IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

CASE NO: _____

Eleventh Circuit Court of Appeals No. 16-11396

(FLSD No. 15-CV-14405-DMM)

ATNAFU RAS MAKONNEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

Sheryl J. Lowenthal
CJA Counsel on Appeal
for Mr. Makonnen
9130 S Dadeland Boulevard
Suite 1511
Miami, Florida 33156-7851
Tel: 305-670-3360
Fax: 305-670-1314
Florida Bar No. 163475

QUESTION PRESENTED

Whether in its supervisory jurisdiction over the Courts of the United States, and based upon this Court's clear precedent and the facts of record, this Court should find that Makonnen did not have the predicate offenses to justify imposition of a career offender enhancement, and thus is entitled to relief from the mandatory 15 year ACCA sentence that was imposed?

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IN THE SUPREME COURT OF THE UNITED STATES
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Atnafu Ras Makonnen,
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vs.

The United States of America,
Respondent.

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

PARTIES TO THE PROCEEDING

The United States of America and Atnafu Ras Makonnen were the parties in the United States District Court, Southern District of Florida and in the Eleventh Circuit Court of Appeals. Makonnen respectfully petitions for a writ of certiorari to review the final order of the Eleventh Circuit Court of Appeals entered on February 2, 2018.

OPINION BELOW

The six-page non-published final order of the United States Court of Appeals, Eleventh Circuit was entered on February 5, 2018. A copy is in the Appendix to this petition at pages 1 to 6. A petition for rehearing was timely filed and was denied on April 4, 2018. A copy of the order of denial is in

the Appendix at page 7. The judgment of the United States District Court, Southern District of Florida, convicting & sentencing Makonnen was rendered on November 7, 2014. A copy is in the Appendix at pages 8-13.

JURISDICTION

The final order of the Eleventh Circuit Court of Appeals was entered on February 5, 2018, the petition for rehearing was denied on April 4, 2018, and this petition is timely filed pursuant to Rule 13.1 of the Supreme Court Rules. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and Rules 10.1(a) and (c) and Rule 13 of the Supreme Court Rules. The jurisdiction of the Eleventh Circuit Court of Appeals was invoked under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS

Fifth Amendment
Capital Crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in the cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statement of the Case and Facts

In 2014 Makonnen was convicted for possession of a firearm by a convicted felon in violation of 18 U.S.C.§§ 922(g) and 924(e)(1). He was sentenced as an armed career offender to prison for 188 months (fifteen years), and five years' supervised release, and presently is incarcerated in the custody of the Florida Department of Corrections with a prospective release date in 2038.

Procedural History

Indictment, Guilty Plea, Sentencing, & 2255 Motion
Case No. 14-CR-14025-DMM-1

A three-count indictment was returned in the Southern District of Florida, Case No. 14-CR-14025-DMM, charging Makonnen with (1) being a felon in possession of a firearm; (2) possession of cocaine; and (3) possession of a firearm in furtherance of a drug trafficking crime. Makonnen entered into a plea agreement to plead guilty to Count 1, possession of a firearm by a convicted felon who is an armed career criminal, in violation of 18 U.S.C. §§922(g)(1) and 924(e)(1). The government agreed to dismiss the second and third counts at sentencing. Makonnen agreed that the government could prove beyond a reasonable

doubt that (1) he possessed a firearm in or affecting interstate or foreign commerce; and that (2) before possessing the firearm he had been convicted of a felony. The plea agreement included an appeal waiver.

The factual proffer provided that in December 2013, detectives served a warrant at MGD Tattoos in Port St. Lucie, Florida. A backpack belonging to Makonnen was found in his work area. A search of the backpack revealed Makonnen's Florida tattoo license, a white plastic bottle containing a substance determined to be cocaine, a digital scale with white powder residue, two plastic baggies, and a Ruger handgun with seven rounds of ammunition. ATF agents examined the firearm and ammunition and determined that (1) both had traveled in interstate and foreign commerce, and (2) Makonnen had been convicted of four Florida felony offenses, as follows:

> Attempted murder first degree with deadly weapon in Miami Dade, County, Florida, 2001;
>
> Attempted robbery with a firearm in Hillsborough, County, Florida, 2001;
>
> Felony battery in De Soto, County, Florida, 2003; and
>
> Sale of cocaine in Palm Beach, County, Florida, 2008.

Sentencing

The parties agreed to recommend the low end of the guidelines with a sentence of 188 months. With offense level 31, criminal history category VI, and an advisory range of 188-235 months the Court found the joint recommendation of 188 months to be reasonable. Makonnen was sentenced to prison for 188 months, five years supervised release, and was ordered to pay a special assessment of $100.00. Counts 2 and 3 were dismissed. Makonnen did not appeal.

The 2255 Civil Proceedings
Case No. 15-CV-14405-DMM

In June 2015 (seven months after sentencing), this Court issued *Johnson v. United States*, 135 S.Ct. 2552 (2015). In November 2015 Makonnen timely filed a *pro se* §2255 motion to vacate, set aside, or correct his sentence based upon *Johnson*, docketed in the underlying criminal case, No. 14-CR-14025, and also as DE-1 in the companion civil proceedings, No. 15-CV-14405.

The ground raised on page 5 of the motion to vacate is: Sentence enhancement under Armed Career Criminal Act is unconstitutional per [*Samuel James] Johnson v. United States*, 135 S.Ct. 2551 (2015). That

ground could not have been raised in earlier proceedings because *Johnson* was not decided until months after the plea and sentence. A memorandum of law was incorporated within the motion at page 5-B, entitled "Sentence Enhancement Under Armed Career Criminal Act is Unconstitutional Per Johnson v. U.S." It sets forth the following argument:

> Defendant entered a negotiated plea to 18 U.S.C. §922(g)(1), possession of a firearm by a convicted felon, in exchange for the government to drop counts two, and three of the charging document. After the defendant pleaded guilty to being a felon in possession of a firearm, the Government sought an enhancement sentence under the Armed Career Criminal Act ("ACCA"). 18 U.S.C. §924(e)(1). The government argued that three or more of the defendant's prior criminal offenses qualified as violent felonies under ACCA. The district court agreed and sentenced defendant to a 15-year prison term under ACCA.
>
> Under what has become known as ACCA's residual clause the term "violent felony" is defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." §924(e)(2)(B)(ii). For this, the court may sentence a defendant to a minimum of 15 years and a maximum of life if a defendant has three or more prior convictions for a "serious drug offense" or a "violent felony." §924(e)(1). Otherwise, in general, the law punishes a defendant with up to 10 years' imprisonment for a possession of a firearm by a convicted felon offense. §924(a)(2). But ACCA's residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. Consequently, the United States Supreme Court in *Johnson* . . . held that the residual clause violates the Constitution's guarantee of due process.
>
> In defendant's case that is now under review, the defendant's guilty plea to the possession of a firearm by a convicted felon is valid despite the fact that the district court's sentence enhancement under

> ACCA's residual clause violates due process as held in *Johnson*. This is so although one can easily envision a serious risk of potential injury by a felon who illegally has possession of a firearm. Accordingly, in that the Supreme Court holds that the residual clause is unconstitutional, defendant now moves the court to set aside the enhanced sentence made under the ACCA's residual clause and resentence defendant under §§922(g) and 924(a)(2).

In response the government noted that the plea agreement specified that Makonnen was an armed career criminal because he had four prior convictions: (1) attempted murder 1st degree with a deadly weapon, (2) attempted robbery with a firearm, (3) felony battery, and (4) sale of cocaine. Footnote 1 on page 2 of the government's response states:

> ACCA provides for a mandatory minimum sentence of 15 years of imprisonment for a defendant who violates 18 U.S.C. §922(g) and has three prior convictions for a "violent felony" or a serious drug offense." 18 U.S.C. §924(e). Makonnen had four convictions that qualified.

The government further argued that Makonnen's argument that the ACCA residual clause is unconstitutional under *Johnson, w*as without merit and should be denied. [The government was wrong on both points].

Agreeing with the government the magistrate judge entered a report recommending the motion to vacate be denied, that no certificate of appealability be issued, and that the case be closed. In the report, the magis-

trate judge ruled that under Florida law, attempted murder, attempted robbery, and felony battery all are crimes of violence under ACCA without resorting to the residual clause, citing (1) *Floyd v. United States*, 2015 WL 1257397 (M.D. Fla. March 18, 2015) (Florida first degree attempted murder is a "crime of violence" in that it has as an element the use, attempted use, or threatened use of physical force against the person of another); (2) *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) (Florida robbery is categorically a crime of violence); and (3) *United States v. Eady*, 591 Fed. Appx. 711 (11th Cir. 2014) (felony battery requires significant bodily harm, disability or disfigurement, and therefore qualifies as a violent felony under ACCA's elements clause). [***These all are pre-Johnson decisions***].

The report further found that Makonnen had at least three qualifying prior convictions that were not invalidated by *Johnson.* Thus, the motion to vacate should be denied, an evidentiary hearing is not required for a frivolous claim, and there is no substantial showing of the denial of a constitutional right to the issuance of a certificate of appealability. The recommendation was for denial, no COA, and for the case to be closed.

Makonnen submitted seven pages of detailed objections to the report and recommendation. The following day the district court entered its order

adopting the report and recommendation finding that the report correctly explained that *Johnson* did not apply because the prior crimes relied upon to deem Makonnen an Armed Career Criminal were three crimes of violence under the elements clause, not the residual clause, and a serious drug offense:

> Upon a careful *de novo* review of the record, as well as [Makonnen's] Objections, the Court agrees with the Report's recommendation to deny the motion to vacate and to deny a certificate of appealability

Makonnen appealed to the Eleventh Circuit. He filed a *pro se* motion for leave to appeal *in forma pauperis* that was denied by the district court. The Eleventh Circuit dismissed the appeal for failure to pay the filing fee, but when Makonnen sent the Clerk a reminder-letter about the motion to proceed IFP, the appeal was reinstated. The Eleventh Circuit online docket shows that the appeal was erroneously dismissed and clerically reinstated because a motion to proceed IFP had been filed.

In November 2016, the Eleventh Circuit entered an Order specifying one question for appeal. In December 2016, undersigned was appointed as CJA counsel for Mr. Makonnen, and has served as his counsel ever since.

The Eleventh Circuit granted Makonnen's motion for a certificate of appealability for the following issue:

> Whether Mr. Makonnen has at least two violent felonies, in combination with his serious drug offense, to qualify him as an armed career criminal, absent the ACCA's residual clause?

In the same order the Court granted Makonnen's motions (1) for leave to proceed *in forma pauperis* and (2) for appointment of counsel.

THE REASONS FOR GRANTING THE WRIT

Makonnen is entitled to sentencing relief because ***he does not have at least two violent felonies, in combination with a serious drug offense***, to qualify him as an armed career criminal absent the ACCA's residual clause.

Florida "felony battery" in violation of Fla.Stat. §784.041(1) is not a "crime of violence" under the ACCA. It is clear from this Court's decision in *Johnson* and its progeny that any Florida battery offense including "felony battery" that contains the same "touches or strikes" language used in the simple battery statute can be accomplished by a mere non-violent touching. And it is clear from a comparison of Fla Stat. §784.041(1) and §784.045(1)(a)(1) that the "causing-great-bodily-harm" element in "felony

battery" requires *no* purpose, intent or any *mens rea* (the harm is necessarily *unintended*, otherwise, it would be an "aggravated battery"). A Florida "felony battery" may be committed by a mere touching. There is strict liability as to the "great bodily harm" caused, according to *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and other precedents. Therefore, a conviction under Fla. Stat. §784.041 does not "have as an element the use, attempted use, or threatened use of physical force against the person of another," and is not a "crime of violence" for purposes of ACCA enhancement.

The identical analysis and reasoning may be applied to the Florida offenses of attempted first degree murder with a deadly weapon, and attempted robbery with a firearm. None of these offenses may be considered a "violent offense" for purposes of enhanced sentencing under the ACCA. They all may be committed without an act of physical violence. Therefore, Makonnen does not have two violent felonies in addition to his drug offense, the ACCA is not applicable in this case, the sentence should be vacated and the cause should be remanded for resentencing without the ACCA enhancement.

Further Makonnen disputes that his sale of cocaine conviction is a serious drug offense for purposes of the ACCA sentencing enhancement.

In determining whether Makonnen's prior offenses may qualify as predicate offenses under the ACCA, we first note that the cases relied on by the magistrate judge and adopted by the district court to support the conclusion that Florida attempted murder, attempted robbery, and felony battery are crimes of violence, all are pre-*Johnson* decisions. They fail to apply the reasoning and rationale that this Court required in *Johnson*. As a result, those cases are inapplicable to the analysis that we now must make in the new world of *Johnson* and its progeny, to determine whether a particular offense is a crime of violence for purposes of enhanced sentencing under ACCA.

This Court's recent decision in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), within the context of an immigration proceeding, strongly bolsters Petitioner's position. It is well to note further, that on July 9, 2018, the Eleventh Circuit will hear *Ovalles v. United States*, Case No. 17-10171, ***en banc*** to entertain the issue of whether the residual (or "risk of force") clause of §924(c)(3)(B) is unconstitutionally void for vagueness for the same reasons that §16(b) is void for vagueness under *Diamya*. The texts of both sections identical, so *Dimaya* now means that the 924(c) residual clause is void for vagueness. In fact, in *Dimaya* this Court soundly rejected the Ele-

venth Circuit's "observations" in the *Ovalles* decision about why 924(c)(3)(B) is constitutional.

Felony Battery is Not a Crime of Violence Under Florida Law

In *Curtis Johnson v. United States*, 559 U.S. 133 (2010), this Court clarified proper application of the ACCA's similarly-worded elements clause by explaining that the term "physical force" in 18 U.S.C. §924(e)(2)(B)(i) means "violent force," or force capable of causing physical pain or injury to another person." 559 U.S. at 140. Because a conviction under Fla. Stat. §784.03(2) for simple battery could be predicated upon a mere non-violent touching, this Court held, it was not a "violent felony" within the ACCA's elements clause. *Id*. at 138, 145.

In *Harris v. United States*, 60 F.3d 1222 (11th Cir. 2010), the Eleventh Circuit applied the reasoning in the Curtis Johnson decision to a different Florida battery statute, Fla. Stat. §800.04, holding that a conviction under that statute for sexual battery on a child under 16 could no longer qualify as a "violent felony" within the elements clause. The Court acknowledged that sexual battery on a child under 16 necessitates "oral, anal, or vaginal penetration by, or union with, the sexual organ of another." However,

Harris held, the offense did *not* have "as an element the use … of physical force against the person of another" because it did not require "violent force – that is force capable of causing physical pain or injury to another person." Therefore, after the *Curtis Johnson c*ase, it was not a "violent felony" within the ACCA's elements clause. *Harris*, 608 F.3d at 1226.

After *Harris*, the Eleventh Circuit continued to strictly apply the holding in *Curtis Johnson.* In *United States v. Owens*, 672 F.3d 966, 971 (11th Cir. 2012), for instance, the Court found that even convictions for second degree rape and second degree sodomy, both of which require penetration of the victim, are *not* "violent felonies" under §924(e) (2)(B)(i) because neither offense "has as an element the violent physical force necessary to qualify as a violent felony under the ACCA."

The reasoning in *Johnson*, *Harris*, and *Owens* applies equally to a conviction under the Florida "felony battery" statute, Fla.Stat. §784.041, which provides (emphasis added):

> (1) A person commits ***felony battery*** if he or she:
>
> a. Actually and intentionally ***touches or strikes*** another person against the will of another; 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…

Because the "*touches or strikes*" language in the felony battery statute is identical to that in Florida's simple battery statute, it is clear from *Johnson* that Fla.Stat. §784.041 permits conviction for a mere, unauthorized "touching" of another person against his will.

Using the categorical approach which this Court clarified in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013) and *Descamps v. United States*, 133 S.Ct. 2276 (2013), and which the Eleventh Circuit applied in *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014) and *United States v. Estrella*, 758 F.3d 1239 (11th Cir. 2014), a violation of Fla. Stat. §784.041 does not necessarily involve actually and intentionally striking ("hitting") another person in order to "cause great bodily harm." As the Eleventh Circuit explained in *Howard* and *Estrella*, whenever as here, a statute criminalizes multiple acts, and the *Shepard* documents do not clarify which act was the basis for the defendant's conviction, the Court must assume that the conviction rested upon nothing more than the least of the acts criminalized, and make its "violent felony" or "crime of violence" determination based upon the "least culpable act." *Howard*, 742 F.3d at

1345 (citing *Monnncrieffe*, 133 S.Ct. at 1684, and *Descamps*, 133 S.Ct. at 2281); *Estrella*, 758 F.3d at 1254 (citing *Moncrieffe*, 133 S.Ct. at 1684). Since the Florida "felony battery" statute prohibits both offensive "touching *or* striking" which causes "great bodily injury," the "least culpable act' under §784.041 is plainly a slight, intentional, but non-violent "*touching*" that causes great bodily harm."

Admittedly the causation-of-great-bodily-harm element in subsection (b) of the Florida felony battery statute differentiates that statute from those at issue in *Johnson*, *Harris*, and *Owens*, but it is a difference without legal significance. The "great bodily harm, permanent disability, or permanent disfigurement" caused by "touching or striking" in subsection (a) is both unknowing and unintentional on the defendant's part. Felony battery is a third degree felony. Makonnen was not charged or convicted with the offense of the greater crime of aggravated battery, a second degree felony under Fla. Stat. §784.045.

The Florida legislature provided in pertinent part in Fla. Stat. §784.045 that a person commits aggravated battery if he *intentionally or knowingly* causes great bodily harm, permanent disability, or permanent disfigurement, or uses a deadly weapon. It is the addition of the *mens rea*

element in 784.045(1)(a)(1), intentionally or knowingly causing great bodily harm, that differentiates the greater crime from the lesser one. Without the *mens rea* element, the wording of 784.045(1)(a)(1) and 784.041(1) would be identical.

The distinction between the two statutes has significant import for the elements clause analysis in this case. In *Leocal v. Ashcroft, supra*, 543 U.S. at 10, this Court explained that the word "use" in the similarly-worded definition of "crime of violence" in 18 U.S.C. §16(a) requires active employment. The phrase "use … of physical force against the person or property of another" in §16(a) "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Ibid*. Accordingly, a conviction under the Florida DUI statute for driving under the influence of alcohol ***and "causing serious bodily injury in an accident***" did ***not*** "have as an element the use of physical force," and thus was not a crime of violence" within the definition of §16(a). See id. at 7, 9, 10. In *Johnson*, this Court cited *Leocal* as authority for its interpretation of the "very similar" language in §924(e)(2)(B)(i) to require "'active violence."' *See Id.* at 140-41 (citations omitted).

Although the "causing of great bodily harm" is intentional and knowing in an "aggravated battery," it is *unintentional and unknowing*" in a "felony battery." Thus it should hold that the "*unintentional and unknowing*" causation of harm is *not*, as a matter of law, "***use*** … ***of physical force*** against the person of another."

The magistrate judge and district court relied on *United States v. Eady*, 591 Fed.Appx. 711 (11th Cir. Nov. 6 2014) (unpublished) to support denying relief to Makonnen. They were both wrong. *Eady* was wrongly decided because unlike Florida's "simple battery" statute "has a single, indivisible set of elements." 591 Fed.Appx. at 719. The least culpable conduct under the "felony battery" statute was ***hitting***. *Ibid*. ("It is incorrect to say that a person can 'actually and intentionally ***hit*** another person' and cause 'great bodily harm, permanent disability, or permanent disfigurement' without using 'force capable of causing physical pain or injury'") (emphasis added). In so stating, the *Eady* panel misapplied the "categorical approach" and ignored the "least culpable act" rule clarified in *Moncrieffe* and *Descamps*, which was strictly applied in other cases.

A violation of Fla. Stat. §784.041 would not *necessarily* involve "actually and intentionally ***hitting*** another person" in order to cause "great

bodily harm" because Florida "felony battery" prohibits *either* an offensive "touching *or* striking." Because either act may "cause great bodily injury," the "least culpable violent "touching" that inadvertently "causes great bodily harm" would have been the correct ruling in *Eady*.

Despite Appellant Eady's reliance on *United States v. Castleman*, 134 S.Ct. 1405 (2014), the Eleventh Circuit failed to consider the fact that in *Castleman* only one justice agreed with the government's assertion in that case, as in Eady's, that a slight intentional touching that "causes great bodily harm" necessarily entails the "use of violent force." *See Id*., at 1415-22 (Scalia, J. concurring in part, concurring in the judgment), whereas the other Justices declined to reach that question and resolved the case on other grounds. *See, Id*., at 1413).

In *Eady* the panel was concerned about the correctness of its elements clause logic. It expressly assumed for argument's sake that its elements clause ruling might be wrong, and thus rested its final decision to uphold the enhanced ACCA sentence upon the ACCA's residual clause. *Id.* at 719-20 (stating that even if it was wrong about the elements clause it still would affirm the enhanced ACCA sentence under the residual clause because a Florida conviction for felony battery "***certainly meets the requirements of***

the residual clause") (emphasis added).

Based upon the *Johnson*, *Harris*, *Owens*, and *Leocal*, it is clear that a conviction for felony battery in violation of Fla. Stat. §784.041 does not "have as an element the use, attempted use, or threatened use of physical force against the person of another." Florida felony battery therefore, is not a violent felony.

Attempted First Degree Murder is not a Crime of Violence under Florida Law

The Categorical Approach

The categorical approach is the framework this Supreme Court has applied in deciding whether an offense qualifies as a violent felony under the ACCA. *Welch v. United States*, 136 S.Ct. 1257, 1262 (2016). Under the categorical approach a court assesses whether a crime qualifies as a violent felony in terms of how the law defines the offense, rather than in terms of how an individual offender might have committed it on a particular occasion. *[Samuel James] Johnson* (2015*), supra*.

The language in ACCA shows that Congress intended sentencing courts to look only to the fact that the defendant had been convicted of

crimes falling within certain categories, ***not to the facts underlying the prior convictions***. *Descamps v. United States*, 133 S.Ct. 2276, 2280 (2013), quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990). Thus, as this Court has held, in applying this categorical approach a court ***may look no further than the statute and the judgment of conviction***. *United States v. Palomino-Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010), citing *United States v. Aguilar-Ortiz*, 450 F.3d 1271, 1273 (11th Cir. 2006).

The Florida statutes underlying Makonnen's 2001 conviction for attempted first degree murder are:

> 782.04 Murder
>
> (1)(a) The unlawful killing of a human being:
>
> > 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; . . . is murder in the first degree.

And

> 777.04 Attempts, solicitation, and conspiracy.
>
> > (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 . ..

See Fla. Stat. §782.04 and 777.04 The Florida jury instructions for attempted first degree murder provide in pertinent part that:

To prove the crime of First Degree Premeditated Murder, the State must prove the following three elements beyond a reasonable doubt:

1. Defendant did some act intended to cause the death of the victim that went beyond just thinking or talking about it.

2. Defendant acted with a premeditated design to kill the victim.

3. The act would have resulted in the death of the victim except that someone prevented defendant from killing the victim or (s)he failed to do so.

Definition

A premeditated design to kill means that there was a conscious decision to kill. The decision must be present in the mind at the time the act was committed. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the act. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the act was committed.

The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the attempted killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the attempted killing.

It is not an attempt to commit first degree premeditated murder if the defendant abandoned the attempt to commit the offense or otherwise prevented its commission under circumstances indicating a complete and voluntary renunciation of his/her criminal purpose.

Fla. Standard Jury Instruction 6.2, 137 S.3d 995, 997 (Fla. 2014)(*per curiam)*.

From review of the elements of the offense of attempted first degree murder after analyzing the statute and the jury instructions it is necessary to determine whether Florida attempted first degree murder qualifies as a violent felony under the elements clause of the ACCA.

The Eleventh Circuit has held, as it explained in its decision in the present case, A conviction for Florida attempted first degree murder requires that the defendant must have done "some act" with a certain *mens rea* (premeditation, intention to cause death); and that the act would have resulted in the death of the victim.

For Florida attempted first degree murder to qualify as a "violent felony" under the elements clause of the ACCA, the required act which would have resulted in the death of the victim must have involved "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. §924(e)(2)(B)(i). In this regard the Supreme Court teaches that:

> … in the context of a statutory definition of "*violent* felony," the phrase "physical force" means *violent* force – that is, force capable of causing physical pain or injury to another person. Even by itself, the word "violent" in §924(e)(2)(B) connotes a substantial degree of force. When the adjective "violent is

> attached to the noun "felony," its connotation of strong physical force is even clearer.

Johnson v. United States, 559 U.S. 133, 140 (2010) (Curtis Johnson) (citations omitted). Thus an act that could have resulted in death is not sufficient; the death-causing act must involve the actual, attempted or threatened use of the level of "violent force" prescribed by the *Curtis Johnson* decision. Using this analysis, Florida attempted first degree murder does not qualify as a "violent felony."

An example of attempted first degree murder that would not meet the ACCA physical force requirement might be tripping someone at the edge of a precipice. Assuming the existence of the required *mens rea*, if the person falls to his death, the crime would be murder, but if the person recovered his balance or hung onto a tree limb, the crime would be attempted murder. Another example would be by dissolving poison or sleeping pills into a beverage, but not using enough to cause death.

Florida Attempted murder with a deadly weapon is not a violent felony under the *Johnson* analysis.

Attempted Robbery With a Firearm is Not a Crime of Violence Under Florida Law

The Eleventh Circuit stated that Makonnen conceded that attempted armed robbery was a crime of violence. That is wrong. Makonnen's position below was that it is not a crime of violence. If a decision was mis-cited, it was not an intentional concession or waiver of any of the issues. Our argument was that in contradiction to other circuits and to this Court, the Eleventh Circuit may have found that it was a crime of violence. Apparently the Eleventh Circuit has not yet deemed ***attempted*** robbery with a firearm to be a crime of violence.

This Court has supervisory power over decisions of the Circuits. If the Eleventh Circuit has mistakenly decided that robbery with a firearm is a crime of violence, or even that an attempt is a crime of violence in and of itself, then that would render Makonnen's sentence illegal and relief should be granted.

The Categorical Approach

The Florida statutes underlying Makonnen's 2001 conviction for attempted robbery with a firearm are:

812.13 Robbery

> (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 as provided in Sections 775.082, 775.083, or 775.084.
>
> (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree punishable as provided in Sections 775.082, 775.083, or 775.084.

777.04 Attempts, solicitation, and conspiracy.

> 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 . ..

See Fla. Stat. §812.13 and 777.04

The Florida jury instructions for robbery with a deadly weapon provide as follows:

> To prove the crime of Robbery, the State must prove the following four elements beyond a reasonable doubt:
>
> (1) Defendant attempted to take the money or property described from the person or custody of the person alleged.

> (2) Force, violence, assault, or putting in fear was used in the course of the attempted taking.
>
> (3) The property that was attempted to be taken was of some value
>
> (4) The taking was with the intent to permanently or temporarily deprive the victim of his right to the property or any benefit from it or to appropriate he property of the victim to his own use or to the use of any person not entitled to it.
>
> If you find that the defendant carried a deadly weapon in the course of committing the robbery and that the weapon was a deadly weapon you should find him guilty of robbery with a deadly weapon.

From review of the elements of the offense of attempted robbery with a deadly weapon, and analyzing the statute and the jury instructions Makonnen determines whether Florida attempted robbery with a firearm qualifies as a violent felony under the elements clause of the ACCA.

A conviction for Florida attempted robbery requires that the defendant must have done "some act" with a certain *mens rea* (intending to take money or property from the person of another with force, violence, assault, or putting in fear in the course of the attempted taking; that the property attempted to be taken was of some value, and that the attempted taking was with the intent to permanently or temporarily deprive the victim of his right

to the property or any benefit from it and appropriate the property to his own use or someone not entitled to it.

For Florida attempted robbery with a deadly weapon to qualify as a "violent felony" under the elements clause of the ACCA, the required act which would have resulted in taking money or property from the victim by force, violence, assault, or putting in fear, must have involved "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. §924(e)(2)(B)(i). In this regard the Supreme Court teaches that:

> … in the context of a statutory definition of "*violent* felony," the phrase "physical force" means *violent* force – that is, force capable of causing physical pain or injury to another person. Even by itself, the word "violent" in §924(e)(2)(B) connotes a substantial degree of force. When the adjective "violent is attached to the noun "felony," its connotation of strong physical force is even clearer.

Johnson v. United States, 559 U.S. 133, 140 (2010) (Curtis Johnson) (citations omitted). Thus an act that could have resulted in taking property by force, violence, assault, or fear, is not sufficient; the attempted robbery must involve the actual, attempted or threatened use of the level of "violent

force" prescribed by the *Curtis Johnson* decision. Applying this analysis, Florida attempted robbery with a deadly weapon does not qualify as a "violent felony." Even if a gun were pointed at the intended victim, that is not violent force. The gun was not discharged. The victim was not struck, touched, or violently forced to do anything.

Therefore Makonnen's ACCA sentencing enhancement based upon a conviction and sentence for Florida attempted robbery must be vacated under *Johnson*. The use of the residual clause to find Florida robbery to be a violent crime is unconstitutionally vague. After *Johnson* Florida robbery and attempted robbery offense no longer satisfies the definition of a "crime of violence."

Putting someone in fear does not require the use, attempted, or threatened use of "violence force."

Florida attempted robbery with a firearm can be committed without actual or threatened violent force, but instead by merely placing another in fear of injury to person or property. Injury may be inflicted on both property and on a person – without any physical force at all, let alone the violent physical force that is required under the Elements Clause.

First, Florida attempted robbery can be accomplished by placing someone in fear of injury to his *property*. Certainly this is an act which does not require the use of violent physical force.

Even injury to tangible property does not require the threat of violent force. One can threaten to injury another's property by throwing paint on a house, pouring chocolate syrup on a passport, or spray painting a car. It goes without saying that these actions do not require violent force.

The elements of robbery in Florida are: force, violence, assault, or putting in fear. Violence is one option. Force is another. Putting the victim in fear is yet another option. The Fourth and Fifth Circuits have held that the threat of physical injury to the person of another does not require use of physical force, let alone violent physical force. *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (statute that criminalizes threatening to commit a crime which will result in death or great bodily injury to another person is not a crime of violence for purposes of the US Sentencing Guidelines because it does not necessarily involve the use of force).

Because the "full range of conduct" covered by the definition of Florida attempted robbery does not require "violent force" against a person, it simply cannot qualify as a "crime of violence" under the Elements Clause. It makes no difference whether the odds are slim of violating the Florida attempted robbery statute without violent physical force.

As the Fourth Circuit held, an offense can only constitute a "crime of violence" under the Elements Clause if it has an element that requires an "intentional employment of physical force [or threat thereof]." *Garcia v. Gonzalez*, 455 F.3d 465, 468 (4th Cir. 2006) (analyzing 18 U.S.C. Section 16(b)'s identical elements clause).

Federal cases interpreting the "intimidation" element in the federal bank robbery statute (18 U.S.C. Section 2113(a)) may be instructive here. Federal bank robbery may be accomplished by intimidation, which means placing someone in fear of bodily harm, similar to the force, violence, assault, or putting in fear element of Fla. Stat. 812.13. See *United States v. Woodrop*, 86 F.3d 359, 364 (4th Cir. 1996) (intimidation under federal bank robbery statute means "an ordinary person in the [victim's position] reasonably could infer a threat of ***bodily harm*** from the defendant's acts")

(emphasis added). See also *United States v. Kelly*, 412 F.3d 1240, 1244 (11th Cir. 2005).

"Intimidation" is satisfied under the bank robbery statute "whether or not the defendant actually intended the intimidation" as long as "an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts." *Woodrup*, 86 F.3d at 36. Indeed, "[w]hether a particular act constitutes intimidation is viewed objectively, and a defendant can be convicted under [the federal bank robbery statute] even if he did not intend for an act to be intimidating." *Kelly*, 412 F.3d at 1244. See also *United States v. Yockel*, 320 F.3d 818, 821 (8th Cir. 2003) (upholding bank robbery conviction in spite of lack of evidence that defendant intended to put teller in fear of injury; defendant did not make any physical movement toward the teller and never presented her with a note demanding money, never displayed a weapon of any kind, never claimed to have a weapon, and did not appear to possess a weapon).

In other words, a defendant may be found guilty of federal bank robbery even though he did not intend to put another in fear of injury. It is

enough that the victim reasonably fears injury from the defendant's actions – whether or not the defendant actually intended to create that fear. Due to the lack of this intent, ***federal bank robbery criminalizes conduct that does not require an intentional threat of physical force***. Therefore bank robbery squarely fails to qualify as a "crime of violence" under *Garcia*. Because the federal bank robbery "intimidation" element is defined the same as the Florida attempted robbery "force, violence, assault, or putting in fear" element, it follows that Florida attempted robbery also fails to qualify as a "crime of violence" under *Garcia*.

In sum, Florida attempted robbery is not a "crime of violence" under the 924(c)(3)(A) Elements Clause for two independent reasons. First the statute does not require a threat of ***violent force***, or any physical force at all. Second, the statute does not require the *intentional* threat of same. This is not a violent felony under *Johnson*.

Sale of Cocaine is not a Serious Drug Offense

The decision that is the subject of this Petition states that Makonnen did not dispute that his prior Florida conviction for selling cocaine qualified as a serious drug offense. Therefore, the issue is abandoned, and in any event, "[it] would be beyond the scope of the COA." [Citations omitted]. See, slip opinion at page 5.

Petitioner suggests that it was grossly unfair for the Court to say that the issue was abandoned when the Court's COA question was phrased in such a way that it would have exceeded the scope of the COA to challenge the drug offense as being a serious drug offense. Every effort was made to address the specific query posed by the Court. The Eleventh Circuit's COA was couched in language that assumed that selling cocaine was a serious drug offense. Counsel did not think it would be appropriate or permissible to challenge what the Court assumed as a part of its COA issue. The question was:

> Whether Mr. Makonnen has at least two violent felonies in combination with his serious drug offense, to qualify him as an armed career criminal, absent the ACCA's residual clause?

Makonnen's conviction for sale of cocaine is not a serious drug offense. He sold cocaine to undercover officers for $100. It is not trafficking, manufacturing, or importation. It is merely a small sale. The issue was not waived.

Respectfully submitted,

/s/ ***Sheryl Joyce Lowenthal***
SHERYL JOYCE LOWENTHAL
Attorney for Appellant Makonnen
9130 S Dadeland Blvd. Suite 1511
Miami, Florida 33156-7851
Ph: 305-670-3360 Fx: 305-670-1314
E-Mail: sjlowenthal @appeals.net
Florida Bar No. 163475