NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

REINALDO SANTOS,

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

MICHAEL CARUSO
Federal Public Defender
Brenda G. Bryn
Assistant Federal Public Defender
Counsel of Record
One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Is the "touches or strikes" language in the Florida battery statutes divisible under *Descamps v. United States*, 133 S.Ct. 2276 (2013) and *Mathis v. United States*, 136 S.Ct. 2243 (2015), permitting application of the "modified categorical approach," or rather, is "touches or strikes" a single indivisible element, requiring the categorical approach, and a finding under *Curtis Johnson v. United States*, 559 U.S. 133 (2010) that a Florida battery on a law enforcement officer conviction is categorically overbroad vis-a-vis the ACCA's elements clause?

2. If a statute is divisible under *Descamps* and *Mathis*, does the "modified categorical approach" permit a district court in an ACCA case to consider undisputed factual allegations in the federal Pre-Sentence Investigation Report to determine which statutory alternative was the basis of the conviction, or – for Sixth Amendment reasons – is the Court's consideration under the "modified categorical approach" restricted to conclusive documents from the state criminal case?

3. Is an offense with a reckless *mens rea* – such as Florida aggravated assault on an officer – a "violent felony" within the ACCA's elements clause, which requires that the offense "have as an element the use . . . of physical force against the person of another"?

4. Did the Eleventh Circuit err under *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003) and *Buck v. Davis*, 137 S.Ct. 759, 773-774 (2017) in denying Petitioner a certificate of appealability based upon adverse circuit precedent, when all of the above issues are nonetheless debatable among reasonable jurists?

INTERESTED PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Reinaldo Santos respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's order denying a certificate of appealability to Petitioner to appeal the district court's denial of his motion to vacate his enhanced ACCA sentence pursuant to 28 U.S.C. § 2255, *Reinaldo Santos v. United States*, Slip op. (11th Cir. Nov. 15, 2018) (No. 17-14291), is included as Appendix A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals denying Petitioner a certificate of appealability to appeal the district court's denial of his motion to vacate pursuant to 28 U.S.C. § 2255, was entered on November 15, 2018. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

(e)(2) As used in this subsection – . . .

> **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, ... , that –
>
> > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another.

28 U.S.C. § 2253. Appeal

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceedings in which the detention complained of arises out of process issued by 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.

Fla. Stat. § 784.03. Battery

(1) A person commits battery if he:

> (a) Actually and intentionally touches or strikes another person against the will of the other; or
>
> (b) Intentionally causes bodily harm to an individual.
>
> (2) Whoever commits battery shall be guilty of a misdemeanor of the first degree . . .

Fla. Stat. § 784.011. Assault

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

(2) Whoever commits an assault shall be guilty of a misdemeanor of the second degree . . .

Fla. Stat. § 785.021. Aggravated Assault

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

> (a) With a deadly weapon without intent to kill; or
>
> (b) With an intent to commit a felony.

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree . . .

Fla. Stat. § 784.07 Assault or battery of law enforcement officers

(2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer . . ., while the officer . . . is engaged in the lawful performance of his duties, the offense for which the person is charged shall be reclassified as follows:

> (a) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.

(b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

(c) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.

STATEMENT OF THE CASE

In November of 1993, Petitioner was arrested and charged with being a previously convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). In December of 1993, the government superseded the indictment, adding a second count for possession of ammunition. On October 18, 1994, Petitioner was found guilty of those offenses by a jury.

Prior to trial, the government notified the Court of its intent to rely upon the Armed Career Criminal Act (ACCA) enhancement in 18 U.S.C. § 924(e) at sentencing, based upon Petitioner's 1990 Florida conviction for aggravated assault on a police officer (Fla. Stat. §§ 784.07(2)(c) & 784.021); his 1987 conviction for aggravated battery (Fla. Stat. § 784.045(1)(a)) and false imprisonment (Fla. Stat. § 787.02); and a separate 1987 conviction for battery on a law enforcement officer (BOLEO) (Fla. Stat. §§ 784.07). The government attached certified copies of the judgments of conviction to its response to the Standing Discovery Order, but introduced no other documents from the state cases into the federal record.

At the December 22, 1994 sentencing, Petitioner faced an enhanced Guideline range of 262-327 months imprisonment as an Armed Career Criminal. The government, however, moved for an upward departure from that range based upon Petitioner's criminal history. The court granted that request, and sentenced

Petitioner to concurrent terms of 360 months imprisonment, followed by 5 years supervised release. Notably, without the ACCA enhancement, at an adjusted offense level of 28, and Criminal History Category of VI, Petitioner's then-mandatory Guideline sentence would have been the statutory maximum term of 120 months imprisonment.

Petitioner did not challenge his ACCA designation on appeal, but did challenge the district court's upward departure from the ACCA range. The Eleventh Circuit, however, found the departure within the district court's discretion, and affirmed. *United States v. Santos*, 93 F.3d 761 (11th Cir. 1996). Petitioner sought certiorari, but it was denied. Thereafter, in 2001, and then again in 2005, Petitioner filed motions to vacate his sentence pursuant to 28 U.S.C. § 2255. Both motions, likewise, were denied.

On May 17, 2016, which was within a year of the Supreme Court's decision in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (June 26, 2015) ("*Samuel Johnson*") declaring the ACCA's residual clause unconstitutionally vague and therefore void, Petitioner sought authorization from the Eleventh Circuit to file a second or successor ("SOS") § 2255 motion challenging the legality of his ACCA sentence on grounds, *inter alia*, that neither his Florida BOLEO conviction, nor his aggravated assault on an officer conviction categorically qualified as "violent felonies" within the ACCA's elements clause.

On June 9, 2016, the Eleventh Circuit found Petitioner had made the *prima facie* showing required by 28 U.S.C. § 2255(h), and authorized him to file a SOS

motion. *In re Reinaldo Santos*, Case No. 16-12612-J, Order at 4-5 (11th Cir. June 9, 2016). Accordingly, that same day petitioner filed a successor motion to vacate his sentence pursuant to 28 U.S.C. §2255. He argued that in light of *Samuel Johnson* and the elimination of the ACCA's residual clause, it was now clear that he had been erroneously sentenced as an Armed Career Criminal. While he did not challenge his aggravated battery conviction as a qualifying "violent felony," he argued that his BOLEO conviction was not categorically a "violent felony" since the Florida standard battery instruction confirmed that the "touches or strikes" element of the Florida battery statute was indivisible, and under *Curtis Johnson v. United States*, 559 U.S. 133 ("*Curtis Johnson*"), the offense was categorically overbroad since it could be committed by a mere touching. In addition, he argued, his aggravated assault on a police officer conviction was also overbroad since Florida caselaw confirmed that the intent element in assault could be satisfied by no more than culpable negligence, *see, e.g., LaValley v. State*, 633 So.2d 1126 (5th DCA 1994); *Kelley v. State*, 552 So.2d 206 (4th DCA 1989); *Green v. State*, 315 So.2d 499 (4th DCA 1975); *DuPree v. State*, 310 So.2d 396 (2d DCA 1975), which was equivalent to recklessness. And, he argued, recklessness was not a sufficient *mens rea* for the elements clause.

The government responded that Petitioner remained an Armed Career Criminal because both of the above convictions, as well as his aggravated battery conviction, remained countable "violent felonies" within the elements clause. In *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1338 (11th Cir.), (2013), *abrogated on other grounds by Samuel Johnson*, 135 S.Ct. 2551, 2557-58 (2015), the

government noted, the Eleventh Circuit had held that a Florida aggravated assault conviction was categorically a "violent felony" within the elements clause, because "by its definitional terms, the offense includes an assault, which is 'an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so," and "[t]herefore, a conviction under section 784.021 will always include 'as an element the . . . threatened use of physical force against the person of another."

While the government acknowledged that under *Curtis Johnson*, a Florida BOLEO conviction did *not* categorically qualify as a violent felony, it argued that Petitioner's conviction nonetheless qualified under the "modified categorical approach." That approach was permissible with regard to a BOLEO predicate, the government claimed, since the Eleventh Circuit had found the underlying battery statute to be divisible in *United States v. Braun*, 801 F.3d 1301 (11th Cir. 2015). And, the government pointed out, in *Curtis Johnson*, this Court had held that battery could be proven "in one of three ways," and "explicitly referred to the three prongs of the battery statute as 'elements.'" 559 U.S. at 136-37. As such, the government argued, those prongs were not mere "means" of committing the crime under *Mathis v. United States*, 136 S.Ct. 2243 (2016).

Finally, the government claimed – citing *In re Hires*, 825 F.3d 1297, 1302 (11th Cir. 2016); *Rozier v. United States*, 701 F.3d 681, 686 (11th Cir. 2012); *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006); and *United States v. Bennett*, 472 F.3d 825,833-34 (11th Cir. 2006) – when applying the modified categorical

approach, the court "may rely on undisputed facts in the PSI, which are deemed admitted by a defendant." Here, the government pointed out, Petitioner had not objected to ¶ 37 of his PSI, which alleged that, according to the probable cause affidavit in the 1987 BOLEO offense, a corrections officer had entered a cell to break up an altercation between Santos and another inmate, and after the other inmate was removed from the cell and the officer was exiting, "Santos struck the officer in the face using a closed fist," and then "kicked the officer in the groin area." Such "facts," the government argued, "are quite clear that Santos was convicted of striking – not merely touching – the officer." And therefore, pursuant to the modified categorical approach, his BOLEO conviction qualified as the third "violent felony" which continued to support his ACCA enhancement even post-*Samuel Johnson*.

Petitioner replied that, as to his BOLEO conviction, *Mathis* and Florida's standard BOLEO instruction, Crim. Jury Instr. No. 8.11, confirmed that the "touching or striking" language in the battery statute simply set forth different means of satisfying a single, indivisible element. He noted that the jury was not required to find either touching or striking beyond a reasonable doubt, but simply "touching or striking" as a single element beyond a reasonable doubt. As such, Petitioner explained, the modified categorical approach was inapplicable, and the BOLEO statute was categorically overbroad. However, he argued, even if the government were correct on divisibility, it was still wrong in suggesting that it was "proper for the court to consider PSI facts – which are not *Shepard* documents." The cases cited by the government suggesting reliance on undisputed PSI facts was

permissible, he argued, had not survived *Descamps v. United States*, 133 S.Ct. 2276 (2013), and certainly had not survived *Mathis*.

With regard to his aggravated assault conviction, Petitioner replied that *Turner* was inconsistent with two prior, binding, circuit precedents: namely, *United States v. Palomino Garcia*, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (which had applied *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), to hold that an offense with a *mens* rea of recklessness did not meet the identically-worded Guidelines' elements clause), and *United States v. Rosales-Bruno*, 676 F.3d 1017, 1021 (11th Cir. 2012) (which had cited *Curtis Johnson* in holding that in determining whether an offense satisfies the elements clause, federal courts are "bound by Florida courts' determination and construction of the substantive elements of that offense"). *Turner*, Petitioner noted, had failed to consider how the Florida courts construed the Florida assault statute as required by *Rosales-Bruno*; if it had, *Palamino Garcia* would have required a finding that a Florida aggravated assault conviction was not a "violent felony."

On May 9, 2017, the magistrate judge issued a report recommending the granting of Petitioner's § 2255 motion. While the magistrate agreed with the government that under *Turner*, Petitioner's aggravated assault conviction remained a qualifying ACCA predicate, the magistrate agreed with Petitioner that his Florida BOLEO conviction was no longer a qualifying predicate. On that point, the magistrate found that the "touches or strikes" language in the Florida battery statutes was indivisible, the modified categorical approach was therefore

unavailable,[1] the statute had to be analyzed categorically, and according to *Curtis Johnson*, 559 U.S. at 136-137 (which in turn had cited *State v. Hearns*, 961 So.2d 211, 218 (Fla. 2007)), a mere touching did not involve "the use . . . of physical force" sufficient for the ACCA's elements clause. For that reason, the magistrate found, Petitioner did not have three qualifying violent felonies after *Samuel Johnson*, and his motion to vacate should be granted.

The government objected to the magistrate's determination that BOLEO was not a violent felony within the elements clause, noting the Eleventh Circuit's recent panel decision in *United States v. Green*, 842 F.3d 1299 (11th Cir. 2016), holding (based upon *Braun* and *Curtis Johnson*) that the "touches or strikes" language in the Florida simple battery statute was divisible. *Id.* at 1322. *Green*, the government argued, was additional "binding" precedent, "obligat[ing]" the district court to apply the modified categorical approach, in determining that BOLEO was a violent felony.

Petitioner objected to the magistrate's aggravated assault ruling, but acknowledged that *Turner*, as well as *United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) (following *Turner*, under the "prior panel precedent rule"), were binding. As to the BOLEO issue, Petitioner advised that the mandate had been

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[1] Although it did not matter given the magistrate's threshold determination of indivisibility, the magistrate also agreed with Petitioner that the PSI was *not* a *Shepard* document that could be considered under the modified categorical approach. Indeed, the magistrate explained, a federal PSI was not a "conclusive" record from the underlying state criminal proceeding, and "even if there was no objection to the facts contained in the PSI, that has no constitutional significance. Instead, what matters is that the defendant did not invoke or waive his constitutional right to have a jury find these facts beyond a reasonable doubt during the earlier criminal proceeding."

withheld *sua sponte* in *Green*, and that a petition for rehearing en banc remained pending in that case.

The district court reviewed the magistrate's determination on both issues *de novo*, and on August 8, 2017 rejected the Report and Recommendation. While the court agreed with the magistrate that *Turner* (and also *Golden*) compelled the conclusion that Florida aggravated assault categorically met the elements clause, the court disagreed with the magistrate's determination that Florida BOLEO was categorically overbroad and did not meet that clause. Under *Green*, the court held, the Florida simple battery statute was divisible, as was the BOLEO statute, and "the modified categorical approach is appropriate here." And, the court found:

> Under the modified categorical approach, the Court may consider *Shepard* documents including charging documents, plea agreements, and transcripts of plea colloquies to determine which stator phrase describes Movant's conviction. *Curtis Johnson*, 559 U.S. at 144 (citations omitted). Undisputed statements in a presentence investigation report may also be considered. *United States v. McCloud*, 818 F.3d 591, 595-96 (11th Cir. 2016) (citations omitted).

Since Petitioner did not "specifically object" to paragraph 37 of the PSI, which described the alleged conduct underlying his BOLEO offense, the court found that it could "look[ ] to the PSI to determine which version or versions of the Florida battery [he] committed." And here, the court noted,

> The PSI demonstrates Movant's battery involved striking, not battery "by the merest touching." *Curtis Johnson*, 559 U.S. at 139; (*see also* PSI ¶ 37). Battery by striking has as an element the "use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Applying the modified categorical approach, the Eleventh Circuit has confirmed committing a battery by striking constitutes a violent felony. *See Green*, 842 F.3d at 1323-24 (noting a *Shepard* document indicated the defendant was "hitting" the victim, finding the defendant had

> committed a battery under Florida statute section 784.03 by "striking," and concluding battery conviction was a violent felony under the ACCA's elements clause).

Accordingly, the district court found, Petitioner's 1987 BOLEO conviction was his third qualifying ACCA predicate, together with his aggravated assault on a police officer and aggravated battery convictions. The court denied his § 2255 motion, and also denied him a certificate of appealability.

On September 26, 2017, Petitioner filed a timely appeal from the denial of his §2255 motion to the Eleventh Circuit. And on October 5, 2017, he sought a certificate of appealability ("COA"), arguing that reasonable jurists would find the district court's ruling that he remained an Armed Career Criminal post-*Samuel Johnson* debatable in at least two respects. First, he noted, reasonable jurists would debate whether the "touch or strike" language in the Florida simple battery statute – and therefore, the BOLEO statute – was divisible into two separate *offenses*, or whether "touch or strike" is a single indivisible element in all Florida battery statutes, which should have precluded application of the modified categorical approach here. As support, he cited Florida's standard battery instruction which did not require the jury to choose between "touching or striking," and argued that according to *Mathis*, these were simply alternative means not elements. *Curtis Johnson*, he explained, was not to the contrary. However, he argued, even *if* the statutory "touch or strike" language set forth alternative elements, reasonable jurists would still debate whether – after *Descamps* and *Mathis*, and consistent with the Sixth Amendment – it was permissible under the modified categorical approach

for the district court to rely upon undisputed factual allegations in a PSI to uphold his ACCA sentence.

On November 15, 2018, Eleventh Circuit Judge Julie Carnes issued an order denying Petitioner a COA. *Reinaldo Santos v. United States*, Slip op. (11th Cir. Nov. 15, 2018) (No. 17-14291). She explained that "binding circuit precedent" foreclosed Petitioner's arguments that his previously-counted convictions were no longer ACCA predicates within the ACCA elements clause, and in the Eleventh Circuit, a COA cannot issue if there is contrary circuit precedent.

With regard to the COA standard, Judge Carnes stated:

> A "prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Baston*, 818 F.3d 651, 662 (11th Cir. 2016) (quotation omitted), *cert denied*, 137 S.Ct. 850 (2017). This "prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions." *In re Lambrix*, 776 776 F.3d 789, 794 (11th Cir. 2015) (clarifying that "published three-judge orders issued under [28 U.S.C.] § 2244(b) are binding precedent in [this] circuit"). "[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted).

On the merits, Judge Carnes held that even though Petitioner did not seek a COA on the issue of whether his aggravated assault on a police officer conviction met the elements clause, "binding circuit precedent" – namely, *In re Rodgers*, 825 F.3d 1335, 1341 (11th Cir. 2016) (following *Turner*) – "forecloses any argument" in that regard. As to whether BOLEO qualified, Judge Carnes held that Petitioner's argument that the "touches or strikes" language in the Florida battery statute was

indivisible was "contradict[ed]" by *Curtis Johnson* as well as the pre-*Mathis* panel decision in *Braun*, while his argument that the court could not rely upon undisputed PSI "facts" under the modified categorical approach, was contradicted by the pre-*Descamps* panel decisions in *Rozier*, *Bennett*, and *Wade*. She stated:

> Santos argues that the "touches or strikes" portion of Florida's battery statute is a single, indivisible element that contains two factual means of committing battery. He asserts that, therefore, it is inappropriate to apply the modified categorical approach to determine whether his battery conviction resulted from touching or striking a law enforcement officer.
>
> *Curtis Johnson* contradicts Santos's approach by stating that Florida battery can be proven in one of three ways because "the elements of the offense are disjunctive." *See id.* at 136-37. In *Descamps*, a majority of the Supreme Court rejected the dissent's assertion that the Florida battery statute at issue in *Curtis Johnson* may have contained alternative means, rather than alternative elements. *See Descamps*, 133 S.Ct. at 2285 n.2 (stating that the decision in *Curtis Johnson* "rested on the explicit premise" that the statute at issue covered several different crimes, rather than several different methods of committing one crime); *see also id.* at 2298 (Alito, J., dissenting) (asserting that it was "a distinct possibility" that a Florida battery conviction did "nevertheless, in [*Curtis*] *Johnson*, we had no difficulty concluding that the modified categorical approach could be applied"). The Supreme Court stated in *Mathis* that its caselaw on the categorical and modified categorical approaches uses the word "elements" when the Court, in fact, has meant to say "elements." *See* 136 S.Ct. at 2254 (explaining that "a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same; and indeed, we have previously insisted on that point with reference to [the] ACCA's elements-only approach").
>
> Florida's battery statute is divisible and subject to the modified categorical approach because it contains disjunctive elements. *Curtis Johnson*, 559 U.S. at 136-37; *Braun*, 801 F.3d at 1305. Although Santos argues to the contrary, the district court could rely on undisputed statements in the PSI when it applied the modified categorical approach to determine whether his conviction of battery on a law enforcement officer was an ACCA predicate conviction. *See Rozier*, 701 F.3d at 686; *Bennett*, 472 F.3d at 832-34.

> According to Santos's PSI, the probable cause affidavit in his battery case stated that he "struck the officer in the face using a closed fist." Also according to the PSI, he pled *nolo contendere* and was convicted. Santos did not object to the accuracy of these statements at the time of sentencing, nor does [he] contst their accuracy now. *See Wade*, 458 F.3d at 1277 (stating that "[i]t is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes"). The PSI reveals that Santos was convicted of battery on a law enforcement office[r] by striking, which involves the use of physical force against the person of another. *See Curtis Johnson*, 559 U.S. at 140 (defining the phrase "physical force," as used in the elements clause, as violent force, that is, force capable of causing physical pain or injury to another person).

Based upon those controlling panel precedents, Judge Carnes concluded that "[r]easonable jurists would not debate whether [Petitioner's] conviction for battery on a law enforcement officer is an ACCA predicate conviction under the elements clause. *See* 18 U.S.C. § 924(e)(2)(B)(i)." And given that, she found, he still had three ACCA predicate convictions after *Samuel Johnson*, and did not deserve a COA.

REASONS FOR GRANTING THE WRIT

I. Under this Court's precedents, a conviction for Florida BOLEO by "touching or striking" is categorically overbroad, and not a "violent felony" within the ACCA's elements clause.

In analyzing whether Petitioner's Florida BOLEO conviction qualified as an ACCA violent felony, the district court and the Eleventh Circuit both held that the "modified categorical approach" was available because the "touches or strikes" language in the Florida battery statute was divisible. That threshold divisibility finding, however, was erroneous. Indeed, as the government has just conceded in the pending case of *Franklin v. United States*, No. 17-8401, the "touches or strikes" language in the Florida battery statute – which is incorporated into the Florida

BOLEO statute – is *indivisible* under *Mathis v. United States*, 136 S.Ct. 2243 (2016). And indeed, indivisibility is confirmed by Florida's standard battery instructions which, consistent with Florida caselaw, do not require the jury to choose between "touching or striking" in either simple battery or BOLEO cases. Since the least culpable conduct under the BOLEO statute is a "'touching or striking' battery [which] does not require the use of violent force," Memorandum of United States, *Franklin v. United States*, No. 17-8401, at 5, Petitioner's Florida BOLEO conviction – like Franklin's – "does not qualify as a violent felony under the ACCA's elements clause," *id.* at 5-6, and can no longer support his enhanced ACCA sentence. For the reasons set forth below, the Court should summarily reverse and so hold in a *per curiam* opinion.

A. Legal background

In *Descamps v. United States*, 570 U.S 254 (2013), this Court clarified that in determining whether an offense qualifies as an ACCA violent felony, courts must apply the "categorical approach" unless the offense is "divisible" into alternative elements. Only if some alternative elements constitute a "violent felony" while others do not, is the district court permitted to employ the "modified categorical approach," which allows it to consider the limited class of documents identified in *Shepard v. United States*, 544 U.S. 13 (2005), to determine the actual offense of conviction. If the offense of conviction is indivisible, however, the "modified [categorical] approach . . . has no role to play." *Descamps*, 570 U.S. at 264-65. The court must determine categorically – that is, by examining the elements of the

offense, not its underlying facts – whether the actual offense of conviction qualifies as an ACCA "violent felony." *Id.* at 260-65. And under the categorical approach, the court is required to "presume that the conviction rested upon nothing more than the least of the acts criminalized." *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190-191 (2013)).

In *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016), the Eleventh Circuit rightly acknowledged that after *Descamps*, the threshold divisibility "inquiry can't end with simply looking at whether the statute is written disjunctively." 810 F.3d at 1268. The key to "figuring out" whether a disjunctively-worded statute is divisible under *Descamps*, the court explained, is whether the jury is "*required*" to find one of several "alternative elements beyond a reasonable doubt, rather than just convict under a statute that happens to list alternative definitions or alternative means for the same crime without requiring jurors to pick which one applies." 810 F.3d at 1267. "[T]he text of a statute," *Lockett* recognized, "won't always tell us if a statute is listing alternative means or definitions, rather than alternative elements." *Id.* at 1268. Rather, *Lockett* acknowledged, it is necessary to "'look to the state's courts to answer this question.'" *Id.* at 1270 (citing *Howard*, 742 F.3d at 1341). Generally, the Court noted in *Lockett*, the state's standard jury instructions "will make clear" whether a jury *must* find a statutory factor unanimously beyond a reasonable doubt. If so, that factor is an "element;" if not, it is an alternative "means" of committing a single, indivisible offense. *Id.* at 1269, 1271.

The Court's ensuing decision in *Mathis* validated *Lockett*'s analysis in this regard. For indeed, the Court was clear in *Mathis* that a statute that merely "spells out various factual ways of committing some component of the offense – a jury need not find (or a defendant admit) any particular item" – is indivisible. 136 S.Ct. at 2249. For that reason, the Court held, the disjunctively-worded Iowa burglary statute was overbroad and indivisible, since "a jury need not agree" on which of the alternative locations specified was burglarized. *Id.* at 2250. Notably, this Court in *Mathis* confirmed the correctness of the Eleventh Circuit's mandate in *Howard* and *Lockett* that in determining whether a statutory alternative is an element or means, sentencing judges must follow state court decisions that definitively answer that question. 136 S.Ct. at 2256. But if there is no decision that authoritatively answers the "element or means?" question, the Court acknowledged, jury instructions would definitely clarify whether a statutory alternative is an element the prosecutor must prove to the jury beyond a reasonable doubt, or rather, "only a possible means of commission" on which proof beyond a reasonable doubt is not required. *See* 136 S.Ct. at 2249, 2256-2257.

Lockett and *Mathis* thus should have been instructive to the district court in determining whether the "touch or strike" language in the Florida BOLEO statute, Fla. Stat. § 784.07(2)(b), is divisible into separate elements, or rather is a single indivisible element. Instead, both decisions were ignored by the district court, in deference to Judge Julie Carnes' original panel decision in *United States v. Green*, 842 F.3d 1299, 1322 (11th Cir. 2016), which has since been vacated, and a revised

decision (without any discussion of divisibility) substituted. *See United States v. Green*, 873 F.3d 846, 850, 868-69 (11th Cir. 2017). Judge Carnes, notably, did not mention either *Green* decision, *Lockett*, or the Florida standard battery instruction, in her order denying Petitioner a COA here.

B. The Florida standard battery instructions and caselaw confirm that the "touches or strikes" language in the battery and BOLEO statutes sets forth a single indivisible element.

Fla. Stat. § 784.07(2)(b) raises a misdemeanor simple battery under § 784.04(1)(a) to a third degree felony, based upon the simple fact that the victim is a law enforcement officer. However, other than the special status of the victim, the elements of the Florida BOLEO offense are no different than those in a simple battery. That offense occurs when a person:

> 1. Actually and intentionally *touches or strikes* another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.

In *Descamps*' terms, the simple battery statute is unquestionably divisible into the two separate offenses set forth in the two numbered paragraphs above. However, after *Lockett* and *Mathis* the first offense is *not further* divisible into two additional offenses – touching and striking – simply because of the disjunctive wording of provision (1) above. For indeed, just as was the case with the disjunctively-worded statutes considered in *Lockett* and *Mathis*, Florida's standard jury instructions and its caselaw both clarify that "touch or strike" are simply alternative "means" of committing a single indivisible *element* of the offense.

It is clear from Florida's standard battery instructions (ignored by both the district court and Judge Carnes in her COA denial) that Florida juries are never instructed to choose between and agree upon the "touch" or "strike" alternatives. The standard jury instruction for simple battery provides:

> To prove the crime of Battery, the State must prove the following element beyond a reasonable doubt:
>
> *Give 1 or 2 as applicable.*
>
> 1. [(Defendant) intentionally touched or struck (victim) against [his] [her] will.]
>
> 2. [(Defendant) intentionally caused bodily harm to (victim)].

Fla. Std. Jury Instr. (Crim.) 8.3; *see* Fla. Stat. § 784.03(1)(a). The BOLEO offense is plainly a derivative of simple battery, and the standard jury instruction for BOLEO shows that its first element is indeed, simple battery:

> To prove the crime of Battery on a [Law Enforcement Officer]. . . , the State must prove the following four elements beyond a reasonable doubt:
>
> 1. (Defendant)
>
> [intentionally touched or struck (victim) against [his] [her] will]
>
> [intentionally caused bodily harm to (victim)] . . . .

Fla. Std. Jury Instr. (Crim.) 8.11.

These standard instructions make clear that both simple battery, and its derivative, BOLEO, each have only a *single* alternative first element. The two bracketed items represent alternative versions of that element, effectively creating two forms of simple battery. Critically, however, the first alternative element of simple battery, which is identical to the first element of BOLEO, is *not* itself further

divisible. If "touching or striking" instead stated alternative "elements," the standard instructions for these offenses plainly would have bracketed those phrases, requiring the court to instruct the jury on the applicable alternative, and requiring the jury to find that alternative beyond a reasonable doubt.[2] That would have created two distinct simple battery/BOLEO crimes: battery/BOLEO by touching, and battery/BOLEO by striking. But the standard instructions do no such thing. They make clear that there is only one form of simple battery under § 784.04(1)(a)(1), and only one form of BOLEO by "touching or striking" under § 784.07(2)(a). In both simple battery and BOLEO, the standard instructions indicate, touching and striking are simply alternative "means," not elements.

And indeed, Florida's standard battery instructions are quite consistent with Florida Supreme Court precedent. In *State v. Weaver*, 957 So.2d 586 (Fla. 2007), for instance, where the prosecution charged the defendant with battery by intentionally touching or striking a law enforcement officer, but the trial court instructed the jury on both the "touching or striking" alternative and the "causing bodily harm" alternative, the Florida Supreme Court repeatedly recognized that "touching or striking" and "causing bodily harm" constituted two "forms" of simple battery, with "touching or striking" representing a single "form." *See id.* at 587-89. Then, a few

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[2] *See Patterson v. New York*, 432 U.S. 197, 2010 (1977)(the Due Process Clause requires the prosecution "to prove beyond a reasonable doubt all of ***the elements*** included in the definition of the offense of which the defendant is charged")(emphasis added); *Richardson v. United States*, 526 U.S. 813, 817 (1999)("[c]alling a particular kind of fact ***an 'element'*** carries certain legal consequences," and "[t]he consequence that matters for this case is that a jury in a federal criminal case cannot convict unless the jury unanimously finds that the Government has proved each element") (emphasis added).

years later, summarizing *Weaver*, the Florida Supreme Court reiterated that "intentional touching or striking" is one "form" of simple battery. *Jaimes v. State*, 51 So.3d 445, 449 (Fla. 2010). That characterization could not have been correct if touching and striking were alternative elements.

Although the decision below cited *Curtis Johnson*, 559 U.S. at 136 as support for a finding that the Florida battery statute is divisible because "touches or strikes" are disjunctive "elements," that was a misreading of *Curtis Johnson*. Upon close examination, the cited discussion in *Curtis Johnson* actually supports Petitioner's argument that touching and striking are simply alternative "means" under *Mathis*, not elements. Notably, after reciting the alternative elements of the simple battery statute, the Court stated in *Curtis Johnson*: "Because the elements of the offense are disjunctive, the prosecution can prove battery in one of three ways. It can prove that the defendant 'intentionally caused bodily harm,' that he 'intentionally struck' the victim, or that he merely 'actually and intentionally touched' the victim." 559 U.S. at 136-37 (internal citation and brackets omitted). That observation comports with the analysis above: Florida simple battery has a single, divisible element, and there are "three ways" (*i.e.*, means) of satisfying it, with touching and striking representing two of those three alternative "ways."

In making that observation, the Court in *Curtis Johnson* cited *State v. Hearns*, 961 So.2d 211 (Fla. 2007). *Hearns* recited the two alternative elements of simple battery, and then stated that the offense could be committed by "three separate acts." *Id.* at 218. In the parlance of *Mathis*, that meant that simple battery

has two alternative elements ("touching or striking" and "causing bodily harm"), comprised of three alternative means (touching, striking, and causing bodily harm). While admittedly, *Hearns* also loosely used the term "elements" to describe these alternatives, the Florida Supreme Court was not using that term in the strict *Mathis*-sense. At no time did it hold that touching and striking are themselves alternative "elements" that, as understood by *Mathis*, a prosecutor must selectively charge and prove, and a jury must unanimously find, beyond a reasonable doubt. Were it otherwise, *Hearns* would be irreconcilable with Florida's longstanding standard jury instructions; Florida decisions interpreting those instructions, *see, e.g.*, *Byrd v. State*, 789 So.2d 1169, 1170 (Fla. 3rd DCA 2001) (holding that the standard instructions include only two definitions of battery); and the Florida Supreme Court's post-*Hearns* decisions in *Weaver* and *Jaimes* agreeing there are only "two forms" of simple battery (*i.e.*, 1) battery by touching or striking; and 2) battery by causing bodily harm. That reading of *Hearns* would be implausible, since it was decided two weeks before *Weaver*, with both opinions authored by the same jurist.

In any event, the cited passage in *Curtis Johnson* was included only in the "background" section of the opinion, and merely explained that, because the record in that case was devoid of any *Shepard* documents, it was required to assume that the battery offense there at issue involved only a touching. *Curtis Johnson*, 559 U.S. at 137. As a result, the divisibility of the simple battery statute was irrelevant and unnecessary to the Court's analysis. In plain terms, it was dicta. Thus, even if the cited passage in *Curtis Johnson* could be read to suggest that touching and striking

are alternative elements as both courts below found, that suggestion was not binding. *See United States v. Birge*, 830 F.3d 1229, 1233 (11th Cir. 2016) (reiterating that "dicta is not binding on anyone for any purpose") (citation omitted); *United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (explaining that "dicta is defined as those portions of an opinion that are not necessary to decide the case").

And indeed, not only was the cited passage in *Curtis Johnson* dicta, but it pre-dated by several years both *Descamps*, which cemented the fundamental concept of divisibility, and *Mathis*, which clarified the critical distinction between elements and means in a disjunctively-worded statute, and, for the very first time, definitively "instruct[ed] courts how to discern 'elements' from 'means.'" *United States v. Gundy*, 842 F.3d 1156, 1162 (11th Cir. 2016). Thus, *Curtis Johnson* could not have possibly conducted the divisibility analysis required by post-*Descamps*, now-binding precedent. Again, *Mathis* refined that analysis in a major way: no longer may courts assume that a statute is divisible merely because it is phrased disjunctively. Rather, courts must now determine whether the statutory alternatives are elements or means, and *Mathis* offered direction on how to make that determination. As Petitioner argued to both courts below and has explained herein, a post-*Mathis* analysis compels the conclusion that touching and striking are means, not elements.

C. The government has rightly conceded in *Franklin v. United States*, No. 17-8401 that BOLEO by "touching or striking" is not an ACCA "violent felony" within the elements clause, and the Court should so hold here.

When these precise arguments were raised by the petitioner in *Franklin*, the government rightly conceded that the "touches or strikes" language in Florida's

battery statute is indeed indivisible; that "'touching' and 'striking' refer to alternative ways to commit a single offense, not alternative elements;" and since a Florida BOLEO offense by "touching or striking" "does not categorically require the use of violence force," Mr. Franklin's BOLEO conviction "does not qualify as a violent felony under the ACCA's elements clause." Memorandum of United States, *Franklin v. United States*, No. 17-8401, at 5. As such, the government suggested in *Franklin*, "the appropriate course" was to GVR the case "for further consideration of petitioner's challenge to his ACCA sentence in light of the government's position."

Although a GVR for reconsideration in light of the government's position in *Franklin* would be *an* appropriate course for the Court to follow here as well, it would not be the most efficient, effective, or just resolution for Petitioner. A summary reversal with a *per curiam* opinion would be more efficient, effective, and just given that as of this writing, Petitioner has overserved his rightful 10 year maximum *by more than fifteen years*, and is close to having fully-served the originally-imposed, now-concededly-illegal 30-year term.[3] Time is truly of the essence if Petitioner is realistically to see even a day of relief from that illegal sentence. And to best assure that he has a chance at prompt relief, he asks that the Court not simply GVR his case to the Eleventh Circuit for "further consideration," but that it summarily reverse with a *per curiam* opinion clarifying definitively that:

> (1) based upon this Court's precedents, Florida Supreme Court precedents, and Florida's standard battery instruction, the "touch or strike" language in the Florida battery statute, and by extension the BOLEO statute, sets forth a single indivisible element;

[3] Petitioner's BOP release date on his 30 year ACCA sentence is March 28, 2020, with his release to a halfway house expected on April 2, 2019.

(2) the "modified categorical approach" has "no role to play" with regard to that single, indivisible element, *Descamps*, 570 U.S. at 264;

(3) under the categorical approach, which is the only approach applicable here, a Florida BOLEO offense must be assumed to have been committed in the least culpable manner, which is by a mere touching, which does not require "*violent* force" as per *Curtis Johnson*, 559 U.S. at 138 (citing *Hearns*, 961 So.2d at 218-219); and

(4) under *Curtis Johnson*, Petitioner's BOLEO conviction is categorically overbroad vis-a-vis the ACCA's elements clause, it can no longer serve as a predicate for his ACCA sentence, and he was illegally sentenced as an Armed Career Criminal.

Without a definitive ruling from the Court in these regards, delay and indecision will likely plague Petitioner's case on remand. As a threshold matter, and irrespective of the government's concession that a Florida battery conviction by "touching or striking" is *not* a proper ACCA predicate, the panel to whom Petitioner's case is assigned on remand after a GVR would have to contend with the Eleventh Circuit's extremely rigid, virtually-insurmountable "prior panel precedent rule." Notably, the Eleventh Circuit has categorically rejected *any* exception to its obligation to follow prior precedent "based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at th[e] time [the prior decision was rendered]." *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001). And it has been emphatic that not only is one panel precluded from "overrul[ing] a prior one's holding even though convinced it is wrong," *United States v. Steele*, 147 F.3d 1316 (11th Cir. 1998) (en banc), but that only an "on-point" decision from this Court or the full Eleventh Circuit sitting en banc can overrule prior panel precedents that have misinterpreted or ignored this Court's own

precedents (such as *Curtis Johnson* and *Leocal v. Ashcroft*, 543 U.S. 1 (2004)). Finally, the Eleventh Circuit takes an exceedingly narrow view of when an *intervening* precedent of this Court is truly "on point." Indeed, it holds that even *Descamps*, *Mathis*, and *Moncrieffe v. Holder*, 569 U.S. 184 (2013) which clarified proper application of the categorical approach, are not "clearly on point" or controlling in a case with different predicate offenses. *See United States v. St. Hubert*, 909 F.3d 335, 2018 WL 5993528 at *10 n. 9 (11th Cir. Nov. 15, 2018) (citing as support *Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007) (explaining that "when only the reasoning, and not the holding, of [an] intervening Supreme Court decision is 'at odds with that of our prior decision' there is 'no basis for a panel to depart from our prior decision'")).

In short, the "prior panel precedent" rule in the Eleventh Circuit is unforgiving. And since there is no reason to assume the Eleventh Circuit will quickly schedule an en banc hearing to determine definitively whether the "touches or strikes" language in the Florida battery statute is divisible, a *per curiam* opinion clarifying that it is *not* and that Petitioner was erroneously sentenced as an Armed Career Criminal, is vital. But indeed, a brief, definitive resolution of this long-simmering divisibility issue would also have the added benefit of relieving this Court from future inundation with petitions raising the same or similar issues, and from having to resolve Issues II, III, and IV in this case. Since a summary reversal on Issue I would alone confirm Petitioner's erroneous ACCA designation, the Court could await a future case to resolve the other issues.

As such, in the interests of justice and judicial economy, Petitioner asks the Court to summarily reverse his case with a *per curiam* opinion on Issue I. Alternatively, he asks the Court to grant plenary review to definitively resolve the divisibility issue herein, as well as the other issues in this case – each of which is squarely presented, and independently warrants reversal.

II. Under this Court's precedents and the Sixth Amendment, the "modified categorical approach" does not permit a court to consider undisputed factual allegations in a PSI to uphold an ACCA sentence.

Even *if* the "touch or strike" language in the BOLEO statute *were* divisible as the district court and court of appeals found, both courts erroneously disregarded this Court's precedents and the Sixth Amendment in holding that a district court may consider undisputed factual allegations in a PSI to determine that Petitioner was convicted of "striking," rather than "touching," so as to uphold his ACCA sentence. Here as in *Curtis Johnson*, the record was devoid of any approved *Shepard* documents establishing whether Petitioner's offense involved a touching or striking. Neither the charging document, the plea colloquy, nor any other document from the 1987 Florida BOLEO case – other than the judgment – was introduced in Petitioner's federal case. And, in such circumstances, the Court has been adamant that the battery offense in question must be assumed to have involved only a touching, and the battery-by-touching offense analyzed categorically. *See Curtis Johnson*, 559 U.S. at 137 ("Since nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts, his conviction was a predicate conviction . . . only if

"actually and intentionally touching" another person constitutes the use of "physical force" within the meaning of [the elements clause].")(internal citation and brackets omitted).

A reasonable jurist would have analyzed Petitioner's offense as a touching not only because *Curtis Johnson* requires it, but because the Sixth Amendment requires it. Indeed, this Court's precedents clarifying the categorical approach leave no doubt that a district court's reliance upon undisputed "facts" in a federal PSI, to enhance a defendant's sentence beyond the otherwise applicable statutory maximum under ACCA violates the Sixth Amendment. *See Descamps*, 133 S.Ct. at 2287-2288 (the categorical approach is predicated upon the Sixth Amendment since only an elements-based approach can "avoid the Sixth Amendment concerns that would arise from sentencing courts making findings of fact that properly belong to juries;" 133 S.Ct. at 2287-2288 (citing *Apprendi v. New Jersey*, 530 U.S 466, 490 (2000)); *Mathis*, 136 S.Ct. at 2252 (in order to comply with *Apprendi*, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense;" the federal judge "is prohibited from conducting such an inquiry himself; . . . [h]e can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.")

In order to ensure that the federal sentencing judge does no more than find the fact of a prior conviction, the Court has strictly limited the information that the judge may consider. In *Shepard v. United States*, 544 U.S. 13, 15 (2005), the Court held that courts are "limited to examining the statutory definition, charging

document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." What these *Shepard* documents have in common is that they are "conclusive records made or used in adjudicating guilt." *Id.* at 21; *see id.* at 23 ("confin[ing]" the class of permissible documents "to records of the convicting court approaching the certainty of the record of conviction"). That accords with their function in the modified categorical approach – namely, to permit the court to identify the elements (and only the elements) for which the defendant was convicted. *Descamps*, 133 S.Ct. at 2284.

In light of the foregoing, reasonable jurists would find that relying on undisputed PSI "facts" to justify Petitioner's ACCA enhancement violated his Sixth Amendment rights. His federal PSI is not a *Shepard*-approved document because it was not a "conclusive record[] made or used in adjudicating guilt," *Shepard*, 544 U.S. at 21, and in fact, was not a part of the state criminal proceedings at all. Unlike true *Shepard* documents, a federal PSI does not communicate the elements of the offense for which the defendant was convicted; rather, it communicates only extraneous factual information and impermissibly encourages speculation regarding "what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct." *Descamps*, 133 S.Ct. at 2288. Thus, although there was no objection to the factual allegations in the PSI, as the magistrate correctly found that has no constitutional significance. Instead, what matters is that Petitioner did not invoke or waive his Sixth Amendment right to have a jury find these "facts" beyond a reasonable doubt during the earlier criminal proceeding. *Lockett*, 810 F.3d at 1272.

The district court did not grapple with these Sixth Amendment issues at all, and neither did the Eleventh Circuit in denying Petitioner a COA. The *Green* decision followed by the district court did not consider the Sixth Amendment, and in any event, *Green*'s divisibility ruling was thereafter vacated. Nor was the Sixth Amendment an issue in any of the other "precedents" followed by either court below. *Rozier* and *Bennett* involved Guideline enhancements which do not present a Sixth Amendment problem. And although *United States v. Braun*, 801 F.3d 1301 (11th Cir. 2015) and *United States v. McCloud*, 818 F.3d 591, 595-596 (11th Cir. 2016) were both ACCA cases, they predated *Mathis*. Finally, *McCloud* relied upon undisputed PSI facts to address a completely different legal question (the "different occasions" question) under the ACCA, and was patently inapposite. Accordingly, none of the decisions relied upon by either court below should have had even persuasive value, particularly after *Mathis* further solidified the Sixth Amendment underpinnings of the categorical approach.

Notably, before issuing the order denying the COA in this case, the Eleventh Circuit held in another precedential decision – without considering *Mathis* – that under the modified categorical approach it could look at "the undisputed facts in the PS[I], 'in order to determine which of the multiple crimes listed in the statute the defendant was convicted of committing.'" *In re Welch*, 884 F.3d. 1319, 1325 (11th Cir. 2018)(citing *McCloud*). Accordingly, unless the Court issues a summary reversal on Issue I, it is probable that the Eleventh Circuit will continue to adhere to its pre-*Mathis* precedent in *Braun* finding "touches or strikes" divisible, and its post-*Mathis*

precedent in *In re Welch* approving the district court's consideration of undisputed PSI facts under the modified categorical approach. Petitioner's only hope for relief, therefore, is for this Court to summarily reverse his case with an opinion explaining why his BOLEO conviction is not a proper ACCA predicate. If the Court declines to do so, Petitioner asks that the Court consider the Eleventh Circuit's ill-founded, and far-reaching "PSI facts" rule on plenary review. Until that rule is reversed, it will impact any divisible offense used an ACCA predicate in the Eleventh Circuit.

III. The circuits are intractably divided on whether an offense with a reckless *mens rea* – such as Florida aggravated assault on a police officer – is a "violent felony" within the ACCA's elements clause.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court held that a conviction under Florida's DUI statute, Fla. Stat. § 316.193(3)(c)(2)(2003), did not have "as an element" the "use ... of physical force *against the person .... of another*," as required by 18 U.S.C. § 16(a). *Id.* at 9-10. While acknowledging its prior holding in *Baily v. United States*, 516 U.S. 137, 145 (1995), that the word "'use' requires active employment," the Court explained in *Leocal* that the "key" or "critical aspect" of § 16(a) was the "*against the person ... of another*" language, which "naturally suggests a higher degree of intent than negligent or merely accidental conduct." *See id.* at 9 (noting that "[w]hile one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident"). Although the Court therefore easily concluded that negligent or accidental conduct did not satisfy § 16(a)'s elements clause, it left

for another day the question of whether reckless conduct could meet the "*against the person . . . of another*" requirement. 543 U.S. at 13.

Notably, the identical elements clauses in the ACCA and Federal Sentencing Guidelines are like § 16(a) in the emphasized respect. And despite the Court's reservation of the recklessness issue in *Leocal*, within 10 years of that decision the courts of appeals had "almost uniformly" held in both ACCA and Guidelines cases that "recklessness is not sufficient." *United States v. Castleman*, 134 S.Ct. 1405, 1414 n. 8 (2014) (citing *United States v. Palomino Garcia*, 606 F.3d 1317, 1335-36 (11th Cir. 2010), and cases from every other circuit except for the First, so holding).

Confusion on that issue arose only after *Voisine v. United States*, 136 S.Ct. 2272 (2017), where the Court held that an offense with a reckless *mens rea* would satisfy the *different* elements clause in 18 U.S.C. § 921(a)(33)(A). That provision defines the term "misdemeanor crime of domestic violence" in 18 U.S.C. §922(g)(9) as an offense that has "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," but does *not* require that the 'use" be "against the person of another."

In *Castleman*, the Court held that § 921(a)(33)(A) required only the use of common law force, not *violent* force like the ACCA. And in *Voisine*, the Court concluded that a reckless domestic assault involved a "use of [common law] force" sufficient to meet the MCDV elements clause. *Id.* at 2278. In so holding, the Court pointed out in *Voisine* that reckless conduct such as hurling a plate was a "deliberate decision to endanger another," not an "accident" like the conduct in *Leocal.* 136 S.Ct.

at 2279. However, the Court underscored, *Leocal* had left open whether recklessness would suffice for the elements clause in § 16(a), and the fact that a reckless *mens rea* was sufficient in the MCDV context, did not "foreclose the possibility" that recklessness might not suffice for § 16(a) due to the different "context[] and purpose[]" of that provision. *Id.* at 2280 n. 4 (acknowledging that "[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their context and purposes").

There are not only differences in context and purpose, but as noted above, significant differences in wording as well between § 16(a) and § 921(a)(33)(A). Again, § 16(a) – unlike § 921(a)(33)(A), but just like § 924(e)(2)(B)(i) – contains the additional "*against the person . . . of another*" language deemed "critical" on the *mens rea* issue in *Leocal.* Although many circuit courts have reconsidered post-*Voisine* whether a reckless *mens rea* satisfies the ACCA's elements clause, they have disagreed generally on how broadly *Voisine* can be read, and specifically on whether a reckless assault qualifies as an ACCA "violent felony."

On one side of the divide stand the First and Fourth Circuits. In *Bennett v. United States*, 868 F.3d 1 (1st Cir. 2017), a First Circuit panel including former Justice Souter found the different language, history, and context of the ACCA significant, and that the question of whether reckless conduct met the ACCA's elements clause was *not* controlled by *Voisine.* The *Bennett* panel ultimately remained "unsure" whether reckless assaults were covered by the ACCA. *Id.* at 7-21. But because it found "grievous ambiguity" on that question, it applied the rule of

lenity to hold that an offense with a reckless *mens rea* would *not* meet the ACCA's elements clause. *Id.* at 23. Although *Bennett* was thereafter withdrawn and vacated as moot due to the death of the defendant in that case, *see* 870 F.3d 34 (1st Cir. 2017), the First Circuit followed *Bennett*'s reasoning in two subsequent decisions, reaffirming in both that an assault offense with a reckless *mens rea* does *not* meet the ACCA's elements clause. *See United States v. Windley*, 864 F.3d 36, 38-38 (1st Cir. 2017); *United States v. Rose*, 896 F.3d 104, 114 (1st Cir. 2018).

The Fourth Circuit has approached the issue differently than the First, but concluded similarly post-*Voisine* that an offense with a reckless *mens rea* does not meet the ACCA's elements clause. *See United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018) (noting that the government had "effectively conceded" that an offense with a reckless *mens rea* did not meet the ACCA's elements clause, and agreeing; holding that ACCA enhancement predicated upon Maryland reckless endangerment "is unlawful;" citing *United States v. Middleton*, 883 F.3d 485, 497 (4th Cir. 2018) (Floyd, J., writing for the plurality) ("[The ACCA force clause [] requires a higher degree of *mens rea* then recklessness.")); *see also Middleton*, *id.* at 498-500 & n. 3 (4th Cir. 2018) (Floyd, J., concurring in part and concurring in the judgment, joined by Harris, J.) (agreeing with the First Circuit's reasoning in *Bennett*, and rejecting the contrary conclusion of other circuits).

The Eighth, Tenth and D.C. Circuits have all reached the contrary conclusion. Each of these courts has reversed its post-*Leocal* position to hold, in light of *Voisine*, that an offense with a *mens rea* of recklessness *does* qualify as a "violent felony"

within the ACCA's elements clause. *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (Kavanaugh, J.) (disagreeing with the First Circuit), *pet. for cert. filed* Sept. 20, 2018 (No. 18-370); *United States v. Fogg*, 836 F.3d 951, 954 (8th Cir. 2016); *United States v. Pam*, 867 F.3d 1191, 1207-08 & n. 16 (10th Cir. 2017) (disagreeing with the First Circuit). And indeed, the Fifth and Sixth Circuits have held similarly in Guidelines cases. *See United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017) (criticizing the First Circuit's reasoning); *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir. 2017).

Despite the fact that many of these circuits have rejected the view of the First Circuit, they have engaged in little independent analysis of their own, and/or improperly discounted material distinctions between § 921(a)(33)(A) and § 16(a)/§924(e)(2)(B)(i)/U.S.S.G. § 4B1.2(a). Nonetheless, unlike the Eleventh Circuit, all of the above courts have at least considered the *mens rea* necessary for either the ACCA or Guidelines' identical elements clauses in light of current Supreme Court precedent and relevant state law. The Eleventh Circuit truly stands alone among the courts of appeals in refusing to consider the question of whether a reckless aggravated assault is a proper ACCA "violent felony," based upon a now-concededly-flawed "prior panel precedent" in which the *mens rea* issue was neither briefed nor considered. With blinders on – not only as to *Voisine*, but also as to *Leocal*, *Moncrieffe*, *Descamps*, and *Mathis* – the Eleventh Circuit holds that its "prior panel precedent" rule requires rigid adherence to *Turner*. It makes no difference to the Eleventh Circuit that the *Turner* panel did not consider either prior or intervening

precedents of this Court, then-binding prior circuit precedent holding that an offense with a reckless *mens rea* did not meet the elements clause (*Palomino Garcia*), or Florida law confirming that only culpable negligence – which is equivalent to recklessness – is necessary for an aggravated assault conviction in the state. *See United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) (finding that *Turner* remained binding "even if flawed" because it did not apply *Palomino Garcia*; "even if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it;" making no mention of intervening precedents of this Court including *Voisine*, although both parties addressed those precedents in supplemental briefing); *id.* at 1257-1260 (Jill Pryor, J., concurring in result) (agreeing that the panel was "bound to follow *Turner*," but urging en banc reconsideration of *Turner*, given its "tension" with earlier circuit decisions in *Palomino Garcia* and *Rosales-Bruno*, as well as this Court's intervening decisions in *Moncrieffe* and *Mathis* which suggest *Turner* should be overruled).

Due to the Eleventh Circuit's rigid application of its "prior panel precedent" rule, and its demonstrated refusal to reconsider *Turner* en banc,[4] there is now an effective three-way circuit split on whether a reckless assault crime is an ACCA "violent felony." Had Petitioner's case arisen in the First or Fourth Circuits, *Turner*

[4] *See United States v. Golden*, Slip op., (11th Cir. Mar. 23, 2017) (No. 15-1567) (denying petition for rehearing en banc, urging the Court to overrule *Turner*); *Ovalles v. United States*, 905 F.3d 1231, 1301-02 (11th Cir. 2018) (en banc) (Martin, J., dissenting) (noting that although *Turner* "was wrongly decided," and in *Golden*, Judge Jill Pryor had concurred separately "to explain why *Turner*'s holding about aggravated assault was wrong," and "overlooked our precedent" in *Rosales-Bruno* requiring considering how a state interprets the elements of its own statute, the full court has not reconsidered *Turner* en banc, and "I've seen no indication we will anytime soon. Instead, we continue to deny prisoners relief).

would *not* have bound those courts, Petitioner's Florida aggravated assault conviction would *not* have qualified as an ACCA "violent felony," and those courts would have declared that Petitioner was erroneously sentenced as an Armed Career Criminal. The Court should resolve the circuit conflict on this issue because it is intractable and prejudicing not only Eleventh Circuit defendants, but defendants in the Fifth, Sixth, Eighth, Tenth, and D.C. Circuits as well who are serving enhanced ACCA and Guideline sentences predicated on reckless offenses. Geography alone should not account for the inequitable treatment of so many federal prisoners.

In *Haight v. United States*, No. 18-370, the government has conceded the circuit conflict, and that the reckless *mens rea* issue "arises with some frequency" under the ACCA. While the government has argued that *Haight* is a "poor vehicle" to resolve the circuit conflict since Justice Kavanaugh authored the D.C. Circuit's decision and would not be available to weigh in on certiorari, Government's Memorandum in Opposition, *Haight*, No. 18-370 (Dec. 13, 2018) at 7, 14-15, there is no such vehicle problem here. *Id.* at 15. Since Petitioner specifically challenged his ACCA sentence on this precise basis before the district court, and the issue was expressly passed on by that court and the court of appeals (both of which found it "foreclosed" by *Turner*), the issue is squarely presented for review at this time.

IV. Under this Court's precedents, the Eleventh Circuit applied an erroneous COA standard.

In the Eleventh Circuit, COAs are not granted where binding circuit precedent forecloses a claim. In the view of the Eleventh Circuit, "reasonable jurists will follow controlling [circuit] law," and that ends the "debatability" of the matter

for COA purposes. *Hamilton v. Sec'y, Fla. Dept. of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) ("we are bound by our Circuit precedent, not by Third Circuit precedent, and circuit precedent "is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent") (citation omitted); *see also Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005).

The Eleventh Circuit's rule in this regard, however, is an egregious misapplication – evidencing complete disregard – of this Court's precedents in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S.Ct. 759 (2017). In *Buck*, the Court confirmed that "[u]ntil a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a baseless and wrong rule requiring that COAs be adjudicated on the merits. Such a rule places too heavy a burden on movants at the COA stage. As this Court explained in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed 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. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774. Indeed, as this Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch*, 136 S. Ct. at 1264. That was *not* the case here.

CONCLUSION

A summary reversal on the merits is appropriate as to Issue I. If the Court does not summarily reverse on Issue I, this case presents an ideal vehicle for the Court to resolve several important and recurring elements clause questions that have risen to the fore in the wake of *Samuel Johnson*. A reversal on either Issue I, II, or III would confirm that Petitioner was erroneously sentenced as an Armed Career Criminal and has been serving an illegal sentence for over 15 years.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Brenda G. Bryn*
Brenda G. Bryn, Assistant Federal Public Defender
Counsel of Record for Petitioner

Fort Lauderdale, Florida
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