NO:

IN THE
SUPREME COURT OF THE UNITED STATES

JAUMON LEWIS,

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

Since the issuing of *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015) (*Johnson II*), which declared ACCA's residual clause void for vagueness, courts have turned to the elements clause as the main engine for finding violent predicate felonies. In this surge of elements' clause cases, courts have had to revisit this Court's definition of violent felony that was set forth in *Curtis Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson I*"). Consequently, issues relating to the elements' clause and *Johnson I* have resulted in several intractable conflicts. Petitioner's case involves several of these conflicts:

1. Whether an element of unintentional causation of great bodily harm such as that found in Florida felony battery, Fla. Stat. §784.041, necessarily entails the use of violent physical force under ACCA's elements clause and *Johnson I*?

2. Whether under the categorical approach and *Duenas-Alvarez*, the least culpable conduct prohibited by a criminal statute must be identified by a case, or whether the plain language of a criminal statute itself may establish the breadth of an offense?

3. With respect to a Florida conviction for armed robbery, Fl. Stat. §812.13(2)(a),

A. Does the common-law element of overcoming resistance necessarily entail the use of violent physical force under ACCA's elements clause and *Johnson I*?

B. Does the mere carrying of a weapon during the course of a Florida robbery – as opposed to the use or brandishing of a weapon – constitute the use of violent physical force under ACCA's elements' clause and *Johnson I*?

4. Whether an element of reckless force, such as that found in Florida aggravated assault, Fla. Stat. §784.021(1)(a), necessarily entails the use of violent physical force under ACCA's elements clause and *Johnson I*?

5. Whether the Eleventh Circuit misapplies this Court's standards in *Miller-El v. Cockrell,* 537 U.S. 322, 336-38 (2003), and *Buck v. Davis*, 137 S.Ct. 759, 773-74 (2017), for issuing certificates of appealability (COA's) for review of a §2255 petition after it has been denied by the district court.

INTERESTED PARTIES

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

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

INTERESTED PARTIES iii

TABLE OF AUTHORITIES iv

PETITION 1

OPINION BELOW 2

STATEMENT OF JURISDICTION 2

STATUTORY AND OTHER PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 8

I. In the Aftermath of *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015) (*Johnson II*) which Declared ACCA's Residual Clause Void for Vagueness, Several Important and Recurring Federal Issues that are the Subject of Intractable Circuit Splits Have Arisen Concerning this Court's Definition of Violent Felony Under *Curtis Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson I*") and ACCA's Elements' Clause, Requiring Intervention by This Court 8

II. The Circuits are Divided on Whether Unintentional Causation of Bodily Harm Necessarily Entails Violent Force Under the Elements' Clause and *Johnson I* 9

III. The Circuits are Divided on the Application of *Duenas-Alvarez* 18

IV. The Circuits are Divided Over Whether State Robbery Offenses that are Based on Common Law Notions of "Force" are Violent Felonies Under the Elements' Clause and *Johnson I*. 22

A. The Eleventh and Fourth Circuits, which both base their robbery offenses on common law robbery, are in conflict as to whether the slight degree of force required to overcome a victim's slight resistance qualifies as violent "physical force" under the elements clause 25

B. The Eleventh Circuit is in conflict with the Ninth and D.C. Circuits as to whether a state robbery statute that dictates enhanced penalties for "possessing" – but does not require "using" a weapon during the commission of a robbery, has "as an element the use, attempted use, or threatened use" of violent force as that term is defined in ACCA's elements clause and *Johnson I* 32

C. Petitioner's Case Should Be Held Pending Resolution of *Stokeling v. United States*, Case No. 17-5554, 2018 WL 1568030 (April 2, 2018), Which is Currently Before This Court 35

V. The Circuits are Divided on the Issue of Whether Reckless Force Can Constitute the Active and Intentional "Use" of Violent Force as Required Under ACCA's Elements' Clause 36

VI. The Eleventh Circuit Misapplies the Standard Set Forth in *Miller-El v. Cockrell,* 537 U.S. 322, 336-38 (2003) and *Buck v. Davis*, 137 S.Ct. 759, 773-74 (2017), Which Allows Defendants to Appeal Adverse § 2255 Rulings Through Certificates of Appealability ("COA") Concerning Whether They are Subject to a "Violent Felony" Provision in Light of *Johnson II* 39

CONCLUSION 40

TABLE OF AUTHORITIES

CASES:

Ali v. Commonwealth,

701 S.E. 2d 64 (Va. 2010) 26

Bellamy v. State,

750 S.E. 2d 395 (Ga. Ct. App. 2013) 26

Benitez-Saldana v. State,

67 So.3d 320 (Fla. 2nd DCA 2011)..30

Buck v. Davis,

137 S.Ct. 759, 773-74 (2017) .... ii, 39-40

Cardozo-Arias v. Holder,

495 Fed. App'x 790 (9th Cir. 2012) 20

Casher v. State,

469 So.2d 679 (Ala. 1985)..26

Chavez-Solis v. Lynch,

803 F.3d 1004 (9th Cir. 2015) 20

Chrzanoski v. Ashcroft,

327 F.3d 188 (2nd Cir. 2003)...16

Cobb v. State,

734 So.2d 182 (Miss. Ct. App. 1999) 26

Commonwealth v. Brown,

484 A.2d 738 (Pa. 1984)...26

Descamps v. United States,

133 S. Ct. 2276 (2013) 22-23, 32, 37

Douglas v. United States,

858 F.3d 1069 (7th Cir. 2017) 15

Dupree v. State,

310 So.2d 396 (Fla. 2d DCA 1975) 37

Flores v. Ashcroft,

350 F.3d 666 (7th Cir. 2003) 13

Gonzales v. Duenas-Alvarez,

549 U.S. 183 (2007) ....i, 14, 18-19, 21

Gordon v. State,

187 S.W. 913 (Ark. 1916)..27

Green v. State,

315 So.2d 499 (Fla. 4th DCA 1975) 37

Harris v. State,

111 So.2d 922 (Fla. 1st DCA 2013)..11

Hayes v. State,

780 So.2d 918 (Fla. 1st DCA 2001)..30

Jeffries v. State,

849 So.2d 401 (Fla. 2d DCA 2003) 11

Jean-Louis v. U.S. Att'y Gen.,

582 F.3d 462 (3d Cir. 2009)..19

Johnson v. State,

612 So.2d 689 (Fla. 1st DCA 1993) 30

Curtis Johnson v. United States,

559 U.S. 133 (2010) .... i, 8-9, 15, 22, 25-26, 31-32

Samuel Johnson v. United States,

135 S. Ct. 2551 (2015) ....i, 5, 8, 16

Kelly v. State,

552 So.2d 206 (Fla. 5th DCA 1989) 37

Lane v. State,

763 S.W. 2d 785 (Tex. Crim. App. 1989)..26

LaValley v. State,

633 So.2d 1126 (Fla. 5th DCA 1995) 37

Leocal v. Ashcroft,

543 U.S. 1, 125 S. Ct. 377 (2004) 37-38

Mahoney v. People,

48 How. Pr. 185 (N.Y. 1874)...27

Mathis v. United States,

136 S. Ct. 2243 (2016) 22, 32, 37

Mendieta-Robles v. Gonzales,

226 Fed. App'x 564 (6th Cir. 2007) 20

Miller-El v. Cockrell,

537 U.S. 322 (2003) .... ii, 39-40

Moncrieffe v. Holder,

133 S. Ct. 1678 (2013) 22, 32, 37

Montsdoca v. State,

93 So. 157 (Fla. 1922) 27, 30

Morris v. State,

993 A.2d 716 (Md. Ct. Spec. App. 2010) 28

People v. Burns,

92 Cal. Rptr. 3d 51 (Ct. App. 2009)...26

People v. Hay,

840 N.E. 2d 459 (Ill. Ct. App. 2005)..26

People v. Hicks,

675 N.W. 2d 599 (Mich. Ct. App. 2003) 26

People v. Moses,

556 N.Y. S.2d 890 (App. Div. 1990) 26

Robinson v. State,

692 So. 2d 883 (Fla. 1997)...14, ,26-27

Robinson v. United States,

App. Case No. 16-13333 (11th Cir. 2017) 6

Ryle v. State,

549 N.E. 2d 81 (Ind. Ct. App. 1990)...26

Sanders v. State,

769 So.2d 506 (Fla. 5th DCA 2000) 30

Slack v. McDaniel,

529 U.S. 473, 120 S. Ct. 1595 (2000) 6

State v. Baker,

452 So.2d 927 (Fla. 1984) 35

States v. Blunt,

193 N.W. 2d 434 (Neb. 1972) 26

State v. Broderick,

59 Mo. 318 (1875) 27

State v. Brown,

496 So.2d 194 (Fla. 3rd DCA 1986) 33

State v. Chance,

662 S.E. 2d 405 (N.C. Ct. App. 2008) 29

State v. Childs,

257 S.W. 3d 655 (Mo. Ct. App. 2008) 26

State v. Curley,

939 P.2d 1130 (N.M. 1997) 26

State v. Eldridge,

677 S.E. 2d 14 (N.C. Ct. App. 2009) 29

State v. Elkins,

707 S.E. 2d 744 (N.C. Ct. App. 2011) 26

State v. Gaetz,

313 P.3d 708 (Haw. 2013) 26

State v. Hearns,

961 So.2d 211 (Fla. 2007) 10

State v. Parsons,

87 P. 349 (Wash. 1906) 27

State v. Robertson,

740 A.2d 330 (R.I. 1999) 26

State v. Sawyer,

29 S.E. 2d 37 (N.C. 1944) 29

State v. Stecker,

108 N.W. 47 (S.D. 1961) 26

State v. Sein,

590 A.2d 665 (N.J. 1991) 26

Stokeling v. United States,

S.Ct. Case No. 17-5554, 2018 WL 1568030 (April 2, 2018) 35-36, 40

Swaby v. Yates,

847 F.3d 62 (1st Cir. 2017) 19

T.S. v. State,

965 So.2d 1288 (Fla. 2d DCA 2007) 11

Turner v. Warden Coleman FCI,

709 F.3d 1328 (11th Cir. 2013) 37-38

United States v. Anderson,

695 F.3d 390 (6th Cir. 2012) 15

United States v. Andino-Ortega,

608 F.3d 305 (5th Cir. 2010) 16

United States v. Aparicio-Soria,

740 F.3d 152 (4th Cir. 2014) 20

United States v. Calvillo-Palacios,

860 F.3d 1285 (9th Cir. 2017) 15

United States v. Castillo-Rivera,

853 F.3d 218 (5th Cir. 2017) 21

United States v. Castleman,

134 S.Ct. 1405, 1410-1413 (2014) 17, 38

United States v. Chapman,

866 F.3d 129 (3d Cir. 2017)..14

United States v. Depass,

510 F. App'x 119 (3d Cir. 2013)..26

United States v. Dowd,

451 F.3d 1244 (11th Cir. 2006) 25, 32, 35

United States v. Fogg,

836 F.3d 951 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017) 39

United States v. Fritts,

841 F.3d 937 (11th Cir. 2016), *cert denied*, *Fritts v. United States*,

No. 16-7883, 2017 WL 554569 (June 19, 2017)......................................25, 32, 35

United States v. Garcia-Perez,

779 F.3d 278 (5th Cir. 2015) 17, 37

United States v. Gardner,

823 F.3d 793 (4th Cir. 2016) 23, 28, 31

United States v. Gatson,

776 F.3d 405 (6th Cir. 2015) 15

United States v. Golden,

854 F.3d 1256 (11th Cir. 2017) 37-38

United States v. Green,

873 F.3d 846 (11th Cir. 2017) 6

United States v. Grisel,

488 F.3d 844 (9th Cir. 2007) 20

United States v. Harris,

844 F.3d 1260 (10th Cir. 2017) 24

United States v. Hill,

832 F.3d 135 (2d Cir. 2016)..17

United States v. Jennings,

515 F.3d 980 (9th Cir. 2008) 15

United States v. Jennings,

860 F.3d 450 (7th Cir. 2017) 20

United States v. Lara,

590 Fed. App'x 574 (6th Cir. 2014) 20

United States v. Lockley,

632 F.3d 1238 ((11th Cir. 2011) ....

United States v. McGrattan,

504 F.3d 608 (6th Cir. 2008) 20

United States v. Mendez-Henriquez,

847 F.3d 214 (5th Cir. 2017) 39

United States v. Ontiveros,

875 F.3d 533 (10th Cir. 2017) 17

United States v. Palomino-Garcia,

606 F.3d 1317 (11th Cir. 2010) 37

United States v. Pam,

867 F.3d 1191 (10th Cir. 2017) 39

United States v. Parnell,

818 F.3d 974 (9th Cir. 2016) 24, 34

United States v. Perez-Vargas,

414 F.3d 1282 (10th Cir. 2005) 16

United States v. Redrick,

841 F.3d 478 (D.C. Cir. 2016) 24, 34

United States v. Reid,

861 F.3d 523 (4th Cir. 2017) 17

United States v. Reynolds,

20 M.J. 118 (C.M.A. 1985)..26

United States v. Rice,

813 F.3d 704 (8th Cir. 2016) 15

United States v. Rico-Mejia,

859 F.3d 318 (5th Cir. 2017) 17

United States v. Seabrooks,

839 F.3d 1326 (11th Cir. 2016, *cert. denied*, *Seabrooks v. United States*,

No. 16-8072, 2017 WL 715744, U.S. (June 19, 2017)..................................25, 35

United States v. Starks,

2017 WL 2802755 (1st Cir. 2017) 24, 34

United States v. Tittles,

852 F.3d 1257 (10th Cir. 2017) 20

United States v. Torres-Miguel,

701 F.3d 165 (4th Cir. 2012) 16-17

United States v. Vail-Bailon,

838 F.3d 1091 (11th Cir. Sept. 28, 2016)..................................6, 9-10, 12, 14, 22

United States v. Valdivia-Flores,

876 F.3d 1201 (9th Cir. 2017) 20

United States v. Vargas-Duran,

356 F.3d 598 (5th Cir. 2004) 16

United States v. Verwiebe,

874 F.3d 258 (6th Cir. 2017), *petition for cert. pending*,

No. 17-8413 (filed Apr. 3, 2018) 39

United States v. Vidal,

504 F.3d 1072 (9th Cir. 2007) 20

United States v. Villegas-Hernandez,

468 F.3d 874 (5th Cir. 2006) 16

United States v. Windley,

864 F.3d 36 (1st Cir. 2017) 39

United States v. Winston,

845 F.3d 876 (8th Cir. 2017) 15

United States v. Winston,

850 F.3d 677 (4th Cir. 2017) 23, 29, 31

Voisine v. United States,

136 S. Ct. 2272 (2016) 38

West v. State,

539 A.2d 231 (Md. Ct. Spec. App. 1988) 26

Whyte v. Lynch,

807 F.3d 463 (1st Cir. 2015) 16, 19

Williams v. State,

651 So.2d 1242 (2nd Cir. 1995) 33

STATUTORY AND OTHER AUTHORITY:

Sup.Ct.R. 13.1 1

Part III of the Rules of the Supreme Court of the United States 1

8 U.S.C. § 1326(a) 11

8 U.S.C. § 1326(b)(1) 11

18 U.S.C. § 16(a) 38

18 U.S.C. § 921(a)(33)(A) 38

18 U.S.C. § 922(g)(9) 38

18 U.S.C. § 924(e) 5, 22

18 U.S.C. § 924(e)(2) 3

18 U.S.C. § 2114(a) 26

18 U.S.C. § 3742 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 2253(c) 3

28 U.S.C. § 2255 .... ii, 5

28 U.S.C. § 2255(a) 3

U.S.S.G. § 2L1.2 6

U.S.S.G. § 2L1.2(b)(A)(ii) 11

U.S.S.G. § 4B1.1 39

Fla. Stat. § 784.011 .... 3, 37

Fla. Stat. 784.021 36-37

Fla. Stat. § 784.021(a) 9

Fla. Stat. § 784.021(1)(a) 2, 4

Fla. Stat. § 784.041 .... i, 4-5, 9, 11, 21

Fla. Stat. § 784.041(1)(a) 10

Fla. Stat. § 784.041(1)(b) 10

Fla. Stat. § 784.045 11

Fla. Stat. § 812.13 22

Fla. Stat. § 812.13(2)(a)..i, 4-5

Fla. Stat. § 812.13(2)(b)..33

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PETITION FOR WRIT OF CERTIORARI

Jaumon Lewis respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the Eleventh Circuit Court of Appeals final order of denial on remand of his motion for a certificate of appealability (COA), rendered and entered in case number 16-11494 in that court on January 23, 2018.

OPINION BELOW

The Eleventh Circuit's denial on remand of petitioner's motion for a COA in Appeal No. 16-11494, is contained in the 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 Eleventh Circuit's final order on remand denying a COA was entered on January 23, 2018. This Court granted a motion for extension to file the instant petition to May 23, 2018. Accordingly, this petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction over petitioner's original proceedings pursuant to 18 U.S.C. §3231 and 28 U.S.C. §2255. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, 18 U.S.C. § 3742, and 28 U.S.C. §2253.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

Fifth Amendment:
No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Sixth Amendment:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ., and to be informed of the nature and cause of the accusation . . . .

18 U.S.C. § 924(e)(2):
(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(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 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

28 U.S.C. § 2255(a):
(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Fla. Stat. §784.011 (2003)

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

(2) Whoever commits an assault shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Fla. Stat. §784.021(1)(a) (2003)

(1) An "aggravated assault" is an assault:

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

(b) With an intent to commit a felony.

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. §784.041 (1999)

(1) A person commits felony battery if he or she:

(a) Actually and intentionally touches or strikes another person against the will of the other; and

(b) Causes great bodily harm, permanent disability, or permanent disfigurement.

(2) A person who commits felony battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. §812.13(2)(a) (2003)

(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.

(2)(a) 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 or as provided in s. 775.082, s. 775.083, or s. 775.084.

STATEMENT OF THE CASE

Defendant pled guilty to count I of a Superseding Indictment that charged him with possession of a firearm by a previously convicted felon. He was sentenced to 180 months pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). His prior predicate convictions were: **(1)** Florida felony battery, Fla. Stat. § 784.041; **(2)** Florida armed robbery with a firearm or deadly weapon, Fla. Stat. § 812.13(2)(a); and **(3)** Florida aggravated assault with a firearm, Fla. Stat. § 784.021(1)(a). *United States v. Lewis*, D.Ct. Case No. 11-CR-20631-PAS (Feb. 27, 2012) (CR-DE 30).

Mr. Lewis did not appeal, but two months after this Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015) (*Johnson II*) which declared ACCA's residual clause void for vagueness, Mr. Lewis filed a petition to vacate his judgment pursuant to 28 U.S.C. § 2255 based on *Johnson II.* He argued that his prior Florida convictions no longer qualified as ACCA predicates due to *Johnson II. Lewis v. United States*, D.Ct. Case No. 15-23059-CIV. The district court found that Mr. Lewis filed a timely § 2255 motion, but it denied him relief on the merits of his claims. (CV-DE 15; App. A-6). Notwithstanding *Johnson II*, the district court found that Mr. Lewis' prior convictions remained valid ACCA predicates under ACCA's elements' clause. (CV-DE 15; App. A-6). Therefore, the district court denied Mr. Lewis' § 2255 petition and also denied Mr. Lewis a certificate of appealability. *Id.*

Mr. Lewis filed a notice of appeal and a motion for certificate of appealability

with the Eleventh Circuit which were denied. *Lewis v. United States*, App. Case No. 16-11494 (Aug. 25, 2016) (App. A-5). Mr. Lewis filed a motion for reconsideration which the Eleventh Circuit also denied. *Lewis v. United States*, App. Case No. 16-11494 (Oct. 12, 2016). (App. A-4 and A-3).

Subsequently, Mr. Lewis filed a Petition for Writ of Certiorari. Based on that Petition and the Solicitor General's response, this Court GVR'd Mr. Lewis' case back to the Eleventh Circuit in light of *Vail-Bailon*, 838 F.3d 1091 (11th Cir. Sept. 28, 2016) (finding Florida felony battery was not a crime of violence pursuant to U.S.S.G. § 2L1.2), *decision vacated and rehearing en banc granted*, App. Case No. 15-10351 (11th Cir. Nov. 21, 2016). *Lewis v. United States*, S.Ct. Case No. 16-7535 (April 17, 2017) (GVR) (App. A-2). While Mr. Lewis' case was pending on remand, the Eleventh Circuit reheard the *Vail-Bailon* case and issued an *en banc* opinion reversing the original panel, finding that Florida felony battery *was* a categorical crime of violence for purposes of U.S.S.G. § 2L1.2. *Vail-Bailon*, 868 F.3d 1293 (11th Cir. Aug. 25, 2017) (*en banc*). The Eleventh Circuit extended this holding to direct-appeal and post-conviction ACCA cases. *United States v. Green*, 873 F.3d 846, 869 (11th Cir. 2017) (direct-appeal ACCA case); *Robinson v. United States*, App. Case No. 16-13333 (11th Cir. 2017) (denial of certificate of appealability in § 2255 ACCA case). On January 23, 2018, the Eleventh Circuit -- *citing Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (*en banc*) and *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604 (2000) -- denied Mr. Lewis' request on remand for a certificate of appealability, stating that Mr. Lewis had, "failed to make the requisite showing

needed to justify the grant of a COA." *Lewis v. United States*, App. No. 16-11494 (Jan. 23, 2018) (App. A-1). Mr. Lewis files this petition for writ of certiorari from the Eleventh Circuit's final order on remand.

REASONS FOR GRANTING THE WRIT

I. In the Aftermath of *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015) (*Johnson II*) which Declared ACCA's Residual Clause Void for Vagueness, Several Important and Recurring Federal Issues that are the Subject of Intractable Circuit Splits Have Arisen Concerning this Court's Definition of Violent Felony Under *Curtis Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson I*") and ACCA's Elements' Clause, Requiring Intervention by this Court.

In *Johnson I*, this Court took great pains over several pages to explain that the term "physical force," as used in ACCA's elements clause was a narrow concept with a core concept of *violence*. Most famously, the Court stated that "physical force" meant "violent force – that is, force capable of causing physical pain or injury to another person." The court fleshed out this concept throughout its opinion, making clear that violent force required a "substantial degree of force" involving "strength," "vigor," "energy," "pressure," and "power." *Id.* at 139; *see id.* at 140 (even by itself, the word "violent" "connotes a substantial degree of force," but "[w]hen the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer"); *id.* at 142 (violent force "connotes forces strong enough to constitute 'power'"). This Court took the time to clarify its meaning over and over in its *Johnson I* opinion to make clear that violent force under the ACCA statute was a narrow concept, not a broad rule that could be used in a sweeping fashion.

When *Johnson I* was decided, the Courts did not agonize over this new narrow definition of violent force because they could rely on the residual clause as an

alternative method for finding predicate felonies upon which to base an ACCA enhancement. That alternative disappeared, however, after *Johnson II*, and since that time the Courts have been battling over the scope of ACCA's elements' clause and revisiting the meaning of violent force as defined previously in *Johnson I*. Consequently, several serious circuit conflicts are in progress concerning ACCA's elements' clause, and this Court should intervene so that ACCA is applied uniformly without unwarranted sentencing disparities.

II. The Circuits are Divided on Whether Unintentional Causation of Bodily Harm Necessarily Entails Violent Force Under the Elements' Clause and *Johnson I*.

The Eleventh Circuit's denial of relief to petitioner based on his Florida conviction for felony battery, Fla. Stat. § 784.041, is part of an intense circuit split about whether state offenses with an element of bodily harm categorically qualify as violent felonies under the elements clause. This dispute is encapsulated in the Eleventh Circuit's 6-to-5 *en banc* decision in *Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017), which significantly broadened this Court's definition of violent felony as set forth in *Johnson I* to expand the elements' clause.

The original definition of "violent force" set forth in *Johnson I* was determined through an analysis of Florida simple battery. A defendant commits a simple battery in Florida where, *inter alia*, he "[a]ctually and intentionally touches or strikes another person against the will of the other." Fla. Stat. § 784.03(1)(a). Where such an offense is a first offense, it is punished as a misdemeanor; if, as in *Johnson I*, it is a second offense, it is punished as a felony. In *Johnson I*, the Court assumed

that the offense involved a touching rather than a striking because the record did not indicate otherwise, and touching was the least culpable conduct. 559 U.S. at 137.

In interpreting the touching component, the Court recognized that it was bound by the Florida Supreme Court's holding that "'actually and intentionally touching' under Florida's battery law is satisfied by *any* intentional physical contact, 'no matter how slight,'" such as a "'tap on the shoulder without consent.'" *Id.* at 138 (quoting *State v. Hearns*, 961 So.2d 211, 218-19 (Fla. 2007)). According to *Johnson I*, such nominal contact did not constitute "violent force," and the Court therefore held that a Florida battery by touching did not satisfy the elements clause. In so holding, the Court focused on the degree of force necessary to commit the offense; the resulting harm was irrelevant.

The offense at issue here and in *Vail-Bailon*, Florida felony battery, is derivative of Florida simple battery. The first element of Florida felony battery is perfectly identical to the simple battery offense addressed in *Johnson I*. Fla. Stat. § 784.041(1)(a) ("A person commits felony battery if he or she . . . [a]ctually and intentionally touches or strikes another person against the will of the other"). That very same conduct, however, is punished as a felony when it "[c]auses great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1)(b). While the touching or striking must be intentional in a felony battery (just like simple battery), the defendant need not intend for that conduct to cause great bodily harm. For felony battery, no *mens rea* is required as to the harm caused. The Florida courts have expressly recognized that a felony battery under

§ 784.041(1) is nothing more than simple-battery conduct that unintentionally causes great bodily harm. *See Jefferies v. State*, 849 So.2d 401, 404 (Fla. 2d DCA 2003) (describing felony battery as a "species" of simple battery, "but with resulting and *unintended* great bodily harm"), *receded from on other grounds by Hall v. State*, 951 So.2d 91 (Fla. 2d DCA 2007); *Harris v. State*, 111 So.3d 922, 925 (Fla. 1st DCA 2013) ("felony battery wholly subsumes battery").

The Florida Legislature created the separate, third-degree felony offense of felony battery in 1997 to "fill the gap" between a misdemeanor simple battery (an offensive touching or striking regardless of harm) and aggravated battery (a simple battery that *intentionally* causes great bodily harm, punished as a second-degree felony), Fla. Stat. § 784.045. *T.S. v. State*, 965 So.2d 1288, 1290 & n.3 (Fla. 2d DCA 2007). While great bodily harm is intentionally caused in an aggravated battery, it is unintended and completely accidental in a felony battery.

In Vail-Bailon, the defendant pled guilty to illegally re-entering the United States after deportation, pursuant to 8 U.S.C. §§ 1326(a), (b)(1). Over his objection, the district court imposed a 16-level sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii) (2014) on the ground that his prior conviction for Florida felony battery in violation of § 784.041(1) qualified as a "crime of violence,' since it "had as an element the use, attempted use, or threatened use of physical force against the person of another."

On appeal, a divided panel of the Eleventh Circuit vacated the sentence, concluding that Petitioner's Florida felony battery conviction did not satisfy the

elements clause. *United States v. Vail-Bailon*, 838 F.3d 1091 (11th Cir. Sept. 28, 2016). Because the record did not indicate otherwise, the panel assumed, as did the parties, that Petitioner's offense was committed by a touching rather than a striking, *id.* at 1094, and the government "expressly conceded [that] a person can be guilty of felony battery . . . if the offender taps another person on the shoulder." *Id.* at 1095. The majority then concluded that felony battery, when committed by a touching, did not require violent force under *Johnson I*. *Id.* at 1094-95. That conclusion, the majority opined, was unaffected by the fact that felony battery requires the causation of great bodily harm. *Id.* at 1095-96. Focusing on the degree of force, the majority explained that "the fact that a mere touching actually does result in great bodily harm [does not] somehow change[ ] the character of the mere touching from" non-violent to violent force. *Id.* at 1096.

After granting rehearing *en banc*, the Eleventh Circuit reversed course, finding that Florida felony battery categorically qualified as a crime of violence under the elements clause. *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (*en banc*). Rather than gauging the quantum of force on its own merits, the *en banc* court concluded that *Johnson I*'s "violent felony" definition set forth a "capability" test that worked backwards from the harm. Thus if great bodily harm was caused, then the force that caused it was necessarily "violent," because it was "capable of" (and in fact did) cause "great bodily harm." Thus under *Vail-Bailon's en banc* decision, the mere fact of the injury means that the offense requires "violent force." This test is contrary to the categorical approach, where the elements set

forth in the statute control, and normal sentencing procedures where the burden of proving an enhancement is on the government. Reasoning that force actually causing pain or injury is necessarily capable of causing such a result, the majority concluded that Florida felony battery met that standard, since it required the causation of great bodily harm. Id. at 1299-1302.

In fashioning its test, the *en banc* majority by-passed the plain wording of the Florida felony battery statute, which provided a means for committing the crime through mere touching. And it further by-passed a part of Johnson I's opinion citing to *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003), for an example of an offense – that was materially identical to Florida felony battery -- that did not meet the elements' clause "violent felony" definition, notwithstanding that it also had an element of causation of "serious bodily injury." Instead, the majority cited to United States v. Duenas-Alvarez, as the reason that it could refuse to credit the felony battery statute's plain "touching" language as definitively interpreted in Johnson I, since there was no Florida case involving mere touching as the basis for a felony battery conviction.

The *en banc* dissenters opined that the majority had incorrectly "cerate[d] a new test for 'physical force' that disregards [the] degree of force," and instead adopts a "novel capacity test." Id. at 1308-14 (Wilson, J., dissenting); see id. at 1315 (Rosenbaum, J. dissenting). That newfound capability test, they argued, "swallow[ed] [*Johnson I's*] finding that Florida simple battery does not require 'physical force,'" because even simple battery had the capability of causing pain or

injury. Id. at 1314 (Wilson, J., dissenting); see id. at 1315 & n.2 (Rosenbaum, J., dissenting). In that regard, they emphasized that Florida felony battery was nothing more than Florida simple battery that unintentionally caused great bodily harm: "the actus reus elements of felony and simple battery are identical;" the only difference is the result. *Id.* at 1311-12 (Wilson, J., dissenting); see id. at 1315, 1320-23 (Rosenbaum, J., dissenting). They also opined that the *en banc* majority had incorrectly applied *Duenas-Alvarez* by requiring *Vail-Bailon* to identify a specific case reflecting a felony battery prosecution based on touching, even though the statutory language made clear that the offense could be committed by such conduct. *Id.* at 1312, n.4 (Wilson, J., dissenting); *id.* at 1320-21 & n. 10 (Rosenbaum, J., dissenting). Based upon the plain language of the Florida felony battery statute, all five dissenting judges agreed that Florida felony battery could be committed without violent force.

The *Vail-Bailon* holding was extended to direct-appeal and post-conviction ACCA cases in *Green*, 873 F.3d 846, 869 (11th Cir. 2017) and *Robinson v. United States,* App. Case No. 16-80639-CIV. All three of these cases have pending petitions for writ of certiorari before this Court.

When the Eleventh Circuit issued its *en banc* decision in *Vail-Bailon,* it joined the Third, Sixth, Seventh, Eighth, and Ninth Circuits which have all held that the causation of bodily harm or injury necessarily requires the use of violent force. Employing a "capability" test, they work backwards from the harm, reasoning that, if an offense requires harm or injury, it is necessarily capable of causing such a

result. *See, e.g.*, *United States v. Chapman*, 866 F.3d 129, 136 (3d Cir. 2017) (employing "capability" test and rejecting view "that there is a minimum quantum of force necessary to satisfy *Johnson*'s definition of 'physical force"); *United States v. Gatson*, 776 F.3d 405, 410-11 (6th Cir. 2015) ("Force that causes any [physical harm] is (to some extent, by definition) force 'capable of causing physical injury or pain to another person.'") (citations omitted); *United States v. Anderson*, 695 F.3d 390, 400 (6th Cir. 2012) ("one can knowingly cause serious physical harm to another, only by knowingly using force capable of causing physical pain or injury, *i.e.*, violent physical force") (quotations and brackets omitted); *United States v. Jennings*, 860 F.3d 450, 458-59 (7th Cir. 2017) ("a criminal act (like battery) that causes bodily harm to a person necessarily entails the use of physical force to produce the harm"); *Douglas v. United States*, 858 F.3d 1069, 1071 (7th Cir. 2017) ("force that *actually* causes injury necessarily was capable of causing that injury and thus satisfied the federal definition"); *United States v. Winston*, 845 F.3d 876, 878 (8th Cir. 2017) (finding no "daylight between physical injury and physical force," and rejecting argument "that a defendant might cause physical injury without using physical force"); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016) (rejecting argument "that a person can cause an injury without using physical force," and concluding that, because battery offense required the causation of physical injury, the offense was necessarily "capable" of producing that result); *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1290-1291 (9th Cir. 2017) ("bodily injury [necessarily required] the use of violent, physical force," because "bodily injury" and "physical force" are "synonymous or

interchangeable" terms).

In contrast, the First, Second, Fourth, Fifth, and Tenth Circuits have all recognized that causation of harm need not require the use of violent force under *Johnson I.* That is so because, in their view, violent force is measured by the degree or quantum of force, not the resulting harm. *See, e.g., Whyte v Lynch,* 807 F.3d 463, 469 (1st Cir. 2015) (distinguishing between causation of harm and violent force, and observing that "[c]ommon sense suggests that" the state "can punish conduct that results in 'physical injury' but does not require the 'use of physical force"); *Chrzanoski v. Ashcroft,* 327 F.3d 188, 193-94 (2nd Cir. 2003) (agreeing that "'there is a difference between the causation of an injury and an injury's causation by the 'use of physical force,'" and finding a "logical fallacy" in "equat[ing] the use of physical force with harm or injury") (citations omitted); *United States v. Torres-Miguel,* 701 F.3d 165, 168 (4th Cir. 2012) (recognizing that "a crime may *result* in death or serious injury without involving use of physical force"); *United States v. Vargas-Duran,* 356 F.3d 598, 606 (5th Cir. 2004) (*en banc*) ("the fact that the statute requires that serious bodily injury result . . . does not mean that the statute requires that the defendant have used the force that caused the injury," recognizing the "difference between a defendant's causation of an injury and the defendant's use of force");[1] *United States v. Perez-Vargas,* 414 F.3d 1282, 1285 (10th Cir. 2005)

[1] *Accord United States v. Villegas-Hernandez,* 468 F.3d 874, 880 (5th Cir. 2006) (rejecting the reasoning that an offense "include[s] the use of force as an element by virtue of its requirement of causation of serious bodily injury"); *United States v.*

(accepting argument that an offense requiring the causation of bodily injury was not necessarily a crime of violence).

Although most of these circuits have limited their holdings in light of this Court's discussion in *Castleman*, which indicated that an indirect application of force, like the administration of poison, might nonetheless constitute a "use" of force in the common law sense, 134 S.Ct. at 1414, the Fifth Circuit reaffirmed the continuing validity of its prior precedent holding in the narrower "crime of violence" context, that a person could indeed "cause physical injury without using [violent] physical force." *United States v. Rico-Mejia*, 859 F.3d 318, 321-23 (5th Cir. 2017). The remaining circuits, moreover, have only limited their holdings insofar as they involved the intentional or knowing causation of harm, *see, e.g.*, *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017) (Colorado second-degree assault), or relied on the indirect use of force (like poison) as an illustration of causation of harm without violent force. *See, e.g.*, *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017) (recognizing that prior holding in *Torres-Miguel* "may still stand," but that its "reasoning can no longer support an argument that the phrase 'use of physical force' excludes *indirect* applications"); *United States v. Hill*, 832 F.3d 135, 143-44 (2d Cir. 2016) (same). Moreover, although *Castleman* clarified that the indirect use of force

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Andino-Ortega, 608 F.3d 305, 310-11 (5th Cir. 2010) (following *Vargas-Duran* to conclude that offense of intentionally injuring a child by act did not satisfy elements clause); *United States v. Garcia-Perez*, 779 F.3d 278, 283-84 (5th Cir. 2015) (concluding that Florida manslaughter, which required causation of death, did "not require proof of force" as an element).

may constitute "violent force," it expressly reserved on the broader question that is presented in this case, of whether the unintentional causation of harm necessarily requires the use of "violent force." Florida felony battery avoids both of the exceptions raised by Castleman because its statutory elements provide only that it may be committed by a touching or a striking (not indirect applications of force), and its element of causation of bodily harm lacks intent, meaning any harm caused may occur through pure accident or negligence. The Court should grant the petition for writ of certiorari to resolve this important circuit conflict.

III. The Circuits are Divided on the Application of *Duenas-Alvarez.*

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the Court addressed how to identify the scope of an offense for purposes of applying the categorical approach. It cautioned that doing so "requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the [federal] definition." *Id.* at 193. And "[t]o show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special . . . manner for which he argues." *Id.*

Importantly, however, that passage must be read in context. In *Duenas-Alvarez*, the offender argued that California's aiding-and-abetting doctrine rendered his theft offense non-generic, because it made a defendant criminally liable for unintended conduct. *Id.* at 190-91. That argument found no support in either

the statutory language or precedent establishing the scope of aiding-and-abetting liability. As a result, the Court required the offender to identify a specific case to support his novel, proposed application. *See id.* at 187, 190-91. This Court has not addressed whether that case-specific requirement of *Duenas-Alvarez* applies even where language of the statute plainly establishes that an offense is overbroad. The courts of appeals are now divided on that question.

The First, Third, Sixth, Ninth, and Tenth Circuits have all held that the plain statutory language can establish that an offense is overbroad, notwithstanding the absence of any reported case. *See Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017) (the "sensible caution [in *Duenas-Alvarez*] against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance to a case [where the plain statutory language is overbroad]. The state crime at issue clearly does apply more broadly than the federally defined offense. Nothing in *Duenas-Alvarez*, therefore, indicates that this state law crime may be treated as if it is narrower than it plainly is."); *Whyte*, 807 F.3d at 468-69 (where the plain language of the statute does not require the use, attempted use, or threatened use of violent force, there is a "realistic probability" the state could punish conduct that results in physical injury without the "use of physical force;" a reported case is not required); *Jean-Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (declining to "impose[ ] this additional step" of identifying a reported case because, unlike *Duenas-Alvarez* where the parties "vigorously disputed" the scope of the offense, "no application of 'legal imagination' to the Pennsylvania simple assault

statute is necessary. The elements . . . are clear, and the ability of the government to prosecute a defendant" for certain conduct is "not disputed"); *United States v. Lara*, 590 Fed. App'x 574, 584 (6th Cir. 2014) ("The government is correct that there appear to be no cases in Tennessee that have applied § 39–14–403 to unattached, uninhabited structures. The meaning of the statute, however, is plain: the statute applies to structures that belong to the principal structure. We should not ignore the plain meaning of the statute;" citing as support *United States v. Aparicio-Soria,* 740 F.3d 152, 158 (4th Cir. 2014) (*en banc*) (where the law is clear, courts do "not need to hypothesize about whether there is a 'reasonable probability' that Maryland prosecutors will charge defendants engaged in non-violent physical contact with resisting arrest; we know that they *can*") (emphasis added);[2] *United States v. Grisel,* 488 F.3d 844, 849 (9th Cir. 2007) (*en banc*) ("Where, as here, a state statute explicitly defines a crime more broadly than the [federal] definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the [federal] definition . . . . The state statute's greater breadth is evident from its text.");[3] *United States v. Tittles,* 852 F.3d 1257, 1274-75

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[2] *Accord United States v. McGrattan,* 504 F.3d 608, 614 (6th Cir. 2008); *Mendieta-Robles v. Gonzales,* 226 Fed. App'x 564, 572 (6th Cir. 2007).

[3] *Accord United States v. Vidal,* 504 F.3d 1072, 1082 (9th Cir. 2007) (*en banc*), *abrogated on other grounds, as recognized in Cardozo-Arias v. Holder,* 495 Fed. App'x 790, 792 n.1 (9th Cir. 2012); *Chavez-Solis v. Lynch,* 803 F.3d 1004, 1009-10 (9th Cir. 2015) (re-affirming and applying *Grisel* and *Vidal*); *United States v. Jennings,* 515 F.3d 980, 989 n.9 (9th Cir. 2008) (same); *United States v. Valdivia-Flores,* 876 F.3d 1201 (9th Cir. 2017) (following *Grisel*).

& n.23 (10th Cir. 2017) ("Where, as here, the statute lists means to commit a crime that would render the crime non-violent under the ACCA's force clause, any conviction under the statute does not count as an ACCA violent felony," and there is no "need to imagine hypothetical non-violent facts to take a statute outside the ACCA's ambit" or "require instances of actual prosecutions for the means that did not satisfy the ACCA. The disparity between the statute and the ACCA [is] enough.").

By contrast, the *en banc* Fifth and Eleventh Circuits have taken the contrary view. Dividing 8-7, the *en banc* Fifth Circuit held that, under *Duenas-Alvarez*, the defendant was required to identify a reported case in which "courts have *actually applied*" the statute in the way the defendant advocated. *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (*en banc*). It specifically rejected the contrary assertion that, "because the Texas statute's definition . . . is plainly broader" than the federal definition, "Castillo-Rivera is not required to point to an actual case." *Id.* at 223. That view, according to the majority, "does not comply with the Supreme Court's directive in *Duenas-Alvarez*." *Id.*

The Eleventh Circuit is now squarely aligned with the Fifth Circuit. The *en banc* majority below refused to credit scenarios offered by Petitioner, which concretely showed how Florida felony battery could be committed by a mere touching. Although the plain language of the statute made clear that the offense could be committed by a touching, the majority found those scenarios "farfetched" absent a case "in which tapping, tickling, or lotion-applying—or any remotely similar

conduct—has been held to constitute a felony battery under Fla. Stat. § 784.041." *Vail-Bailon,* 868 F.3d at 1306. The dissent noted that such an approach in the face of explicit statutory elements misapplied Duenas-Alvarez, and that reported appellate cases did not represent the total universe of convictions under a statute. *See id.* at 1320 n.10.

This court should resolve the circuit split developing around the Duenas-Alvarez case to preserve the categorical approach, and to prevent the courts from moving in a more a subjective and problematic direction, such as attempting to discover a "typical" or "ordinary" version of the offense that nullifies some of its explicit statutory elements.

IV. The Circuits are Divided Over Whether State Robbery Offenses that are Based on Common Law Notions of "Force" are Violent Felonies Under the Elements' Clause and *Johnson I.*

This case presents several circuit conflicts that have arisen about whether similar state robbery offenses qualify as predicates under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA). At issue here is the Florida robbery statute, Fla. Stat. § 812.13, which is based on common law robbery, and prohibits the taking of money or property from a person through "the use of force, violence, assault or putting in fear." Reading the statutory language without the benefit of Florida caselaw, it may appear that Florida robbery is an easy ACCA predicate. However, a deeper look at Florida robbery under the categorical approach as set forth in *Descamps v. United States,* 133 S.Ct. 2276 (2013); *Moncrieffe*

v. Holder, 133 S.Ct. 1678 (2013); and *Mathis v. United States,* 136 S.Ct.2243 (2016), compels the conclusion that no Florida robbery offense "has as an element the use, attempted use, or threatened use of [violent] physical force against the person of another," as required for ACCA's elements' clause. The categorical approach requires courts to look only at the elements of the offense as defined by state law and determine the least culpable conduct for the offense. This inquiry begins with determining whether the offense has any divisible elements. "If a 'statute lists multiple alternative elements, and so effectively creates several different crimes,' then the statute is divisible," but "if a statute 'does not require the factfinder (whether jury or judge) to make that determination,' then it isn't divisible. *Descamps*, 133 S.Ct. at 2285, 2290, 2293. Applying the categorical approach, it is clear that the offense of Florida robbery through "force, violence, assault, or putting in fear," is only one indivisible element of the crime. See Fla. Stat. Crim. Jury Instr. 15.1. Because this element is indivisible, courts are limited to a strict categorical approach when assessing the robbery offense as a possible predicate, and they may not use Shepard documents or go beyond the judgment of conviction.

Under the Court's basic rules, the Fourth Circuit has concluded that two state offenses for robbery "by violence" do not have "violent force" as an element. *See United States v. Gardner*, 823 F.3d 793, 803 (4th Cir. 2016) (North Carolina common law robbery is not an ACCA "violent felony" because *de minimis* contact is sufficient for a robbery "by violence"); *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017) (Virginia common law "robbery by violence" required only slight degree of force, and

thus, was not a violent felony within the meaning of ACCA). And the First and Ninth Circuits have concluded that even an armed robbery conviction does not have "violent force" as an element. *United States v. Starks,* 2017 WL 2802755 (1st Cir. 2017) ("the crime of [Massachusetts] armed robbery does not require that the perpetrator utilize the weapon in the perpetration of the robbery . . . . Similarly, the perpetrator need not display the weapon or otherwise make the victim aware of its presence," and therefore, the Massachusetts offense of armed robbery does not qualify as a serious violent felony under ACCA); *United States v. Parnell,* 818 F.3d 974, 978-81 (9th Cir. 2016) (Massachusetts armed robbery is not an ACCA "violent felony" because the statute simply requires possessing, rather than using, a weapon).

While admittedly, other courts have reached different conclusions, their differing conclusions are generally attributable to the different wording of the state robbery statutes which are at issue, or authoritative interpretations of the statutory language by the respective state supreme courts. *Gardner*, 823 F.3d at 804; *see, e.g, United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017) (Colorado robbery is an ACCA "violent felony" because the Colorado Supreme Court has confirmed that the "violent" taking expressly required by the statute requires actual violence); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016) (Maryland armed robbery is a "violent felony" since, unlike the Massachusetts statute construed in *Parnell*, Maryland requires use – not simply possessing – of a deadly weapon).

Notably, the D.C. Circuit in *Redrick* and the Tenth Circuit in *Harris* have still

engaged in the proper analysis mandated under this Court's basic rules. By contrast, the Eleventh Circuit stands alone among its sister courts in failing to conduct the type of categorical analysis now mandated. It stands alone in reflexively applying outdated and abrogated elements clause precedents that either did not take into account the Johnson I definition of "physical force," or demonstrably misapplied the "modified categorical approach." And it stands alone in refusing to reconsider whether the robbery statute is even divisible or determine the least of the acts criminalized under a state robbery statute as construed by the state courts.

For this reason, the Eleventh Circuit's holdings that Florida robbery is a categorical violent felony under the elements' clause – see *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), *cert. denied Fritts v. United States*, No. 16-7883, 2017 WL 554569 (June 19, 2017); *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016), *cert. denied Seabrooks v. United States*, No. 16-8072, 2017 WL 715744, U.S. (June 19, 2017); *Lockley*, 632 F.3d 1238; and *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006) -- has resulted in direct conflicts with the decisions of other circuit courts of appeals. These conflicts are untenable and should be resolved by this Court.

A. The Eleventh and Fourth Circuits, which both base their robbery offenses on common law robbery, are in conflict as to whether the slight degree of force required to overcome a victim's slight resistance qualifies as violent "physical force" under the elements clause.

As noted above, this Court's *Johnson I* decision which defined ACCA's

"physical force" to require *violence*, is central to any elements' clause inquiry. The corollary to Johnson I's rule is that lesser amounts of force do not meet that standard, and thus, do not result in the imposition of the ACCA enhancement. Johnson I contrasted violent force with the degree of force needed to commit common law battery, which had an element labeled "force" but which could be committed "by even the slightest touching." *Johnson I* at 139. Since the issuance of *Johnson I*, a circuit conflict has developed regarding whether state robbery offenses that are based on common law robbery meet ACCA's standard of violent force. At stake is whether these offenses qualify as ACCA predicates under the elements clause. Since many states base their robbery offenses on common law robbery,[4] the issue concerns many defendants across the country who are defending against ACCA

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[4] *See e.g., United States v. Reynolds*, 20 M.J. 118, 120-121 (C.M.A. 1985); *Casher v. State*, 469 So.2d 679, 680-81 (Ala. 1985); *People v. Burns*, 92 Cal. Rptr. 3d 51, 55-57 (Ct. App. 2009); *Robinson v. State*, 692 So.2d 883, 886-87 (Fla. 1997); *Bellamy v. State*, 750 S.E. 2d 395, 396 (Ga. Ct. App. 2013); *State v. Gaetz*, 313 P.3d 708, 710-11, 716-17 (Haw. 2013); *People v. Hay*, 840 N.E. 2d 459, 466-67 (Ill. Ct. App. 2005); *Ryle v. State*, 549 N.E. 2d 81, 84 n.5 (Ind. Ct. App. 1990); *West v. State*, 539 A.2d 231, 233-235 (Md. Ct. Spec. App. 1988); *People v. Hicks*, 675 N.W. 2d 599, 609 (Mich. Ct. App. 2003); *Cobb v. State*, 734 So.2d 182, 184 (Miss. Ct. App. 1999); *State v. Childs*, 257 S.W. 3d 655, 660 (Mo. Ct. App. 2008); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665 (N.J. 1991); *People v. Moses*, 556 N.Y.S.2d 890, 892 (App. Div. 1990); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *State v. Elkins*, 707 S.E.2d 744, 748-49 (N.C. Ct. App. 2011); *Commonwealth v. Brown*, 484 A.2d 738, 741 (Pa. 1984); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Stecker*, 108 N.W. 47, 50 (S.D. 1961); *Lane v. State*, 763 S.W. 2d 785, 787 (Tex. Crim. App. 1989); *Ali v. Commonwealth*, 701 S.E. 2d 64, 68 (Va. 2010); *cf. United States v. Depass*, 510 F.App'x 119, 120-21 (3d Cir. 2013) (unpublished) (holding that evidence that the defendant "pushed" the victim out of the way so that he could steal a package from her car sufficed to show that the taking was "by violence" for purpose of sustaining a robbery conviction under 18 U.S.C. § 2114(a), which incorporated the "common law meaning" of robbery).

enhancements involving robbery. This issue has national significance and is ripe for review.

Florida's statutory robbery offense is based on common law robbery. *Montsdoca v. State,* 93 So.157, 159 (Fla. 1922). Under the common law, robbery was the taking of property from a person with the additional element of "force" necessary to overcome the resistance of the victim or "putting in fear." 4 Blackstone 242 ("Lastly, the taking must be by force, or a previous putting in fear"). Under the force prong, the force or violence required was not substantial. 4 Blackstone 242 ("It is sufficient that so much force, . . . be used, as might . . . oblige a man to part with his property without or against his consent."); *See Montsdoca,* 93 So. at 159 (degree of force was immaterial); *Robinson v. State,* 692 So.2d 883 (Fla. 1997) (degree of force was immaterial); *State v. Parsons,* 87 P. 349, 351 (Wash. 1906) ('[T]he degree of force used was immaterial as long as it was sufficient to compel the prosecuting witness to part with his property."); *Mahoney v. People,* 48 How. Pr. 185, 189 (N.Y. 1874) ("It is not the extent and degree of force which make the crime, but the success thereof."); see also *Gordon v. State,* 187 S.W. 913, 915 (Ark. 1916) ("The law d[id] not require that one be beaten up before he submit[ted] to the robbery to constitute the offense."). No bodily injury or threat of bodily injury was necessary. Rather, any level of resistance by the victim which the defendant overcame rendered the taking a robbery.

Under common law, robbery could also be charged when there was no struggle, if the article was so attached to the person or clothes as to create

resistance, however slight. *State v. Broderick*, 59 Mo. 318, 319-321 (1875) ("[t]he violence used was sufficient" to sustain a robbery conviction where the defendant stole a watch chain by "seizing [it]" and "br[ea]k[ing] it loose from the watch and the button hole" to which it was attached).

Analyzing robbery in its most basic form, the courts have defined robbery as a combination of larceny and battery. *Morris v. State*, 993 A.2d 716, 735 (Md. Ct. Spec. App. 2010) ("Robbery is a larceny from the person accomplished by either an assault (putting in fear) or a battery (violence)."); see also *Gardner*, 823 F.3d 803 (*quoting State v. Sawyer*, 29 S.E. 2d 37 (N.C. 1944). Pursuant to this Court's precedents, neither larceny nor battery is considered to be a violent felony within the meaning of ACCA. *Johnson I*, 559 U.S. 133. Thus, the combination of larceny (one non-violent felony) plus battery (another non-violent felony) should equal one final non-violent felony.

The circuits are currently disputing this very issue. Specifically, the Fourth and Eleventh Circuits have reached opposing conclusions regarding whether a state robbery offense that uses a standard based on common law robbery of overcoming resistance, satisfies the "physical force" prong of the elements clause.

In *United States v. Gardner*, the Fourth Circuit held that the offense of common law robbery by "violence" in North Carolina does not qualify as a "violent felony" under the elements clause because it does not categorically require the use of "physical force." 823 F.3d at 803-804. Notably, the Fourth Circuit determined from a thorough review of North Carolina appellate law in *Gardner* that North Carolina

common law robbery by means of "violence" may be committed by any force "sufficient to compel a victim to part with his property." Id. (*quoting State v. Sawyer*, 29 S.E. 2d 34, 37 (N.C. 1944)). "'The degree of force is immaterial.'" Id. (*also quoting Sawyer*). And indeed, the Fourth Circuit concluded, that *Sawyer*'s definition "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.* (emphasis in original).

The Fourth Circuit discussed two North Carolina state cases that supported that conclusion. *Id.* (*discussing State v. Chance*, 662 S.E. 2d 405 (N.C. Ct. App. 2008), and *State v. Eldridge*, 677 S.E. 2d 14 (N.C. Ct. App. 2009). In *Chance*, an appellate court upheld a robbery conviction where the defendant simply pushed the victim's hand off a carton of cigarettes; that was sufficient "actual force." And in Eldridge, the court upheld a robbery conviction where a defendant pushed the shoulder of a store clerk, causing her to fall onto shelves while the defendant took possession of a TV. Based on those decisions, the Fourth Circuit concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require violent "physical force," and therefore the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*

Likewise, the Fourth Circuit found that Virginia common law "robbery by violence" also failed to qualify as a serious violent felony under ACCA's elements' clause. *Winston*, 850 F.3d 677. The reasoning was similar to *Gardner*. The court

found that the Virginia robbery offense required only a slight degree of force to overcome the resistance of the victim, and such force could be de minimis. Thus, it ruled that the Virginia robbery offense failed to qualify as an ACCA predicate.

Like the North Carolina offense addressed in *Gardner* and the Virginia offense addressed in *Winston*, a Florida robbery offense is also based on common law robbery, and it may be committed by the minimal force sufficient to overcome a victim's slight resistance. But it has also always been the law in Florida (as in North Carolina) that the degree of force is "immaterial." *Montsdoca v. State*, 93 So.157, 159 (Fla. 1922). As the Fourth Circuit recognized, a standard requiring that force overcome resistance, but reaffirming that the degree of force used is "immaterial," suggests that so long as the victim's resistance is slight, a defendant need only use de minimis force to commit a robbery.

Florida's case law confirms this point. *See Sanders v. State*, 769 So.2d 506, 507-08 (Fla. 5th DCA 2000) (affirming a strong arm robbery conviction where the defendant merely peeled back the victim's fingers before snatching money from his hand); *Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993) (finding force sufficient when tear of scab off victim's finger was enough to sustain conviction for robbery); *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001) (upholding conviction for robbery by force based upon testimony of the victim "that her assailant 'bumped' her from behind with his shoulder and probably would have caused her to fall to the ground but for the fact that she was in between rows of cars when the robbery occurred," and did not fall); *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla.

2nd DCA 2011) (affirming conviction for Florida strong arm robbery when defendant engaged in tug-of-war over the victim's purse").

Had the Fourth Circuit heard petitioner's case, it likely would have found after surveying Florida caselaw that, like the robberies in *Gardner* and *Winston*, Florida robbery may be committed by using only a *de minimis* degree of force, and therefore it does not categorically require the elements' clause use of "physical force." The act of peeling back the victim's fingers in *Sanders* is functionally equivalent to the act of pushing away the victim's hand in *Chance*. Both acts allowed the defendants to overcome the victim's resistance and remove the cigarettes (in *Chance*) and the cash (in *Sanders*) from the victim's grasp. But neither act rises to the level of "violent force" required by *Johnson I*. And plainly, the "bump" in *Hayes* is indistinguishable from the "push" in *Eldridge*. If anything, the "push" in *Eldridge* was more forceful in that it caused the victim to fall onto shelves, while the victim in *Hayes* did not fall.

The petitioner's ACCA enhancement, based in part on Florida armed robbery conflicts with the decision of the Fourth Circuit as well as the common law, which is what the Florida robbery offense is based upon. The Eleventh Circuit subjects defendants in its jurisdiction to the harsh penalty of ACCA based on robbery offenses that are nothing more than a combination of larceny and battery, neither of which qualifies individually as a violent felony under ACCA. Accordingly, this Court should grant the petition and resolve the circuit conflict.

B. The Eleventh Circuit is in conflict with the Ninth and D.C. Circuits as to whether a state robbery statute that dictates enhanced penalties for "possessing" – but does not require "using" a weapon during the commission of a robbery, has "as an element the use, attempted use, or threatened use" of violent force as that term is defined in ACCA's elements clause and *Johnson I*.

Although the petitioner in this case was convicted of Florida armed robbery, that should not preclude relief in his case. The element that makes petitioner's robbery "armed" only requires the carrying – rather than the use – of a weapon. And since carrying a weapon is not a violent act (see *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008)), this element should not render Florida armed robbery a violent felony under ACCA. There is a circuit conflict on this issue.

The Eleventh Circuit, through *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006) has held that such armed robberies under Florida law are "undeniably" a violent felony under the ACCA elements clause. The *Dowd* case upon which this theory is based is an especially defective ruling. First, there was no analysis in the *Dowd* case – not under *Johnson, Descamps, Moncrieffe; Mathis*, or otherwise. Instead, the *Dowd* case set out its full analysis in one line which stated, "Dowd's January 17, 1974, armed robbery conviction is undeniably a conviction for a violent felony." *Dowd*, 451 F.3d at 1254. Furthermore, a closer look at the briefs in *Dowd* establishes that the parties and the court improperly employed a modified categorical approach, even though the Florida robbery offense is indivisible. Thus, the dispute in *Dowd* utilized the wrong analysis entirely. See also *Fritts*, 841 F.3d 937.

Because of its truncated analysis, the *Dowd* case never considered Florida law which determined whether an armed robbery required a forceful use of arms. Had it considered this body of law, the Eleventh Circuit would have found that Florida armed robbery did not require force. Instead, the Florida robbery offense "with a weapon," only requires that the offender "in the course of committing the robbery . . . ***carr[y]*** a weapon." Fla. Stat. § 812.13(2)(b) (emphasis added). The weapon need not be brandished or used in a threatening manner, or even visibly displayed. *State v. Baker*, 452 So.2d 927 (Fla. 1984) ("The victim may never even be aware that a robber is armed, so long as the perpetrator has the weapon in his possession during the offense.") And in fact, because the weapon only has to be possessed "in the course of committing the robbery," Florida courts have upheld the robbery offense with a weapon upon evidence that a defendant simply stole a gun ***after*** the initial robbery, and fled with it as part of the loot. *State v. Brown*, 496 So.2d 194 (Fla. 3rd DCA 1986). This is not what it means to use or threaten violent physical force against the person of another in ACCA's elements clause.

Moreover, weapons under this enhanced "armed" version of robbery may consist of ordinary, non-violent items that the defendant did not intend to use as a weapon. *Williams v. State*, 651 So.2d 1242, 1243 (2nd Cir. 1995). It could be any object "that could be used to cause death or inflict serious bodily harm," Fla. Std. Jury Instr. 15.1, even a cup of coffee. Thus, the Eleventh Circuit's position that armed robberies are "undeniably violent felonies," is wrong based on both federal and state principles.

At least two other Circuits have found this distinction between carrying and using a weapon during a robbery to be determinative on the question of whether armed robbery qualifies as a violent felony under ACCA's elements clause. First, in *United States v. Parnell*, 818 F.3d 974, 978-981 (9th Cir. 2016), the Ninth Circuit held – after considering Massachusetts caselaw – that a conviction under the Massachusetts armed robbery statute was not a violent felony because the underlying offense permitted conviction upon the use of "any force, however slight," and all that was required by the Massachusetts courts for an "armed robbery" conviction was the mere possession of a weapon without using or even displaying it. And that "does not bring Massachusetts' armed robbery statute within ACCA's force clauses," the Ninth Circuit held. Id. at 978-981. *See also*, *United States v. Starks,* 2017 WL 2802755 (1st Cir. 2017) (finding Massachusetts armed robbery offense did not qualify as an ACCA predicate because neither the underlying robbery offense, nor the armed nature of the offense required anything more than de minimis force). In *United States v. Redrick*, 841 F.3d 478 (D.C. Cir. 2016), the D.C. court reached an opposite conclusion after reviewing the Maryland armed robbery statute, since the Maryland statute – unlike the Massachusetts armed robbery statute -- specifically required "the use of a dangerous or deadly weapon." *See id.* at 484 (noting that a "Massachusetts armed robbery does not require 'use' of the dangerous or deadly weapon; the victim does not even need to be aware of the presence of the weapon" for an armed robbery conviction in Massachusetts; by contrast, the "use" requirement in the Maryland statute means that a conviction under that statute has "as an element

the use, attempted use, or threatened use of physical force against the person of another).

Under the reasoning in both the Ninth and D.C. Circuits on this issue, a Florida armed robbery conviction would not have "undeniably" qualified as a "violent felony." To the contrary, both the Ninth and D.C. Circuits would have deferred to the Florida Supreme Court's decision in *Baker*, and held that the mere fact that a weapon was "possessed" is insufficient to bring an otherwise non-qualifying robbery conviction within the ACCA's elements clause. Had petitioner appealed his sentence in either then Ninth or D.C. Circuits, these courts would have disregarded the Eleventh Circuit's Dowd and Fritts cases, and their progeny, as clearly-abrogated and unpersuasive, and they would likely have vacated petitioner's enhanced ACCA sentence. This Court should intervene and resolve these issues because Eleventh Circuit defendants are currently subject to more harsh and inequitable treatment under ACCA due to the currently insurmountable "precedents" of *Dowd*, 451 F.3d 1244; *Lockley,* 632 F.3d 1245; *Seabrooks*, 839 F.3d 1326; and *Fritts*, 841 F.3d 937.

C. Petitioner's Case Should Be Held Pending Resolution of *Stokeling v. United States*, Case No. 17-5554, 2018 WL 1568030 (April 2, 2018), Which is Currently Before This Court.

Petitioner notes that this Court recently granted a petition for writ of certiorari in *Stokeling v. United States*, Case No. 17-5554, 2018 WL 1568030 (April 2, 2018). In Stokeling, the Court took the following issue:

QUESTION PRESENTED: Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

The *Stokeling* case is directly applicable to petitioner's case as it involves an analysis of the Florida robbery statute and whether a conviction under that statute can qualify as an ACCA predicate. Accordingly, petitioner requests that this Court hold his case pending the resolution of *Stokeling*. If this Court determines that the Florida robbery statute does not qualify as an ACCA predicate pursuant to the question presented above, then petitioner requests that his petition be granted, and that his sentence be vacated and remanded for resentencing without the ACCA enhancement.

V. The Circuits are Divided on the Issue of Whether Reckless Force Can Constitute the Active and Intentional "Use" of Violent Force as Required Under ACCA's Elements' Clause.

This Court should also reverse the Eleventh Circuit's use of Mr. Lewis' Florida Aggravated Assault Conviction, Fla. Stat. § 784.021, as an ACCA predicate. Petitioner submits that the aggravated assault offense is not capable of being a violent felony under ACCA because it has a reckless *mens rea* with respect to force which prevents it from having as an element the "use," "attempted use," or "threatened use" of force as required under ACCA. Recklessness is not the active and intentional employment of force that trigger's ACCA's elements' clause. *United*

States v. Palomino-Garcia, 606 F.3d 1317, 1334-37 (11th Cir. 2010), *citing Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377 (2004).

Florida § 784.021 defines aggravated assault as an "assault with a deadly weapon without intent to kill," and it further defines assault as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Fla. Stat. §§ 784.021, 784.011. The intent element has been further defined by Florida courts as being satisfied through culpable negligence which is akin to recklessness. *LaValley v. State*, 633 So.2d 1126 (Fla. 5th DCA 1995); *Kelly v. State*, 552 So.2d 206 (Fla. 5th DCA 1989); *Green v. State*, 315 So.2d 499 (Fla. 4th DCA 1975); and *Dupree v. State*, 310 So.2d 396, 398 (Fla. 2d DCA 1975); *see also United States v. Garcia-Perez*, 779 f.3d 278, 285 (5th Cir. 2015) (equating Florida's "culpable negligence" standard with "recklessness").

Although petitioner recognizes that current Eleventh Circuit law, *United States v. Golden*, 854 F.3d 1256, 1256-57 (11th Cir. 2017); *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013), deem Florida aggravated assault to be a categorical "crime of violence" and "violent felony," he maintains that those decisions were incorrectly decided and have since been abrogated by this Court's intervening decisions of *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), *Descamps v. United States*, 133 S.Ct. 2276 (2013) and *Mathis v. United States*, 136 S.Ct. 2243 (2016), which together, require courts to use a strict categorical approach looking only at the

elements of the offense as defined by state (Florida) law for its analysis – an approach that *Turner* and *Golden* failed to do.

This Court's decisions in *Leocal*, and *Voisine v. United States*, 136 S.Ct. 2272 (2016), have left the recklessness issue open. Many courts have interpreted *Voisine* broadly, however, as finding reckless force to be sufficient for the active and intentional use of force required under ACCA's elements clause. However, *Voisine* did not construe ACCA's elements clause, but instead, it construed 18 U.S.C. § 922(g)(9), which is a unique provision prohibiting any person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. While admittedly, the definition of "misdemeanor crime of domestic violence" contains a similar elements clause to that in ACCA, (see 18 U.S.C. § 921(a)(33)(A)), and *Voisine* found reckless force satisfied the domestic violence provision, *Voisine* also made a point to distinguish 18 U.S.C. § 921(a)(33)(A) from 18 U.S.C. § 16(a), which provides an elements' clause for crimes of violence which has been adopted in the sentencing guidelines and is similar to the elements' clause in ACCA. Further, *Voisine* explicitly noted that the misdemeanor domestic violence provision and 18 U.S.C. § 16(a) have been given "divergent readings" in light of their different "contexts and purposes." 136 S.Ct. at 2280 n.4 (citing *United States v. Castleman*, 134 S.Ct. 1405, 1410-1413 (2014) (noting that concept of "force" in misdemeanor domestic violence elements' clause was read more broadly than "force" in ACCA's elements' clause because ACCA required "violent force" and a misdemeanor domestic violence offense did not). By highlighting these differences, *Voisine* indicates that -- while reckless

force may be sufficient for misdemeanor domestic violence offenses -- a reckless *mens rea* with respect to force is not sufficient for ACCA's elements' clause.

Notwithstanding the different "contexts and purposes" highlighted by *Voisine* and its explicit refusal to decide the issue beyond the domestic violence misdemeanor context, a circuit split has developed regarding whether offenses requiring only reckless force will suffice as an active and intentional "use" of force under ACCA's elements' clause. *See United States v. Pam*, 867 F.3d 1191, 1207-1208 (10th Cir. 2017); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), *cert denied*, 137 S. Ct. 2117 (2017); *accord, United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017), *petition for cert. pending*, No. 17-8413 (filed Apr. 3, 2018) (involving U.S.S.G. §4B1.1); *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-221 (5th Cir. 2017) (involving U.S.S.G. § 2L1.2). *But see contra, United States v. Windley*, 864 F.3d 36 (1st Cir. 2017). Because this Court indicated in *Voisine* that there were significant differences between the elements clauses in the misdemeanor domestic violence context and ACCA, this Court should decide the issue as the circuit split is mature and ripe for review.

VI. The Eleventh Circuit Misapplies the Standard Set Forth in *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003), and *Buck v. Davis*, 137 S.Ct. 759, 773-74 (2017), Which Allows Defendants to Appeal Adverse § 2255 Rulings Through Certificates of Appealability ("COA") Concerning Whether They are Subject to a "Violent Felony" Provision in Light of *Johnson II*.

The multitude of contentious circuit splits presented in petitioner's case demonstrates that "jurists of reason could disagree with the district court's

resolution of [the petitioner's] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The summary dispositions of petitioner's case amidst these circuit conflicts shows that the Eleventh Circuit is misapplying *Miller-El* and *Buck*. The Eleventh Circuit's misapplication places too heavy a burden on movants at the COA stage. Because the Eleventh Circuit's rule precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled to relief, petitioner respectfully requests that this Court grant his petition to correct the Eleventh Circuit's misapplication of *Miller-El* and *Buck* to ensure that post-conviction defendants in the Eleventh Circuit have the same opportunity to obtain COA's as do other defendants.

CONCLUSION

Based upon the foregoing petition, the Court should hold the case pending resolution of *Stokeling v. United States*, Case No. 17-5554, 2018 WL 1568030 (April 2, 2018), or grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit and remand the case for resentencing without the ACCA enhancement.

Respectfully submitted,

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