In the

United States Court of Appeals

For the Seventh Circuit

No. 17-1912

DONNIE JOHNSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division.
No. 16-cv-00214 — **Rudy Lozano**, *Judge*.

ARGUED SEPTEMBER 28, 2021 — DECIDED JANUARY 24, 2022

Before FLAUM, KANNE, and SCUDDER, *Circuit Judges*.

FLAUM, *Circuit Judge*. In 2004, a jury convicted Donnie Johnson of being a felon in possession of a firearm. Based on his prior convictions, the district court found that he qualified for a sentencing enhancement under the Armed Career Criminal Act (ACCA) and sentenced him to 275 months in prison. In 2015, the Supreme Court decided *Samuel Johnson v. United States*, holding that the so-called "residual clause" of the

ACCA was unconstitutionally vague. *See* 576 U.S. 591 (2015).[1] Johnson then filed a motion in 2016 under 28 U.S.C. § 2255 to vacate his sentence on the grounds that it was based on the ACCA's now-defunct residual clause. The district court denied his motion, and this Court subsequently granted Johnson's request for a certificate of appealability.

Despite the Supreme Court's holding in *Samuel Johnson*, Johnson's sentence is proper if he has at least three prior convictions that qualify for enhancement under the provisions of the ACCA which *Samuel Johnson* left undisturbed (the "violent felony" and "serious drug offense" provisions). Because Johnson does have at least three such convictions, we affirm the district court's decision to deny Johnson's motion to vacate his sentence.

I. Background

In August 2001, a Gary, Indiana police officer stopped a van Johnson was driving. The officer observed Johnson move from the front seat to the middle of the van. After arresting Johnson on an outstanding warrant, the officer searched the van and found a loaded .22 caliber handgun. A federal jury subsequently convicted Johnson of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1).

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[1] There are two Supreme Court cases named "*Johnson v. United States*" that are relevant to Donnie Johnson's appeal: *Samuel Johnson*, 576 U.S. 591 (2015), which, as noted, declared the residual clause of the ACCA unconstitutional, and *Curtis Johnson v. United States*, 559 U.S. 133 (2010), which addressed the amount of force necessary for a crime to be a "violent felony" under the ACCA. To avoid confusion, we will refer to these cases as *Samuel Johnson* and *Curtis Johnson* respectively.

As his conviction for being a felon in possession of a firearm suggests, this was not Johnson's first run-in with the law. Relevant here are four of his prior convictions: (1) a 1982 conviction for distribution of a controlled substance, (2) a 1984 burglary conviction, (3) a 1989 criminal deviate conduct conviction, and (4) a 1990 conviction for inflicting bodily injury during an escape. Based on these convictions, the district court found that Johnson qualified for a sentence enhancement under the ACCA, which establishes a mandatory minimum sentence of 15 years (180 months) when a defendant is convicted of being a felon in possession of a firearm and has at least three convictions which qualify as "violent felon[ies]" or "serious drug offense[s]." *See* 18 U.S.C. § 924(e)(1). Pursuant to this finding, the district court sentenced Johnson to 275 months in prison.

Relevant to petitioner's appeal is the ACCA's definition of "violent felony," which reads:

> [T]he term "violent felony" means 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 against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B).

In 2015, the Supreme Court held the last clause of this definition ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") to be void for vagueness, declaring that any sentence imposed under the so-called "residual clause" violates due process. *Samuel Johnson*, 576 U.S. at 606. The decision, however, left undisturbed the other provisions of the definition, *id.*, and, thus, a sentence enhancement under the ACCA may stand if the underlying, prior convictions qualify under the remaining definitional provisions.

Based on the Court's decision in *Samuel Johnson*, petitioner filed a motion *pro se* in the district court in 2016 to vacate his sentence. He argued, among other things, that his criminal deviate conduct and escape convictions qualified as "violent felonies" only under the ACCA's now-invalidated residual clause and that, as a result, he was entitled to re-sentencing.[2]

The district court disagreed and denied his motion, reasoning that both convictions qualified as violent felonies under subpart (i) (the "force provision") of the definition since they involve the use of force against another. Though the court declined to issue a certificate of appealability in tandem with its opinion and order, this Court subsequently granted Johnson's request for such a certificate. On appeal, Johnson

[2] At the district court, petitioner also argued that his drug and burglary offenses did not qualify as predicates under the ACCA. The district court rejected those arguments, and petitioner does not now challenge that portion of the court's decision. For this reason, we proceed with the understanding that these offenses qualify under the ACCA, meaning that petitioner has, at a minimum, two of the three offenses required for a sentencing court to impose an enhancement under the ACCA, not counting the criminal deviate conduct and escape convictions at issue here.

challenges the district court's findings that both the criminal deviate conduct and escape convictions qualified as violent felonies under the force provision.

II. Discussion

"Whether a prior conviction constitutes a violent felony under the ACCA is a legal conclusion that we review de novo." *United States v. Fife*, 624 F.3d 441, 445 (7th Cir. 2010).

Because he does not challenge the district court's finding that his drug and burglary convictions did not implicate the residual clause and thus were proper predicate convictions for a sentence enhancement under the ACCA, Johnson must succeed in showing that *neither* his criminal deviate conduct conviction *nor* his escape conviction qualifies as a proper third offense to trigger ACCA's sentence enhancement.

Courts reviewing whether a prior conviction qualifies as a violent felony or serious drug offense under the ACCA employ what is known as the categorial approach. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under this approach, a reviewing court looks only to the elements of the offense of conviction to determine whether such an offense *categorically* falls within the definitions of either a violent felony or serious drug offense as defined by the ACCA. *See id.* It is not the actual facts of the defendant's actions in committing the offense but, rather, the elements of the offense itself that matter for this inquiry. *See id; Taylor v. United States*, 495 U.S. 575, 600–02 (1990).

One complication arises, however, when the statute defining the offense of the prior conviction is disjunctive (that is, it proscribes a swath of conduct via a list of alternatives). In such

a scenario, one portion of the statute may outlaw conduct clearly falling outside of the ACCA's reach while another portion outlaws conduct clearly falling within its reach. To determine whether a violation of such a statute qualifies as an ACCA predicate offense, then, a court must determine whether the statute's list contains a number of different elements pertaining to a variety of separable crimes or whether the statute's list merely contains a variety of means by which one overarching crime may be committed. *Mathis*, 136 S. Ct. at 2249. If it is the former, the statute is said to be "divisible," and the court must then determine the precise crime of which the defendant was convicted and compare the appropriate elements to the ACCA's definitions. *Id.* If, on the other hand, the court determines that the statute merely contains a list of various means by which one crime may be committed, the statute is referred to as being "indivisible" and its violation may not serve as a predicate offense under the ACCA if any one of the listed "means" of committing the offense does not qualify as a violent felony or drug offense. *Id.* at 2248–49, 2257.

To make this determination of "divisibility," the Supreme Court has offered a number of sources that may illuminate whether the listed alternatives are elements or means: authoritative case law from the state courts, the text of the statute itself, and, if neither of these prove helpful, the record of the prior conviction for "the sole and limited purpose of determining whether [the listed items are] element[s] of the offense." *Id.* at 2256–57 (alterations in original) (quoting *Rendon v. Holder*, 782 F.3d 466, 473–74 (9th Cir. 2015)). If the charging instrument and the jury instructions, for instance, include all of the alternatives listed in the statute, "[t]hat is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor

must prove to a jury beyond a reasonable doubt." *Id.* at 2257. By contrast, a charging instrument or jury instruction that includes only one of the statute's listed alternatives, to the exclusion of all others, would suggest that the statute's list is a list of elements, with each element pertaining to a separate crime. *Id.*

If a court determines the statute is divisible, it then may apply the "modified categorical approach." The Supreme Court has clarified that, "[u]nder that approach, a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* at 2249. To reiterate, this examination of the record documents is only to determine the elements of the crime for which the defendant was convicted and may not be relied upon to find that a defendant qualifies for a sentence enhancement under the ACCA because he, for instance, committed a non-violent crime in a violent way. *See id*. at 2253. The crime itself, divorced from the facts of the defendant's particular commission of it, still must categorically qualify as a violent felony or a serious drug offense as the ACCA defines those terms.

Johnson essentially raises the same three arguments with respect to both his criminal deviate conduct and escape convictions to show that they do not qualify as violent felonies: the statutes are indivisible, they do not require sufficient force to qualify as ACCA violent felonies, and they do not require sufficient intent to qualify as ACCA violent felonies. Starting with petitioner's criminal deviate conduct conviction, we find that the offense does qualify as a violent felony under the

ACCA and therefore do not reach his arguments about his escape conviction.

A. Divisibility

We ask first whether Indiana's criminal deviate conduct statute is divisible. Johnson argues that Indiana's criminal deviate conduct statute is indivisible and, therefore, that a conviction under it cannot qualify as a violent felony. At the time of Johnson's conviction, the relevant portion of Indiana's statute read:

> A person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when:
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> (1) the other person is compelled by force or imminent threat of force;
>
> (2) the other person is unaware that the conduct is occurring; or
>
> (3) the other person is so mentally disabled or deficient that consent to the conduct cannot be given;
>
> commits criminal deviate conduct, a Class B felony.

Ind. Code § 35-42-4-2. "Deviate sexual conduct" was further defined as:

> [A]n act involving:

> (1) a sex organ of one person and the mouth or anus of another person; or
>
> (2) the penetration of the sex organ or anus of a person by an object.

Ind. Code § 35-41-1-9.

On its face, the text of Indiana's criminal deviate conduct statute raises questions about divisibility. It proscribes a swath of conduct via a list of alternatives, some of which may qualify as violent felonies under the ACCA's force provision (*e.g.*, subpart (1)) and some of which likely do not (subparts (2) and (3)). Thus, if the statute is indivisible, a conviction under it cannot qualify for an ACCA enhancement because the offense does not *categorically* qualify as a violent felony as contemplated by the ACCA. If, on the other hand, the statute is divisible, we must engage in the modified categorical approach to first determine which of the alternative crimes Johnson was convicted of and then determine whether that crime meets the requirements of the ACCA's violent felony definition.

As a starting point for the divisibility analysis, we look to authoritative state law. *See Mathis*, 136 S. Ct. at 2256–57. Petitioner argues that the three alternatives listed in the criminal deviate conduct statute are merely means of satisfying an implied "absence of consent element." But this interpretation is unsupported by Indiana's case law. For instance, in *Collins v. State*, the Indiana Supreme Court held that the state's criminal deviate conduct and deviate sexual conduct provisions "define multiple sets of essential elements, and each set describes a separate offense of criminal deviate conduct." 717 N.E.2d 108, 110 (Ind. 1999). This understanding aligns with the

court's analysis in *Taylor v. State*, 496 N.E.2d 561 (Ind. 1986), another case involving the criminal deviate conduct statute. In analyzing the question of whether it was proper to admit a witness's testimony about the victim's lack of consent and the fact that the defendant used a gun to facilitate the crimes, the state's supreme court held that this "testimony was relevant and properly admitted as evidence on the *element*[] of force." *Taylor*, 496 N.E.2d at 565 (emphasis added). If, instead, the statute's force provision was merely a means of satisfying a lack of consent element (as petitioner proposes), it would be odd for the *Taylor* court to describe the evidence as supporting the victim's testimony "that she did not consent" but then, in the very next sentence, state that this evidence about lack of consent was relevant to the "element[] of force."

In arguing that the alternatives listed in the criminal deviate conduct statute are merely alternative means of satisfying one unifying element that he refers to as the "absence of consent element," petitioner places too much weight on wording cherry-picked from *Stewart v. State*, 555 N.E.2d 121 (Ind. 1990). First, petitioner points to the fact that the court twice (both times in footnotes) describes the criminal deviate conduct statute as "set[ting] out the *circumstances* under which the commission of sexual deviate conduct is a crime." *See Stewart*, 555 N.E.2d at 122, n.1 & 126, n.4 (emphasis added). Petitioner makes much of the court's use of the word "circumstances" in these footnotes, pointing to the fact that the Supreme Court later used the same word to describe a crime's means as opposed to its elements. *See Mathis*, 136 S. Ct. at 2248, 2253; *Descamps v. United States*, 570 U.S. 254, 268, 270, 277 (2013). This argument would carry some weight if *Stewart* had been decided after these Supreme Court cases which, petitioner argues, gave the word a special meaning—and if *Stewart* had

cited to them. But both *Mathis* and *Descamps* were decided after *Stewart*. The sentences from *Stewart* to which petitioner points, then, are most plausibly read as clarifying that Indiana does not criminalize all sexual deviate conduct but, rather, criminalizes it only in certain circumstances. Indeed, attempting to replace "circumstances" with either "means" or "elements" in this excerpt from *Stewart* renders the text unnatural and disjointed, further suggesting that the court was not attempting to convey any special "means versus elements" connotation.

Next, petitioner argues that the following text from *Stewart* supports his theory that the criminal deviate conduct statute has an implied "absence of consent" element: "The criminal deviate conduct statute prohibits [certain] sex acts … in the absence of the consent of one of the participants." *Stewart*, 555 N.E.2d at 126 (Ind. 1990). Petitioner asserts that this phrase "define[s]" the criminal deviate conduct statute. Not so. This phrase merely *describes* the statute and does so at a very general level. Given the other Indiana cases on this issue and the context of the sentence Johnson relies on, the phrase is most plausibly read as a general description of what the statute does, rather than a technical definition of the statute intended to add an implied element to the offense.

Next, should authoritative state law fail to decisively resolve our divisibility questions, we look to record documents. *See Mathis*, 136 S. Ct. at 2256–57. To the extent the above-recited case law leaves any doubt as to the divisibility of Indiana's criminal deviate conduct offense, the record documents are revelatory. At trial, the applicable jury instruction read, in relevant part:

> To convict the defendant of the crime of Criminal Deviate Conduct as a Class B Felony, the State must prove each of the following elements beyond a reasonable doubt.
>
> The Defendant:
>
> 1. knowingly or intentionally
>
> 2. caused another person to perform or submit to deviate sexual conduct
>
> 3. when the other person was compelled by force or imminent threat of force.

The fact that the jury instruction singles out one of the statute's listed alternatives (compulsion via force) to the exclusion of all others and further states that the government must prove that "element[] beyond a reasonable doubt" to secure a conviction buttresses the view that Indiana's criminal deviate conduct statute is divisible into distinct elements. For all of these reasons, we hold that the statute is divisible.

Given these jury instructions, we can make short work of the next step in our analysis: determining which crime Johnson was convicted of under the criminal deviate conduct statute. *See Mathis*, 136 S. Ct. at 2249 (instructing that, under the modified categorical approach, courts reviewing ACCA sentence enhancements may examine a limited set of judicial records to determine which version of the statutory alternatives the defendant was charged and convicted under). The jury instructions make clear that Johnson was convicted of the version of criminal deviate conduct requiring compulsion by force.

B. Sufficiency of the Force Required

Following this divisibility holding, we turn next to the question of what level of force qualifies a crime as an ACCA predicate offense. Petitioner contends that even if the Court finds that Indiana's criminal deviate conduct statute is divisible and even if the Court finds that Johnson's conviction was for criminal deviate conduct via forcible compulsion, Indiana law defines "force" to include conduct that does not meet the higher bar for "force" contemplated by the ACCA's definition of "violent felony." Beginning with the federal statute, the relevant portion of the ACCA's definition of violent felony is the first prong, which states that a felony qualifies as a "violent felony" if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Notably, the statute explicitly states that the sort of force contemplated is physical, rather than emotional or psychological.

The ACCA does not provide any definition for "physical force," but two Supreme Court cases have shed light on the meaning of this term: *Curtis Johnson v. United States*, 559 U.S. 133 (2010) and *Stokeling v. United States*, 139 S. Ct. 544 (2019).

In *Curtis Johnson*, the Supreme Court decided whether the petitioner's previous conviction in Florida for simple battery qualified as a violent felony predicate offense under the ACCA. Under Florida law, a battery occurs "when a person either '1. [a]ctually and intentionally touches or strikes another person against the will of the other,' or '2. [i]ntentionally causes bodily harm to another person.'" *Id.* at 136 (alteration in original) (citing Fla. Stat. § 784.03(1)(b)). The Court determined that the statute was indivisible, meaning that in order to categorically qualify as a violent felony, the least violent

version of the offense—"[a]ctually and intentionally touch[ing] another person"—must constitute the use of "physical force" contemplated by the statute. In ruling that it did not, the Court held that "physical force"—at least in the context of defining a "violent felony" under the ACCA—meant "force capable of causing physical pain or injury to another person." *Id.* at 140.

The Court returned to this definition of "physical force" nearly a decade later, in *Stokeling*. There, the Court held that common law robbery—which requires at least some resistance, no matter how slight, by the victim—meets the ACCA's requirements for physical force. *Stokeling*, 139 S. Ct. at 555. In so ruling, the Court explained: "[T]he common law [] linked the terms 'violence' and 'force.' Overcoming a victim's resistance was *per se* violence against the victim, even if it ultimately caused minimal pain or injury." *Id.* at 553. This understanding, the Court explained, comported with *Curtis Johnson*'s requirement that the force be "capable of causing physical pain or injury," *Curtis Johnson*, 559 U.S. at 140, since any overcoming of resistance inherently involves a "physical contest" and "it is the physical contest between the criminal and the victim that is itself 'capable of causing physical pain or injury.'" *Stokeling*, 139 U.S. at 553 (quoting *Curtis Johnson*, 559 U.S. at 140).

To summarize, after *Curtis Johnson*, any offense involving force "capable of causing physical pain or injury" is sufficient to qualify as a violent felony under the ACCA. And after *Stokeling*, an offense per se satisfies *Curtis Johnson*'s definition of force if it involves the offender's overcoming the victim's resistance. Per the wording of the ACCA statute itself, an offense that satisfies either *Curtis Johnson*'s or *Stokeling*'s level of

force satisfies the ACCA's standard, whether it involves "the use, attempted use, or threatened use" of such force.

We now turn to the state statute defining petitioner's offense of conviction. Indiana's forcible criminal deviate conduct offense involves the defendant's use of "force or imminent threat of force" to compel the victim to submit to a sexual act against their will. Ind. Code § 35-42-4-2. Contrary to petitioner's view, Indiana's criminal deviate conduct statute requires a sufficient level of force to qualify as a violent felony under the ACCA. In Indiana, forcible criminal deviate conduct may be committed in one of two ways: (1) the offender may compel the victim to submit by overcoming their resistance; or (2) the offender may compel the victim to submit by threatening or otherwise placing the victim in "fear of bodily harm," in which case no physical resistance by the victim is required. *See Birch v. State*, 401 N.E.2d 750, 751 (Ind. Ct. App. 1980) (stating that a defendant may be convicted of criminal deviate conduct if he either overcomes a victim's resistance or makes threats that place the victim in fear of bodily injury); *see also Woodson v. State*, 483 N.E.2d 62, 64 (Ind. 1985) (same).

Either variation requires a level of force sufficient under the ACCA.[3] A forcible criminal deviate conduct offense under

[3] Johnson's citation to *Jansen v. State*, 122 N.E.3d 473 (Ind. Ct. App.) (unpublished), *appeal denied*, 127 N.E.3d 231 (Ind. 2019), is not to the contrary for several reasons. In that case, the court interpreted Indiana's sexual battery statute, which also required that the victim be "compelled to submit." *Id.* at ¶13. However, the case was decided after Indiana made "comprehensive revision[s]" to its criminal statutes in 2014, *see United States v. Duncan*, 833 F.3d 751, 754 n.1 (7th Cir. 2016), which resulted in the elimination of the criminal deviate conduct statute. Additionally, *Jansen* is an unpublished case issued by the Indiana Court of Appeals and therefore

the first variation clearly falls within the Supreme Court's interpretation in *Stokeling* that force "sufficient to overcome a victim's resistance" satisfies the ACCA's requirements. *See Stokeling*, 139 S. Ct. at 554. Johnson's argument to the contrary is fatally undermined by the text of Indiana's statute, which requires that the victim be "compelled to submit" to the sexual conduct. The requirements of compulsion and submission both indicate that, for instances in which the victim does resist, the offender must overcome that resistance, thereby satisfying *Stokeling*. *See id.* at 551 (adopting the common law's definition of "force" or "violence," which required only that "[s]ufficient force must be used to overcome resistance … however slight the resistance" (citation omitted)). Moreover, even if the Indiana criminal deviate conduct statute swept up instances where the defendant attempted but failed to overcome the victim's resistance, such conduct would still qualify as a violent felony under the ACCA, which includes the "attempted use … of physical force." 18 U.S.C. § 924(e)(2)(B)(i).

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has no precedential value, *see* Ind. R. App. P. 65. As such, even if it interpreted the right statute, the case is not an example of the "authoritative sources of state law" to which the U.S. Supreme Court instructed reviewing courts to look. *See Mathis*, 136 S. Ct. at 2256–57. Moreover, however, the defendant's conduct in *Jansen*, which involved rubbing his hands over the victim's breasts and shorts and trying to take her shorts off—after the victim repeatedly pushed his hands away—is not inconsistent with *Stokeling*'s definition of sufficient force. *See Stokeling*, 139 S. Ct. at 553 (concluding that "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by [*Curtis*] *Johnson*" because "[t]he altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself 'capable of causing physical pain or injury'" (quoting *Curtis Johnson*, 559 U.S. at 139, 140)).

For instances in which the victim does not resist, the conduct may yet qualify as criminal deviate conduct under the second variation of the offense if the victim declined to resist because the offender placed them in fear of bodily harm. *Birch*, 401 N.E.2d at 751 (holding that criminal deviate conduct ordinarily requires that the offender overcome the victim's resistance but clarifying that "[p]hysical resistance is not required if the victim is in fear of bodily harm."). Because such instances necessarily involve the "threatened use," 18 U.S.C. § 924(e)(2)(B)(i), of "force capable of causing physical pain or injury to another person," *Curtis Johnson*, 559 U.S. at 140, they also satisfy the ACCA's "violent felony" requirements.

At bottom, Indiana's forcible criminal deviate conduct offense involves the defendant's use of "force or imminent threat of force" to compel the victim to submit to a sexual act against their will. Ind. Code § 35-42-4-2. Under the Supreme Court's holdings in *Curtis Johnson* and *Stokeling*, there can be no question that such an offense "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B).

C. Sufficiency of the Intent Required

Finally, we turn to the question of intent. *See Borden v. United States*, 141 S. Ct. 1817, 1821–22 (2021) (holding that a crime is not a violent felony "if it requires only a *mens rea* of recklessness."). Petitioner argues that Indiana's forcible criminal deviate conduct offense does not qualify as an ACCA predicate offense because it does not require that the prohibited conduct be committed intentionally. In support of this contention, petitioner points to *Leocal v. Ashcroft*, 543 U.S. 1 (2004), claiming that the Supreme Court's holding in that case should be read to mean that an offense must require

intentional conduct in order to qualify as a violent felony under the ACCA.

Petitioner's reliance on *Leocal* is misguided. In that case, the Supreme Court interpreted a separate but similarly worded statute defining the term "crime of violence," 18 U.S.C. § 16, as requiring a higher *mens rea* than just "the merely accidental or negligent conduct involved in a DUI offense." *Leocal*, 543 U.S. at 11. The Court reasoned that the statute's text—in particular the phrase, "use … of physical force" (which is also present in the ACCA's definition of violent felony)—implied that the employment of force must be more active than passive or accidental. *Id.* at 9. This Court has previously held that "*Leocal* neither holds nor suggests that there must be a *separate* intent element attached to the degree of injury," and that "an offense defined as a knowing or intentional act that causes bodily harm comes within the elements clause of … § 924(e)(2)(B)(i) [the violent felony definition] …." *Douglas v. United States*, 858 F.3d 1069, 1072 (7th Cir. 2017). Indiana's criminal deviate conduct offense requires that an offender act "knowingly or intentionally," Ind. Code § 35-42-4-2, and thus clearly does not sweep up "merely accidental or negligent conduct" like that of the DUI offense at issue in *Leocal*. 543 U.S. at 11.

* * *

For these reasons, we hold that Indiana's criminal deviate conduct offense is divisible and that the forcible compulsion variety of that offense requires sufficient force and intent to qualify as a "violent felony" under the ACCA. Because petitioner has two prior convictions which he concedes qualify as predicate offenses under the ACCA and because we hold that

his criminal deviate conduct conviction is also a violent felony under the ACCA, we need not examine whether his escape conviction constitutes a predicate offense. Petitioner met the criteria for the ACCA's sentencing enhancement, so the imposition of his sentence under the statute was appropriate.

III. Conclusion

We AFFIRM the district court's denial of petitioner's motion to vacate his sentence.