No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLARD QUINN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PROOF OF SERVICE

State of Illinois)
) ss
County of Champaign)

COLLEEN C.M. RAMAIS, being first duly sworn on oath, deposes and states as follows:

1. That on June 29, 2018, the original and ten copies of the petition for writ of certiorari and motion to proceed *in forma pauperis* in the above-entitled case were deposited with Federal Express in Urbana, Champaign County, Illinois,

properly addressed to the Clerk of the United States Supreme Court and within the time for filing said petition for writ of certiorari; and

2. That an additional copy of the petition for writ of certiorari and motion to proceed *in forma pauperis* were served upon the following counsel of record for Respondent:

Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530

Mr. David E. Hollar
Assistant United States Attorney
Office of the United States Attorney
5400 Federal Plaza, Suite 1500
Hammond, IN 46320

WILLARD QUINN, Petitioner

THOMAS W. PATTON
Federal Public Defender

s/ Colleen C.M. Ramais
COLLEEN C.M. RAMAIS
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COUNSEL OF RECORD FOR PETITIONER

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLARD QUINN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Now comes the petitioner, Willard Quinn, by his undersigned federal public defender, and pursuant to 18 U.S.C. § 3006A, and Rule 39.1 of this Court, respectfully requests leave to proceed *in forma pauperis* before this Court, and to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit without prepayment of filing fees and costs.

In support of this motion, petitioner states that he is indigent, was sentenced to a term of imprisonment in the United States Bureau of Prisons, and was

represented by the undersigned counsel pursuant to 18 U.S.C. § 3006A in the United States Court of Appeals for the Seventh Circuit.

WILLARD QUINN, Petitioner

THOMAS W. PATTON
Federal Public Defender

s/ Colleen C.M. Ramais
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Date: June 29, 2018

No. _____

IN THE

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WILLARD QUINN,
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v.

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On Petition for a Writ of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the force clause of the Sentencing Guidelines' definition of "crime of violence" can be satisfied by a statutory requirement that a defendant's actions "result in" injury to another, where the statute does not otherwise require the use or threatened use of violent force.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

WILLARD QUINN,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Willard Quinn respectfully prays that a writ of certiorari issue to review the unpublished order of the United States Court of Appeals for the Seventh Circuit, issued on April 2, 2018, affirming the petitioner's conviction and sentence.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit appears in Appendix A to this Petition. In this decision, the Seventh Circuit

summarily affirmed Mr. Quinn's sentence on the basis of its decision in *Douglas v. United States*, 858 F.3d 1069 (7th Cir.), *cert. denied*, 138 S. Ct. 565 (2017).

JURISDICTION

Petitioner seeks review of the final decision of the Court of Appeals entered on April 2, 2018. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner was sentenced under Section 2K2.1 of the Sentencing Guidelines, which applies a higher base offense level to a defendant's possession of a weapon when the defendant has previously been convicted of a felony "crime of violence." *Compare* U.S.S.G. § 2K2.1(a)(4)(A) *with* U.S.S.G. § 2K2.1(a)(6). For purposes of this section, "crime of violence" is defined by reference to Section 4B1.2 of the Guidelines, which, in turn, defines it as:

> [A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 2K2.1 n.1; U.S.S.G. § 4B1.2(a). The heightened base offense level was applied based on Mr. Quinn's prior Indiana conviction for battery resulting in serious bodily injury, a Class C felony, under the following statute:

> A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits a battery, a Class B misdemeanor. However, the offense is:
>
> …
>
> (3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon.

Ind. Code § 35-42-2-1, Sec. 1(a) (2007).

STATEMENT OF THE CASE

This case presents an opportunity for the Court to continue to clarify the scope of the definition of "crime of violence" under the force clause for purposes of the Sentencing Guidelines and to resolve a circuit split concerning the clause's applicability to statutes which require that a defendant's conduct result in injury rather than explicitly requiring the use of violent force.

A. Legal Background

The definition of a "crime of violence" arises in many contexts throughout the Guidelines, affecting the advisory sentencing range for felons in possession of a firearm, drug offenders, and immigration offenders, among others. *See, e.g.*, U.S.S.G. §§ 2K2.1(a), 2L1.2(b), 4B1.1(a). In analyzing the identically-worded "force" clause of the definition of "violent felony" found in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), this Court held that "physical force" is not equivalent to the common law definition of force. *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). Rather, to be considered a "violent felony," a statute must require the exertion of "a substantial degree of force," as "the phrase 'physical force' means

violent force – that is, force capable of causing physical pain or injury to another person." *Id.* (emphasis in original). The Circuit Courts have construed the provision of the Guidelines interchangeably with the language in the Armed Career Criminal Act. *See, e.g.*, *United States v. Woods*, 576 F.3d 400, 403-04 (7th Cir. 2009).

However, the standard of "force capable of causing physical pain or injury to another person" has left some room for interpretation. As courts have applied this standard to various statutes which have, as an element, some measure of injury, a circuit split has emerged as to whether an injury necessarily requires the use of force described in *Curtis Johnson*. This case presents the Court with an opportunity to address this grey area in the law: whetre a statute requires an injury, is it appropriate to read-in a violent force requirement, so as to conclude that the statute has, "as an element, the use, attempted use, or threatened use of force." U.S.S.G. § 4B1.2(a). This issue reaches well beyond the particular state statute at hand and are broadly connected to the implementation of the Sentencing Guidelines. Finally, the objection to classifying this prior conviction as a crime of violence was fully raised and argued in the court of appeals, and this case provides the Court with a clean vehicle for clarifying the application of the Guidelines. The petition should be granted.

B. Factual Background

1. The United States charged petitioner with violating Section 922(g)(1) after he possessed a firearm as a felon in July 2016. 18 U.S.C. § 922(g)(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Petitioner pleaded

guilty. The district court sentenced him to 57 months' imprisonment, followed by a two-year term of supervised release, after calculating his advisory sentencing range at 51-63 months' imprisonment. This determination rested in part on the district court's conclusion that petitioner's prior Indiana conviction for battery resulting in serious bodily injury constituted a "crime of violence" for purposes of Section 2K2.1(a)(4)(A) of the Sentencing Guidelines, which raised the base offense level to 20 from 14. The district court applied the heightened base offense level, concluding that it was bound by the Seventh Circuit's holding in *Douglas v. United States*, 858 F.3d 1069 (7th Cir. 2017).

2. In the court of appeals, petitioner again challenged the characterization of his prior offense as a crime of violence under the Guidelines. Petitioner argued that Indiana law only requires an intentional touching of another person, "in a rude, insolent, or angry manner," for the commission of battery, and that the resulting injury does not require a direct causal link to the battery such that *violent* force is necessary to support a conviction under the statute. Ind. Code § 35-42-2-1, Sec. 1(a) (2007). On its face, the force required by the statute is no more than was rejected by this Court in *Curtis Johnson*. Indeed, Indiana courts have confirmed that "[e]vidence of touching, however slight, is sufficient to support a conviction for battery." *Wolf v. State*, 76 N.E.3d 911, 915 (Ind. App. 2017). This is true even when the state must prove that the touching resulted in injury to another person. *Id.* Petitioner argued that a force element that can be satisfied by such minimal physical contact does not require proof that a defendant used or threatened

violent force "capable of causing physical pain or injury to another person" even when it "results in" injury to another and is, accordingly, too broad to qualify as crime of violence. Ind. Code § 35-42-2-1, Sec. 1(a)(3) (2007); *Curtis Johnson*, 559 U.S. at 140.

In support of his argument, petitioner pointed to Indiana case law that concluded that the offensive touch does not have to directly cause the injury to support a conviction for battery resulting in serious bodily injury. In *Thompson v. State*, the Court of Appeals of Indiana contemplated a case where the defendant shoved his ex-wife during a heated argument. 82 N.E.3d 376, 378 (Ind. App. 2017). The ex-wife tripped, twisted her ankle, and, as she fell, she struck her boyfriend's elderly grandmother in the mouth, causing the grandmother to fall and fracture her tailbone and a vertebra in her back. *Id.* at 378-79. The defendant was convicted of battery resulting in injury based on his touching of his ex-wife and her twisted ankle, and battery resulting in serious bodily injury based on his touching of his ex-wife and the grandmother's fractured bones. *Id.* at 379. The court of appeals rejected the defendant's challenge to the second conviction, concluding that nothing in the statute "requires the injured 'person' to be the same 'person' who was touched." *Id.* at 381 (quoting Ind. Code § 35-42-2-1 (2014)). Accordingly, it held that "the statutory definition of battery does not preclude a charge based on one person being touched and a second person being injured as a result of that touching." *Id.* at 381-82.

Though the conduct in *Thompson* resulted in direct injury to the ex-wife and was likely forceful, there is nothing in the law to preclude a conviction for serious bodily injury resulting from a mere offensive touch. For example, if Thompson's ex-wife had stepped back in reaction to an offensive touch, bumping into the grandmother and resulting in the same broken bones, Thompson's actions would still support a conviction for battery resulting in serious bodily injury, but his use of force would remain within the common law definition of force, and not rise to the level of violent physical force.

3. The court of appeals affirmed the district court's Guidelines calculation, holding that petitioner's conviction for battery resulting in serious bodily injury was, categorically, a crime of violence, concluding that petitioner had not offered a compelling reason to reexamine its holding in *Douglas* that "'force that actually causes injury necessarily [is] capable of causing that injury and thus satisfies the federal definition.'" App. 2a (quoting *Douglas*, 858 F.3d at 1071) (alteration in original). The court of appeals did not address petitioner's argument that "causing" injury is necessarily distinguishable from "resulting in" injury.

As this decision was consistent with the rest of the circuit's case law, petitioner did not file a petition for rehearing or rehearing en banc.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are divided over the implementation of the Sentencing Guidelines with respect to whether a statutory element which requires injury necessarily also requires the use of violent physical force. After the

Guidelines were modified to remove the vague residual clause which included any offense which "involves conduct that presents a serious potential risk of physical injury to another" in the definition of "crime of violence," the question of whether the outcome (the injury) necessarily requires use of violent force has taken on greater importance in calculating the appropriate advisory sentencing range. U.S.S.G. § 4B1.2(a)(2) (2015).

I. The circuit court's decision results in inconsistent application of the Guidelines.

The Seventh Circuit's decision in this case highlights a division among the federal circuit courts as to the significance of an element in a statute that requires an injury as a result. This conflict erodes the core purpose of the categorical approach of *Taylor v. United States* – to ensure that the same local criminal activity is subject to the same federal penalties. 495 U.S. 575, 591 (1990). An offense which otherwise requires only minimal, nonviolent force but which has, as an element, a resulting injury, is often considered a crime of violence when committed by a defendant in the Seventh Circuit, but not necessarily when committed by a defendant in the First or Fourth Circuit, for example. These conflicts warrant the Court's attention.

Indeed, several federal courts of appeals have recognized the important distinction between an offense that has as an element an injury and one that has as an element the use of force to cause that injury, concluding that the former is broader than the latter. For example, the Second Circuit called it a "logical fallacy" to conclude "that simply because all conduct involving a risk of the use of physical

force also involves a risk of injury then the converse must be true," *Dalton v. Ashcroft*, 257 F.3d 200, 207 (2d Cir. 2001), and found that even a statute requiring the *intentional* causation of injury "does not necessarily involve the use of force," particularly when a conviction under the relevant statute could arise out of injury caused "by guile, deception, or even deliberate omission," *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195 (2d Cir. 2003) (interpreting the identical "crime of violence" language found in 18 U.S.C. § 16(a)). The court elaborated that "human experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient" or someone who causes physical impairment by placing a tranquilizer in the victim's drink. *Id.* at 195–96.

The Tenth Circuit has similarly noted the difference between an element that requires a certain *means* by which an injury occurs (*i.e.,* the use of physical force), and one which requires a certain *result* of a defendant's conduct (*i.e.*, bodily injury). *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005). *Perez-Vargas* concluded that Colorado's third degree assault statute, criminalizing "knowingly or recklessly caus[ing] bodily injury to another person or with criminal negligence … caus[ing] bodily injury to another person by means of a deadly weapon," did "not necessarily include the use or threatened use of 'physical force' as required by the Guidelines." *Id.* at 1285, 1287. The First, Fourth, and Fifth Circuits have also recognized this distinction. See *Whyte v. Lynch*, 807 F.3d 463, 471 (1st Cir. 2015) (holding that the plain language of the statute at issue, which required intentional

causation of physical injury to another person, "does not require as an element the use, attempted use, or threatened use of violent force"); *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2010) (holding that a statute which criminalizes a threat "to commit a crime which will result in death or great bodily injury to another person" did not contain, as an element, the threat of use of force); *United States v. Cracia-Cantu*, 302 F.3d 308, 312-13 (5th Cir. 2002) (employing a parallel analysis of the risk of use of force clause in 18 U.S.C. § 16(b)).

The Seventh Circuit's case law on this matter is at odds with its sister circuits. *See, e.g.*, *United States v. Jennings*, 860 F.3d 450, 458-59 (7th Cir. 2017). However, the court has also held elsewhere that a statutory element which requires that a defendant "inflicts bodily injury on or otherwise causes bodily injury to another person" is not enough, in and of itself, to render a statute a crime of violence. *United States v. Bennett*, 863 F.3d 679, 681-82 (7th Cir. 2017). In *Bennett*, the court recognized that nothing in the Indiana resisting arrest statute prevented a defendant from being convicted of felony resisting arrest should an officer be injured when a defendant tugs away from the handcuffs, or puts his arms beneath his body to prevent handcuffing, even though the conduct at issue is properly considered neither violent nor threatening. *Id.* No meaningful distinction can be drawn between "forcibly resist[ing] arrest" which "causes bodily injury to another person" and "touch[ing] another person in a rude, insolent, or angry manner" which "results in serious bodily injury to any other person." Ind. Code §§ 35-44-3-3(b)(1)(B), 35-42-2-1, Sec. 1(a)(3). This inconsistent reading of the "force" clause

necessarily results in inconsistent applications to defendants, undermining the goal of the Sentencing Guidelines of uniformity in sentencing. U.S.S.G. Ch. 1, Pt. A, Sec. 3.

II. The question presented is important.

As this Court has repeatedly emphasized, the United States Sentencing Guidelines are a "'meaningful benchmark'" in sentencing any federal criminal defendant. *Rosales-Mireles v. United States*, -- S. Ct. --, 2018 WL 3013806 at *4 (June 18, 2018) (quoting *Peugh v. United States*, 569 U.S. 530, 541 (2013)). They are, "'in a real sense[,] the basis for the sentence.'" *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) (quoting *Peugh*, 569 U.S. at 542). Though the Guidelines are advisory, due to their substantial influence on a district court's ultimate sentencing determination, a court's "'failure to calculate the correct Guidelines range constitutes procedural error.'" *Rosales-Mireles*, 2018 WL 3013806 at *5 (quoting *Peugh*, 569 U.S. at 537). The definition of a "crime of violence" arises in many contexts throughout the Guidelines, affecting the advisory sentencing range for felons in possession of a firearm, drug offenders, and immigration offenders, among others. *See, e.g.*, U.S.S.G. §§ 2K2.1(a), 2L1.2(b), 4B1.1(a). Clarity in applying this definition is crucial to achieving consistency in application of the Guidelines throughout the circuits.

This case provides this Court an opportunity to address a problematic practice that has crept into the assessment of whether a statute that does not have, on its face, an element that requires the use of violent force, but requires a resulting

injury, implicitly requires the use or threatened use of violent force. *United States v. Douglas* provides an example of the Circuit Courts returning to the "ordinary case" analysis eschewed by this Court in *Samuel Johnson v. United States*. 135 S. Ct. 2551, 2557-58 (2015). In *Douglas*, the Seventh Circuit rejected the argument that tickling could lead to a Class C felony battery conviction if the tickled person "twitches, falls, strikes his head on a coffee table, and suffers a serious injury," because the defendant-appellant could not locate "a decision in which Indiana's courts have convicted someone of committing a Class C felony battery after a light touch initiates a long causal chain that ends in serious injury." *Douglas*, 858 F.3d at 1071. While it is certainly true that most cases of battery resulting in serious bodily injury will involve the use of violent force that directly causes the serious injury, nothing in Indiana law precludes prosecution under the statute where a slight offensive touch triggers a force that then causes injury. *See supra*; *Wolf*, 76 N.E.3d at 915; *Thompson*, 82 N.E.3d at 379.

Where the plain language of the statute clearly requires the use of violent force, an inability to point to application of a statute to a situation that did not involve violent force, yet resulted in a conviction, may indeed defeat a claim that the statute is broader than it appears. However, when a statute does not, on its face, require the use or threatened use of violent force (as here, where a showing of even the slightest touch is all that is required for conviction, *see Wolf*, 76 N.E.3d at 915), sentencing courts should place the burden on the government to show that the state's interpretation of the law effectively *does* require a showing of the use or

threatened use of violent force. By requiring the defendant to cite a case that discusses this absence of a requirement, the court has effectively looked at the "usual" or "ordinary" case that results in a conviction and read in a requirement that a defendant use or threaten to use violent force, based on an expected fact pattern. It has also assumed consistent use of prosecutorial discretion – if the state *could* charge a broader range of conduct under the statute, but does not frequently *do* so, this does not change the elements of the offense. Indeed, this type of speculation is precisely what this Court rejected in *Samuel Johnson* as vague. *See Samuel Johnson*, 135 S. Ct. 2551, 2557-58 (holding that the "residual clause" of the Armed Career Criminal Act was unconstitutionally vague as it required a court to speculate as to whether a crime "otherwise involves conduct that presents a serious potential risk of physical injury to another"). The Seventh Circuit's developing body of law on this point re-injects the uncertainty of such an analysis by extrapolating elements from the usual circumstances of conviction.

Focusing on whether the defendant can cite a case that did not involve the use of violent force is likely to lead to inconsistent outcomes and relies on the chance of which cases have been appealed, as most convictions are never appealed and do not have written, searchable opinions detailing the facts of the case. When a statute includes a specific force element, there is much more likely to be published opinions regarding how much force is necessary to satisfy the statute. Here, the answer is slight touching. *Wolf*, 76 N.E.3d at 915. Were there some requirement that the touch be the direct, immediate cause of the injury, it would be reasonable to

extrapolate that the touch must represent violent force. However, because there is no such requirement, *see Thompson*, 82 N.E.3d at 379, it was error for the Seventh Circuit to conduct an "ordinary case" analysis and read a direct causation requirement into the statute, *see Douglas*, 858 F.3d at 1071.

III. This case presents an ideal vehicle for resolving the conflict.

This case is in an ideal posture for the Court to resolve the questions presented. Petitioner preserved his objection to the classification of his battery conviction as a crime of violence in the district court, arguing that it did not categorically require the use or threatened use of violent physical force. He argued the precise issue raised here in the court of appeals.

The answer to the question presented weighs heavily on the calculation of petitioner's Guidelines range. Should this Court agree that Indiana battery resulting in serious bodily injury is not, categorically, a crime of violence, petitioner's total offense level would be calculated at a level 12, rather than 17, and the advisory Guidelines range would be 30 to 37 months' imprisonment, rather than the 51 to 63 months' as determined by the district court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 29, 2018

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ORDER

April 2, 2018

Before

MICHAEL S. KANNE, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

No. 17-2419	UNITED STATES OF AMERICA, Plaintiff - Appellee v. WILLARD QUINN, Defendant - Appellant
Originating Case Information:	
District Court No: 3:16-cr-00077-JD-MGG-1 Northern District of Indiana, South Bend Division District Judge Jon E. DeGuilio	

Willard Quinn argues on appeal only that this court should overrule its recent decision in *Douglas v. United States*, 858 F.3d 1069 (7th Cir.), *cert. denied*, 138 S. Ct. 565 (2017), in which the court held that the Indiana offense of battery resulting in serious bodily injury offense has as an element the use of physical force and therefore constitutes a crime of violence. Quinn challenges the same Indiana statute that was at issue in *Douglas*.

In 2017 Quinn pleaded guilty, without a plea agreement, to possessing a firearm after being convicted of a crime punishable by imprisonment for a term exceeding on year, in violation of 18 U.S.C. § 922(g)(1). The Presentence Investigation Report concluded that Quinn's base offense level should be 20 because his prior Indiana conviction for "battery resulting in serious bodily injury" constituted a "prior felony crime of violence conviction." U.S.S.G. § 2K2.1(a)(4)(A). Quinn objected to the conclusion, but recognized that the district court was bound by the recent decision in *Douglas* and noted that he was raising the objection to preserve for appeal.

On appeal, Quinn argues that *Douglas* was wrongly decided because the Indiana statute does not require "violent force" or "intentional force," and therefore does not have, as an element, the use or threatened use of physical force. *See* Ind. Code § 35-42-2-1 (2014). He argues that the Indiana battery statute under which he was convicted, on its face, requires only an offensive touching, not the level of force required to constitute violent force under *Johnson v. United States*, 559 U.S. 133, 140 (2010). The *Douglas* court rejected this argument because Douglas, like Quinn, was convicted of the Class C felony version of the crime, which has "serious bodily injury" as an element. Based on *Johnson*'s definition that violent force is force "capable of causing" injury, the *Douglas* court concluded that "force that actually causes injury necessarily [is] capable of causing that injury and thus satisfies the federal definition." *Douglas*, 858 F.3d at 1071. The Eleventh Circuit has agreed with this reasoning in analyzing a similar battery statute. *See United States v. Vail-Bailon*, 868 F.3d 1293, 1302 (11th Cir. 2017).

Quinn admits that his sole argument on appeal is foreclosed by *Douglas*, and his brief does not offer a compelling reason for the court to reexamine its recent decision. Accordingly, we affirm the judgment of the district court in light of this court's decision in *Douglas*. Quinn has preserved the issue for further review.

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