No. 17-9097

IN THE SUPREME COURT OF THE UNITED STATES

JAUMON R. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly denied a certificate of appealability (COA) on petitioner's claim that his prior conviction for felony battery, in violation of Fla. Stat. § 784.041 (2001), was not a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i).

2. Whether the court of appeals correctly denied a COA on petitioner's claim that his prior conviction for aggravated assault with a deadly weapon, in violation of Fla. Stat. § 784.021(1)(a) (1997), was not a conviction for a "violent felony" under the ACCA's elements clause.

3. Whether the court of appeals correctly denied a COA on petitioner's claim that his prior conviction for armed robbery, in violation of Fla. Stat. § 812.13 (2001), was not a conviction for a "violent felony" under the ACCA's elements clause.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1, at 1-2) is unreported. The order of the district court (Pet. App. A6, at 1-8) is not published in the Federal Supplement but is available at 2016 WL 8737355.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2018. On April 13, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 23, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Pet. App. A9, at 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. Petitioner did not appeal his conviction or sentence. Pet. App. A6, at 2. He later filed a motion to vacate his sentence under 28 U.S.C. 2255. 15-cv-23059 D. Ct. Doc. 1, at 1-7 (Aug. 14, 2015). The district court denied the motion and denied a certificate of appealability (COA). Pet. App. A6, at 1-8. The court of appeals similarly denied a COA, Pet. App. A5, at 1, and denied petitioner's motion for reconsideration, Pet. App. A3, at 1. This Court granted petitioner's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded "for further consideration in light of the position asserted by the Acting Solicitor General in his memorandum for the United States." Pet. App. A2, at 1. On remand, the court of appeals again denied a COA. Pet. App. A1, at 1-2.

1. In 2010, police officers in Miami, Florida, saw petitioner conducting a hand-to-hand sale of crack cocaine. Presentence Investigation Report (PSR) ¶ 9. When the officers exited their vehicle and announced themselves, petitioner fled, discarding baggies of crack cocaine. Ibid. The officers caught

up to petitioner and handcuffed him. 11-cr-20631 D. Ct. Doc. 27, at 1 (Dec. 8, 2011). During a search incident to the arrest, the officers found a loaded semi-automatic pistol on petitioner's person. Ibid.

2. A federal grand jury in the Southern District of Florida returned a superseding indictment charging petitioner with two counts of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1); one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). 11-cr-20631 Superseding Indictment 1-3. Petitioner pleaded guilty to one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), pursuant to a plea agreement. 11-cr-20631 Plea Agreement 1; Pet. App. A9, at 1.

A conviction for violating 18 U.S.C. 922(g)(1) has a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment, 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the "elements clause," and the portion beginning with "otherwise" is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court explained that "physical force" under the ACCA's elements clause "means violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140.

In the plea agreement, the government agreed to dismiss the other felon-in-possession count. 11-cr-20631 Plea Agreement 1. The government also agreed to dismiss the remaining two counts if petitioner was found at sentencing to have three prior convictions for violent felonies or serious drug offenses under 18 U.S.C. 924(e)(1). 11-cr-20631 Plea Agreement 1. Petitioner and the government stipulated in the plea agreement that petitioner had prior felony convictions for armed robbery, aggravated assault with a deadly weapon, felony battery, and fleeing or attempting to elude a police officer in a motor vehicle, all in violation of Florida law. Id. at 1-2.

The Probation Office classified petitioner as an armed career criminal under the ACCA based on his prior Florida convictions. PSR ¶¶ 22, 31; see PSR ¶¶ 26-29. The district court imposed a sentence of 180 months of imprisonment. Pet. App. A9, at 2. The government dismissed the remaining counts of the superseding indictment. 11-cr-20631 D. Ct. Doc. 31, at 1 (Feb. 27, 2012). Petitioner did not appeal his conviction or sentence. Pet. App. A6, at 2.

3. In 2015, this Court held in Samuel Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557. The Court subsequently made clear that Samuel Johnson's holding is a substantive rule that applies retroactively. See Welch, 136 S. Ct. at 1265.

Following this Court's decision in Samuel Johnson, petitioner moved to vacate his sentence under 28 U.S.C. 2255. 15-cv-23059 D. Ct. Doc. 1, at 1-7. Petitioner, proceeding pro se, contended that Samuel Johnson's invalidation of the residual clause meant that none of his prior Florida convictions qualified as a violent felony under the ACCA. Id. at 3-4. A magistrate judge recommended that petitioner's Section 2255 motion be denied because his prior convictions for felony battery, aggravated assault with a deadly weapon, and armed robbery qualified as violent felonies under the ACCA's elements clause. Pet. App. A7, at 24-26, 29.

Petitioner, still proceeding pro se, objected to the magistrate judge's recommendation, arguing that "at least two" of

his prior convictions -- for aggravated assault with a deadly weapon and fleeing or attempting to elude a police officer in a motor vehicle -- did not qualify as violent felonies under the ACCA's elements clause. 15-cv-23059 D. Ct. Doc. 10, at 3 (Oct. 20, 2015); see id. at 3-6. In response, the government agreed that petitioner's prior conviction for fleeing or attempting to elude a police officer in a motor vehicle no longer qualified as an ACCA predicate. 15-cv-23059 D. Ct. Doc. 13, at 7-8 (Nov. 22, 2015). The government argued, however, that petitioner's other three prior convictions -- for armed robbery, aggravated assault with a deadly weapon, and felony battery -- qualified as violent felonies under the ACCA's elements clause. Id. at 8. Petitioner filed supplemental objections, contending that his prior conviction for felony battery did not satisfy that clause. 15-cv-23059 D. Ct. Doc. 14, at 2-10 (Dec. 8, 2015).

The district court denied petitioner's Section 2255 motion. Pet. App. A6, at 1-8. The court observed that petitioner had not objected to the magistrate judge's determination that his prior conviction for armed robbery qualified as a violent felony. Id. at 4. The court then overruled petitioner's objections to the magistrate judge's determinations that his prior convictions for aggravated assault with a deadly weapon and felony battery satisfied the ACCA's elements clause. Id. at 4-7. The court denied petitioner's request for a COA. Id. at 7.

4. Petitioner, represented by counsel, filed a motion for a COA in the court of appeals. Pet. C.A. Mot. for COA 1-19. Petitioner argued that he was entitled to a COA on the question "[w]hether the district court erred in denying [his] claim that he was wrongly sentenced as an armed career criminal," id. at 17, noting that the government had acknowledged that fleeing or attempting to elude a police officer in a motor vehicle no longer qualified as a violent felony, id. at 6, and asserting the existence of "cognizable legal arguments that each of the three remaining prior convictions should not qualify as a predicate offense," ibid.

The court of appeals denied a COA. Pet. App. A5, at 1. Petitioner filed a motion for reconsideration. Pet. App. A4, at 1-24. While that motion was pending, a divided panel of the court in United States v. Vail-Bailon, 838 F.3d 1091 (11th Cir. 2016), vacated, No. 15-10351 (Nov. 21, 2016), determined that Florida felony battery did not satisfy a definition of "crime of violence" in Sentencing Guidelines § 2L1.2 (2014) that is worded identically to the ACCA's elements clause. 838 F.3d at 1093-1098. The court in this case declined to reconsider its order denying petitioner a COA. Pet. App. A3, at 1. The court subsequently granted the government's petition for rehearing en banc in Vail-Bailon. 11/21/16 Order at 1-2, Vail-Bailon, supra (No. 15-10351).

Petitioner filed a petition for a writ of certiorari, arguing that the court of appeals erred in denying a COA permitting him to

challenge the district court's determination that Florida felony battery qualifies as a violent felony. 16-7535 Pet. 9-15. In response, the government acknowledged that, in light of the pending en banc proceedings in Vail-Bailon, petitioner had "sufficiently established that the constitutional question [that his Section 2255 motion] presents is, at this time, reasonably debatable." 16-7535 U.S. Mem. 3. This Court granted the petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case "for further consideration in light of the position asserted by the Acting Solicitor General." Pet. App. A2, at 1.

5. a. While petitioner's case was pending on remand, the court of appeals issued its en banc decision in Vail-Bailon. United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017) (en banc), cert. denied, 138 S. Ct. 2620 (2018). In Vail-Bailon, the en banc court of appeals determined that Florida felony battery categorically qualifies as a "crime of violence" under the clause of Sentencing Guidelines § 2L1.2 (2014) that is worded identically to the ACCA's elements clause. Vail-Bailon, 868 F.3d at 1299.

The en banc court of appeals in Vail-Bailon first explained that this Court's decision in Curtis Johnson "articulates the standard [the court of appeals] should follow in determining whether an offense calls for the use of physical force, and th[e] test is whether the statute calls for violent force that is capable of causing physical pain." Vail-Bailon, 868 F.3d at 1302. The

court of appeals declined to adopt the defendant's alternative definition of force that is "likely to cause" injury, which was based not on any language in Curtis Johnson itself, but was instead a gloss on "words found in a cited circuit court decision." Id. at 1301. "Indeed," the court observed, "to [its] knowledge, no court has ever defined physical force to mean force that is 'likely to cause pain.'" Ibid.

The court of appeals next determined that, "[b]y its plain terms, felony battery in violation of Florida Statute § 784.041 requires the use of physical force as defined by Curtis Johnson." Vail-Bailon, 868 F.3d at 1303. The Florida felony battery statute provides that "[a] person commits felony battery if he or she: (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." Fla. Stat. § 784.041(1) (2001). The court explained that Florida felony battery requires the intentional use of force "that causes the victim to suffer great bodily harm" and that such force is necessarily "capable of causing pain or injury." Vail-Bailon, 868 F.3d at 1303. The court also observed that Florida courts have repeatedly held that felony battery "cannot be committed without the use of physical force or violence," under a definition of "physical force" that requires "more than mere touching." Id. at 1304 (quoting Dominguez v. State, 98 So. 3d 198, 200 (Fla. Dist. Ct. App. 2012)); see id. at 1303-1304. The court accordingly found

that Florida law foreclosed the defendant's argument that "it is possible for an offender to violate Florida Statute § 784.041 by engaging in conduct that consists of no more than a slight touch or nominal contact." Id. at 1305.

The court of appeals then rejected the defendant's efforts to portray the Florida statute more broadly, which involved postulating "farfetched hypotheticals" involving "relatively benign conduct combined with unlikely circumstances and a bizarre chain of events that result in an unforeseeable injury" -- for example, tapping someone who is startled and falls down a staircase; tickling someone who falls out of a window; or applying lotion to the skin of someone who has an unknown but severe allergy. Vail-Bailon, 868 F.3d at 1305-1306. The court found "no support in Florida law for the idea" that Florida felony battery "is designed to criminalize the conduct described in the proffered hypotheticals." Id. at 1306. It also noted that the defendant had not "shown that prosecution under Florida Statute § 784.041 for the conduct described in the hypotheticals is a realistic probability." Ibid. (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).

b. After the en banc decision in Vail-Bailon, the court of appeals in this case denied petitioner's request for a COA. Pet. App. A1, at 1-2. The court determined that, in light of its en banc decision in Vail-Bailon, petitioner had "failed to make the requisite showing needed to justify the grant of a COA" on the

question whether Florida felony battery qualifies as an ACCA predicate. Pet. App. A1, at 2. The court also determined that petitioner was not entitled to a COA on his claim that Florida aggravated assault with a deadly weapon does not qualify as an ACCA predicate. Id. at 2 n.1.

ARGUMENT

Petitioner contends (Pet. 8-22, 36-39) that his prior Florida convictions for felony battery and aggravated assault with a deadly weapon do not qualify as "violent felon[ies]" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i). The court of appeals correctly denied a COA on those questions, and its decision does not conflict with any decision of this Court or of another court of appeals. This Court has repeatedly and recently denied petitions for writs of certiorari raising similar questions, and further review of those questions is likewise unwarranted here.

Petitioner additionally contends (Pet. 22-36) that his prior conviction for armed robbery, in violation of Fla. Stat. § 812.13 (2001), is not a conviction for a "violent felony" under the ACCA's elements clause. The Court is currently considering a related question in Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018). The petition for a writ of certiorari should therefore be held pending the decision in Stokeling and then disposed of as appropriate in light of that decision.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under 28 U.S.C. 2255 must obtain a

COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted).

Contrary to petitioner's contention, the court of appeals did not "[m]isappl[y]" that standard. Pet. 39 (emphasis omitted). Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck v. Davis, 137 S. Ct. 759, 773 (2017), the Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that] the issues presented are adequate to deserve encouragement to proceed further," ibid. (citation omitted). At the time of the court of appeals' order here, petitioner's claims that his prior Florida convictions could qualify as ACCA predicates only by resort to the now-invalidated residual clause did not "deserve encouragement to proceed further," ibid. (citation omitted), given that all of his arguments were squarely foreclosed by circuit precedent and this Court had not yet granted review in Stokeling, see United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017) (en banc), cert. denied, 138 S. Ct. 2620 (2018); United States v. Fritts, 841 F.3d 937 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017); Turner v. Warden

Coleman FCI (Medium), 709 F.3d 1328 (11th Cir.), cert. denied, 570 U.S. 925 (2013).

2. Petitioner contends (Pet. 9-22) that his prior conviction for Florida felony battery, in violation of Fla. Stat. § 784.041 (2001), does not qualify as a "violent felony" under the ACCA's elements clause because it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force," 18 U.S.C. 924(e)(2)(B)(i). This Court has recently and repeatedly declined to review similar questions about whether Florida felony battery is a violent felony under the ACCA's elements clause or a crime of violence under the Sentencing Guidelines, and the same result is warranted here. See Gathers v. United States, cert. denied, 138 S. Ct. 2622 (2018) (No. 17-7694); Green v. United States, cert. denied, 138 S. Ct. 2620 (2018) (No. 17-7299); Robinson v. United States, cert. denied, 138 S. Ct. 2620 (2018) (No. 17-7188); Vail-Bailon v. United States, cert. denied, 138 S. Ct. 2620 (2018) (No. 17-7151).[1]

a. In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court held that an offender uses "'physical force'" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B)(i), when he uses "violent force -- that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140; see Sessions v.

[1] Similar questions are also raised in the pending petitions for writs of certiorari in Solis-Alonzo v. United States, No. 17-8703 (filed Apr. 30, 2018); Flowers v. United States, No. 17-9250 (filed May 9, 2018); and Makonnen v. United States, No. 18-5105 (filed June 29, 2018).

Dimaya, 138 S. Ct. 1204, 1220 (2018) (noting that "this Court has made clear that 'physical force' means 'force capable of causing physical pain or injury'") (quoting Curtis Johnson, 559 U.S. at 140). The Court concluded that the offense at issue in Curtis Johnson itself -- simple battery under Florida law, which requires only an intentional touching and may be committed by "[t]he most 'nominal contact,' such as a 'tap on the shoulder without consent'" -- does not categorically require such force. 559 U.S. at 138 (quoting State v. Hearns, 961 So. 2d 211, 219 (Fla. 2007)) (brackets and ellipses omitted).

Application of Curtis Johnson's definition of "force" to the different offense at issue here, however, yields a different result. In contrast to the offense at issue in Curtis Johnson, Florida felony battery requires not only that an offender intentionally touch or strike another person against that person's will, but also that the offender "cause[] great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1) (2001). Because Florida felony battery requires force that actually causes great bodily injury, it necessarily requires "force capable of causing physical pain or injury" under Curtis Johnson, 559 U.S. at 140 (emphasis added). The en banc court of appeals in Vail-Bailon thus correctly determined that under "the plain language of Curtis Johnson" and its "definition of physical force," Florida felony battery has the "use of force" as an element. 868 F.3d at 1302.

b. Petitioner errs in asserting (Pet. 9) the existence of an "intense circuit split" about the proper application of Curtis Johnson's definition of "physical force" to offenses involving causation of bodily injury.

Petitioner relies (Pet. 16-17) on decisions from the First, Second, Fourth, Fifth, and Tenth Circuits, which he suggests have "recognized that causation of harm need not require the use of violent force" under Curtis Johnson. But with one exception, each of those circuits has taken a contrary position following this Court's decision in United States v. Castleman, 134 S. Ct. 1405 (2014). Castleman held that the term "use of physical force" as used in 18 U.S.C. 922(g)(9) encompasses the indirect application of force leading to physical harm. See 134 S. Ct. at 1414-1415; see also id. at 1416-1417 (Scalia, J., concurring in part and concurring in the judgment) (explaining that "it is impossible to cause bodily injury without using force 'capable of' producing that result"). In light of Castleman, the First, Second, Fourth, and Tenth Circuits have all retreated from the decisions that petitioner cites (Pet. 16-17) for his argument that "violent force is measured by the degree or quantum of force, not the resulting harm." See United States v. Edwards, 857 F.3d 420, 426 n.11 (1st Cir.) (suggesting that Whyte v. Lynch, 807 F.3d 463, 469 (1st Cir. 2015), is inconsistent with Castleman), cert. denied, 138 S. Ct. 283 (2017); United States v. Hill, 832 F.3d 135, 143-144 (2d Cir. 2016) (recognizing that Chrzanoski v. Ashcroft, 327 F.3d 188 (2d

Cir. 2003), has been abrogated by Castleman); United States v. Covington, 880 F.3d 129, 134 (4th Cir.) (recognizing that United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012), has been abrogated by Castleman), cert. denied, 138 S. Ct. 2588 (2018);[2] United States v. Kendall, 876 F.3d 1264, 1270-1271 (10th Cir. 2017) (recognizing that United States v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005), has been abrogated by Castleman), cert. denied, 138 S. Ct. 1582 (2018).

The sole exception is the Fifth Circuit's decision in United States v. Rico-Mejia, 859 F.3d 318 (2017), which the Fifth Circuit recently reaffirmed in United States v. Reyes-Contreras, 882 F.3d 113 (2018). But the government petitioned for rehearing en banc on the relevant issue, and the Fifth Circuit has granted the government's petition. See United States v. Reyes-Contreras, 892 F.3d 800 (2018) (en banc). The Fifth Circuit's order granting en banc review vacates the panel opinion. See 5th Cir. R. 41.3. The

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[2] In United States v. Middleton, 883 F.3d 485 (2018), the Fourth Circuit held that South Carolina involuntary manslaughter, which applies where the defendant kills another person unintentionally while acting with "reckless disregard of the safety of others," is not a violent felony under the ACCA. Id. at 489 (citation omitted). The court noted that the statute had been applied to a defendant who sold alcohol to high school students who then shared the alcohol with another person who drove while intoxicated, crashed his car, and died. Ibid. The Fourth Circuit concluded that conduct leading to bodily injury through so "attenuated a chain of causation" did not qualify as a use of violent force. Id. at 492. Unlike the statute at issue in Middleton, the Florida felony battery statute has no application to "illegal sale[s]," ibid.; it requires a direct touching or striking that inflicts "great bodily harm," Fla. Stat. § 784.041(1) (2001).

Fifth Circuit now has the opportunity to adopt the uniform view of the other courts of appeals and to resolve any division that may have existed. In any event, the Fifth Circuit's decisions have focused on indirect use of force "without any bodily contact," not on an intentional touching or striking that causes physical injury. Reyes-Contreras, 882 F.3d at 123 (citation and internal quotation marks omitted).

Petitioner acknowledges (Pet. 17) that the courts of appeals "have limited" the holdings he cites in support of his position, but he nonetheless contends that they have done so only in cases that "involved the intentional or knowing causation of harm" or in cases addressing indirect applications of force such as the administration of poison. To begin with, not all of the relevant decisions have required the intentional causation of harm. See, e.g., Kendall, 876 F.3d at 1267 (concluding that D.C. Code § 22-405(c) (2009), which requires interference with a law enforcement officer that results in "significant bodily injury" to the officer, constitutes a "crime of violence" under Sentencing Guidelines § 4B1.2). More fundamentally, petitioner's attempt to factually distinguish decisions that apply the same legal rule does not suggest a circuit conflict. At bottom, petitioner identifies no decision holding that "use of physical force" means anything other than what this Court said it meant in Curtis Johnson: "force capable of causing physical pain or injury to another person." 559 U.S. at 140 (citation omitted). Nor does petitioner identify

any decision holding that a state statute similar to Florida's felony battery statute falls outside of the definition of a violent felony. See Douglas v. United States, 858 F.3d 1069, 1071-1072 (7th Cir.) (determining that Indiana's felony battery statute, which requires offensive touching and "serious bodily injury," qualifies as a violent felony under the ACCA's elements clause), cert. denied, 138 S. Ct. 565 (2017).

c. Petitioner separately contends (Pet. 21-22) that the court of appeals in Vail-Bailon erred in determining that Florida case law did not support a broad construction of the Florida felony battery statute that would encompass various hypothetical scenarios involving mere touches that lead to catastrophic injuries. He further contends (Pet. 18-22) that the courts of appeals are divided over the showing required under Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), to establish "a realistic probability" that a State "would apply its statute to conduct that falls outside" a particular federal definition, id. at 193. This Court has recently denied petitions for writs of certiorari raising similar arguments, see Vazquez v. Sessions, 138 S. Ct. 2697 (2018) (No. 17-1304); Gathers v. United States, supra (No. 17-7694); Espinosa-Bazaldua v. United States, 138 S. Ct. 2621 (2018) (No. 17-7490); Green v. United States, supra (No. 17-7299); Robinson v. United States, supra (No. 17-7188); Vail-Bailon v. United States, supra (No. 17-7151), and it should do the same here.

The court of appeals in Vail-Bailon did not apply Duenas-Alvarez in a way that implicates any circuit division.

As a general matter, to determine whether a prior conviction supports a sentencing enhancement like the one specified in the ACCA, courts employ a "categorical approach" under which they compare the definition of the state offense with the relevant federal definition. See, e.g., Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). In evaluating the definition of a state offense, courts must look to the "interpretation of state law" by the State's highest court. Curtis Johnson, 559 U.S. at 138. If the definition of the state offense is broader than the relevant federal definition, the prior state conviction does not qualify. Mathis, 136 S. Ct. at 2248. This Court has cautioned, however, that the categorical approach "is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside'" the federal definition. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (quoting Duenas-Alvarez, 549 U.S. at 193); see Taylor v. United States, 495 U.S. 575, 602 (1990) (holding that the categorical approach is satisfied if the "statutory definition [of the prior conviction] substantially corresponds to [the] 'generic' [definition]").

Petitioner contends (Pet. 19-22) that the courts of appeals have divided over the application of Duenas-Alvarez's "realistic

probability" test. He asserts (Pet. 21) that, in the Fifth Circuit's view, a defendant establishes the requisite probability only by demonstrating that the State actually prosecutes the nonqualifying conduct under the relevant statute. In contrast, according to petitioner (Pet. 19-21), the First, Third, Sixth, Ninth, and Tenth Circuits have taken the position that the "realistic probability" test is satisfied if a state statute on its face describes an offense that is broader than the relevant federal definition.

To the extent that any such division exists, this case does not implicate it. The decision below merely followed the en banc decision in Vail-Bailon. See Pet. App. A1, at 2. And in Vail-Bailon, the Eleventh Circuit explained that, "[b]y its plain terms, felony battery in violation of Florida Statute § 784.041 requires the use of physical force as defined by Curtis Johnson." 868 F.3d at 1303. In other words, the court in Vail-Bailon determined that the state statute was not overbroad on its face. See id. at 1302-1303. The court then bolstered its application of Curtis Johnson by looking to Florida case law, explaining that its determination was consistent with state decisions confining the Florida felony battery statute to actions taken with sufficient physical force or violence. See id. at 1303-1304. Only then did the court reject the defendant's counterargument that the Florida felony battery statute could be "applied to penalize freak accidents," id. at 1306, observing that Florida law does not appear

to cover those sorts of "freak accidents" at all, ibid. See Gov't C.A. En Banc Br. at 44-46, Vail-Bailon, supra (No. 15-10351) (explaining that Florida limits offenses based on proximately caused injuries) (citing, e.g., Tipton v. State, 97 So. 2d 277, 281 (Fla. 1957)).

Accordingly, the decision here does not implicate any disagreement among other circuits involving the application of Duenas-Alvarez to statutes that are overbroad on their face. And for similar reasons, the resolution of the Duenas-Alvarez question in petitioner's favor would not change the outcome of the case, because the decisions in both Vail-Bailon and in this case rest in the first instance on a straightforward application of Curtis Johnson to the text of the Florida felony battery statute.

3. Petitioner separately contends (Pet. 36-39) that his prior conviction for aggravated assault with a deadly weapon, in violation of Fla. Stat. § 784.021(1)(a) (1997), also does not qualify as a "violent felony" under the ACCA's elements clause. This Court has recently declined review of that issue in other cases. See Nedd v. United States, cert. denied, 138 S. Ct. 2649 (2018) (No. 17-7542); Jones v. United States, cert. denied, 138 S. Ct. 2622 (2018) (No. 17-7667).[3] The same result is warranted here.

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[3] The same issue is also raised in the pending petitions for writs of certiorari in Griffin v. United States, No. 17-8260 (filed Mar. 13, 2018), and Flowers v. United States, supra (No. 17-9250).

a. Florida aggravated assault with a deadly weapon, in violation of Fla. Stat. § 784.021(1)(a) (1997), categorically requires the threat of force capable of causing physical pain or injury. The offense requires an assault "[w]ith a deadly weapon without intent to kill." Ibid. An "assault" is defined as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Fla. Stat. § 784.011(1) (1997) (emphasis added). And under Florida law, an instrument is a "deadly weapon" if it "will likely cause death or great bodily harm when used in the ordinary and usual manner contemplated by its design" or is "used or threatened to be used in a way likely to produce death or great bodily harm." Michaud v. State, 47 So. 3d 374, 376 (Fla. Dist. Ct. App. 2010).

A Florida conviction for aggravated assault necessarily "has as an element the use, attempted use, or threatened use of force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), because it requires a threat "to do violence to the person of another," Fla. Stat. § 784.011(1) (1997); see Turner, 709 F.3d at 1338 (determining that Florida aggravated assault "will always include 'as an element the . . . threatened use of physical force against the person of another'" because it "necessarily includes an assault, which is 'an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent

ability to do so'") (citations and emphasis omitted). The additional element of use of a "deadly weapon," Fla. Stat. § 784.021(1)(a) (1997), required for petitioner's conviction, further establishes that his aggravated assault crime required at least the "threatened use of physical force," 18 U.S.C. 924(e)(2)(B)(i); see, e.g., United States v. Taylor, 848 F.3d 476, 493-494 (1st Cir.) (determining that assault with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(b), is an ACCA violent felony), cert. denied, 137 S. Ct. 2255 (2017). To satisfy that element, a defendant must use in the assault an instrument that is likely to cause great bodily harm. See Vitko v. State, 363 So. 2d 42, 43 (Fla. Dist. Ct. App. 1978) (use of deadly weapon for purposes of Florida aggravated assault requires more than merely carrying a weapon); see also, e.g., Rodriguez v. State, 594 So. 2d 318, 319 (Fla. Dist. Ct. App. 1992) (defendant "use[d]" a deadly weapon by "pointing a pistol at the victim to secure acquiescence to his acts of simple battery").

b. Petitioner contends (Pet. 36-39) that Florida aggravated assault with a deadly weapon may be committed by reckless conduct and that such conduct does not satisfy the ACCA's elements clause. But even assuming that a conviction for aggravated assault with a deadly weapon under Florida law may be based on reckless conduct, petitioner errs in asserting that such conduct would not satisfy the ACCA's elements clause.

In Voisine v. United States, 136 S. Ct. 2272 (2016), this Court held that a conviction for reckless causation of physical harm involves the "use * * * of physical force," for purposes of the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. 921(a)(33)(A)(ii) and 922(g)(9). 136 S. Ct. at 2276-2280. The Court explained that the harm caused by "reckless behavior" -- which requires undertaking an act "with awareness of the[] substantial risk of causing injury" -- "is the result of a deliberate decision to endanger another" and thus not an "accident." Id. at 2279. The Court therefore determined that the word "use" includes "the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of [the defendant's] volitional conduct." Ibid.

The Court's reasoning in Voisine fully supports the inclusion of reckless conduct in the identical phrase "use * * * of physical force" under the ACCA's elements clause. Numerous courts of appeals have accordingly applied Voisine's logic to the ACCA or to Sentencing Guidelines provisions that employ the same language. See, e.g., United States v. Haight, 892 F.3d 1271, 1280-1281 (D.C. Cir. 2018); United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017); United States v. Pam, 867 F.3d 1191, 1207-1208 (10th Cir. 2017); see also United States v. Mendez-Henriquez, 847 F.3d 214, 220-221 (5th Cir.) (applying Voisine's reasoning to conclude that reckless conduct is included in Sentencing Guidelines § 2L1.2's "crime of violence"

definition), cert. denied, 137 S. Ct. 2177 (2017); United States v. Howell, 838 F.3d 489, 501 (5th Cir. 2016) (same, with respect to Sentencing Guidelines § 4B1.2(a)'s "crime of violence" definition), cert. denied, 137 S. Ct. 1108 (2017); United States v. Verwiebe, 874 F.3d 258, 262 (6th Cir. 2017) (same, with respect to Sentencing Guidelines § 4B1.2(a)'s "crime of violence" definition), petition for cert. pending, No. 17-8413 (filed Apr. 3, 2018); United States v. Benally, 843 F.3d 350, 354 (9th Cir. 2016) (noting that Voisine suggested that reckless conduct may constitute a "crime of violence" under 18 U.S.C. 16, but declining to reach the issue where the challenged statute required "only gross negligence").

c. Petitioner does not point to any conflict among the courts of appeals on whether Florida aggravated assault with a deadly weapon qualifies as a violent felony under the ACCA's elements clause. See United States v. Pittro, 646 Fed. Appx. 481, 485 (6th Cir. 2016) (concluding that Florida aggravated assault satisfies the ACCA's elements clause); United States v. Koenig, 410 Fed. Appx. 971, 973 (7th Cir. 2010) (same); see also United States v. Alonzo-Garcia, 542 Fed. Appx. 412, 416 (5th Cir. 2013) (per curiam) (concluding that Florida aggravated assault satisfies the elements clause of Sentencing Guidelines § 2L1.2's "crime of violence" definition).

Petitioner is correct (Pet. 39), however, that the First Circuit has departed from the approach followed by other courts of

appeals on the question whether reckless conduct can qualify as the "use" of force under the ACCA. In a decision issued after the petition for a writ of certiorari was filed, the First Circuit made clear that its precedent "forecloses the argument that crimes with a mens rea of recklessness may be violent felonies under [the ACCA's] force clause." United States v. Rose, 896 F.3d 104, 109 (2018). But that shallow conflict does not warrant review in this case. This case arises in a COA posture, and it is far from clear that the relevant offense -- which requires, inter alia, "an intentional unlawful threat by word or act to do violence to the person of another," Fla. Stat. § 784.011(1) (1997) (emphasis added); see id. § 784.021(1)(a) -- can be committed through reckless conduct alone. Petitioner's interpretation (Pet. 37) of the state law as permitting conviction in such circumstances does not rest on any definitive interpretation by the Supreme Court of Florida and was not explored in the lower courts.

4. Petitioner contends (Pet. 22-35) that his prior conviction for armed robbery, in violation of Fla. Stat. § 812.13 (2001), was not a conviction for a "violent felony" under the ACCA's elements clause. As petitioner observes (Pet. 35-36), that issue relates to the issue currently before this Court in Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018), which will address whether a defendant's prior conviction for robbery

under Section 812.13 satisfies the ACCA's elements clause.[4] The petition for a writ of certiorari should therefore be held pending the Court's decision in Stokeling and disposed of as appropriate in light of that decision.

CONCLUSION

With respect to the third question presented, the petition for a writ of certiorari should be held pending the decision in Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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[4] Petitioner observes (Pet. 32-33) that under Section 812.13(2), a defendant could be convicted of armed robbery without any showing that the weapon was used or displayed. In determining that armed robbery under Florida law qualifies as a violent felony, however, the court of appeals has not relied on the "armed" nature of the robbery. Pet. 32. Rather, the court has reasoned that a Florida robbery conviction, "even without a firearm," satisfies the elements clause. Fritts, 841 F.3d at 940.