

No. ____

IN THE
Supreme Court of the United States

EDDY WILMER VAIL-BAILON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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DECEMBER 20, 2017

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QUESTIONS PRESENTED

In *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), the Court defined the term “physical force” in the elements clause of the Armed Career Criminal Act to mean “*violent* force—that is, force capable of causing pain or injury to another person.” In *United States v. Castleman*, 572 U.S. ___, 134 S. Ct. 1405, 1413-14 (2014), the Court expressly left open the question whether the causation of harm necessarily entails the use of “violent force.” Below, the en banc Eleventh Circuit held that it did. Dividing 6-5, it reasoned that “violent force” is measured by the harm resulting from the offense, not by the degree of force used to commit it.

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), the Court explained that, for purposes of applying the categorical approach, there must be a “realistic probability, not a theoretical possibility, that the state would apply its statute to conduct that falls outside” the relevant federal definition. Below, the en banc Eleventh Circuit again divided 6-5 as to whether a defendant can establish a “realistic probability” of a statute’s non-violent application where, absent any reported case, the plain statutory language itself supports such an application.

The questions presented are:

1. Under *Curtis Johnson*, does the causation of great bodily harm necessarily entail the use of “violent force”?
2. Under *Duenas-Alvarez*, must a defendant always identify a case to establish the least culpable conduct prohibited by a criminal statute, or may the plain language of the statute itself establish the breadth of the offense?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review decisions of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's 6-5 en banc opinion in *United States v. Vail-Bailon*, 865 F.3d 1293 (11th Cir. Aug. 25, 2017) is reproduced as Appendix A. The Eleventh Circuit's vacated panel opinion in *United States v. Vail-Bailon*, 838 F.3d 1091 (11th Cir. Sept. 28, 2016) is reproduced as Appendix B.

JURISDICTION

The court of appeals issued its en banc opinion on August 25, 2017. On November 28, 2017, Justice Thomas extended the time within which to file a petition for writ of certiorari to December 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND LEGAL PROVISIONS INVOLVED

The Armed Career Criminal Act defines a "violent felony" as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). An identical definition for the term "crime of violence" is incorporated into the federal Sentencing

Guidelines. U.S.S.G. § 2L1.2, cmt. n.1(B)(iii) (2014), cmt.2 (2016);¹ U.S.S.G. § 4B1.2(a)(1).

The Florida simple battery statute, Fla. Stat. 784.03(1)(a)1, provides that a defendant commits a misdemeanor simple battery in Florida where, *inter alia*, he “[a]ctually and intentionally touches or strikes another person against the will of the other.” If a person has a prior conviction for battery, and he commits a second or subsequent battery, his simple battery is punished as a third-degree felony. Fla. Stat. § 784.03(2).

The Florida felony battery statute, Fla. Stat. § 784.041(1), provides that “a person commits felony battery if he or she . . . [a]ctually and intentionally touches or strikes another person against the will of the other,” and “[c]auses great bodily harm, permanent disability, or permanent disfigurement.” Felony battery under § 784.041(1) is likewise a third-degree felony.

¹ The Sentencing Commission amended § 2L1.2 in 2016. U.S.S.G., Supp. to App. C., amend. 802. While that amendment eliminated the 16-level enhancement, “crimes of violence” continue to form the basis of another enhancement in that Guideline. U.S.S.G. § 2L1.2(b)(3)(E). And the commentary retains the original “elements clause” definition. U.S.S.G. § 2L1.2, cmt. n.2.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

1. In *Curtis Johnson v. United States*, the Court interpreted the term “physical force,” as used in the ACCA’s elements clause, to mean “*violent* force—that is, force capable of causing physical pain or injury to another person.” 559 U.S. 133, 140, (2010). Throughout the opinion, both leading up to and following that 15-word definition, the Court repeatedly referred to “violent force” as a “substantial degree of force” involving “strength,” “vigor,” “energy,” “pressure,” and “power.” *Id.* at 139; *see id.* at 140 (even by itself, the word “violent” “connotes a substantial degree of force,” but “[w]hen the adjective ‘violent’ is attached to the noun ‘felony,’ its connotation of strong physical force is even clearer”); *id.* at 142 (violent force “connotes forces strong enough to constitutes ‘power’”).

The offense at issue in *Curtis Johnson* was a Florida simple battery. A defendant commits a simple battery in Florida where, *inter alia*, he “[a]ctually and intentionally touches or strikes another person against the will of the other.” Fla. Stat. § 784.03(1)(a)1. Where such an offense is a first offense, it is punished as a misdemeanor; if, as in *Curtis Johnson*, it is a second offense, it is punished as a felony. In *Curtis Johnson*, the Court assumed that the offense involved a touching rather than a striking because the record did not indicate otherwise, and touching was the least culpable conduct. 559 U.S. at 137.

In interpreting the touching component, the Court recognized that it was bound by the Florida Supreme Court’s holding that “‘actually and intentionally

touching' under Florida's battery law is satisfied by *any* intentional physical contact, 'no matter how slight,'" such as a "tap on the shoulder without consent." *Id.* at 138 (quoting *State v. Hearn*, 961 So.2d 211, 218-19 (Fla. 2007)). According to *Curtis Johnson*, such nominal contact did not constitute "violent force," and the Court therefore held that a Florida battery by touching did not satisfy the elements clause. In so holding, the Court focused on the degree of force necessary to commit the offense; the resulting harm was irrelevant.

2. The offense at issue here, Florida felony battery, is derivative of Florida simple battery. The first element of Florida felony battery is perfectly identical to the simple battery offense addressed in *Curtis Johnson*. Fla. Stat. § 784.041(1)(a) ("A person commits felony battery if he or she . . . [a]ctually and intentionally touches or strikes another person against the will of the other"). That very same conduct, however, is punished as a felony when it "[c]auses great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1)(b). While the touching or striking must be intentional in a felony battery (just like simple battery), the defendant need not intend for that conduct to cause great bodily harm. For felony battery, no *mens rea* is required as to the harm caused. The Florida courts have expressly recognized that a felony battery under § 784.041(1) is nothing more than simple-battery conduct that unintentionally cause great bodily harm. *See Jefferies v. State*, 849 So.2d 401, 404 (Fla. 2d DCA 2003) (describing felony battery as a "species" of simple battery, "but with resulting and *unintended* great bodily harm"), *receded from on other grounds by Hall v. State*,

951 So.2d 91 (Fla. 2d DCA 2007); *Harris v. State*, 111 So.3d 922, 925 (Fla. 1st DCA 2013) (“felony battery wholly subsumes battery”).

The Florida Legislature created the separate, third-degree felony offense of felony battery in 1997 to “fill the gap” between a misdemeanor simple battery (an offensive touching or striking regardless of harm) and aggravated battery (a simple battery that *intentionally* causes great bodily harm, punished as a second-degree felony), Fla. Stat. § 784.045. *T.S. v. State*, 965 So.2d 1288, 1290 & n.3 (Fla. 2d DCA 2007). While great bodily harm is intentionally caused in an aggravated battery, it is unintended and completely accidental in a felony battery.

B. PROCEDURAL BACKGROUND

In 2014, Petitioner pled guilty to illegally re-entering the United States after deportation, pursuant to 8 U.S.C. §§ 1326(a), (b)(1). Over his objection, the district court imposed a 16-level sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii) (2014) on the ground that his prior conviction for Florida felony battery in violation of § 784.041(1) qualified as a “crime of violence,” since it “had as an element the use, attempted use, or threatened use of physical force against the person of another.” As a result, his guideline range became 37-46 months. He was sentenced to the low-end of that range, followed by 3 years supervised release.

On appeal, a divided panel of the Eleventh Circuit vacated the sentence, concluding that Petitioner’s Florida felony battery conviction did not satisfy the elements clause. *United States v. Vail-Bailon*, 838 F.3d 1091 (11th Cir. Sept. 28, 2016). Because the record did not indicate otherwise, the panel assumed, as did the

parties, that Petitioner's offense was committed by a touching rather than a striking, *id.* at 1094, and the government "expressly conceded [that] a person can be guilty of felony battery . . . if the offender taps another person on the shoulder." *Id.* at 1095. The majority then concluded that felony battery, when committed by a touching, did not require violent force under *Curtis Johnson*. *Id.* at 1094-95. That conclusion, the majority opined, was unaffected by the fact that felony battery requires the causation of great bodily harm. *Id.* at 1095-96. Focusing on the degree of force, the majority explained that "the fact that a mere touching actually does result in great bodily harm [does not] somehow change[] the character of the mere touching from" non-violent to violent force. *Id.* at 1096.

The majority rejected the dissent's contrary assertion that *Curtis Johnson* adopted a "capability" test for measuring violent force. *Id.* at 1097; *see id.* at 1100 (Siler, J., dissenting) ("[T]he issue from *Johnson* is whether the defendant's action is *capable* of causing bodily injury If something necessarily results from the touching, then the logic is that it had to have been capable of that result from the beginning."). The dissent had erred, the majority held, by looking at the phrase "force capable of causing physical pain or injury to another person" "in isolation, without the context" provided by the rest of the decision, including "the Supreme Court's immediate citation" to *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003), defining "violent force" as force "intended to cause bodily injury, or at a minimum likely to do so." "The Supreme Court's reliance on *Flores* must mean something," the majority noted, and the dissent's "capability" test "does not account at all for the

Supreme Court's reliance on *Flores*, which very clearly puts into context what the Supreme Court had in mind when it used the phrase on which the government relies." *Id.* at 1097.

After the full Court granted the government's petition for rehearing and vacated the panel opinion, Petitioner argued that the panel dissent's "capability" test could not be squared with either the reasoning or holding of *Curtis Johnson*, since the very existence of the felony battery statute proved that a mere touching was "capable" of causing great bodily harm in some cases. Moreover, he pointed out, the citation to *Flores* in *Curtis Johnson* necessarily informed the meaning of the word "capable" in the immediately preceding definition of "violent force." That was particularly true given the subsequent confirmation in *United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014), that the Court had indeed cited *Flores* "with approval" in *Curtis Johnson*. In a felony battery case, he argued, the citation to *Flores* was particularly significant, since the Indiana battery offense there at issue included the same two elements as Florida felony battery: a knowing or intentional touching, and the causation of serious bodily injury. The Seventh Circuit in *Flores* had found this materially identical offense did not satisfy the elements clause, notwithstanding the causation of serious bodily injury. And the Court had approved of that result first in *Curtis Johnson* and again in *Castleman*.

In response, the government conceded that *Castleman* had indeed confirmed that *Flores* had been cited "with approval" in *Curtis Johnson*, and that a Florida felony battery—by the terms of the statute—could be committed by the same "mere

touching” that *Curtis Johnson* had held did not meet the elements clause. Nonetheless, the government urged the en banc court to find that, because Petitioner had not cited any reported case involving a felony battery committed by a mere touching, he had not shown a “realistic probability” that his offense was overbroad. The government argued that, in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), this Court had held that a “theoretical possibility” of a non-violent application was insufficient. Instead, Petitioner needed to identify an actual case “in which the state courts in fact did apply the statute in the [way] for which he argues.” As to this argument, Petitioner replied that the Eleventh Circuit had held in three prior precedents—*Accardo v. U.S. Att’y Gen.*, 634 F.3d 133 (11th Cir. 2011); *Ramos v. U.S. Att’y Gen.*, 709 F.3d 1066 (11th Cir. 2013); and *Vassell v. U.S. Att’y Gen.*, 839 F.3d 1352, 1362 (11th Cir. 2014)—that an actual case need not be identified where, as here, the plain language of the statutory elements makes clear that the statute covers non-violent conduct.

In a 6-5 decision, a narrow en banc majority affirmed the original sentence, holding that Florida felony battery categorically qualifies as a crime of violence under the elements clause. *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. Aug. 25, 2017) (en banc). The en banc majority framed the issue before it as “whether felony battery” “necessarily requires the use of physical force” under *Curtis Johnson*. *Id.* at 1299. Agreeing with the panel dissent, the en banc majority concluded that *Curtis Johnson*’s “violent felony” definition set forth a “capability” test by asking whether the offense requires “force capable of causing pain or injury.”

Reasoning that force actually causing pain or injury is necessarily capable of causing such a result, the majority concluded that Florida felony battery met that standard, since it required the causation of great bodily harm. *Id.* at 1299-1302.

The en banc majority rejected Petitioner's contrary assertion that *Curtis Johnson's* definition of "violent force" was measured the "degree of force" used. *Id.* at 1300-1302. Moreover, citing *Duenas-Alvarez*—but ignoring the trilogy of circuit precedents interpreting it—the majority likewise rejected Petitioner's assertion that the plain language of the statute made clear that, like Florida simple battery, Florida felony battery could be committed by a "mere" or slight touching, regardless of the resulting harm. The en banc majority refused to credit the statute's plain "touching" language, as definitively interpreted in *Curtis Johnson*, because there was "no case" in Florida "in which tapping, tickling, or lotion-applying—or any remotely similar conduct—has been held to constitute a felony battery." Without such a case, it found that Petitioner could not show that prosecution for such non-violent conduct was a "realistic probability," as opposed to "legal imagination." *Id.* at 1305-1307.

In complementary dissents, Judges Wilson and Rosenbaum both opined that the en banc majority had incorrectly "create[d] a new test for 'physical force' that disregards [the] degree of force," and instead adopts a "novel capacity test." *Id.* at 1308-1314 (Wilson, J., dissenting); *see id.* at 1315 (Rosenbaum, J., dissenting). That newfound capability test, they argued, "swallow[ed] *Curtis Johnson's* finding that Florida simple battery does not require 'physical force,'" because even simple

battery had the capability of causing pain or injury. *Id.* at 1314 (Wilson, J., dissenting); *see id.* at 1315 & n.2 (Rosenbaum, J., dissenting). In that regard, they emphasized that Florida felony battery was nothing more than Florida simple battery that unintentionally caused great bodily harm: “the *actus reus* elements of felony and simple battery are identical,” the only difference is the result. *Id.* at 1311-1312 (Wilson, J., dissenting); *see id.* at 1315, 1320-1323 (Rosenbaum, J., dissenting). Thus, they opined, the en banc majority had also incorrectly applied *Duenas-Alvarez* by requiring Petitioner to identify a specific case reflecting a felony battery prosecution for a mere touching. Since the statutory language made plain that the offense could be committed by such conduct, the statutory language itself created the “realistic probability” that Florida would apply the statute in this way; no “legal imagination” was required. *Id.* at 1312, n.4 (Wilson, J., dissenting) (citing *Ramos*); *id.* at 1320-1321 & n.10 (Rosenbaum, J., dissenting) (citing *Ramos*; noting that it was clear from *State v. Hearn*, 961 So.2d 211 (Fla. 2007) and *Curtis Johnson* that the first element of felony battery applies to a mere touching; and opining that “[w]hether Florida has actually prosecuted such a case is entirely irrelevant to the analysis”). Based upon the plain language of the Florida felony battery statute, all five dissenting judges agreed that Florida felony battery could be committed without violent force.

Approximately a month after the 6-5 en banc decision, the Eleventh Circuit confirmed that its holding—that Florida felony battery was “categorically” a “crime of violence”—would control the “violent felony” determination in ACCA cases.

Because the Guidelines' and the ACCA's elements clauses are "identical," the Eleventh Circuit held that *Vail-Bailon* compelled the conclusion that Florida felony battery categorically qualified as a "violent felony" within the ACCA's element clause. *United States v. Green*, 873 F.3d 846, 869 (11th Cir. 2017). And after *Green*, the Court has continued to apply *Vail-Bailon* in ACCA cases, including those on collateral review. *See, e.g., Willard Robinson v. United States*, (11th Cir. Nov. 13, 2017) (No. 16-13333) (granting government's motion for summary affirmance; concluding, in light of *Vail-Bailon* and *Green*, that "the government is clearly right as a matter of law" that Robinson's felony battery conviction categorically qualified as a violent felony under the ACCA's elements clause).

Petitions for writ of certiorari in *Green* and *Robinson* have been filed contemporaneously with the one in the instant case.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON BOTH QUESTIONS PRESENTED

A. The Circuits are Divided on Whether the Causation of Bodily Harm Necessarily Entails Violent Force Under *Curtis Johnson*

In *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), the 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 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. For even great bodily harm may be caused by only *de minimis* force.

The Court expressly left this question open in *United States v. Castleman*, 572 U.S. ___, 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. 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* actually held that an Indiana battery statute—“materially indistinguishable” from the Florida felony battery statute 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”);² *United States v. Perez-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).

² 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. 2015) (concluding that Florida manslaughter, which required causation of death, did “not require proof force” as an element).

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 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 *Castleman*. The Court should decide it here.

B. The Circuits are Divided on the Application of *Duenas-Alvarez*

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the Court addressed how to identify the scope of an offense for purposes of applying the categorical approach. It cautioned that doing so “requires more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the [federal] definition.” *Id.* at 193. And “[t]o show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special . . . manner for which he argues.” *Id.*

Importantly, however, that passage must be read in context. In *Duenas-Alvarez*, the offender argued that California’s aiding-and-abetting doctrine rendered his theft offense non-generic, because it made a defendant criminally liable for unintended conduct. *Id.* at 190-91. That argument found no support in either the statutory language or precedent establishing the scope of aiding-and-abetting liability. As a result, the Court required the offender to identify a specific case to support his novel, proposed application. *See id.* at 187, 190-91. This Court has not

addressed whether that case-specific requirement of *Duenas-Alvarez* applies even where language of the statute plainly establishes that an offense is overbroad. The courts of appeals are now divided on that question.

1. The First, Third, Sixth, Ninth, and Tenth Circuits have all held that the plain statutory language can establish that an offense is overbroad, notwithstanding the absence of any reported case. *See Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017) (the “sensible caution [in *Duenas-Alvarez*] against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance to a case [where the plain statutory language is overbroad]. The state crime at issue clearly does apply more broadly than the federally defined offense. Nothing in *Duenas-Alvarez*, therefore, indicates that this state law crime may be treated as if it is narrower than it plainly is.”); *Whyte*, 807 F.3d at 468-69 (where the plain language of the statute does not require the use, attempted use, or threatened use of violent force, there is a “realistic probability” the state could punish conduct that results in physical injury without the “use of physical force,” a reported case is not required); *Jean-Louis v. U.S. Att’y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (declining to “impose[] this additional step” of identifying a reported case because, unlike *Duenas-Alvarez* where the parties “vigorously disputed” the scope of the offense, “no application of ‘legal imagination’ to the Pennsylvania simple assault statute is necessary. The elements . . . are clear, and the ability of the government to prosecute a defendant” for certain conduct is “not disputed”); *United States v. Lara*, 590 Fed. App’x 574, 584 (6th Cir. 2014) (“The

government is correct that there appear to be no cases in Tennessee that have applied § 39-14-403 to unattached, uninhabited structures. The meaning of the statute, however, is plain: the statute applies to structures that belong to the principal structure. We should not ignore the plain meaning of the statute,” citing as support *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) (where the law is clear, courts do “not need to hypothesize about whether there is a ‘reasonable probability’ that Maryland prosecutors will charge defendants engaged in non-violent physical contact with resisting arrest; we know that they *can*”) (emphasis added);³ *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (en banc) (“Where, as here, a state statute explicitly defines a crime more broadly than the [federal] definition, no ‘legal imagination’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the [federal] definition The state statute’s greater breadth is evident from its text.”);⁴ *United States v. Tittles*, 852 F.3d 1257, 1274-75 & n.23 (10th Cir. 2017) (“Where, as here, the statute lists means to commit a crime that would render the crime non-violent under the ACCA’s force clause, any conviction under the statute does not count as an ACCA violent felony,” and there is no “need to imagine

³ Accord *United States v. McGrattan*, 504 F.3d 608, 614 (6th Cir. 2008); *Mendieta-Robles v. Gonzales*, 226 Fed. App’x 564, 572 (6th Cir. 2007).

⁴ Accord *United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc), *abrogated on other grounds, as recognized in Cardozo-Arias v. Holder*, 495 Fed. App’x 790, 792 n.1 (9th Cir. 2012); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009-10 (9th Cir. 2015) (re-affirming and applying *Grisel* and *Vidal*); *United States v. Jennings*, 515 F.3d 980, 989 n.9 (9th Cir. 2008) (same); *United States v. Valdivia-Flores*, ___ F.3d ___, 2017 WL 6044232 at **5-6 (9th Cir. Dec. 7, 2017) (following *Grisel*).

hypothetical non-violent facts to take a statute outside the ACCA's ambit" or "require instances of actual prosecutions for the means that did not satisfy the ACCA. The disparity between the statute and the ACCA [is] enough.").

2. By contrast, the en banc Fifth and Eleventh Circuits have taken the contrary view. Dividing 8-7, the en banc Fifth Circuit held that, under *Duenas-Alvarez*, the defendant was required to identify a reported case in which "courts have *actually applied*" the statute in the way the defendant advocated. *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc). It specifically rejected the contrary assertion that, "because the Texas statute's definition . . . is plainly broader" than the federal definition, "Castillo-Rivera is not required to point to an actual case." *Id.* at 223. That view, according to the majority, "does not comply with the Supreme Court's directive in *Duenas-Alvarez*." *Id.*

Contrary to the circuits above, the Fifth Circuit majority reasoned: "There is no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face. Indeed, the Court in *Duenas-Alvarez* emphasized that a defendant must 'at least' point to an actual state case—the implication being that even pointing to such a case may not be satisfactory. In short, without supporting state case law, interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'" *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193). The majority asserted that this requirement was consistent with prior Fifth Circuit precedents. *Id.* at 223-24. And because the

defendant did not identify a reported case supporting his construction of the statute, the majority rejected his argument. *Id.* at 224-25.

The seven-member dissent in *Castillo-Rivera* disagreed that *Duenas-Alvarez* inflexibly requires a defendant to “point to a state decision . . . in all cases in order to establish a realistic probability that the state would apply its law in a way that falls outside of the scope of the relevant federal” definition. *Id.* at 238 (Dennis, J., dissenting) (citation omitted). Rather, the dissent pointed out, “*Duenas-Alvarez* is concerned with the defendant who tries to demonstrate that a statute is overbroad by hypothesizing that it might be applied in some fanciful or unlikely way—through ‘the application of legal imagination.’ *Castillo-Rivera* is not relying on ‘the application of legal imagination’ to establish that [the statute] is overbroad; he is relying on the statute’s plain language.” *Id.* at 239.

The majority’s contrary conclusion, the dissent argued, also ran afoul of the categorical approach adopted in *Taylor v. United States*, 495 U.S. 575 (1990), because “state prosecutors’ discretionary decisions whether or not to prosecute an offense under certain circumstances cannot add *statutory elements* to statutes that plainly do not contain those elements.” *Id.* (Emphasis in original). “Viewed in this context, it is clear that *Duenas-Alvarez* does not, as the majority opinion holds, require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a state case.” *Id.* The dissent also argued that the majority’s approach was contrary to the facts of *Taylor*, as well as numerous prior

Fifth Circuit cases, which did not require the defendant to identify a case. *See id.* at 239-41.

Finally, the dissent noted that “the majority opinion [does not] address or even acknowledge that its holding directly conflicts with holdings from the First, Third, Sixth, Ninth, and Eleventh Circuits,⁵ all of which have recognized the limits of *Duenas-Alvarez*’s requirement.” *Id.* at 241 (citing cases). The dissent concluded that “the majority opinion’s unqualified rule that a defendant must in all cases point to a state court decision to illustrate the state statute’s breadth misconstrues *Duenas-Alvarez*, directly conflicts with *Taylor*, and ignores both our established circuit precedent and the holdings of several of our sister circuits.” *Id.*

The Eleventh Circuit is now squarely aligned with the Fifth Circuit. The en banc majority below refused to credit scenarios offered by Petitioner, which concretely showed how Florida felony battery could be committed by a mere touching. Although the plain language of the statute made clear that the offense could be committed by a touching, the majority found those scenarios “farfetched” absent a case “in which tapping, tickling, or lotion-applying—or any remotely similar conduct—has been held to constitute a felony battery under Florida Statute § 784.041.” *Vail-Bailon*, 868 F.3d at 1306. Without such a case, the en banc majority found that Petitioner was offering “little more than the verboten legal imagination proscribed” by *Duenas-Alvarez*. *Id.* at 1307. The majority,

⁵ Here, the Fifth Circuit was referring to the Eleventh Circuit’s pre-*Vail-Bailon* panel precedents in *Ramos*, 709 F.3d at 1071-72, *Vassell*, 839 F.3d at 1362, and *Accardo*, 634 F.3d at 1336-37.

inexplicably, made no mention of the Eleventh Circuit's earlier precedents finding this aspect of *Duenas-Alvarez* inapplicable where the plain language of the statute establishes its scope.

By contrast, and relying upon those earlier precedents, Judge Wilson's dissent correctly explained that:

the felony battery statute specifically refers to "touching" that "causes great bodily harm," Fla. Stat. § 784.041, and Florida courts have defined "touching" in the battery context to refer to a mere touching, *see Curtis Johnson*, 559 U.S. at 138. Felony battery's "statutory language itself" therefore creates a 'realistic probability that Florida would apply the statute to' a mere touching that happens to cause great bodily harm. *Ramos v. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The Florida legislature would not have included a mere touching as an operative act in felony battery if the legislature did not intend to punish some mere touchings.

Id. at 1312 n. 4 (brackets and parallel citation omitted).

Judge Rosenbaum's dissent made the same point. She reiterated that "a petitioner does not engage in legal imagination when the *statutory language itself* creates the realistic possibility that a state would apply the statute to the identified least culpable conduct, regardless of whether it actually has done so." *Id.* at 1320 (emphasis in original; citations and ellipsis omitted). Applying that principle to felony battery, she explained:

We know that, by its language, the first element applies to mere touching. *State v. Hearn*, 961 So. 2d 211 (Fla. 2007); *Curtis Johnson*, 559 U.S. 133. . . . So the terms of the felony-battery statute itself make it plain beyond all doubt that mere touching that accidentally results in serious bodily injury squarely satisfies the statute's requirements. Indeed, the government conceded as much at oral argument. For this reason, despite the Majority Opinion's reassurance that, "to its knowledge, there is . . . no case in which mere touching that

accidentally resulted in serious bodily injury has been held to constitute a felony battery under Florida Statute § 784.041,” whether Florida has actually prosecuted such a case is entirely irrelevant to the analysis. *See Ramos*, 709 F.3d at 1071-72.

Id. at 1320-1321 (brackets omitted). While there were only two reported felony battery decisions involving a touching, neither of which involved nominal contact, Judge Rosenbaum opined that they were “not a sufficient sample size to conclude that no one has ever convicted of felony battery for mere-touching conduct.” *Id.* at 1320 n.10. And “even if it were, as noted above, mere touching that accidentally results in grievous bodily injury falls squarely within the [statutory] language.” *Id.*

II. BOTH QUESTIONS ARE RECURRING AND IMPORTANT

1. The time is ripe to clarify *Curtis Johnson*’s definition of “violent force.” Indeed, other than re-affirming that definition in *Castleman*, 134 S. Ct. at 1411 n.4, the Court has not clarified *Curtis Johnson* since deciding it over seven years ago. Moreover, the meaning of that decision is now of paramount importance in light *Samuel Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), which declared the ACCA’s residual clause void for vagueness. The residual clause had previously acted as a broad catchall under which many offenses qualified as violent felonies. Without the residual clause, however, the elements clause has become the primary battleground. Parties, probation officers, and lower courts are now routinely required to assess whether offenses satisfy that clause. Its meaning should be uniform across the nation.

Moreover, the question presented here implicates a wide variety of offenses. Indeed, any offense that requires the causation of harm, injury, or death, but that

does not specify a violent means for causing that result, will be implicated. That not only includes felony battery offenses like the ones here and in *Flores/Douglas*, but also assault, manslaughter, threat, domestic violence, child endangerment, and a host of other statutes requiring the causation of some harm or injury. Given this broad potential application, the Court was careful to leave that question open in *Castleman*, deciding the case on another ground. Here, however, the question of whether causation of great bodily harm necessitates “force capable of causing pain or injury to another” cannot be avoided, and should be decided. The rampant uncertainty described above on this question is intractable because it derives from this Court’s opinion in *Curtis Johnson* itself.

2. The *Duenas-Alvarez* question also has widespread application, and likewise necessitates resolution, since Federal courts across the nation apply the categorical approach on a daily basis. In the criminal context, they do so to determine whether a federal criminal defendant is subject to a mandatory minimum penalty or enhanced guideline range. And, in the immigration context, they do so to determine whether an alien is subject to removal. Thus, while the categorical approach represents a technical area of the law, its application has grave consequences in both the federal criminal and immigration arenas. Given the stakes, its application must be uniform.

This Court has attempted to vigilantly ensure such uniformity by repeatedly granting review to clarify the categorical approach. See, e.g., *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016) (clarifying when statutes are divisible for

modified categorical approach); *Descamps v. United States*, 570 U.S. ___, 133 S. Ct. 2276 (2013) (holding that modified categorical approach is inapplicable to indivisible statutes); *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (re-affirming and clarifying application of categorical approach in immigration context); *Nijhawan v. Holder*, 557 U.S. 29 (2009) (declining to apply categorical approach to particular immigration statute); *Shepard v. United States*, 544 U.S. 13 (2005) (limiting class of documents that may be considered under modified categorical approach). Given the uncertainty created by *Duenas-Alvarez*, and the prevalence of the categorical approach, the Court's intervention in this area is warranted yet again.

Furthermore, the minority view adopted by the en banc Fifth and Eleventh Circuits will have troubling repercussions if not corrected. Under that view, the scope of a predicate offense can be ascertained only by examining the particular facts contained in the universe of reported cases. That limited universe, however, will seldom reflect the true scope of the offense. The reported case law can be skewed or sparse due to the relative novelty of an offense, prosecutorial discretion, and—most importantly—the ubiquity of guilty pleas. *See Aparicio-Soria*, 740 F.3d at 157-158 (“It may be that Maryland prosecutors tend to charge too many offenders with resisting arrest when they could charge far more serious crimes, or it may be that we have a skewed universe of cases from the hundreds of resisting arrest convictions sustained each year.”); *see also United States v. Davis*, 875 F.3d 592, 606 (11th Cir. Nov. 7, 2017) (Rosenbaum, J., concurring in part) (noting that “only a handful of the numerous cases prosecuted under § 784.041 have published opinions

in them. As a result, we have no way of knowing the scope of what Florida has actually prosecuted under that statute”).

The charging, plea, and appeal practices under a statute cannot change the scope of the offense, which, at bottom, derives from the statute enacted by the legislature. See *Castillo-Rivera*, 853 F.3d at 239 (Dennis, J., dissenting). And, by precluding courts from relying on the plain statutory language, that application of the categorical approach will ensure an artificial analysis—one where the least culpable conduct used by the courts does not represent the least culpable conduct actually prohibited by the statute. At the very least, such a troubling application and extension of *Duenas-Alvarez* warrants this Court’s close scrutiny.

Notably, the effects of *Vail-Bailon* in this regard have already been felt outside the Eleventh Circuit, and in diverse contexts far removed from that here. For example, in *In re Aspilaire*, 2017 WL 5377562 (BIA Sept. 18, 2017), the Board of Immigration Appeals followed *Vail-Bailon* to reject the contention of a lawful permanent U.S. resident subject to a removal order that the absence of Florida prosecutions for possession of antique firearms was irrelevant under *Ramos*. To the contrary, the Board found citing *Vail-Bailon*, the absence of any reported prosecutions was dispositive. *Id.* at *5. As the Board of Immigration Appeals correctly recognized, the en banc majority in *Vail-Bailon* had “implicitly reject[ed] the understanding of the realistic probability doctrine reflected in *Ramos*.” *Id.*

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE BOTH QUESTIONS

1. The *Curtis Johnson* question is ideally presented for decision here. The Florida felony battery statute perfectly tees up the dispute because it requires *both* a touching *and* the causation of great bodily harm. If “violent force” is measured by an offense’s capability of causing pain or injury, then Florida felony battery would satisfy the elements clause, since conduct actually causing great bodily harm is necessarily capable of producing pain or injury. If, however, “violent force” is measured not by the resulting harm but by the degree of force, then Florida felony battery—which, by its plain terms, can be committed by a touching—would not satisfy the elements clause. The en banc majority and dissenting opinions below fractured along these very lines. Thus, this is an ideal statute to resolve the question presented.

That is particularly true since Florida felony battery is derivative of the Florida simple battery offense considered in *Curtis Johnson*. In *Curtis Johnson*, this Court recognized that, under Florida Supreme Court precedent, a battery by touching could be committed by the most nominal contact, such as a tap on the shoulder. 559 U.S. at 138. Thus, the Court has already established the meaning of the touching component under Florida law. And the felony battery offense here can be committed by the exact same conduct. Again, the only difference is that this simple-battery conduct inadvertently causes great bodily harm.

Finally, the very existence of the statute here provides strong support for Petitioner’s interpretation of *Curtis Johnson*, for it confirms that even a mere

touching has the capability of causing great bodily harm. If *Curtis Johnson* truly employed a “capability” test, then it should have reached the opposite outcome. See 868 F.3d at 1314 (Wilson, J., dissenting). If, however, that interpretation of *Curtis Johnson* is incorrect, then this statute presents the ideal occasion to explain why.

2. The Florida felony battery statute also ideally presents the *Duenas-Alvarez* question. On the one hand, it is undisputed that there are no reported decisions demonstrating that Florida felony battery may be committed by a mere touching. On the other hand, as both dissenting opinions below recognized, the plain language of Fla. Stat. § 784.041(1) makes clear that Florida felony battery may be committed by a touching. Were it otherwise, the Legislature would have limited felony battery to striking. It did not because, as explained above, felony battery is a derivative of simple battery—one that happens to result in great bodily harm. Given that the first element of felony battery is simple battery, see Fla. Stat. §§ 784.03(1)(a)1, 784.041(1)(a), and the Florida Supreme Court has definitively held that battery by touching can occur by only the most nominal contact, *Curtis Johnson*, 559 U.S. at 138, the statute plainly proscribes such conduct.

Accordingly, if *Duenas-Alvarez* requires defendants to always identify a case establishing the least culpable conduct, as the Fifth and Eleventh Circuits now hold, then Petitioner could not prevail. There is no reported decision confirming what the plain statutory language says—*i.e.*, that felony battery can occur where a mere touching happens to cause great bodily harm. However, if no case is required where the plain statutory language makes clear that the offense is overbroad, as

First, Third, Ninth, Tenth, and earlier Eleventh Circuit opinions have held, then *Duenas-Alvarez* would pose no obstacle here. Thus, the disputed application of *Duenas-Alvarez* is ideally presented here.

This issue, moreover, was fully pressed and decided in the en banc proceedings below. In its en banc brief, the government relied heavily on *Duenas-Alvarez*, arguing that Petitioner “does not (and cannot) show that his own felony battery conviction rested on an intentional touch[ing] that . . . caused great bodily harm. Nor does he show that Florida has ever applied its felony battery to the sort of [mere touching] conduct in his hypotheticals.” U.S. En Banc Br. 24-25. Petitioner replied that no such case was necessary, relying on the earlier Eleventh Circuit cases finding plain statutory language sufficient. Pet. En Banc Reply Br. 19-21. The en banc majority embraced the government’s argument. 868 F.3d at 1305-1306. The dissents, by contrast, embraced Petitioner’s argument. *Id.* at 1312, n.4; 1320-1321 & n.10. This internal disagreement tracks the larger disagreement among the circuits.

IV. THE DECISION BELOW IS WRONG

The Eleventh Circuit incorrectly concluded that Florida felony battery categorically meets the elements clause.

1. The panel majority in *Vail-Bailon*, and the en banc dissents, persuasively explain why Florida felony battery, when committed by a touching, does not satisfy the elements clause. Those opinions, as well as the many circuit opinions cited above, have correctly explained that the causation of bodily harm or

injury need not require “*violent force*.” To reflexively equate physical harm or injury with violent force reflects a logical fallacy and an incorrect reading of *Curtis Johnson*. A proper reading of that decision—taking into account the entirety of its explanation—compels the conclusion that violent force is measured by the degree or quantum of force used, not by whether it has the capability of causing pain or injury. Numerous passages of *Curtis Johnson* employed a “degree of force” metric. And this Court has repeatedly cautioned against reading a single statement from an opinion “‘in isolation’ rather than ‘alongside the rest of the opinion,’” *Endrew F. v. Douglas Cty. Sch. Dist.*, 580 U.S. ___, 137 S. Ct. 988, 998 (2017), as the en banc majority did here. *Vail-Bailon*, 868 F.3d at 1308-1309 (Wilson, J., dissenting).

One need look no further than the result reached in *Curtis Johnson* to confirm that “force capable of causing pain or injury” refers to the “degree of force” rather than the possible consequences of the offense. Had the Court truly adopted a “capability” test in *Curtis Johnson*, it would have reached the opposite outcome in that case. Indeed, the very existence of the Florida felony battery statute here confirms that the same mere touching in a simple battery is capable of causing great bodily harm. Yet *Curtis Johnson* nonetheless held that simple battery did not require the use of violent force. The only way to make sense of that holding is to conclude that “*violent force*” depends on the degree or quantum of force used, not its capability of causing pain or injury. The latter test adopted by the en banc majority in *Vail-Bailon* is thus incompatible with the outcome reached in *Curtis Johnson* itself. It will sweep in numerous offenses requiring minimal contact (or none at all),

thus eviscerating any distinction between violent and non-violent offenses, which was the very distinction that *Curtis Johnson* sought to create.

In addition to *Curtis Johnson*'s outcome and repeated references to "degree of force," it also approvingly cited the Seventh Circuit's decision in *Flores* immediately following its definition of "violent force" as "force capable of causing pain or injury." 559 U.S. at 140. The Court later confirmed in *Castleman* that it had indeed cited *Flores* "with approval." 134 S. Ct. at 1412. It could not have done so had it intended the word "capable" in its definition to refer to the result of the defendant's conduct rather than the degree of force used. That is so because causation of serious bodily harm was also an element of the offense in *Flores*, and the Seventh Circuit held there that the touching in that case did not involve "violent force." If this Court had disagreed with that holding, it would not have so prominently relied upon that decision, citing the very page of the *Flores* opinion where that holding appeared. Indeed, there were many other circuit decisions discussed in the *Curtis Johnson* briefing, but the Court cited only *Flores*. Thus, because the Court approved of *Flores*, it must have agreed with Petitioner's argument about his "materially indistinguishable" battery offense. By reaching the contrary conclusion, the Eleventh Circuit has rendered the Court's citation to *Flores* meaningless.

2. The dissenting opinions in *Vail-Bailon*, as well as the many circuit opinions cited above, persuasively explain why the en banc majority also improperly applied *Duenas-Alvarez*. No reported case is necessary to confirm what the statutory language plainly says: that Florida felony battery may be committed by a

touching. And this Court has already correctly explained that “[t]he Florida Supreme Court has held that the element of ‘actually and intentionally touching’ under Florida’s battery law is satisfied by *any* intentional physical contact, ‘no matter how slight.’” *Curtis Johnson*, 559 U.S. at 138 (quoting *Hearns*, 961 So.2d at 218). The law is clear that Florida felony battery may be committed by only a mere touching.

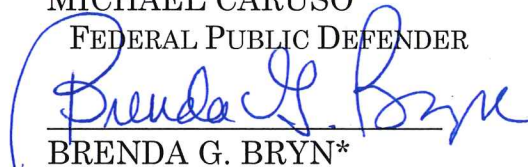
In *Duenas-Alvarez*, this Court was concerned with a defendant who sought to establish a statute’s overbreadth in an unlikely way that was unsupported by the statutory language. The Court therefore required a reported case in order to avoid the exercise of legal imagination. But no such imagination is required where, as here, the plain statutory language, as well as precedent from the state’s highest court, establishes that the statute is overbroad. Applying *Duenas-Alvarez* under such circumstances contravenes the categorical approach. The elements of the offense ultimately derive from the statute, not from the limited universe of appellate decisions. If a statute is newly enacted, infrequently charged, or has not generated many reported decisions—a distinct possibility given that most cases are resolved by guilty pleas—then the approach of the en banc majority here and the Fifth Circuit would still require courts to disregard the statutory language when ascertaining the least culpable conduct. Nothing in law or logic justifies that anomalous approach.

CONCLUSION

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

Respectfully submitted,

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DECEMBER 20, 2017

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