No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

ANTHONY GRANT JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

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PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

1. Whether the Florida offense of armed robbery, Fla. Stat. § 812.13, categorically requires the use of "*violent* force," as defined in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), so as to qualify as a "violent felony" under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA).

2. Whether the quantum of force and mens rea required by the elements of the Florida offense of resisting with violence, Fla. Stat. § 843.01, are sufficient to satisfy the elements clause of the ACCA.

3. Whether the Florida offense of aggravated battery with a deadly weapon, Fla. Stat. § 784.045, which may be committed through the same "touch" at issue in *Curtis Johnson*, satisfies the elements clause of the ACCA.

LIST OF PARTIES

Petitioner, Anthony Jackson, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Jackson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion is provided in Appendix A (App. A). *See also Jackson v. United States*, 707 F.3d 954 (11th Cir. 2018).

STATEMENT OF JURISDICTION

The Eleventh Circuit's decision was issued on January 4, 2018. *See* App. A. This petition is timely filed under Supreme Court Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), provides in pertinent 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2)(B) As used in this subsection . . . the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

The 1991 version of the Florida robbery statute, Fla. Stat. § 812.13, provides, in relevant part:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . .

Florida Statute § 843.01, which proscribes resisting an officer with violence, provides in relevant part:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree . . . .

The Florida aggravated battery statute provides, in relevant part:

> (1)(a) A person commits aggravated battery who, in committing *battery*–
>
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
> 2. *Uses a deadly weapon*.

Fla. Stat. § 784.045 (emphasis added).

The Florida battery statute provides, in relevant part:

> The offense of battery occurs when a person:
>
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
> 2. Intentionally causes bodily harm to another person.

Fla. Stat. § 784.03(1)(a).

STATEMENT OF THE CASE

Petitioner Jackson has continuously challenged his ACCA-enhanced sentence since it was imposed in 2009, and this Court has twice granted him certiorari and vacated the judgment of the Eleventh Circuit upholding that sentence—once in light of *Curtis Johnson v. United States*, 559 U.S. 133 (2010), and once in light of *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015). Yet Mr. Jackson remains in federal prison serving that sentence.

Mr. Jackson entered the federal system in 2008, in the Middle District of Florida, on the charge of possession of a firearm by a convicted felon. *See* 18 U.S.C. § 922(g)(1). In 2009, he was sentenced under the ACCA. *See* 18 U.S.C. § 924(e).

Mr. Jackson's unenhanced guidelines range of imprisonment would have been 57 to 71 months, except that the ACCA enhancement was then applied. And Mr. Jackson's enhanced guidelines range would have been 135 to 168 months, but for the ACCA's 15-year mandatory minimum. His guidelines range of imprisonment thus became 180 months.

Mr. Jackson's prior convictions relied upon for the ACCA enhancement included one "serious drug offense"—delivery of cocaine in 1989, when he was 16 years old. In 1992, he was convicted of armed robbery and aggravated battery, which were committed on the same occasion, and resisting with violence.[1]

[1] Mr. Jackson's other felony convictions—possession of a firearm by a convicted felon and armed burglary of a dwelling committed on the same occasion as the robbery and battery—are clearly not violent felonies. *See, e.g., United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008); *United States v. Esprit*, 841 F.3d 1235 (11th Cir. 2016).

At sentencing, the district court overruled Mr. Jackson's objection to the ACCA enhancement, determined that the Florida offense of resisting with violence fell within the ACCA's elements clause, and imposed a 180-month sentence of imprisonment. On direct appeal, the Eleventh Circuit affirmed Mr. Jackson's ACCA sentence based on the elements clause, and Mr. Jackson petitioned the Supreme Court for further review. *See United States v. Jackson*, 355 F. App'x 297 (11th Cir. 2009), *vacated by* 562 U.S. 1128 (2011), and *superseded by* 440 F. App'x 857 (11th Cir. 2011).

While Mr. Jackson's petition for writ of certiorari was pending, this Court decided *Curtis Johnson v. United States*, holding that the ACCA's elements clause requires "violent force—that is, force capable of causing physical pain or injury to another person." 559 U.S. 133, 140 (2010). Thereafter, this Court granted Mr. Jackson's certiorari petition, vacated the Eleventh Circuit judgment, and remanded for further consideration. *See Jackson v. United States*, 562 U.S. 1128 (2011).

On remand, the Eleventh Circuit again affirmed, but this time this Court denied certiorari. *See United States v. Jackson*, 440 F. App'x 857 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1132 (Jan. 17, 2012). The judgment and sentence in the criminal case thus became final in January 2012.

In November 2012, Mr. Jackson instituted the instant proceedings pursuant to 28 U.S.C. § 2255, by filing a timely *pro se* motion to vacate his ACCA-sentence, in

which he challenged the constitutionality of the ACCA.[2] The district court denied Mr. Jackson's § 2255 motion on April 10, 2014, and denied his motion to reconsider on August 6, 2014. Mr. Jackson timely appealed. After the district court denied Mr. Jackson a certificate of appealability (COA), Mr. Jackson moved the Eleventh Circuit for a COA in March 2015. While that motion was pending, this Court decided *Samuel Johnson v. United States*, 135 S. Ct. 2551 (June 26, 2015). The Eleventh Circuit nonetheless denied Mr. Jackson's COA motion on August 4, 2015, and his motion for reconsideration on October 1, 2015.

Mr. Jackson then timely filed a *pro se* petition for writ of certiorari. *See Jackson v. United States,* Sup. Ct. No. 15-7915. While it was pending, this Court decided *Welch v. United States*, 136 S. Ct. 1257 (2016).

The Solicitor General then responded to Mr. Jackson's petition, expressly waived the defense of procedural default, and asked this Court to grant the writ. This Court did so in June 2016, thereby vacating the Eleventh Circuit judgment and remanding Mr. Jackson's case for further consideration in light of *Welch*. *See Jackson v. United States,* 136 S. Ct. 2408 (2016). Thereafter, the Eleventh Circuit appointed counsel and granted a COA concerning the application of the procedural default doctrine and the constitutionality of Mr. Jackson's ACCA sentence based on *Samuel Johnson* and *Welch*.

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[2] Mr. Jackson's *pro se* § 2255 motion raised several grounds for relief, but the only ground relevant here is ground two, the ACCA challenge. The other grounds, therefore, are not discussed

The Eleventh Circuit then affirmed based on its prior precedent that held Florida robbery and resisting with violence qualify under the ACCA's elements clause. Although Mr. Jackson also briefed whether Florida's aggravated battery offense qualified as a "violent felony," to preserve the issue in the event that Eleventh Circuit precedent holding robbery was overturned, the Eleventh Circuit did not mention aggravated battery in its opinion. See App. A. Shortly thereafter, this Court granted certiorari to resolve whether Florida robbery is a "violent felony." *See Stokeling v. United States*, ___ S.Ct. ___, 2018 WL 1568030 (April 2, 2018).

REASONS FOR GRANTING THE WRIT

Mr. Jackson's sentence was enhanced under the Armed Career Criminal Act (ACCA), based, in part, on the Florida offenses of robbery and resisting with violence.[3] Had he been sentenced in the Ninth or Tenth Circuit, he would not have been subject to the ACCA-enhanced penalties based on those offenses. This Court recently granted certiorari in *Stokeling v. United States*, ___ S. Ct. ___, 2018 WL 1568030 (April 2, 2018), which will resolve the circuit split on Florida robbery that is discussed in issue I, below. Mr. Jackson also requests certiorari review herein to resolve the circuit conflict regarding Florida's resisting-with-violence offense. Additionally, because the Eleventh Circuit's decisions post-*Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), have diluted the holding in *Curtis Johnson v. United States*, 559 U.S. 133 (2010), certiorari is sought concerning whether the Florida offense of aggravated battery qualifies as a "violent felony."

I. The Eleventh and Ninth Circuits are intractably divided on whether a Florida robbery conviction categorically requires the Curtis *Johnson* level of "violent force," and certiorari has been granted to resolve the circuit conflict on that issue.

In *United States v. Fritts*, the Eleventh Circuit held that Florida robbery—whether armed or unarmed—is categorically an ACCA violent felony. 841 F.3d 937, 943 (11th Cir. 2016). According to the Eleventh Circuit, armed and unarmed robbery qualify as violent felonies for ACCA purposes for the same reason, i.e., according to

[3] As noted above, Mr. Jackson also has one conviction qualifying as a "serious drug offense," as well as a conviction for Florida aggravated battery that was committed on the same occasion as his Florida robbery offense.

Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997), overcoming victim resistance is a necessary element of any Florida robbery offense. 841 F.3d at 942-944. The Eleventh Circuit assumed from the mere fact of "victim resistance," and the perpetrator's need to use some physical force to overcome it, that robbery was categorically a violent felony.

According to *Fritts*, it was irrelevant that Fritts' own conviction pre-dated *Robinson* since *Robinson* simply clarified what the Florida robbery statute "always meant." 841 F.3d at 943. But while *Robinson* did clarify that a mere sudden snatching without any victim resistance is simply theft, not robbery, *id.* at 942-944, what it did not clarify was how much force was actually necessary to overcome resistance for a Florida robbery conviction. Decades before *Robinson*, however, the Florida Supreme Court had held that the "degree of force" was actually "immaterial" so long as it was sufficient to overcome resistance. *Montsdoca v. State*, 93 So. 157, 159 (1922). And the Eleventh Circuit in *Fritts* cited *Montsdoca* as controlling as well. 841 F.3d at 943.

Although neither *Montsdoca* nor *Robinson* specifically addressed what degree of force is necessary to overcome resistance under the Florida robbery statute, the Florida intermediate appellate courts have provided clarity as to the "least culpable conduct" under the statute in that regard. Several Florida appellate court decisions have confirmed post-*Robinson* that victim resistance in a robbery may well be quite minimal, and where it is, the degree of force necessary to overcome it is also minimal. Specifically, Florida courts have sustained robbery convictions under Fla. Stat.

§ 812.13 where a defendant has simply: (1) bumped someone from behind, *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001); (2) engaged in a tug-of-war over a purse, *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011); (3) peeled back someone's fingers in order to take money from his clenched fist, *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th DCA 2000); or (4) otherwise removed money from someone's fist, knocking off a scab in the process, *Winston Johnson v. State*, 612 So. 2d 689, 690-91 (Fla. 1st DCA 1993).

As one Florida court explained, a robbery conviction may be upheld in Florida based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986). And as another court stated, the victim must simply resist "in any degree"; where "any degree" of resistance is overcome by the perpetrator, "the crime of robbery is complete." *Mims v. State*, 342 So. 2d 116, 117 (Fla. 3d DCA 1977).

The Ninth Circuit recognized this in *United States v. Geozos*, where it held that a Florida conviction for robbery, whether armed or unarmed, fails to qualify as a "violent felony" under the elements clause because it "does not involve the use of violent force within the meaning of ACCA." 879 F.3d 890, 900-01 (9th Cir. 2017). In so holding, the Ninth Circuit found significant that under Florida case law, "any degree" of resistance was sufficient for conviction, and an individual could violate the statute simply by engaging "in a non-violent tug-of-war" over a purse. *Id.* at 900 (citing *Mims* and *Benitez-Saldana*).

In coming to a decision that it recognized was at "odds" with the Eleventh Circuit's holding in *Fritts*, the Ninth Circuit rightly pointed out that "in focusing on

the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, [the Eleventh Circuit] has overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." *Id.* at 901 (citing *Montsdoca*, 93 So. at 159 ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.")).

As is clear from *Geozos*, the Ninth and Eleventh Circuits' decisions directly conflict regarding an important and recurring question of federal law: namely, whether the minimal force required to overcome minimal resistance under the Florida robbery statute categorically meets the level of "physical force" required by *Curtis Johnson* for "violent felonies" within the ACCA elements clause. *See* 559 U.S. at 140 (holding that in the context of a "violent felony" definition, "physical force" means "violent force," which requires a "substantial degree of force.") And indeed, just this week, in *Stokeling v. United States*, ___ S. Ct. ___, 2018 WL 1568030 (April 2, 2018), certiorari was granted to resolve that very issue.

Mr. Jackson therefore urges this Court to hold the instant case pending its decision in *Stokeling*, and, if the Eleventh Circuit is reversed, to vacate the decision below as well, and remand with directions that Mr. Jackson be sentenced without the ACCA enhancement.

II. The Circuits are divided on whether resisting with violence, Fla. Stat. § 843.01, has as an element the use, attempted use, or threatened use of physical force against the person of another.

A prior conviction under § 843.01 is a predicate violent felony in the Eleventh Circuit but not in the Tenth Circuit. *See United States v. Lee*, 701 F. App'x 697, 700 & n.1 (10th Cir. 2017). The two circuits have taken different approaches to determine whether the offense is categorically a violent felony. Employing the analysis used in *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), the Tenth Circuit considered the minimum conduct criminalized by § 843.01, Fla. Stat., as defined by the Florida Supreme Court. But through rote application of its prior panel precedent rule, the Eleventh Circuit analyzed the typical conduct punished, rather than the minimum conduct criminalized. The Court should review Petitioner's judgment to resolve this circuit split.

A. The Florida offense of resisting with violence does not require *violent* force.

The Eleventh Circuit reflexively held that Petitioner's argument was foreclosed by the prior panel precedents of *United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012), and *United States v. Hill*, 799 F.3d 1318 (11th Cir. 2015). These precedents, however, failed to consider the Florida Supreme Court's definition of the minimum conduct criminalized by the offense as required by *Moncrieffe*. In *Romo-Villalobos*, which pre-dated *Moncrieffe*, the Eleventh Circuit failed to assume that the conviction under Florida Statute § 843.01 "rested upon nothing more than the least of the acts criminalized." *Moncrieffe*, 564 U.S at 191 (internal brackets and quotation marks omitted). Instead, the Eleventh Circuit "emphasized . . . Florida

[intermediate appellate court] cases where defendants had engaged in more substantial, and more violent, conduct" instead of the controlling Florida Supreme Court case and other intermediate appellate cases describing the least culpable conduct under the statute. *Lee*, 701 F. App'x at 700 & n.1.

The minimum conduct required by the Florida Supreme Court to satisfy the "violence" element of § 843.01 is the use of unlawful force. *See I.N. Johnson v. State*, 50 So. 529 (Fla. 1909). In *I.N. Johnson*, the state charged the defendant with "knowingly and willfully resisting, obstructing or opposing the execution of legal process, by offering or doing violence" to an officer. *Id.* at 529.[4] The charging document alleged "a knowing and willful resistance . . . by gripping the hand of the officer and forcibly preventing him from opening the door of the room . . . thereby obstructing the officer in entering the room to make the arrest." *Id.* at 529-30. The Florida Supreme Court found that this allegation met the "violence" element of the statute:

> The allegation that the defendant gripped the hand of the officer, and forcibly prevented him from opening the door for the purpose of making the arrest under the capias, necessarily involves resistance, and an act of violence to the person of the officer while engaged in the execution of legal process. The force alleged is unlawful, and as such is synonymous with violence.

Id. at 530. "Unlawful" force in Florida can be as minor as an unwanted touch, a simple battery proscribed by § 784.03. Such a touch, while sufficient to sustain a

[4] The charge was brought under Section 3500 of the General Statutes of 1906, a predecessor to today's § 843.01.

conviction under § 784.03 or § 843.01, does not contain the degree of force necessary – violent force or strong physical force – to be a violent felony. *See Curtis Johnson*, 559 U.S. at 140.

The Florida Supreme Court's decision in *I.N. Johnson* has not been abrogated or overruled. The federal court is bound by the state supreme court's interpretation of state law, including its determination of the elements of a state criminal offense. *See Curtis Johnson*, 559 U.S. at 138. "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

More recent cases from Florida's intermediate courts of appeal show that, like the gripping of the officer's hand in *I.N. Johnson*, the force required by "offering or doing violence" under § 843.01 is not violent force or strong physical force. In particular, the State of Florida established a "prima facie case" for resisting an officer with violence where the State alleged that the defendant was holding onto a doorknob and "wiggling and struggling" to free himself. *State v. Green*, 400 So. 2d 1322, 1323-24 (Fla. 5th DCA 1981). In another case, the defendant "struggled, kicked, and flailed his arms and legs," even though he never actually struck an officer. *Wright v. State*, 681 So. 2d 852, 853-54 (Fla. 5th Cir. DCA 1996). Also, a driver terminated a consensual encounter with police by speeding off, hitting the officer's hand with the truck's rearview mirror in the process. *Yarusso v. State*, 942 So. 2d 939, 941 (Fla. 2d DCA 2006). In still another case, the defendant "scuffled" with police *after* being

handcuffed. *Miller v. State*, 636 So. 2d 144, 151 (Fla. 1st DCA 1994); *see also Kaiser v. State*, 328 So. 2d 570, 571 (Fla. 3d DCA 1976) (conviction based on "a scuffle" with the officer).

The Eleventh Circuit in *Romo-Villalobos* discounted, overlooked, or ignored these Florida cases demonstrating the minimum conduct constituting the offense and instead focused on other Florida intermediate appellate cases describing something more than the least culpable conduct. In retrospect, this approach contradicts *Moncrieffe*'s clear instruction to assume that Petitioner's conviction under Florida Statute § 843.01 "rested upon nothing more than the least of the acts criminalized." *Moncrieffe*, 564 U.S. at 191. But of course, the panel in *Romo-Villalobos* did not have the benefit of *Moncrieffe* at the time it issued its decision.

Although the Eleventh Circuit had an opportunity in *Hill*, to revisit the issue after *Moncrieffe* and consider the minimum conduct criminalized by Florida Statute § 843.01, the Eleventh Circuit failed to cite *Moncrieffe* or incorporate the analysis. Petitioner argued to the court below that the proper application of the categorical approach – as informed by *Moncrieffe* – would result in a finding that a conviction under § 843.01 is not a violent felony. The Eleventh Circuit, however, refused to consider this in light of its prior precedent rule. *See* App. A.

Indeed, application of the approach mandated by *Moncrieffe* and urged by Petitioner has led the Tenth Circuit to a different result and created the current conflict between the circuits which this Court should resolve. *See Lee*, 701 F. App'x at 700. Considering the minimum conduct criminalized by § 843.01 as described by

the Florida Supreme Court, the Tenth Circuit held that a conviction for the offense does not qualify as a violent felony. Overtly disagreeing with the Eleventh Circuit, the Tenth Circuit explained that "our job is not to find what kind of conduct is most routinely prosecuted, and evaluate *that*. Under the categorical approach, we consider only the 'minimum conduct criminalized,' not the typical conduct punished." *Lee*, 701 F. App'x at 700, n.1 (citing *Moncrieffe*, 133 S. Ct. at 1685).

Adding to the tension between the circuits, the Ninth Circuit came to a similar conclusion as the Tenth Circuit when interpreting an analogous Arizona statute. *See United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013). The Ninth Circuit considered Arizona law to determine the minimal conduct criminalized rather than the typical conduct punished before concluding that the Arizona offense could not be considered categorically a violent felony due to an insufficient degree of physical force. *Id.* at 1088.

In addition to resolving the circuit split, certiorari is warranted herein because the Eleventh Circuit has not followed this Court's precedent concerning the mens rea required under the elements clause.

B. The decision below also conflicts with this Court's precedent regarding the mens rea required to qualify as "use" of physical force.

The word "use" in the elements clause requires an "active employment" of force, which "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (interpreting the elements clause of 18 U.S.C. § 16); *see also United States v. Palomino Garcia*, 606

F.3d 1317 (11th Cir. 2010) (holding that an offense that may be committed by reckless conduct cannot qualify as a "crime of violence" under the guidelines elements clause). The Eleventh Circuit's invocation of prior precedent to implicitly reject Petitioner's argument that the mens rea required by Florida law does not meet the federal "use" of physical force definition conflicts with this Court's precedent in *Leocal*.

The court below invoked the prior precedent of *Romo-Villalobos*, in which the Eleventh Circuit held that a conviction under Florida Statute § 843.01 required proof of "general intent" as to all elements of the offense – not only "resist[ing], obstruct[ing], or oppos[ing] any officer," but also the final "doing violence" element. 674 F.3d at 1250, n.3. As an initial matter, the Florida Supreme Court has established that a general intent is required only for the first elements of the statute, "resist[ing], obstruct[ing], or oppos[ing] any officer," and that no intent is required as to the final "doing violence element, which makes the crime "akin" to a strict liability crime. *See Frey v. State*, 708 So. 2d 918 (Fla. 1998); *see also Polite v. State*, 973 So. 2d 1107 (Fla. 2007). The Florida Supreme Court's construction of § 843.01 in *Frey* remains the law of Florida, and that construction is binding on all federal courts. *See Curtis Johnson*, 559 U.S. at 138 ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements" of the state offense at issue). Thus, to the extent the Eleventh Circuit's determination of the mens rea in *Romo-Villalobos* conflicts with the Florida Supreme Court's determination of the mens rea in *Frey*, the Eleventh Circuit's decision runs afoul of

this Court's reminder in *Curtis Johnson* that the federal courts are bound by the Florida Supreme Court's interpretation of state law.

But even if, *arguendo*, a conviction under § 843.01 requires proof of "general intent" as to all elements of the offense, the Eleventh Circuit's conclusion in *Romo-Villalobos* that general intent crimes are not exempt from the violent felony definition, *id*. at 1251, contradicts this Court's controlling precedent of *Leocal*, which *Romo-Villalobos* neither cited nor considered. As indicated by *Leocal*, the federal elements clause requires a specific intent to apply violent force; it is not satisfied by a mere, general intent to commit the *actus reus* of the crime (here, "resist[ing], obstruct[ing], or oppos[ing]: an officer). *See Leocal*, 543 U.S. at 9.

Indeed, other circuits have found that general intent crimes are indeed "overbroad" by comparison to an offense that "has as an element the use, intended use, or threatened use of physical force against the person of another." *See, e.g.*, *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1099 n.4 (9th Cir. 2015) (stating that if, as the government argued, the state aggravated assault statute at issue in that case "were a general intent crime, application of the enhancement would fail because the statute would be overbroad"); *United States v. Rico-Mendoza*, 548 F. App'x 210, 212-14 (5th Cir. 2013) (stating that when the least culpable act of the predicate offense was "the defendant '[i]ntentionally point[ing] any firearm toward another, or display[ing] in a threatening manner any dangerous weapon toward another,'" such crime did not qualify as the "use of force" under the elements clause because no "intent to harm or apprehension by the victim of potential harm," was

required; the offense could include "an accidental or jesting pointing of the weapon"). Consistent with the *mens rea* analysis in *Leocal* and these other circuit decisions, a conviction for resisting with violence in violation of § 843.01, a general intent crime, is categorically "overbroad" by comparison to an offense that has the "use" of physical force as an element. It is thus not a "violent felony" within the elements clause. This Court should review the conflict between the circuit court below and this Court's precedents.

III. The Florida offense of aggravated battery with a deadly weapon is not a "violent felony" under the ACCA's elements clause.

As a final matter, if this Court finds that Florida robbery is not a "violent felony," Mr. Jackson's aggravated battery offense—committed on the same occasion as the robbery offense in Issue I—may become material to the question of whether he is an armed career criminal. However, as set forth below, the Florida offense of aggravated battery with a deadly weapon does not qualify as a "violent felony." In *Turner v. Warden*, the Eleventh Circuit held that aggravated battery in violation of Fla. Stat. § 784.045 is categorically a violent felony under the ACCA's elements clause. 709 F.3d 1328, 1341 (11th Cir. 2013). However, the *Turner* Court's analysis of aggravated battery lacks the strict element-by-element comparison, overbreadth analysis, and examination of Florida case law required by *Moncrieffe*, *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016).

An aggravated battery with a deadly weapon is a simple battery, in which the defendant "uses a deadly weapon." Like any other Florida battery, aggravated

battery can be committed by a non-consensual and non-violent "touching." Because the *Shepard* documents do not establish whether Mr. Jackson's battery was accomplished through touching or striking, we must presume the battery was accomplished through the least culpable means—touching. *See United States v. Braun*, 801 F.3d 1301, 1305 (11th Cir. 2015) (citing *Moncrieffe*, 133 S. Ct. at 1684) ("We must presume that the conviction rested upon nothing more than the least of the acts criminalized . . . ."). Accordingly, under *Descamps* and *Moncrieffe*, we must presume that Mr. Jackson's conviction for aggravated battery must be considered a mere non-consensual "touching" while "using" a deadly weapon.

This Court has held that Florida battery, when committed by actually and intentionally touching another against his or her will, does not satisfy the elements clause. *Curtis Johnson*, 559 U.S. at 139. That the aggravated battery statute requires the additional element of "using" a deadly weapon does not place the touching within the elements clause, because "using" a deadly weapon during a battery does not require that the weapon ever "touch" the victim. A conviction is permissible if the defendant simply holds the weapon while committing a touching. *See, e.g.*, *Severance v. State*, 972 So. 2d 931, 934 (Fla. 4th DCA 2007) (en banc) (clarifying that to "use a deadly weapon" for purposes of the aggravated battery statute "cover[s] all uses;" the Legislature "did not intend to limit the manner or method of use; therefore, it is unnecessary that the defendant use the weapon to commit the touching that constitutes the battery; it is sufficient if the defendant simply "hold[s] a deadly weapon without actually touching the victim with the weapon"). Thus, the weapon

need not play any part in the offense. Indeed, the defendant need not even threaten to use it. So long as the weapon is in the defendant's possession during the touching, regardless of its use, the defendant has committed an aggravated battery. *Id*.

Moreover, the term "deadly weapon" in § 784.045(1)(a)(2) is itself indeterminate and overbroad. According to Florida's standard jury instruction for aggravated battery, "a weapon is a 'deadly weapon' if it is used or threatened to be used in a way likely to produce death or great bodily injury." That a deadly weapon may be "likely to produce" death or great bodily injury does not mean that an offense committed with a deadly weapon requires the use or threatened use of violent force. For example, poison is clearly a "deadly weapon" within that definition, and it can be easily administered without violent force.

Thus, the only physical contact required to commit an aggravated battery with a deadly weapon is touching another individual. *Severance*, 972 So. 2d at 937. As explained in *Severance*, the "foundational element" of aggravated battery requires only "that the accused be engaged in the act of committing a simple battery against the victim. The Legislature has added a new element to a simple battery—that a deadly weapon also be used in some way—as a basis for increasing the punishment beyond what a mere simple battery by itself would bring." *Id*. The "element of contact with the victim," i.e., touching, does not require that the deadly weapon be used to make the contact with the victim. *Id*. And merely holding the weapon does not make the touching involve the strong degree of force required by *Curtis Johnson*.

Thus, despite *Turner*'s categorical holding to the contrary, Florida case law and post-*Turner* precedent in this Court supports Mr. Jackson's position that aggravated battery with a deadly weapon through a touch does not qualify as a violent felony under the elements clause.

CONCLUSION

For the foregoing reasons, Petitioner Jackson requests that this Court grant certiorari on the issues of whether Florida resisting with violence and aggravated battery qualify as violent felonies under the ACCA. Additionally, or alternatively, he urges the Court to hold this case pending resolution of the Florida robbery issue in *Stokeling*.

Respectfully submitted,

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APPENDIX A

Decision of the Court of Appeals for the Eleventh Circuit

707 Fed.Appx. 954 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Anthony Grant JACKSON, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

No. 14-15100

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Non-Argument Calendar

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(January 4, 2018)

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket Nos. 6:12-cv-01746-GAP-KRS; 6:08-cr-00054-GAP-KRS-1

Attorneys and Law Firms

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Anthony Grant Jackson, Pro Se

Yvette Rhodes, Arthur Lee Bentley, III, Karin Bethany Hoppmann, U.S. Attorney's Office, Tampa, FL, Emmett Jackson Boggs, U.S. Attorney's Office, Orlando, FL, for Respondent-Appellee

Before WILSON, WILLIAM PRYOR, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

Anthony Grant Jackson appeals the denial of his 28 U.S.C. § 2255 motion to vacate his sentence. On appeal, Jackson argues that he does not have three qualifying Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), predicate offenses. [1]

1 The United States has waived its defense of procedural default, so we do not discuss it here.

In a section 2255 proceeding, we review legal issues de novo and factual findings for clear error. *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999) (per curiam). A district court's determination that a conviction qualifies as a violent felony under the ACCA is reviewed de novo. *United States v. Gandy*, 710 F.3d 1234, 1236 (11th Cir. 2013) (per curiam).

We have recently reaffirmed that Florida armed robbery qualifies as a violent felony under the ACCA's elements clause. *See United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016). We have also held that Florida resisting arrest with violence is a violent felony under the ACCA's elements clause. *See United States v. Hill*, 799 F.3d 1318, 1322–23 (11th Cir. 2015) (per curiam). A "prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

Here, the district court did not err by denying Jackson's § 2255 motion. Jackson has a prior conviction for Florida armed robbery and a prior conviction for Florida resisting arrest with violence, both of which qualify as violent felonies under the ACCA's elements clause based on our ***955** binding precedent. [2] To the extent that Jackson asserts that those decisions were wrongly decided, we remain bound by those holdings until they are overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc. Thus, combined with his "serious drug offense" predicate offense, Jackson has three ACCA qualifying predicate offenses.

2 Jackson also has a conviction for delivery of cocaine, and he does not challenge that it qualifies as a serious drug offense.

AFFIRMED.

All Citations

707 Fed.Appx. 954 (Mem)

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