No. 07-1322

# In the Supreme Court of the United States

MIGUEL ANGEL HERNANDEZ, PETITIONER

*v.*

MICHAEL B. MUKASEY, ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether simple battery in violation of Ga. Code Ann. § 16-5-23(a)(2) is a "crime of violence" under 18 U.S.C. 16, and therefore qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 513 F.3d 1336. The opinions of the Board of Immigration Appeals and the immigration judge are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on January 18, 2008. The petition for a writ of certiorari was filed on April 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may be removed from the United States if he is convicted of an "aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). The INA de-

fines the term "aggravated felony" to include a "crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F). Under 18 U.S.C. 16, a "crime of violence" is:

> (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, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

2. Petitioner is a native and citizen of Mexico. He was admitted to the United States as a lawful permanent resident in September 2004. Pet. App. 3a. In March 2005, petitioner was convicted in Georgia state court of one count of simple battery. *Ibid.*; A.R. 52. Georgia's simple battery statute provides, in pertinent part:

> A person commits the offense of simple battery when he or she either:
>
> (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or
>
> (2) Intentionally causes physical harm to another.

Ga. Code Ann. § 16-5-23(a). Petitioner was convicted under the second subsection, for "[i]ntentionally caus[ing] physical harm to another." *Id.* § 16-5-23(a)(2); see Pet. App. 3a; A.R. 52. Petitioner was sentenced to 12 months of imprisonment, with six days of time served and the remainder to be served on probation. Pet. App.

3a; A.R. 52. Probation was later revoked, and petitioner served the final 22 days of his sentence in jail. Pet. App. 3a; A.R. 49.

In October 2006, the Department of Homeland Security (DHS) commenced removal proceedings against petitioner based on his 2005 conviction. DHS alleged, *inter alia*, that petitioner's offense qualified as a "crime of violence" under 18 U.S.C. 16, and that it was therefore an "aggravated felony" under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 4a; A.R. 60-62. The immigration judge (IJ) found petitioner removable on that ground, and ordered petitioner removed to Mexico. A.R. 29-32.

3. The Board of Immigration Appeals (BIA) affirmed. A.R. 2. Citing its decision in *In re Martin*, 23 I. & N. Dec. 491, 494-495 (BIA 2002), as well as the Eleventh Circuit's decision in *Hicks* v. *Moore*, 422 F.3d 1246 (2005), the BIA concluded that the offense of which petitioner was convicted qualifies as a "crime of violence" under 18 U.S.C. 16(a), and is therefore an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F). A.R. 2.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court began by noting that Georgia courts have interpreted both prongs of the simple battery statute to require actual physical contact, but that Section 16-5-23(a)(2), as compared to Section 16-5-23(a)(1), has been interpreted to contemplate "a touching that goes beyond insult to the infliction of pain or physical injury." *Id.* at 7a (quoting *Hammonds* v. *State*, 587 S.E.2d 161, 163 (Ga. Ct. App. 2003)). The court noted that, in a prior decision, the Eleventh Circuit had held that Ga. Code Ann. § 16-5-23(a)(1) is an offense that "has, as an element, the use or attempted use of physical force" under the definition of "misdemeanor crime of domestic vio-

lence" in 18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005), having reasoned that "[a] person cannot make physical contact—particularly of an insulting or provoking nature—with another without exerting some level of physical force." Pet. App. 8a (quoting *United States* v. *Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006), cert. denied, 127 S. Ct. 2028 (2007)). In this case, the court noted, petitioner's conviction "required more than simple physical contact with the victim; it required intentionally causing *physical harm* to the victim through physical contact." *Id.* at 9a. The court accordingly concluded that petitioner's conviction qualifies as a "crime of violence" under 18 U.S.C. 16(a).

**ARGUMENT**

Petitioner renews his contention (Pet. 5-18) that his conviction for simple battery in violation of Ga. Code Ann. § 16-5-23(a)(2) is not a "crime of violence" under 18 U.S.C. 16. The court of appeals correctly rejected that contention, and its decision does not warrant further review.

1. Petitioner was convicted of violating a provision of Georgia law that makes it a criminal offense "intentionally [to] cause[] physical harm to another." Ga. Code Ann. § 16-5-23(a)(2). Georgia courts have interpreted that provision to "contemplate[] a touching" that results in "pain or physical injury." *Hammonds*, 587 S.E.2d at 163. The court of appeals correctly concluded that the conduct proscribed by Section 16-5-23(a)(2) constitutes a "use of physical force," and therefore qualifies as a "crime of violence" under 18 U.S.C. 16(a). See Pet. App. 12a. The court's conclusion is consistent with both the text and the history of the statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (noting that 18 U.S.C.

16(a) was designed to include "a threatened or attempted simple assault or battery on another person").

2. Petitioner's primary submission (Pet. 7-8) is that Section 16-5-23(a)(2) does not qualify as a "crime of violence" because "[t]here are many things one could intentionally do to cause 'physical harm' without using or threatening physical force." Pet. 7. Petitioner offers a series of hypothetical examples, such as "drop[ping] a banana peel in the path of another," or "sneak[ing] up behind another on the edge of a balcony and scream-[ing], causing him to lose his balance and fall." *Ibid.* Petitioner makes no effort, however, to reconcile his argument with the Georgia court's interpretation of Section 16-5-23(a)(2) as requiring physical contact. See Pet. App. 12a n.4. Petitioner instead simply disputes (Pet. 14-15) that Section 16-5-23(a)(2), as opposed to Section 16-5-23(a)(1), has been so interpreted. Petitioner is mistaken. Both *Hammonds*, *supra*, and *Lyman* v. *State*, 374 S.E.2d 563 (Ga. Ct. App. 1988), cited in the court of appeals' opinion (at Pet. App. 7a-8a and 12a n.4), specifically concerned Section 16-5-23(a)(2), and in both cases, the court affirmed that Section 16-5-23(a)(2) contemplates physical contact that results in physical harm. See *Hammonds*, 587 S.E.2d at 163; *Lyman*, 374 S.E.2d at 565.

Moreover, petitioner fails to identify any case in which the statute has been applied in the manner he hypothesizes. Cf. *Gonzales* v. *Duenas-Alvarez*, 127 S. Ct. 815, 822 (2007) ("[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. * * * [An offender] must at least point to his own case or other cases in which the state courts in fact did apply

the statute in the special (nongeneric) manner for which he argues."). Petitioner offers (Pet. 15) only one example of a case in which the Georgia courts purportedly applied Section 16-5-23(a)(2) to conduct not involving physical contact or the use of physical force: *J.A.T.* v. *State*, 212 S.E.2d 879 (Ga. Ct. App. 1975), in which the court held that held that siccing a dog on another constitutes simple battery in violation of Section 16-5-23(a). *J.A.T.* lends no support to petitioner's argument. It is true, as petitioner notes (Pet. 15), that the defendant in *J.A.T.* did not "touch" the victim, in the sense that there was no *direct* physical contact between the parties; the defendant instead commanded his dog to accomplish the "touching." But the same might be said of a person who throws a rock at his victim, or who strikes his victim with his car, cf. *J.A.T.*, 212 S.E.2d at 880 (citing cases), or, for that matter, a person who aims a gun at his victim and pulls the trigger. In each case, the offender causes physical harm by making physical contact, whether direct or indirect, with the victim. In each case, the offender has used physical force against another.

3. Petitioner contends (Pet. 8-14) that review is warranted to resolve a conflict among the courts of appeals regarding whether statutes similar to Ga. Code Ann. § 16-5-23(a)(2) qualify as "crimes of violence." Petitioner's contention is without merit.

a. As an initial matter, most of the cases that petitioner cites concern statutes that are materially dissimilar to Ga. Code Ann. § 16-5-23(a)(2). *Larin-Ulloa* v. *Gonzales*, 462 F.3d 456 (5th Cir. 2006), held that a statutory provision proscribing "intentionally causing physical contact with another person * * * in any manner whereby great bodily harm, disfigurement or death can be inflicted," *id.* at 458 (quoting Kan. Stat. Ann.

§ 21-3414(a)(1)(C)), did not qualify as a Section 16(a) "crime of violence" because the provision "does not require that the defendant *intend to injure* or use force on the victim or that the physical contact itself be violent, harmful, offensive, or even non-consensual," *id.* at 466 (emphasis added) (footnotes omitted). Similarly, *Flores* v. *Ashcroft*, 350 F.3d 666 (7th Cir. 2003), held that a statutory provision that proscribes "knowingly or intentionally touch[ing] another person in a rude, insolent, or angry manner," where that touching "results in bodily injury to any other person," *id.* at 669 (quoting Ind. Code Ann. § 35-42-2-1(a)(1)(A)), did not qualify as a Section 16(a) "crime of violence" because the provision "does not make *intent to injure* an element of the offense," *id.* at 671 (emphasis added). See *id.* at 672 (holding that the "force" to which 18 U.S.C. 16 refers must be "the sort that is intended to cause bodily injury, or at a minimum likely to do so"). As petitioner himself acknowledges, "the statute at issue in the present case involves an intent to cause physical harm." Pet. 9. There is thus no conflict between the decision below and *Larin-Ulloa* or *Flores*.

*Ortega-Mendez* v. *Gonzales*, 450 F.3d 1010 (9th Cir. 2006), is also inapposite. In that case, the court held that a statutory provision proscribing "any willful and unlawful use of force or violence upon the person of another," *id.* at 1016 (quoting Cal. Penal Code § 242), did not qualify as a Section 16(a) "crime of violence" because it "requir[ed] neither a force capable of hurting or causing injury nor violence in the usual sense of the term," *id.* at 1016. *Ortega-Mendez* did not address the question whether a statute like Ga. Code Ann. § 16-5-23(a)(2), which requires proof of physical harm, would qualify under Section 16(a).

Finally, in *United States* v. *Arnold*, 58 F.3d 1117 (6th Cir. 1995), cert. denied, 519 U.S. 1019 (1996), the court considered the Tennessee offense of assault with intent to commit sexual battery, defined as unlawful sexual contact with another person accompanied by: (1) the use of force or coercion; (2) knowledge of the victim's mental deficiency or physical incapacitation; or (3) fraud. *Id.* at 1121-1122 (citing Tenn. Code Ann. § 39-2-607). The language of the statute made plain that "force may, but need not, be involved in an assault with intent to commit sexual battery under Tennessee law." *Id.* at 1122. The court did not consider whether the offense of "intentionally caus[ing] physical harm" to another, Ga. Code Ann. § 16-5-23(a)(2), is an offense that has, as an element, the use, attempted use, or threatened use of force.[*]

b. The court of appeals' conclusion that intentionally causing physical harm to another is an offense that has a use-of-force element is consistent with decisions of the First and Eighth Circuits. See *United States* v. *Nason*, 269 F.3d 10, 20 (1st Cir. 2001) (Maine assault statute punishing the intentional, knowing, or reckless causation of bodily injury qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A) (2000

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[*] Petitioner also cites (Pet. 7, 14) *Gonzales-Garcia* v. *Gonzales*, 166 Fed. Appx. 740 (5th Cir. 2006) (unpublished), in which the court held that an assault statute punishing persons who "intentionally or knowingly cause[] physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative," *id.* at 744 (quoting Tex. Penal Code Ann. § 22.01(a)(3)), is not a "crime of violence" under 18 U.S.C. 16(a). The question in this case is not, however, whether an assault statute punishing "offensive or provocative contact" qualifies as a Section 16(a) "crime of violence." The battery statute here at issue requires proof of the intentional causation of physical harm. See Ga. Code Ann. § 16-5-23(a)(2).

& Supp. V 2005)); *United States* v. *Smith*, 171 F.3d 617, 621 (8th Cir. 1999) (Iowa assault statute punishing the commission of an act intended to cause pain or injury qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005)).

Other courts have concluded that, standing alone, statutory language proscribing the intentional infliction of physical harm does not describe an offense that has a use-of-force element. See *Chrzanoski* v. *Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (Connecticut assault statute punishing intentional causation of injury to another person does not qualify as a "crime of violence" under 18 U.S.C. 16(a)); *United States* v. *Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006) (Texas assault statute punishing intentional, knowing, or reckless causation of bodily injury does not qualify as an "aggravated felony" under Sentencing Guidelines § 2L1.2(b)(1)(C), cert. denied, 128 S. Ct. 1351 (2007)); *United States* v. *Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005) (Colorado assault statute punishing knowingly or recklessly causing bodily injury to another person does not have a use-of-force element, and therefore does not qualify as a "crime of violence" under Guidelines § 2L1.2(b)(1)(A)). In those cases, the courts reasoned that "the intentional causation of injury does not necessarily involve the use of force," because injury can also be caused by "guile, deception, or even deliberate omission." *Chrzanoski*, 327 F.3d at 195; accord *Perez-Vargas*, 414 F.3d at 1286-1287; see *Villegas-Hernandez*, 468 F.3d at 879 ("[I]njury could result from any of a number of acts, without use of 'destructive or violent force', making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing

an approaching car driven by an independently acting third party will hit the victim.").

The decision below is not, however, inconsistent with those decisions. As the court of appeals emphasized (Pet. App. 7a-9a, 12a n.4), Georgia courts have interpreted Ga. Code Ann. § 16-5-23(a)(2) to require proof of "a touching that goes beyond insult to the infliction of pain or physical injury." Pet. App. 7a (quoting *Hammonds*, 587 S.E.2d at 163). That interpretation precludes application of Section 16-5-23(a)(2) to conduct involving only "guile, deception, or * * * deliberate omission," *Chrzanoski*, 327 F.3d at 195, unaccompanied by any application of force.

It is true, as petitioner points out (Pet. 9-10), that the Fifth Circuit has held that Georgia's family-violence battery provision, Ga. Code Ann. § 16-5-23.1(f), does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," and thus is not a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A). *United States* v. *Lopez-Hernandez*, 112 Fed. Appx. 984, 985 (5th Cir. 2004) (per curiam) (quoting Sentencing Guidelines § 2L1.2, comment. (n.1(B)(ii)(I))), cert. denied, 543 U.S. 1177 (2005). Although the Georgia family-violence battery provision is not the "exact statute" at issue here, Pet. 9, it is similar to Ga. Code Ann. § 16-5-23(a)(2): Much like the simple battery statute, it punishes "intentionally caus[ing] substantial physical harm or visible bodily harm." Ga. Code Ann. § 16-5-23.1(a) and (f). The Fifth Circuit concluded that family-violence battery does not have a use-of-force element because it "does not contain a requirement that the offender apply force, but rather, leaves open the possibility that harm to the victim might result from omission or from the actions of

another person or animal controlled by the offender." *Lopez-Hernandez*, 112 Fed. Appx. at 985 (citing *J.A.T.* v. *State*, 212 S.E.2d 879).

This Court's review is not, however, warranted to resolve any tension between *Lopez-Hernandez* and the decision below. The Fifth Circuit's decision in *Lopez-Hernandez* is unpublished and non-precedential. It concerned the meaning of a Sentencing Guideline, rather than a federal statute. It did not consider the fact that Georgia's battery statute has been interpreted to require physical contact, see, *e.g.*, *Martin* v. *State*, 629 S.E.2d 134, 135 (Ga. Ct. App. 2006), nor did it explain why directing an animal to injure a victim, as in *J.A.T.*, would not qualify as a "use of physical force." Moreover, it relied primarily on the Fifth Circuit's prior decision in *United States* v. *Calderon-Pena*, 383 F.3d 254 (2004) (per curiam) (en banc), cert. denied, 543 U.S. 1076 (2005), which held that "knowingly * * * engag[ing] in conduct that places a child younger than 15 years in imminent danger of * * * bodily injury," *id.* at 260 (quoting Tex. Penal Code Ann. § 22.041(c)), lacks a use-of-force element and thus does not qualify as a "crime of violence" under Sentencing Guidelines § 2L1.2. *Calderon-Pena*, 383 F.3d at 260; see *Lopez-Hernandez*, 112 Fed. Appx. at 985. The Fifth Circuit has recently called for en banc reconsideration of *Calderon-Pena*, see *United States* v. *Gomez-Gomez*, No. 05-41461 (argued en banc May 22, 2008), which suggests that the Fifth Circuit may harmonize its decisions with the view that an offense involving the intentional infliction of physical harm is one that has, as an element, the use of physical force. For that reason as well, review is not warranted in this case.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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