No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

ISSAC DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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 Florida offense of attempted robbery, Fla. Stat. §§ 777.04 and 812.13, categorically requires the use of "*violent* force," so as to qualify as a "violent felony" under the elements clause of the Armed Career Criminal Act.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion affirming Mr. Davis's sentence is reproduced as Appendix ("App.") A.

JURISDICTION

The court of appeals issued its opinion on February 8, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(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.

Fla. Stat. § 812.13. Robbery (2002)

> **(1)** "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(3)(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

Fla. Stat. § 777.04 (2002)

(1) A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt, ranked for purposes of sentencing as provided in subsection (4). Criminal attempt includes the act of an adult who, with intent to commit an offense prohibited by law, allures, seduces, coaxes, or induces a child under the age of 12 to engage in an offense prohibited by law.

STATEMENT OF THE CASE

Issac Davis was indicted on one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). The government filed a superseding indictment on August 5, 2016, alleging Mr. Davis was an armed career criminal under 18 U.S.C. § 924(e). Mr. Davis pled guilty to the one-count superseding indictment on September 14, 2016.

Prior to sentencing, probation completed a pre-sentence investigation report ("PSI"). The PSI alleged that Mr. Davis was an armed career criminal based on the following prior convictions:

1) attempted armed robbery under Florida Stat. §§ 812.13(2)(a) and 777.04(1) in case F05031910, from Miami-Dade County;

2) armed robbery under Florida Stat. § 812.13(2)(a) in case F05031909, from Miami-Dade County; and

3) strongarm robbery under Florida Stat. § 812.13(2)(c) in case F13018879, from Miami-Dade County for which Mr. Davis was sentenced to one year probation.

Mr. Davis objected to his designation as an armed career criminal, arguing that he did not have the requisite qualifying priors. The district court found that current Eleventh Circuit precedent required it to find Mr. Davis's priors qualified as predicates under the ACCA and overruled his objections. The court sentenced Mr. Davis as an armed career criminal to the minimum mandatory sentence of 180 months' imprisonment.

Mr. Davis filed a notice of appeal on February 10, 2017. On February 8, 2018, the Eleventh Circuit affirmed Mr. Davis's sentence as an armed career

criminal relying on the Eleventh Circuit decisions in *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016); *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016); and *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011).

REASONS FOR GRANTING THE PETITION

Mr. Davis's sentence was enhanced under the Armed Career Criminal Act (ACCA), based on the Florida offenses of strongarm robbery, attempted robbery, and armed robbery. 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. Mr. Davis 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. Davis be sentenced without the ACCA enhancement. Mr. Davis also requests certiorari review herein on the question of whether an *attempted* Florida robbery qualifies as a "violent felony" under the ACCA, even if Florida robbery does.

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 *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, in *Stokeling v. United States*, ___ S. Ct. ___, 2018 WL 1568030 (April 2, 2018), certiorari was granted to resolve that very issue.

Mr. Davis 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. Davis be sentenced without the ACCA enhancement.

II. Florida *attempted* armed robbery is not a violent felony under the ACCA post *Johnson*.

Even should the Court find that Florida armed robbery is a violent felony, *attempted* armed robbery is not because Florida's attempt statute, even when

applied to a violent felony, does not require the use, attempted use, or threatened use of violent force. Thus, Mr. Davis should not have been sentenced as an armed career criminal.

In order to commit an attempted crime, Florida law requires only that a person "does **any** act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof." Fla. Stat. § 777.04(a) (emphasis added). For an attempted crime to qualify as a violent felony, the overt act must always involve the use, attempted use, or threatened us of violent physical force. And under *Moncrieffe v. Holder*, the Court must analyze attempted armed robbery looking at the "least of the acts' criminalized." 133 S. Ct. 1678, 1684 (2011). Because an attempt only requires that a person do *any* act toward the commission of armed robbery, there is a wide array of behavior that would constitute attempted armed robbery that would not involve violent physical force.

Indeed, Florida courts have supported this notion in upholding convictions for attempted robbery when no physical violence toward another person was present. In *Grant v. State*, 138 So.3d 1079 (4th DCA 2014), the Fourth District held the evidence was sufficient to support a conviction for attempted armed robbery where the defendant parked his vehicle in a secluded area near the store and took a route minimizing potential observation; he covered his face with a cloth and wore a hooded sweatshirt and gloves on a hot day; he forcefully yanked twice on the store's door but it did not open; he took flight immediately upon his failed entry; and

handcuffs and a purple velvet bag were found on defendants person, suggesting a plan to take jewelry from the store. *Grant*, 138 So. 3d at 1038. *Grant* is a perfect example of how someone can commit attempted armed robbery without using violence or the threat of violence towards another person. In fact, the defendant in that case did not interact with any other person.

Similarly, in *Mercer v. State*¸ 347 So. 2d 733 (4th DCA 1977), the court upheld an attempted robbery conviction where the defendant had stopped at a convenience store and talked to an employee, seeking to enlist his help in robbing the station the following day. He told the employee that he would come back the next day with a gun to rob the store. Right on time the next day the defendant and another man came to the station and asked for the manager, but left after finding that the manager, who had the only key to the safe, was not there. *Id.* at 734. A later search of the defendant's car revealed a sawed-off shotgun, gloves, binoculars, shoelaces, and a knife. In its decision finding this was sufficient for a conviction of attempted robbery, the *Mercer* court relied primarily on a 1912 Florida case in which the court upheld attempted robbery convictions for two defendants where one defendant pushed open the swinging doors of a saloon, "thrust his head within, and seeing that there were about 12 men in the saloon, withdrew and crossed the street and joined his codefendant." *People v. Moran*, 122 P. 969 (1912). The two men walked away, but were found later, each with a pistol and a handkerchief around his neck that was designed to serve as a mask.

These cases make clear that Florida attempted armed robbery does not require the use or threatened use of violence or even the involvement of another person. Therefore, it does not qualify as a violent felony under the ACCA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Additionally, or alternatively, Mr. Davis urges the Court to hold this case pending resolution of the Florida robbery issue in *Stokeling*.

Respectfully submitted,

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APPENDIX

A-1

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
ISSAC DAVIS

JUDGMENT IN A CRIMINAL CASE

Case Number: **113C 1:16-20441-CR-WILLIAMS**
USM Number: **13580-104**

Counsel For Defendant: **AFPD, Sowmya Bharathi**
Counsel For The United States: **AUSA, Marianne Curtis**
Court Reporter: **Patricia Sanders**

The defendant pleaded guilty to Count(s) One of the One-Count Superseding Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. §922(g)(1)	Felon in possession of a firearm and ammunition.	04/29/2016	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **1/20/2017**

Kathleen M. Williams
United States District Judge

Date: 1/30/17

DEFENDANT: **ISSAC DAVIS**
CASE NUMBER: **113C 1:16-20441-CR-WILLIAMS**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **(180) Months as to the One-Count Superseding Indictment.**

The court makes the following recommendations to the Bureau of Prisons: that the Defendant be designated to a facility in South Florida or as close as possible and be evaluated for participation in the RDAP program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **ISSAC DAVIS**
CASE NUMBER: **113C 1:16-20441-CR-WILLIAMS**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **(3) Years as to the One-Count Superseding Indictment with special conditions imposed.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **ISSAC DAVIS**
CASE NUMBER: **113C 1:16-20441-CR-WILLIAMS**

SPECIAL CONDITIONS OF SUPERVISION

Anger Control / Domestic Violence:

The Defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The Defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Permissible Search:

The Defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Support of Dependents:

The Defendant shall support his dependant (s).

DEFENDANT: **ISSAC DAVIS**
CASE NUMBER: **113C 1:16-20441-CR-WILLIAMS**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **ISSAC DAVIS**
CASE NUMBER: **113C 1:16-20441-CR-WILLIAMS**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Government shall file a preliminary order of forfeiture within 3 days.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10680
Non-Argument Calendar

D.C. Docket No. 1:16-cr-20441-KMW-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ISSAC DAVIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 8, 2018)

Before JULIE CARNES, ANDERSON, and HULL, Circuit Judges.

PER CURIAM:

Issac Davis appeals his 180-month sentence, the statutory mandatory minimum under the Armed Career Criminal Act ("ACCA"), after pleading guilty to one count of being a felon in possession of a firearm and ammunition. On appeal, he argues that the district court erred in designating him as an armed career criminal because his Fla. Stat. § 812.13 convictions for attempted armed robbery, armed robbery, and strongarm robbery are not violent felonies under the elements clause of the ACCA. Davis also argues that the district court erred in assigning criminal history points for two Florida misdemeanor marijuana cases in which the state court withheld adjudication.

I.

We review *de novo* whether a particular conviction is a violent felony under the ACCA. United States v. Seabrooks, 839 F.3d 1326, 1338 (11th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017). We consider cases interpreting "crime of violence" under the Sentencing Guidelines to be authority for interpreting "violent felony" under the ACCA because the relevant parts of the definitions are identical. United States v. Fritts, 841 F.3d 937, 940 n.4 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017). We are bound by circuit precedent unless it is overruled *en banc* or by a Supreme Court decision that is "clearly on point." United States v. White, 837 F.3d 1225, 1228, 1230–31 (11th Cir. 2016) (quotations omitted).

When a defendant is convicted of violating 18 U.S.C. § 922(g) by being a felon in possession of a firearm and has at least 3 prior convictions for a "violent felony" or a "serious drug offense," he is subject to a mandatory minimum sentence of 15 years. 18 U.S.C. § 924(e)(1). A "violent felony" is any offense punishable by more than one year of imprisonment that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).[1]

Applying the categorical approach, we have previously determined that a conviction for attempted robbery under an identical version of Fla. Stat. § 812.13 and § 777.04(1) was categorically a felony crime of violence under the elements clause of the Sentencing Guidelines. United States v. Lockley, 632 F.3d 1238, 1246 (11th Cir. 2011). We have since applied this precedent to determine a conviction for robbery under Fla. Stat. § 812.13 categorically qualifies as a violent felony under the elements clause of the ACCA. See Seabrooks, 839 F.3d at 1340–43; Fritts, 841 F.3d at 940–42.

[1] The U.S. Supreme Court has held that the "residual clause" of the second prong is unconstitutionally vague. *Johnson v. United States*, 136 S. Ct. 2551, 2557–58 (2015).

The district court did not err in designating Davis as an armed career criminal or in sentencing him to the ACCA mandatory minimum sentence. Our precedent demonstrates that all three of his prior convictions were violent felonies under the elements clause of the ACCA. See Lockley, 632 F.3d at 1246; Seabrooks, 839 F.3d at 1340–43; Fritts, 841 F.3d at 940–42. Although Davis argues that intervening Supreme Court precedent has abrogated our prior holdings, the Supreme Court must "actually abrogate or directly conflict with, as opposed to merely weaken" our prior holdings for us not to be bound. White, 837 F.3d at 1230–31. Here, Supreme Court precedent has merely weakened our prior holdings, at most, and so we are bound by those decisions.

II.

We review *de novo* a district court's legal interpretation of the Sentencing Guidelines, taking into consideration the language of both the guidelines and the commentary. United States v. Fulford, 662 F.3d 1174, 1177 (11th Cir. 2011). Guideline commentary is binding on courts unless it violates the Constitution or a federal statute or is an inconsistent or plainly erroneous interpretation of the guideline. United States v. Birge, 830 F.3d 1229, 1232 (11th Cir. 2016). We interpret the Sentencing Guidelines following the traditional rules of statutory construction. Fulford, 662 F.3d at 1177. If a defendant fails to object to the facts

of his prior convictions as set out in the PSI, he is deemed to have admitted to those facts. See United States v. Bennett, 472 F.3d 825, 833–34 (11th Cir. 2006).

Criminal history points are assigned pursuant to U.S.S.G. §§ 4A1.1 and 4A1.2. See U.S.S.G. § 4A1.1, comment. Section 4A1.1(c) calls for adding one criminal history point for each prior sentence not already counted in subsections (a) and (b). U.S.S.G. § 4A1.1(c). Although the Sentencing Guidelines do not specifically address withheld adjudications, the Sentencing Guidelines direct that a "diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under § 4A1.1(c) even if a conviction is not formally entered." U.S.S.G. § 4A1.2(f). We have determined that a state case in which the defendant enters a plea of *nolo contendere* and adjudication is withheld is properly included in a defendant's criminal history calculation, as a diversionary disposition. See, e.g., United States v. Rockman, 993 F.2d 811, 814 (11th Cir. 1993); United States v. Wright, 862 F.3d 1265, 1280 (11th Cir. 2017). Federal law, not state law, is used to determine the application of the Sentencing Guidelines. See United States v. Elliot, 732 F.3d 1307, 1312 (11th Cir. 2013). Thus, it is not relevant how Florida treats pleas of *nolo contendere*, but only how federal law applies those cases.

The district court did not err in assigning criminal history points for the two Florida misdemeanor marijuana cases in which the state court withheld

adjudication. Our precedent, which remains binding, demonstrates that when adjudication is withheld and the defendant enters a guilty plea or a *nolo contendere* plea—as Davis did here—the case is properly included in the criminal history calculation. See Rockman, 993 F.2d at 814 (11th Cir. 1993); Wright, 862 F.3d at 1280.

Therefore, Davis's 180-month mandatory minimum sentence is

AFFIRMED.