No. _____

IN THE
Supreme Court of the United States

_____

DETRICK SMITH,

***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

_____

Donna Lee Elm
Federal Defender

Danli Song, Counsel of Record
Research and Writing Attorney
Federal Defender's Office
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Facsimile: (407) 648-6765
E-mail: danli_song@fd.org

QUESTIONS PRESENTED

The broad question presented by this case is whether the Eleventh Circuit Court of Appeals erroneously denied Mr. Smith a certificate of appealability ("COA") on whether he was unconstitutionally sentenced above the statutory maximum for his offense of possession of a firearm by a convicted felon.

More specifically, this case presents the following questions:

(1) Can reasonable jurists debate whether a Florida conviction for robbery is a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)?[1]

(2) Can reasonable jurists debate whether a Florida conviction for felony battery is a "violent felony" under the ACCA's elements clause, where the statute only requires the causation of great bodily harm rather than a substantial degree of force?

[1] This Court is currently considering whether Florida robbery is a "violent felony" under the ACCA's elements clause in *Stokeling v. United States*, No. 17-5554 (cert. granted Apr. 2, 2018). Therefore, this petition should be held pending *Stokeling* and disposed of as appropriate in light of that decision.

LIST OF PARTIES

Petitioner, Detrick Smith, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and other Authorities — Page(s)

PETITION FOR A WRIT OF CERTIORARI

Detrick Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Smith's application for a COA in Appeal No. 17-15686 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Smith's case under 18 U.S.C. § 3231. The district court denied Mr. Smith's 28 U.S.C. § 2255 motion on October 25, 2017, and Mr. Smith filed a timely notice of appeal. *See* Appendix B. Mr. Smith subsequently filed a COA application in the Eleventh Circuit, which was denied on May 16, 2018. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves the ACCA, 18 U.S.C. § 924(e). The ACCA's sentencing enhancement provision provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(1).

In relevant part, the ACCA defines a "violent felony" as:

> [A]ny 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; or

> **(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B).

The Antiterrorism and Effective Death Penalty Act of 1996 provides, in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c).

At the time of Mr. Smith's robbery conviction, the Florida robbery statute provided, in relevant part:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Fla. Stat. § 812.13(1) (1992).

At the time of Mr. Smith's felony battery conviction, the Florida felony battery statute provided, in relevant part:

> (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.

Fla. Stat. § 784.041 (2000).

STATEMENT OF THE CASE

Mr. Smith was convicted of possessing a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). On July 20, 2010, he was sentenced to 108 months' imprisonment, to be followed by 36 months' supervised release. After Mr. Smith appealed his sentence, and the government cross-appealed, his sentence was vacated in part, based on the Eleventh Circuit's determination that he should be resentenced under the ACCA. On April 1, 2013, Mr. Smith was resentenced to 180 months' imprisonment, to be followed by 60 months' supervised released, under the ACCA. His ACCA enhancement was based on three Florida convictions for robbery with a firearm, felony battery, and sale of cocaine. His sentence was affirmed on March 18, 2014.

On September 2, 2015, Mr. Smith moved to vacate his sentence under 28 U.S.C. § 2255, arguing that his ACCA enhancement was unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).[2] On October 25, 2017, the district court dismissed the motion, stating that Mr. Smith was still an armed career criminal based, in part, on his prior Florida convictions for felony battery and robbery with a firearm. The district court also denied a COA. *Id.*

On December 22, 2017, Mr. Smith timely appealed his § 2255 denial and subsequently filed an application for a COA with the Eleventh Circuit on whether he was unconstitutionally sentenced above the statutory maximum for his offense, arguing that his felony battery and robbery with a firearm convictions were not ACCA predicates. On May 16, 2018, the Eleventh Circuit

[2] In *Johnson II*, the Supreme Court held that the residual clause of the Armed Career Criminal Act's "violent felony" definition was unconstitutionally vague. *Johnson II*, 135 S. Ct. at 2557. The decision in *Johnson II* applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

denied Mr. Smith a COA, determining that he remained an armed career criminal based on his convictions for robbery, felony battery, and sale of cocaine.[3]

On April 2, 2018, this Court agreed to hear whether a Florida conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause. *Stokeling v. United States*, No. 17-5554, 2018 WL 1568030 (U.S. Apr. 2, 2018).

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED ON BOTH QUESTIONS PRESENTED

a. The Ninth and Eleventh Circuits' Disagreement About Whether a Florida Conviction for Robbery Qualifies as a "Violent Felony" under the ACCA's Elements Clause Shows that Reasonable Jurists Can Debate the Issue, and Certiorari has been Granted to Resolve the Conflict.

In *United States v. Fritts*, the Eleventh Circuit held that Florida robbery—whether armed or unarmed—is categorically a "violent felony" under the ACCA. 841 F.3d 937, 943 (11th Cir. 2016). According to the Eleventh Circuit, armed and unarmed robbery qualify as "violent felon[ies]" for the same reason, because overcoming victim resistance is a necessary element of any Florida robbery offense. 841 F.3d at 942–44 (citing *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997)). Because Florida robbery requires a perpetrator to overcome a victim's resistance, the Eleventh Circuit assumed that Florida robbery categorically requires the use of violent "physical force." *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*) (defining "physical force" under the ACCA as "violent force—that is, force capable of causing physical pain or injury to another person.").

[3] Although the Eleventh Circuit only addressed why his felony battery conviction was a "violent felony," in ruling that Mr. Smith remained subject to the ACCA enhancement, it presumably found that his conviction for robbery also qualified as a violent felony given that only those three convictions were identified as ACCA predicates in his Pre-Sentence Report.

According to *Fritts*, it was irrelevant that Fritts' own conviction predated *Robinson* since *Robinson* simply clarified what the Florida robbery statute "always meant." 841 F.3d at 943. But while *Robinson* did clarify that a mere sudden snatching with no victim resistance is simply theft, not robbery, *id.* at 942–44, what it did not clarify was how much force was necessary to overcome resistance for a Florida robbery conviction. Decades before *Robinson*, however, the Florida Supreme Court had held that the "degree of force" was "immaterial" so long as it was enough to overcome resistance. *Montsdoca v. State*, 93 So. 157, 159 (1922). And the Eleventh Circuit in *Fritts* cited *Montsdoca* as controlling as well. 841 F.3d at 943.

Although neither *Montsdoca* nor *Robinson* specifically addressed what degree of force is necessary to overcome resistance under the Florida robbery statute, the Florida intermediate appellate courts have clarified the "least culpable conduct" under the statute in that regard. Several Florida appellate court decisions have confirmed post-*Robinson* that victim resistance in a robbery may well be minimal, and where it is, the degree of force necessary to overcome it is also minimal. Indeed, a review of Florida case law confirms that a defendant may convicted of robbery even if he uses only a minimal amount of force. A conviction may be imposed if a defendant: (1) peels back someone's fingers;[4] (2) struggles to escape someone's grasp;[5] (3)

[4] *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th DCA 2000).

[5] *See Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) (discussing *Colby v. State*, 46 Fla. 112, 114 (Fla. 1903), and stating, "[a]lthough the crime in *Colby* was held to be larceny, it would be robbery under the current version of the robbery statute because the perpetrator used force to escape the victim's grasp."). Indeed, Florida courts have made clear that if a pickpocket "jostles the owner, or if the owner, catching the pickpocket in the act, struggles to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting W. LaFave, A. Scott, Jr., *Criminal Law* § 8.11(d), at 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000).

engages in a tug-of-war over a purse;[6] (4) pushes someone;[7] (5) shakes someone;[8] (6) bumps someone from behind;[9] or (7) pulls a scab off someone's finger.[10] Under Florida law, a robbery conviction may be upheld based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986);[11] *see also Mims v. State*, 342 So. 2d 116, 117 (Fla. 3d DCA 1977).

The Ninth Circuit recognized this in *United States v. Geozos*, where it held that a Florida conviction for robbery, whether armed or unarmed, fails to qualify as a "violent felony" under the elements clause because it "does not involve the use of violent force within the meaning of ACCA." 879 F.3d 890, 900–01 (9th Cir. 2017). In so holding, the Ninth Circuit found significant that under Florida case law, "any degree" of resistance was sufficient for conviction, and an individual could violate the statute simply by engaging "in a non-violent tug-of-war" over a purse. *Id.* at 900 (citing *Mims* and *Benitez-Saldana*).

In coming to a decision that it recognized was at "odds" with the Eleventh Circuit's holding in *Fritts*, the Ninth Circuit rightly pointed out that "in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, [the Eleventh Circuit] has overlooked the fact that, if resistance itself is minimal, then the force used to overcome that

---

[6] *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011).

[7] *Rumph v. State*, 544 So. 2d 1150, 1151 (Fla. 5th DCA 1989).

[8] *Montsdoca v. State*, 93 So. 157, 159–160 (Fla. 1922).

[9] *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001).

[10] *Johnson v. State*, 612 So. 2d 689, 690–91 (Fla. 1st DCA 1993).

[11] In *Santiago*, the defendant reached into a car and pulled two gold necklaces from around the victim's neck, causing a few scratch marks and some redness around her neck. *Santiago*, 497 So. 2d at 976.

resistance is not necessarily violent force." *Id.* at 901 (citing *Montsdoca*, 93 So. at 159 ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.")).

As is clear from *Geozos*, the Ninth and Eleventh Circuits' decisions directly conflict about an important and recurring question of federal law: whether the minimal force required to overcome minimal resistance under the Florida robbery statute categorically meets the level of "physical force" required by *Curtis Johnson* for "violent felonies" within the ACCA elements clause. *See* 559 U.S. at 140 (holding that in the context of a "violent felony" definition, "physical force" means "violent force," which requires a "substantial degree of force.") And indeed, in *Stokeling*, certiorari was granted to resolve that very issue. Thus, the disagreement between the Ninth and Eleventh Circuits, as well as this Court's decision to hear *Stokeling*, show that at a minimum, reasonable jurists can (and do) debate this issue. Mr. Smith therefore urges this Court to hold this case pending *Stokeling*.

b. Because the Circuits Are Split Over Whether the Causation of Bodily Harm Necessarily Entails Violent Force Under *Curtis Johnson*, Reasonable Jurists Can Debate Whether a Florida Conviction for Felony Battery Qualifies as a "Violent Felony" under the ACCA's Elements Clause.

As noted above, in *Curtis Johnson*, this Court defined "physical force" in the ACCA's elements clause as "*violent* force—that is, force capable of causing physical pain or injury to another person." If violent force is purely measured by its "capability" of causing harm, then all offenses requiring the causation of harm would satisfy the definition, for offenses that actually cause harm are necessarily capable of causing harm. On the other hand, if violent force is measured by the degree of force applied, as the entirety of the opinion indicates, then offenses requiring the causation of harm would not necessarily require violent force.

Even great bodily harm may be caused by only *de minimis* force.

The Court expressly left this question open in *United States v. Castleman*, 134 S. Ct. 1405 (2014). In that case, the Court declined to import *Curtis Johnson*'s definition of "physical force" as "violent force" into a similar elements clause in 18 U.S.C. § 921(a)(33)(A), defining "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9). Instead, the Court held that, as used in that statute, "physical force" broadly referred to common-law force, which, unlike *Curtis Johnson*'s narrower definition, included even a slight touching. *See id.* at 1410–13 & n.4. Applying that broader definition, *Castleman* held that the offense in that case—the intentional or knowing causation of bodily injury—was a misdemeanor crime of domestic violence, because the causation of bodily injury necessarily required the use of common-law force. *See id.* at 1414–15.

Writing only for himself, Justice Scalia argued that causation of bodily injury also required violent force under *Curtis Johnson*, because it was "impossible to cause bodily injury without using force 'capable' of producing that result." *Id.* at 1416–17 (Scalia, J., concurring in part and concurring in the judgment). The majority, however, did not accept that reasoning. Instead, it expressly reserved judgment on that question—twice. *Id.* at 1413 ("Whether or not the causation of bodily injury necessarily entails violent force—a question we do not reach—mere offensive touching does not."); *id.* at 1414 ("Justice Scalia's concurrence suggests that these forms of injury necessitate violent force, under *Johnson*'s definition of that phrase. But whether or not that is so—a question we do not decide—these forms of injury do necessitate force in the common-law sense.") (internal citation omitted). That question has long divided the circuits.

1. On the one hand, the Third, Sixth, Seventh, Eighth, Ninth, and now Eleventh Circuits have all held that the causation of bodily harm or injury necessarily requires the use of

violence 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 those Circuits, however, numerous judges have registered disagreement. In *Vail-Bailon*, five Eleventh Circuit judges vigorously dissented on this point, as explained above. In the Sixth Circuit, Judge White opined that "serious physical injury most often results from physical force, but it can also occur in the absence of any force being used by the offender." *Anderson*, 695 F.3d at 404 (White, J., concurring). Thus, she agreed with other circuits that "have rejected such a broad interpretation of physical force." *Id.* at 405. In the Eighth Circuit, Judge Kelly made the same observation, opining that that there were a number of ways that a person could cause physical injury without using any degree of force. *Rice*, 813 F.3d at 707-08 (Kelly, J., dissenting). And the Seventh Circuit in *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), actually held that an Indiana battery statute—"materially indistinguishable" from the Florida felony battery statue here—did not require violent force. *Vail-Bailon*, 868 F.3d at 1302. Although *Curtis Johnson* had cited *Flores* "with approval," *Castleman*, 134 S. Ct. at 1412, the Seventh Circuit in *Douglas*, in an opinion written by the very same judge, subsequently reached the exact opposite conclusion on the very same statute—without even citing the earlier decision in *Flores*.

2. 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 *Curtis Johnson*. 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");[12] *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005) (accepting argument that an offense requiring the causation of bodily injury was not necessarily a crime of violence).

Following *Castleman*, where the Court indicated that the administration of poison and other indirect applications of force 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). While the remaining circuits above have backtracked on parallel pronouncements in light of the indirect force discussion in *Castleman*, they have done so only in cases involving 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), and/or only to the extent that they had previously relied upon the administration of poison or some indirect application of force to illustrate the broader principle that causation of harm need not require violent force. *See, e.g.*,

[12] *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. 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 force" as an element).

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). But, again, *Castleman* expressly reserved on the broader question of whether the causation of harm necessarily requires the use of violent force. And this case neatly presents that question while conveniently avoiding the harder questions about poison and indirect applications of force, since Florida felony battery may be committed only by a touching or a striking. It does not require intentional or knowing causation of bodily harm and may not be committed by poisoning or any other indirect application of force.

* * *

In short, the circuits have long been hopelessly confused about the meaning of the term "physical force" in the elements clause. And *Curtis Johnson*'s definition of "physical force" as "*violent* force—that is, force capable of causing physical pain or injury to another person" has only cemented and exacerbated the confusion. Many circuits reason backwards from the harm, concluding that the causation of pain or injury cannot occur without the use of violent force. Other courts and judges, by contrast, have focused on the degree or quantum of force, concluding that the causation of pain or injury need not be caused by violent force. The Court expressly left this question open in in *Castleman*. The Court should decide it here.

Either issue presented in this petition is dispositive—if either Florida robbery or felony battery are not ACCA predicates, then Mr. Smith is not eligible for the ACCA enhancement and his sentence is above the statutory maximum. Because reasonable jurists can debate whether Florida felony battery is a "violent felony," Mr. Smith respectfully requests that if this petition is not held pending *Stokeling*,

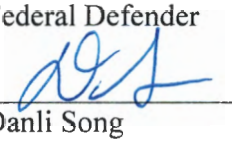
it be granted to review the Eleventh Circuit's erroneous denial of his application for a COA.

CONCLUSION

For the above reasons, Mr. Smith's petition should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender



Danli Song
Research and Writing Attorney
Federal Defender's Office
201 S. Orange Avenue, Suite 300
Orlando, FL 32801
Telephone 407-648-6338
Facsimile 407-648-6095
E-mail: danli_song@fd.org
Counsel of Record for Petitioner

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 16, 2018

Rosemary Cakmis
Federal Public Defender's Office
201 S ORANGE AVE STE 300
ORLANDO, FL 32801

Donna Lee Elm
Federal Public Defender's Office
201 S ORANGE AVE STE 300
ORLANDO, FL 32801

Conrad Benjamin Kahn
Federal Public Defender's Office
201 S ORANGE AVE STE 300
ORLANDO, FL 32801

Danli Song
Federal Public Defender's Office
201 S ORANGE AVE STE 300
ORLANDO, FL 32801

Appeal Number: 17-15686-G
Case Style: Detrick Smith v. USA
District Court Docket No: 2:15-cv-00532-JES-CM
Secondary Case Number: 2:09-cr-00059-JES-SPC-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

All pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Bryon Robinson, G
Phone #: (404) 335-6185

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 17-15686-G

DETRICK SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

APPLICATION FOR CERTIFICATE OF APPEALABILITY

Donna Lee Elm
Federal Defender

Danli Song
Research and Writing Attorney
Appellate Division
201 S. Orange Avenue, Ste. 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Facsimile: (407) 648-6765
Email: Danli_Song@fd.org
Counsel for Appellant

Appeal No. 17-15686-G

Detrick Smith v. United States of America

CERTIFICATE OF INTERESTED PERSONS

The persons listed below are interested in the outcome of this case:

Bentley, III, A. Lee

Cakmis, Rosemary

Elm, Donna Lee

Kahn, Conrad

Lopez, Maria Chapa

Merryday, The Honorable Steven D.

Michelland, Jeffrey

Mirando, The Honorable Carol

Muldrow, W. Stephen

Rhodes, David

Sholl, Peter J.

Smith, Detrick

Song, Danli

Steele, The Honorable John E.

Viacava, Yolande G.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DETRICK SMITH,

Appellant,

v. **Case No. 17-15686-G**

UNITED STATES OF AMERICA,

Appellee.
_____/

APPLICATION FOR CERTIFICATE OF APPEALABILITY

Appellant Detrick Smith, through undersigned counsel, and pursuant to 28 U.S.C. § 2253 and Fed. R. App. P. 22(b), respectfully requests that this Honorable Court issue a certificate of appealability (COA) on the issue of whether Mr. Smith was unconstitutionally sentenced above the statutory maximum for his offense of possession of a firearm and ammunition by a convicted felon. In support thereof, Mr. Smith states the following:

PROCEDURAL HISTORY

On February 8, 2010, Mr. Smith was convicted of one count of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C.

§ 922(g). Cr. Doc. 61.[1] On July 20, 2010, he was sentenced to 108 months' imprisonment, to be followed by 36 months' supervised release. Cr. Docs. 76, 77. After Mr. Smith appealed his sentence, and the government cross-appealed, his sentence was vacated in part, based on this Court's determination that he should be resentenced under the Armed Career Criminal Act (ACCA). Cr. Doc. 110. On April 1, 2013, Mr. Smith was resentenced to 180 months' imprisonment, to be followed by 60 months' supervised released, under the ACCA. Cr. Docs. 125, 126. His sentence was affirmed on March 18, 2014. Cr. Doc. 135.

On September 2, 2015, Mr. Smith moved to vacate his sentence under 28 U.S.C. § 2255, arguing that his ACCA enhancement was unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*).[2] Civ Doc. 1. On October 25, 2016, the district court dismissed the motion, stating that Mr. Smith was still an armed career criminal based, in part, on his prior Florida

[1] References to the § 2255 proceeding are cited as "Civ. Doc." References to the underlying criminal proceeding in case no. 2:09-cr-59-FtM-29CM are cited as "Cr. Doc."

[2] In *Johnson II*, the Supreme Court held that the residual clause of the Armed Career Criminal Act's "violent felony" definition was unconstitutionally vague. *Johnson II*, 135 S. Ct. at 2557. The decision in *Johnson II* applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

convictions for felony battery and robbery with a firearm. Civ. Doc. 20. The district court also denied a COA. *Id.*

On December 22, 2017, Mr. Smith timely appealed his § 2255 denial. Civ. Doc. 24.

COA STANDARD

The Court may issue a COA where an "applicant has made a substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The COA must "indicate which specific issue or issues satisfy" this showing. 28 U.S.C. § 2253(c)(3).

The Supreme Court has clarified that a COA "does not require a showing that the appeal will succeed." *Welch v. United States*, 136 S. Ct. 1257, 1263–64 (2016) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)). An applicant need only show that the issues raised are debatable among jurists. *Id.* Indeed, the Supreme Court has recently confirmed that a prisoner's failure "to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017). Thus, a claim can be "debatable" even if "every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Cockrell*, 537 U.S. at 337.

Additionally, although a matter may be well-settled adversely to a movant in the relevant district court or court of appeals, the fact that other coequal or higher courts have reached conflicting views suffices to require the certification of an appeal. *See e.g.*, *Lynce v. Mathis*, 519 U.S. 433, 436 (1997).

MR. SMITH HAS MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT (DUE PROCESS) BECAUSE HE WAS ERRONEOUSLY SENTENCED ABOVE THE STATUTORY MAXIMUM

The district court denied Mr. Smith's § 2255 motion based, in part, on a determination that his prior Florida convictions for felony battery and robbery with a firearm are "violent felonies" under the ACCA's elements clause.[3] In so holding, the district court cited to this Court's en banc decision in *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (*Vail-Bailon II*), which held that felony battery categorically qualifies as a "crime of violence" under the sentencing guidelines' elements clause.[4] However, as set forth below, reasonable

[3] Mr. Smith's ACCA enhancement was also based on a Florida conviction for sale/delivery of cocaine, which he does not challenge. PSR ¶ 31.

[4] This Court has noted that USSG § 2L1.2's elements clause "is the same as the elements clauses of the ACCA and the career-offender guideline." *United States v. Vail-Bailon*, 838 F.3d 1091, 1094 (11th Cir. 2016) (*Vail-Bailon I*). In determining whether a prior conviction is a "violent felony" under the ACCA's elements clause, courts may rely on cases interpreting the elements clause under the guidelines and vice versa. *Id.*; *United States v. Chitwood*, 676 F.3d 971, 975

jurists could at least debate whether those convictions qualify as ACCA predicate offenses in light of *Johnson II*. Without the ACCA enhancement, Mr. Smith's conviction for possession of a firearm and ammunition by a convicted felon is a Class C felony with a statutory maximum of 10 years' imprisonment and 3 years' supervised release. *See* 18 U.S.C. §§ 924(a), 3583(b)(2), 3559(a)(3).

i. Reasonable jurists can debate whether Florida felony battery qualifies as a "violent felony" under the ACCA's elements clause.

Mr. Smith acknowledges that in *Vail-Bailon II*, this Court found that Florida felony battery categorically requires the use of "physical force" under USSG § 2L1.2's elements clause, reversing the panel decision in *United States v. Vail-Bailon*, 838 F.3d 1091, 1094 (11th Cir. 2016) (*Vail-Bailon I*), which had held felony battery committed through a "touch" does not meet the elements clause. However, given that five members of this Court dissented from the holding in *Vail-Bailon II*, reasonable jurists clearly can, and do, debate whether a Florida felony battery conviction is a "violent felony" under the elements clause.

---

n.2 (11th Cir. 2012). *Vail-Bailon II*'s holding was applied to the ACCA's elements clause in *United States v. Green*, 873 F.3d 846 (11th Cir. 2017).

And Mr. Smith submits that it is not a "violent felony." In *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*), the Supreme Court held that "physical force" in the elements clause means "*violent* force—that is, force capable of causing physical pain or injury to another person" and that the mere touch in Florida's simple battery statute does not satisfy that requisite "substantial degree of force." Notably, Florida's felony battery statute can be violated through the same touch at issue in *Johnson I* (with the only additional element being an unintentional outcome of great bodily harm) and thus categorically does not satisfy the elements clause.

A person commits felony battery under Fla. Stat. § 784.041(1) if he: (1) actually and intentionally touches or strikes another person against the will of the other; and (2) causes great bodily harm, permanent disability, or permanent disfigurement. Fla. Stat. § 784.041(1) (2007). Felony battery was created to fill a gap between simple battery under Fla. Stat. § 784.03(1)(a) and aggravated battery under Fla. Stat. § 784.045(1)(a). *Jefferies v. State*, 849 So. 2d 401, 404 (Fla. 2d DCA 2003). The touching elements in simple battery, felony battery, and aggravated battery are identical—"actually and intentionally touch[ing] . . . another person against the[ir] will . . . ." Fla. Stat. §§ 784.03, 784.041; 784.045. They differ only in their second elements. Simple battery does not have another

element. Both felony battery and aggravated battery require that a victim suffer "great bodily harm, permanent disability, or permanent disfigurement." *T.S. v. State*, 965 So. 2d 1288, 1290 (Fla. 2d DCA 2007) ("The definition of felony battery recites the first prong of the battery definition and adds the element of causing great bodily harm, permanent disability, or permanent disfigurement."). The difference between the two is that aggravated battery requires that the defendant intend the injury; felony battery does not.

Thus, the issue is whether a "touch" that unintentionally results in great bodily harm categorically requires "physical force" as defined in *Johnson I*.[5] Mr. Smith submits that it does not. Both the majority and dissent in *Vail-Bailon II* agreed that under *Johnson I*, a mere touch, without more, cannot satisfy the elements clause. 868 F.3d at 1304, 1308. The disagreement lies in whether the consequence that flows from the touch in felony battery affects the elements

[5] Although the district court did not rule on the issue of whether the felony battery statute is divisible, Mr. Smith maintains that the felony battery statute is indivisible, and thus, under the least culpable act doctrine, his conviction must be presumed to have been committed through a "touch." *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016); *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013). However, even if the statute is indivisible, no *Shepard* documents clarify whether he necessarily pled to committing the offense through a "touch" or "strike," and thus, this Court must still presume he committed the offense through a "touch."

clause analysis—that is, whether a touch is a touch, regardless of the outcome.

The *Vail-Bailon II* majority held that the resulting injury necessarily fulfilled *Johnson I*'s definition of "physical force" to mean force "capable of" causing physical injury. *Id.* at 1297. It rejected the argument that its holding would swallow *Johnson I*'s holding that the touch required for a simple battery is not "capable of" causing physical injury, distinguishing between "a statute requiring nothing more than a slight touch" and "a statute requiring a touch that is *forceful enough* to cause great bodily harm." *Id.* at 1301. Thus, the majority did not believe that a touch was a touch—instead, the resulting harm necessarily meant that the touch in felony battery was more "forceful" than the touch required for a simple battery. *Id.*

However, *Vail-Bailon II*'s primary dissent, which was joined by four other judges of this Court, persuasively illustrates why the resulting harm does not make the touch more "forceful" than the touch required for simple battery. *Id.* at 1308–14 (Wilson, J., dissenting). As explained by the primary dissent, the majority's isolated focus on the "capable of" phrase "announces that just one sentence in [*Johnson I*] matters."[6] *Id.* at 1309. Thus, the majority's test

[6] Judge Rosenbaum also filed a persuasive dissent, which was, in large part, joined by Judge Jordan and Judge Martin. *Id.* at 1314–23 (Rosenbaum, J.,

incorrectly "turns not on the amount of force an act involves but rather on the possible consequences of the act." *Id.* Under the majority's approach, degree of force is [made] irrelevant." *Id.* A more accurate and simpler reading of *Johnson I* would instead focus on the degree of contact used—thus, limited contact like taps, touches, and pinches should not qualify as force, while kicks, strikes, punches and similar degrees of contact should qualify. *Id.* at 1310.

Moreover, the "capable of" statement, when read in context with the rest of the *Johnson I* force analysis, was clearly meant to underscore that "physical force" means a substantial *degree* of force—not to "declare that all contact that is capable of causing pain or injury is 'physical force.'" *Id.* at 1313. The capability sentence is found in the middle of *Johnson I*'s force analysis, "and the language in the sentence derives meaning from that analysis." *Id.* The primary dissent provides a more natural, contextualized reading of that section of *Johnson I* by usefully adding its own bracketed text:

> "[T]he phrase 'physical force' means *violent* force [read *a substantial degree of force*]—that is, force [read *a degree of power*]

---

dissenting). Judge Rosenbaum's dissent includes an additional focus on the meaning of "use" in the elements clause under cases like *Leocal v. Ashcroft*, 543 U.S. 1 (2004). *Id.* at 1316–18. As noted by Judge Rosenbaum, it is not enough that the felony battery touch be committed intentionally, but that the causation-of-harm prong also has a mens rea element. *Id.*

capable of causing physical pain or injury to another person."

Id. (emphases in original).

Any other reading of that section would essentially write out the emphasis on violence found throughout the *Johnson I* opinion. *Id.* Contrary to the majority's view, an interpretation that physical force includes any offense "capable of" causing physical injury—without any additional context—would, indeed, swallow its own holding. Under that definition, one would be hard-pressed to come up with *any* offense that would not hold at least a possibility of causing injury or pain and therefore qualify as a "violent felony." *Id.* at 1314 ("Many forms of non-violent conduct have the capacity to cause pain or injury; pinching and tapping, for example, both can at the very least result in a person suffering pain."). And under that definition, "a mere touching *would* constitute 'physical force'" because the consequences that flow from acts do not necessarily change the character of the acts. *Id.* ("Any unwanted touching could cause pain or injury. A tap on a pedestrian's shoulder could distract the pedestrian causing her to collide with another person and suffer injury. A student's spitball could hit its victim in the eye causing injury."). As the primary dissent aptly put it, "[a] spitball that happens to cause great bodily harm is still just a spitball. A mere touching that happens to cause great bodily harm is still just a mere touching."

Id. at 1312.[7]

Thus, it makes little sense that the Supreme Court would set out to create a test that would dictate the opposite conclusion of its own holding. *Id.* Given that the Supreme Court "took the time to pen a thorough discussion of 'physical force' . . . [w]e should take that entire discussion into account. When we do, it is apparent that the [capability] sentence does not discard degree of force for a capacity test." *Id.*

Therefore, under the correct degree-of-force elements clause analysis, the issue here is straightforward—"felony battery can be committed by a mere touching, and [*Johnson I*] told us that a mere touching . . . is not a crime of

[7] The primary dissent also rejected the en banc majority's view that the hypotheticals involving touches that resulted in great bodily harm were far-fetched—one, because the hypotheticals were realistic scenarios, and two, because the text of the felony battery statute and Florida courts explicitly defined the act as a touch. *Id.* at n.4 (Wilson, J., dissenting).

There is currently a circuit split on whether the plain language of a statute, without a supporting case, is sufficient to establish the least culpable act under a statute. *Compare United States v. Tittles*, 852 F.3d 1257, 1274–75 & n.23 (10th Cir. 2017), *Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017), *Jean-Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009), *United States v. Lara*, 590 F. App'x 574, 584 (6th Cir. 2014), *and United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007), *with United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc).

violence."[8] *Id.* at 1314. At a minimum, *Vail-Bailon I* and *II* illustrate the difficulty of this issue, which reasonable jurists in this Court can and do debate.

ii. Reasonable jurists can debate whether Florida robbery with a firearm qualifies as a "violent felony" under the ACCA's elements clause.

Mr. Smith acknowledges that in *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016), this Court held that, based on prior panel precedent, specifically its decisions in *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006), and *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), a Florida conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause. Based on *Lockley*, the Court held that the least culpable means of committing

[8] The primary dissent aptly illustrated its position with the following example:

> If, while walking down the street, you tap a jogger on the shoulder and the tap startles him, causing him to trip, hit his head, and suffer a concussion, have you committed a violent act? Most would say no. But if you punch the jogger and the punch causes him to fall, hit his head, and suffer a concussion, you have undoubtedly committed a violent act. The difference between a non-violent and violent act, then, is the degree of force used. Both a tap and a punch are capable of causing great bodily harm, but a tap involves a limited degree of force while a punch involves a substantial degree of force. Or, in the words of the Sentencing Guidelines, a punch involves "physical force."

Id. at 1308.

robbery under Florida law was by putting a victim in fear, and that version of the robbery offense categorically qualified under the elements clause. *Id.* However, reasonable jurists can at least debate the issue of whether Florida robbery with a firearm meets the elements clause, given that the Ninth Circuit held, post-*Fritts*, that a Florida conviction for robbery, regardless of whether it is armed or unarmed, fails to qualify as a "violent felony" under the elements clause. *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017). Mr. Smith respectfully submits that the *Geozos* Court correctly decided this issue.

Under Florida's robbery statute,[9] a robbery occurs where a taking is accomplished using enough force to overcome a victim's resistance. *See*

[9] The Florida robbery statute in effect at the time of Mr. Smith's conviction provided in pertinent part:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> 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 . . . .

Fla. Stat. § 812.13 (1992).

Robinson v. State, 692 So. 2d 883 (Fla. 1997). Thus, if a victim's resistance is minimal, the force needed to overcome that resistance is similarly minimal. Indeed, a review of Florida case law clarifies that a defendant may convicted of robbery even if he uses only a *de minimis* amount of force. A conviction may be imposed if a defendant: (1) bumps someone from behind;[10] (2) engages in a tug-of-war over a purse;[11] (3) pushes someone;[12] (4) shakes someone;[13] (5) struggles

[10] *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001).

[11] *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011).

[12] *Rumph v. State*, 544 So. 2d 1150, 1151 (Fla. 5th DCA 1989).

[13] *Montsdoca v. State*, 93 So. 157, 159–160 (Fla. 1922).

to escape someone's grasp;[14] (6) peels back someone's fingers;[15] or (7) pulls a scab off someone's finger.[16] Indeed, under Florida law, a robbery conviction may be upheld based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975,

---

[14] *Colby v. State*, 46 Fla. 112, 114 (Fla. 1903). In *Colby*, the defendant was caught during an attempted pickpocketing. *Id.* The victim grabbed the defendant's arm, and the defendant struggled to escape. *Id.* Under the robbery statute in effect at the time, the Florida Supreme Court held it was not a robbery because the force was used to escape, rather than secure the money. *Id.*

However, the Florida Supreme Court has made clear that this conduct would have qualified as a robbery under the current robbery statute, which is at issue in this case. *See Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) ("Although the crime in *Colby* was held to be larceny, it would be robbery under the current version of the robbery statute because the perpetrator used force to escape the victim's grasp."). Indeed, Florida courts have made clear that if a pickpocket "jostles the owner, or if the owner, catching the pickpocket in the act, struggles to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting W. LaFave, A. Scott, Jr., *Criminal Law* § 8.11(d), at 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000).

[15] *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th DCA 2000). The government incorrectly attempts to distinguish *Sanders* from *Goldsmith v. State*, 573 So. 2d 445 (Fla. 2d DCA 1991), stating that the *Goldsmith* court "found that merely touch[ing] or brush[ing] a victim's hand" was insufficient to constitute a robbery. Br. in Opp. at 15 n.7, *Durham*, No. 16-7756 (Apr. 26, 2017). However, in *Goldsmith*, the defendant snatched money from an undercover officer's hand, *without* touching the officer, and the court said that was insufficient to constitute robbery. *Goldsmith*, 573 So. 2d at 445. The *Sanders* court was not citing *Goldsmith* to contrast a mere touch and a peeling of one's fingers.

[16] *Johnson v. State*, 612 So. 2d 689, 690–91 (Fla. 1st DCA 1993).

976 (Fla. 4th DCA 1986).[17]

The Ninth Circuit recognized Florida robbery's minimal force requirement in *Geozos*, relying on Florida caselaw which clarified that an individual may violate Florida's robbery statute without using violent force, such as engaging "in a non-violent tug-of-war" over a purse. 870 F.3d at 900 (citing *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011)). And while both this Court and the Ninth Circuit have recognized the Florida robbery statute requires an individual use enough force to overcome a victim's resistance, the Ninth Circuit, in coming to a decision that it recognized was at "odds" with *Fritts*, stated that it believed this Court "overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." *Id.* at 901.

Moreover, other Circuits have debated this point with regard to other state robbery statutes, as Florida is not alone in its use of a resistance-based standard. Indeed, at least fifteen states use some variation of this standard in the text of

[17] In *Santiago*, the defendant reached into a car and pulled two gold necklaces from around the victim's neck, causing a few scratch marks and some redness around her neck. *Santiago*, 497 So. 2d at 976.

their statutes,[18] and several others have adopted it through case law.[19] Since the ACCA residual clause was struck down in *Johnson II*, several Circuits have had to reevaluate whether these robbery statutes and others still qualify as "violent felon[ies]" under the ACCA's elements clause.[20] These Courts have reached differing conclusions, and as a result, significant tension has arisen regarding the degree of force a state robbery statute must require to categorically satisfy the

[18] *See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz .Rev. Stat. §§ 13-1901, 1902; Conn. Gen. Stat. § 53a-133(1); Del. Code Ann. tit. 11, § 831(a)(1); Haw. Rev. Stat. § 708-841(1)(a); Me. Rev. Stat. tit. 17-A, § 651(1)(B)(1); Minn. Stat. § 609.24; Mo. Rev. Stat. §§ 570.010(13), 570.025(1); Nev. Stat. § 200.380(1)(b); N.Y. Penal Law § 160.00(1); Okla. Stat. tit. 21, §§ 791, 792, 793; Or. Rev. Stat. § 164.395(1)(a); Wash. Rev. Code § 9A.56.190; Wis. Stat. § 943.32(1)(a).

[19] *See, e.g.*, *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W.2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1988); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *Winn v. Commonwealth*, 462 S.E.2d 911, 913 (Va. 1995).

[20] *See United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016); *United States v. Garner*, 823 F.3d 793 (4th Cir. 2016); *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016); *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016); *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017); *United States v. Doctor*, 843 F.3d 306 (4th Cir. 2016); *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016); *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015).

"physical force" prong of the element clause. The Fourth Circuit's decisions in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), and *United States v. Winston*, 850 F.3d 677, 683–86 (4th Cir. 2017), further support Mr. Smith's contention that reasonable jurists can debate this issue.

In *Winston*, the Fourth Circuit held that a Virginia conviction for common law robbery committed by "violence" does not categorically require the use of "physical force." 850 F.3d at 683–86. Such a robbery is committed where a defendant employs "anything which calls out resistance." *Id.* at 685 (quoting *Maxwell v. Commonwealth*, 165 Va. 860 (1936)). Indeed, a conviction may be imposed even if a defendant does not "actual[ly] harm" the victim. *Id.* (quoting *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487 (Va. Ct. App. Dec. 12, 2000)). Rejecting the government's argument that overcoming resistance requires violent "physical force," the Fourth Circuit held that the *de minimis* force required under Virginia law does not rise to the level of violent "physical force." *Id*.

In *Gardner*, the Fourth Circuit held that the offense of common law robbery 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 803–04. A North Carolina common law robbery may be

committed by force so long as the force is "is sufficient to compel a victim to part with his property." *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). "This definition," the Fourth Circuit stated, "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 then 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)). Based on these decisions, the Fourth Circuit concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require "physical force," and therefore the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*

Like the Virginia offense described in *Winston* and the North Carolina offense addressed in *Gardner*, a Florida robbery may be committed by force sufficient to overcome a victim's resistance. As the Fourth Circuit recognized, this definition implicitly suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery. And, as explained above, Florida case law confirms this point.

Given the circuit split between this Court and the Ninth Circuit, and the

tension among the other circuits regarding similar statutes, reasonable jurists can at least debate whether the *de minimis* force required for a robbery conviction under Florida law satisfies the elements clause.

CONCLUSION

Based on the foregoing, Mr. Smith has shown that reasonable jurists could debate whether he has made a substantial showing of the denial of his constitutional rights. *See* 28 U.S.C. 2253(c)(2). Mr. Smith respectfully submits that a COA is warranted and that his appeal should be permitted to proceed. Therefore, Mr. Smith respectfully requests that this Court issue a COA on the following issue: Whether Mr. Smith was unconstitutionally sentenced above the statutory maximum in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). Such a COA would comply with the requirement that the COA specify the issue that satisfies the requirements of the § 2253 standard.

Respectfully submitted by,

Donna L. Elm, Federal Defender

/s/ Danli Song
Danli Song
Research and Writing Attorney
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
T: (407) 648-6338/F: (407) 648-6765
E-Mail: Danli_Song@fd.org

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I certify that this application complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 11th Cir. R. 22-2, because this application contains 4,641 words according to Microsoft Word's word count, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

/s/ Danli Song
Danli Song
Research and Writing Attorney

CERTIFICATE OF SERVICE

I certify that on January 26, 2018, the foregoing was electronically filed with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to the United States Attorney's Office.

/s/ Danli Song
Danli Song
Research and Writing Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15686-G

DETRICK C. SMITH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Detrick Smith is a federal prisoner who was convicted, after a 2010 bench trial, of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). He filed the instant, counseled 28 U.S.C. § 2255 motion to vacate. He argues that his sentence enhancement under the Armed Career Criminal Act ("ACCA") is invalid because his Florida battery conviction, under Fla. Stat. § 784.041, does not qualify as a violent felony, pursuant to *Johnson v. United States,* 135 S. Ct. 2551 (2015).

The district court entered an opinion and order that denied Smith's § 2255 motion and a certificate of appealability ("COA"), and denied him *in forma pauperis* ("IFP") status on appeal. The district court noted that, in *United States v. Green,* 873 F.3d 846, 869 (11th Cir. 2017), this Court held that Fla. Stat. § 784.041 qualifies as a violent felony under the ACCA's elements clause. Smith now seeks a COA and leave to proceed IFP from this Court.

To obtain a COA, a petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas petition on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Smith has not shown that reasonable jurists would debate the district court's conclusion that his conviction under Fla. Stat. § 784.041 qualifies as a violent felony under the ACCA's elements clause post-*Johnson*.[1] In *United States v. Vail-Bailon,* this Court held that Fla. Stat. § 784.041 requires the use of force capable of causing physical pain or injury. *United States v. Vail-Bailon,* 868 F.3d 1293, 1303 (11th Cir. 2017) (*en banc*). Although *Vail-Bailon* concerned whether Florida felony battery qualified as a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii), the decision utilized the definition of "physical force" and analysis from *United States v. Johnson,* 559 U.S. 133, 140 (2010) ("*Curtis Johnson*"), which was an ACCA case. In addition, this Court extended *Vail-Bailon,* recently holding that Fla. Stat. § 784.041 qualifies as a crime of violence under the ACCA's elements clause. *See Green,* 873 F.3d at 869.

Because Smith has not shown that jurists of reason would debate the district court's denial of his § 2255 motion, his motion for a COA is DENIED, and his motion for leave to proceed IFP is DENIED as MOOT.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

[1] As defined by Fla. Stat. § 784.041, a person commits felony battery if he: (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.

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

DETRICK SMITH,

Petitioner,

v.

Case No: 2:15-cv-532-FtM-29CM
Case No. 2:09-CR-59-FTM-29CM

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

This matter comes before the Court on petitioner's Motion Under 28 U.S.C. Section 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Cv. Doc. #1; Cr. Doc. #140)[1]. The government filed a Response in Opposition to Motion (Cv. Doc. #8), and petitioner filed a Reply (Cv. Doc. #11). The Court finds that oral arguments are not required, and that an evidentiary hearing is not warranted, Hernandez v. United States, 778 F.3d 1230, 1232-33 (11th Cir. 2015).

---

[1]The Court will make references to the dockets in the instant action and in the related criminal case throughout this opinion. The Court will refer to the docket of the civil habeas case as "Cv. Doc.", and will refer to the docket of the underlying criminal case as "Cr. Doc."

I.

On August 5, 2009, a federal grand jury in Fort Myers, Florida returned a one-count Indictment (Cr. Doc. #1) charging petitioner with possession of firearms (a 9mm Luger and a .38 caliber Taurus) and ammunition after having been convicted of a felony, all in violation of 18 U.S.C. § 922(g)(1), § 924(e), and § 2. The Indictment identified several prior felony convictions, including robbery with a firearm, sale or delivery of cocaine, two separate convictions for possession of cocaine, felony battery, and possession of a controlled substance.

Counsel filed a Motion to Suppress Evidence (Cr. Doc. #23) on petitioner's behalf, which was denied. (Cr. Doc. #48.) Petitioner signed a Waiver of Right to Trial by Jury and Request for Specific Findings of Fact (Cr. Doc. #54), which was approved by the Court, and the bench trial was held on February 3, 2010. (Cr. Docs. #58, #59.) By written Opinion and Order, the Court found petitioner not guilty as to the Skyy Industries 9 mm Luger, and otherwise guilty of count One as to the Taurus .38 caliber revolver, serial number JB61158, the three rounds of Master .38 caliber ammunition which were loaded in the Taurus revolver, and the seven rounds of Winchester-Western 9 mm Luger ammunition loaded in the Skyy Industries Luger. (Cr. Doc. #61.)

On July 12, 2010, the Court heard arguments on defendant's objection to his classification as an armed career criminal. (Cr. Doc. #68.) In an Opinion and Order (Cr. Doc. #74), the Court sustained the objection, finding that the felony battery conviction was not a qualifying predicate conviction. On July 20, 2010, the Court sentenced petitioner to a term of imprisonment of 108 months, to be served partially concurrent with the term imposed in Lee County Circuit Court, Case No. 09-CF-15184, beginning from the date of the entry of this judgment, followed by a term of supervised release. (Cr. Doc. #76.) Judgment (Cr. Doc. #77) was filed on July 21, 2010.

Petitioner appealed the conviction, and the government appealed the sentence. The Eleventh Circuit affirmed the conviction, but vacated and remanded the case for resentencing under the Armed Career Criminal Act. The Eleventh Circuit found that felony battery *did* qualify as a violent felony because the statute requires purposeful, violent, and aggressive conduct similar to burglary, arson, extortion, or crimes involving the use of explosives. United States v. Smith, 448 F. App'x 936, 940 (11th Cir. 2011). A writ of certiorari was denied. Smith v. United States, 568 U.S. 1192 (2013).

On April 1, 2013, petitioner was resentenced to a term of 180 months of imprisonment, with the Armed Career Criminal Act

enhancement. The Judgment Upon Remand (Cr. Doc. #126) was filed on April 2, 2013. Petitioner appealed this second sentence. The Eleventh Circuit noted that the ACCA designation had become the law of the case, and affirmed the sentence. United States v. Smith, 559 F. App'x 884, 889 (11th Cir. 2014). The Petition for writ of certiorari was denied, Smith v. United States, 135 S. Ct. 147 (2014), and the request for rehearing was denied, Smith v. United States, 135 S. Ct. 1490 (2015).

On June 26, 2015, the United States Supreme Court decided Johnson v. United States, 135 S. Ct. 2551 (2015) (Johnson II), which was made retroactively applicable on collateral review by Welch v. United States, 136 S. Ct. 1257 (2016). The undersigned reappointed the Federal Public Defender to represent petitioner for any post-conviction relief, if appropriate. (Cr. Doc. #138.) The pending motion under 28 U.S.C. § 2255 was timely filed by counsel.

On October 4, 2016, petitioner filed a Notice of Supplemental Authority and Request for Oral Argument (Cv. Doc. #13) in light of the ruling in United States v. Vail-Bailon, 838 F.3d 1091 (11th Cir. 2016) determining that Vail-Bailon's prior conviction for felony battery did *not* qualify as a crime of violence, and vacating Vail-Bailon's sentence for further proceedings. On November 21,

2016, the Eleventh Circuit granted the government's request for a rehearing, and vacated the prior opinion pending rehearing.

On rehearing en banc in Vail-Bailon, the Eleventh Circuit determined that a felony battery conviction does qualify as a crime of violence under the elements clause of the Armed Career Criminal Act. As a result, Vail-Bailon's sentence was affirmed and reinstated. United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. Aug. 25, 2017).

II.

Petitioner raises only one issue: Petitioner asserts that he is no longer subject to an Armed Career Criminal Act sentence enhancement because his prior felony battery conviction no longer qualifies as a "violent felony" under the applicable statute. The government responds that the prior conviction for felony battery still qualifies as a crime of violence under the elements clause of the statute, and therefore relief should be denied.

A defendant charged with being a felon in possession of a firearm or ammunition faces a statutory maximum of ten years imprisonment. 18 U.S.C. §§ 922(g), 924(a)(2). Under the ACCA, however, a defendant who has three previous felony convictions[1] for a violent felony or a serious drug offense, or both, is subject

1 The other two qualifying felonies are not at issue in the Motion.

to an enhanced sentence of at least fifteen years imprisonment. 18 U.S.C. 924(e)(1). Under the ACCA,

> 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; or
>
> **(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. . . .

18 U.S.C. § 924(e)(2)(B). Subsection (i) is referred to as the "elements clause"; the first clause of subsection (ii) is referred to as the "enumerated offenses clause," which the second clause is known as the "residual clause". Beeman v. United States, 871 F.3d 1215, 1221 (11th Cir. 2017). In Johnson II, the United States Supreme Court held that the "residual clause", 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague and a violation of the Due Process Clause of the United States Constitution. Johnson II was made retroactive to cases on collateral review. Welch v. United States, 136 S.Ct. 1257, 1268 (2016).

Felony battery is not an enumerated offense, and the residual clause is no longer applicable. Petitioner asserts that felony battery is also not within the elements clause, while the government argues to the contrary. The Eleventh Circuit has now

held that a felony battery conviction under Florida law is a crime of violence within the meaning of the ACCA. Vail-Bailon, 868 F.3d at 1299-1302; United States v. Green, No. 14-12830, 2017 WL 4321551, at *17 (11th Cir. Sept. 29, 2017). Therefore, this argument is foreclosed and relief must be denied.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Petitioner's Motion Under 28 U.S.C. Section 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Cv. Doc. #1; Cr. Doc. #140) is **DENIED**.

2. The Clerk of the Court shall enter judgment accordingly and close the civil file. The Clerk is further directed to place a copy of the civil Judgment in the criminal file.

IT IS FURTHER ORDERED:

A CERTIFICATE OF APPEALABILITY (COA) AND LEAVE TO APPEAL *IN FORMA PAUPERIS* ARE DENIED. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1); Harbison v. Bell, 556 U.S. 180, 183 (2009). "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional

claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004), or that "the issues presented were adequate to deserve encouragement to proceed further," Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)(citations omitted). Petitioner has not made the requisite showing in these circumstances.

Finally, because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

DONE and ORDERED at Fort Myers, Florida, this 25th day of October, 2017.

JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

Copies:
Petitioner
AUSA