NO:

IN THE
SUPREME COURT OF THE UNITED STATES

DEMETRIUS FITZGERALD,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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s/; Peter T. Patanzo
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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Florida offense of aggravated battery with a deadly weapon in violation of Fla. Stat. § 784.045, is a violent felony as defined by the ACCA, and a crime of violence as defined by the Federal Sentencing Guidelines?

II. Whether the Florida offense of resisting with violence in violation of Fla. Stat. 843.01, is a violent felony as defined by the ACCA, and a crime of violence as defined by the Federal Sentencing Guidelines?

INTERESTED PARTIES

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

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OCTOBER TERM, 2018

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v.

UNITED STATES OF AMERICA,

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

PETITION FOR WRIT OF CERTIORARI

Demetrius Fitzgerald respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-18525 on November 28, 2018, *United States v. Demetrius Fitzgerald*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit affirming the judgment and commitment of the United States District Court is contained in the Appendix A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES. The Tenth Circuit Court of Appeals has issued an opinion in conflict with the Eleventh Circuit's decision in this case. The final decision of the court of appeals was issued on November 28, 2018. This petition is timely filed pursuant to SUP CT. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals had jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following statutes:

18 U.S.C. § 924(e)(2)(B)(i), The Armed Career Criminal Act.

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by and adult, that-

(i) has as an element the use, attempted use, or threatened use of physical

force against the person of another....

U.S.S.G. § 2K2.1(a)(2), Firearms.

(2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.

Commentary:

"Crime of Violence" has the meaning given that term in U.S.S.G. § 4B1.2(a) and Application Note 1, of the Commentary to § 4B1.2.

U.S.S.G. § 4B1.1 and U.S.S.G. § 4B1.1(c)(3), Career Offender and Armed Career Criminal.

Commentary:

(1) Definitions - "Crime of Violence,".... is defined in § 4B1.2.

U.S.S.G. § 4B1.2, Definitions of Terms Used in Section § 4B1.1:

(a) the term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year, that ---

(1) has an element the use, attempted use, or threatened use of physical force against the person of another…

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On March 23, 2017, a federal grand jury returned an indictment against Mr. Fitzgerald charging him in three counts: **Count I**, Possession of a Firearm or Ammunition by a Convicted Felon, specifically, a Glock Model 22, .40 Caliber semi-automatic pistol, a Kel-Tech Model P3AT, .380 caliber semi automatic pistol, and approximately 28 rounds of .40 caliber ammunition and approximately 12 rounds of .380 caliber ammunition, in violation of Title 18 U.S.C. § 922(g)(1) and § 924(e); **Count II**, Possession with the Intent to Distribute a Controlled Substance, specifically, Oxycodone, Marijuana and Alprazolam, in violation of Title 21 U.S.C. §

841(a)(1),(b)(1)(C),(b)(1)(D), and (b)(2); and in **Count III**, Possession of Firearm in furtherance of a Drug Trafficking crime as set forth in Count II, in violation of 18 U.S.C. § 924(c)(1)(A).

On August 25, 2017, Mr. Fitzgerald entered a guilty plea. (ECF:45). On November 21, 2017, the district court sentenced Mr. Fitzgerald to a total sentence of 240 month imprisonment. The district court found that Mr. Fitzgerald had at least three prior convictions for the application of the ACCA and to qualify as a career offender under the guidelines. The sentence imposed included a 180 month mandatory sentence pursuant to the ACCA on Count I; a 180 month guideline sentence as a career offender and armed career criminal as to Count II, to be served concurrently with the sentence imposed on Count I; and a 60 month mandatory sentence pursuant to 18 U.S.C. § 924(c)(1)(A) as to Count III, which is to be served consecutive to both Count I and Count II. [ECF:47,p.14-15].

The 180 month sentence was imposed pursuant to the Armed Career Criminal Act which mandates a 15-year mandatory minimum term of imprisonment for a person convicted under § 922(g) who had previously been convicted of three violent felonies. *See* 18 U.S.C. § 924(e). The district court found that Mr. Fitzgerald's two prior convictions for aggravated battery and two prior convictions for resisting with violence categorically qualified for the application of the ACCA and enhancements as a career criminal. (ECF:47,p.8,14-17). At the sentencing, Mr. Fitzgerald argued that under Florida law neither prior conviction qualified for the enhancements after this Court's decision in *Johnson*. The district court's decision

effected Mr. Fitzgerald's substantial rights and had the district court sided with Mr. Fitzgerald there would be no 180 month minimum mandatory sentence, nor would Mr. Fitzgerald qualify as a career criminal under the guidelines. Mr. Fitzgerald timely appealed. (ECF:40).

The Eleventh Circuit affirmed the sentence. The Eleventh Circuit explained that it was bound to follow its prior decision in *Turner v. Warden, Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2013), *abrogated on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015).

REASONS FOR GRANTING THE WRIT

I. The Florida offense of aggravated battery with a deadly weapon in violation of Fla. Stat. § 784.045 is not a violent felony as defined by the ACCA, nor a crime of violence as defined by the Federal Sentencing Guidelines.

The district court erroneously found that Mr. Fitzgerald's Florida convictions for aggravated battery with a deadly weapon was a violent felony for the application of the ACCA, and a crime of violence as defined by the Sentencing Guidelines. Under the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--"*has as an element the use, attempted use, or threatened use of physical force against the person of another."* Under U.S.S.G. § 2K2.1, "crime of violence" has the meaning given that term under U.S.S.G. § 4B1.2(a) and the Application note 1 of the Commentary to § 4B1.2. U.S.S.G. § 2K2.1, comment. (n.1). Section 4B1.2(a)(1) of the U.S. Sentencing Guidelines defines a "crime of violence" as a felony punishable by imprisonment for a term exceeding one year that *"has as an element the use, attempted use, or threatened use of physical force against the physical person of another."*

Under Florida law, a battery is defined as actually touching or striking another person against their will; or intentionally causing bodily harm to another person. F.S. § 784.03. An aggravated battery under Florida law is defined as a battery, combined with either intentionally or knowingly causing great bodily harm,

permanent disability, or permanent disfigurement; or use of a deadly weapon. F.S. § 784.045.

This Court has held that Florida's simple battery statute, F.S. § 784.03, is overbroad because it can be violated by merely "actually and intentionally touching" someone against their will. Because a simple battery offense can be committed by any intentional physical contact, no matter how slight, it does not categorically "require" the use of violent, physical force necessary to satisfy the elements clause. *Curtis Johnson v. United States*, 559 U.S. 133, 138 (2010) (citing *State v. Hearns*, 961 So.2d 211, 218 (Fla. 2007)). Accordingly, an aggravated battery can be committed by simply touching someone against their will with a deadly weapon; or simply touching someone and causing great bodily harm, permanent disability, or permanent disfigurement.

The intentional striking or touching element of Florida's battery statute is indivisible and as such is not amenable to the modified categorical approach. *See Mathis v. United* States, 136 S.Ct. 2243 (2016); *Descamps v. United States*, 133 S.Ct. 2276 (2013). When the prior conviction at issue involves a divisible statute, this Court has approved a method labeled the "modified categorical approach" to determine whether the prior conviction is a violent felony. *See Descamps*, 133 S.Ct. at 2281. A divisible statute sets out one or more elements of the offense in the alternative – for example, a burglary may be defined as unlawful entry into a building or an automobile. *Id*. The modified categorical approach would permit a sentencing court to consult a limited class of documents, such as indictments and

jury instructions to determine which alternative provided the basis for the defendant's conviction. *Id*. However, when a court applies the modified categorical approach, the focus is on the elements rather than the facts of the prior conviction. *Descamps*, 133 S.Ct at 2285; *United States v. Howard*, 742 F.3d 1334, 1347 (11th Cir. 2014).

A statute is not divisible where it disjunctively lists various factual means of satisfying an element. *Mathis*, 136 S.Ct. at 2249. The modified approach serves— and serves solely— as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque. *Mathis*, 136 S. Ct. at 2253.

Here, the Florida jury instructions for aggravated battery make clear that the "touching or striking" component under § 784.041(1)(a) are simply alternative means of satisfying a single, indivisible element. Fla. Std. Jury Instr. in Crim. 8.4. Indeed, "touch" and "strike" are contained within a single element. Thus, they are not alternative elements of the offense which the jury must find beyond a reasonable doubt. Thus, the modified category approach does not apply to the touching or striking element, and aggravated battery can never qualify as a violent felony.

That conclusion is unaffected by the second element of the offense, which requires either: 1) the intentional infliction of great bodily harm, permanent disability, or permanent disfigurement; or 2) the use of a deadly weapon. The

second element is indivisible because it merely disjunctively lists two factual means of satisfying an element.

Even if the second element was divisible, Mr. Fitzgerald's convictions for aggravated battery would not qualify as a crime of violence because the mere use of a deadly weapon does not categorically involve the use of violent, physical force necessary to satisfy the elements clause as required by *Curtis Johnson.* Under the plain language of the statute, a person can be convicted of aggravated battery for merely touching someone against their will with a deadly weapon. Additionally, a person can be convicted of aggravated battery by use of a deadly weapon without ever touching the victim with the deadly weapon. A conviction is permissible if the defendant simply holds the weapon while committing a simple battery. *See Severance v. State*, 972 So. 2d 931, 934 (Fla. Dist. Ct. App. 2007)(element "uses a deadly weapon" in the aggravated battery statute does not require using the weapon to commit the touching).

In determining whether a prior conviction is a crime of violence under a modified categorical approach, this Court must assume that the offense was committed under the least culpable method. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). Here, that would mean assuming that the offense was committed by a mere touching, which under *Curtis Johnson*, fails to meet the requirements of the elements clause. *See Severerance*, 972 So. 2d at 934.

In this case, the district court failed to apply that controlling authority and failed to assume, as it must under the modified categorical approach, that Mr.

Fitzgerald committed the offense by a simple touching while holding a weapon. Accordingly, the district court erred when it found that Mr. Fitzgerald's prior convictions for aggravated battery with a deadly weapon was a violent felony under the ACCA and a crime of violence under the Federal Sentencing Guidelines.

II. The Florida offense of resisting with violence in violation of Fla. Stat. § 843.01 is not a violent felony as defined by the ACCA, nor a crime of violence as defined by the Federal Sentencing Guidelines.

The district court erred when it found that Mr. Fitzgerald's convictions in Florida for resisting arrest with violence were categorically violent felonies under the ACCA, and crimes of violence under the Sentencing Guidelines. In *I.N. Johnson v. State*, 50 So._ 529, (1909), the defendant was charged with the offense of "knowingly and willfully resisting, obstructing or opposing the execution of legal process, by offering or doing violence" to an officer. The charging document alleged "a knowing and willful resistance...by gripping the hand of the officer and forcibly preventing him from opening the door of the room....thereby obstructing the officer in entering the room to make the arrest. The Florida Supreme Court found that this allegation met the "violence" element of the statute. *Id.* at 530.

As authoritatively interpreted by the Florida Supreme Court, the "violence" element of § 843.01, is satisfied by the use of unlawful force. "Unlawful" force in Florida can be as minor as an unwanted touching, a simple battery proscribed by Fla. Stat. § 784.03. Such a touch, while sufficient to sustain a conviction under § 784.03 or § 843.01, does not contain the degree of force necessary, that is, violent

force or strong physical force, to be an ACCA predicate or a predicate offense for application of the career offender guideline. *See Curtis Johnson*, 559 U.S. at 140.

The Florida Supreme Court's decision in *I.N. Johnson* has not been abrogated or overruled. It thus remains good law, and must be followed when determining the least culpable conduct that satisfies the elements of a § 843.01 offense. "Sentencing courts....are bound to follow any state court decisions that define or interpret the statute's substantive elements because state law is what the state supreme court says it is." *United States v. Howard*, 742 F.3d 1334, 1346 (11th Cir. 2014).

More recent cases from Florida's district courts of appeal show, like the gripping of the officer's hand in *I.N. Johnson*, the force involved in "offering to do violence" under § 843.01, does not meet the degree of force to another necessary to be considered a violent felony or a crime of violence. Thus, a prima facie case for resisting an officer with violence can be established by holding onto a doorknob and wiggling and struggling to free himself. *State v. Green*, 400 So.2d 1322, 1323-24 (Fla. 5th DCA 1981). A conviction for resisting with violence was sustained where the evidence showed the defendant struggled kicked and flailed his arms and legs, even though he never actually struck an officer. *Wright v. State*, 681 So.2d 852, 853-54 (Fla. 5th DCA 1996). In, *Yarusso v. State*, 942 So.2d 939, 941 (Fla. 2d DCA 2006), a driver terminated a consensual encounter with police by speeding off, hitting the officer's hand with the truck's rearview mirror in the process. It was undisputed that the "act of violence" occurred when the truck's mirror hit the officer's hand. *Id.* at 942. In still another case, the evidence supporting the § 843.01

conviction was that the defendant "scuffled" with police after being handcuffed. *Miller v. State*, 636 So.2d 144, 151 (Fla. 1st DCA 1994); see also *Kaiser v. State*, 328 So.2d 570, 571 (Fla. 3rd DCA 1976).

A "scuffle" with an officer does not rise to the level of violence needed for an ACCA predicate or a crime of violence under the Sentencing Guidelines. For example, in *United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013), the court considered whether an Arizona statute that criminalized "resisting arrest" and requires the use or threatened use of physical force against an officer constituted a crime of violence under U.S.S.G. § 2L1.2, which contains identical language. The Ninth Circuit noted a decision of the Arizona Court of Appeals that held a defendant's "struggle to keep from being handcuffed" and "kicking the officers trying to control her" constituted conduct within the scope of the resisting arrest statute "because some physical force was used." *Flores-Cordero*, 723 F.3d at 1087-88 (citing *State v. Lee*, 176 P.3d 712 (Ariz. Ct. App. 2008)). Thus, the Ninth Circuit determined, "under prevailing Arizona law, the use of minimal force is sufficient to constitute 'resisting arrest.'" *Id.* Because the state appellate court did not require the defendant's conduct to necessarily involve the force capable of inflicting pain or causing injury as contemplated by *Curtis Johnson*, the Arizona conviction for resisting arrest was not categorically a crime of violence within the meaning of federal law. *Id.* at 1088.

Mr. Fitzgerald recognizes that the Eleventh Circuit and the district court relied on *United States v. Romo-Villalobos*, 674 F.3d 1246, 1248-51 (11th Cir. 2012),

and *United States v. Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015), when holding his prior convictions under Fla. Stat. § 843.01, qualified as violent felonies and crimes of violence, but he maintains the Court erred in doing so. In neither case did any Court mention the Florida Supreme Court's 1909 decision in *I.N. Johnson*, which is controlling as to the elements of the state crime of resisting arrest with violence. Also, the Court's discounting, in *Romo-Villalobos*, of Green's "wiggling and struggling" language, 400 So.2d at 1232-24, fails to take into account the *Moncrieffe* requirement that the Court consider "the least of the acts criminalized," 564 U.S. at 191.

In *Hill*, the Court found that § 843.01 qualifies as a violent felony because "Florida's intermediary courts have held that violence is a necessary element of the offense." *See Hill*, 799 F.3d at 1322 (citing to *Rawlings v. State*, 976 So.2d 1179 (Fla 5th DCA 2008) and *Walker v. State*, 965 So.2d 1281 (Fla. 2d DCA 2007)). Neither *Rawlings*, nor *Walker* discussed the "minimum conduct criminalized by the state statute," that is, the minimum amount of force needed to qualify as "violence" under § 843.01. *See Moncrieffe*, 564 U.S. at 191. The Florida courts do not discuss the quantum of force needed to constitute "violence" in the § 843.01 context. The answer to what constitutes the minimum amount force needed is found in the Florida Supreme Court's decision in *I.N. Johnson* - the "violence" element of § 843.01, is satisfied by the mere use of unlawful force.

In *United States v. Lee*, --- F. App'x ---, 2017 WL 2829372 at 3 & n.1 (10th Cir. June 30, 2017), the Tenth Circuit did discuss and take into account the Florida

Supreme Court decision in *I.N. Johnson.* The Tenth Circuit unambiguously found that a conviction under Florida's resisting with violence statute is not an ACCA predicate. *Id.* at 4 ("Having compared the minimum culpable conduct criminalized by § 843.01 to similar forcible conduct deemed not to involve violent force, we conclude that a conviction under § 843.01 does not qualify as an ACCA predicate."). The analysis in *Lee*, which takes into account all of the pertinent Florida and United States Supreme Court case law, is compelling, and Mr. Fitzgerald respectfully maintains it should be followed.

a. The mens rea required by Florida law does not meet the federal "use of physical force" definition.

The *Romo-Villalobos* Court held that a conviction under § 843.01 required proof of "general intent" as to all elements of the offense -- not only "resisting, obstructing, or opposing any officer," but also the final "doing violence" element. *See Romo-Villalobos*, 674 F.3d at 1250 n.3. Mr. Fitzgerald contends that the Florida Supreme Court's decisions in *Frey v. State*, 708 So.2d 908, 920 (Fla. 1998) and *Polite v. State*, 973 So.2d 1107 (Fla. 2007), establish that a general intent is only required for the first elements of the statute, "resisting, obstructing, or opposing any officer," and that no intent is required as to the final "doing violence" element, which makes the crime "akin" to a strict liability crime. *See Staples v. United States*, 511 U.S. 600, 609 (1994) (recognizing that "different element of the same offense can require different mental states).

In *Frey*, the court explained that "the statute's plain language reveals that no heightened or particularized, i.e., no specific intent is required for the commission of

this crime, only a general intent to knowingly and willfully impede an officer in the performance of his or her duties." *Frey*, 708 So.2d at 920. The Florida Supreme Court thus attached adverbs "knowingly and willfully" to the element of resisting an officer in the performance of his/her duties, so as to render the offense one of "general intent." *Id.* The *Frey* court stated, the only way the Florida offense of resisting an officer with violence could become a specific intent crime would be "if the present statute were recast to require a heightened or particularized intent." *Id.*

In nearly two decades since *Frey*, the Florida legislature has not recast Fla. Stat. § 843.01 to require an "intent of doing violence." Nor has any Florida court read "with intent of doing violence" into the statute. Instead, the Florida Supreme Court reaffirmed *Frey* in *Polite v. State*, 973 So.2d 1107 (Fla. 2007), which makes clear that the words "knowingly and willfully" do not modify the entire course of conduct described in § 843.01.

The Florida Supreme Court's construction of § 843.01 in *Frey* thus remains the law of Florida, and under *Curtis Johnson*, that construction is binding on all federal courts. *See Curtis Johnson*, 559 U.S. at 138. Because a defendant need not actively and deliberately "use" violent force to be guilty of the Florida offense of resisting with violence, that offense is not categorically a crime of violence or violent felony. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (stating the phrase "use...of physical force " in the similarly worded elements clause of 18 U.S.C. § 16(a) suggests "a higher degree of intent than negligent or merely accidental conduct").

Even if, a conviction under § 843.01 requires proof of "general intent" as to all elements of the offense, the conclusion that a general intent crime falls within the elements clause is contrary to controlling Supreme Court precedent, *Leocal*. The Supreme Court plainly meant that the federal elements clause requires a specific intent to apply violent force, it is not satisfied by a mere, general intent to commit the *actus reus* of the crime (here, "resisting, obstructing, or opposing" an officer). *See Leocal*, 543 U.S. at 9.

Other circuits have found that general intent crimes are indeed "overbroad" by comparison to an offense that "has as an element the use, intended use, or threatened use of physical force against the person of another." *See, e.g., United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1099 n.4 (9th Cir. 2015)(stating that if, as the government argued, the state aggravated assault statute at issue "were a general intent crime, application of the enhancement would fail because the statute would be overbroad"); *United States v. Rico-Mendoza*, 548 F. App'x 210, 212, 214 (5th Cir. 2013)(stating that when the least culpable act of the predicate offense was "the defendant intentionally pointing any firearm toward another, or displaying in a threatening manner any dangerous weapon toward another," such crime did not qualify as the "use of force" under the elements clause because no "intent to harm or apprehension by the victim of potential harm," was required, the offense could include "an accidental or jesting pointing of the weapon").

Consistent with the mens rea analysis in *Leocal* and the other circuit decisions, a conviction for resisting with violence in violation of § 843.01, a general

intent crime, is categorically "overbroad" by comparison to an offense that has the use of physical force as an element. Therefore, Mr. Fitzgerald's prior convictions are not violent felonies as defined by the ACCA, nor a crime of violence under the Sentencing Guidelines, and the holdings in *Romo-Villalobos* and *Hill* are no longer good law.

CONCLUSION

In affirming Mr. Fitzgerald's sentence, the Eleventh Circuit explained that it was bound to follow its prior decision in *Turner v. Warden,* 709 F.3d 1328, 1341 (11th Cir. 2013), abrogated on other grounds by *Johnson v. United States*, 135 S. Ct. 2551 (2015). The *Turner* court did not conduct the type of strict, element-by-element comparison – and overbreadth analysis – now required by the categorical approach after *Descamps*. Additionally, the *Turner* panel did not consider how Florida courts have interpreted the language within Florida's aggravated battery and resisting arrest with violence statute. Given the Eleventh's Circuit's continued reliance on *Turner, Romo-Villalobos, and Hill*, this Court must review Mr. Fitzgerald's case based on the foregoing.

Respectfully submitted,
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APPENDIX

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15285
Non-Argument Calendar

D.C. Docket No. 9:17-cr-80042-RLR-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DEMETRIUS DEVON FITZGERALD,
a.k.a. Demtemoivs D. Fitzgerald,
a.k.a. Fat Mimi,

Defendant-Appellant.

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

(November 28, 2018)

Before TJOFLAT, NEWSOM, and EDMONSON, Circuit Judges.

PER CURIAM:

Demetrius Fitzgerald appeals his 240-month total sentence for being a felon in possession of a firearm, possessing with intent to distribute oxycodone, marijuana, and alprazolam, and possessing multiple firearms in furtherance of a drug trafficking crime. Fitzgerald argues that the district court erred in treating him as an armed career criminal and a career offender because his Florida aggravated battery with a deadly weapon and resisting arrest with violence convictions were not predicate offenses under the elements clause of the Armed Career Criminal Act ("ACCA") and the career-offender guideline.

We review *de novo* whether a prior conviction qualifies as a violent felony under the ACCA or a crime of violence under the career-offender guideline. *United States v. Seabrooks*, 839 F.3d 1326, 1338 (11th Cir. 2016) (ACCA), *cert. denied*, 137 S. Ct. 2265 (2017); *United States v. Vail-Bailon*, 868 F.3d 1293, 1296 (11th Cir. 2017) (*en banc*) (career offender), *cert. denied*, 138 S. Ct. 2620 (2018). We apply the same analysis for both ACCA violent felonies and crimes of violence under the sentencing guidelines, as they are "virtually identical." *United States v. Rainey*, 362 F.3d 733, 734 (11th Cir. 2004).

A defendant who violates 18 U.S.C. § 922(g) and has at least 3 earlier convictions for violent felonies or serious drug offenses is subject to an enhanced statutory sentence of 15 years to life imprisonment. 18 U.S.C. § 924(e)(1). To qualify as a career offender a defendant must have at least two prior felony convictions for a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a)(3). Under the elements clauses in the ACCA and career-offender guidelines, an offense is a violent felony or a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a).

In *United States v. Romo-Villalobos*, we concluded that a Florida conviction for resisting arrest with violence constituted a crime of violence under the elements clause of the career-offender guideline. 674 F.3d 1246, 1249 (11th Cir. 2012). In *United States v. Hill*, we reaffirmed our holding in *Romo-Villalobos* after the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). 799 F.3d 1318, 1322-23 (11th Cir. 2015); *see also United States v. Joyner*, 882 F.3d 1369, 1378 (11th Cir. 2018), *petition for cert. filed*, (U.S. May 23, 2018) (No. 17-9128). In *Turner v. Warden Coleman FCI*, we concluded that a Florida conviction for aggravated battery with a deadly weapon satisfied the elements clause of the ACCA. 709 F.3d 1328, 1341 (11th Cir. 2013). We have reaffirmed

our holding in *Turner* after *Johnson*. *United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017); *In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016).

Under the prior precedent rule, we are bound by a prior binding precedent "unless and until it is overruled" by this Court *en banc* or by the Supreme Court. *United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008) (quotation marks omitted).

Here, the district court properly sentenced Fitzgerald as an armed career criminal and a career offender because his four total prior Florida convictions for aggravated battery with a deadly weapon and resisting arrest with violence are violent felonies and crimes of violence in the light of our prior precedent. *See Hill*, 799 F.3d at 1322 (resisting arrest with violence); *Turner*, 709 F.3d at 1341 (aggravated battery with a deadly weapon).

AFFIRMED.