes "offensive touching" is over-inclusive and not categorically a "crime of violence." *See, United States v. Sandoval*, 390 F3d 1077, 1081 (9th Cir. 2004)(Washington's felony assault on a police officer is not a COG crime of violence because "it is possible to commit third-degree assault through an unlawful touching that does not involve substantial physical force or seriously risk physical injury."); *and compare, United States v. Lawrence,* 627 F.3d 1281, 1287 (9th Cir. 2010)(finding Washington's second-degree assault statute to be categorically a crime of violence, in part because it required "substantial bodily harm," i.e., "substantial" disfigurement, "substantial" loss or impairment of the function of any bodily part or organ, or "a fracture of any bodily part"). "Under the categorical approach, the crime of violence determination 'function[s] as an on-off switch': An offense qualifies as a crime of violence 'in all cases or in none'." *Dominquez-Maroyoqui, supra* at 920.

Dunlap discussed only the *Greenwood* case in holding that causation of physical injury under Oregon law meets the level or quantum of force required to be a "violent felony" under the ACCA or COG. Although the victim's headache in *Greenwood* was caused by being struck in the head with an object, the case holds that a headache lasting about an hour meets Oregon's definition of "physical injury." Headaches can be caused by no direct force, such as by exposing a person to noxious fumes. The key to the categorical approach "is elements, not facts," *Mathis, supra.*

For all of the reasons previously discussed, this Court should reconsider its holding in *Dunlap* that an Oregon felony dependent solely on proof of causation of physical injury in the misdemeanor sense is a violent felony.

II. Oregon's APSO Is Not A Qualifying Crime Of Violence Under The Enumerated Crimes Prong Of The Career Offender Guideline.

A. No type of assault was an enumerated crime in the COG prior to August 2016; thus, APSO was not an enumerated crime under the guideline in effect at the time of Mr. Smith's drug offense.[10]

The COG prior to August 2016 did not list any type of "assault" as an enumerated crime. However, Application Note 1 to USSG §4B1.2 described "crime of violence" as including "aggravated assault." At that time, the Note read, in pertinent part:

> 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, extortionate extension of credit and burglary of a dwelling. Other offenses are included as 'crimes of violence' if (A) that offense has an element the use, attempted use, or threatened use of physical force against the person of another or (B) conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives . . . or, by its nature, presented a serious potential risk of physical injury to another. (Emphasis added).

At that time, the enumerated crimes provision, USSG §4B1.2(a)(2), provided that a crime of violence "is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Thus, it combined the "residual clause" language with a list of enumerated crimes that did NOT include "aggravated assault."

Significantly, the Note discussed aggravated assault as an additional enumerated crime, and not as one of "[o]ther offenses" that have as "an element the use, attempted use, or threatened use of physical force against the person of another." Most of the offenses listed only in the commentary have been held or assumed to not match the force element clause. *See, e.g., United States v. Zungia-Soto,* 527 F.3d 1110, 1125 n.3 (10th Cir. 2008) (Texas aggravated assault); *United*

[10] This argument is condensed, and submitted only in the unlikely event that the Court were to find Oregon's APSO does match the generic definition of "aggravated assault."

States v. Martinez-Flores, 720 F.3d 293, 299 (5th Cir. 2013) (New Jersey aggravated assault); *United States v. McMurray*, 653 F.3d 367, 374-75 (6th Cir. 2011) (Tennessee aggravated assault); *Crews, supra*; *United States v. Dixon*, 805 F.3d 1193, 1197-98 (9th Cir. 2015) (California robbery); *Delgado-Hernandez v. Holder*, 697 F.3d1125 (9th 2012) (California kidnapping); *United States v. Armijo*, 651 F.3d 1226 (10th Cir. 2011) (manslaughter under Colo. Rev. Stat. §18-3-104(1)(a)); *United States v. Garcia-Perez*, 779 F.3d 278 (5th Cir. 2015) (manslaughter under Fla. Stat. §782.07(1)). Furthermore, the Guidelines Commission in August 2016 added "aggravated assault" to the enumerated crimes prong of COG, a somewhat unnecessary addition if most felony assaults would satisfy the force element clause.

Under the Supreme Court's decision on *Stinson v. United States,* 508 US 36, 40-41 (1993), an offense that is merely listed in commentary, but does not interpret or explain any existing text of the guideline, is not a "crime of violence". Where "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Id.,* at 43. In other words, commentary has no freestanding definitional power and cannot add crimes to the enumerated crimes in the guideline's text. The First, Fourth, Seventh and Tenth Circuits have expressly held that an offense listed only in the COG commentary is not an enumerated crime of violence. The Third and Eleventh Circuits have held the opposite.[11]

[11] *See United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016) (holding that in the absence of the residual clause after Johnson, an offense that does not satisfy § 4B1.2(a)(1) and is not enumerated in §4B1.2(a)(2) does not interpret any text in the guideline and is thus not a "crime of violence"); *United States v. Rollins*, No. 13-1731, 2016 WL 4587028, at *5 (7th Cir. Aug. 29, 2016) (en banc) ("[T]he application notes are interpretations of, not additions to, to Guidelines themselves; an application note has no independent force. Accordingly, the list of qualifying crimes in application note 1 to § 4B1.2 is enforceable only as an interpretation of the definition of the term "crime of violence" in the guideline itself." As a result, conviction for possession of a sawed-off shotgun does not qualify as a crime of violence in the absence of the residual clause

B. Oregon's APSO is not the equivalent of generic "aggravated assault"; thus, the statute is not a "crime of violence" under the COG as amended August 2016.

Determining the meaning of "aggravated assault" as "an enumerated Guidelines crime" requires "surveying the Model Penal Code and state statutes to determine how they define the offense." *Gomez-Hernandez, supra,* 680 F3d at 1177. The Court went on to explain:

> Under the Model Penal Code, "[a] person is guilty of aggravated assault if he: (a) *attempts to cause serious bodily injury* to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another *with a deadly weapon.*" Model Penal Code §211.1(emphases added). Consistent with this definition, the Eleventh Circuit concluded that "[t]he generic offense of 'aggravated assault' under §2L1.2 of the Guidelines involves a criminal assault accompanied by the aggravating factors of either the intent to cause serious bodily injury to the victim or the use of a deadly weapon." *United States v. Palomino Garcia,* 606 F.3d 1317, 1332 (11th Cir.2010) (relying on most states' definitions of aggravated assault, as well as learned treatises and the Model Penal Code).
>
> We agree with the Eleventh Circuit that (1) intent to cause serious bodily injury, and (2) use of a deadly weapon to attempt to cause bodily injury (serious or not), are both generic aggravating factors. *Gomez-Hernandez* at 1178.

Gomez-Hernandez involved an attempted assault conviction; hence its focus on the "intent to cause serious bodily injury," rather than causation of serious bodily injury. *See also, United States v. Garcia-Jimenez*, 807 F3d 1079 (9th Cir. 2015)(finding New Jersey's aggravated assault statute did not match the federal generic "aggravated assault" under USSG §2L1.2(b)(1)(A); noting government did not argue that cause-and-result statute matched the force element component of that guideline).

In *Dominguez-Maroyoqui, supra* at 920*,* the Government conceded that assaulting a federal officer did not match the closest enumerated crime, "aggravated assault," because it did not require

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after *Johnson*.); *United States v. Hood*, 628 F.3d 669, 671 (4th Cir. 2010); *United States v. Armijo*, 651 F.3d 1226, 1234-37 (10th Cir. 2011); *contra, United States v. Marrero*, 743 F.3d 389, 397-401 (3d Cir. 2014); *United States v. Hall*, 714 F.3d 1270, 1272-74 (11th Cir. 2013).

proof of any aggravated factors identified by *Gomez-Hernandez*. That statute, 18 USC 111(a), included the act of forcible assault, but did not require either the attempted or completed causation of serious bodily injury, or use of a deadly weapon. Oregon's APSO likewise lacks those requirements. See discussion of what constitutes "physical injury" under Oregon law, *supra.*

Conclusion

The use of force element in APSO is defined identical to Oregon's misdemeanor assault in the fourth degree. The gravamen of the statute is "causation of physical injury," not use of violent force capable of causing physical injury in the sense of "violent felonies" such as murder or forcible rape. Moreover, Oregon law does not require the active use of any degree of physical force to cause the requisite injury; rather any direct or indirect act by a defendant, as well as an act of omission that causes injury suffices. "Physical injury" as a term of art under Oregon law can be inflicted by mere offensive touching—e.g., placing a hand against a person's nose and mouth for a few seconds that impairs breathing, or a non-violent push or pull that causes a person to lose balance, fall, and scrape a knee. Furthermore, Oregon law does not require that a defendant "know" that physical injury will result from his conduct. This is not what Congress intended as a "violent felony" that would mandate punishment under the ACCA. The Guidelines historically have required an "aggravated assault," to trigger enhanced penalties based on prior felony assault convictions, under various provisions including the COG. Oregon's APSO is categorically not "aggravated assault," because it does not require serious physical injury or physical injury caused by use of a deadly weapon.

For the reasons set forth in this memorandum, and such other points and authorities as may be offered by way of supplemental memoranda or at oral argument at time of sentencing, this Court

should reconsider or distinguish its decision in *Dunlap*, and find that Mr. Smith's conviction for APSO is not a qualifying crime of violence to make him a Career Offender.

Respectfully submitted this 24th day of October, 2016.

/s/ Terri Wood
TERRI WOOD OSB 883325
Attorney for Billy Smith