NO: 17-6887

IN THE
SUPREME COURT OF THE UNITED STATES

BENJIE WRIGHT,

***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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The government expressly concedes (BIO at 8, 12, 13) 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 8. 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 10-12. Thus, there is no dispute "about the degree of force required to support a robbery conviction under Florida law." BIO at 10-12. Rather, 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 10-12 (consulting state decisional law to determine least culpable conduct). The parties are thus in agreement on the proper approach. And so too are they in agreement on the type of conduct punishable as robbery in Florida. The government acknowledges (BIO at 10-12) 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). There is no dispute about the facts of any of these Florida robbery cases. 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. Again, that is purely a question of federal—not state—law about the meaning of the elements clause.

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 9) that the Court has recently denied several petitions raising the same question presented here. But, in the very same paragraph, the government acknowledges that 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 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 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 Eleventh Circuit has increased. U.S. Sentencing Comm'n, *Interactive Sourcebook*.[2] From 2013 through

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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.

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 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

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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).

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 **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

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

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. As explained in the Petition (at 14-20) but ignored by the government, Florida is hardly unique in

requiring an offender to "overcome victim resistance" to be found guilty of robbery. 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, as explained in the Petition (at 20-26) and Petitioner's First Supplemental Brief (at 1-3), 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.[6] 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.[7] And because these offenses derive from the

[6] Contrary to the government, the offenses at issue in the other circuit cases cited in the BIO at 15-16 are *not* "similar" to the unarmed robbery offenses in Florida, North Carolina, Virginia, and Ohio. Nor has Petitioner ever claimed that they are similar.

[7] 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

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."

Such guidance is both necessary and overdue. 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.

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courts had not required the "overpowering force" element "to be violent in the sense discussed by the Supreme Court in *Johnson*;" they had recognized that if an article is attached in some way, "so 'as to create resistance however slight," the offense becomes robbery;" thus, "minor scuffles," including those involving bumping or grabbing where the victim was not harmed, are "insufficiently violent to qualify as force under *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).

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. As noted at the outset, the government has conspicuously not argued that this case poses any "vehicle problems." And rightly so. Petitioner's case presents the ideal vehicle in which to resolve the admitted circuit conflict for multiple reasons.

Finally, 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. The ACCA enhancement here does not depend upon an "armed" robbery, thus leaving aside any questions about the presence of a weapon. And Petitioner was convicted after the Florida Supreme Court's decision in *Robinson*, which clarified beyond all doubt that "overcoming resistance" is an element of the offense. 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 9; *see* BIO at 11 (advancing same argument in context of unpeeling someone's fingers). 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 9). 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. On that view, certainly the "bump" (without injury) in *Hayes* would constitute similarly "minor" and thus non-violent force. The same is also true of unpeeling the

victim's fingers without injury (*Sanders*), an abrasion-causing grabbing of an arm during a tug-of-war (*Benitez-Saldana*), and the "slight injury" to the victim's hand by grabbing money and tearing off a scab (*Winston Johnson*). 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.

V. Florida Felony Battery Is Also a Non-violent Offense Under ACCA.

The government states that this Petition is also a poor vehicle for further review because this Court's resolution would not affect petitioner's classification as an armed career criminal. (BIO 14). The government then incorrectly states that Petitioner did not challenge his prior conviction for felony battery in violation of Fla. Stat. 784.041

(1999). However, the petitioner did challenge the Florida Battery as not being a qualifying offense under the ACCA. (BFP 8; 11th Cir. Brief at 31; 11th Cir. Reply Brief at 7).

The same elemental problems that Florida Robbery contains are applicable to Florida Battery. Indeed, the Supreme Court has held that Florida battery under Fla. Stat. § 784.03 does not categorically satisfy the ACCA's elements clause because it can be accomplished by any intentional touching, "no matter how slight." See *Johnson v. United States*, 559 U.S. 133, 138, (2010) ("Curtis Johnson"). The Johnsons court specifically held that "the Florida felony offense of battery by "[a]ctually and intentionally touch[ing]" another person does not have "as an element the use . . . of physical force against the person of another," § 924(e)(2)(B)(i), and thus does not constitute a "violent felony" under § 924(e)(1). Pp. 137-145.[8]

Curtis Johnson took great lengths to define what type of force would be considered the violent force necessary to qualify as a predicate offense under the ACCA. *Curtis Johnson* defined the force necessary to qualify under ACCA as, "strength or energy; active power; vigor; often an unusual degree of strength or energy," "power to affect strongly in physical relations," or "power, violence, compulsion, or constraint exerted upon a person." *Id*. at 138-139.

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[8] (1) (a) The offense of battery occurs when a person:1. Actually and intentionally touches or strikes another person against the will of the other; or2. Intentionally causes bodily harm to another person.(b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.(2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, "conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered.

Fla. Stat. Ann. § 784.03

Using this definition of force for purposes of defining the violent force *Curtis Johnson* requires, as we must, a Florida Felony Battery can be committed without the necessary power and energy described in *Curtis Johnson*. Upon analysis, felony battery can be committed without violent physical force.

Felony battery criminalizes a mere touching that happens to cause great bodily harm. See Fla. Stat. § 784.041;[9] *Jefferies v. State*, 849 So. 2d 401, 404 (Fla. Dist. Ct. App. 2003) ("Felony battery is . . . a species of the specific intent crime of battery . . . but with resulting and unintended great bodily harm."). A mere touching is not violent—it does not involve a substantial degree of force. A tap on a jogger's shoulder that happens to cause the jogger to suffer a concussion is still just a tap. *United States v. Vail-Bailon*, 868 F.3d 1293, 1308 (11th Cir. 2017)(J. Wilson dissenting)

Justice Wilson points out in his dissent that it is the degree of force used in a particular circumstance that determines whether an action is sufficiently violent. He opines that contact with a person that was not violent could cause serious bodily harm though the degree of force that created the harm can be slight. Justice Wilson points out that a spit ball shot into one's eye can cause serious injury if the eyelid is open and no injury if the eyelid is closed. The result of injury or no injury was initiated by the same amount of force in both instances. Therefore, a felony battery can be committed using slight force and still cause the serious injury to incur a charge of felony battery. As such, felony battery can be committed with less force that is required in *Curtis Johnson.*

[9] Florida's felony battery statute states in pertinent part: (1)(a) [a]ctually and intentionally touches or strikes another person against the will of the other; and (b) [c]auses great bodily harm, permanent disability, or permanent disfigurement.

Clearly, there is a difference of opinion as to what constitutes the requisite force necessary to qualify as the violent force required by *Curtis Johnson*. The *en banc* decision in *Vail-Bailon* concluded that Florida felony battery was a crime of violence under ACCA while the panel decision concluded that it wasn't. (*See United States v. Vail Bailon* 838 F.3d 1091 (11th Cir. 2016). This Court needs to resolve the issue for Florida felony battery as well as Florida Robbery are crimes of violence under ACCA.

VI. The Officers Lacked Reasonable Suspicion to Detain the Petitioner.

The government claims that the issue of whether the officers had the requisite reasonable suspicion to detain the petitioner does not warrant further review. The petitioner does not agree. The government claims that the "petitioner matched the BOLO description in nearly all other respects, it was reasonable for the officers to suspect that petitioner could be the perpetrator." That view belies the facts. The petitioner did not match the BOLO. His clothing was diametrically opposite to what the BOLO described. The BOLO said white shirt and black cargo pants. The petitioner was wearing a black shirt and camouflage pants. (Exhibit 63, 2:00). His body weight was wrong; he was not a heavy-set individual as the BOLO indicated, he was medium build. (D.E. 57, p. 41). Other black males in the store had just as much indicia of matching the BOLO as the petitioner. Yet the officers focused on petitioner. The trial court pointed out however that the age description matched three black males that could be seen in the video prior to the officers randomly selecting the appellant. (D.E. p.85).

Police-citizen encounters that are consensual require no justification, but those that are not consensual impose a detention on a citizen and so must be supported by an officer's reasonable, articulable suspicion. See *Florida v. Bostick*, 501 U.S. 429, 434,

(1991); *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Clearly the encounter between the appellant and the officers became a detention as soon as the appellant was surrounded by the officers and prevented from leaving. The appellant's will was overborne by the officers' conduct and physical touching of the appellant. Therefore, the officers must be able to justify their actions by demonstrating reasonable articulable suspicion for the detention.

In light of the commonality of the description that Officer Arriola was relying on, the low boy haircut, tattoos on the forearm and a black male in his thirties; there was not reasonable articulable suspicion present to allow the officers to constitutionally seize the appellant. The trial court expressed how random the officers' actions were in light of the other black males present in the store that matched the vague bolo description that the officers were operating under.

As such the detention of the appellant was unconstitutional and the trial court erred when the motion to suppress was not granted.

VII. The Officers Conducted a Full-Blown Search Without Probable Cause.

The evidence in the video clearly shows that after the appellant was unlawfully detained, the officers immediately forced the appellant to a standing position. At that point the officers proceeded to lift his shirt. At the same time the officers began rifling through the appellants pockets. (D.E. 63, 2:20). The officers dispensed with any pretense of doing a Terry stop, skipping all the constitutional requirements of Terry and initiated an illegal full-blown search. (D.E. 63, 2:20). Detentions may be investigative yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity the

police may not carry out a full search of the person. *Florida v. Royer*, 460 U.S. 491, 499, (1983).

An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. See, e. g., *United States v. Brignoni-Ponce*, 422 U.S. 873, at 881-882 (1975). It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. *Florida v. Royer*, 460 U.S. 491 at 500.

Surrounding the defendant on all sides by uniformed armed officers was clearly a seizure. Once he was unconstitutionally seized the officers did not have the basis to conduct a full-blown search that begins with lifting the petitioner's shirt in a search for weapons. There was no frisk, only a search. *Terry* permits the officers to conduct a pat down of the suspect if the officers have reasonable cause to believe that the suspect may be armed. In this instance nothing that the petitioner was doing, and nothing that the petitioner said gave the officers reasonable suspicion that he was armed. He was sitting quietly in the store. He made no furtive movements. He did not run and he made a motion to his pocket only after the officers asked for identification. None of these actions gave the officers the reasonable belief that the appellant was armed. There simply was no justification to conduct a full-blown search of the defendant's person based on tattoos on his arms and having a low haircut and being in his thirties.

This petition is not a poor vehicle for addressing the permissible scope of a frisk under *Terry* because challenges to the constitutionality of searches under the Fourth Amendment are fact specific inquiries. In this case the viability of the detention and the search underneath clothing are extensions of the viability of *Terry* and necessitate Supreme Court review.

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,

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