No. 17-6140

IN THE SUPREME COURT OF THE UNITED STATES

XAVIER JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government expressly concedes (BIO at 6, 14, 17) that the Eleventh and Ninth Circuits are split on whether Florida robbery qualifies as an ACCA violent felony. Yet 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 6. Neither assertion is persuasive, and a COA should have been granted on this issue. Further, the government is wrong that reasonable jurists could not debate whether an *attempted* robbery under Florida law qualifies as a violent felony. And finally, the government misconstrues this Court's decision in *United States v. Castleman*, 134 S. Ct. 1405 (2014). The government argues that *Castleman* stands for the proposition that "violent force" does not require the direct application of force, but instead, that any action that causes death or serious bodily injury necessarily requires the use of violent physical force. However, the Court in *Castleman* specifically left open the question of whether an action that causes death necessarily requires the use of violent physical force. And for the reasons below and in Mr. Jones's initial petition, reasonable jurists can debate whether Florida attempted first-degree murder qualifies as a violent felony.

I. Reasonable jurists could debate whether Florida robbery and attempted robbery qualify as violent felonies.

A. The Circuits are divided on whether Florida robbery is a violent felony.

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 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).

The government does not dispute that, to resolve that federal question, the Court must look to the "least culpable conduct" punishable as robbery in Florida, and intermediate appellate decisions illustrate the type of conduct so punishable. *See* BIO at 10-13 (consulting state decisional law to determine least culpable conduct). The government also acknowledges (BIO at 11-13) that "overcoming resistance" can involve no more than a "tug-of-war" over a purse, as in *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011); bumping a victim from behind, as in *Hayes v. State*, 780 So.2d 918 (Fla. 1st DCA 2011); or removing money from a victim's clenched fist, as in *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000) and *Winston Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993). Rather, the only dispute is whether the type of force described therein (*i.e.*, force necessary to

overcome minimal resistance by the victim) amounts to "physical force," which this Court has defined as "*violent* force." *Curtis Johnson*, 599 U.S. at 140.

In that regard, the case for review of the federal question presented here is compelling. 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.

B. The federal question dividing the Circuits warrants review.

The conflict is already intractable. The Eleventh Circuit has followed its precedential decision in *Fritts* in scores of cases and has 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).

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, the Court can expect an avalanche of 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 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 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—

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[1] For the Eleventh Circuit petitions, see *Davis v. United States*, No. 17-5543 (petition filed Aug. 8, 2017); *Conde v. United States,* No. 17-5772 (petition filed Aug. 24, 2017); *Phelps v. United States,* No. 17-5745 (petition filed Aug. 24, 2017); *Williams v. United States,* No. 17-6026 (petition filed Sept. 14, 2017); *Everette v. United States,* No. 17-6054 (petition filed Sept. 18, 2017); *Jones v. United States,* No. 17-6140 (petition filed Sept. 25, 2017); *James v. United States*, No. 17-6271 (petition filed Oct. 3, 2017); *Middleton v. United States,* No. 17-6276 (petition filed Oct. 3, 2017); *Rivera v. United States,* No. 17-6374 (petition filed Oct. 12, 2017); *Shotwell v. United States*, No. 17-6540 (petition filed Oct.. 17, 2017); *Mays v. United States,* No. 17-6664 (petition filed Nov. 2, 2017); *Hardy v. United States,* No. 17-6829 (petition filed Nov. 9, 2017); *Pace v. United States*, No. 17-7140 (petition filed Dec. 18, 2017). For the Fourth Circuit petition, see *Orr v. United States,* No. 17-6577 (petition filed Oct. 26, 2017).

[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.

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] 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] Larceny, burglary, and simple assault are not violent felonies. As a result, robbery is now likely the most commonly-used ACCA predicate nationwide. And nowhere is that more true than in Florida.

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[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).

Furthermore, 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. *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. 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 **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.

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

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*.

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. The "overcoming resistance" element in the Florida statute derives from the common law, and a majority of states have retained a similar element in their robbery offenses. Moreover, many state courts—not only those in Florida—have interpreted an "overcoming resistance" element consistent with the common law.

On this point, the government acknowledges that the Fourth Circuit in *United States v. Gardner*, 823 F.3d 794 (4th Cir. 2016) and *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), as well as the Sixth Circuit in *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017), correctly recognized that state courts in North Carolina, Virginia, and Ohio have all held that conduct such as bumping the victim, grabbing a victim's hand or arm, and/or pulling the strap on a victim's purse against only slight resistance is not violent force. BIO at 15 ("In those cases, the degree of force required under state law was not sufficient to satisfy the ACCA's elements clause"). The government asserts that the outcomes in *Gardner*, *Winston*, and *Yates* "arise not from any disagreement about the meaning of 'physical force'

under *Johnson*, but from differences in how States define robbery." BIO at 14, 16. But whether or not these cases exacerbate the subsequent, admitted conflict between the Ninth and Eleventh Circuits, they show that numerous states have similar robbery offenses.[6] And because these offenses derive from the common law and include "overcoming resistance" as an element, they can be committed by conduct similar to that which satisfies Florida's "overcoming resistance" element—*e.g.*, bumping, grabbing, pulling the strap on a purse, etc.. As a result, any decision by the Court here would inevitably provide useful guidance to the lower courts on whether such minor uses of force satisfy *Curtis Johnson*'s definition of "*violent* force."

C. 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.

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[6] One offense strikingly similar to Florida's robbery offense, which the Ninth Circuit has also considered (although the government has not), is Arizona robbery. *See United States v. Molinar*, ___ F.3d ___, 2017 WL 5760565 at *4 (9th Cir. Nov. 29, 2017) (Ariz. Rev. Stat. § 1904 did not meet the career offender elements clause because Arizona courts had not required the "overpowering force" element "to be violent in the sense discussed by the Supreme Court in *Johnson*;"); *United States v. Jones*, ___ F.3d ___, 2017 WL 6495827 (9th Cir. Dec. 15, 2017) (*Molinar*'s holding applied equally to whether Arizona armed robbery was a "violent felony" under the ACCA's elements clause).

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 10-11. 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.

D. Reasonable jurists could debate whether Florida *attempted* armed robbery is a violent felony.

The government erroneously argues that in order to satisfy the "attempted use" of force under the violent felony definition, it is sufficient that a person intend to use force. That argument is incorrect for the following reasons. First, the government is conflating the *intent* required for a conviction for attempted robbery—intending the completed robbery—with the *action* required for a conviction of attempted robbery—a "substantial step" toward the completion of the crime. While, in order to be convicted of attempted robbery, one must intend to complete every element of robbery, there is no requirement under Florida law that a person actually, physically attempt every element of robbery. Rather, one need only take one substantial step towards completing that intention. *See* Fla. Stat. § 777.04(1) ("A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense . . . commits the offense of criminal attempt") (emphasis added). No jury instructions even require the jurors to agree on or identify the substantial step taken. Thus, because the law does not require that a person attempt every element, the one substantial step taken to support a conviction for attempted robbery need not be a step related to the force element.

Additionally, applying the mode of analysis the government suggests is inconsistent with what is required under *Descamps v. United States*, 133 S.Ct. 2276 (2013) and Curtis Johnson. Together, those cases require that in order to be a violent felony under the ACCA, a crime must require that the perpetrator use,

attempt to use, or threaten to use violent physical force in every instance. Under the government's urged analysis, it would be sufficient that a person *intend* to use violent physical force. But that is not the law. *Descamps* and *Curtis Johnson* make clear that the person must actually use, attempt to use, or threaten to use violent, physical force in every case. But under Florida law, such action is not required in every case. All that is required is any substantial step. And the caselaw cited in the initial petition makes clear that can be something as non-violent as arriving at the location of the planned robbery. *See e.g.*, *Grant v. State*, 138 So.3d 1079 (4th DCA 2014) (discussed below).

E. Reasonable jurists can debate whether attempted first-degree murder is a violent felony under *Curtis Johnson*.

The government argues that reasonable jurists could not debate whether attempted first-degree murder is a violent felony because *Castleman* holds that violent force does not require direct force. Essentially, the government argues that under *Castleman*, it is sufficient that the action cause death or bodily harm, even if the person did not use actual physical force against the other. However, the question of whether causing serious bodily injury or death necessarily requires the use of violent force was specifically left open in *Castleman* and the Circuits are divided on that issue.

In *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), the Court defined "physical force" in the ACCA's elements clause as "*violent* force—that is, force capable of causing physical pain or injury to another person." If violent force is measured by its "capability" of causing harm, then all offenses requiring the

causation of harm would satisfy the definition. On the other hand, if violent force is measured by the degree of force applied, as the entirety of the opinion indicates, then offenses requiring the causation of harm would not necessarily require violent force. For even great bodily harm may be caused by only *de minimis* force.

The Court expressly left this question open in *Castleman*. In that case, the Court declined to import *Curtis Johnson*'s definition of "physical force" as "violent force" into a similar elements clause in 18 U.S.C. § 921(a)(33)(A), defining "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9). Instead, the Court held that, as used in that statute, "physical force" broadly referred to common-law force, which, unlike *Curtis Johnson*'s narrower definition, included even a slight touching. *See id.* at 1410-13 & n.4. Applying that broader definition, *Castleman* held that the offense in that case—the intentional or knowing causation of bodily injury—was a misdemeanor crime of domestic violence, because the causation of bodily injury necessarily required the use of *common-law* force. *See id.* at 1414-15.

Writing only for himself, Justice Scalia argued that causation of bodily injury also required violent force under *Curtis Johnson*, because it was "impossible to cause bodily injury without using force 'capable' of producing that result." *Id.* at 1416-17 (Scalia, J., concurring in part and concurring in the judgment). The majority, however, did not accept that reasoning. Instead, it expressly reserved judgment on that question—twice. *Id.* at 1413 ("Whether or not the causation of bodily injury necessarily entails violent force—a question we do not reach—mere

offensive touching does not."); *id.* at 1414 ("Justice Scalia's concurrence suggests that these forms of injury necessitate violent force, under *Johnson*'s definition of that phrase. But whether or not that is so—a question we do not decide—these forms of injury do necessitate force in the common-law sense.") (internal citation omitted). That question has long divided the circuits.

On the one hand, the Third, Sixth, Seventh, Eighth, Ninth, and now Eleventh Circuits have all held that the causation of bodily harm or injury necessarily requires the use of violence force. Employing a "capability" test, they work backwards from the harm, reasoning that, if an offense requires harm or injury, it is necessarily capable of causing such a result. *See, e.g.*, *United States v. Chapman*, 866 F.3d 129, 136 (3d Cir. 2017); *United States v. Gatson*, 776 F.3d 405, 410-11 (6th Cir. 2015); *United States v. Anderson*, 695 F.3d 390, 400 (6th Cir. 2012); *United States v. Jennings*, 860 F.3d 450, 458-59 (7th Cir. 2017); *Douglas v. United States*, 858 F.3d 1069, 1071 (7th Cir. 2017); *United States v. Winston*, 845 F.3d 876, 878 (8th Cir. 2017); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016); *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1290-1291 (9th Cir. 2017).

In those Circuits, however, numerous judges have registered disagreement. In *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017), five Eleventh Circuit judges vigorously dissented on this point. In the Sixth Circuit, Judge White opined that "serious physical injury most often results from physical force, but it can also occur in the absence of any force being used by the offender." *Anderson*, 695 F.3d at 404 (White, J., concurring). Thus, she agreed with other circuits that

"have rejected such a broad interpretation of physical force." *Id.* at 405. In the Eighth Circuit, Judge Kelly made the same observation, opining that that there were a number of ways that a person could cause physical injury without using any degree of force. *Rice*, 813 F.3d at 707-08 (Kelly, J., dissenting).

In contrast, the First, Second, Fourth, Fifth, and Tenth Circuits have all recognized that causation of harm need not require the use of violent force under *Curtis Johnson*. That is so because, in their view, violent force is measured by the degree or quantum of force, not the resulting harm. *See, e.g.*, *Whyte v Lynch*, 807 F.3d 463, 469 (1st Cir. 2015); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 193-94 (2nd Cir. 2003); *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc); *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005).

Following *Castleman*, where the Court indicated that the administration of poison and other indirect applications of force might nonetheless constitute a "use" of force in the common law sense, 134 S.Ct. at 1414, the Fifth Circuit reaffirmed the continuing validity of its prior precedent holding in the narrower crime of violence context, that a person could indeed "cause physical injury without using [violent] physical force." *United States v. Rico-Mejia*, 859 F.3d 318, 321-23 (5th Cir. 2017). While the remaining circuits above have backtracked on parallel pronouncements in light of the indirect force discussion in *Castleman*, they have done so only in cases involving the intentional or knowing causation of harm, *see, e.g.*, *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017) (Colorado second-degree assault), and/or

only to the extent that they had previously relied upon the administration of poison or some indirect application of force to illustrate the broader principle that causation of harm need not require violent force. *See, e.g., United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017) (recognizing that prior holding in *Torres-Miguel* "may still stand," but that its "reasoning can no longer support an argument that the phrase 'use of physical force' excludes *indirect* applications"); *United States v. Hill*, 832 F.3d 135, 143-44 (2d Cir. 2016) (same). But, again, *Castleman* expressly reserved on the broader question of whether the causation of harm necessarily requires the use of violent force. Thus, *Castleman* does not preclude a finding that Florida attempted first degree murder is not a violent felony, and consequently, reasonable jurists could debate that.

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. At a minimum, this Court should hold this case pending its determination in the cases currently before it raising the issue of whether Florida robbery constitutes a violent felony.

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