

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WILLIAM GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's prior conviction for felony battery, in violation of Fla. Stat. § 784.041 (2009), qualifies as a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i).

2. Whether petitioner's prior conviction for battery by a repeat offender, in violation of Fla. Stat. § 784.03 (2006), qualifies as a "violent felony" under the ACCA.

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No. 17-7299

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C31) is reported at 873 F.3d 846. A prior opinion of the court of appeals (Pet. App. B1-B33) is reported at 842 F.3d 1299.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2017. The petition for a writ of certiorari was filed on December 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g). The district court sentenced him to 262 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. C1-C31.

1. In 2013, petitioner was charged with various state offenses and was released before trial under the condition that he wear a court-ordered monitoring device. Pet. App. C8. His local sheriff's office thereafter discovered that petitioner had stopped wearing the device. Ibid. A week later, officers went to the trailer home of petitioner's girlfriend, Jodi Simmons, to execute a warrant for petitioner's arrest. Ibid. With Simmons's consent, the officers searched the trailer and found a loaded .22 caliber revolver, .22 caliber ammunition, methamphetamine, a digital scale, and pipes used to smoke methamphetamine. Ibid. One of the officers then discovered petitioner hiding in a closet and arrested him. Id. at C8-C9; see Presentence Investigation Report (PSR) ¶¶ 11-12.

2. A federal grand jury returned an indictment charging petitioner with possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g). Indictment 1-3. A jury found petitioner guilty of that charge. Judgment 1.

A conviction for violating 18 U.S.C. 922(g) typically exposes the offender to a statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for “violent felon[ies]” or “serious drug offense[s]” that were “committed on occasions different from one another,” then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1); see Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a “violent felony” as:

any crime punishable by imprisonment for a term exceeding one year * * * that --

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the “elements clause” and the portion beginning with “otherwise” is known as the “residual clause.” Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court defined “physical force” under the ACCA’s elements clause to “mean[] violent force -- that is, force capable of causing physical pain or injury to another person.” Id. at 140.

In calculating petitioner's recommended Sentencing Guidelines range, the Probation Office determined that petitioner had more than 25 prior adult criminal convictions, resulting in a total of 26 criminal history points, well above the 13 points required to place an offender in criminal-history category VI. PSR ¶¶ 34-62; see Pet. App. C10 (noting petitioner's "lengthy and violent criminal record"). In addition, the Probation Office classified petitioner as an armed career criminal under the ACCA based on four prior Florida convictions: a 2000 conviction for aggravated assault with intent to commit a felony, in violation of Fla. Stat. § 784.021 (1999); a 2004 conviction for resisting an officer with violence, in violation of Fla. Stat. § 843.01 (2004); a 2006 conviction for third-degree felony battery, in violation of Fla. Stat. § 784.03 (2006); and a 2010 conviction for felony battery causing great bodily harm, in violation of Fla. Stat. § 784.041 (2009).¹ PSR ¶¶ 29, 41, 47, 50, 57; see Pet. App. C28. Petitioner's felony battery conviction under Section 784.041 was

¹ According to the presentence report, each of these convictions resulted from petitioner's entry of a "nolo contendere" plea. See PSR ¶¶ 41, 47, 50, 57. Although the ACCA's penalty enhancements are triggered by three prior qualifying "convictions," 18 U.S.C. 924(e)(1), the Eleventh Circuit has held that "a nolo contendere plea where * * * there is subsequently an adjudication of guilt is a conviction under Florida law which satisfies the requirement of the Armed Career Criminal statute." United States v. Drayton, 113 F.3d 1191, 1192-1193 (1997) (per curiam) (opinion denying rehearing); see id. at 1193 (noting that "prison sentences upon revocation" of probation following nolo contendere pleas "could not have been imposed absent an adjudication" of guilt). Petitioner does not contend that his pleas were not "convictions" under the ACCA.

based on an incident in which he strangled, hit, and kicked his girlfriend, knocking out two of her teeth. PSR ¶ 57. In light of petitioner's criminal-history category of VI and his total offense level of 34, the PSR calculated an advisory Sentencing Guidelines range of 262 to 327 months of imprisonment. PSR ¶¶ 31, 99.

Petitioner objected to his classification as an armed career criminal, arguing that his 2006 conviction for third-degree felony battery and his 2010 conviction for felony battery causing great bodily harm were not "violent felonies" under the ACCA. D. Ct. Doc. 45, at 2 (May 16, 2014). The Florida statute defining third-degree battery provides that "[t]he offense of battery occurs when a person * * * [a]ctually and intentionally touches or strikes another person against the will of the other; or * * * [i]ntentionally causes bodily harm to another person," Fla. Stat. § 784.03(1)(a) (2006), and that a person who commits battery after being convicted of battery, aggravated battery, or felony battery is guilty of a third-degree felony, see id. § 784.03(2) (2006). The Florida felony battery statute, id. § 784.041 (2009), provides that "[a] person commits felony battery if he or she: (a) [a]ctually and intentionally touches or strikes another person against the will of the other; and (b) [c]auses great bodily harm, permanent disability, or permanent disfigurement." Id. § 784.041(1) (2009). Petitioner contended that neither conviction qualified as a "violent felon[y]" under the ACCA because the government had not shown that those convictions were based on a

“striking,” as opposed to a mere “touching.” D. Ct. Doc. 45, at 2; Sent. Tr. 5-9, 11-12. In its response to petitioner’s objection, the government attached certified copies of documents relating to petitioner’s prior convictions. D. Ct. Doc. 48-1 to 48-4 (June 5, 2014); see Sent. Tr. 12-13 (court admitted documents as exhibits at sentencing hearing).

The district court overruled petitioner’s objection and sentenced him to 262 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 13, 28; Judgment 2-3.

3. While petitioner’s appeal was pending, this Court held in Johnson v. United States, 135 S. Ct. 2551 (2015), that the residual clause of the ACCA’s violent-felony definition is unconstitutionally vague. Id. at 2557. The Court noted, however, that its holding was limited to the residual clause and did not “call into question * * * the remainder of the [ACCA’s] definition of a violent felony.” Id. at 2563.

The court of appeals affirmed. Pet. App. B1-B33. With respect to petitioner’s challenge to his ACCA sentence, the court noted that petitioner had acknowledged that his prior convictions for aggravated assault and resisting an officer with violence qualified as violent felonies under the ACCA, and it determined that petitioner’s conviction for third-degree felony battery under Fla. Stat. § 784.03 qualified as a violent felony under the ACCA’s elements clause. Id. at B28-B31. The court determined that

Section 784.03 is a divisible statute subject to the “modified categorical approach,” under which certain record documents may be consulted to determine the specific offense that he committed. Id. at B29. And it found that state-court documents had established that petitioner “was convicted under the ‘striking’ element, and not the ‘actually and intentionally’ touching element, of § 784.03,” which involved sufficient “force” to qualify as a violent felony under the ACCA’s elements clause. Ibid. Because it held that petitioner had three prior convictions for violent felonies without considering petitioner’s felony battery conviction under Section 784.041, the court concluded that it “need not decide” whether that conviction was also a violent felony. Id. at B31.

4. a. Petitioner filed a petition for rehearing and rehearing en banc, challenging the conclusion that his Florida third-degree battery conviction was for a violent felony. He argued both that Section 784.03 is not divisible under the modified categorical approach and that, even if the statute were divisible, the panel erred in concluding that state-court documents showed that petitioner had been convicted of a “violent” alternative version of the offense. Pet. C.A. Reh’g Pet. 4-15.

b. After petitioner filed his rehearing petition, the en banc court of appeals determined that a Florida felony battery conviction categorically qualifies as a “crime of violence” under the elements clause in Sentencing Guidelines § 2L1.2 (2014), which

is worded like the ACCA's. United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017), petition for cert. pending, No. 17-7151 (filed Dec. 20, 2017); Pet. App. A1-A39. The court first explained that this Court's decision in Curtis Johnson "articulates the standard we should follow in determining whether an offense calls for the use of physical force, and th[e] test is whether the statute calls for violent force that is capable of causing physical pain." Vail-Bailon, 868 F.3d at 1302. The court declined to adopt the defendant's alternative definition of force that is "likely to cause" injury, which was based on "words found in a cited circuit court decision" but not repeated in the Court's Curtis Johnson decision itself. Id. at 1301. "Indeed," the court added, "to our knowledge, no court has ever defined physical force to mean force that is 'likely to cause pain.'" Ibid.

The court of appeals next determined that, "[b]y its plain terms, felony battery in violation of Florida Statute § 784.041 requires the use of physical force as defined by Curtis Johnson." Vail-Bailon, 868 F.3d at 1303. The court explained that Florida felony battery requires the intentional use of force "that causes the victim to suffer great bodily harm" and that such force is necessarily "capable of causing pain or injury." Ibid. The court also observed that Florida courts have repeatedly held that felony battery "cannot be committed without the use of physical force or violence," under a definition of "physical force" that requires "more than mere touching." Id. at 1304 (quoting Dominguez v.

State, 98 So. 3d 198, 200 (Fla. Dist. Ct. App. 2012)); see id. at 1303-1304. The court accordingly found that Florida law foreclosed the defendant's argument that "it is possible for an offender to violate Florida Statute § 784.041 by engaging in conduct that consists of no more than a slight touch or nominal contact." Id. at 1305.

The court of appeals then rejected the defendant's efforts to portray the Florida statute more broadly by postulating "farfetched hypotheticals" involving "relatively benign conduct combined with unlikely circumstances and a bizarre chain of events that result in an unforeseeable injury": for example, tapping someone who is startled and falls down a staircase; tickling someone who falls out of a window; or applying lotion to the skin of someone who has an unknown but severe allergy. Vail-Bailon, 868 F.3d at 1305-1306. The court found "no support in Florida law for the idea" that Florida felony battery "is designed to criminalize the conduct described in the proffered hypotheticals." Id. at 1306. It also noted that the defendant had not "shown that prosecution under Florida Statute § 784.041 for the conduct described in the hypotheticals is a realistic probability." Ibid. (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).

c. The panel in this case vacated its prior opinion, denied petitioner's petition for rehearing "as moot," and again affirmed. Pet. App. C1-C31. As relevant here, the court of appeals found that the en banc decision in Vail-Bailon determining that felony

battery under Fla. Stat. § 784.041 is a crime of violence under the elements clause of the Sentencing Guidelines “compel[led] a conclusion” that petitioner’s conviction for felony battery constituted a violent felony under the identically worded elements clause in the ACCA. Id. at C29. Because petitioner acknowledged that he had two other convictions that qualified as ACCA violent felonies, id. at C28, the court found that he had been correctly sentenced under the ACCA, id. at C29.

ARGUMENT

Petitioner renews his contention (Pet. 8-34) that his prior conviction for Florida felony battery does not qualify as a violent felony under the ACCA’s elements clause because it does not include as an element the use, attempted use, or threatened use of “physical force” as the Court defined that term in Curtis Johnson v. United States, 559 U.S. 133 (2010). The court of appeals correctly rejected that contention, and its decision does not implicate any division among the courts of appeals that warrants this Court’s review.² Nor does petitioner’s separate contention (Pet. 34-37) about the divisibility of Florida simple battery warrant review, as that question was neither passed upon nor presented below.

² Other pending petitions for writs of certiorari present similar questions whether Florida felony battery is a violent felony under the ACCA’s elements clause or a crime of violence under analogous provisions of the Sentencing Guidelines. See Vail-Bailon v. United States, No. 17-7151 (filed Dec. 20, 2017); Robinson v. United States, No. 17-7188 (filed Dec. 20, 2017); Gathers v. United States, No. 17-7694 (filed Feb. 2, 2018).

1. a. Petitioner first challenges (Pet. 8-15, 30-33) the court of appeals' definition of the "physical force" necessary for an offense to qualify as a "violent felony" under the ACCA. The court, however, correctly determined that petitioner's prior conviction for Florida felony battery is a crime of violence because it "has as an element the use, attempted use, or threatened use of physical force." Pet. App. C28-C29 (quoting 18 U.S.C. 924(e)(2)(B)(i)).

In Curtis Johnson, this Court held that an offender uses "'physical force'" for purposes of the ACCA when he uses "violent force -- that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140; see Sessions v. Dimaya, No. 15-1498, 2018 WL 1800371 (Apr. 17, 2018) (noting that "this Court has made clear that 'physical force' means 'force capable of causing physical pain or injury'" (quoting Curtis Johnson, 559 U.S. at 140)). The Court concluded that the offense at issue in Curtis Johnson itself -- simple battery under Florida law, which requires only an intentional touching and may be committed by "[t]he most 'nominal contact,' such as a 'tap on the shoulder without consent'" -- does not categorically require such force. Id. at 138 (quoting State v. Hearn, 961 So. 2d 211, 219 (Fla. 2007) (brackets and ellipses omitted)).

Application of Curtis Johnson's definition of "force" to the different offense at issue here, however, yields a different result. In contrast to the offense at issue in Curtis Johnson,

Florida felony battery requires not only that an offender intentionally touch or strike another person against that person's will, but also that the offender "[c]ause[] great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1). Because Florida felony battery requires force that actually causes great bodily injury, it necessarily requires "force capable of causing physical pain or injury" under Curtis Johnson, 559 U.S. at 140 (emphasis added). The en banc court of appeals in Vail-Bailon thus correctly applied "the plain language of Curtis Johnson" and its "definition of physical force" to determine that the crime has the "use of force" as an element. 868 F.3d at 1302.

Petitioner does not dispute (Pet. 30-33) that force that causes "great bodily harm" is "capable of causing physical pain or injury." Instead, he contends (Pet. 31-32) that this Court did not mean to adopt the definition of "physical force" that it recited in Curtis Johnson, under which the force's "capability of causing pain or injury" is determinative. Petitioner first postulates (Pet. 31) that the definition announced in Curtis Johnson required a different result in Curtis Johnson itself, on the theory that the touching required for the simple battery offense at issue there theoretically was "capable of causing great bodily harm." But the relevant inquiry depends on whether the use of physical force is an element of the crime, not on "the possible consequences of the offense" in a particular case, as petitioner

asserts (ibid.). See Curtis Johnson, 559 U.S. at 142; see also 18 U.S.C. 924(e)(2)(B)(i). Here, the Florida felony battery statute includes the element of “[c]aus[ing] great bodily harm, permanent disability, or permanent disfigurement.” Fla. Stat. § 784.041(1). The simple battery statute at issue in Curtis Johnson did not. Thus, while the elements of the offense at issue in Curtis Johnson did not require proof of circumstances in which injury was possible, the elements of the offense here do.

Petitioner next posits (Pet. 32) that Curtis Johnson “approvingly cited” a circuit court decision, Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003), that articulated -- in language that does not appear in Curtis Johnson itself -- a requirement of a likelihood of causing bodily injury. In Vail-Bailon, the Eleventh Circuit correctly rejected that argument, explaining that “[i]t is a safe operating assumption that when the Supreme Court articulates a standard, it actually means the words it has used to set out that standard, not words found in a cited circuit court decision.” 868 F.3d at 1301; see id. at 1302 & n.16 (noting that the author of the Flores opinion had subsequently made clear that “the capability standard announced in Curtis Johnson controls the inquiry”) (citing Douglas v. United States, 858 F.3d 1069, 1071-1072 (7th Cir.), cert. denied, 138 S. Ct. 565 (2017)).

b. Petitioner contends (Pet. 10) that the proper application of Curtis Johnson’s definition of “physical force” “has long divided the circuits.” That is incorrect.

Petitioner relies on (Pet. 12-13) decisions from the First, Second, Fourth, Fifth, and Tenth Circuits, which he asserts (Pet. 12) have “recognized that causation of harm need not require the use of violent force under Curtis Johnson.” But with one exception, each of those circuits has taken a contrary position following this Court’s decision in United States v. Castleman, 134 S. Ct. 1405 (2014).

Castleman held that the phrase “use of physical force” as used in 18 U.S.C. 922(g)(9) encompasses the indirect application of force leading to physical harm. See 134 S. Ct. at 1414-1415; see also id. at 1416-1417 (Scalia, J., concurring in part and concurring in the judgment) (explaining that “it is impossible to cause bodily injury without using force ‘capable of’ producing that result”). In light of Castleman, the First, Second, Fourth, and Tenth Circuits have all retreated from the decisions that petitioner cites (Pet. 15-16) for his argument that “violent force is measured by the degree or quantum of force, not the resulting harm.” See United States v. Edwards, 857 F.3d 420, 426 n.11 (1st Cir.) (suggesting that Whyte v. Lynch, 807 F.3d 463, 469 (1st Cir. 2015), is inconsistent with Castleman), cert. denied, 138 S. Ct. 283 (2017); United States v. Hill, 832 F.3d 135, 143-144 (2d Cir. 2016) (recognizing that Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003), has been abrogated by Castleman); United States v. Covington, 880 F.3d 129, 134 (4th Cir. 2018) (recognizing that United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012), has

been abrogated by Castleman);³ United States v. Kendall, 876 F.3d 1264, 1270-1271 (10th Cir. 2017) (recognizing that United States v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005), has been abrogated by Castleman), cert. denied, No. 17-8177 (Apr. 16, 2018).

The sole exception is the Fifth Circuit's decision in United States v. Rico-Mejia, 859 F.3d 318 (2017), which the Fifth Circuit recently reaffirmed in United States v. Reyes-Contreras, 882 F.3d 113 (2018). Judge Jones concurred in the judgment in Reyes-Contreras, noting that the Fifth Circuit is now the lone outlier and that the Fifth Circuit should reconsider its flawed Rico-Mejia decision en banc. See id. at 126-127. The government recently filed a petition for rehearing en banc in Reyes-Contreras, and the Fifth Circuit should be given the opportunity to bring its precedent in line with the uniform views of the other courts of appeals. In any event, the Fifth Circuit's decisions have focused on indirect use of force "without any bodily contact," not on an

³ In United States v. Middleton, 993 F.3d. 485 (2018), the Fourth Circuit held that South Carolina involuntary manslaughter, which applies where the defendant kills another person unintentionally while acting with "reckless disregard of the safety of others," is not a violent felony under the ACCA. Id. at 489 (citation omitted). The court noted that the statute had been applied to a defendant who sold alcohol to high school students who then shared the alcohol with another person who drove while intoxicated, crashed his car, and died. Ibid. The Fourth Circuit concluded that conduct leading to bodily injury through so "attenuated a chain of causation" did not qualify as a use of violent force. Unlike the statute at issue in Middleton, the Florida felony battery statute has no application to "illegal sale[s]," id. at 492; it requires a direct touching or striking that inflicts "great bodily harm," Fla. Stat. § 784.041(1).

intentional touching or striking that causes physical injury. Id. at 123 (citation and internal quotation marks omitted). Thus, as the court of appeals recognized in Vail-Bailon, “no court” since Curtis Johnson has adopted petitioner’s position and “defined physical force to mean force that is ‘likely to cause pain.’” 868 F.3d at 1301.

Petitioner acknowledges (Pet. 14) that the courts of appeals “have backtracked” on the decisions he cites in support of his position, but he nonetheless contends that they “have done so only in cases involving the intentional or knowing causation of harm” or in cases addressing indirect applications of force such as the administration of poison. To begin with, not all of the relevant decisions have required the intentional causation of harm. See, e.g., Kendall, 876 F.3d at 1267 (concluding that D.C. Code § 22-405(c) (2001), which requires interference with a law enforcement officer that results in “significant bodily injury” to the officer, constitutes a “crime of violence” under Sentencing Guidelines § 4B1.2). More fundamentally, petitioner’s attempt to factually distinguish decisions that apply the same legal rule as the decision below does not suggest a circuit conflict. At bottom, petitioner identifies no decision holding that “use of physical force” means anything other than what this Court said it meant in Curtis Johnson: “force capable of causing physical pain or injury to another person.” 559 U.S. at 140 (citation omitted). Nor does petitioner identify any decision holding that a state statute

similar to Florida's felony battery statute falls outside of the definition of a "crime of violence." See Douglas, 858 F.3d at 1071-1072 (determining that Indiana's felony battery statute, which requires offensive touching and "serious bodily injury," qualifies as a "crime of violence" under 18 U.S.C. 924(e)(2)(B)(i)).⁴

2. Petitioner separately contends (Pet. 33-34) that the court of appeals in Vail-Bailon erred in determining that Florida case law did not support the broad construction of the Florida felony battery statute to encompass various hypothetical scenarios involving mere touches that lead to catastrophic injuries. He further contends (Pet. 15-23) that the courts of appeals are divided over the showing required to establish "a realistic probability" that a State "would apply its statute to conduct that falls outside" a particular federal definition of a crime. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007). This Court recently denied a petition for a writ of certiorari raising a similar argument, see Castillo-Rivera v. United States, 138 S. Ct.

⁴ This Court recently granted a petition for a writ of certiorari raising the question whether a state statute requiring force sufficient to overcome the victim's resistance contains as an element the type of violent force defined in Curtis Johnson. See Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018). The resolution of that question would not affect this case, however, because it turns on whether force sufficient to overcome resistance is force capable of causing injury -- not on whether force that actually causes injury is capable of causing injury. There is accordingly no need to hold this petition pending the Court's decision in Stokeling.

501 (Dec. 4, 2017) (No. 17-5054), and it should do the same here. The court in Vail-Bailon did not apply Duenas-Alvarez in a way that implicates any circuit division.

As a general matter, to determine whether a prior conviction supports a sentencing enhancement like the one provided in the ACCA, courts employ a “categorical approach” under which they compare the definition of the state offense with the relevant federal definition. See, e.g., Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). In evaluating the definition of a state offense, courts must look to the “interpretation of state law” by the State’s highest court. Curtis Johnson, 559 U.S. at 138. If the definition of the state offense is broader than the relevant federal definition, the prior state conviction does not qualify. Mathis, 136 S. Ct. at 2248. This Court has cautioned, however, that the categorical approach “is not an invitation to apply ‘legal imagination’ to the state offense; there must be ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside’” the federal definition. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (quoting Duenas-Alvarez, 549 U.S. at 193); see Taylor v. United States, 495 U.S. 575, 602 (1990) (holding that the categorical approach is satisfied if the “statutory definition [of the prior conviction] substantially corresponds to [the] ‘generic’ [definition]”).

Petitioner contends (Pet. 16) that the courts of appeals have divided over the application of Duenas-Alvarez's "realistic probability" test. He asserts (Pet. 18-21) that, in the Fifth Circuit's view, a defendant establishes the requisite probability only by demonstrating that the State actually prosecutes the nonqualifying conduct under the relevant statute. In contrast, according to petitioner (Pet. 16-18), the First, Third, Sixth, Ninth, and Tenth Circuits have taken the position that the "realistic probability" test is satisfied if a state statute on its face defines an offense more broadly than the federal crime.

To the extent any such division exists, this case does not implicate it. The decision below merely followed the en banc decision in Vail-Bailon. See Pet. App. C28-C29. And in Vail-Bailon, the Eleventh Circuit explained that, "[b]y its plain terms, felony battery in violation of Florida Statute § 784.041 requires the use of physical force as defined by Curtis Johnson." 868 F.3d at 1303. In other words, the Vail-Bailon court determined that the state statute was not overbroad on its face. See id. at 1302-1303. The court then bolstered its application of Curtis Johnson by looking to Florida case law, explaining that its determination was consistent with state decisions confining the Florida felony battery statute to actions taken with sufficient physical force or violence. See id. at 1303-1304. Only then did the court reject the defendant's counterargument that the Florida felony battery statute could be "applied to penalize freak accidents," id. at

1306 -- an argument it rejected not because the statute “is newly enacted, infrequently charged, or has not generated many reported decisions,” Pet. 34, but because Florida law does not appear to cover those sorts of “freak accidents” at all, 868 F.3d at 1306. See Gov’t C.A. En Banc Br. at 44-46, Vail-Bailon, supra (No. 15-10351) (explaining that Florida limits offenses based on proximately caused injuries) (citing, e.g., Tipton v. State, 97 So. 2d 277, 281 (Fla. 1957)).

The Eleventh Circuit’s decision in Vail-Bailon thus did not “squarely” hold that “a defendant must in all [categorical approach] cases point to a state court decision to illustrate the state statute’s breadth,” as petitioner asserts (Pet. 21). Indeed, petitioner acknowledges (Pet. 21-22 & n.6) that prior Eleventh Circuit decisions had stated that an overbroad statute itself can create a realistic probability of prosecution under Duenas-Alvarez. See, e.g., Vassell v. U.S. Attorney General, 839 F.3d 1352, 1362 (11th Cir. 2016). And petitioner acknowledges (Pet. 21-22) that Vail-Bailon did not expressly adopt the contrary view.⁵

Accordingly, the decision here does not implicate any disagreement among other circuits involving the application of

⁵ Petitioner notes (Pet. 28) that one Board of Immigration Appeals decision suggested that Vail-Bailon “implicitly reject[ed]” the Eleventh Circuit’s prior decisions applying Duenas-Alvarez. See In re Aspilaire, A098 517 544, 2017 WL 5377562, at *5 (B.I.A. Sept. 18, 2017). But a suggestion in a parenthetical in an unpublished Board of Immigration Appeals decision does not mean that the Eleventh Circuit took a definitive position on the question.

Duenas-Alvarez to statutes that are overbroad on their face. And for similar reasons, the resolution of the Duenas-Alvarez question in petitioner's favor would not change the outcome of the case, because the decisions in both Vail-Bailon and in this case rest in the first instance on a straightforward application of Curtis Johnson to the text of the Florida felony battery statute.

3. Petitioner also contends (Pet. 34-37) that if this Court grants review of his claim that his felony battery conviction did not qualify as a violent felony under the ACCA, and if he "prevails on the merits" of that claim, the Court should additionally consider his claim that Florida simple battery, in violation of Fla. Stat. § 784.03, is not a "divisible" offense under this Court's decisions in Mathis, supra, and Descamps v. United States, 570 U.S. 254 (2013). Petitioner forfeited that argument in the court of appeals, and the court of appeals did not pass on it. This Court should deny review for that reason alone. See United States v. Williams, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below.") (citation and internal quotation marks omitted).

In Descamps, this Court held that the modified categorical approach, which allows a sentencing court to consider certain record documents in deciding whether a defendant's prior conviction qualifies as a violent felony, applies only when a court considers a conviction under a "divisible" statute that sets out

"multiple, alternative versions of the crime." 570 U.S. at 260-262. Under an approach described in Shepard v. United States, 544 U.S. 13 (2005), a sentencing court in such a case may consider a limited set of documents, including the charging document, plea agreement, transcript of plea colloquy, or other comparable judicial records, to determine the nature of a prior conviction. Id. at 26.

Petitioner now contends (Pet. 37) that the "modified categorical approach does not apply" to his conviction under Fla. Stat. § 784.03 because that statute is not divisible. But petitioner did not dispute that the district court could apply the modified categorical approach in resolving his objection to the presentence report's classification of his prior third-degree felony battery conviction under Section 784.03 as a violent felony. Instead, he argued that the government failed to introduce "Shepard-approved documents" showing that his "plea was necessarily premised on a 'striking.'" D. Ct. Doc. 45, at 2. Likewise, petitioner argued in his court of appeals brief that the record documents the government had submitted did not establish that his conviction under Section 784.03 qualified as a violent felony under the ACCA's elements clause. See Pet. C.A. Br. 25-27.

As a result, the court of appeals focused in its initial decision on the sufficiency of the Shepard-approved documents. See Pet. App. B30-B31. Although it stated that the statute was

divisible, see id. at B29, it did not resolve a dispute between the parties in so stating. Petitioner raised his claim that Section 784.03 is not divisible for the first time in his petition for rehearing of the initial panel decision. Pet. C.A. Reh'g Pet. 4-9 (arguing that "'touching or striking'" are "alternative means of committing a single element of the offense"). That belated assertion was insufficient to preserve the issue for review. See United States v. McCullough, 851 F.3d 1194, 1202 (11th Cir.) (applying "longstanding" rule "that an appellant who does not raise an issue in his opening brief may not do so later" to Mathis claim) (citation and internal quotation marks omitted), cert. denied, 137 S. Ct. 2173 (2017); see also Chaidez v. United States, 133 S. Ct. 1103, 1113 n.16 (2013) (declining to consider arguments raised for the first time in petitioner's petition for rehearing en banc).

In any event, the court of appeals later vacated its initial decision addressing the divisibility of Section 784.03. See Pet. App. C8 ("[W]e hereby vacate our prior panel opinion * * * and substitute it with the following opinion."). And in light of its determination that petitioner's felony battery conviction under Section 784.041 qualifies as a violent felony, the court did not again address Section 784.03. See id. at C28-C29. Petitioner's assertion that "a remand for further consideration will merely subject him to the same adverse ruling rendered in the initial decision below" (Pet. 34) is thus speculative. Petitioner fails to identify any case in which this Court has reviewed a vacated

opinion because of a prediction that a future court might reach a similar result. This Court's review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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