No. 18-6870

IN THE SUPREME COURT OF THE UNITED STATES

JAMES FREDERICK, 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 IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for felony battery, in violation of Fla. Stat. § 784.041 (2011), was a conviction for a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(1) (2015).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-4) is not published in the Federal Reporter but is reprinted at 737 Fed. Appx. 522.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2018. The petition for a writ of certiorari was filed on November 26, 2018. 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). Pet. App. A3, at 1. He was sentenced to 51 months of imprisonment, to be followed by two years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. A1, at 1-4.

1. In 2015, police officers responded to a report of shots fired in Boynton Beach, Florida. Presentence Investigation Report (PSR) ¶ 4. The officers arrived on the scene and found petitioner in possession of a pistol. PSR ¶¶ 5-6.

A federal grand jury in the Southern District of Florida indicted petitioner on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2, at 1. Petitioner pleaded guilty. Pet. App. A3, at 1.

2. The Sentencing Guideline for a conviction for violating 18 U.S.C. 922(g)(1) provides for a base offense level of 20 if the defendant has a prior "felony conviction of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 2K2.1(a)(4)(A) (2015). At the time of petitioner's sentencing, Sentencing Guidelines § 4B1.2(a) (2015) defined a "crime of violence" as:

> any 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 burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Ibid.; see id. § 2K2.1, comment. (n.1); PSR 1 (applying the 2015 version of the Guidelines).

The Probation Office determined that petitioner had a prior conviction that qualified as a crime of violence -- namely, a 2011 conviction for felony battery, in violation of Florida law. PSR ¶ 40. Accordingly, the Probation Office assigned petitioner a base offense level of 20 under Section 2K2.1. PSR ¶ 14. It then applied a three-level decrease for acceptance of responsibility. PSR ¶¶ 21-22. Based on a total offense level of 17 and a criminal history category of VI, the Probation Office calculated an advisory Guidelines range of 51 to 63 months of imprisonment. PSR ¶ 93.

Petitioner objected to the classification of his prior felony battery conviction as a crime of violence, arguing that Florida felony battery does not have as an element the use of "physical force" under Section 4B1.2(a)(1). D. Ct. Doc. 31, at 1-3 (July 7, 2016). The district court overruled petitioner's objection, Sent. Tr. 2, 8-9, and adopted the Probation Office's calculation of his advisory Guidelines range, id. at 10. The court sentenced petitioner to 51 months of imprisonment. Ibid.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1, at 1-4.

a. While petitioner's appeal was pending, the en banc court of appeals determined that Florida felony battery categorically qualified as a "crime of violence" under a clause of Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2014), worded identically to Section 4B1.2(a)(1). United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017), cert. denied, 138 S. Ct. 2620 (2018). The court of appeals first explained that this Court's decision in Curtis Johnson v. United States, 559 U.S. 133 (2010), "articulates the standard [a court] 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 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. Section 784.041 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) (2011). The court explained that the statute 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 by positing "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.; see Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

b. Relying on the en banc decision in Vail-Bailon, the court of appeals in this case determined that petitioner's prior Florida conviction for felony battery was a conviction for a crime of violence under Section 4B1.2(a)(1). Pet. App. A1, at 2-3. The court explained that "[t]he en banc court's decision in Vail-Bailon squarely forecloses" petitioner's argument that Florida felony battery does not "'ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another.'" Ibid. (quoting Sentencing Guidelines § 4B1.2(a)(1) (2015)).

ARGUMENT

Petitioner contends (Pet. 30-33) that his prior conviction for felony battery, in violation of Fla. Stat. § 784.041 (2011), does not qualify as a crime of violence under Sentencing Guidelines § 4B1.2(a)(1) (2015) because it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force." The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This Court has recently and repeatedly declined to review similar questions about whether Florida felony battery is a crime of violence under the Sentencing Guidelines or a violent felony under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C 924(e). See Lewis v. United States, No. 17-9097

(Feb. 25, 2019); Makonnen v. United States, 139 S. Ct. 455 (2018) (No. 18-5105); Solis-Alonzo v. United States, 139 S. Ct. 73 (2018) (No. 17-8703); Flowers v. United States, 139 S. Ct. 140 (2018) (No. 17-9250); Gathers v. United States, 138 S. Ct. 2622 (2018) (No. 17-7694); Green v. United States, 138 S. Ct. 2620 (2018) (No. 17-7299); Robinson v. United States, 138 S. Ct. 2620 (2018) (No. 17-7188); Vail-Bailon v. United States, 138 S. Ct. 2620 (2018) (No. 17-7151). The same result is warranted here. In addition, this case would be a poor vehicle for further review because it concerns the application of a provision of the advisory Sentencing Guidelines, and because Florida felony battery would have qualified as a crime of violence under a separate clause of the "crime of violence" definition in former Section 4B1.2(a).

1. The court of appeals correctly determined that Florida felony battery qualifies as a crime of violence under Sentencing Guidelines § 4B1.2(a)(1) (2015). Pet. App. A1, at 2-3.

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's elements clause, 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. 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. Id. at 138 (quoting State v. Hearns, 961 So. 2d 211, 219 (Fla. 2007)) (brackets and ellipsis 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 "[c]ause[] great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1)(b) (2011). 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 United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017), cert. denied, 138 S. Ct. 2620 (2018), thus correctly determined that under "the plain language of Curtis Johnson" and its "definition of physical force," Florida felony battery has the use of physical force as an element. Id. at 1302.

Petitioner acknowledges (Pet. 9) that "the fact that harm is actually caused means that the conduct at issue was 'capable' of causing harm." Petitioner contends (Pet. 31), however, that the Court did not "truly adopt[] a 'capability' test in Curtis Johnson." After the petition for a writ of certiorari in this case was filed, however, this Court in Stokeling v. United States,

139 S. Ct. 544 (2019), reaffirmed that "physical force" in the ACCA's elements clause means "'force capable of causing physical pain or injury.'" Id. at 554 (quoting Curtis Johnson, 559 U.S. at 140); see ibid. (explaining that the standard set forth in Curtis Johnson "does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality"). As petitioner anticipated (Pet. 9), such a reiteration of that standard in Stokeling "validate[s] Vail-Bailon's holding" that Florida felony battery has as an element the use of physical force.

2. Petitioner does not point to any conflict among the courts of appeals on whether Florida felony battery qualifies as a crime of violence under the Sentencing Guidelines or a violent felony under the ACCA. Instead, petitioner asserts (Pet. 7-17) the existence of a circuit conflict on the proper application of Curtis Johnson's definition of "physical force" to offenses involving causation of bodily injury. Petitioner points to (Pet. 13-15) decisions from the First, Second, Fourth, Fifth, and Tenth Circuits, which he asserts (Pet. 13) have "recognized that causation of harm need not require the use of 'violent force' under Curtis Johnson." As petitioner acknowledges (Pet. 14-15), however, the First, Second, Fourth, and Tenth Circuits have retreated from those decisions following this Court's decision in United States v. Castleman, 572 U.S. 157 (2014), which held that "use" of "physical force" in 18 U.S.C. 922(g)(9) encompasses the

indirect application of force leading to physical harm. Castleman, 572 U.S. at 170-171; see id. at 174 (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"); see also United States v. Ellison, 866 F.3d 32, 37-38 (1st Cir. 2017) (rejecting, in light of Castleman, the argument that "a threat to poison" is not a "'threatened use of physical force'" under Sentencing Guidelines § 4B1.2(a) (2015), and noting that the First Circuit had previously "rejected the same argument" in the ACCA context); United States v. Edwards, 857 F.3d 420, 426 n.11 (1st Cir.)(suggesting that Whyte v. Lynch, 807 F.3d 463 (1st Cir. 2015), is inconsistent with Castleman), cert. denied, 138 S. Ct. 283 (2017); Villanueva v. United States, 893 F.3d 123, 130 (2d Cir. 2018) (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); 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).

After the petition for a writ of certiorari in this case was filed, the en banc Fifth Circuit likewise recognized that the court's prior decision in United States v. Rico-Mejia, 859 F.3d

318 (2017), "is incompatible with Castleman" and "expressly disapprove[d] [Rico-Mejia's] conclusion." United States v. Reyes-Contreras, 910 F.3d 169, 181 (2018); see id. at 187 (overruling United States v. Rico-Mejia, supra; United States v. Garcia-Perez, 779 F.3d 278 (5th Cir. 2015); United States v. Andino-Ortega, 608 F.3d 305 (5th Cir. 2010); United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006), cert. denied, 549 U.S. 1245 (2007); and United States v. Vargas-Duran, 356 F.3d 598 (5th Cir.) (en banc), cert. denied, 543 U.S. 995 (2004)). The en banc court thus adopted the uniform view of the other circuits that the logic of Castleman extends to the application of Curtis Johnson's definition of "physical force." See id. at 182.[1]

Petitioner acknowledges (Pet. 14) that courts of appeals "have backtracked" on the decisions that he cites, but he nonetheless contends that they have done so only in cases "involving the intentional or knowing causation of harm" or in cases addressing indirect applications of force such as the administration of poison. To begin with, that is not a correct description of all of the relevant decisions. See, e.g., Kendall, 876 F.3d at 1267 (concluding that D.C. Code § 22-405(c) (Supp.

[1] The question whether the causation of injury entails the "use" of "physical force" under the ACCA is currently pending before the en banc Third Circuit. See Revised Gov't C.A. Br. at 16-30, United States v. Harris, No. 17-1861 (3d Cir. Aug. 27, 2018); Order at 1, United States v. Harris, supra (3d Cir. June 7, 2018); see also United States v. Mayo, 901 F.3d 218, 228-230 (3d Cir. 2018); United States v. Chapman, 866 F.3d 129, 133 (3d Cir. 2017), cert. denied, 138 S. Ct. 1582 (2018).

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) (emphasis omitted). More fundamentally, however, 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 and reiterated that it meant in Stokeling: use of "force capable of causing physical pain or injury." Stokeling, 139 S. Ct. at 554 (citation and emphasis omitted); Curtis Johnson, 559 U.S. at 140. 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).

3. Petitioner separately contends (Pet. 32-33) 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. 17-25) 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 Lewis v. United States, supra (No. 17-9097); 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 provided in Sentencing Guidelines § 4B1.2(a)(1) (2015), 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. 17-25) that the courts of appeals have divided over the application of Duenas-Alvarez's "realistic probability" test. He asserts (Pet. 20) that, in the Fifth Circuit's view, a defendant establishes the requisite probability only by demonstrating that state courts have actually applied the relevant statute to reach nonqualifying conduct. In contrast, according to petitioner (Pet. 18-20), 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 defines an offense more broadly than the federal crime.

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 3. 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.[2]

4. In addition, this case would be a poor vehicle for further review because petitioner's challenge to his sentence rests on a claimed error in the application of an advisory Sentencing Guidelines provision, which was in any event applicable for an independent reason.

a. Typically, this Court leaves issues of Guidelines application in the hands of the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Because the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. Ibid.; see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns,

[2] Petitioner suggests (Pet. 25) that his argument is similar to one raised in United States v. Sims, No. 17-666. After the petition for a writ of certiorari in this case was filed, the Court issued its decision in Sims. See United States v. Stitt, 139 S. Ct. 399 (2018). The Court in that case did not address the application of Duenas-Alvarez's "realistic probability" requirement. See id. at 407-408. Accordingly, no sound basis exists to grant the petition for a writ of certiorari, vacate the judgment below, and remand for further consideration in light of the Court's decision in Sims.

thereby encouraging what it finds to be better sentencing practices.").

Indeed, the Commission has illustrated its attention to such matters through its actions with respect to other portions of the "crime of violence" definition at issue here. In 2016, the Commission amended Sentencing Guidelines § 4B1.2(a) to eliminate the provision's residual clause and to expand the list of enumerated offenses. See 81 Fed. Reg. 4741, 4742-4743 (Jan. 27, 2016). Those amendments demonstrate the Commission's continuing attention to the Guidelines in general and to the definition of a crime of violence in particular. No sound reason exists for this Court to deviate from its usual practice of declining to review questions of Guidelines interpretation.

b. The inclusion of the residual clause in Sentencing Guidelines § 4B1.2 (2015) at the time petitioner was sentenced -- which is the version that would also be used if he were resentenced, see 18 U.S.C. 3742(g)(1) -- provides yet another reason to deny further review. Even if petitioner's prior conviction for Florida felony battery does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," Sentencing Guidelines § 4B1.2(a)(1) (2015), it would still qualify as a crime of violence under the residual clause of former Section 4B1.2(a)(2), which covered any felony offense that "involves conduct that presents a serious potential risk of physical injury to another," id.

§ 4B1.2(a)(2); see Beckles v. United States, 137 S. Ct. 886, 890 (2017) (upholding the constitutionality of Section 4B1.2(a)(2)'s residual clause). Because Florida felony battery requires an intentional touch or strike that results in "great bodily harm, permanent disability, or permanent disfigurement," Fla. Stat. § 784.041(1) (2011), the "ordinary case" of that offense will involve conduct that presents a serious risk of physical injury (not freak accidents). See United States v. Alexander, 609 F.3d 1250, 1253-1254 (11th Cir. 2010) (applying "ordinary case" approach to the residual clause of Section 4B1.2(a)(2)); see also United States v. Smith, 448 Fed. Appx. 936, 940 (11th Cir. 2011) (concluding that the "ordinary case" of Florida felony battery presents a substantial risk of injury). Thus, regardless of this Court's resolution of the question presented, the court of appeals correctly affirmed the district court's calculation of the applicable advisory Guidelines range.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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