

**NO MORE SIMPLE BATTERY IN WEST VIRGINIA:  
THE NEWLY AMENDED § 61-2-9 AND § 61-2-28**

*Katherine Moore\**

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I. INTRODUCTION

On March 4, 2014, the West Virginia Legislature passed House Bill 4445.<sup>1</sup> This Bill “modif[ied] the definition of ‘battery’ and ‘domestic battery’ to conform with federal laws.”<sup>2</sup> More specifically, House Bill 4445 was passed pursuant to the Fourth Circuit’s decision in *United States v. White*.<sup>3</sup> The enactment of House Bill 4445 erased the offense of simple battery from the books of West Virginia’s Code and transformed battery and domestic battery into offenses that inherently encompass violent force.

II. *UNITED STATES V. WHITE*

The Fourth Circuit’s decision in *United States v. White* was the driving force behind the reform of West Virginia’s battery and domestic battery statutes.<sup>4</sup> The issue presented to the court was whether Appellant White’s prior conviction for violating

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\* J.D. Candidate, West Virginia University College of Law, Class of 2015. The Author would like to thank the members of *The West Virginia Law Review* who made suggestions and helped edit this Article.

<sup>1</sup> H.B. 4445, 81st Leg., Reg. Sess. (W. Va. 2014).

<sup>2</sup> *Id.*

<sup>3</sup> 606 F.3d 144 (4th Cir. 2010); *see* H.B. 4445, 81st Leg., Reg. Sess. (W. Va. 2014).

<sup>4</sup> 606 F.3d 144 (4th Cir. 2010); *see* H.B. 4445, 81st Leg., Reg. Sess. (W. Va. 2014).

Virginia Code § 18.2-57.2, “assault and battery against a family or household member,”<sup>5</sup> was considered a misdemeanor crime of domestic violence in accordance with § 921(a)(33)(A)<sup>6</sup> under the United States Code.<sup>7</sup>

White was convicted in 2004 for “assault and battery against a family or household member” and subsequently violated 18 U.S.C. § 922(g)(9) by being a prohibited person in possession of a firearm.<sup>8</sup> White challenged his indictment under § 922(g)(9), claiming that because “Virginia uses the common law definition of battery, the elements of [his 2004 conviction] could not meet the statutory definition of ‘misdemeanor crime of domestic violence,’”<sup>9</sup> as a misdemeanor crime of violence requires “as an element, the use or attempted use of physical force.”<sup>10</sup>

In determining whether or not White’s 2004 conviction was considered a misdemeanor crime of domestic violence, the court had to decide “whether the ‘use . . . of physical force,’” under § 921(a)(33)(A)(ii) was an element under Virginia’s common law assault and battery statute.<sup>11</sup> The Court’s determination hinged on the interpretation of the phrase “physical force.”<sup>12</sup>

The examination of Virginia’s common law assault and battery offenses revealed a “de minimis” depiction: a battery may arise from “the slightest touch and no physical injury is required.”<sup>13</sup> The court questioned whether “physical force,” as referenced under 18 U.S.C. § 921(a)(33)(A)(ii), included force that failed to result in physical injury.<sup>14</sup> In

<sup>5</sup> A violation of Virginia Code § 18.2.-57.2 “is a Class 1 misdemeanor under Virginia law.” *White*, 606 F.3d at 146.

<sup>6</sup> 18 U.S.C. § 921(a)(33)(A) defines a misdemeanor domestic crime of violence as an offense that (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A) (2012).

<sup>7</sup> *White*, 606 F.3d at 146–47.

<sup>8</sup> *Id.* Under 18 U.S.C. § 922(g)(9), it is unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm, or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9) (2012).

<sup>9</sup> *White*, 606 F.3d at 146 (quoting 18 U.S.C. § 921(a)(33)(A)(ii)).

<sup>10</sup> *Id.* (quoting 18 U.S.C. § 921(a)(33)(A)(ii)) (internal quotations omitted).

<sup>11</sup> *Id.* at 147.

<sup>12</sup> *See id.*

<sup>13</sup> *Id.* at 148.

<sup>14</sup> *Id.* at 149.

answering this question, the Fourth Circuit examined the circuit split among its sister courts.<sup>15</sup> The First, Eighth, and Eleventh Circuits interpreted “physical force” to include even the slightest touch.<sup>16</sup> In contrast, the Seventh, Ninth, and Tenth Circuits interpreted “physical force” to include only that which is “violent in nature . . . .”<sup>17</sup> Due to this split, the Fourth Circuit directed its attention to the Supreme Court’s decision in *Johnson v. United States*.<sup>18</sup>

A. *The Fourth Circuit’s Interpretation of Johnson v. United States: The Definition of “Physical Force”*

In *Johnson*, the issue presented to the Supreme Court was whether “[a]ctually and intentionally touch[ing] another person” under Florida’s battery statute<sup>19</sup> “constitue[d] the use of ‘physical force’ within the meaning of § 924(e)(2)(B)(i).”<sup>20</sup> The

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 150 (quoting *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (“To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word ‘force’ as having a meaning in the legal community that differs from its meaning in the physics community. The way to do this is to insist that the force be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so.”)); *see also* *United States v. Hays*, 526 F.3d 674, 679 (10th Cir. 2008) (“For example, in the midst of an argument, a wife might angrily point her finger at her husband and he, in response, might swat it away with his hand. This touch might very well be considered ‘rude’ or ‘insolent’ in the context of a vehement verbal argument, but it does not entail ‘use of physical force’ in anything other than an exceedingly technical and scientific way.”).

<sup>18</sup> 559 U.S. 133 (2010).

<sup>19</sup> Florida’s battery statute provides:

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

FLA. STAT. § 784.03 (2014).

<sup>20</sup> *White*, 606 F.3d at 152 (internal quotations omitted). 18 U.S.C. § 924(e) is also known as the Armed Career Criminal Act (ACCA). *See* CHARLES DOYLE, CONG. RESEARCH SERV., R41449, ARMED CAREER CRIMINAL ACT (18 U.S.C. 924(E)): AN OVERVIEW 1 (2010). The ACCA “establishes a 15-year mandatory minimum term of imprisonment for defendants convicted of unlawful possession of a firearm under section 18 U.S.C. 922(g) who have three prior convictions for violent felonies or serious drug offenses.” *Id.* at 1. Subsection (2)(B) of the ACCA provides:

(B) the term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

- (i) has as an element the use, attempted use, or threatened use of *physical force* against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

Court viewed “actually and intentionally touching” under the statute to be “any intentional physical contact, ‘no matter how slight.’”<sup>21</sup> The Court rejected that a battery failing to result in injury constituted “physical force.”<sup>22</sup> The Supreme Court concluded that, under § 924(e)(2)(B)(i), “the phrase ‘physical force’ mean[t] *violent* force . . . .”<sup>23</sup>

Although the Supreme Court’s decision in *Johnson* defined “physical force” only in regard to the phrase’s presence under § 924(e)(2)(B), the Fourth Circuit in *White* opined that the “Court’s reasoning in *Johnson* . . . as to the meaning of ‘physical force’ . . . is compelling if not overwhelming” for the purpose of construing § 922(g)(9).<sup>24</sup> The Fourth Circuit employed the Supreme Court’s analysis in defining “physical force” to interpret the same phrase as it is found under § 921(a)(33)(A)(ii)—the statutory section defining the offense of “misdemeanor crime of domestic violence.”<sup>25</sup> The Fourth Circuit opined,

We see little, if any, distinction between the “physical force” element in . . . a “*violent* felony” under § 924(e) in *Johnson* and a “misdemeanor crime of domestic *violence*” in 922(g)(9) in the case at bar. . . . [T]hese statutes describe an act of “violence” and require the identical element of that violent act to include “physical force.” . . . [A] “violent felony” requires “violent force.” We see no principled basis upon which to say a “crime of domestic *violence*” would include *nonviolent* force such as offensive touching in a common law battery.<sup>26</sup>

The court held that “physical force” meant “violent force;” and, so, a misdemeanor crime of domestic violence required the use of violent force—“force capable of causing physical pain or injury to another person.”<sup>27</sup>

By adopting this definition of “physical force,” it followed that White’s 2004 conviction in Virginia for “assault and battery against a family or household member” was not, categorically, a “misdemeanor crime of domestic violence” for the purpose of firearm possession restriction under § 922(g)(9).<sup>28</sup> The court could not, however, determine if White’s prior conviction was a result of the use of “physical force” or merely “offensive touching” because “[g]eneral district courts in Virginia are courts not of record . . . .”<sup>29</sup> Therefore, the underlying facts leading to White’s conviction for

18 U.S.C. § 924(e)(2)(B) (2014) (emphasis added).

<sup>21</sup> *White*, 606 F.3d at 152 (quoting *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

<sup>22</sup> *Id.* (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)).

<sup>23</sup> *Id.* at 153 (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 153, 156 (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)).

<sup>28</sup> *Id.* at 153.

<sup>29</sup> *Id.* at 146, 155.

“assault and battery against a family or household member” were indeterminable.<sup>30</sup> Because White’s conviction was “devoid of any qualifying documentation” showing a use of “physical force,” the conviction could not be classified as a “misdemeanor crime of domestic violence,” and, therefore, White’s conviction under 18 U.S.C. § 922(g)(9), for being a prohibited person in possession of a firearm, was reversed.<sup>31</sup>

### III. BEFORE HOUSE BILL 4445

Prior to the passing of House Bill 4445, the West Virginia battery statute read as follows:

(c) *Battery*. -- If any person unlawfully and intentionally makes physical contact of an *insulting or provoking nature* with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor . . . .<sup>32</sup>

The closely-related offense of domestic battery utilized the same language:<sup>33</sup>

(a) *Domestic battery*. -- Any person who unlawfully and intentionally makes physical contact of an *insulting or provoking nature* with his or her family or household member or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor . . . .<sup>34</sup>

Pre-March 4, 2014, both the battery and domestic battery statutes in West Virginia encompassed two separate offenses with which an individual could be charged: simple battery and a more serious “violent battery.”<sup>35</sup> Under both § 61-2-9(c) and § 61-2-28(a), simple battery<sup>36</sup> could be committed by “mak[ing] physical contact of an *insulting or provoking nature*” with another individual.<sup>37</sup> A more egregious, violent battery could

<sup>30</sup> *Id.* at 155.

<sup>31</sup> *Id.* at 156.

<sup>32</sup> W. VA. CODE § 61-2-9(c) (2011) (emphasis added).

<sup>33</sup> Compare W. VA. CODE § 61-2-9(c) (2011), with W. VA. CODE § 61-2-28(a) (2011). The only difference between “battery” and “domestic battery” is the relationship between the offender and the victim.

<sup>34</sup> W. VA. CODE § 61-2-28(a) (2011) (emphasis added).

<sup>35</sup> See W. VA. CODE § 61-2-9(c) (2011); W. VA. CODE § 61-2-28(a) (2011).

<sup>36</sup> “Simple battery” is distinguishable from a battery resulting in physical injury. See *United States v. Yaider*, 2009 WL 2986965, at \*2–4 (N.D.W. Va. 2009) (analyzing Georgia’s simple battery statute as used in the Eleventh Circuit case of *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006)).

<sup>37</sup> W. VA. CODE § 61-2-9(c) (2011) (emphasis added); W. VA. CODE § 61-2-28(a) (2011) (emphasis added).

be committed by “unlawfully and intentionally caus[ing] physical harm to another person . . . .”<sup>38</sup>

Under the old versions of § 61-2-9(c) and § 61-2-28(a), it seems as though a battery could be committed by “the slightest touching of another . . . if done in a rude, insolent, or angry manner.”<sup>39</sup> This broad characterization of battery mirrored Virginia’s common law conception of the offense.<sup>40</sup> This “de minimis” view of battery is precisely what the West Virginia Legislature steered away from when it passed House Bill 4445.<sup>41</sup>

#### IV. AFTER HOUSE BILL 4445

Today, the West Virginia battery statute reads as follows:

(c) *Battery*. -- Any person who unlawfully and intentionally makes physical contact with *force capable of causing physical pain or injury* to the person of another or unlawfully and intentionally causes physical pain or injury to another person, he or she is guilty of a misdemeanor . . . .<sup>42</sup>

The domestic battery statute was identically altered:

(a) *Domestic battery*. -- Any person who unlawfully and intentionally makes physical contact *force capable of causing physical pain or injury* to his or her family or household member or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor . . . .<sup>43</sup>

In both the battery and domestic battery statutes, the West Virginia Legislature removed the phrase “of an insulting or provoking nature,” and replaced it with “force capable of causing physical pain or injury.”<sup>44</sup> As of June 12, 2014,<sup>45</sup> physical contact of “a rude, insolent, or angry manner,” that fails to result in bodily injury, is no longer

<sup>38</sup> W. VA. CODE § 61-2-9(c) (2011); W. VA. CODE § 61-2-28(a) (2011).

<sup>39</sup> *United States v. White*, 606 F.3d 144, 148 (4th Cir. 2010) (quoting *Crosswhite v. Barnes*, 124 S.E. 242, 244 (Va. 1924)).

<sup>40</sup> “It is clear from longstanding Virginia jurisprudence that battery may be accomplished with the slightest touch and no physical injury is required.” *Id.*

<sup>41</sup> See *United States v. White*, 606 F.3d 144, 147, 150–54 (4th Cir. 2010). Compare W. VA. CODE § 61-2-9(c) (2011), and W. VA. CODE § 61-2-28(a) (2011), with W. VA. CODE § 61-2-9(c) (2014), and W. VA. CODE § 61-2-28(a) (2014).

<sup>42</sup> W. VA. CODE § 61-2-9(c) (2014) (emphasis added).

<sup>43</sup> W. VA. CODE § 61-2-28(a) (2014) (emphasis added).

<sup>44</sup> Compare W. VA. CODE § 61-2-28(a) (2011), and W. VA. CODE § 61-2-9(c) (2011), with W. VA. CODE § 61-2-28(a) (2014), and W. VA. CODE § 61-2-9(c) (2014).

<sup>45</sup> House Bill 4445 was passed on March 4, 2014, and became effective ninety days from passage. H.B. 4445, 2014 Leg., Reg. Sess. (W. Va. 2014).

considered a battery. This alteration has the effect of abolishing the offense of simple battery<sup>46</sup> in West Virginia.

## V. IMPLICATIONS

Abolishing the offenses of simple battery and simple domestic battery in West Virginia affects both the criminal justice system as a whole and individual offenders within the system. First, and most intuitively, House Bill 4445 erased a criminal offense with which an individual could be charged. However, House Bill 4445 generated a second, less apparent consequence for offenders convicted under § 61-2-28(a). Per the newly amended § 61-2-28(a), any person found to have committed domestic battery has categorically committed a “crime of violence” for the purpose of firearm restriction and for the purpose of federal sentencing enhancements.

### A. *Any Person Convicted under the Newly-Amended § 61-2-28(a) Is Prohibited from Possessing a Firearm.*

Any person convicted under West Virginia Code § 61-2-28(a) is also guilty of a “misdemeanor crime of domestic violence” and subject to the restraints of 18 U.S.C. § 922(g)(9). A West Virginia court will no longer go through an analysis, as the Fourth Circuit did in *United States v. White*, to determine whether or not an individual who has committed the offense of domestic battery has also committed a “misdemeanor crime of domestic violence,”<sup>47</sup> subject to restriction of firearm possession. Due to the change in statutory language, any person convicted of domestic battery under § 61-2-28(a) has *ipso facto* engaged in conducted involving “the use . . . of physical force,”<sup>48</sup> and, therefore, is restricted from possessing, shipping, or transporting any firearm or ammunition.<sup>49</sup> Furthermore, if an individual does in fact possess a firearm after being convicted of domestic battery in West Virginia, such individual will be prosecuted under federal—not state—law.<sup>50</sup>

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<sup>46</sup> A “simple battery” may be defined as physical contact of an “insulting or provoking nature” that fails to result in physical injury. *United States v. Yaider*, 2009 WL 2986965, at \*2 (N.D.W. Va. 2009) (quoting GA. CODE ANN. § 16-5-23(a)(1) (2014)); see *United States v. Runyon*, 707 F.3d 475, 504 (4th Cir. 2013) (“[Defendant] was convicted in 2001 of a misdemeanor simple battery for grabbing his wife’s arm and poking her nose . . . .”); *Medina v. United States*, 259 F.3d 220, 222, 227 n.5 (4th Cir. 2001) (defining “simple battery” under Virginia law); *United States v. Lyttle*, 2010 WL 5175168, at \*2 (S.D.W. Va. 2010) (“Subsection (c) [of § 61-2-9] refers to simple batteries and unwanted touchings, as well as intentional physical harm.”).

<sup>47</sup> 18 U.S.C. § 922(g)(9) (2013); 18 U.S.C. § 921(a)(33)(A) (2013).

<sup>48</sup> 18 U.S.C. § 921(a)(33)(A)(ii).

<sup>49</sup> 18 U.S.C. § 922(g)(9).

<sup>50</sup> See *id.*

*B. Any Person Convicted under the Newly-Amended § 61-2-28(a) Is Subject to Possible Sentencing Enhancements under 18 U.S.C. § 924(e)(1).*

If a person convicted under West Virginia Code § 61-2-28(a) later possesses a firearm and also has three previous convictions for violent felonies or serious drug offenses, such person will receive a mandatory minimum of fifteen years in prison.<sup>51</sup> For example, if an individual with three previous convictions for possession with intent to distribute marijuana and a domestic battery conviction later possesses a firearm, such individual will be federally prosecuted and receive a mandatory minimum sentence of fifteen years.<sup>52</sup>

## VI. CONCLUSION

The passing of House Bill 4445 erased simple battery as a punishable offense in West Virginia. Furthermore, Bill 4445 has federal implications, exposing defendants to firearm restrictions and potential mandatory minimum sentences for those with past criminal histories. Amending § 61-2-28(a) and § 61-2-9(c) allows courts to more easily and efficiently classify underlying battery and domestic battery offenses, as all such offenses following the effective date of June 12, 2014, are inherently violent and encompass physical force.

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<sup>51</sup> 18 U.S.C. § 924(e)(1).

<sup>52</sup> *See id.*