SJC-12874

COMMONWEALTH vs. LEE W. ASHFORD.

Plymouth. April 7, 2020. - December 16, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Firearms. Evidence, Firearm. Statute, Retroactive application. Practice, Criminal, Retroactivity of judicial holding, Sentence. Intentional Conduct. Wanton or Reckless Conduct.

Indictments found and returned in the Superior Court Department on April 9, 2010.

Following review by the Appeals Court, 87 Mass. App. Ct. 1113 (2015), a motion for required findings of not guilty, filed on January 28, 2019, was considered by Angel Kelly, J.

The Supreme Judicial Court granted an application for direct appellate review.

Timothy St. Lawrence for the defendant.
B. Patrick Nevins, Assistant District Attorney, for the Commonwealth.
Jessica LaClair, for Paris Tillery, amicus curiae, submitted a brief.

[1] Chief Justice Gants participated in the deliberation on this case prior to his death. Justice Lenk participated in the deliberation on this case prior to her retirement.

Michael Tumposky, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

GAZIANO, J. When State police troopers attempted to stop the defendant's vehicle for speeding, he fled, first in the vehicle and then on foot. After he was apprehended, police recovered drugs they saw him throw into a Dumpster as well as a loaded gun from a bag on the rear seat of the vehicle. On appeal, the defendant argues that our holding in Commonwealth v. Brown, 479 Mass. 600, 601 (2018) -- that the Commonwealth must prove he knew that the gun was loaded in order to establish a violation of G. L. c. 269, § 10 (n) -- applies retroactively to his case on collateral review. The defendant also asks us to consider whether assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b), a crime that can be accomplished either intentionally or recklessly, is categorically a violent crime, as required to serve as a predicate offense under G. L. c. 269, § 10G, the Massachusetts armed career criminal act (ACCA or Massachusetts ACCA).

We conclude that Brown, 479 Mass. at 608, did not announce a new rule, and therefore it applies retroactively to cases on collateral review. We also conclude that in order for a conviction of assault and battery by means of a dangerous weapon to count as a predicate offense for purposes of the ACCA, the Commonwealth must use the modified categorical approach to prove

that the defendant was convicted of intentional assault and battery by means of a dangerous weapon. This is so because there is substantial ambiguity as to whether the force clause of the ACCA encompasses reckless conduct; accordingly, under the rule of lenity, the defendant is entitled to the narrower reading of the criminal statute.

Background. 1. Arrest. Shortly after 9 P.M. on February 8, 2010, a State police trooper began following the defendant's vehicle as it pulled out of a gasoline station in Brockton. When the vehicle started traveling at thirty-five miles per hour in a zone with a speed limit of thirty miles per hour, the trooper activated his blue lights and attempted to stop the vehicle. The defendant accelerated, and the trooper pursued. After another police vehicle joined the chase, the defendant parked and fled on foot.

The troopers then continued the pursuit on foot, and eventually caught up to the defendant, who had his hands in his pockets. When they ordered him to take his hands out of his pockets, the defendant "motioned" towards a nearby Dumpster. One of the officers testified that something came out of the defendant's pocket and went into the container. The defendant was arrested, and an officer later recovered three plastic bags from the Dumpster. The bags contained a substance that subsequently was identified as "crack" cocaine. One of the bags

held two smaller "twists" that had lesser portions of the drug, and a third contained fourteen "twists."

Another trooper searched the defendant's vehicle and found a plastic bag on the rear seat that contained a pistol, a scale, and a bottle of a cologne named "Very Sexy." A magazine, containing four rounds of ammunition, was fully inserted into the weapon.

On the drive to the State police barracks, a trooper read the defendant his Miranda rights[2] and then proceeded to ask him what type of cologne he was wearing. The defendant replied, "Very Sexy." He said that the cologne, drugs, and scale were his, but denied all knowledge of a handgun. He told police that he fled because of the drugs.

2. Prior proceedings. At a jury trial in the Superior Court, the defendant was convicted of unlawful possession of a firearm, in violation of G. L. c. 269, § 10 (a); unlawful possession of a loaded firearm, in violation of G. L. c. 269, § 10 (n); and possession of cocaine with the intent to distribute, in violation of G. L. c. 94C, § 32A (c). Then, in a jury-waived trial before the same judge, the defendant was convicted of a sentencing enhancement for two prior violent crimes under the ACCA. See G. L. c. 269, § 10G (b). At the

[2] See Miranda v. Arizona, 384 U.S. 436 (1966).

trial on the ACCA charge, the Commonwealth submitted evidence that the defendant previously had been convicted of armed robbery and assault and battery by means of a dangerous weapon. As to this latter conviction, the Commonwealth's evidence consisted of identification testimony by the officer who had booked the defendant, and a certified record of the conviction.

In a consolidated judgment on the convictions of unlawful possession of a firearm and the ACCA enhancement, the judge sentenced the defendant to a term of incarceration of not less than ten years and not more than ten years and one day, the mandatory minimum under the ACCA. That sentence was to run concurrently with a sentence of not less than two years and not more than three years for possessing cocaine in violation of G. L. c. 94C, § 32A (c). In addition, the defendant was sentenced to two years of probation on the loaded firearm conviction, G. L. c. 269, § 10 (n), which was to run from and after his ten-year sentence under the ACCA.

The defendant appealed and also filed a motion for a new trial; that motion was denied following an evidentiary hearing. The Appeals Court consolidated the direct appeal and the appeal from the denial of the motion. See Commonwealth v. Ashford, 87 Mass. App. Ct. 1113 (2015). In April 2015, the court affirmed both the judgment and the denial of the motion for a new trial. Id.

In January 2019, the defendant challenged both the loaded firearm conviction and the ACCA enhancement in a motion for required findings of not guilty, pursuant to Mass. R. Crim. P. 25, as amended, 420 Mass. 1502 (1995), or, in the alternative, to vacate an unlawful sentence. The motion was denied, and we granted the defendant's motion for direct appellate review.

Discussion. 1. Possession of a loaded firearm. a. Retroactivity of Brown on collateral review. In Brown, 479 Mass. at 601, we held that in order for a defendant to be convicted of possessing a loaded firearm under G. L. c. 269, § 10 (n), the Commonwealth had to prove that the defendant knew the weapon was loaded. The defendant contends that he is entitled to the retroactive effect of that decision on collateral review. We agree.

"In general, when we construe a statute, we do not engage in an analysis whether that interpretation is given retroactive or prospective effect; the interpretation we give the statute usually reflects the court's view of its meaning since the statute's enactment." Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 587 (2012), citing McIntire, petitioner, 458 Mass. 257, 261 (2010), cert. denied, 563 U.S. 1012 (2011). Where the statutory interpretation at issue is not constitutionally required, however, we retain some discretion to apply the rule only prospectively. See Eaton, supra at 588, quoting

Commonwealth v. Dagley, 442 Mass. 713, 721 n.10 (2004), cert. denied, 544 U.S. 930 (2005). This discretion is guided by consideration of the novelty of the interpretation, whether retroactivity is consistent with the purposes of the rule announced, and whether "hardship or inequity would result from retroactive application" (citation omitted). American Int'l Ins. Co. v. Robert Seuffer GmbH & Co. KG, 468 Mass. 109, 121, cert. denied, 574 U.S. 1061 (2014). There must be good reason "to disturb the presumptively retroactive application" of a statutory interpretation. Id. See Eaton, supra (prospective effect was given in those "very limited circumstances" because retroactive application would have clouded title to thousands of property transactions).

We discern no reason here to exercise our discretion and to apply the holding in Brown only prospectively. While Brown decided an open question of law, its interpretation was not entirely novel. See Brown, 479 Mass. at 608. It relied on Commonwealth v. Johnson, 461 Mass. 44, 53 (2011), where we held that "[a]ll of the required elements of unlawful possession of ammunition [including the element of knowledge] were encompassed by the elements of unlawful possession of a loaded firearm." From that conclusion, it is a logical step to the holding in Brown, supra, that the element of knowledge required by the lesser included offense must be shown in order to convict a

defendant of the greater offense. Furthermore, any inequity or hardship to the Commonwealth resulting from any lack of warning that it was required to prove knowledge is outweighed by our concern for the inequity and hardship visited upon a defendant, like this one, who might have been convicted and sentenced without the Commonwealth proving an essential element of the crime. Thus, as we have held, the holding in Brown that the Commonwealth must prove a defendant knew that the gun was loaded in order to sustain a conviction under G. L. c. 269, § 10 (n), applies to cases on collateral review. See Commonwealth v. Silvelo, 486 Mass. 13, 17 (2020), citing Commonwealth v. Paul, 96 Mass. App. Ct. 263, 265-266 (2019).

b. Sufficiency. Having determined that the holding in Brown is applicable here, we next must decide whether there was sufficient evidence for the jury to have found the defendant knew that the gun was loaded. In reviewing the sufficiency of the evidence, we examine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis in original). Brown, 479 Mass. at 608, quoting Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). In this case, the evidence was not sufficient.[3]

[3] For this reason, we do not reach the further question whether the absence of an instruction on this element created a

Where there is no direct evidence that a defendant knew a gun was loaded, a jury rationally may infer that fact from circumstantial evidence. Brown, 479 Mass. at 608. While this inference need only be reasonable and possible, not necessary and inescapable, Commonwealth v. Sullivan, 469 Mass. 621, 624 (2014), it is equally true that "no essential element of the crime may rest in surmise, conjecture, or guesswork" (citation omitted), Commonwealth v. Lopez, 484 Mass. 211, 216 (2020). The "evidence is not sufficient if it requires piling 'inference upon inference'" (citation omitted). Commonwealth v. Merry, 453 Mass. 653, 661 (2009).

Here, the gun was not found on the defendant's person but in his vehicle. He was not seen handling the weapon, and he denied ownership. This evidence is similar to the evidence of knowledge that we deemed insufficient in Brown in two key respects: the gun was not discovered on the defendant's person, and one cannot tell whether the firearm was loaded simply by looking at it. See Brown, 479 Mass. at 608. Contrast Silvelo, 486 Mass. at 19 ("ammunition [inside revolver] would have been clearly visible").

The Commonwealth's argument that the gun was loaded hinges on evidence of the defendant's drug distribution. The

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substantial risk of a miscarriage of justice. See Commonwealth v. Silvelo, 486 Mass. 13, 17 (2020).

Commonwealth argues that the jury could have inferred that the gun was loaded because there was testimony that the use of "protection" "could be" significant for those involved in dealing narcotics, particularly alone at night. Taking the inference one step further, the Commonwealth contends that a loaded gun offers better protection than an unloaded one, and therefore the jury could have found beyond a reasonable doubt that the gun was loaded. We do not agree.

First, the expert testimony that the defendant would have been more likely to carry a loaded weapon was weak. The Commonwealth's expert merely answered, "it could be," when asked if "protection" would be important to someone dealing narcotics in Brockton.

Second, the inference that drug dealers in general are more likely to carry "protection," even if accepted, is too broad, free-floating, and speculative to support the required element of knowledge that a specific gun was loaded. And because many people carry handguns for protection or self-defense, see Commonwealth v. Cooper, 97 Mass. App. Ct. 772, 774 (2020), countenancing this inference would vitiate the requirement announced in Brown, 479 Mass. at 601, that knowledge is an independent element of G. L. c. 269, § 10 (n). It also runs counter to the statutory scheme, which clearly contemplates

individuals carrying either loaded or unloaded firearms. See G. L. c. 269, § 10 (a), (n).

Such an inference is especially inadequate where, as here, it stands alone, in circumstances where there was no direct evidence of the defendant handling the gun or threatening to use it. See Cooper, 97 Mass. App. Ct. at 774 (evidence of knowledge was sufficient where "gun was neither holstered, nor concealed, but was drawn" and tucked into defendant's armpit area, and there also was evidence defendant deliberately had obtained weapon); Commonwealth v. Grayson, 96 Mass. App. Ct. 748, 752 (2019) ("reasonable inference that a person carrying a firearm in his [or her] waistband would know whether it was loaded" supports inference of knowledge, but, standing alone, is insufficient to establish knowledge); Commonwealth v. Resende, 94 Mass. App. Ct. 194, 200-201 (2018) ("close case" where "commonsense inference . . . that a person would check to see if the firearm was loaded before putting it in his [or her] waistband" plus threats related to using firearm were deemed sufficient evidence of knowledge); Commonwealth v. Galarza, 93 Mass. App. Ct. 740, 742, 747-748 (2018) (evidence of knowledge was insufficient where gun was found in console of truck driven by defendant but owned by third party). Here, where the defendant was not seen handling the gun or threatening to use it, we conclude that the evidence presented was insufficient to

support the conviction of carrying a loaded firearm, G. L. c. 269, § 10 (n), and that the conviction must be vacated.

2. Massachusetts ACCA enhancement. a. Retroactivity of Beal on collateral review. When an individual is convicted of illegally possessing a firearm or ammunition, the ACCA, G. L. c. 269, § 10G, imposes harsher sentences based on the number of times that the individual previously has been convicted of a serious drug offense or "violent crime." See Commonwealth v. Wentworth, 482 Mass. 664, 670 (2019); Commonwealth v. Eberhart, 461 Mass. 809, 814 (2012). For purposes of the ACCA, a "violent crime" is defined as

> "any crime punishable by imprisonment for a term exceeding one year . . . that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another."

G. L. c. 140, § 121. See G. L. c. 269, § 10G. This definition traditionally was divided into three parts, such that "to constitute a violent crime under the ACCA, the crime must fall within the scope of either (1) the force clause; (2) the enumerated crimes provision; or (3) the residual clause." Commonwealth v. Beal, 474 Mass. 341, 349 (2016), citing Eberhart, supra at 814–815. Because the Massachusetts ACCA "largely replicates" a nearly identical Federal statute, the

Federal armed career criminal act (Federal ACCA), see 18 U.S.C. § 924(e), "we often look to the Federal courts for guidance on issues relating to the meaning and scope of this statute."[4] Beal, supra.

In Johnson v. United States, 576 U.S. 591, 597 (2015), the United States Supreme Court held that the residual clause of the Federal ACCA was unconstitutionally vague. The residual clause violated fundamental principles of due process because it "both denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." Id. In Beal, 474 Mass. at 351, we adopted the reasoning of Johnson to conclude that the residual clause of the Massachusetts ACCA likewise was unconstitutionally vague. See Wentworth, 482 Mass. at 671.

Here, assault and battery by means of a dangerous weapon, one of the defendant's predicate offenses for the ACCA charge, is not within the enumerated crimes clause. See G. L. c. 140, § 121. Should we conclude, as the defendant argues, that he is

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[4] The only potentially material difference in the language of the Massachusetts and Federal ACCA lies in the force clauses, where the phrase "or a deadly weapon" is included in the Massachusetts version. See G. L. c. 140, § 121; 18 U.S.C. § 924(e)(2)(B)(i). The potential application of that phrase, however, is not at issue in this case. We note, however, that determining whether a crime was violent because it involved using a deadly weapon against the person of another must account for the fact that deadly weapons are a narrower, more lethal subset of dangerous weapons. See Commonwealth v. Rezendes, 88 Mass. App. Ct. 369, 372-378 (2015).

entitled to the benefit of Beal, 474 Mass. at 351, then the defendant's ACCA enhancement can survive collateral review only if the predicate charges fall within the force clause. See Wentworth, 482 Mass. at 671. Therefore, we first must decide whether our holding in Beal applies retroactively to cases on collateral review.

The retroactivity of a constitutional rule is governed by principles announced by the United States Supreme Court in Teague v. Lane, 489 U.S. 288, 307 (1989), and adopted by this court in Commonwealth v. Bray, 407 Mass. 296, 303 (1990). Under the Teague-Bray framework, the initial inquiry is whether a rule is "new" or "old" (citations omitted). Commonwealth v. Sylvain, 466 Mass. 422, 433 (2013), S.C., 473 Mass. 832 (2016). Unless one of two exceptions is implicated, new rules apply only to defendants whose cases are pending on direct review; old rules are "fully retroactive" and apply both on direct and collateral review. Commonwealth v. Robinson, 408 Mass. 245, 247 & n.2 (1990), citing Bray, supra. See Sylvain, supra.

The two exceptions that render a new constitutional rule fully retroactive are for rules that are either "substantive" or "watershed" rules of criminal procedure. See Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 665 (2013), S.C., 471 Mass. 12 (2015). For purposes of a Teague-Bray analysis, a rule is substantive if it "'places a class of

private conduct beyond the power of the State to proscribe,' . . . or addresses a constitutional determination 'prohibiting a certain category of punishment for a class of defendants because of their status or offense." Diatchenko, supra, quoting Saffle v. Parks, 494 U.S. 484, 494 (1990).

In Welch v. United States, 136 S. Ct. 1257, 1264-1265 (2016), the United States Supreme Court used this framework to address the retroactive application of its conclusion in Johnson, 576 U.S. at 597, that the residual clause of the Federal ACCA was unconstitutionally vague. The Court first concluded that Johnson announced a new rule. See Welch, supra at 1264. It then concluded that the new rule was substantive, because "Johnson changed the substantive reach of the [Federal ACCA], altering 'the range of conduct or the class of persons that the [act] punishes.'" Id. at 1265, quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004).

With respect to the Massachusetts ACCA, we are persuaded by the Court's analysis in Welch, 136 S. Ct. at 1264-1265. If Johnson announced a new substantive rule under Teague, see Welch, supra at 1265, then our decision in Beal, following and relying upon Johnson, similarly announced a new substantive rule under Teague-Bray. "[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires [S]tate collateral review courts to give

retroactive effect to that rule." Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016). Thus, our determination that the residual clause of the Massachusetts ACCA is unconstitutionally vague, see Beal, 474 Mass. at 351, applies retroactively to cases on both direct and collateral review. Therefore, neither of the defendant's prior convictions may count as a predicate under the residual clause.

b. Assault and battery by means of a dangerous weapon as a violent crime under the force clause of the ACCA. The defendant contends that the offense of assault and battery by means of a dangerous weapon is not a categorically violent crime under the ACCA force clause; he does not challenge the predicate offense of armed robbery. As noted supra, because the defendant is entitled to the benefit of Beal, 474 Mass. at 351, and assault and battery by means of a dangerous weapon is not among the enumerated crimes in the Massachusetts ACCA, his ACCA sentencing enhancement based on two predicate crimes, G. L. c. 269, § 10G (b), can survive review only if that offense is within the reach of the force clause. See G. L. c. 140, § 121. See also Wentworth, 482 Mass. at 671.

i. The categorical and modified categorical approaches. Depending on the nature of the criminal statute in question, we employ either the "categorical approach" or the "modified categorical approach" to determine whether a predicate offense

qualifies as a violent crime within the meaning of the ACCA. Wentworth, 482 Mass. at 671-672. See Eberhart, 461 Mass. at 815-816.

Where the "statutory definition of the prior offense unambiguously qualifies that offense as a predicate conviction," we use the categorical approach. Eberhart, 461 Mass. at 815, quoting Commonwealth v. Colon, 81 Mass. App. Ct. 8, 15 (2011). The categorical approach "generally requires a court to look only to the fact of conviction and the statutory definition of the prior offense." Wentworth, 482 Mass. at 671, quoting Colon, supra. This is appropriate where the crime is inherently violent, i.e., where any course of conduct that would satisfy the elements of the crime also would constitute a violent crime within the meaning of the ACCA. See Wentworth, supra at 672; Eberhart, supra. Since, after Beal, 474 Mass. at 351, only the force clause is germane, and the residual clause plays no role in the analysis, this amounts to looking to the elements of the crime and asking whether they include "as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another." G. L. c. 140, § 121. Where a particular crime is categorically a violent crime, a certified copy of the prior conviction is sufficient to establish beyond a reasonable doubt that the crime committed was a violent crime. See Eberhart, supra at 817.

On the other hand, "we use the 'modified categorical approach' to determine whether a defendant had been convicted of a violent crime when the defendant was 'convicted under a broad statute that encompasses multiple crimes,' not all of which are categorically 'violent crimes.'" Beal, 474 Mass. at 351, quoting Eberhart, 461 Mass. at 816. Under the modified categorical approach, the Commonwealth must submit additional evidence, such that the fact finder can conclude that the prior crime was a crime of violence within the meaning of the ACCA. See Wentworth, 482 Mass. at 672; id. at 674 (admission during plea colloquy that defendant "struck his girlfriend at the time in the face and shoved her down on the bed" was sufficient to show conviction was for crime of violence, namely, harmful assault and battery).

Here, the defendant challenges whether assault and battery by means of a dangerous weapon, a crime which can be accomplished either intentionally or recklessly, is categorically a violent crime. More specifically, he argues that the definition of the word "use" (actively to employ something) in the force clause of the ACCA, coupled with the limiting phrase "against the person of another," denotes a degree of intentionality that is incompatible with a mens rea of recklessness.

ii. Massachusetts precedent. As the name suggests, the offense of assault and battery by means of a dangerous weapon builds upon the lesser included offense of assault and battery. See Commonwealth v. Ford, 424 Mass. 709, 711 (1997). Existing Massachusetts case law determining whether assault and battery by means of a dangerous weapon is categorically violent does the same. See Commonwealth v. Widener, 91 Mass. App. Ct. 696, 703 (2017). Like simple assault and battery, assault and battery by means of a dangerous weapon can be committed either intentionally or recklessly. See Ford, supra. Intentional assault and battery by means of a dangerous weapon requires an "intentional, unjustified touching, however slight, by means of [a] dangerous weapon." Id. at 712, quoting Commonwealth v. Appleby, 380 Mass. 296, 306 (1980). See Commonwealth v. Burno, 396 Mass. 622, 625 (1986), citing Commonwealth v. McCan, 277 Mass. 199, 203 (1931). Reckless assault and battery by means of a dangerous weapon is the "intentional commission of a wanton or reckless act (something more than gross negligence)[5] causing

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[5] In Massachusetts,

> "[w]anton or reckless conduct is determined based either on the defendant's specific knowledge or on what a reasonable person should have known in the circumstances. If based on the objective measure of recklessness, the defendant's actions constitute 'wanton or reckless conduct . . . if an ordinary normal [person] under the same circumstances would have realized the gravity of the danger.' If based on the subjective measure, i.e., the defendant's own knowledge,

physical or bodily injury to another" by means of a dangerous weapon. Ford, supra at 711. See Burno, supra, citing Commonwealth v. Welansky, 316 Mass. 383, 400-401 (1944). While the recklessly caused injury need not be permanent, it must have "interfered with the health or comfort of the victim" and "have been more than transient and trifling." Burno, supra at 627.

In Eberhart, 461 Mass. at 818, we considered whether simple assault and battery -- a crime that includes harmful, reckless, and offensive battery -- was categorically violent for purposes of the ACCA. We followed the reasoning of the Appeals Court's decision in Colon, 81 Mass. App. Ct. at 17-18, to conclude that assault and battery was not categorically violent. See Eberhart, supra at 818-819. While both harmful and reckless battery implicated sufficient "physical force" (defined as "violent or substantial force capable of causing pain or injury") to fall within the scope of the force clause, offensive battery (which could be accomplished by de minimis touching) did not. Id., citing Colon, supra at 18-20.

> 'grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct so as to avoid the act or omission which caused the harm.'"

Commonwealth v. Pugh, 462 Mass. 482, 496-497 (2012), quoting Commonwealth v. Welansky, 316 Mass. 383, 398-399 (1944).

Since our decision in Eberhart, 461 Mass. at 818-820, we unequivocally have stated that reckless assault and battery is a violent crime within the meaning of the ACCA. See Wentworth, 482 Mass. at 673, quoting Beal, 474 Mass. at 351-352, and G. L. c. 140, § 121 ("harmful battery and reckless battery each qualify as a 'violent crime' under the force clause because each 'has as an element the use, attempted use or threatened use of physical force'"); Commonwealth v. Rezendes, 88 Mass. App. Ct. 369, 372 (2015) ("It is undisputed that, if committed by an adult, an assault and battery by means of a dangerous weapon . . . would constitute a violent crime under the Massachusetts ACCA").

This line of cases, however, addresses a fundamentally different argument from that which the defendant raises here. The holdings in these cases rest upon a distinction between violent force capable of causing pain or injury and de minimis touching. See Wentworth, 482 Mass. at 672, citing Eberhart, 461 Mass. at 818-819; Beal, 474 Mass. at 352-353; Colon, 81 Mass. App. Ct. at 19-20. See also Commonwealth v. Mora, 477 Mass. 399, 407 (2017) ("conduct that may be sufficient to meet the definition of robbery may not satisfy the [ACCA] definition of 'violent crime'").

The defendant does not argue, and indeed could not argue reasonably, that reckless conduct cannot produce sufficient

physical force to count as violent. Rather, his argument hinges on a determination whether force properly can be said to be "use[d] . . . against the person of another" if it is generated recklessly. Because our cases have addressed only the quantum of force necessary to count as violent force, and have not substantively engaged with the defendant's argument about the intentionality implied by the statutory language,[6] we do not consider that argument to be foreclosed by existing precedent.

iii. Federal guidance. While our cases have not grappled thoroughly with whether the language and intent of the ACCA preclude crimes committed recklessly from being predicate offenses, the issue has been extensively litigated in Federal courts. Because of the nearly identical language, and the fact that the Massachusetts ACCA was explicitly modeled on its Federal counterpart, we "consider the Federal courts' construction of the Federal [ACCA] highly persuasive in interpreting [the Massachusetts ACCA]." Eberhart, 461 Mass. at 815, quoting Colon, 81 Mass. App. Ct. at 14. We therefore begin our analysis by reviewing this Federal guidance.

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[6] In Commonwealth v. Widener, 91 Mass. App. Ct. 696, 702-703 (2017), the Appeals Court rejected an argument about whether the force clause in the ACCA reached reckless conduct, but did so by following our statement concerning reckless assault and battery in Commonwealth v. Eberhart, 461 Mass. 809, 818-820 (2012), and the Appeals Court's decision in Rezendes, 88 Mass. App. Ct. at 372.

Relevant Federal case law starts with Leocal v. Ashcroft, 543 U.S. 1 (2004). There, the United States Supreme Court addressed whether a conviction of driving while under the influence of alcohol and causing serious bodily harm under Florida law constituted a "crime of violence" for purposes of Federal immigration law. Id. at 8. The relevant language defining a crime of violence (18 U.S.C. § 16) in Leocal, supra, is materially identical to the force clauses in both the Federal and Massachusetts ACCA.[7]

In a unanimous decision, relying on precisely the argument advanced by the defendant here, the Leocal court concluded that the force clause in 18 U.S.C. § 16 did not reach negligent conduct. See Leocal, 543 U.S. at 9. The Court reasoned that "'use' requires active employment. While one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident." (Citation omitted.) Id. With notable uniformity, eleven United States Courts of Appeals relied upon this reasoning to conclude that crimes that

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[7] Compare 18 U.S.C. § 16(a) ("an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"), with G. L. c. 140, § 121 ("has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another"), and 18 U.S.C. § 924(e)(2)(B)(i) ("has as an element the use, attempted use, or threatened use of physical force against the person of another").

could be committed recklessly were not categorically violent within the meaning of the Federal ACCA or materially identical provisions of State statutes.[8]

The United States Supreme Court's decision in Voisine v. United States, 136 S. Ct. 2272 (2016), disrupted this judicial consensus. The issue in that case was whether a definition of misdemeanor crimes of domestic violence, which required the "use . . . of physical force," precluded qualifying reckless assaults as predicate offenses in light of Leocal, 543 U.S.

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[8] See United States v. Fish, 758 F.3d 1, 8-10 (1st Cir. 2014) (because assault and battery by means of dangerous weapon under Massachusetts law can be committed recklessly, it is not categorically violent under force clause of Federal ACCA). See, e.g., United States v. Moreno, 821 F.3d 223, 228 (2d Cir. 2016); United States v. Boose, 739 F.3d 1185, 1187 (8th Cir. 2014); United States v. Ocampo-Cruz, 561 Fed. Appx. 361, 364 (5th Cir. 2014), citing United States v. Vargas-Duran, 356 F.3d 598, 603 (5th Cir.) (en banc), cert. denied, 543 U.S. 965 and 543 U.S. 995 (2004); United States v. McMurray, 653 F.3d 367, 374-375 (6th Cir. 2011); United States v. Garcia, 606 F.3d 1317, 1335-1336, 1336 n.16 (11th Cir. 2010) ("Given the near unanimity of the circuit courts on this issue, it is perhaps not surprising that the government cites no authority supporting its position that a conviction based on recklessness satisfies the 'use of physical force' requirement [of materially identical Federal sentencing guidelines]"); United States v. Zuniga-Soto, 527 F.3d 1110, 1124-1125 (10th Cir. 2008), overruled by United States v. Bettcher, 911 F.3d 1040, 1045 (10th Cir. 2018); Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc) ("We agree with our sister circuits that the reasoning of Leocal -- which merely holds that using force negligently or less is not a crime of violence -- extends to crimes involving the reckless use of force"); Garcia v. Gonzales, 455 F.3d 465, 469 (4th Cir. 2006); Popal v. Gonzales, 416 F.3d 249, 254 (3d Cir. 2005); United States v. Rutherford, 54 F.3d 370, 372-374 (7th Cir.), cert. denied, 516 U.S. 924 (1995).

at 9. Voisine, supra at 2279-2280. The Court decided that the word "use" alone did not preclude the definition from including reckless domestic assaults, because "that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." Id. at 2279. The Court also noted that the contrary reading would risk "rendering [18 U.S.C.] § 922(g)(9) broadly inoperative in the [thirty-five] jurisdictions with assault laws extending to recklessness," and that, therefore, Congress must have intended the ban on ownership of firearms under 18 U.S.C. § 922(g)(9), for those who have committed an offense of domestic violence, to encompass reckless conduct. Id. at 2280-2282. It is worth emphasizing that the limiting phrase "against the person of another" is not part of the definition interpreted in Voisine. See 18 U.S.C. § 921(a)(33)(A).

After Voisine, Federal courts were left with the question whether the different context and purpose of the Federal ACCA,[9] along with the inclusion of the phrase "against the person of

[9] In United States v. Castleman, 572 U.S. 157, 162-168 (2014), the United States Supreme Court had analyzed the context, language, and purposes of the Federal ACCA force clause and the ban on possession of firearms by those who have been convicted of a crime of domestic violence, later at issue in Voisine v. United States, 136 S. Ct. 2272 (2016), to conclude that the word "force" had different meanings in the two statutes.

another," were sufficient to distinguish the reasoning of Voisine from the previously dominant analysis of Leocal. See, e.g., United States v. Windley, 864 F.3d 36, 38-39 (1st Cir. 2017) (Voisine contained "grievous ambiguity," and therefore rule of lenity required conclusion that assault and battery by means of dangerous weapon under Massachusetts statute was not categorically violent). The decision in Voisine explicitly did not resolve this question. See Voisine, 136 S. Ct at 2280 n.4 ("Like Leocal, our decision today concerning § 921[a][33][A]'s scope does not resolve whether [the force clause of 18 U.S.C. § 16] includes reckless behavior"). Perhaps unsurprisingly, United States Courts of Appeals have come to divergent conclusions on this question,[10] leading to the United States

[10] Several United States Courts of Appeals have relied on Voisine, 136 S. Ct. at 2279, to conclude that the force clause of the Federal ACCA reaches reckless conduct. See United States v. Burris, 920 F.3d 942, 952 (5th Cir. 2019); Davis v. United States, 900 F.3d 733, 736 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019); United States v. Haight, 892 F.3d 1271, 1280-1281 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 796 (2019); United States v. Pam, 867 F.3d 1191, 1207-1208 (10th Cir. 2017); United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017). But see United States v. Orona, 923 F.3d 1197, 1202-1203 (9th Cir.), rehearing granted, 942 F.3d 1159 (9th Cir. 2019); United States v. Middleton, 883 F.3d 485, 497 (4th Cir. 2018) (Floyd, J., concurring); United States v. Windley, 864 F.3d 36, 39 (1st Cir. 2017) ("Massachusetts reckless [assault and battery by means of a dangerous weapon] is not a violent felony under the force clause"). See generally Turner, Reestablishing a Knowledge Mens Rea Requirement for Armed Career Criminal Act "Violent Felonies" Post-Voisine, 72 Vand. L. Rev. 1717 (2019).

Supreme Court's pending decision in Borden vs. United States, No. 19-5410, which was argued and will be decided in this court term.

The majority of decisions from the United States District Court for the District of Massachusetts -- decided after Voisine and specifically considering the offense of assault and battery by means of a dangerous weapon under the Massachusetts statute -- have concluded that the force clause of the Federal ACCA does not reach reckless conduct and, therefore, that the offense of assault and battery by means of a dangerous weapon is not categorically a violent crime under the Massachusetts ACCA. See United States v. Lattanzio, 232 F. Supp. 3d 220, 226-228 (D. Mass. 2017).[11]

Subsequently, in Windley, 864 F.3d at 39, the United States Court of Appeals for the First Circuit addressed this body of jurisprudence in concluding that the Massachusetts offense of assault and battery by means of a dangerous weapon is not

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[11] See, e.g., United States v. Cruz, 234 F. Supp. 3d 328, 330 (D. Mass. 2017); Virden vs. United States, U.S. Dist. Ct., No. 09-10325-LTS, slip op. at 5 (D. Mass. Feb. 3, 2017); Cruz vs. United States, U.S. Dist. Ct., No. 09-10104-RWZ, slip op. at 7-11 (D. Mass. Jan. 26, 2017); United States vs. Ford, U.S. Dist. Ct., No. 05-10326-FDS (D. Mass. Nov. 16, 2016); United States vs. Windley, U.S. Dist. Ct., No. 14-10197-PBS (D. Mass. July 6, 2016). But see United States v. McGregor, 229 F. Supp. 3d 77, 79 (D. Mass. 2017) (adopting analysis of United States v. Webb, 217 F. Supp. 3d 381, 391-397 [D. Mass. 2016], and holding that, after Voisine, assault and battery by means of dangerous weapon is categorically violent for purposes of Federal ACCA).

categorically violent so as to serve as a predicate offense under the Federal ACCA. The court reached its decision, in part, by pointing out that "reckless driving that results in a non-trifling injury has led to convictions for Massachusetts reckless [assault and battery by means of a dangerous weapon]." See id. at 38, and cases cited. Reckless driving bears a profound similarity to the conduct the United States Supreme Court found was beyond the scope of the force clause in Leocal, 543 U.S. at 9. See United States v. Fish, 758 F.3d 1, 8 (1st Cir. 2014) (pointing to similarities between reckless assault and battery by means of dangerous weapon under Massachusetts statute and conduct in Leocal, albeit prior to Voisine). Relying on its earlier decision in Bennett v. United States, 868 F.3d 1, 2 (1st Cir.), opinion withdrawn and vacated, 870 F.3d 34 (1st Cir. 2017),[12] the First Circuit concluded that "[t]hese [reckless driving cases] are the types of cases that give rise to grievous ambiguity as to whether the use of physical force against the person of another includes the reckless causation of bodily injury." Windley, supra at 38-39, citing Bennett, supra at 18-20. Accordingly, the rule of lenity required the court to

[12] Bennett v. United States, 868 F.3d 1, 2 (1st Cir.), opinion withdrawn and vacated, 870 F.3d 34 (1st Cir. 2017), was withdrawn and vacated because of the death of the defendant. Its conclusion and reasoning were fully adopted in Windley, 864 F.3d at 39.

construe the statute narrowly and in the defendant's favor, such that, under the Massachusetts statute, assault and battery by means of a dangerous weapon is not categorically violent for purposes of the force clause of the Federal ACCA. See Windley, supra at 37-39, citing Bennett, supra at 23.

iv. Recklessness under the Massachusetts ACCA. While, in interpreting the Massachusetts ACCA, we are not bound by these Federal cases, we are persuaded by the detailed analysis in Bennett, 868 F.3d at 7-23, adopted and affirmed in Windley, 864 F.3d at 38-39, that there is "grievous ambiguity" as to whether one can use (actively employ) force against the person of another when one acts recklessly.

In considering this ambiguity, the United State Supreme Court's discussions in Voisine, 136 S. Ct. at 2272, 2279, and Leocal, 543 U.S. at 9, are instructive. In Voisine, supra, the Court contemplated an angry husband who recklessly threw a plate at a wall near his wife. The Court concluded that the hurling of the plate "counts as a 'use' of force even if the husband did not know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate would ricochet and injure his wife." Id. In Leocal, supra at 9-11, by contrast, the Court concluded that the defendant's action of driving while under the influence of alcohol, and thereby causing bodily injury to another, was not an act involving the

"use . . . of physical force against . . . another" because "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury."

The distinction, in part, lies in how one reads the limiting phrase "against the person . . . of another." As the United States Court of Appeals for the Sixth Circuit explained:

> "the actor is reckless if he consciously disregard[s] a substantial risk that the conduct will cause harm to another. The reckless actor is indifferent, therefore, to the substantial possibility that his force will apply to the person of another. Hence he does not consciously desire that application; nor, since recklessness does not require a 'practical certainty' of harm, can we infer that he desires it. As culpable as the reckless actor might be, therefore, he does not volitionally apply force 'against the person of another.'" (Quotation and citations omitted.)

United States v. Harper, 875 F.3d 329, 330, 331–332 (6th Cir. 2017), cert. denied, 139 S. Ct. 53 (2018) (arguing that its own circuit's binding precedent, United States v. Verwiebe, 872 F.3d 408 [6th Cir.], amended, 874 F.3d 258 [6th Cir. 2017], was wrongly decided).

Ultimately, we need not resolve the statutory ambiguity in the Massachusetts ACCA. Its mere presence is enough to conclude that, under the rule of lenity, the defendant is entitled to the narrower construction of the criminal statute. See United States v. Davis, 139 S. Ct. 2319, 2333 (2019) ("ambiguities

about the breadth of a criminal statute should be resolved in the defendant's favor"); Commonwealth v. Constantino, 443 Mass. 521, 525 (2005), quoting Commonwealth v. Carrion, 431 Mass. 44, 45-46 (2000) ("it is well established that '[i]f the statutory language [could] plausibly be found to be ambiguous, the rule of lenity requires the defendant be given the benefit of the ambiguity'" [quotations omitted]); Commonwealth v. Connolly, 394 Mass. 169, 174 (1985) ("We must resolve in favor of criminal defendants any reasonable doubt as to the statute's meaning").

We recognize that the result we reach may seem counterintuitive, for intentionally shooting a person without killing the individual -- a paradigmatic assault and battery by means of a dangerous weapon -- is undoubtedly a crime of violence. We note, however, that it is precisely this sort of intuition, the "arbitrariness of hypothesizing the 'ordinary case' of any given crime," that rendered the residual clause unconstitutionally vague. Beal, 474 Mass. at 350, quoting Johnson, 576 U.S. at 596. The categorical or modified categorical framework requires us to look beyond any sense of a typical assault and battery by means of a dangerous weapon and to follow a strict categorical approach "only when all crimes encompassed within that statute are violent crimes." Eberhart, 461 Mass. at 817.

As a practical matter, unlike the interpretation avoided in Voisine, 136 S. Ct. at 2280-2281, our decision today in no way vitiates the operation or intention of the ACCA, for, in contrast to the Federal system, a Massachusetts defendant has the right to a subsequent jury trial on the ACCA charge. See Eberhart, 461 Mass. at 816. The Commonwealth therefore is permitted to submit a much broader class of evidence than the so-called Shepard documents permissible in Federal court. See id. ("At this subsequent offender trial, the trial judge may admit any evidence that would have been admissible at the original trial of the alleged predicate offense" [quotation and citation omitted]). See also Shepard v. United States, 544 U.S. 13, 26 (2005). Therefore, under the modified categorical approach, it should not be difficult for the Commonwealth to prove that a defendant intentionally has used force or a deadly weapon against the person of another, in those instances where the defendant actually did do so.

Here, however, the certified copy of the defendant's conviction of assault and battery by means of a dangerous weapon, the only evidence submitted by the Commonwealth, was insufficient to establish that the defendant committed intentional rather than reckless assault and battery by means of a dangerous weapon. Further, for the double jeopardy reasons elaborated in Beal, 474 Mass. at 353-354, a remand to allow the

Commonwealth to submit additional evidence would be inappropriate.[13]

Conclusion. The matter is remanded to the Superior Court, where the judgment of conviction under G. L. c. 269, § 10 (n), shall be vacated and set aside and the charge dismissed with prejudice. On the subsequent offender portion of the indictment, so much of the judgment of conviction as pertains to the predicate offense of assault and battery by means of a dangerous weapon must be vacated and set aside. Judgment shall enter under G. L. c. 269, § 10G (a), based on one predicate offense, and the defendant shall be resentenced accordingly.

So ordered.

[13] Because the defendant's conviction under G. L. c. 269, § 10 (n), must be vacated, we need not decide whether applying that provision, and an enhancement pursuant to G. L. c. 269, § 10G, violates the protections against double jeopardy.