NO: 17-6026

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

ANTHONY BERNARD WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a Florida conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause where the offense may be committed using a minimal degree of force.

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The government recognizes (BIO at 4,7) that the Eleventh and Ninth Circuits are split on whether Florida robbery qualifies as an ACCA violent felony. And it does not dispute that this case is a perfect vehicle to resolve that circuit conflict. Instead, it asserts that this undisputed conflict does not warrant resolution, because it involves the interpretation of "a specific state law" and lacks "broad legal importance." BIO at 4. Neither assertion is persuasive.

I. The Circuits Are Divided on a Question of Federal Law

Contrary to the government's suggestion, the Eleventh and Ninth Circuits agree completely about Florida law. They agree that, in order to commit robbery, there must be "force sufficient to overcome a victim's resistance." *Robinson v. State*, 692 So.2d 883, 886-87 (Fla. 1997). And they agree that "[t]he degree of force used is *immaterial*," so long as it is "sufficient to overcome the victim's resistance." *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922) (emphasis added). *See United States v. Fritts*, 841 F.3d 937, 943-944 (11th Cir. 2016) (citing *Robinson* and *Montsdoca* as authoritative); *United States v. Geozos*, 870 F.3d 890, 900-901 (9th Cir. 2017) (same). The parties likewise agree that this is the governing legal standard in Florida. *See* BIO at 5-6. The disagreement instead lies in whether the force necessary to overcome the victim's resistance is categorically "physical force" under the ACCA's elements clause in 18 U.S.C. § 924(e)(2)(B)(i). And, of course, "[t]he meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law, not state law." *Curtis Johnson v. United States*, 559 U.S. 133, 138 (2010).

In that regard, the case for review of the federal question presented here is even more compelling than the question reviewed in *Curtis Johnson*. When the Court granted certiorari in *Curtis Johnson*, there was no clear and acknowledged circuit split on whether Florida simple battery satisfied the elements clause. *See* Brief of the Respondent in Opposition, *Johnson v. United States*, 2008 WL 5661843 at **8-10 (Dec. 24, 2008) (No. 08-6925). Instead, the circuits broadly disagreed on whether conduct common to many state battery offenses—*i.e.*, a *de minimis* touching—qualified as "physical force" under the elements clause. Similarly, as explained in the Petition and supplemental briefing here, the circuits broadly disagree now as well on whether conduct common to common-law robbery offenses—*e.g.*, bumping, grabbing, or minor struggling, which may or may not cause slight injuries—satisfies the definition of "physical force" adopted in *Curtis Johnson*. That there is also a clear circuit split on the precise state offense here (Florida robbery) makes review of the federal question presented vital to assure identically-situated defendants are not treated differently.

II. The Federal Question Dividing the Circuits Warrants Review

Although the question presented is one of federal law that admittedly divides the circuits, the government nonetheless insists that review is not warranted. Its assertions do not withstand scrutiny. The circuit conflict should be resolved.

1. As an initial matter, the government points out (BIO at 10) that the Court has recently denied several petitions raising the same question presented here. These petitions were all denied *before* the Ninth Circuit's conflict-creating decision in *Geozos*. Moreover, the government does not dispute that, while of recent vintage, that conflict is already intractable. The Eleventh Circuit has followed its precedential

decision in *Fritts* in scores of cases and shown no interest in reconsidering *Fritts* en banc. And the government declined to seek rehearing or certiorari in *Geozos*. Thus, moving forward, geography alone will determine whether a Florida robbery offense satisfies the ACCA's elements clause. Geography will determine whether certain federal defendants will be subject to an enhanced mandatory minimum penalty of 15 years, 18 U.S.C. § 924(e), as opposed to the otherwise-applicable 10-year maximum, 18 U.S.C. § 924(a)(2). Only this Court can resolve that untenable disparity.

2. To minimize the stakes, the government asserts that Florida robbery's status as a violent felony lacks broad national importance. But the raw numbers refute that assertion. At present, there are no less than fifteen pending certiorari petitions—fourteen from the Eleventh Circuit, and one from the Fourth Circuit—raising this issue.[1] That conservative figure does not include the numerous petitions that were filed and denied before *Geozos*. Nor does it include the incalculable number of petitions that will be filed absent immediate intervention by this Court. Indeed, now that there is a direct circuit conflict on whether Florida robbery is a violent felony, the Court can expect numerous petitions presenting the question.

Federal sentencing data supports that uncontroversial prediction. Following the invalidation of the ACCA's residual clause in *Samuel Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015), Florida has truly become the ACCA epicenter of the country. While the total number of ACCA sentences nationally has decreased somewhat without the residual clause, the percentage of the total originating from the

[1] For the Eleventh Circuit petitions, see *Davis v. United States*, No. 17-5543 (petition

Eleventh Circuit has increased. U.S. Sentencing Comm'n, *Interactive Sourcebook.*[2] From 2013 through 2016, the Eleventh Circuit accounted for the most ACCA sentences by far in the country—approximately 25% of the total each year—with the three Florida Districts accounting for at least 75% of the ACCA cases in the Eleventh Circuit and 20% of the national total. *Id.* And, while 2017 statistics are not yet available, the Commission has confirmed that there were still over 300 ACCA sentences imposed in 2017, U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties* 2 (2017), with the Southern District of Florida remaining among the top five districts nationally in the number of felon in possession cases. U.S. Sent. Comm'n, *Quick Facts: Felon in Possession of a Firearm* 1 (2017).

With such a substantial number of ACCA cases nationwide originating in Florida, many of them will inevitably involve Florida robbery. Indeed, Florida has had a consistently high robbery rate—with over 20,000 robberies committed every year for the last four decades.[3] That is a lot of prior Florida robbery offenses available for use as ACCA predicates. More generally, the Sentencing Commission found in a 2015 study based on its 2014 data that robbery followed only traffic offenses, larceny, burglary, and simple assault as the most common prior offenses committed by armed career criminals nationally. U.S. Sent'g Comm'n, *Public Data Briefing: "Crime of Violence" and Related Issues.*[4] Of course, traffic offenses, larceny, and misdemeanor

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[2] The Commission's Interactive Sourcebook is available at https://isb.ussc.gov/Login. These statistics are based on data found under "All Tables and Figures," in Table 22.

[3] http://www.disastercenter.com/crime/flcrime.htm.

[4] http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/COV_briefing.pdf (Slide 30).

simple assaults will never qualify as "violent felonies." And, after this Court's recent clarification of the categorical approach and elimination of the residual clause, many burglary offenses no longer qualify as ACCA predicates. *See, e.g., Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 2292 (2013) (California); *United States v. Esprit*, 841 F.3d 1235, 1240 (11th Cir. 2016) (Florida). As a result, robbery is now likely the most commonly-used ACCA predicate nationwide. And nowhere is that more true than in Florida. Given the sheer number of ACCA cases in the Eleventh Circuit, and the substantial number of those cases involving Florida robbery, the question presented here is of national importance for those reasons alone.

3. But there is more. Contrary to the government's suggestion, this issue is by no means limited to the Eleventh Circuit. Florida has one of the most—if not the most—transient populations in the country.[5] That means people who commit crimes in Florida do not remain in Florida. The transient nature of Florida's population, coupled with the substantial number of robbery offenses committed there, explains why federal courts around the country (not merely in the Eleventh Circuit) have already considered—and will continue to consider—whether Florida robbery satisfies the elements clause. The issue crops up everywhere, from New York to Alaska.

Geozos itself illustrates that wide range. The defendant there was sentenced as an armed career criminal in Anchorage, Alaska based upon a prior Florida robbery. If that remote corner of the country is grappling with the issue, then no jurisdiction is immune. Moreover, courts in other jurisdictions have also concluded that Florida robbery is not a violent felony. *See, e.g., United States v. Lee*, 2016 WL 1464118 at

[5] City-Data.com/forum/city-vs-city/794683-whats –most-transient-state-6.html.

**6-7 (W.D.N.Y. 2016) (holding that "Florida's robbery statute is not a categorical match for the ACCA definition of "physical force," and cannot be an ACCA predicate). But while the Ninth Circuit and some district courts have carefully surveyed Florida law, others have uncritically followed the home-circuit decision in *Fritts*. *See, e.g.*, *United States v. Orr*, 685 Fed. App'x 263, 265-66 (4th Cir. 2017) (arising out of North Carolina); *Gardner v. United States*, 2017 WL 1322150 at *2 (E.D. Tenn. 2017); *Wright v. United States*, 2017 WL 1322162 at *2 (E.D. Tenn. 2017). If not corrected, *Fritts* will continue to spill over and prejudice defendants far and wide.

Now that the Eleventh and Ninth Circuits have dug in, other courts will line up behind those two competing decisions. For example, in *United States v. Gabriel Lazaro Garcia-Hernandez*, Case No. 17-3027, the Eighth Circuit is currently reviewing an ACCA sentence imposed by a North Dakota district court predicated upon Florida robbery, where the district court reflexively followed *Fritts*, Case No. 4:14-cr-00076-DLH, DE 87 at 9 (D.N.D. July 18, 2017). On appeal, the appellant is urging the Eighth Circuit to follow the Ninth Circuit's intervening decision in *Geozos*, while the government will undoubtedly ask the Eighth Circuit to follow *Fritts*. Because the Eighth Circuit and others like it will merely choose between those two opinions, the government does not suggest that further percolation is necessary. Nor could it: the two positions to this straightforward dispute have been fully staked out by the Eleventh and Ninth Circuits. And this Court has frequently granted certiorari to resolve 1-1 splits in federal statutory interpretation cases, since nationwide uniformity in application of a federal statute is critical. *See, e.g,, Nichols v. United States*, 136 S. Ct. 1113, 1117 (2016); *Hall v. United States*, 566 U.S. 506, 511 & n.1 (2012).

Furthermore, as explained above, the circuit conflict ultimately boils down to proper interpretation of the term "physical force" in § 924(e)(2)(B)(i), as defined in *Curtis Johnson*. Only this Court can resolve the dispute about what its decision means. And, absent immediate resolution, defendants on the wrong side of the circuit split—not only those in the Eleventh Circuit, but those in other courts that follow *Fritts*—will continue to serve at least five additional years in prison beyond the statutory maximum. Timely petitions for collateral review filed after *Samuel Johnson* in such courts will continue to be incorrectly denied. And many more ACCA sentences predicated upon Florida robbery will become unchallengeable. Time is of the essence; there is no reason to delay.

Resolution of the elements clause issue here will not only impact ACCA cases on direct and collateral review. It will extend to several important enhancements under the Sentencing Guidelines, which contain an identical elements clause. *See* U.S.S.G. §§ 4B1.2(a)(1) (career offenders), 2K2.1 cmnt. n.1 (firearms), 2L1.2 cmnt. n.2 (immigration). And, if the Court declares 18 U.S.C. § 16(b) unconstitutionally vague in *Sessions v. Dimaya* (No. 15-1498) (re-argued Oct. 2, 2017), then the question here could impact immigration cases as well, since the elements clause in 18 U.S.C. § 16(a) is virtually identical to the ACCA's. Both the Eleventh and Ninth Circuits have a substantial number of immigration cases on their civil and criminal dockets. And should *Dimaya* eliminate § 16(b), the Ninth Circuit will be bound by *Geozos*, while the Eleventh Circuit will be bound by *Fritts*, in determining whether aliens with prior Florida robberies newly convicted of crimes (including illegal re-entry) were previously convicted of "aggravated felonies."

4. Lastly, resolving the question presented here will do more than resolve the intractable and far-reaching conflict on Florida robbery's status as a violent felony. It will also have the added bonus of providing much-needed guidance to the lower courts on how to apply *Curtis Johnson* to numerous other robbery offenses.

Three full decades have passed since Congress amended the ACCA to include two different "violent felony" definitions. And during that time, burglary and robbery have remained the most common offenses used for ACCA enhancements under those definitions. This Court has granted certiorari in multiple ACCA cases to address various state burglary offenses. *E.g.*, *Mathis v. United States*, 579 U.S. __, 136 S. Ct. 2243 (2016); *Descamps*, 570 U.S. 254; *James v. United States*, 550 U.S. 192 (2007); *Taylor v. United States*, 495 U.S. 575 (1990). But still, surprisingly, it has never addressed whether a state robbery conviction has satisfied the elements (or residual) clauses. That question looms large after elimination of the residual clause, since the elements clause has taken center stage in ACCA litigation. The Court expressly left open the Florida robbery elements-clause question in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016), observing only that reasonable jurists could debate it. The time has come for a definitive resolution.

III. This Case is an Ideal Vehicle

Because the recurring federal question presented here admittedly divides the circuits and is otherwise of national importance, the only question that remains is whether this case is an appropriate vehicle to decide it. It is. Petitioner's case

presents the ideal vehicle in which to resolve the admitted circuit conflict for multiple reasons.

Petitioner's case poses no procedural or tangential issues that threaten to complicate, let alone obstruct, review. His case comes to this Court on direct (not collateral) review in an ACCA (not Guidelines) case and the petition is a one issue case. In short, the question is squarely and cleanly presented here. The Court should decide it.

IV. The Decision Below is Wrong

Finally, the Eleventh Circuit's decision in *Fritts* is wrong. As explained by the Ninth Circuit in *Geozos*, the "Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." 870 F.3d at 901. The government does not dispute that *Fritts* overlooked that key point. Nor does it dispute that *Fritts* failed to consult the intermediate appellate decisions illuminating the scope of Florida's "overcoming resistance" element. That error infected its conclusion.

The government nonetheless argues that the robbery conduct described in those intermediate appellate decisions does in fact constitute "violent force" under *Curtis Johnson*. To do so, it sweepingly asserts that any degree of "[f]orce sufficient to prevail in a physical contest for possession of the stolen item" is violent, since prevailing in a struggle "could not occur through 'mere unwanted touching.'" BIO at 7; But that assertion is based on a misreading of *Curtis Johnson*. This Court did not hold that a "mere unwanted touching" established a floor, such that anything more

than that satisfies the elements clause. The only conduct the Court was asked to consider in that case was an unwanted touching. It does not logically follow that every type of conduct involving more force than mere contact with another is violent force.

Furthermore, the government incorrectly suggests that conduct "capable" of causing *any* pain or injury is violent force. That test lacks a meaningful limit. While *Curtis Johnson* defined the term "physical force" as "*violent* force—that is, force capable of causing pain or injury to another person," 559 U.S. at 140, both before and after that 15-word definition, the Court made clear that "violent force" was measured by the "degree" or "quantum" of force. *Id.* at 139, 140, 142 (referring to "substantial degree of force" involving "strength," "vigor," "energy," "pressure," and "power"). The government's singular focus on the word "capable" ignores the explanation pervading the remainder of the opinion.

The only specific conduct *Curtis Johnson* mentioned as necessarily involving the requisite degree of force was a "slap in the face," since the force used in slapping someone's face would necessarily "inflict pain." 559 U.S. at 143. But beyond that single example of a classic battery by striking, the Court did not mention any other category of conduct that would inflict an "equivalent" degree of pain or injury to categorically meet its new "violent force" definition. The government posits that "[f]orce sufficient to prevail in a physical contest for possession of the stolen item" is "equivalent to 'a slap in the face.'" BIO at 6. But *Curtis Johnson* said no such thing. And bumping, grabbing, and unpeeling one's fingers do not require the same violence or degree of force as a slap in the face.

The government's sweeping position here is not only at odds with *Curtis*

Johnson but *United States v. Castleman*, 572 U.S. __, 134 S. Ct. 1405 (2014). There, the Court adopted the broader common-law definition of "physical force" for a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), rather than *Curtis Johnson*'s "*violent* force" definition, reasoning that "domestic violence" encompasses a range of force broader than 'violence' *simpliciter*." *Id.* at 1411 n.4 (emphasis in original). Relevant here, the Court observed that "most physical assaults committed against women and intimates are relatively minor," and include "pushing, grabbing, [and] shoving." *Id.* at 1412 (citations omitted). The Court opined that such "[m]inor uses of force may not constitute 'violence' in the generic sense." *Id.* As one such "example," the Court pointed out that, in *Curtis Johnson*, it had cited "with approval" *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003), where the Seventh Circuit had noted that it was 'hard to describe . . . as 'violence'" "a squeeze of the arm [that] causes a bruise." *Id.*

That deliberate approval suggests that the dividing line between violent and non-violent "force" lies somewhere between a slap to the face and a bruising squeeze of the arm. "tug-of-war" over a purse,; bumping a victim from behind,; or removing money from a victim's clenched fist, On that view, certainly a "bump" (without injury) in as in *Hayes v. State*, 780 So.2d 918 (Fla. 1st DCA 2011) would constitute similarly "minor" and thus non-violent force. The same is also true of unpeeling the victim's fingers without injury as in *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000) (*Sanders*), an abrasion-causing grabbing of an arm during a tug-of-war as in *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011). Each of these "minor uses of force" was demonstrably sufficient to overcome a victim's "minor resistance" in a

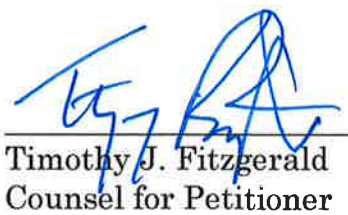
Florida robbery case. But just like the bruising squeeze to the arm discussed in *Castleman*, which actually resulted in a minor injury, they do not constitute "violence" in the generic sense. The government's assumption that minor injuries are themselves proof of "violent force" (BIO at 12-13) is not supported by *Curtis Johnson*, *Castleman*, or real-world experience.

Finally, it is notable that Justice Scalia—writing only for himself—opined in *Castleman* that shoving, grabbing, pinching, and hair pulling would all meet the *Curtis Johnson* definition of "*violent* force," since (in his view) each of these actions was "capable of causing physical pain or injury." *Id.* at 1421-1422 (Scalia, J., concurring in the judgment). Significantly, however, no other member of the Court joined that view. That is so because such conduct—constituting more than an unwanted touch, but less than a painful slap to the face—entails only a minor use of force, not strength, vigor, or power. It thus lacks the degree of force necessary to qualify as violent. And because Florida robbery may unquestionably be committed by such conduct, it is not categorically a violent felony under the ACCA's elements clause.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition and the supplemental briefs, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

By: 

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