NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MAURICE DORVILUS,

***Petitioner*,**

v.

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. Does a Florida robbery conviction categorically require the use of "*violent* force" as defined in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) due to its "overcoming resistance" element, if that element – as interpreted by the Florida appellate courts – can be satisfied by such minor conduct as bumping the victim, unpeeling the victim's fingers to take money from his hand, or engaging in a tug-of-war over a purse?

2. Could reasonable jurists debate whether a Florida battery on a law enforcement officer (BOLEO) conviction qualifies as a "violent felony" for purposes of ACCA?

3. Could reasonable jurists debate whether a Florida resisting with violence (RWV) conviction qualifies as a "violent felony" for purposes of ACCA?

4. Did the Eleventh Circuit err under *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003) and *Buck v. Davis*, 137 S.Ct. 759, 773-774 (2017) in denying Petitioner a certificate of appealability since the issues above are debatable among reasonable jurists?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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MAURICE DORVILUS respectfully petitions this Court 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 order denying a certificate of appealability to Petitioner to appeal the district court's denial of his motion to vacate his enhanced

ACCA sentence pursuant to 28 U.S.C. § 2255, *Maurice Dorvilus v. United States*, Ct. App. No. 17-14417 (11th Cir. Jan. 26, 2018), is included as Appendix A-1.

STATEMENT OF JURISDICTION

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. The decision of the court of appeals denying Petitioner a certificate of appealability to appeal the district court's denial of his motion to vacate pursuant to 28 U.S.C. § 2255, was entered on January 26, 2018. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

(e)(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.

28 U.S.C. § 2253. Appeal

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceedings in which the detention complained of arises out of process issued by State court; or
>
> (B) the final order in a proceeding under section 2255

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Fla. Stat. § 812.13. Robbery (1989)

(1) "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.

Fla. Stat. § 784.03 Battery (2000)

(1) A person commits battery if he:

> (a) Actually and intentionally touches or strikes another person against the will of the other; or
>
> (b) Intentionally causes bodily harm to an individual.
>
> (2) Whoever commits battery shall be guilty of a misdemeanor of the first degree . . .

Fla. Stat. § 784.07 Assault or battery of law enforcement officers (2000)

(2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer . . ., while the officer . . . is engaged in the lawful performance of his duties, the offense for which the person is charged shall be reclassified as follows:

> (a) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.
>
> (b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

Fla. Stat. § 843.01 Resisting Arrest With Violence (2000)

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 . . . .

STATEMENT OF THE CASE

Mr. Dorvilus was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (See App. A-2). The indictment also alleged that he was subject to an enhanced penalty under the Armed Career Criminal Act ("ACCA"). On August 13, 2008, Mr. Dorvilus was convicted after a jury trial. After trial, a Presentence Investigation Report ("PSI") issued, finding that Mr. Dorvilus was subject to ACCA based on the following prior convictions: (1) 1989 Florida robbery; (2) cocaine trafficking; (3) burglary of a structure; (4) battery on a police officer ("BOLEO")/ resisting with violence ("RWV"); and (5) Georgia robbery. At sentencing, Mr. Dorvilus was sentenced under ACCA with a statutory range of 15 years – Life and a guideline range of 188-235 months. The court sentenced Mr. Dorvilus to 204 months, followed by 5 years of supervised release. Mr. Dorvilus appealed his judgment to the Eleventh Circuit and to this Court. Both requests were denied. Thereafter, Mr. Dorvilus filed his first motion to vacate under 28 U.S.C. § 2255 on March 31, 2011. That motion was denied on January 26, 2012.

Mr. Dorvilus filed his Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence with the Eleventh Circuit on May 17, 2016, based on the Supreme Court's decision in Samuel *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015) (*"Samuel Johnson"*). *In re Maurice Dorvilus,* Court of Appeals Dkt. 16-12684 (11th Cir. 2016). The Eleventh Circuit granted Mr.

Dorvilus' request, and permitted him to litigate these issues before the district court. *Id*.

After briefing, the Magistrate Judge issued a Report and Recommendation ("R&R"), recommending that the § 2255 petition be denied and that a certificate of appealability ("COA") be denied. (See App. A-5). The Magistrate Judge found that the Florida offenses of robbery, cocaine trafficking, and RWV qualified Mr. Dorvilus for ACCA. Mr. Dorvilus and the government timely filed objections to the R&R. (See App. A-6, A-7). The District Court upheld the R&R, but also found that Mr. Dorvilus' BOLEO conviction that was paired with his prior RWV, was a predicate for ACCA. (App. A-8). Thus, the district court found that Mr. Dorvilus had three ACCA predicates which no reasonable jurist could dispute. It, therefore, denied Mr. Dorvilus' § 2255 petition and it declined to issue a certificate of appealability (A-8).

Mr. Dorvilus appealed the district court's order and requested a certificate of appealability. The Eleventh Circuit denied this request, citing to *Hamilton v*. Sec'y*, Fla. Dept. of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), finding that "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." (App. A-8 p.2). Mr. Dorvilus submits that the Eleventh Circuit's erroneous ruling denying him relief involved issues that are subject to contentious circuit splits as well as important federal issues that must be decided. Mr. Dorvilus also notes that this Court has granted certiorari on one of the issues presented in this petition, regarding the viability of Florida robbery as a violent felony for ACCA. *See Stokeling v. United States*, *pet. for cert granted*, No. 17-

5554, ___ S.Ct. ___, 2018 WL 1568030 (April 4, 2018). Accordingly, this Court should hold Mr. Dorvilus' case in abeyance pending the resolution of *Stokeling*. Alternatively, this Court should grant Mr. Dorvilus' request for certiorari to determine the issues regarding Florida's BOLEO and RWV offenses, as well as the Eleventh Circuit's standard for denying certificates of appealability.

REASONS FOR GRANTING THE WRIT

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.

A. A Florida robbery offense only requires *de minimis* force, as it is based on common law standards which deem the level of force for a robbery to be "immaterial."

In *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), the Eleventh Circuit held that Florida robbery is categorically an ACCA violent felony. *Id.* at 943. The court, notably, did not analyze Fritts' armed robbery conviction any differently than an unarmed robbery conviction. According to the Eleventh Circuit, both armed and unarmed robbery qualified as an ACCA violent felony for the same reason: namely, according to *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 court assumed from the mere fact of "victim resistance," and the perpetrator's need to use some physical force to overcome it, that the offense 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 *Robinson* did *not* clarify was how much force was actually necessary to overcome resistance for a Florida robbery conviction. Notably, decades before *Robinson*, in *Montsdoca v. State*, 93 So. 157 (1922), the Florida Supreme Court had

held that the "degree of force" was actually "immaterial" so long as it was sufficient to overcome resistance. *Id.* at 159. And the Eleventh Circuit in *Fritts* cited *Montsdoca* as controlling precedent. 841 F.3d at 943.

Although neither *Montsdoca* nor *Robinson* specifically addressed what degree of force was 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. Notably, 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. 2nd DCA 2011); (3) peeled back someone's fingers without injury 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 paraphrased the Florida standard, 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. 3rd DCA 1977). These standards articulated by Florida courts evidence that the Florida robbery offense has common law roots because under the common law the level of force is immaterial.

The Ninth Circuit recognized in *United States v. Geozos*, 879 F.3d 890 (9th Cir. 2017), that a conviction for Florida 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." *Id.* at 900-901.[1] 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*).

Notably, the Ninth Circuit – in coming to a decision that it recognized was at "odds" with the Eleventh Circuit's holding in *Fritts* – rightly pointed out that the Eleventh Circuit, "in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, 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

[1] The *Geozos* Court correctly stated that whether a robbery was armed or unarmed makes no difference because an individual may be convicted of armed robbery for "merely *carrying* a firearm" during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. 870 F.3d at 900-9901; following *Parnell v. United States*, 818 F.3d 974, 978–81 (9th Cir. 2016), which held that a Massachusetts conviction for *armed* robbery, which required only the possession of a firearm without using or even displaying it, does not qualify as a "violent felony" under the ACCA's elements clause)) (emphasis in original).

is such force as is actually sufficient to overcome the victim's resistance")) (emphasis in the original).

As is clear from *Geozos*, the Ninth and Eleventh Circuits' decisions directly conflict on 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 v. United States*, 559 U.S. 133 (2010) ("Curtis Johnson"), for "violent felonies" within the ACCA elements clause. *See id.* 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, recently in *Stokeling v. United States*, *pet. for cert granted*, No. 17-5554, ___ S.Ct. ___, 2018 WL 1568030 (April 4, 2018), certiorari was granted to resolve that very issue.

The Court should hold the instant case pending its decision in *Stokeling*, and – if *Stokeling* is vacated – this Court should "GVR" Mr. Dorvilus' case as well, remanding it with directions that Petitioner be sentenced without the ACCA enhancement.

B. The decision below is wrong because *Fritts* was wrong in holding Florida robbery is categorically an ACCA "violent felony."

In *Fritts,* the Eleventh Circuit disregarded the common law roots of Florida robbery's force requirement; it disregarded that the Florida courts' interpretation of "overcoming resistance" to this day has been consistent with the approach at common law: the degree of force used is "immaterial." In overlooking that key point,

and failing to consult the intermediate appellate decisions illuminating the scope of Florida's "overcoming resistance" element, the court below committed a clear error of law under this Court's precedents that infected its ultimate conclusion.

The Eleventh Circuit has consistently ignored this Court's precedents, which confirm that not all "force" qualifies as "physical force" for purposes of the ACCA elements clause. Notably, when *Curtis Johnson* defined the term "physical force" as "violent force—that is, force capable of causing pain or injury to another person," 559 U.S. at 140, both before and after that 15-word definition, the Court made clear that "violent force" was measured by the "degree" or "quantum" of force. *Id.* at 139, 140, 142 (referring to "substantial degree of force" involving "strength," "vigor," "energy," "pressure," and "power"). While a mere nominal touching did not meet that standard, the only specific conduct *Curtis Johnson* mentioned as necessarily involving the requisite degree of "violent force" was a "slap in the face," since the force used in slapping someone's face would necessarily "inflict pain." *Id.* at 143. Beyond that single example of a classic battery by striking, the Court did not mention any other category of conduct that would inflict an "equivalent" degree of pain or injury to categorically meet its new "violent force" definition.

Thereafter, in *United States v. Castleman*, 572 U.S. __, 134 S. Ct. 1405 (2014), in the course of adopting the broader common-law definition of "physical force" for a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), rather than *Curtis Johnson*'s "*violent* force" definition, the Court emphasized that that "domestic violence" encompasses a range of force broader than 'violence' *simpliciter*." *Id.* at

1411 n.4 (emphasis in original). Relevant here, the Court observed that "most physical assaults committed against women and intimates are relatively minor," and include "pushing, grabbing, [and] shoving." *Id.* at 1412 (citations omitted). The Court opined that such "[m]inor uses of force may not constitute 'violence' in the generic sense." *Id.* As one such "example," the Court pointed out that, in *Curtis Johnson*, it had cited "with approval" *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003), where the Seventh Circuit had noted that it was 'hard to describe . . . as 'violence'" "a squeeze of the arm [that] causes a bruise." *Id.*

That deliberate approval suggests that the dividing line between violent and non-violent "force" lies somewhere between a slap to the face and a bruising squeeze of the arm. On that view, certainly the "bump" (without injury) in *Hayes* would constitute similarly "minor" and thus non-violent force. The same is also true of unpeeling the victim's fingers without injury in *Sanders*. And even though the grabbing of an arm during a tug-of-war in *Benitez-Saldana* caused "an abrasion," and there was a "slight injury" to the victim's hand by the offender's grabbing money and tearing off a scab in *Winston Johnson,* just like the bruising squeeze to the arm discussed in *Castleman*, which likewise resulted in a minor injury, such conduct does not constitute "violence" in the generic sense.

Finally, it is notable that Justice Scalia—writing only for himself—opined in *Castleman* that shoving, grabbing, pinching, and hair pulling would all meet the *Curtis Johnson* definition of "*violent* force," since (in his view) each of these actions was "capable of causing physical pain or injury." *Id.* at 1421-1422 (Scalia, J.,

concurring in the judgment). Significantly, however, no other member of the Court joined that view. That is so because such conduct—constituting more than an unwanted touch, but less than a painful slap to the face—entails only a minor use of force, not strength, vigor, or power. It thus lacks the degree of force necessary to qualify as violent. And because Florida robbery may unquestionably be committed by such conduct, it is not categorically a violent felony under the ACCA's elements clause.

Accordingly, the Court should hold Petitioner's case pending its decision in *Stokeling*, and – if the Court finds that robbery does not have violent force as an element -- it should "GVR" petitioner's case for resentencing without the ACCA enhancement. However, even if the Court were to agree with the Eleventh Circuit that Florida robbery is categorically a violent felony, this Court should still grant certiorari on the separate issues raised by Mr. Dorvilus as set forth below.

II. Reasonable jurists could debate whether a battery on a law enforcement officer (BOLEO) conviction qualifies as a "violent felony" for purposes of ACCA.

A. The "touch and strike" language in the Florida simple battery statute (which also governs the Florida BOLEO offense) is indivisible, and the least culpable conduct under that provision – a nominal touching – is non-violent.

In analyzing whether Petitioner's battery on a law enforcement officer offense ("BOLEO") qualified as an ACCA violent felony, the district court applied the modified categorical approach. But the district court's threshold divisibility ruling was wrong under both Eleventh Circuit and this Court's precedent. It directly

contravened the Eleventh Circuit's reasoning in *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016), and this Court's confirming decision in *Mathis v. United States*, 136 S.Ct. 2243 (June 23, 2016). The district court did not attempt to grapple with the dictates of these controlling precedents in its order denying Petitioner's § 2255 motion and the certificate of appealability.

In *Descamps v. United States*, 133 S.Ct. 2276 (2013), this Court clarified that in determining whether an offense qualifies as an ACCA violent felony, courts must apply the "categorical approach" unless the offense is "divisible" into alternative elements. Only if some alternative elements constitute a "violent felony" while others do not, is the district court permitted to employ the "modified categorical approach," which allows it to consider the limited class of documents identified in *Shepard v. United States*, 544 U.S. 13 (2005), to determine the actual offense of conviction. If the offense of conviction is indivisible, however, the "modified [categorical] approach . . . has no role to play." *Descamps*, 133 S.Ct. at 2285-2286. The court must determine categorically – that is, by examining the elements of the offense, not its underlying facts – whether the actual offense of conviction qualifies as an ACCA "violent felony." *Id.* at 2283-2285. And under the categorical approach, the court is required to "presume that the conviction rested upon nothing more than the least of the acts criminalized." *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014) (citing *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013)).

In *Lockett*, the Eleventh Circuit rightly acknowledged that the threshold divisibility "inquiry can't end with simply looking at whether the statute is written

disjunctively." 810 F.3d at 1268. The key to "figuring out" whether a disjunctively-worded statute is divisible under *Descamps*, the Court explained, is whether the jury is "*required*" to find one of several "alternative elements beyond a reasonable doubt, rather than just convict under a statute that happens to list alternative definitions or alternative means for the same crime without requiring jurors to pick which one applies." 810 F.3d at 1267. "[T]he text of a statute," *Lockett* recognized, "won't always tell us if a statute is listing alternative means or definitions, rather than alternative elements." *Id.* at 1268. Rather, *Lockett* acknowledged, it is necessary to "'look to the state's courts to answer this question.'" *Id.* at 1270 (citing *Howard*, 742 F.3d at 1341). Generally, the Court noted in *Lockett*, the state's standard jury instructions "will make clear" whether a jury *must* find a statutory factor unanimously beyond a reasonable doubt. If so, that factor is an "element;" if not, it is an alternative "means" of committing a single, indivisible offense. *Id.* at 1269, 1271.

This Court's ensuing decision in *Mathis* validated *Lockett*'s analysis in this regard. For indeed, the Court was clear in *Mathis* that a statute that merely "spells out various factual ways of committing some component of the offense – a jury need not find (or a defendant admit) any particular item" – is indivisible. 136 S.Ct. at 2249. For that reason, the Court held, the disjunctively-worded Iowa burglary statute was overbroad and indivisible, since "a jury need not agree" on which of the alternative locations specified was burglarized. *Id.* at 2250. Notably, this Court in *Mathis* confirmed the correctness of the Eleventh Circuit's mandate in *Howard* and

Lockett that in determining whether a statutory alternative is an element or means, sentencing judges must follow state courts decisions that definitively answer that question. 136 S.Ct. at 2256. The Court also acknowledged that jury instructions would definitely clarify whether a statutory alternative is an element the prosecutor must prove to the jury beyond a reasonable doubt, or rather, "only a possible means of commission" on which proof beyond a reasonable doubt is not required. *See* 136 S.Ct. at 2249, 2256-2257. Under *Lockett* and *Mathis* the "touch or strike" language in the Florida BOLEO statute, Fla. Stat. § 784.07(2)(b), is not divisible into separate elements, but rather is a single indivisible element.

Section 784.07(2)(b) raises a misdemeanor simple battery under § 784.04(1)(a) to a third degree felony, based upon the simple fact that the victim is a law enforcement officer. Notably, other than the special status of the victim, the elements of the Florida BOLEO offense are no different than those in a simple battery. That offense 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.

In *Descamps*' terms, the simple battery statute is unquestionably divisible into the two separate offenses set forth in the two numbered paragraphs above. However, after *Lockett* and *Mathis* the first offense is not *further* divisible into two additional offenses – touching and striking – simply because of the disjunctive wording of provision (1) above. For indeed, just as was the case with the disjunctively-worded statutes considered in *Lockett* and *Mathis*, Florida's standard

jury instructions and its caselaw both clarify that "touch or strike" are simply alternative "means" of committing a single indivisible *element* of the offense.

It is clear from Florida's standard battery instructions that Florida juries are never instructed to choose between and agree upon the "touch" or "strike" alternatives. The standard jury instruction for simple battery provides:

> To prove the crime of Battery, the State must prove the following element beyond a reasonable doubt:
>
> *Give 1 or 2 as applicable.*
>
> 1. [(Defendant) intentionally touched or struck (victim) against [his] [her] will.]
>
> 2. [(Defendant) intentionally caused bodily harm to (victim)].

Fla. Std. Jury Instr. (Crim.) 8.3; *see* Fla. Stat. § 784.03(1)(a). The BOLEO offense is plainly a derivative of simple battery, and the standard jury instruction for BOLEO shows that its first element is indeed, simple battery:

> To prove the crime of Battery on a [Law Enforcement Officer]. . . , the State must prove the following four elements beyond a reasonable doubt:
>
> 1. (Defendant)
>
> [intentionally touched or struck (victim) against [his] [her] will]
>
> [intentionally caused bodily harm to (victim)] . . . .

Fla. Std. Jury Instr. (Crim.) 8.11.

These standard instructions make clear that both simple battery, and its derivative, BOLEO, each have only a *single* alternative first element. The two bracketed items represent alternative versions of that element, effectively creating

two forms of simple battery. Critically, however, the first alternative element of simple battery, which is identical to the first element of BOLEO, is *not* itself further divisible. If "touching or striking" instead stated alternative "elements," the standard instructions for these offenses plainly would have bracketed those phrases, requiring the court to instruct the jury on the applicable alternative, and requiring the jury to find that alternative beyond a reasonable doubt.[2] That would have created two distinct simple battery/BOLEO crimes: battery/BOLEO by touching, and battery/BOLEO by striking. But the standard instructions do no such thing. They make clear that there is only one form of simple battery under § 784.04(1)(a)(1), and only one form of BOLEO by "touching or striking" under § 784.07(2)(a). In both simple battery and BOLEO, the standard instructions indicate, touching and striking are simply alternative "means," not elements.

And indeed, Florida's standard battery instructions are quite consistent with Florida Supreme Court precedent. In *State v. Weaver*, 957 So.2d 586 (Fla. 2007), for instance, where the prosecution charged the defendant with battery by intentionally touching or striking a law enforcement officer, but the trial court instructed the jury on both the "touching or striking" alternative and the "causing bodily harm" alternative, the Florida Supreme Court repeatedly recognized that "touching or

[2] *See Patterson v. New York*, 432 U.S. 197, 2010 (1977) (the Due Process Clause requires the prosecution "to prove beyond a reasonable doubt all of ***the elements*** included in the definition of the offense of which the defendant is charged") (emphasis added); *Richardson v. United States*, 526 U.S. 813, 817 (1999) ("[c]alling a particular kind of fact ***an 'element'*** carries certain legal consequences," and "[t]he consequence that matters for this case is that a jury in a federal criminal case cannot convict unless the jury unanimously finds that the Government has proved each element") (emphasis added).

striking" and "causing bodily harm" constituted two "forms" of simple battery, with "touching or striking" representing a single "form." *See id.* at 587-89. Then, a few years later, summarizing *Weaver*, the Florida Supreme Court reiterated that "intentional touching or striking" is one "form" of simple battery. *Jaimes v. State*, 51 So.3d 445, 449 (Fla. 2010). That characterization could not have been correct if touching and striking were alternative elements.

Although the district court cited *Curtis Johnson*, 559 U.S. at 136, as support for its finding that "the battery statute is divisible and contains disjunctive elements," upon close examination, the cited discussion in *Curtis Johnson* actually supports the argument that touching and striking are alternative means, not elements. Specifically, after reciting the alternative elements of the simple battery statute, the *Curtis Johnson* Court stated: "Because the elements of the offense are disjunctive, the prosecution can prove battery in one of three ways. It can prove that the defendant 'intentionally caused bodily harm,' that he 'intentionally struck' the victim, or that he merely 'actually and intentionally touched' the victim." 559 U.S. at 136-37 (internal citation and brackets omitted). That observation comports with the analysis above: Florida simple battery has a single, divisible element, and there are "three ways" (*i.e.*, means) of satisfying it, with touching and striking representing two of those three alternative "ways."

In making that observation, the Court cited *State v. Hearns*, 961 So.2d 211 (Fla. 2007). *Hearns* recited the two alternative elements of simple battery, and then stated that the offense could be committed by "three separate acts." *Id.* at 218. In

the parlance of *Mathis*, that meant that simple battery has two alternative elements ("touching or striking" and "causing bodily harm"), comprised of three alternative means (touching, striking, and causing bodily harm). While admittedly, *Hearns* also loosely used the term "elements" to describe these alternatives, the Florida Supreme Court was not using that term in the strict *Mathis*-sense. At no time did it hold that touching and striking are themselves alternative "elements" that, as understood by *Mathis*, a prosecutor must selectively charge and prove, and a jury must unanimously find, beyond a reasonable doubt. Were it otherwise, *Hearns* would be irreconcilable with Florida's longstanding standard jury instructions, and with the Florida Supreme Court's post-*Hearns* decisions in *Weaver* and *Jaimes* stating that there are only "two forms" of simple battery (*i.e.*, 1) battery by touching or striking; and 2) battery by causing bodily harm.

In any event, even if *Curtis Johnson* could be interpreted differently, that would not preclude Petitioner's indivisibility argument. For notably, the passage in *Curtis Johnson* cited by the district court was included only in the "background" section of the opinion, and it was only cited as dicta. And indeed, not only was the cited passage in *Curtis Johnson* dicta, but it pre-dated by several years both *Descamps*, which cemented the fundamental concept of divisibility, and *Mathis*, which clarified the critical distinction between elements and means in a disjunctively-worded statute, and, for the very first time, definitively "instruct[ed] courts how to discern 'elements' from 'means.'" *United States v. Gundy*, 842 F.3d 1156, 1162 (11th Cir. 2016). Thus, *Curtis Johnson* could not have possibly conducted

the divisibility analysis required by post-*Descamps*, now-binding precedent. Again, *Mathis* refined that analysis in a major way: no longer may courts assume that a statute is divisible merely because it is phrased disjunctively. Rather, courts must now determine whether the statutory alternatives are elements or means, and *Mathis* offered direction on how to make that determination. As explained above, and argued in the pending petition for writ of certiorari in *Green v. United States*, No. 17-7299 (petition filed Dec. 20, 2017) at 34-37, a post-*Mathis* analysis here compels the conclusion that touching and striking are means, not elements.

At the very least, reasonable jurists could have found the district court erred in concluding that the Florida BOLEO statute was divisible, and that the "modified categorical approach" was permissible to determine if Petitioner had been convicted of striking rather than touching a police officer. Indeed, reasonable jurists not only "could" – but likely *would* – have found, based upon Florida's standard instructions and caselaw, that the "touch or strike" language in the statute sets forth a single indivisible element; that the court was required to apply the categorical approach and assume the offense was committed in the least culpable way; and that here the least culpable way of committing the offense was by a mere touching, which requires only the most nominal, *de minimis* contact. *Curtis Johnson*, 559 U.S. at 138 (citing *Hearns*, 961 So.2d at 218-219).

B. Even if the "touch and strike" language was divisible, and the "modified categorical approach" was therefore permissible, that approach does not permit a court to consider undisputed factual allegations in a Presentence Investigation Report to uphold an ACCA sentence.

Even if the "touch or strike" language in the BOLEO statute was divisible as the district court found, reasonable jurists would still debate whether the district court nonetheless erred under the "modified categorical approach" in basing its determination that Mr. Dorvilus was convicted of "striking" rather than "touching" upon undisputed factual allegations in his PSI.

Here, as in *Curtis Johnson*, the record was devoid of any approved *Shepard* documents establishing whether Petitioner's offense involved a touching or striking. And notably, in such circumstances, the Court has been adamant that the battery offense in question must be assumed to have involved only a touching, and the battery-by-touching offense analyzed categorically. *See Curtis Johnson*, 559 U.S. at 137 ("Since nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts, his conviction was a predicate conviction . . . only if "actually and intentionally touching" another person constitutes the use of "physical force" within the meaning of [the elements clause]."") (internal citation and brackets omitted).

Reasonable jurists would find that the district court should have analyzed Petitioner's offense as a touching in a similar, categorical manner. For indeed, a federal court's reliance upon undisputed PSI "facts" to enhance a defendant's sentence beyond the otherwise applicable statutory maximum violates the Sixth

Amendment. See *Descamps*, 133 S.Ct. at 2287-2288 (the categorical approach is predicated upon the Sixth Amendment since only an elements-based approach can "avoid the Sixth Amendment concerns that would arise from sentencing courts making findings of fact that properly belong to juries;" 133 S.Ct. at 2287-2288 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)); *Mathis*, 136 S.Ct. at 2252 (in order to comply with *Apprendi*, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense;" the federal judge "is prohibited from conducting such an inquiry himself; . . [h]e can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.")

In order to ensure that the federal sentencing judge does no more than find the fact of a prior conviction, the Court has strictly limited the information that the judge may consider. In *Shepard v. United States*, 544 U.S. 13, 15 (2005), the Court held that courts are "limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." What these so-called *Shepard* documents have in common is that they are "conclusive records made or used in adjudicating guilt." *Id.* at 21; *see id.* at 23 ("confin[ing]" the class of permissible documents "to records of the convicting court approaching the certainty of the record of conviction"). That accords with their function in the modified categorical approach – namely, to permit the court to identify the elements (and only the elements) for which the defendant was convicted. *Descamps*, 133 S.Ct. at 2284.

In light of the foregoing, reasonable jurists could and would find that relying on undisputed PSI "facts" to justify Petitioner's ACCA enhancement violated his Sixth Amendment rights. His federal PSI is not a *Shepard*-approved document. Not only is it not a "conclusive record[] made or used in adjudicating guilt," *Shepard*, 544 U.S. at 21, but it was not a part of the state criminal proceedings at all. Unlike true *Shepard* documents, a federal PSI does not communicate the elements of the offense for which the defendant was convicted; rather, it communicates only extraneous factual information and impermissibly encourages speculation regarding "what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct." *Descamps*, 133 S.Ct. at 2288. Thus, even if there was no objection to the factual allegations contained in the PSI, that has no constitutional significance. Instead, what matters is that the defendant did not invoke or waive his constitutional right to have a jury find these "facts" beyond a reasonable doubt during the earlier criminal proceeding. *Lockett*, 810 F.3d at 1272 ("The constitutional question in ACCA sentencing isn't what facts went unchallenged during a plea hearing. It's whether the defendant knowingly and intelligently waived her Sixth Amendment right to a jury deciding each of the facts necessary to convict her. If a jury would not have been required to find a specific fact, a court can't later use this fact as the basis for longer imprisonment. 'The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but

legally extraneous circumstances;'" citing *Descamps*).

Admittedly, after issuing the order denying the COA in this case, the Eleventh Circuit held in a now-precedential decision – again, without considering *Mathis* – that under the modified categorical approach it could look at "the undisputed facts in the PS[I], 'in order to determine which of the multiple crimes listed in the statute the defendant was convicted of committing.'" *In re Welch*, ___ F.3d. ___, 2018 WL 1325013 at *5 (11th Cir. March 15, 2018). Accordingly, even if the Court were to GVR this case with directions to grant a COA on this issue, the Eleventh Circuit will be compelled by its post-*Mathis* precedent – *Welch* – to approve the district court's consideration of undisputed PSI facts under the modified categorical approach. Petitioner's only hope for relief, accordingly, is that the Court will reconsider this ill-founded rule in the Eleventh Circuit, and overturn it.

III. The Tenth and Eleventh Circuits' Disagreement About Whether a Florida Conviction for Resisting with Violence ("RWV") Qualifies as a "Violent Felony" under the ACCA's Elements Clause Shows that Reasonable Jurists Can Debate the Issue.

Section 843.01 provides: "Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . in the lawful execution of any legal duty, by offering or doing violence to the person of such officer" commits a felony of the third degree. Similar to the analysis above, the question here is whether § 843.01 requires "violent force" or "strong physical force" as an element of conviction. It does not. The lead case is *I.N. Johnson v. State*, 50 So. 529 (Fla. 1909), where the defendant was charged with the offense of "knowingly and willfully resisting, obstructing or opposing the execution of legal process, by offering or doing violence" to an officer.

Id. at 529.[3] 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.

As authoritatively interpreted by the Florida Supreme Court, then, the "violence" element of § 843.01 is satisfied by the use of unlawful force. "Unlawful" force in Florida can be as minor as an unwanted touch, a simple battery proscribed by Fla. Stat. § 784.03. Such a touch, while sufficient to sustain a conviction under § 784.03 or § 843.01, does not contain the degree of force necessary – violent force or strong physical force – to be an ACCA predicate. *Curtis Johnson*, 559 U.S. at 140.

The Florida Supreme Court's decision in *I.N. Johnson* has not been abrogated or overruled. It thus remains good law, and must be followed when determining the least culpable conduct that satisfies the elements of a § 843.01 offense. *Curtis Johnson*.

More recent cases from Florida's district courts of appeal show that, like the gripping of the officer's hand in *I.N. Johnson*, the force involved in "offering or doing

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

violence" under § 843.01 does not meet the degree of force necessary to be considered a "violent felony" under the ACCA. Notably, a "prima facie case" for RWV was established by allegations 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). A conviction for RWV was also sustained where the evidence showed 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 DCA 1996). In another case, 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). It was "undisputed that an act of violence occurred" when the truck's mirror hit the officer's hand. *Id.* at 942. In still another case, the evidence supporting the § 843.01 conviction was that 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 for RWV based on "a scuffle" with the officer).

A "scuffle" with an officer does not require the degree of force needed to be an ACCA predicate any more than does gripping the officer's hand. For example, in *United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013), the Ninth Circuit considered whether an Arizona statute that criminalizes "resisting arrest" and requires use or threatened use of physical force against an officer constituted a crime

of violence under U.S.S.G. § 2L1.2. *Id*. at 1087.[4] The *Flores-Cordero* court noted a decision of the Arizona court of appeals that held a defendant's "struggle to keep from being handcuffed" and "kick[ing] the officers trying to control her" constituted conduct within the scope of the resisting arrest statute "because some physical force was used." 723 F.3d at 1087-88 (citing *State v. Lee*, 176 P.3d 712 (Ariz. Ct. App. 2008)). Thus, the Ninth Circuit determined, "[u]nder prevailing Arizona law, the use of minimal force is sufficient to constitute 'resisting arrest.'" *Id*. Because the state appellate court did not require that defendant's conduct – "instigating a scuffle with officers" – necessarily involved force capable of inflicting pain or causing injury as contemplated by *Curtis Johnson*, the Arizona conviction for resisting arrest was not categorically a crime of violence within the meaning of federal law. *Id*. at 1088.

Mr. Dorvilus recognizes that the Eleventh Circuit has held that RWV under § 843.01 is an ACCA "violent felony," but he respectfully maintains that the court erred in so deciding. *United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012); *United States v. Hill*, 799 F.3d 1318, 1322–23 (11th Cir. 2015). In neither case did the Eleventh Circuit make any mention of the Florida Supreme Court's 1909 decision in *I.N. Johnson*, which is controlling as to the elements of the state crime. Also, in *Romo-Villalobos*, the Eleventh Circuit discounted *Green*'s "wiggling and struggling" language, 400 So. 2d at 1323–24, based upon the procedural posture of that case. However, by doing that, the Eleventh Circuit failed to consider "the

[4] U.S.S.G. § 2L1.2's definition of a "crime of violence" contains an elements clause that is identical to that found in the ACCA. *Compare* U.S.S.G. § 2L1.2, comment. (n.2) *with* § 924(e)(2)(B)(1). Cases construing the guidelines' elements clause are thus relevant to cases addressing the ACCA's elements clause. *United States v. Green*, 873 F.3d 846, 869 (11th Cir. 2017).

least of the acts criminalized" when conducting its analysis. *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). Discussing *Green*, another circuit court has explained:

> Even construing the facts in favor of the State, there are only so many reasonable inferences "wiggling and struggling" can be read to support. A reasonable jury could not, for example, construe "wiggling and struggling" to mean that there was a brawl. For this reason, we disagree with the Eleventh Circuit's decision to discount *Green* in holding that a conviction under § 843.01 is an ACCA predicate. *United States v. Romo-Villalobos*, 674 F.3d 1246, 1249 (11th Cir. 2012). The Eleventh Circuit gave short shrift to *Green* for the same reason as the United States does here, i.e., the procedural posture. The court emphasized instead other Florida cases where defendants had engaged in more substantial, and more violent, conduct. *See Romo-Villalobos*, 674 F.3d at 1249 (citing cases). But, 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. *See Moncrieffe*, [569 U.S. at 191].

United States v. Lee, 701 F. App'x 697, 700 & n.1 (10th Cir. 2017).[5] The Tenth Circuit, which did discuss and take into account the Florida Supreme Court's decision in *I.N. Johnson*, *Id.* at 699, unambiguously found that a conviction under §

[5] In *Hill*, the Eleventh Circuit found that § 843.01 qualified as a violent felony because "Florida's intermediary courts have held that violence is a necessary element of the offense." 799 F.3d at 1322 (citing *Rawlings v. State*, 976 So.2d 1179, 1181 (Fla. 5th DCA 2008); and *Walker v. State*, 965 So.2d 1281, 1284 (Fla. 2d DCA 2007) (both cases are also cited in *Romo-Villalobos*, 674 F.3d at 1249). Neither *Rawlings* nor *Walker*, though, discussed the "minimum conduct criminalized by the state statute," *Moncrieffe*, 569 U.S. at 191, that is, the minimum amount of force needed to qualify as "violence" under § 843.01. Those courts' observations that "violence" is an element of a § 843.01 offense thus do not address the quantum of force needed to constitute "violence" in the § 843.01 context. The answer to what constitutes the minimum amount of force needed is found in the Florida Supreme Court's decision in *I.N. Johnson* – the "violence" element of § 843.01 is satisfied by the mere use of unlawful force.

843.01 is not an ACCA predicate. *Id*. at 701 ("Having compared the minimum culpable conduct criminalized by § 843.01 to similar forcible conduct deemed not to involve *violent* force, we conclude that a conviction under § 843.01 does not qualify as an ACCA predicate)"; *id*. ("[W]e hold that a conviction under § 843.01 does not qualify as an ACCA predicate"). The analysis in *Lee*, which takes into account all of the pertinent Florida and United States Supreme Court case law, is compelling, and Mr. Dorvilus respectfully maintains that, at a minimum, reasonable jurists can debate whether a Florida conviction for RWV qualifies as a "violent felony" under the ACCA's elements clause.

IV. The Eleventh Circuit applies an erroneous standard for denying certificates of appealability ("COA").

In this case, the Eleventh Circuit justified its failure to issue a certificate of appealability on its published decision entitled *Hamilton v*. Sec'y*, Fla. Dept. of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), which holds that, "no COA should issue where the [§2255] claim is foreclosed by binding [11th] [C]ircuit precedent because reasonable jurists will follow controlling law." However, the rule in *Hamilton* is inconsistent with the COA standard articulated in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S.Ct. 759 (2017). In *Buck*, the Court confirmed that "[u]ntil a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). "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.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit's unique COA rule places too heavy a burden on movants at the COA stage. As this Court explained in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, as this Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). Here, that plainly

is not the case with regard to whether Florida robbery is a "violent felony," since this Court has granted certiorari to resolve the debate between reasonable jurists on that issue. Further, reasonable jurists could debate whether Florida BOLEO qualifies as a "violent felony" pursuant to ACCA, and there is a circuit split regarding whether Florida's RWV offense qualifies as an ACCA predicate. Accordingly, this Court should grant Mr. Dorvilus' petition for writ of certiorari to correct the Eleventh Circuit's erroneous COA standard.

CONCLUSION

The Court should hold this case pending resolution of the Florida robbery issue in *Stokeling*. If *Stokeling* is overturned, this Court should GVR Mr. Dorvilus' case with instructions that he be resentenced without ACCA. Alternatively, the Court should grant certiorari on the battery on a law enforcement officer, resisting with violence and certificate of appealability issues.

Respectfully submitted,

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