No. _____

In The
Supreme Court of the United States

LONNIE ANTHONY JONES,
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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QUESTION PRESENTED

At issue in this matter is whether second-degree murder in Florida[1] is a "violent felony" within the meaning of the elements clause of the Armed Career Criminal Act (the ACCA). Asked differently,[2] this case posits the question as to whether this Court's definition of "physical force" in *Curtis Johnson v. United States*, 130 S. Ct. 1265 (2010), requires the deployment of destructive or violent force as distinguished from causing bodily injury through indirect means.[3]

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[1] Particular to this case is the version of second-degree murder found at Florida Statutes § 782.04(2) (1992).

[2] Should this Court hold this case pending this Court's resolution of a similar question in *Denard Stokeling v. United States*, No. 17-5554 (petition for cert. granted, and argued Oct. 9, 2018).

[3] *See, e.g.*, the petition for a writ of certiorari filed in *Edwin Deshazior v. United States*, No. 17-8766 (May 1, 2018) (asking "[w]hether an offense that may be committed through an indirect, non-violent application of force – such as the use of poison – has as an element the use, attempted use, or threatened use of physical force for purposes of the ACCA"); *see also Stokeling v. United States*, No. 17-5554 (argued Oct. 9, 2018) (deciding whether Florida's robbery offense includes as an element the use, attempted use, or threatened use of physical force against a person to categorically qualify as a "violent felony" for purposes of the Armed Career Criminal Act (ACCA)).

List of Parties

Petitioner, Lonnie Anthony Jones, 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

The Petitioner, Lonnie Anthony Jones, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion is published and is provided in the Appendix. It can also be found at *United States v. Jones*, 906 F.3d 1325 (11th Cir. 2018).

JURISDICTION

The Eleventh Circuit issued its panel opinion on October 25, 2018. *See* Appendix. The mandate was issued on November 26, 2018. *See* Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code § 924(e):

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
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> (2) As used in this subsection . . . (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
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> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
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> (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[.]

STATEMENT OF THE CASE

The procedural traffic of the case below is relatively straight-forward and without complexity. Mr. Jones was named in a seven-count indictment returned and filed on May 11, 2016, *see* Doc. 1, alleging various drug and gun matters. His case was prosecuted in the Middle District of Florida, Fort Myers Division.

Under the terms and conditions of a written plea agreement with the government, *see* Doc. 57, Mr. Jones pled guilty to Count 6 of the indictment (possession with intent to distribute marijuana, cocaine, cocaine base, and oxycodone) as well as Count 7 (felon-in-possession of firearms and ammunition). The remaining counts were dismissed.

According to the district court, Mr. Jones qualified to be sentenced as an Armed Career Criminal under Count 7, *see* 18 U.S.C. § 924(e); and, as such, Mr. Jones was sentenced to a mandatory minimum of 180 months, or 15 years, in federal prison as to both counts (Counts 6 and 7) concurrently. *See* Doc. 73 (the written judgment and sentence).

Mr. Jones appealed the district court's sentence to the Eleventh Circuit Court of Appeals, arguing that he should not have been found to have the requisite prior convictions to qualify for Armed Career Criminal treatment. Ordinarily, one convicted of felon-in-possession, i.e., 18 U.S.C. § 922(g), is exposed to a maximum penalty of up to 10 years. *See* 18 U.S.C. 924(a)(2). For those who have

three prior qualifying convictions for "serious drug offenses" or "violent felonies," however, the penalties increase to a mandatory minimum of at least 15 years' imprisonment. *See* 18 U.S.C. § 924(e)(1).

For his part, Mr. Jones did not contest in the lower courts the argument that he had some qualifying "violent felonies" for a Florida conviction for resisting an officer with violence from 1994 and a Florida robbery with a firearm conviction from 1988. *See* revised Pre-Sentence Report (PSR), dated May 15, 2017, Doc. 71, page 11, ¶ 41. He challenged a third conviction, though: a Florida second-degree murder conviction from 1992. It was this Florida conviction for second-degree murder both the district court and the appellate court held was a "violent felony" for purposes of the Armed Career Criminal Act under the elements clause of section 924(e)(2)(B)(i); hence, with three prior "violent felonies," Mr. Jones was subject to the 15-year mandatory minimum penalty – which he received. Were Florida's second-degree murder found not to categorically qualify as a "violent felony" under the ACCA, Mr. Jones would be entitled to have his current 15-year sentence vacated and set aside and receive a sentencing hearing anew at which the maximum penalty would be no more than 10 years in prison.

The Eleventh Circuit synthesized the case thusly:

> At his sentencing, Jones objected to the classification of his Florida second-degree murder conviction as a "violent felony" for purposes of the ACCA. He did not challenge the felony convictions for resisting an officer with violence and robbery with a firearm. He argued, however, that Florida's second-degree murder charge was not a violent felony for purposes of the ACCA because the statute does not require the use of physical force. As an example of a second-degree murder conviction that could be overbroad for purposes of the categorical approach, he posited murder by providing a lethal amount of cocaine or surreptitious poisoning, although that was not the basis of his underlying conviction. The sentence court overruled the objection and found that Jones had three prior felony convictions, qualifying him as an armed career criminal. Jones was sentenced to concurrent 15-year sentences on both drug and gun counts.

See Appendix, *United States v. Jones*, 906 F.3d 1325, 1327 (11th Cir. 2018).

On appeal, the panel from the appellate court said that it was bound by its prior precedent rule; that in light of its published opinion, *Hylor v. United States*, 896 F.3d 1219 (11th Cir. 2018), which held that in Florida attempted first-degree murder is categorically a violent felony under the ACCA, second-degree murder also categorically qualified as a "violent felony." *See Jones*, 906 F.3d at 1328-1329.

> In *Hylor*, we held that in Florida attempted first-degree murder is categorically a violent felony under the ACCA. *Id.* Under Florida law first-degree murder is "[t]he unlawful killing of a human being ... [w]hen perpetrated from a premeditated design to effect the death of the person killed or any human being." Fla. Stat. § 782.04(1)(a) (2017). We explained that "[o]ur precedents make clear that even poisoning is [physical force and so] a violent felony under the elements clause" of the ACCA. *Hylor*, 896 F.3d at 1223. Under applicable Supreme Court law, we held that "[p]oisoning someone is a

> physical ... use of force because it involves force 'exerted by and through concrete bodies.'" *Id.* (quoting *Curtis Johnson*, 559 U.S. at 138, 130 S. Ct. 1265). We added that "administering poison to kill someone is an intentional act that is 'capable of causing physical pain or injury.'" *Id.* (quoting *Deshazior*, 882 F.3d at 1358). And we held that indirect physical force – through the use of poison or other means – still qualifies as violent physical force under the ACCA elements clause. *Id.* (citing *Castleman*, 572 U.S. at 171, 134 S. Ct. 1405); *see also Deshazior*, 882 F.3d at 1357-58.[4]

Jones, 906 F.3d at 1328-1329 (footnote omitted).

"Again," the Eleventh Circuit summarized, "for purposes of the ACCA elements clause, we examine whether an offense 'has as an element the use, attempted use, or threatened use of physical force against the person of another.'" *Id.* at 1329 (citing 18 U.S.C. § 924(e)(2)(B)). "With this language, the ACCA elements clause asks about the actions constituting an offense, rather than the mental state of the actor committing the offense." *Jones*, 906 F.3d at 1329. Therefore, the Eleventh Circuit held, "[b]ecause *Hylor* held that Florida attempted first-degree murder is a violent felony within the meaning of the ACCA elements clause, and because we can discern no meaningful differences for our purposes, we too conclude that in Florida second-degree murder is a violent felony." *Id.*

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4 A petition for a writ of certiorari in *Edwin Deshazior v. United States*, No. 17-8766, is pending before this Court, and was, according to the Clerk's docket, distributed for conference on September 24, 2018.

Mr. Jones did not file a petition for rehearing or a petition for rehearing *en banc* in the appellate court; rather, the mandate from the panel decision issued on November 26, 2018, and this petition for a writ of certiorari followed. Mr. Jones remains incarcerated serving his 15-year prison sentence.

REASONS FOR GRANTING THE WRIT

Introduction

Mr. Jones acknowledges that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." S. Ct. Rule 10. But he would humbly submit that the issues raised by his case merit this Court's attention, time, and resources. Indeed, this case does not involve any "asserted error consist[ing] of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Mr. Jones assumes the position that the Eleventh Circuit Court of Appeals "has decided an important question of federal law [as well as deciding] an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* Thus, Mr. Jones appeals to this Court for its intervention.

As a procedural matter, the instant case is an excellent vehicle to entertain the question presented, one for which may potentially affect thousands of federal criminal defendants each year.[5] Mr. Jones comes to this Court after a direct criminal appeal and on one question in the context of the Armed Career Criminal Act (the ACCA). There are no factual questions to address, and the matter involves only a legal analysis and application of the Court's jurisprudence. *Cf., Curtis*

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[5] There were 8,064 firearms cases in fiscal year 2017. *See* U.S.S.C. *Overview of Federal Criminal Cases – Fiscal Year 2017* at 3. More than half of firearms cases (57.1%) involved the illegal possession of a firearm by a prohibited person, usually a convicted felon. *See id.* at 10.

Johnson v. United States, 130 S. Ct. 1265 (2010), *with United States v. Castleman*, 134 S. Ct. 1405 (2014).

In both the district court and the appellate court, Mr. Jones argued, as a categorical matter, the criminal offense of second-degree murder in Florida can be committed in such a way that falls outside the definition of "physical force" this Court pronounced in *Curtis Johnson v. United States*, 130 S. Ct. 1265 (2010).[6] Conversely, to answer that challenge, both the government and the courts relied on *United States v. Castleman*, 134 S. Ct. 1405 (2014).[7] It is the contention of Mr. Jones that *Castleman* does not bear on the question at bar, and this case allows the Court to expressly answer that question.

Here, the Eleventh Circuit wrote in its published opinion below and framed the issue presented as such:

> This case turns on the meaning of the phrase "physical force" in the ACCA definition of "violent felony." The Supreme Court has determined that the phrase "physical force" in the violent felony definition means "*violent* force – that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original). Although in a different context, the Supreme Court has held that a statute's use of

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[6] *See generally Coppolino v. State*, 223 So.2d 68 (Fla. 2nd DCA 1968) (Florida state case in which appellate court upheld jury's guilty verdict for second-degree murder committed by poisoning, a crime arguably executed without the use of "physical force" as defined by the Supreme Court in *Curtis Johnson*).

[7] *See, e.g., United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) ("the Government erroneously conflates the use of violent force with the causation of injury"); *but see In re Irby*, 858 F.3d 231, 238 (4th Cir. 2017) ("one cannot unlawfully kill another human being without a use of physical force capable of causing physical pain or injury to another").

> the phrase "physical force" encompassed indirect as well as direct force. It specifically determined that poisoning would qualify as an application of physical force even though the force was applied indirectly. *United States v. Castleman*, 572 U.S. 157, 171 (2014) (holding that a conviction for causing bodily injury qualified as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9)). [The Eleventh Circuit] has since determined that poisoning someone constitutes "physical force" under the ACCA. *See Deshazior*, 882 F.3d at 1357-58. It did not matter whether the use of force occurred directly or indirectly. *Id.* (citing *Castleman*, 572 U.S. at 171).

Jones, 906 F.3d at 1328. Said differently, the question was fully preserved in the courts below and the Eleventh Circuit squarely resolved it in a published opinion.

Moreover, when preparing and researching the instant petition, it is plainly obvious that the issue presented is one under consideration by a number of courts nationally[8] -- generally, what is and what is not considered a "violent felony" or a "crime of violence," and specifically to this cause, whether second-degree murder in Florida qualifies as a "violent felony" for purposes of the ACCA. It is not lost on Mr. Jones that if one were to ask an average citizen on the street whether second-degree murder is a "violent" offense, the answer most likely is yes. But, when viewed through the optics of a legal lens in the context before this Honorable Court, the answer must be no. The answer is no because Mr. Jones submits that this Honorable Court was thinking about, it was contemplating, it defined "violent

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[8] *See, e.g., United States v. Reyes-Contreras*, -- F.3d --, 2018 WL 6253909 (5th Cir. Nov. 30, 2018) (*en banc*) (collecting cases).

felony" in *Curtis Johnson* as an offense committed in a physically forceful way, i.e., the degree of conduct is what we look to (kicking, or punching, or slapping, using a baseball bat) when deciding the question posed by this petition.[9] We must address *how* the injury was caused, not the injury itself.[10] In that second-degree murder, at least in Florida, can be committed without "violent physical force," as a legal matter, it cannot be said to qualify as a "violent felony" under the Armed Career Criminal Act.

Context and the Current Landscape

In 1992, Mr. Jones suffered a Florida conviction for second-degree murder. *See* Pre-Sentence Report (PSR) ¶ 51. The district court found this prior conviction to qualify as a "violent felony" for purposes of the Armed Career Criminal Act (the ACCA)[11] and it used the conviction to enhance the sentencing process governing

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[9] *See* petition for writ of certiorari filed in *Edwin Deshazior v. United States*, No. 17-8766 (May 1, 2018) (presenting the question of "[w]hether an offense that may be committed through an indirect, non-violent application of force – such as the use of poison – has as an element the use, attempted use, or threatened use of physical force for purposes of the ACCA").

[10] *See, e.g.,* the Fourth Circuit Court of Appeals in *United States v. Middleton*, 883 F.3d 485, at 490-491 (4th Cir. 2018) and *United States v. Torres-Miguel*, 701 F.3d 165, 167-169 (4th Cir. 2012) ("[a]n offense that *results* in physical injury, but does not involve the use or threatened use of force, simply does not meet the Guidelines definition of a crime of violence"); *but see United States v. Reyes-Contreras*, -- F.3d --, 2018 WL 6253909, at *9 (5th Cir. 2018) (*en banc*) ("[w]e hold that, as relevant here, *Castleman* is not limited to cases of domestic violence and that for purposes of identifying a conviction as a ["crime of violence"], there is no valid distinction between direct and indirect force").

[11] As well as a "crime of violence" for purposes of the career offender enhancement under the Sentencing Guidelines.

Mr. Jones. Mr. Jones objected, and argued that this conviction was not a qualifying predicate conviction under section 924(e). The district court said Mr. Jones was wrong and overruled his objection. The appellate court agreed with the district court and affirmed its sentence. By this petition, Mr. Jones would now ask of this Honorable Court for its review and help. Mr. Jones continues to assert the position that he does not qualify to be sentenced as an Armed Career Criminal.

Before this Court announced its opinion in *Curtis Johnson v. United States*, 130 S. Ct. 1265 (2010), reversing the Eleventh Circuit's decision in *United States v. Johnson*, 528 F.3d 1318 (11th Cir. 2008), there existed "a circuit split over whether the requisite physical force to be considered a violent felony under the [Armed Career Criminal Act (the ACCA)] included *de minimis* touching or whether the physical force must be violent in nature."[12] In *Curtis Johnson*, the Supreme Court fell on the side of the split "that requires violent force," and not merely any nominal degree of physical force. Page, Daija M., Note, *Forcing the Issue: An Examination of Johnson v. United States*, 65 U. Miami L. Rev. 1191, 1192 (2014).

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[12] Page, Daija M., Note, *Forcing the Issue: An Examination of Johnson v. United States*, 65 U. Miami L. Rev. 1191, 1192 (2014) (footnote and citations omitted).

In her law review note, *see supra.*, Daija Page discussed at length the impact of *Curtis Johnson* and how we should interpret, define, and accept what state offenses have "as an element the use, attempted use, or threatened use of physical force against the person of another" to constitute a "violent felony" for purposes of the Armed Career Criminal Act (ACCA). *See* 18 U.S.C. § 924(e)(2)(B)(i). She recounted how, before *Curtis Johnson*,

> there was a circuit split over whether the requisite physical force included *de minimis* touching or whether the physical force must be violent in nature. The First, Eighth, and Eleventh Circuits held that battery committed by *de minimis* touching was sufficient to constitute a violent felony because it required some level of physical force in the sense of "Newtonian mechanics." In contrast, the Fifth, Seventh, Ninth, and Tenth Circuits rejected this test and held that the physical force required must be violent force.

Page, *Forcing the Issue*, 65 U. Miami L. Rev. at 1195 (footnotes and citations omitted). Particularly, Ms. Page chronicled how the Eleventh Circuit

> expressly denounced the "violent physical force" view of other circuits in *Unites States v. Griffith*[, 455 F.3d 1339 (11th Cir. 2006)] as going against common sense. . . . [The court concluded in *Griffith* that] Congress knew how to limit "physical force" to something more than *de minimis* force if it intended to do so. Finally, the Eleventh Circuit held that where Congress does not include a limiting phrase, a court cannot assume Congress intended physical force to mean violent physical force.
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> . . .
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> The Eleventh Circuit maintained its position on the *de minimis* test of physical force, and the circuit split continued until March 2010 when the Supreme Court reversed the Eleventh Circuit's determination of what amount of physical force constituted a violent felony under the ACCA.

Page, *Forcing the Issue*, 65 U. Miami L. Rev. at 1195-1196, 1197 (footnotes and citations omitted).

Justice Scalia, writing for the majority in *Curtis Johnson*, took pains to define "physical force" as used and contemplated at section 924(e)(2)(B)(i).[13] Observing that "physical force" was not expressly defined in the statute,[14] Justice Scalia wrote ... at length:

> The adjective "physical" is clear in meaning but not of much help to our inquiry. It plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force. It is the noun that poses the difficulty; "force" has a number of meanings. For present purposes we can exclude its specialized meaning in the field of physics: a cause of the acceleration of mass. Webster's New International Dictionary 986 (2d ed. 1954) (hereinafter Webster's Second). In more general usage it means "[s]trength or energy; active power; vigor; often an unusual degree of strength or energy," "[p]ower to affect strongly in physical relations," or "[p]ower, violence, compulsion, or constraint exerted upon a person." *Id.*, at 985. Black's Law Dictionary 717 (9th ed. 2009) (hereinafter Black's) defines "force" as "[p]ower, violence, or pressure directed against a person or thing." And it defines "physical force" as "[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim." *Ibid.* All of these definitions suggest a degree of power that would not be satisfied by the merest touching.
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> . . .
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> We think it clear that in the context of a statutory definition of "*violent* felony," the phrase "physical force" means *violent* force – that is, force capable of causing physical pain or injury to another person. [ ] Even by

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13 *See, e.g., In re Irby*, 858 F.3d 231, 235 (4th Cir. 2017) ("the [Supreme] Court held that the 'force' as used in § 924(e)(2)(B)(i) must be 'violent,' 'great,' or 'strong,' that is, force 'capable of causing physical pain or injury to another person'") (footnote and citation omitted).

14 *See, e.g., United States v. Middleton*, 883 F.3d 485, 488-489 (4th Cir. 2018) ("Congress did not define the term 'physical force'") (citing *Curtis Johnson*, 559 U.S. at 138).

> itself, the word "violent" in § 924(e)(2)(B) connotes a substantial degree of force. Webster's Second 2846 (defining "violent" as "[m]oving, acting, or characterized, by physical force, esp. by extreme and sudden or by unjust or improper force; furious; severe; vehement . . ."); 19 Oxford English Dictionary 656 (2d ed. 1989) ("[c]haracterized by the exertion of great physical force or strength"); Black's 1706 ("[o]f, relating to, or characterized by strong physical force"). When the adjective "violent" is attached to the noun "felony," its connotation of strong physical force is even clearer.

Curtis Johnson, 130 S. Ct. at 1270-1271 (citations omitted) (emphasis in original).

"In short," the Eleventh Circuit determined in *United States v. Vail-Bailon*, "we conclude that the test set out in *Curtis Johnson* articulates the standard we should follow in determining whether an offense calls for the use of physical force, and that test is whether the statute calls for violent force that is capable of causing physical pain or injury to another."[15] *United States v. Vail-Bailon*, 868 F.3d 1293, 2017 WL 3667647 at *6 (11th Cir. Aug. 25, 2017) (*en banc*). In other words, and "[a]s articulated by the Supreme Court in *Curtis Johnson*, physical force for purposes of the elements clause means '*violent* force – that is, force capable of causing physical pain or injury.'" *Id.* at *7 (quoting *Curtis Johnson*, 559 U.S. at

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[15] Maybe asked differently, is any nominal degree of physical force capable of causing injury, or even death, sufficient – as a matter of law – to satisfy the Supreme Court's mandate that the ACCA's requirement that a violent felony is committed through violent physical force? Mr. Jones would answer this question, "No, it is not." Otherwise, if it is, then the residual clause which was found unconstitutional in *Samuel Johnson* is now simply read and captured in the elements or force clause of the ACCA – and this result simply could not be the intended consequence of either *Johnson* case. *See United States v. Vail-Bailon*, 868 F.3d 1293, 1301 (11th Cir. 2017) (*en banc*) ("we know from *Curtis Johnson* that slight touching alone is insufficient to establish physical force").

140, 130 S. Ct. 1265). And the word "violent," according to Justice Scalia, connotes a substantial degree of force; or power, or vigor; compulsion; strong physical force ... indeed, unjust or improper force; furious, severe, vehement – violence! *See Curtis Johnson*, 130 S. Ct. at 1270-1271.

Mr. Jones recognized that the appellate court in *United States v. Owens*, 672 F.3d 966, 970 (11th Cir. 2012), discussed the Supreme Court's definition of "physical force," by exploring:

> The ACCA does not define "physical force," and the [Supreme Court] stated that in general parlance, the word means strength or energy, active power; vigor; often an unusual degree of strength or energy. Noting that the definition of "force" includes "power, violence, or pressure directed against a person or thing," and "physical force" includes "force consisting in a physical act," the Court found that all the definitions suggest a degree of power that would not be satisfied by the merest touching. Further, the Court rejected the established common-law meaning of "force," which included even the slightest offensive touching, because its meaning did not fit the statutory context.
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> The Court reasoned that because context determines meaning, the phrase "physical force" as used in the statutory definition of violent felony "means *violent* force – that is, force capable of causing physical pain or injury to another person." The word "violent" connotes a substantial degree of force, and the implication of "strong physical force" is made even more pellucid by its attachment to the word "felony." The term physical force itself normally connotes force strong enough to constitute power – and all the more so when it is contained in a definition of "violent felony."

United States v. Owens, 672 F.3d 966, 970 (11th Cir. 2012) (citations and quotations omitted).[16]

In other words, "we see no need to look any further than *Curtis Johnson* itself for the controlling definition of physical force as used in the elements clause." *Vail-Bailon*, 2017 WL 3667647 at *7.

To be sure, the Court's holding in *Castleman* should not stand for the proposition the government would posit, i.e., that common-law *de minimis* force has supplanted *Curtis Johnson*'s violent physical force. *See, e.g.,* Page, Daija M., Note, *Forcing the Issue: An Examination of Johnson v. United States*, 65 U. Miami L. Rev. 1191, 1192 (2014) (In *Curtis Johnson*, the Supreme Court fell on the side of the split "that requires violent force," and not merely any nominal degree of physical force.)

In *Castleman*, the Court interpreted "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), defined at section 921(a)(33)(A), in pertinent part, as having "as an element, the use or attempted use of physical force." The Court held in this context (not an ACCA context) that "force" means common law force (*i.e.*, offensive touching), unlike the "violent physical force" required under the

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16 *See also, e.g., United States v. Garcia-Perez*, 779 F.3d 278, 283 (5th Cir. 2015) (discussing quality and degree of "force" necessary to find a "crime of violence" under the Sentencing Guidelines as "'force' necessary under this provision must rise to the level of 'destructive or violent force.'") (citation omitted). Noteworthy, it appears that the Fifth Circuit has overruled a number of its previous decisions and opinions, including *Garcia-Perez*, with its most current *en banc* opinion in *United States v. Reyes-Contreras*, -- F.3d --, 2018 WL 6253909, at *13 (5th Cir. Nov. 30, 2018).

ACCA by *Curtis Johnson v. United States*, 559 U.S. 133 (2010). *Castleman*, 134 S. Ct. at 1410-1413. It also held that because the "common law concept of 'force' encompasses even its indirect application," an element of *causing physical injury* necessarily includes use of "force in the common-law sense" *Castleman*, 134 S. Ct. at 1414-1415. The Court emphasized that it had "declined to read the common-law meaning of 'force' into ACCA's definition of a 'violent felony,' because we found it a 'comical misfit with the defined term.'" *Id.* at 1410 (quoting *Johnson*, 559 U.S. at 145)). In a footnote, the Court stated that its holding was specific to the context of "misdemeanor crime of domestic violence." *Castleman*, 134 S. Ct. at 1412 n.4 ("The Courts of Appeals have generally held that mere offensive touching cannot constitute the 'physical force' necessary to a 'crime of violence' [under § 16], just as we held in *Johnson* that it could not constitute the 'physical force' necessary to a 'violent felony.' . . . Nothing in today's opinion casts doubt on these holdings, because—as we explain—'domestic violence' encompasses a range of force broader than that which constitutes 'violence' simpliciter.").

Despite the fact that *Castleman*'s holdings relate solely to the "concept of common law force," as expressly distinguished from the narrower "violent physical force" under the ACCA, the lower courts have been divided. Several have applied *Castleman* to hold (or reaffirm) that for purposes of the ACCA/Guidelines/§16(a), an element of *causing physical injury* or *resulting injury* necessarily implies the

element of "violent physical force" under *Curtis Johnson*, i.e., "force capable of causing physical pain or injury to another person." *See, e.g., United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016) (USSG § 4B1.2); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2015) (USSG § 4B1.2); *Hernandez v. Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016) (18 U.S.C. § 16(a)/ACCA); *United States v. Anderson*, 695 F.3d 390, 399-401 (6th Cir. 2012) (ACCA).

Conversely, other courts have held (before and after *Castleman*) that *causing injury* does not necessarily mean the use of "violent physical force." *See, e.g., United States v. Rico-Mejia,* 859 F.3d 318, 322-323 (5th Cir. 2017)[17] (discussing crime of violence under USSG § 2L1.2 and finding that *Castleman* did not apply); *Whyte v. Lynch*, 807 F.3d 463, 470-471 (1st Cir. 2015) (18 U.S.C. §16(a)/ACCA); *United States v. McNeal*, 818 F.3d 141, 156 n.10 (4th Cir. 2016) (18 U.S.C. § 924(c)(3)(A)); *United States v. Garcia-Perez,* 779 F.3d 278, 283-284 (5th Cir. 2015)[18] (Florida manslaughter not a crime of violence under USSG § 2L1.2); *United States v. Martinez-Flores*, 720 F.3d 293, 299 (5th Cir. 2013) (§ 2L1.2); *United States v. Gomez*, 690 F.3d 194, 197, 203 (4th Cir. 2012) (§ 2L1.2); *United States v. Andino-Ortega,* 608

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[17] Again, it's come to the attention of Mr. Jones that the Fifth Circuit has recently overruled a number of its prior decisions and opinions, including *Rico-Mejia*, in *United States v. Reyes-Contreras*, -- F.3d --, 2018 WL 6253909, at *13 (5th Cir. Nov. 30, 2018) (*en banc*).

[18] *See supra., Reyes-Contreras* (overruling prior decisions and opinions, including *Garcia-Perez*).

F.3d 305, 309-311 (5th Cir. 2010)[19] (§ 2L1.2); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008) (§ 2L1.2); *United States v. Rodriguez-Enriquez*, 518 F.3d 1191, 1192-1195 (10th Cir. 2008) (finding that "drugging a victim" is not a crime of violence, pursuant to § 2L1.2); *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (§ 2L1.2);[20] *United States v. Perez-Vargas*, 414 F.3d 1282, 1284-1287 (10th Cir. 2005) (§ 2L1.2); *United States v. Lopez-Patino*, 391 F.3d 1034, 1037 (9th Cir. 2004) (§ 2L1.2); *Chrzanoski v. Ashcroft,* 327 F.3d 188, 191-194 (2nd Cir. 2003) (§ 16(a); the court agreed that there is a "difference between the causation of an injury and an injury's causation by the use of physical force"); *see generally United States v. Butler*, -- F Supp. 3d --, 2017 WL 2304215 (D. D.C. 2017) (ACCA); *United States v. Brown,* 2017 WL 1383640 (D.D.C. 2017) (ACCA); *United States v. Watts*, 2017 WL 411341 (D. Kan. 2017) (career offender); *United States v. Fisher*, 2017 WL 1426049 (E. D. Pa. 2017) (ACCA); *United States v. Hill*, 225 F. Supp. 3d 328 (W.D. Penn. 2016) (career offender); *United States v. Fennell*, 2016 WL 4702557 (N. D. Tex. 2016) (ACCA).

As observed by Judge Wilson in the Eleventh Circuit in a dissenting opinion from *Vail-Bailon*, 868 F.3d at 1308, "The difference between a non-violent and violent act, then, is the degree of force used." Said differently, *causing injury* does

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19 *See supra.*

20 *See supra.*

not necessarily entail using violent physical force. This seems to be a very commonsensical principle to put forth. *See, e.g., United States v. Garcia-Perez*, 779 F.3d 278, 283 (5th Cir. 2015) ("Florida courts have repeatedly set out the elements that must be proved to convict under [second-degree murder] and an element of force makes no appearance").[21]

Second-degree murder in Florida is not a violent felony under the ACCA

Here, the specific criminal statute at play, Florida's second-degree murder statute, requires "any act imminently dangerous to another" of which said act was committed from a place "evincing a depraved mind regardless of human life" that does not require any specific intent to kill or injure. Florida Statute § 782.04(2) (1992).[22] The Supreme Court, in another context, said of the word "any" in *United States v. Gonzalez*, 117 S. Ct. 1032, 1035 (1997), "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' Webster's Third New International Dictionary 97 (1976)." This all means that Florida's second-degree murder statute can be violated by conduct that is not

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[21] *But see Reyes-Contreras*, -- F.3d at --, 2018 WL 6253909, at *13 (overruling, in whole or in part, *United States v. Garcia-Perez*, 779 F.3d 278 (5th Cir. 2015).

[22] For example, a district court judge in Colorado posed a hypothetical of "killing someone by locking them in a room and depriving them of food and water," that is, "You have not applied any force. You have not used any force. . . . And surely that person would be charged with murder." *United States v. Pearb Roeung Nicks*, Case No. 1:15-CR-321-WJM (D. Co. April 4, 2016) (transcript of sentencing hearing at Docket Entry 43, page 16).

necessarily committed in a vehicle of violent physical force as contemplated by *Curtis Johnson*.

Similarly, Mr. Jones synthesized in his initial brief filed with the appellate court:

> But, what is most important for this appeal, is that Florida's second-degree murder statute broadly envelops those acts and conduct outside the Supreme Court's defined parameters of "violent force;" meaning, one need not engage in "violent force" to commit second-degree murder in violation of F.S. § 782.04(2). Again, the "Supreme Court elaborated that 'in the context of a statutory definition of '*violent* felony,'' physical force means '*violent* force – that is, force capable of causing physical pain or injury to another person.'" *Oliver v. United States*, 2017 WL 384245 at * 4 (S.D.Fla. Jan. 4, 2017) (quoting *Curtis Johnson*, 130 S. Ct. at 1271 ("When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer.")) (emphasis in original). Nowhere in the jury instructions articulating the elements to prove up second-degree murder is there to be found a requirement that a defendant must engage in violent force, or force capable of causing pain or injury to another person in order to be convicted of the offense.[23] A Florida second-degree murder conviction simply does not require proof of force. *See Garcia-Perez*, 779 F.3d at 283. Second-degree murder, F.S. § 782.04(2), falls outside the definition of physical or violent force as given by the Supreme Court and, thus, cannot be deemed a "violent felony" or a "crime of violence" under either the ACCA or the career offender enhancement.

Appellant's Initial Brief, pages 37-38.

Courts must use the categorical approach when deciding whether a

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[23] Taking a cue from the Fifth Circuit, "Florida courts have repeatedly set out the elements that must be proved to convict under the [second-degree murder] statute, **and an element of force makes no appearance**." *United States v. Garcia-Perez*, 779 F.3d 278, 283 (5th Cir. 2015) (emphasis added). *But see Reyes-Contreras*, 2018 WL 6253909, at *13.

conviction is a violent felony under the ACCA, looking to the statutory definition and not to the actual conduct underlying the conviction. *See Taylor v. United State*, 495 U.S. 575 (1990).

The governing jurisprudence says "'Physical force,' in other words, is a unique type of force; it is powerful, violent force." *Vail-Balon*, 868 F.3d at 1310 (Wilson, J., dissenting).

> *Curtis Johnson* thus requires our Court, when determining whether a crime necessarily involves "physical force," to analyze the degree of force used to commit the crime. If the crime requires a "substantial degree of force" – the type of strong physical power that is generally "capable of causing physical pain or injury" upon impact – the crime requires physical force. This standard makes identifying the actions that involve "physical force" simple. Touching, tapping, pinching, and other actions involving limited, non-violent contact do not constitute "physical force." But kicking, striking, punching, and other actions that are associated with violence do constitute "physical force."

Id.

Judge Wilson observed in his dissent in *Vail-Balon*, "since *Curtis Johnson* was decided in 2010, our court without difficulty, has adhered to the Supreme Court's finding that degree of force is the gravamen of the physical-force inquiry." *Id.* (citing *United States v. Owens*, 672 F.3d 966, 970-972 (11th Cir. 2012) (finding that Alabama's second-degree rape and sodomy statutes did not require the use of "physical force" as contemplated by *Curtis Johnson*)). *See also United States v. Hernandez-Montes,* 831 F.3d 284 (5th Cir. 2016) (defendant's Florida conviction

for attempted second-degree murder was not a crime of violence, pursuant to USSG § 2L1.2);[24] *United States v. Watts*, 2017 WL 411341 (D. Kan. Jan. 31, 2017) (second degree murder under Missouri law is not a crime of violence for purposes of the career offender enhancement); *Montoya v. United States*, 2016 WL 6810727 at *7 (D. Utah Nov. 17, 2016) ("[o]n its merits, attempted murder in Utah does not qualify as a crime of violence . . . because it does not require proof of force as an element"); *United States v. Martinez*, Case No. 07-cr-00236-REB-1 (D. Colo. Feb. 1, 2017) (under elements clause, a conviction for Nevada's second-degree murder statute is not a violent felony for ACCA);[25] *United States v. Nicks*, Case No. WJM-15-0321 (D. Colo. April 4, 2016) (second-degree murder conviction under Colorado law not a crime of violence).[26]

This Court in *Curtis Johnson* provided a definition to allow us to determine whether Florida's second-degree murder qualifies as either a "violent felony" under the ACCA (or even as a "crime of violence" for the career offender

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[24] Interestingly, the Fifth Circuit in *Reyes-Contreras* did not expressly overrule *Hernandez-Montes*, and it reasonably appears that *Hernandez-Montes* remains good law in the Fifth Circuit as of this petition, unless deemed a specific progeny of one of the enumerated cases. *See Reyes-Contreras*, 2018 WL 6253909, at *13.

[25] *See* district court order granting § 2255 motion, filed on February 1, 2017, at Docket Entry 264 ("Given the very broad language [of the Nevada second-degree murder] statute which defines second degree murder, I conclude that the statute does not have as an element the use, attempted use, or threatened use of physical force against the person of another. Thus, the 1978 Nevada statute which defines second degree murder does not fall within the elements clause of § 924(e)(2)(B)(i).").

[26] *See* sentencing transcript filed on April 14, 2016, at Docket Entry 43, pages 27-31.

enhancement in the Sentencing Guidelines). We must follow that guidance. When we do, it is clear that second-degree murder in Florida can be committed without and does not have as an element the use, attempted use, or threatened use of (violent) physical force against the person of another such that it does not – and can not – satisfy the federal definition of "violent felony." *See United States v. Vail-Bailon*, 868 F.3d 1293, 1323 (11th Cir. 2017) (*en banc*) (Rosenbaum, J., dissenting). Hence, second-degree murder, though it may connote[27] "violence," can be committed without the need for or use of "violent physical force" as an element of the offense. Mr. Jones would humbly ask of this Court to accept his case to make this plain, overrule the appellate court, and have the matter ultimately remanded for a brand new sentencing hearing in the district court.

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[27] The word "connote" is seen used in several authorities cited in this petition. The word "connote" is generally accepted to mean a suggestion, "[t]o *connote* is to suggest a connection," whereas "to *denote* is to refer to something outright," or "[a] word's denotation is its literal meaning." Vocabularly.com, *Choose Your Words*, connote/denote, www.vocabularly.com/articles/chooseyourwords/connote-denote/. *See also* www.csun.edu/~bashforth/098_PDF/06Sep15 Connotation_Denotation.pdf ("connotation" is the emotional and imaginative association surrounding a word; "denotation" is the strict dictionary meaning of a word).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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