No. _____

IN THE
Supreme Court of the United States

_____

GLOVER A. YAWN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

The broad question presented by this case is whether the Eleventh Circuit Court of Appeals erroneously affirmed Mr. Yawn's sentence under the Armed Career Criminal Act (ACCA), which was above the statutory maximum for his offense of possession of a firearm by a convicted felon. Specifically, this case presents the following question:

(1) Is a Florida conviction for felony battery a "violent felony" under the ACCA's elements clause, where the statute only requires the causation of great bodily harm rather than a substantial degree of force?

LIST OF PARTIES

Petitioner, Glover A. Yawn, Jr., was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Glover A. Yawn, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's decision affirming Mr. Yawn's sentence in Appeal No. 17-15686 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Yawn's case under 18 U.S.C. § 3231. The district court entered its judgment against Mr. Yawn on February 28, 2018, and he filed a timely notice of appeal. *See* Appendix B. The Eleventh Circuit affirmed his sentence on July 11, 2018. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves the ACCA, 18 U.S.C. § 924(e). The ACCA's sentencing enhancement provision provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(1).

In relevant part, the ACCA defines a "violent felony" as:

> [A]ny 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 Antiterrorism and Effective Death Penalty Act of 1996 provides, in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c).

At the time of Mr. Yawn's felony battery conviction, the Florida felony battery statute provided, in relevant part:

> (1) A person commits felony battery if he or she:
> (a) Actually and intentionally touches or strikes another person against the will of the other; and
> (b) Causes great bodily harm, permanent disability, or permanent disfigurement.

Fla. Stat. § 784.041 (2008).

STATEMENT OF THE CASE

Mr. Yawn was convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). On February 27, 2018, he was sentenced to 180 months' imprisonment, to be followed by five years' supervised release, under the ACCA. His ACCA enhancement was based on three Florida convictions—two "serious drug offenses" and one felony battery conviction. On March 13, 2018, Mr. Yawn timely appealed and subsequently filed briefing

in the Eleventh Circuit on whether he was unconstitutionally sentenced above the statutory maximum for his offense, arguing that his felony battery conviction was not an ACCA predicate. His sentence was affirmed on July 11, 2018. The Eleventh Circuit determined that his ACCA enhancement was properly applied based, in part, on his felony battery conviction.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED OVER WHETHER THE CAUSATION OF BODILY HARM NECESSARILY ENTAILS VIOLENT FORCE UNDER *CURTIS JOHNSON*.

In *Curtis Johnson*, 559 U.S. 133 (2010), this Court defined "physical force" in the ACCA's elements clause as "*violent* force—that is, force capable of causing physical pain or injury to another person." If violent force is purely measured by its "capability" of causing harm, then all offenses requiring the causation of harm would satisfy the definition, for offenses that actually cause harm are necessarily capable of causing harm. On the other hand, if violent force is measured by the degree of force applied, as the entirety of the opinion indicates, then offenses requiring the causation of harm would not necessarily require violent force. Even great bodily harm may be caused by only *de minimis* force.

The Court expressly left this question open in *United States v. Castleman*, 134 S. Ct. 1405 (2014). In that case, the Court declined to import *Curtis Johnson*'s definition of "physical force" as "violent force" into a similar elements clause in 18 U.S.C. § 921(a)(33)(A), defining "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9). Instead, the Court held that, as used in that statute, "physical force" broadly referred to common-law force, which, unlike *Curtis Johnson*'s narrower definition, included even a slight touching. *See id.* at 1410–13 & n.4. Applying that broader definition, *Castleman* held that the offense in that case—the intentional or knowing causation of bodily injury—was a misdemeanor crime of domestic violence, because the

causation of bodily injury necessarily required the use of common-law force. *See id.* at 1414–15.

Writing only for himself, Justice Scalia argued that causation of bodily injury also required violent force under *Curtis Johnson*, because it was "impossible to cause bodily injury without using force 'capable' of producing that result." *Id.* at 1416–17 (Scalia, J., concurring in part and concurring in the judgment). The majority, however, did not accept that reasoning. Instead, it expressly reserved judgment on that question—twice. *Id.* at 1413 ("Whether or not the causation of bodily injury necessarily entails violent force—a question we do not reach—mere offensive touching does not."); *id.* at 1414 ("Justice Scalia's concurrence suggests that these forms of injury necessitate violent force, under *Johnson*'s definition of that phrase. But whether or not that is so—a question we do not decide—these forms of injury do necessitate force in the common-law sense.") (internal citation omitted). That question has long divided the circuits.

1. On the one hand, the Third, Sixth, Seventh, Eighth, Ninth, and now Eleventh Circuits have all held that the causation of bodily harm or injury necessarily requires the use of violence force. Employing a "capability" test, they work backwards from the harm, reasoning that, if an offense requires harm or injury, it is necessarily capable of causing such a result. *See, e.g.*, *United States v. Chapman*, 866 F.3d 129, 136 (3d Cir. 2017) (employing "capability" test and rejecting view "that there is a minimum quantum of force necessary to satisfy *Johnson*'s definition of 'physical force"); *United States v. Gatson*, 776 F.3d 405, 410-11 (6th Cir. 2015) ("Force that causes any [physical harm] is (to some extent, by definition) force 'capable of causing physical injury or pain to another person.'") (citations omitted); *United States v. Anderson*, 695 F.3d 390, 400 (6th Cir. 2012) ("one can knowingly cause serious physical harm to another, only by knowingly using force capable of causing physical pain or injury, *i.e.*, violent physical force")

(quotations and brackets omitted); *United States v. Jennings*, 860 F.3d 450, 458-59 (7th Cir. 2017) ("a criminal act (like battery) that causes bodily harm to a person necessarily entails the use of physical force to produce the harm"); *Douglas v. United States*, 858 F.3d 1069, 1071 (7th Cir. 2017) ("force that *actually* causes injury necessarily was capable of causing that injury and thus satisfied the federal definition"); *United States v. Winston*, 845 F.3d 876, 878 (8th Cir. 2017) (finding no "daylight between physical injury and physical force," and rejecting argument "that a defendant might cause physical injury without using physical force"); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016) (rejecting argument "that a person can cause an injury without using physical force," and concluding that, because battery offense required the causation of physical injury, the offense was necessarily "capable" of producing that result); *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1290-1291 (9th Cir. 2017) ("bodily injury [necessarily required] the use of violent, physical force," because "bodily injury" and "physical force" are "synonymous or interchangeable" terms).

In those Circuits, however, numerous judges have registered disagreement. In *Vail-Bailon*, five Eleventh Circuit judges vigorously dissented on this point, as explained above. *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 2620 (2018). In the Sixth Circuit, Judge White opined that "serious physical injury most often results from physical force, but it can also occur in the absence of any force being used by the offender." *Anderson*, 695 F.3d at 404 (White, J., concurring). Thus, she agreed with other circuits that "have rejected such a broad interpretation of physical force." *Id.* at 405. In the Eighth Circuit, Judge Kelly made the same observation, opining that that there were a number of ways that a person could cause physical injury without using any degree of force. *Rice*, 813 F.3d at 707-08 (Kelly, J., dissenting). And the Seventh Circuit in *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), actually

held that an Indiana battery statute—"materially indistinguishable" from the Florida felony battery statue here—did not require violent force. *Vail-Bailon*, 868 F.3d at 1302. Although *Curtis Johnson* had cited *Flores* "with approval," *Castleman*, 134 S. Ct. at 1412, the Seventh Circuit in *Douglas*, in an opinion written by the very same judge, subsequently reached the exact opposite conclusion on the very same statute—without even citing the earlier decision in *Flores*.

2. In contrast, the First, Second, Fourth, Fifth, and Tenth Circuits have all recognized that causation of harm need not require the use of violent force under *Curtis Johnson*. That is so because, in their view, violent force is measured by the degree or quantum of force, not the resulting harm. *See, e.g.*, *Whyte v Lynch*, 807 F.3d 463, 469 (1st Cir. 2015) (distinguishing between causation of harm and violent force, and observing that "[c]ommon sense suggests that" the state "can punish conduct that results in 'physical injury' but does not require the 'use of physical force"); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 193-94 (2nd Cir. 2003) (agreeing that "'there is a difference between the causation of an injury and an injury's causation by the 'use of physical force,'" and finding a "logical fallacy" in "equat[ing] the use of physical force with harm or injury") (citations omitted); *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012) (recognizing that "a crime may *result* in death or serious injury without involving use of physical force"); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc) ("the fact that the statute requires that serious bodily injury result . . . does not mean that the statute requires that the defendant have used the force that caused the injury," recognizing the "difference between a defendant's causation of an injury and the defendant's use of force");[1] *United States v. Perez-*

[1] *Accord United States v. Villegas-Hernandez*, 468 F.3d 874, 880 (5th Cir. 2006) (rejecting the reasoning that an offense "include[s] the use of force as an element by virtue of its requirement of causation of serious bodily injury"); *United States v. Andino-Ortega*, 608 F.3d 305, 310-11 (5th Cir. 2010) (following *Vargas-Duran* to conclude that offense of intentionally injuring a child by act did not satisfy elements clause); *United States v. Garcia-Perez*, 779 F.3d 278, 283-84 (5th Cir.

Vargas, 414 F.3d 1282, 1285 (10th Cir. 2005) (accepting argument that an offense requiring the causation of bodily injury was not necessarily a crime of violence).

Following *Castleman*, where the Court indicated that the administration of poison and other indirect applications of force might nonetheless constitute a "use" of force in the common law sense, 134 S.Ct. at 1414, the Fifth Circuit reaffirmed the continuing validity of its prior precedent holding in the narrower crime of violence context, that a person could indeed "cause physical injury without using [violent] physical force." *United States v. Rico-Mejia*, 859 F.3d 318, 321-23 (5th Cir. 2017). While the remaining circuits above have backtracked on parallel pronouncements in light of the indirect force discussion in *Castleman*, they have done so only in cases involving the intentional or knowing causation of harm, *see, e.g.*, *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017) (Colorado second-degree assault), and/or only to the extent that they had previously relied upon the administration of poison or some indirect application of force to illustrate the broader principle that causation of harm need not require violent force. *See, e.g.*, *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017) (recognizing that prior holding in *Torres-Miguel* "may still stand," but that its "reasoning can no longer support an argument that the phrase 'use of physical force' excludes *indirect* applications"); *United States v. Hill*, 832 F.3d 135, 143-44 (2d Cir. 2016) (same). But, again, *Castleman* expressly reserved on the broader question of whether the causation of harm necessarily requires the use of violent force. And this case neatly presents that question while conveniently avoiding the harder questions about poison and indirect applications of force, since Florida felony battery may be committed only by a touching or a

2015) (concluding that Florida manslaughter, which required causation of death, did "not require proof force" as an element).

striking. It does not require intentional or knowing causation of bodily harm and may not be committed by poisoning or any other indirect application of force.

* * *

In short, the circuits have long been hopelessly confused about the meaning of the term "physical force" in the elements clause. And *Curtis Johnson*'s definition of "physical force" as "*violent* force—that is, force capable of causing physical pain or injury to another person" has only cemented and exacerbated the confusion. Many circuits reason backwards from the harm, concluding that the causation of pain or injury cannot occur without the use of violent force. Other courts and judges, by contrast, have focused on the degree or quantum of force, concluding that the causation of pain or injury need not be caused by violent force. The Court expressly left this question open in in *Castleman*. The Court should decide it here.

CONCLUSION

For the above reasons, Mr. Yawn's petition should be granted.

Respectfully submitted,

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