

No. 17-7299

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 2017

ROBERT WILLIAM GREEN,
Petitioner,
vs.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Court should hold this petition pending resolution of *Stokeling v. United States*, cert. granted, ___ S.Ct. ___, 2018 WL 1568030 (April 2, 2018) (No. 17-5554).

* * *

In *Stokeling*, the Court will decide whether Florida robbery is a violent felony within the elements clause of the Armed Career Criminal Act—*i.e.*, whether it has an element the use, attempted use, or threatened use of “physical force.” 18 U.S.C. § 924(e)(2)(B)(i). Central to that question is the meaning of “physical force,” as defined in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). At the petition-stage, the petitioner in *Stokeling* argued that the degree of force necessary to commit Florida robbery could be slight, and that degree of force does not satisfy the *Curtis Johnson* definition of “physical force” as “violent force.” *Id.* at 140. In opposition, the government argued that the force involved was demonstrably “capable” of causing pain or injury, and thus necessarily satisfied the *Curtis Johnson* definition of “violent force” as “force capable of causing physical pain or injury to another person.” *Id.* The dispute over that definition in *Curtis Johnson* is at the forefront of *Stokeling*.

That same dispute, notably, was at the forefront of the 6-5 decision by the court in *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc), *cert. pending*, No. 17-7151 (filed Dec. 20, 2017), and in the decision below. If “violent force” is measured by its “capability” of causing harm, as the government argues in its BIO and the majority in *Vail-Bailon* concluded, then Petitioner’s Florida felony battery conviction would indeed satisfy the elements clause, since the offensive touching did cause great bodily harm (and thus was “capable” of causing pain or injury). If, on the other hand, “violent force” is measured not by actual result or mere “capability,” but instead by the degree of force used, as Petitioner has argued and the *Vail-Bailon* dissenters concluded, then Petitioner’s felony battery conviction would not satisfy the elements clause. Indeed, the government does not now dispute that his Florida felony-battery conviction required the same degree of force that *Curtis Johnson* deemed insufficient—*i.e.*, a mere offensive touching.¹

¹ The government’s assertion that *Vail-Bailon* did not abrogate the Eleventh Circuit’s prior precedent in *Vassell v. United States Attorney General*, 839 F.3d 1352, 1362 (11th Cir. 2016), holding “that an overbroad statute itself can create a realistic probability of prosecution under *Duenas-Alvarez*” (BIO at 20-21) obviates the potential obstacle to relief embodied in the second question presented by the petition. In other words, the government reads *Vail-Bailon* as accepting Petitioner’s argument that, based on the face of the statute, felony battery may indeed be committed by a mere touching that causes great bodily harm, but concluding – simply – that such conduct categorically satisfies *Curtis Johnson*.

Because *Stokeling* will clarify *Curtis Johnson*'s definition of "violent force," and a dispute over that definition lies at the heart of this case as well, the proper resolution is to hold this petition pending *Stokeling*. The government resists that common-sense approach, arguing *Stokeling* will "not affect this case . . . 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." (BIO at 17 n. 4). But that argument prematurely assumes that *Stokeling* will accept the government's proffered "capability" understanding of *Curtis Johnson*. If *Stokeling* rejects the government's understanding, and instead adopts the degree-of-force understanding advocated by the petitioner there, the Petitioner here, and the *Vail-Bailon* dissenters, that would clearly affect this case. Indeed, it would require a disposition in Petitioner's favor.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending resolution of *Stokeling*.

Respectfully submitted,

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