

No. _____

IN THE
Supreme Court of the United States

ERIC LONDREY GRIFFIN,

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

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER

***MEGAN SAILLANT**
ASSISTANT FEDERAL PUBLIC DEFENDER
Florida Bar No. 0042092
101 SE 2nd Place, Suite 112
Gainesville, Florida 32601
Telephone: (352) 373-5823
FAX: (352) 373-7644
Attorney for Petitioner

* Counsel of Record

QUESTION 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*, 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.” In *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc), the Eleventh Circuit, by a margin of 6-5, held that causation of harm necessarily entails the use of “violent force,” reasoning that “violent force” is measured by the harm resulting from the offense, not by the degree of force used to commit it. In the proceeding below, the Eleventh Circuit applied the analysis from *Vail-Bailon* to reach the conclusion that Mr. Griffin’s Florida convictions for aggravated assault and assault or battery in a county detention facility were ACCA predicate offenses.

The question presented here is whether, under *Curtis Johnson*, the causation of great bodily harm necessarily entails the use of “violent force”?

Mr. Griffin is aware of at least three cases pending before this Court that present the same issue. See *Green v. United States*, 873 F.3d 846 (11th Cir. 2017), *petition for cert. filed*, (U.S. Dec. 20, 2017) (No. 17-7299); *Robinson v. United States*, No. 16-13333-EE (11th Cir. Nov. 13, 2017), *petition for cert. filed*, (U.S. Dec. 20, 2017) (No. 17-7188); *Vail-Bailon v. United States*, 868 F.3d 1293 (11th Cir. 2017) (en banc), *petition for cert. filed*, (U.S. Dec. 20, 2017) (No. 17-7151).

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION.....	13
APPENDIX	
<i>Griffin v. United States of America</i> , No. 17-12428-B (11th Cir. Nov. 15, 2017)	
	A-1
<i>Griffin v. United States of America</i> , No. 3:00-cr-75-LAC-EMT Judgment (N.D. Fla. May 15, 2017)	
	A-2
<i>Griffin v. United States of America</i> , No. 3:00-cr-75-LAC-EMT Order Adopting Report and Recommendation (N.D. Fla. May 15, 2017)	
	A-3
<i>Griffin v. United States of America</i> , No. 3:00-cr-75-LAC-EMT Report and Recommendation (N.D. Fla. Apr. 28, 2017)	
	A-4

TABLE OF AUTHORITIES

Cases

<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017)	12
<i>Chrzanoski v. Ashcroft</i> , 327 F.3d 188 (2nd Cir. 2003).....	9
<i>Curtis Johnson v. United States</i> , 559 U.S. 133 (2010)	i, 5
<i>Douglas v. United States</i> , 858 F.3d 1069 (7th Cir. 2017)	7
<i>Green v. United States</i> , 873 F.3d 846 (11th Cir. 2017), <i>petition for cert. filed</i> , (U.S. Dec. 20, 2017) (No. 17-7299)	i
<i>Griffin v. United States of America</i> , No. 17-12428-B (11th Cir. Nov. 15, 2017).....	1
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	12
<i>Robinson v. United States</i> , No. 16-13333-EE (11th Cir. Nov. 13, 2017), <i>petition for cert. filed</i> , (U.S. Dec. 20, 2017) (No. 17-7188)	i
<i>Samuel Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	4, 12
<i>United States v. Anderson</i> , 695 F.3d 390 (6th Cir. 2012)	7, 8
<i>United States v. Andino-Ortega</i> , 608 F.3d 305 (5th Cir. 2010)	9
<i>United States v. Calvillo-Palacios</i> , 860 F.3d 1285 (9th Cir. 2017)	7
<i>United States v. Castleman</i> , 134 S. Ct. 1405 (2014)	<i>passim</i>
<i>United States v. Chapman</i> , 866 F.3d 129 (3d Cir. 2017)	7
<i>United States v. Garcia-Perez</i> , 779 F.3d 278 (5th Cir. 2015)	9
<i>United States v. Gatson</i> , 776 F.3d 405 (6th Cir. 2015).....	7
<i>United States v. Hill</i> , 832 F.3d 135 (2d Cir. 2016)	10
<i>United States v. Jennings</i> , 860 F.3d 450 (7th Cir. 2017).....	7
<i>United States v. Ontiveros</i> , 875 F.3d 533 (10th Cir. 2017).....	10
<i>United States v. Perez-Vargas</i> , 414 F.3d 1282 (10th Cir. 2005)	9

TABLE OF AUTHORITIES - *cont'd*

Cases

<i>United States v. Reid</i> , 861 F.3d 523 (4th Cir. 2017)	10
<i>United States v. Rice</i> , 813 F.3d 704 (8th Cir. 2016)	7, 8
<i>United States v. Rico-Mejia</i> , 859 F.3d 318 (5th Cir. 2017)	10
<i>United States v. Torres-Miguel</i> , 701 F.3d 165 (4th Cir. 2012)	9
<i>United States v. Vargas-Duran</i> , 356 F.3d 598 (5th Cir. 2004)	9
<i>United States v. Villegas-Hernandez</i> , 468 F.3d 874 (5th Cir. 2006)	9
<i>United States v. Winston</i> , 845 F.3d 876 (8th Cir. 2017)	7
<i>Vail-Bailon v. United States</i> , 868 F.3d 1293 (11th Cir. 2017) (en banc), <i>petition for cert. filed</i> , (U.S. Dec. 20, 2017) (No. 177151)	i, 8
<i>Whyte v Lynch</i> , 807 F.3d 463 (1st Cir. 2015)	8

Statutes

18 U.S.C. § 921(a)(33)(A)	5
18 U.S.C. § 922(g)(9)	5
18 U.S.C. § 924(e)	2
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2253(c)(2)	11
28 U.S.C. § 2255	1, 4
Fla. Stat. § 951.075 (1992)	2
Fla. Stat. 784.021 (1996)	3

PETITION FOR WRIT OF CERTIORARI

In this post-conviction proceeding under 28 U.S.C. § 2255, Petitioner Eric Londrey Griffin respectfully prays that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Eleventh Circuit denying a certificate of appealability (“COA”) on the claim set forth here.

OPINIONS BELOW

The Order of the Eleventh Circuit Court of Appeals denying Petitioner’s request for a COA was entered in *Griffin v. United States of America*, No. 17-12428-B (11th Cir. Nov. 15, 2017). (App. A-1).

JURISDICTION

This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1). The Eleventh Circuit entered judgment against Petitioner on November 15, 2017. This Petition is timely filed.¹

¹ The Court previously granted Mr. Griffin’s motion for extension of time to file the instant Petition.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the ACCA, 18 U.S.C. § 924(e). The ACCA's enhanced sentencing provision provides, in pertinent part:

In the case of a person who violates section 922(g) of this title and has three previous convictions ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(1).

In relevant part, the ACCA defines a "violent felony" as:

[A]ny 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 Florida statute criminalizing attempted assault or battery within a correctional facility at the time of Mr. Griffin's conviction provided, in pertinent part:

Every person being detained or undergoing a sentence in a county or municipal jail or detention facility who commits assault, battery, or assault and battery upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury, but which is not an assault with intent to commit a felony, shall be guilty of a felony of the second degree.

Fla. Stat. § 951.075 (1992).

The Florida statute criminalizing aggravated assault with a deadly weapon at the time of Mr. Griffin's conviction provided, in pertinent part:

(1) An “aggravated assault” is an assault:

(a) With a deadly weapon without intent to kill; or

(b) With an intent to commit a felony.

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree ...

Fla. Stat. 784.021 (1996).

STATEMENT OF THE CASE

Mr. Griffin was convicted of three counts of possession of a firearm by a convicted felon, and on January 4, 2001, was sentenced under the Armed Career Criminal Act (ACCA) to 295 months' imprisonment, for each count, to be served concurrently. At the time of sentencing Mr. Griffin had four Florida convictions that qualified as ACCA predicate offenses. They were for: delivery of cocaine, battery on a corrections officer, attempted assault or battery within a county detention facility, and aggravated assault with a deadly weapon. Mr. Griffin filed a timely appeal and his convictions were affirmed on November 16, 2001.

In January of 2007 Mr. Griffin moved to vacate his sentence under 28 U.S.C. § 2255. The motion was dismissed as time barred. A second § 2255 motion was filed in October of 2014, it was also denied, this time for lack of jurisdiction.

On July 19, 2016, after receiving permission from the Eleventh Circuit, Mr. Griffin filed a successive § 2255 motion arguing his ACCA sentence was unconstitutional in light of *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court concluded the Florida offenses of attempted assault or battery in a county detention facility and aggravated assault both still qualified as violent felonies according to the force/elements clause of the ACCA. Because Mr. Griffin had these two convictions, plus a serious drug offense conviction, he had the requisite three prior convictions to justify the ACCA enhancement. The district court declined to reach the merits of Mr. Griffin's argument regarding his conviction for battery on a correctional officer. The motion was denied by the district court on May 15, 2017. The

court also denied a certificate of appealability. Mr. Griffin filed a timely notice of appeal.

The Eleventh Circuit also denied a COA, holding binding circuit precedent established that both of the relevant convictions were in fact “violent felonies” according to the ACCA. (App. A-1). Therefore, Mr. Griffin had not shown “that jurists of reason would debate the district court’s conclusion ...” (App. A-1 at 10).

REASONS FOR GRANTING THE WRIT

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

In *Curtis Johnson*, 559 U.S. at 140, 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 *Curtis Johnson* 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 *Castleman*, 134 S. Ct. 1405 (2014). There, 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.

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. 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 opposite conclusion on the same statute—without even citing the earlier decision in *Flores*.

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

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).

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). 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 on 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.

The issue presented by this petition is dispositive — if Mr. Griffin’s prior Florida assault and assault or battery convictions do not qualify as “violent felon[ies]” under the ACCA’s elements clause, then Mr. Griffin is ineligible for enhanced sentencing under the ACCA and his 295-month sentence exceeds the applicable statutory maximum.

At a minimum this Court should grant the petition and remand to the Eleventh Circuit for consideration of the issue in full. The Eleventh Circuit denied Mr. Griffin’s request for a COA, and ignoring the fact that courts across the country do in fact disagree on the issue.

Under 28 U.S.C. § 2253(c)(2), a court of appeals must grant leave to appeal where the appellant makes a “substantial showing of the denial of a federal constitutional right.” As this Court reiterated in *Buck v. Davis*, “At the COA stage, the only question is whether the applicant has shown that ‘jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to

proceed further.” 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

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*, 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 battery offenses like the one in *Flores/Douglas*, but also assault – of great important here, 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

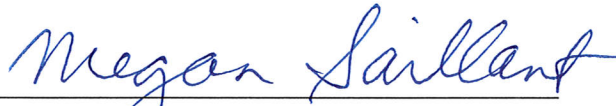
uncertainty described above on this question is intractable because it derives from this Court's opinion in *Curtis Johnson* itself.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Eric Londrey Griffin prays that this Court grant this Petition for a Writ of Certiorari, or, alternatively, grant summary reversal and remand the case to the Court of Appeals with instructions to grant a COA or to review Petitioner's application for COA anew.

Respectfully submitted,

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER



*MEGAN SALLANT
ASSISTANT FEDERAL PUBLIC DEFENDER
Florida Bar No. 0042092
101 SE 2nd Street, Suite 112
Gainesville, Florida 32601
Telephone: (352) 373-5823
FAX: (352) 373-7644
Attorney for Petitioner

* Counsel of Record