

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

No.:

EZEKIEL FLOWERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether offenses committed by reckless conduct are “violent felonies” under the elements clause of the Armed Career Criminal Act?
2. Whether the causation of great bodily harm necessarily requires the use of “physical force” under the elements clause of the Armed Career Criminal Act without any regard to the degree of force needed to cause the bodily harm?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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2.	Whether the causation of great bodily harm necessarily requires the use of “physical force” under the elements clause of the Armed Career Criminal Act without any regard to the degree of force needed to cause the bodily harm.	
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PETITION FOR WRIT OF CERTIORARI

Ezekiel Flowers respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in Case No. 17-12051 on February 16, 2018, affirming the judgment entered by the district court for the Southern District of Florida.

OPINION BELOW

An unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, *United States v. Flowers*, __ Fed. Appx __, 2018 WL 921553 (11th Cir. 2018), was issued on February 16, 2018 and is attached as Appendix A to this Petition.

STATEMENT OF JURISDICTION

The district court entered a final judgment denying a motion to vacate judgment and sentence which was filed pursuant to 18 U.S.C. § 2255. The district court issued a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) on the issue of whether Mr. Flower's Florida

convictions for aggravated assault with a deadly weapon and felony battery qualify as crimes of violence under the Armed Career Criminal Act after *Johnson*. An appeal was timely filed, and the Eleventh Circuit Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

The ACCA provides, in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years....

(2) As used in this subsection –

* * *

(B) the term “violent felony” means 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . .

18 U.S.C. § 924(e).

“[T]he term ‘misdemeanor crime of domestic violence’ means an offense that . . . has as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse....” 18 U.S.C. § 921(a)(33)(A).

“An ‘aggravated assault’ is an assault: (a) With a deadly weapon without intent to kill; or (b) With an intent to commit a felony.” Fla. Stat. § 784.021(1) (2004).¹

“An ‘assault’ is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.” Fla. Stat. § 784.011(1) (2004).

“A person commits felony battery if he or she: (a) Actually and intentionally touches or strikes another person against the will of the other; and (b) Causes great bodily harm, permanent disability, or permanent disfigurement.” Fla. Stat. § 784.041(1) (2003).²

¹ The incidents giving rise to Petitioner Flowers’s aggravated assault convictions took place in December 2004 and December 2006. The 2006 versions of the aggravated assault statute and assault definition were identical to the 2004 versions cited herein.

² The incident giving rise to Petitioner Flowers’s felony battery conviction took place in November 2003.

STATEMENT OF THE CASE

In January 2012, Petitioner Mr. Flowers was indicted on a single count of being a felon-in-possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1). Mr. Flowers pled not guilty and was convicted at trial in June 2012.

In calculating Mr. Flowers' advisory guidelines range, the presentence report ("PSR") determined that Mr. Flowers was an armed career criminal under the ACCA based on four prior Florida convictions: (1) a 2003 robbery conviction, in violation of Fla. Stat. § 812.13; (2) a 2004 felony battery conviction, in violation of Fla. Stat. § 784.041; (3) a 2005 conviction for aggravated assault with a deadly weapon, in violation of Fla. Stat. § 784.021(1)(a); and (4) a 2007 conviction for aggravated assault with a deadly weapon, in violation of Fla. Stat. § 784.021(1)(a).

Accordingly, the PSR assigned Mr. Flowers a total offense level of 33 and a criminal history category of IV, resulting in a guidelines range of 188 to 235 months' imprisonment. Mr. Flowers was also subject to the ACCA's 15-year (180-month) mandatory minimum. On August 23,

2012, he was sentenced to 188 months' imprisonment followed by five years of supervised release.

In June 2016, Flowers filed a § 2255 motion to vacate his sentence arguing that, in light of *Samuel Johnson v. United States*, 135 S. Ct. 2551 (U.S. 2015) (holding the ACCA's residual clause to be unconstitutionally vague), his prior Florida convictions no longer qualified as predicate offenses under the ACCA's remaining clauses (elements clause and/or enumerated clause). Mr. Flowers argued that: (a) because felony battery could be committed through non-violent force or mere touching; and (b) because Florida aggravated assault can be completed through recklessness, none of these offenses could categorically satisfy the ACCA's elements clause.³

The district court denied Mr. Flowers's motion concluding that all of Mr. Flowers's prior convictions remained qualifying violent felonies under the ACCA's elements clause but did grant him a certificate of appealability as to whether a Florida conviction for aggravated assault with a deadly weapon and felony battery qualify as crimes of violence under the ACCA.

³ None of Flowers's prior convictions are listed in the ACCA's enumerated clause.

On February 16, 2018, the Eleventh Circuit issued an unpublished three-panel opinion affirming the district court's decision as to both aggravated assault with a deadly weapon and felony battery. The panel noted that in *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328 (11th Cir. 2013), the Eleventh Circuit had already held that aggravated assault under Fla. Stat. § 784.021 categorically qualified as a violent felony under the ACCA's elements clause. *See Flowers* at *3 (citing *Turner*, 709 F.3d at 1337-1338). The panel reiterated *Turner's* conclusion that "a conviction under section 784.021 will always include 'as an element the ... threatened use of physical force against the person of another,'" *Flowers* at *3 (quoting *Turner*, 709 F.3d at 1338 and 18 U.S.C. § 924(e)(2)(B)(i)) and noted that the Eleventh Circuit has since reaffirmed *Turner's* holding as to Florida aggravated assault. *Id.* (citing *United States v. Golden*, 854 F.3d 1256 (11th Cir.) (per curiam), *cert. denied*, 138 S.Ct. 197 (2017)).

Because the panel was bound by *Turner* and *Golden*, it affirmed the district court's decision as to Mr. Flowers's two prior convictions for aggravated assault. 2018 WL 921553 at *3-4.

As for Flowers’s single prior conviction for Florida felony battery, the panel noted that the Eleventh Circuit had recently “concluded that a conviction for felony battery under Fla. Stat. § 784.041 qualifies as a ‘crime of violence’ under [the elements clause of] U.S.S.G. § 2L1.2” and further noted that § 2L1.2 “contains the same elements clause as the ACCA.” *Flowers* at *2 (quoting *United States v. Vail-Bailon*, 868 F.3d 1293, 1297, 1308 (11th Cir. 2017) (*en banc*), petition for cert. docketed, No. 17-7151 (Dec. 20, 2017)).

Because the panel was bound by *Vail-Bailon*, it affirmed the district court’s decision as to Flowers’s prior conviction for Florida felony battery. 2018 WL 921553 at *2-3.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT BECAUSE THE CIRCUITS ARE DIVIDED ON THE QUESTIONS OF:

1. Whether offenses committed by reckless conduct are “violent felonies” under the elements clause of the Armed Career Criminal Act; and
2. Whether the causation of great bodily harm necessarily requires the use of “physical force” under the elements clause of the Armed Career Criminal Act without any regard to the degree of force needed to cause the bodily harm.

I. Florida’s Offense of Aggravated Assault and Felony Battery

A. *Florida Aggravated Assault Can Be Proved Through Reckless Conduct*

Florida courts have consistently held that the intent element of aggravated assault may be satisfied by proof of culpable negligence. *LaValley v. State*, 633 So.2d 1126, 1127 (Fla. 5th DCA 1994); *Kelly v. State*, 552 So.2d 206, 208 (Fla. 5th DCA 1989) (“Where, as here, there is no proof of an intentional assault on the victim, that proof may be supplied by proof of conduct equivalent to willful and reckless disregard for the safety of others.”); *Green v. State*, 315 So.2d 499, 500 (Fla. 4th DCA 1975) (reversing conviction for aggravated assault because proof of intent was lacking, but explaining that “intent” in an aggravated

assault case can be supplied by proof of conduct equivalent to culpable negligence since such an offense is a lesser included offense of manslaughter by culpable negligence); *DuPree v. State*, 310 So.2d 396, 398 (Fla. 2nd DCA 1975) (holding in a manslaughter case that to sustain DuPree’s conviction for the lesser included offense of aggravated assault, his conduct must have been equivalent to culpable negligence); *see also Golden*, 854 F.3d at 1258 (Pryor (Jill), C.J., concurring but disagreeing with the precedent that obligated her to concur) (observing that aggravated assault can be committed by an act of recklessness and does not necessarily require an intentional act (which the ACCA’s elements clause requires)).

B. Florida’s Crime of Felony Battery Can Be Committed by The Act of Touching However Slight

Under Florida Statute Section 784.041(1), a person commits felony battery if he or she:

- (a) Actually and intentionally touches or strikes another person against the will of the other; and
- (b) Causes great bodily harm, permanent disability, or permanent disfigurement.

Thus, under Florida law, a felony battery can be committed via a non-violent “touching.” Florida case law confirms that a violation of Section

784.041(1) is strict liability (no *mens rea* required) as to the “great bodily harm, permanent disability, or permanent disfigurement” caused. *See T.S. v. State*, 965 So.2d 1288, 1290 (Fla. 2nd DCA 2007) (distinguishing felony battery from aggravated battery, in that the offender must “*intentionally or knowingly*” cause the bodily harm in aggravated battery, while there is no similar *mens rea* requirement for felony battery; upholding felony battery conviction where defendant’s “punching of the victim was a quick, almost reflexive response to having tea thrown in his face,” and there was no evidence he intended to or knew that he would cause such injury) (*italics in the original*).

II. Circuit Split regarding Offenses Committed by Reckless Conduct

The circuits are split as to whether offenses committed by reckless conduct (“reckless offenses”) are “violent felonies” under the ACCA’s element’s clause.

Currently, the Fifth, Sixth, Eighth and Tenth Circuits rely on *Voisine v. United States*, 136 S. Ct. 2272 (2016) to find that reckless offenses qualify as predicates offenses under the ACCA’s elements

clause and/or similar Guidelines elements clauses.⁴ *See United States v. Howell*, 838 F.3d 489, 499-503 (5th Cir. 2016) (holding that, in light of *Voisine*, Texas assault’s “mental state of recklessness may qualify [the offense as having] ‘...as an element the use, attempted use, or threatened use of physical force against the person of another’ within the meaning of [U.S.S.G.] § 4B1.2(a)(1)”; *United States v. Verwiebe*, 874 F.3d 258, 262-264 (6th Cir. 2017) (holding that, in light of *Voisine*, federal assault with a deadly weapon’s element of recklessness satisfies U.S.S.G. § 4B1.2(a)’s elements clause, but also opining that “*Voisine* confirms that recklessness suffices under the [ACCA’s] elements clause”); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (holding that, in light of *Voisine*, Minnesota drive by shooting’s element of recklessness qualifies the offense as a violent felony under the ACCA’s elements clause); *United States v. Pam*, 867 F.3d 1191, 1208 (10th Cir. 2017) (holding that, in light of *Voisine*, New Mexico’s shooting-at-or-from-a-motor-vehicle’s element of recklessness does not

⁴ *Voisine* held that reckless assaults do involve “the use ... of physical force” and therefore do qualify as “misdemeanor crime[s] of domestic violence” under the similarly worded Misdemeanor Domestic Violence Act’s (“MDVA”) elements clause found at 18 U.S.C. § 921(a)(33)(A).

bar it from constituting a violent felony under the ACCA's elements clause).

Despite *Voisine*, however, the First Circuit holds that reckless offenses cannot be considered violent felonies under the ACCA's elements clause. See *United States v. Windley*, 864 F.3d 36, 39 (1st Cir. 2017) (per curiam) (holding that Massachusetts ABDW's reckless element makes the offense too broad to be considered a violent felony under the ACCA's elements clause) (adopting the analysis in *Bennett v. United States*, 868 F.3d 1 (1st Cir.) (declining to apply *Voisine*'s reasoning to allow reckless offenses to qualify as ACCA predicates), *withdrawn as moot by* 870 F.3d 34 (1st Cir. 2017)); see also *United States v. Kennedy*, 881 F.3d 14, 19 (1st Cir. 2018) (following *Windley*, and also holding that Massachusetts ABDW is not categorically a violent felony under the ACCA's elements clause, since it can be committed via recklessness).

III. Circuit Split on the Question of Whether Causation of Bodily Harm Necessarily Requires the Use Of "Physical Force" Without Any Regard to the Degree of Force Needed to Cause Bodily Harm

In *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), this 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. at 140. The offense at issue in *Curtis Johnson* was 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, 218-219 (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, and the resulting harm was treated as irrelevant.

Despite the holding in *Curtis Johnson*, the Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits hold that the causation of bodily harm or injury necessarily requires the use of violent force without any regard to the degree of force used to cause the bodily harm. *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, 410-411 (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.’”); *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 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”);⁵

⁵ *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)

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).

Furthermore, despite this Court’s holding in *United States v. Castleman*, 134 S. Ct. 1405 (2014),⁶ the Fifth Circuit reaffirmed the continuing validity of its prior precedent 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 considering 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

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

⁶ In *Castleman*, this Court declined to import *Curtis Johnson*’s definition of “physical force” as “violent force” into the Misdemeanor Domestic Violence Act’s elements clause found in 18 U.S.C. § 921(a)(33)(A), but did hold that, as used in the MDVA, “physical force” referred to common-law force, which, unlike the ACCA’s narrower definition, included slight touching. *See id.* at 1410-1413 & n.4.

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).

IV. The issues presented are recurring and important and this Case presents an ideal opportunity to resolve them.

A. Reckless Offenses Constituting Violent Felonies under the ACCA

In the less than two years following this Court’s *Voisine* decision, district courts around the country are largely in disagreement as to whether reckless offenses can now be treated as violent felony predicates under the ACCA’s elements clause (or under the Guidelines). In the federal courts that do not yet have binding circuit law as to whether *Voisine* can apply to ACCA cases, a substantial number of judges continue to hold to the earlier majority view that reckless offenses cannot (or should not) satisfy the ACCA’s elements clause. *See, e.g., United States v. Fisher*, 2017 WL 1426049, at *7 (E.D. Pa., April 21, 2017) (holding, despite *Voisine*, that because Pennsylvania aggravated assault can be committed via recklessness it is not a crime of violence

under the ACCA's elements clause); *Nelson v. United States*, 2017 WL 150242, at *5 (D.N.J., Jan. 12, 2017) (holding, despite *Voisine*, that an aggravated assault conviction could have been triggered by reckless conduct and therefore could not categorically qualify as a crime of violence under the ACCA's elements clause); *United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018) (Floyd, C.J., concurring) (opining, despite *Voisine*, that South Carolina involuntary manslaughter cannot be an ACCA predicate because it can be committed via recklessness); *United States v. Lewis*, 2018 WL 340041, at *5 (D. Or., Jan. 9, 2018) (opining that *Voisine* does not impact earlier Ninth Circuit earlier decisions limiting ACCA predicate convictions to intentional or knowing offenses, and also noting that "the Supreme Court's decision in *Voisine* was limited to § 921(a)(33)(A) and expressly declined to decide whether reckless conduct satisfied the elements clause of § 16"); *Jefferson v. United States*, 2016 WL 6023331, at *3 (S.D. Ala., Oct. 13, 2016) (holding, despite *Voisine*, that "[b]ecause Jefferson's Alabama manslaughter conviction could have been based on reckless conduct, it was error to rely on this conviction to enhance Jefferson's sentence under the ACCA"); *United States v. Taylor*, 272

F.Supp.3d 127, 146 (D.D.C. 2017) (holding, post-*Voisine* but without analyzing *Voisine*, that “a state statute that requires the mere reckless application of force ... does not meet the requirements of the elements clause of the ACCA”).

Finally, because federal courts do not have consistent nationwide guidance at this time as to whether reckless offenses can (or should) fall under ACCA’s elements clause, the resulting sentencing disparities (because they can be severe considering the ACCA’s mandatory 15-year minimum) are serious enough to raise constitutionality concerns. *See, e.g., Solem v. Helm*, 103 S.Ct. 3001, 3010 (U.S. 1983) (observing that a severe-enough sentencing disparity can be an indicator of an Eighth Amendment violation).

Considering five of the circuits are presently divided (and the remaining circuits uncommitted) as to whether *Voisine* can or should extend to ACCA cases, and since district courts in the remaining circuits largely disagree as to how to resolve the issue, Petitioner Flowers’s case presents a timely opportunity to determine – once and for all – whether reckless offenses count as violent predicates under the ACCA’s elements clause.

B. Causation of Bodily Harm Without Regard to the Degree of Force Used to Cause the Bodily Harm

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*, 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 here, 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* while deciding the case on another grounds. 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.

Mr. Flower’s case is an ideal case to resolve the conflict since Florida felony battery can be committed with non-violent slight touching.

V. The decision below is wrong.

A. *An ACCA Violent Felony Requires More Than Recklessness*

Florida’s crime of aggravated assault is not an ACCA violent felony because aggravated assault can be committed through recklessness or culpable negligence.⁷

⁷ This Court is “bound by the Florida Supreme Court’s interpretation of [its] state law[s], including its determination of the elements [of its criminal statutes].” *Curtis Johnson*, 130 S.Ct. at 1269. According to the Florida Supreme Court, the decision of any intermediate court of appeal also “represents the law of Florida unless and until [it is] overruled by [the higher] court.” *Weiman v. McHaffie*, 470 So.2d 682,

For an offense to be a violent felony within the ACCA’s elements clause, however, it must have as an element the active and intentional employment of force, which requires more than negligence or recklessness. *See Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004) (the term “use” in the similarly-worded elements clause in 18 U.S.C. §16(a) requires “active employment;” the phrase “use . . . of physical force” in a crime of violence definition “most naturally suggests a higher degree of intent than negligent or merely accidental conduct”); *United States v. Palomino Garcia*, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona “aggravated assault” need not be committed intentionally, and could be committed recklessly, it did not “have as an element the use of physical force;” citing and following *Leocal*). Since the ACCA’s elements clause can only be satisfied by intentional conduct it cannot include offenses that can be committed through a *mens rea* of recklessness like Florida’s offense of aggravated assault. *See Palomino Garcia*, 606 F.3d at 1334-1336. So, even though the *Flowers* panel was

684 (Fla. 1985) (citing *Stanfill v. State*, 384 So.2d 141, 143 (Fla. 1980)); *see also United States v. Rosales-Bruno*, 676 F.3d 1017, 1021 (11th Cir. 2012) (citing *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1348 (11th Cir. 2011) (affording *Curtis Johnson* deference to states’ intermediate courts, where no state supreme court precedent exists)).

bound by *Turner*, the result in *Flowers* (as to Florida's aggravated assault) was incorrect – for the same reason that *Turner* was incorrectly decided. Therefore, Mr. Flowers is not an Armed Career Criminal because his two (2) convictions for aggravated assault are not violent felonies under the ACCA's elements clause.

B. An ACCA Violent Felony Requires More Than A Slight Touch

The *Flowers* panel incorrectly concluded that Florida felony battery categorically meets the elements clause. The original 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 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 an incorrect reading of *Curtis Johnson*. A proper reading of that decision – considering 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. Therefore, Mr.

Flowers conviction for felony battery should not be counted as a predicate violent felony conviction under the ACCA.

CONCLUSION

For the reasons stated above, this Court should grant the writ.

Respectfully submitted,

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s/ Deric Zacca

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