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.

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

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

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On page I of its Brief in Opposition, the government has rephrased the questions presented as follows:

(1) whether a prior conviction for felony battery in violation of Fla.Stat. 784.041 (1999), was a conviction for a violent felony under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i);

(2) whether a prior conviction for attempted first degree murder in violation of Fla. Stat. 777.04(1) and 782.04(1)(a) (1999), was a conviction for a violent felony under the ACCA's elements clause;

(3) whether a prior conviction for sale of cocaine was a serious drug offense under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii); and

(4) whether a prior conviction for attempted armed robbery, in violation of Fla.Stat. 812.13(1997), was a conviction for a violent felony under the ACCA's elements clause?

In reply to the Government's Brief in Opposition, Petitioner Makonnen will address the Government's argument in the following order: first, the felony battery issue; second, the serious drug offense issue; and third, holding this petition in abeyance pending a decision in *Stokeling.* Mr. Makonnen does not waive any issues or matters in his original petition that not addressed directly in this reply. Petitioner adopts and relies on all issues, arguments, and authorities in his original petition as though set forth in their entirety herein.

Government to the contrary, Felony battery does not qualify as a "violent felony" under the ACCA's elements clause because it does not have as an element the use, attempted use, or threatened use of physical force.

Following the decision in *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 have arisen that are the subject of intractable circuit splits. Those circuit splits include this Court's definition of violent felony under *Curtis Johnson v. United States,* 559 U.S. 133 (2010) (*Johnson II)*, and ACCA's elements clause. This Court's intervention and resolution are required.

In *Johnson I*, this Court went to great lengths 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*. The Court stated that "physical force" meant "violent force – that is, force capable of causing physical pain or injury to another person." The Court more fully explained the concept throughout the 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 "con-

notes 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 clarified its meaning over and over in the *Johnson I* opinion to be clear that violent force under the ACCA statute was a narrow concept, not a broad rule that could be use in a sweeping fashion.

When *Johnson I* was decided, courts generally 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.* Since that time the Courts have been battling over the scope of the ACCA elements clause and revisiting the meaning of violent force as defined previously in *Johnson I*. As a result, several serious circuit conflicts are in progress concerning the ACCA elements clause. This Court should intervene to ensure that they all will be applied uniformly to avoid unwarranted sentencing disparities.

Circuits are divided as to whether unintentional causation of bodily harm necessarily entails violent force under the Elements clause and *John-*

son I. The Eleventh Circuit's denial of relief based on Makonnen's 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 the focus of the Eleventh Circuit's six-to-five *en banc* decision in *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017). *Vail-Bailon* 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 simple battery under Florida law 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 holding of the Florida Supreme Court 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)). Pursuant 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.

Florida felony battery, the offense at issue in Makonnen's present case and also in *Vail-Bailon,* is derivative of Florida simple battery. The first element of Florida felony battery is identical to the simple battery that was addressed in *Johnson I*. Fla. Stat. §784.041(1)(a) ("A person commits felony battery if he … [a]ctually and intentionally touches or strikes another person against the will of the other"). That 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, as in a simple battery, the defendant need not intend for that conduct to cause great bodily harm. For felony battery, *mens rea* is not required as to the harm caused. Florida courts have expressly recognized that a felony battery under §784.041(1) is nothing more than simple battery conduct that intentionally causes great bodily harm. *See Jeffries 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 defense 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 the felony battery conviction did not satisfy the elements clause. *United States v. Vail-Bailon*, 838 F.3d 1091 (11th Cir. 2016). Because the record did not indicate otherwise the panel assumed, as did the parties, that the 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 concluded that felony battery 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 itself, 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*). Instead of 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* ruling 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 whereby 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 because it required the causation of great bodily harm. 868 F.3d at 1299-1302.

In creating its test the *en banc* majority bypassed the plain wording of the Florida felony battery statute which provided a means for committing the crime through mere touching; and further bypassed that part of the *Johnson I* opinion citing *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003), for an example of an offense – 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 *Duenas-Alvarez*, *infra*, 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/is no Florida case involving mere touching as the basis for a felony battery conviction.

The dissents in the *en banc* decision opined that the majority had degree of force," and instead adopts a "novel capacity test." 868 F.3d 1308-

14 (Wilson, J., dissenting: and see 868 F.3d at 1315 (Rosenbaum, J. dissenting). This newfound capability test, they argued, "swallowed" the holding in *Johnson I* that Florida simple battery does not require "physical force," because even simple battery had the capability of causing pain or injury. 868 F.3d at 1314 (Wilson, J. dissenting). Based upon the plain language of the Florida felony battery statute, five judges dissented, agreeing that Florida felony battery could be committed without violent force.

This Eleventh Circuit decision is consistent with the Third, Sixth, Seventh, Eighth, and Ninth Circuits all of which have held that the causation of bodily harm or injury requires the use of violent force.

In contrast, however, the First, Second, Fourth Fifth, and Tenth Circuits all recognize that causation of harm need not require the use of violent force under *Johnson I.* The Court is presented with an important circuit conflict that remains unresolved. This Court should grant the petition for writ of certiorari to resolve the conflict.

An additional circuit conflict exists with regard to the application of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), addressing how to

identify the scope of an offense for purposes of applying the categorical approach. The First, Third, Sixth, Ninth, and Tenth Circuits all hold that the plain statutory language can establish that an offense is overbroad notwithstanding the absence of any reported case; whereas the Fifth and Eleventh Circuits hold that under *Duenas-Alvarez*, the defendant is required to identify a report case in which courts have "actually applied" the statute in the way the defendant advocates. All of those cases are set forth, described, and analyzed in great detail in the petition that is presently pending before this Court in *Lewis v. United States*, Case No. 17-9097, and are adopted herein.

There are so many unanswered questions and unresolved conflicts in this area of sentencing that cry out for resolution by this Court, to establish uniformity throughout the country.

Makonnen did not abandon or waive the issue of whether his conviction for "sale of cocaine" was a "serious drug offense."

The government's position in its answer brief filed in the Eleventh Circuit, was that petitioner abandoned the issue of whether sale of cocaine is a serious drug offense by not raising it. That position was adopted as a holding by the Eleventh Circuit and was included in its decision. It is, however, an unfair conclusion. Clearly the matter of whether the drug offense was a "serious drug offense" was beyond the scope of the question presented by the Eleventh Circuit in its Certificate of Appealabilty. The Eleventh Circuit states that in the opinion that it was abandoned, or waived.

In reality, counsel found herself in a "Catch 22" situation: raise the issue in blatant violation of the limited scope of the COA, or address only the issues specified by the Eleventh Circuit in the COA and the order of appointment. By taking the latter path, abiding by the language of the COA and the limitations on her appointment, counsel did not raise it. Now she finds that she and her client are in the untenable position of having been sandbagged by a finding that the issue was abandoned or waived.

To preclude consideration of the issue now is unfair, unreasonable, and unjust. Counsel has been placed in the untenable position of being con-

sidered to have abandoned an issue for not raising and arguing it, when to do so would have been a violation of the limited scope of her appointment by the Eleventh Circuit as appellate counsel for Mr. Makonnen.

This Court should do what is right and just, and not allow Mr. Makonnen to be further punished for falling into the trap set in the COA issued by the Court of Appeals.

This matter should be held in abeyance pending a decision in Stokeling v. United States, No. 17-5554, Oral Argument heard on October 9, 2018.

In *Stokeling* this Court entertained the following issue: whether a state robbery offense that includes as an element the common law requirement of overcoming victim resistance, is categorically a "violent felony" under the only remaining definition of that term in the ACCA (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 specifically been interpreted by state appellate courts to require only slight force to overcome resistance?)

The government argues that it is unnecessary to hold this matter in abeyance pending the issuance of a decision in *Stokeling* because Makonnen has the requisite number of prior predicate convictions to support the imposition of an enhanced ACCA sentence even without the Florida robbery conviction, thus regardless of whether Florida robbery would be a valid predicate for ACCA enhanced sentencing.

Government's position to the contrary, in order to be fair, and to ensure that justice is done in this case and in every case, this Court should review, consider, and decide the validity of both of the previous convictions: whether Makonnen's conviction for sale of cocaine is a serious drug offense, and whether Florida felony battery is a violent felony. If either of those questions should be resolved favorably to the defense position, and indeed both should be, and should *Stokeling* also be decided favorably to the defense, then the conclusion is ineluctable that Makonnen is entitled to sentencing relief.

This petition should be granted. The ACCA enhanced sentence should be vacated, and this cause should be remanded with instructions that Mr. Makonnen be resentenced to a correct and reasonable sentence without imposition of any ACCA enhancement.

No prejudice will inure to the government if the Court holds this case in abeyance pending the outcome of the *Stokeling* case. On the other hand, Mr. Makonnen will be irretrievably prejudiced and unnecessarily excessively punished, should his petition be denied without waiting for a decision in *Stokeling*.

CONCLUSION

For all of the foregoing reasons, Petitioner Makonnen requests that this Court grant certiorari on the issues of whether Florida felony battery qualifies as a violent felony under the ACCA; and whether Florida sale of cocaine is a "serious drug offense." Additionally, or alternatively, he urges the Court to hold this case pending resolution of the Florida robbery issue in *Stokeling*.

Respectfully submitted,

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