NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

LAMAR EADY, JR.,

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. Does the "knowingly" provision of 18 U.S.C. § 924(a)(2) apply to both the possession and status elements of a 18 U.S.C. § 922(g) crime? The Court will decide that issue in *Rehaif v. United States*, No. 17-9560.

2. Under the "realistic probability" standard of *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), is it necessary to identify a reported case to establish that a state statute is overbroad vis-a-vis a federal definition if the plain language of the state statute so indicates?

3. 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 the question of whether Florida felony battery under Fla. Stat. § 784.041(1) is an ACCA "violent felony" is 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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Lamar Eady, Jr. ("Petitioner") 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 Petitioner a certificate of appealability, *Eady v. United States*, Order (11th Cir. Jan. 23, 2019) (No. 18-14449), is included in the Appendix at 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 a

certificate of appealability was entered on January 23, 2019. On March 29, Justice Thomas extended the time to file this petition until May 23, 2019. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §922

> **(g)** It shall be unlawful for any person –
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [or]
>
> (5) who, being an alien . . . is illegally or unlawfully in the United States . . .
>
> to . . . possess in or affecting commerce, any firearm or ammunition . . .

18 U.S.C. § 924. Penalties

> **(a)(2)** Whoever, knowingly violates subsection (a)(6), (d) (g) (h), (i), (j), or (o) of section 922 shall be fined as provided in this title imprisoned not more than 10 years, or both. . . .
>
> **(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; or
> > >
> > > **(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Fla. Stat. § 784.03. (Simple) Battery

> (1)(a) The offense of battery 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.

(b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree . . .

(2) A person who has one prior conviction for battery . . . and who commits any second or subsequent battery commits a felony of the third degree . . .

Fla. Stat. § 784.041. Felony Battery

(1) A person commits felony battery if he or she:

(a) Actually and intentionally touches or strikes another person against the will of the other; and

(b) Causes great bodily harm, permanent disability, or permanent disfigurement. . . .

(3) A person who commits felony battery . . . commits a felony of the third degree . . .

Fla. Stat. § 784.045. Aggravated Battery

(1)(a) A person commits aggravated battery, who, in committing battery:

1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or

2. Uses a deadly weapon. . . .

(b)(2) Whoever commits aggravated battery should be guilty of a felony of the second degree . . .

STATEMENT OF THE CASE

On July 26, 2013, a federal grand jury charged Petitioner with "knowingly possess[ing] a firearm and ammunition in and affecting interstate and foreign commerce" on June 30, 2013, "having been convicted of a crime punishable by imprisonment for a term exceeding one year," in violation of 18 U.S.C. §922(g)(1). Consistent with the law in effect at the time, the grand jury did *not* charge that Petitioner knew of his status as a convicted felon when he possessed a firearm and ammunition. Nor was Petitioner's jury instructed that such knowledge was an element the government must prove beyond a reasonable doubt.

On November 13, 2014, Petitioner was convicted as charged.

In the PSI, the probation officer calculated Petitioner's adjusted offense level under U.S.S.G. § 2K2.1 as a level 29. However, the probation officer opined, Petitioner qualified as an "Armed Career Criminal" pursuant to 18 U.S.C. §924(e) and was subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e), and pursuant to §4B1.4(a), because of three prior convictions including a 2010 conviction for Florida felony battery under Fla. Stat. § 784.041(1).

Pursuant to §4B1.4(b)(3)(B), Petitioner's recommended offense level as an Armed Career Criminal was 33, and he faced a statutory penalty of 15 years up to life imprisonment. At a total offense level of 33, and a criminal history category of IV, his advisory guideline range as an Armed Career Criminal was 188-235 months imprisonment. Without the ACCA enhancement, at a total offense level of 29 and a criminal history category of IV, his advisory guideline range would have been 121-151 months imprisonment.

Petitioner objected to the probation officer's conclusion that he qualified as an Armed Career Criminal. He argued that his Florida felony battery conviction was not a qualifying

ACCA "violent felony" under either the elements clause or the residual clause of the ACCA. He acknowledged that "great bodily harm, permanent disability, or permanent disfigurement" was an element of any "felony battery" under Fla. Stat. § 784.041(1). However, he pointed out, such "harm" could be caused by either "*touching* or striking," and, since the offense could be committed by a mere (non-violent) touching, under *Curtis Johnson v. United States*, 559 U.S. 133 (2010), it was *not* categorically a "violent felony" under the elements clause. Moreover, he noted, what distinguished the crime of "aggravated battery" (a 2nd degree felony, punished under Fla. Stat. §784.045) from the lesser 3rd degree felony of "felony battery," was that "great bodily harm" was caused "*knowingly* and *intentionally*" in an "aggravated battery," but "*unknowingly* and *unintentionally*" in a "felony battery." Since "felony battery" was therefore a "strict liability" crime as to the "harm caused," he argued, it was not a qualifying ACCA predicate.

At Petitioner's February 11, 2014 sentencing, the court overruled those objections. It found that his guideline range as an Armed Career Criminal was indeed 188-235 months as set forth in the PSI, and sentenced him to the low end of that range–188 months imprisonment, to be followed by 5 years supervised release.

Petitioner appealed his enhanced ACCA sentence to the Eleventh Circuit. However, the Eleventh Circuit affirmed in an unpublished decision finding that Florida felony battery was a qualifying "violent felony" under both the elements clause and the (then-still-valid) residual clause of the ACCA. *United States v. Eady*, 591 Fed. Appx. 711, 719-20 (11th Cir. Nov. 6, 2014). Petitioner thereafter sought certiorari, but review was denied. *Eady v. United States*, 135 S.Ct. 1847 (April 20, 2015) (No. 14-8372). Two months after the denial of certiorari in his case,

this Court declared the ACCA's residual clause unconstitutionally vague and void in *Samuel Johnson v. United States,* ___ U.S. ___, 136 S.Ct. 2251 (June 26, 2015).

On April 16, 2016, Petitioner moved to vacate his enhanced ACCA sentence pursuant to 28 U.S.C. § 2255. Since he was still within a year of "finality" of his conviction and sentence at that point, his motion was timely under 28 U.S.C. § 2255(f)(1). In the motion, he argued that in light of the intervening decision in *Samuel Johnson*, he no longer had three convictions that qualified as "violent felonies," and was therefore no longer an Armed Career Criminal. While that § 2255 motion was pending, a divided 3-judge panel of the Eleventh Circuit held that Florida felony battery by touching did not categorically have "*violent* force" as an element as required by *Curtis Johnson*. *United States v. Vail-Bailon,* 838 F.3d 1091 (11th Cir. 2016). However, the full Eleventh Circuit reheard the case en banc, reversed the panel, and held in a narrow 6-5 decision that Florida felony battery, even by touching, *did* categorically have "violent force" as an element. *United States v. Vail-Bailon,* 868 F.3d 1293 (11th Cir. 2018) (en banc).

The en banc majority in *Vail-Bailon* framed the issue before it as whether Florida felony battery "necessarily requires the use of physical force" under *Curtis Johnson*. *Id.* at 1299. In that regard, it noted with significance that in *Curtis Johnson* this Court had defined "physical force" as "*violent* force–that is <u>force capable of causing pain or injury to another person</u>." *Id.* at 1297 (underling added by the *Vail-Bailon* majority). The emphasized language confirmed for the en banc majority that the test for "*violent* force" in *Curtis Johnson* was result-focused and asked only if the conduct in question was "capable" of causing pain or injury; it was not a "degree of force" test as Vail-Bailon had argued. Reasoning that force that actually *did* cause pain or injury was "necessarily *capable*" of causing such a result, the majority concluded that Florida felony battery easily met that standard, since the statute required the causation of great

bodily harm in every case. *Id.* at 1299-1302 (characterizing the definition of "physical force" in *Curtis Johnson* as a "capability-based definition," or "capability' test;" holding that "the capability standard announced in *Curtis Johnson* controls the inquiry, not [a] likelihood standard").

The majority squarely rejected Vail-Bailon's contrary assertion that the word "capable" had to be read in the context of the surrounding discussion, which confirmed that *Curtis Johnson*'s definition of "violent force" was to be measured in terms of "degree," and the degree of force used had to be substantial enough that it was "likely" to cause pain or injury. *Id.* at 1300-1302. Moreover, citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007) — but ignoring the trilogy of circuit precedents interpreting *Duenas-Alvarez* including *Ramos v. Att'y. Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) — the majority also rejected Vail-Bailon's assertion that the "touch or strike" language of the statute made clear that, like Florida simple battery, Florida felony battery could be committed by a "mere" or slight touching that accidentally caused great bodily harm. 368 F.3d at 1306-07. The en banc majority refused to credit the statute's plain "touches" language, as definitively interpreted in *Curtis Johnson*, because there was "no case" in Florida "in which tapping, tickling, or lotion-applying—or any remotely similar conduct—has been held to constitute a felony battery." 868 F.3d at 1306 (noting that all of "the real-world examples of Florida felony battery we are aware of involve conduct that clearly required the use of physical force, as defined by *Curtis Johnson*; citing reported cases that involved biting, punching the victim in the face, and grabbing the victim, sitting on her chest, and strangling her with sufficient force to break her clavicle).

Without any reported prosecuted case involving causation of great bodily injury though a mere or slight touching, the majority found that Vail-Bailon could not show that prosecution for

non-violent conduct was a "realistic probability," as opposed to a "florid exercise of legal imagination." *Id.* at 1305-1307. Contrary to the plain statutory language, and based upon the facts of the very few reported appellate cases under Fla. Stat. § 784.041(1) in existence, the Court presumed that Florida's felony battery statute required more than a "mere" touch, namely, "a touch that is forceful enough to cause great bodily harm." *Id.* at 1301. The majority contrasted the felony battery statute in this regard with the simple battery statute, acknowledging that "a statute requiring nothing more than a slight touch does not categorically qualify as physical force under the capability-based definition applied by *Curtis Johnson*." *Id.*

In complementary dissents, Judges Wilson (joined by Judges Jordan, Martin, and Jill Pryor) and Judge Rosenbaum (joined by judges Martin and Jordan) opined that the en banc majority had incorrectly "create[d] a new test for 'physical force' that disregards [the] degree of force," and instead adopts a "novel capacity test." *Id.* at 1308-1314 (Wilson, J., dissenting); *see id*. at 1315 (Rosenbaum, J., dissenting). Its capacity test, they argued, "swallow[ed] *Curtis Johnson*'s finding that Florida simple battery does not require 'physical force,'" because even simple battery had the capability of causing pain or injury. *Id.* at 1314 (Wilson, J., dissenting); *see id.* at 1315 & n.2 (Rosenbaum, J., dissenting).

In that regard, they emphasized that Florida felony battery was nothing more than Florida simple battery that unintentionally caused great bodily harm: that "the *actus reus* elements of felony and simple battery are identical;" and that the only difference is the result. *Id.* at 1311-1312 (Wilson, J., dissenting); *see id.* at 1315, 1320-1323 (Rosenbaum, J., dissenting). Thus, they opined, the en banc majority had incorrectly applied *Duenas-Alvarez* by requiring Vail-Bailon to identify a specific case confirming an actual felony battery prosecution for a mere touching. Since the statutory language made plain that the offense could be committed by such

conduct, in their view the statutory language itself created the "realistic probability" that Florida would apply the statute in this way; no "legal imagination" was required. *Id.* at 1312, n.4 (Wilson, J., dissenting) (citing *Ramos*); *id.* at 1320-1321 & n.10 (Rosenbaum, J., dissenting) (citing *Ramos*; noting that it was clear from *State v. Hearns*, 961 So.2d 211 (Fla. 2007) and *Curtis Johnson* that the first element of felony battery applies to a mere touching; and opining that "[w]hether Florida has actually prosecuted such a case is entirely irrelevant to the analysis"). Based on the plain language of the Florida felony battery statute, all five dissenting judges agreed that Florida felony battery could be committed without "*violent* force."

Based upon the *Vail-Bailon* en banc majority's contrary and controlling view, however, the magistrate judge recommended denial of Petitioner's § 2255 motion. Petitioner filed detailed objections including on the *Duenas-Alvarez* issue, and—noting a sharp circuit split as to proper application of *Duenas-Alvarez* where, as here, a statute's overbreath was plain on its face—at the very least sought a certificate of appealability ("COA") to further pursue that issue. However, on September 21, 2018, the district court overruled his objections, adopted the Report and Recommendation, and denied the § 2255 motion. By separate order, the court denied Petitioner a COA, finding he had "failed to demonstrate the deprivation of a Federal constitutional right."

On October 18, 2019, Petitioner appealed the denial of his § 2255 motion and thereafter sought a COA." In his motion for certificate of appealability, he argued that reasonable jurists would debate the district court's determination that Florida felony battery was a qualifying "violent felony" in several respects, including whether under *Duenas-Alvarez* the plain language of a statute (the word "touches" in Fla. Stat. § 784.041(1)) may itself create a "reasonable probability" the statute applies to non-violent conduct, or whether a case is needed to confirm actual prosecution for overbroad, non-violent conduct such as a mere touching.

On January 23, 2019, Judge Rosenbaum (the author of the *Vail-Bailon* panel decision, and of a strenuous dissent from the en banc decision) denied Petitioner a certificate of appealability, finding that reasonable jurists would not debate any of the issues he had raised because of the en banc majority's decision in *Vail-Bailon*. She stated:

> In *Vail-Bailon*, this Court addressed whether felony battery in Florida necessarily requires the use of physical force, and, thus, categorically qualifies as a crime of violence under the elements clause of U.S.S.G. § 2L1.2. Applying the definition of "physical force" that the Supreme Court used in *Johnson v. United States*, 559 U.S. 133 (2010) ("*Curtis Johnson*"), to assess whether Florida's simple battery statute was a crime of violence under the ACCA, this Court found that Florida felony battery was a crime of violence under the elements clause of § 2L1.2. *Vail-Bailon*, 868 F.3d at 1308.
>
> Here, reasonable jurists would not debate the district court's determination that Eady's § 2255 motion be denied. In light of this Court's decision in *Vail-Bailon*, Florida felony battery clearly qualifies as a violent felony under the elements clause of the ACCA. *See United States v. Lockley*, 632 F.3d 1238, 1243 n. 5 (11th Cir. 2011) (stating that this Court applies the same analysis for both ACCA violent felonies and crimes of violence under the Sentencing Guidelines). Thus, Eady's motion for a COA is denied.

Eady v. United States, Order at 3 (11th Cir. Jan. 23, 2019) (No. 18-14449).

REASONS FOR GRANTING THE WRIT

I. Petitioner's conviction cannot stand if the Court rules in *Rehaif v. United States*, No. 17-9560 that the "knowingly" provision in 18 U.S.C. § 924(a)(2) applies to both the possession and status elements in 18 U.S.C. § 922(g).

This Court has granted certiorari in *Rehaif v. United States*, No. 17-9560 on the important question of whether the "knowingly" provision of 18 U.S.C. § 924(a)(2) applies to both the possession and status elements of a 18 U.S.C. § 922(g) crime. 2019 WL 166874 (Jan. 11, 2019). The petition for a writ of certiorari in *Rehaif* relied extensively on then-Judge Gorsuch's opinions in *United States v. Games-Perez*, explaining that the "knowingly" provision should apply to the status elements of § 922(g) including, as there, whether the defendant was a convicted felon. 667

F.3d 1136, 1142-46 (10th Cir. 2012) (Gorsuch, J., concurring in judgment); 695 F.3d 1104, 1116-17 (10th Cir. 2012) (Mem) (Gorsuch, J., dissenting from denial of rehearing en banc).

Petitioner was charged with being a convicted felon who knowingly possessed a firearm and ammunition, and he was convicted of that offense after a jury trial. The grand jury's indictment did not charge, and the government did not prove to the jury beyond a reasonable doubt, that Petitioner knew he was a convicted felon at the time of the firearm and ammunition possession. Should this Court decide in *Rehaif* that the "knowingly" provision of § 924(a)(2) applies to the status elements of § 922(g), Petitioner's conviction upon a defective indictment cannot stand.

Petitioner therefore respectfully requests that this Court hold his petition pending the Court's decision in *Rehaif*. Although this issue was not raised below, this Court is not precluded from holding Petitioner's case and directing the court below to consider the effect of an intervening change in substantive law in *Rehaif* upon Petitioner's case. Indeed, in *Reed v. United States*, No. 18-7490, where as here the petitioner raised a *Rehaif* claim for the first time on certiorari, the government agreed – after considering the April 23, 2019 oral argument in *Rehaif* – that the petitioner's case should be held, as the decision in *Rehaif* "may affect the proper disposition of the petition." Gov't Br. 2, *Reed v. United States*, No. 18-7490 (U.S., May 10, 2019).

The legality of Petitioner's conviction is squarely before the Court at this time. Had Petitioner challenged the grand jury's failure to charge and petit jury's failure to find that he knew of his status as well as his possession of a firearm and ammunition, Eleventh Circuit precedent plainly would have foreclosed such arguments. *See United States v. Jackson*, 120 F.3d 1226 (11th Cir. 1997) (cited and followed by *United States v. Rehaif*, 888 F.3d 1138, 1144 (11th

Cir. 20180, *cert. granted*, 2019 WL 166874 (Jan. 11, 2019)). A decision for the petitioner in *Rehaif*, however, will definitively abrogate *Jackson.* Should that occur, certiorari should be granted, the judgment below should be vacated, and the case remanded for further consideration of the legality of Petitioner's indictment and conviction in light of what would be a complete sea change in controlling substantive law.

II. The circuits are divided on proper application of *Duenas-Alvarez* where the plain language of the state statute is overbroad on its face vis-a-vis the federal definition.

A. The circuits are intractably divided on the question presented.

In *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc), the Eleventh Circuit split 6-5 on proper application of this Court's holding in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) that in applying the categorical approach, there must be a "realistic probability, not a theoretical possibility, that the state would apply its statute to conduct that falls outside" the relevant federal definition. *Id.* at 193. The *Vail-Bailon* court sharply disagreed on whether the plain "touch" language of Florida's battery statute itself established that "realistic probability," or whether a reported case was necessary to confirm overbreadth. And notably, the circuits have long been divided on proper application of *Duenas-Alvarez* in similar circumstances.

In *Duenas-Alvarez*, the Court cautioned that identifying the scope of an offense for purposes of applying the categorical approach "requires more than the application of legal imagination to a state statute's language." *Id.* at 193. To show a "realistic probability," the Court explained, "an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special . . . manner for which he argues." *Id.*

Importantly, however, that passage must be read in context. In *Duenas-Alvarez*, the offender argued that California's aiding-and-abetting doctrine rendered his theft offense non-generic, because it made a defendant criminally liable for unintended conduct. *Id.* at 190-91. That argument found no support in either the statutory language or precedent establishing the scope of aiding-and-abetting liability. As a result, the Court required the offender to identify a specific case to support his novel, proposed application. *See id.* at 187, 190-91. This Court has not addressed whether the case-specific requirement of *Duenas-Alvarez* applies even where, as here, the language of the statute plainly establishes that an offense is overbroad. The courts of appeals are sharply divided on that question.

1. The First, Second, Third, Sixth, Ninth, and Tenth Circuits have all held that a statute's plain language can establish that an offense is overbroad, notwithstanding the absence of a confirmatory reported case. *See Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017) (the "sensible caution [in *Duenas-Alvarez*] against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance to a case [where the plain statutory language is overbroad]. The state crime at issue clearly does apply more broadly than the federally defined offense. Nothing in *Duenas-Alvarez*, therefore, indicates that this state law crime may be treated as if it is narrower than it plainly is."); *Whyte v. Lynch*, 807 F.3d 463, 468-69 (1st Cir. 2015) (where the plain language of the statute does not require the use, attempted use, or threatened use of violent force, there is a "realistic probability" the state could punish conduct that results in physical injury without the "use of physical force;" a reported case is not required); *Hylton v. Sessions*, 897 F.3d 57, 64 (2nd Cir. 2018) (citing the Eleventh Circuit's pre-*Vail-Bailon* decision in *Ramos v. Att'y Gen.*, 709 F.3d 1066 (11th Cir. 2013) for the proposition that there is no requirement to point to a case "'when the statutory language itself,

rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition'"); *Jean-Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (declining to "impose[ ] this additional step" of identifying a reported case because, unlike *Duenas-Alvarez* where the parties "vigorously disputed" the scope of the offense, "no application of 'legal imagination' to the Pennsylvania simple assault statute is necessary. The elements . . . are clear, and the ability of the government to prosecute a defendant" for certain conduct is "not disputed"); *United States v. Lara*, 590 F. App'x 574, 584 (6th Cir. 2014) ("The government is correct that there appear to be no cases in Tennessee that have applied § 39–14–403 to unattached, uninhabited structures. The meaning of the statute, however, is plain: the statute applies to structures that belong to the principal structure. We should not ignore the plain meaning of the statute;" citing as support *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) (where the law is clear, courts do "not need to hypothesize about whether there is a 'reasonable probability' that Maryland prosecutors will charge defendants engaged in non-violent physical contact with resisting arrest; we know that they can") (emphasis added);[1] *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the [federal] definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the [federal] definition . . . . The state statute's greater breadth is evident from its text.");[2] *United States v. Titties*, 852 F.3d 1257,

[1] *Accord Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572 (6th Cir. 2007); *United States v. McGrattan*, 504 F.3d 608, 614 (6th Cir. 2008).

[2] *Accord United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc), *abrogated on other grounds, as recognized in Cardozo-Arias v. Holder*, 495 F. App'x 790, 792 n.1 (9th Cir. 2012); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009-10 (9th Cir. 2015) (re-affirming and applying

1274-75 & n.23 (10th Cir. 2017) ("Where, as here, the statute lists means to commit a crime that would render the crime non-violent under the ACCA's force clause, any conviction under the statute does not count as an ACCA violent felony," and there is no "need to imagine hypothetical non-violent facts to take a statute outside the ACCA's ambit" or "require instances of actual prosecutions for the means that did not satisfy the ACCA. The disparity between the statute and the ACCA [is] enough.").

2. By contrast, a majority of the judges on the Fifth and Eleventh Circuits have taken the contrary view. Dividing 8-7, the en banc Fifth Circuit held that, under *Duenas-Alvarez*, the defendant was required to identify a reported case in which "courts have *actually applied*" the statute in the way the defendant advocated. *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc). It specifically rejected the contrary assertion of the dissenters that, "because the Texas statute's definition . . . is plainly broader" than the federal definition, "Castillo-Rivera is not required to point to an actual case." *Id.* at 223. That view, according to the majority, "does not comply with the Supreme Court's directive in *Duenas-Alvarez*." *Id.*

Contrary to the views expressed by the First, Second, Third, Sixth, Ninth, and Tenth Circuits, the Fifth Circuit majority reasoned: "There is no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face. Indeed, the Court in *Duenas-Alvarez* emphasized that a defendant must 'at least' point to an actual state case—the implication being that even pointing to such a case may not be satisfactory. In short, without supporting state case law, interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'" *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193). The majority asserted that this requirement was consistent with prior

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Grisel and *Vidal*); *United States v. Jennings*, 515 F.3d 980, 989 n.9 (9th Cir. 2008) (same); *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017) (following *Grisel*).

Fifth Circuit precedents. *Id.* at 223-24. Because the defendant did not identify a reported case supporting his construction of the statute, the majority rejected his argument. *Id.* at 224-25.

The seven-member dissent in *Castillo-Rivera* disagreed that *Duenas-Alvarez* inflexibly requires a defendant to "point to a state decision . . . in all cases in order to establish a realistic probability that the state would apply its law in a way that falls outside of the scope of the relevant federal" definition. *Id.* at 238 (Dennis, J., dissenting) (citation omitted). Rather, the dissent pointed out, "*Duenas-Alvarez* is concerned with the defendant who tries to demonstrate that a statute is overbroad by hypothesizing that it might be applied in some fanciful or unlikely way—through 'the application of legal imagination.' Castillo-Rivera is not relying on 'the application of legal imagination' to establish that [the statute] is overbroad; he is relying on the statute's plain language." *Id.* at 239.

The majority's contrary conclusion, the dissent argued, also ran afoul of the categorical approach adopted in *Taylor v. United States*, 495 U.S. 575 (1990), because "state prosecutors' discretionary decisions whether or not to prosecute an offense under certain circumstances cannot add *statutory elements* to statutes that plainly do not contain those elements." *Id.* (Emphasis in original). "Viewed in this context, it is clear that *Duenas-Alvarez* does not, as the majority opinion holds, require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a state case." *Id.* The dissent also argued that the majority's approach was contrary to the facts of *Taylor*, as well as numerous prior Fifth Circuit cases, which did not require the defendant to identify a case. *See id.* at 239-41.

Finally, the dissent noted that "the majority opinion [does not] address or even acknowledge that its holding directly conflicts with holdings from the First, Third, Sixth, Ninth,

and Eleventh Circuits,[3] all of which have recognized the limits of *Duenas-Alvarez*'s requirement." *Id.* at 241 (citing cases). The dissent concluded that "the majority opinion's unqualified rule that a defendant must in all cases point to a state court decision to illustrate the state statute's breadth misconstrues *Duenas-Alvarez*, directly conflicts with *Taylor*, and ignores both our established circuit precedent and the holdings of several of our sister circuits." *Id.*

The Eleventh Circuit is now squarely aligned with the Fifth Circuit. In *Vail-Bailon*, the en banc majority refused to credit scenarios offered by Vail-Bailon, which concretely showed how Florida felony battery could be committed by a mere touching. Although the plain language of the statute made clear that the offense could be committed by a touching, the majority found those scenarios "farfetched" absent a case "in which tapping, tickling, or lotion-applying—or any remotely similar conduct—has been held to constitute a felony battery under Florida Statute § 784.041." *Vail-Bailon*, 868 F.3d at 1306. Without such a case, the en banc majority found that Vail-Bailon was offering "little more than the verboten legal imagination proscribed" by *Duenas-Alvarez*. *Id.* at 1307. The majority, inexplicably, made no mention of the Eleventh Circuit's earlier precedents finding this aspect of *Duenas-Alvarez* inapplicable where the plain language of the statute establishes its scope.

By contrast, and relying upon those earlier precedents, Judge Wilson's dissent correctly explained that:

> the felony battery statute specifically refers to "touching" that "causes great bodily harm," Fla. Stat. § 784.041, and Florida courts have defined "touching" in the battery context to refer to a mere touching, *see Curtis Johnson*, 559 U.S. at 138. Felony battery's "statutory language itself" therefore creates a 'realistic probability that Florida would apply the statute to' a mere touching that happens to cause great bodily harm. *Ramos v. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th

[3] Here, the Fifth Circuit was referring to the Eleventh Circuit's pre-*Vail-Bailon* panel precedents in *Ramos*, 709 F.3d at 1071-72, *Vassell v. Att'y Gen.*, 839 F.3d 1352, 1362 (11th Cir. 2016), and *Accardo v. Att'y Gen.*, 634 F.3d 1333, 1336-37 (11th Cir. 2011).

> Cir. 2013) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The Florida legislature would not have included a mere touching as an operative act in felony battery if the legislature did not intend to punish some mere touchings.

Id. at 1312 n. 4 (brackets and parallel citation omitted).

Judge Rosenbaum's dissent made the same point. She reiterated that "a petitioner does not engage in legal imagination when the *statutory language itself* creates the realistic possibility that a state would apply the statute to the identified least culpable conduct, regardless of whether it actually has done so." *Id*. at 1320 (emphasis in original; citations and ellipsis omitted). Applying that principle to felony battery, she explained:

> We know that, by its language, the first element applies to mere touching. *State v. Hearns*, 961 So. 2d 211 (Fla. 2007); *Curtis Johnson*, 559 U.S. 133. . . . So the terms of the felony-battery statute itself make it plain beyond all doubt that mere touching that accidentally results in serious bodily injury squarely satisfies the statute's requirements. Indeed, the government conceded as much at oral argument. For this reason, despite the Majority Opinion's reassurance that, "to its knowledge, there is . . . no case in which mere touching that accidentally resulted in serious bodily injury has been held to constitute a felony battery under Florida Statute § 784.041," whether Florida has actually prosecuted such a case is entirely irrelevant to the analysis. *See Ramos*, 709 F.3d at 1071-72.

Id. at 1320-1321 (brackets omitted). While there were only two reported felony battery decisions involving a touching, neither of which involved nominal contact, Judge Rosenbaum opined that they were "not a sufficient sample size to conclude that no one has ever convicted of felony battery for mere-touching conduct." *Id.* at 1320 n.10. And "even if it were, as noted above, mere touching that accidentally results in grievous bodily injury falls squarely within the [statutory] language." *Id.*

B. This is an excellent vehicle for certiorari because the question dividing the circuits is directly presented here, and is recurring and important with widespread application in other contexts.

Notably, the correctness or incorrectness of the *Vail-Bailon* majority's application of *Duenas-Alvarez* was before the Court in *United States v. Sims*, No. 17-766. *See* Resp. Br.,

United States v. Sims, No. 17-766, 2018 WL 3913908 at **34-39 (Aug. 14, 2018) (asking the Court to resolve the longstanding circuit conflict as to whether *Duenas-Alvarez* requires identification of a real case in which a court has applied the statute in an overbroad fashion, if the plain language of the statute of conviction is *itself* facially overbroad). However, the Court found that the issue was not appropriately before it, since Sims had not presented it to the courts below. *See United States v. Stitt et al*., 139 S.Ct. 399, 407-08 (2018) (noting, "'we are a court of review, not of first view;'" remanding to allow the lower courts to determine whether they would consider the issue) (citation omitted).[4]

Here, by contrast, the *Duenas-Alvarez* question was both pressed and passed upon below. It is a threshold question for any case involving the Florida felony battery statute, and – as explained in Part C. below – is integral to resolving whether Petitioner was correctly sentenced as an Armed Career Criminal. However, the importance of proper application of *Duenas-Alvarez* is not limited to this particular predicate offense or any particular federal statute. It has been a recurring and important question with widespread application because Federal courts across the nation apply the categorical approach on a daily basis in diverse contexts. In the criminal context, they do so to determine not only whether a federal criminal defendant is subject to a mandatory minimum penalty or enhanced guideline range, but also whether a defendant may have committed predicate "crimes of violence" under 18 U.S.C. § 924(c). And, in the immigration context, courts apply the categorical approach to determine whether an alien is

[4] On January 17, 2019, the Eighth Circuit ordered simultaneous supplemental briefing on the issue left open by the Court in *United States v. Sims*, No. 16-766. Notably, in its supplemental brief, the government did not defend the Eleventh and Fifth Circuit's minority position on *Duenas-Alvarez*. Instead, it "assum[ed] that *unambiguous* statutory text alone could satisfy *Duenas-Alvarez*'s 'realistic probability' requirement," but argued that the Arkansas statutory text was not unambiguous, and that "Sims's construction of the statute is, at best, strained." Supplemental Brief for United States, *United States v. Sims*, No. 16-1233 (8th Cir. Feb. 22, 2019). As of this writing, there has been no decision on the issue.

subject to removal. Thus, while the categorical approach represents a technical area of the law, its application has widespread and extremely grave consequences in both the federal criminal and immigration arenas. Given the stakes, its application must be uniform.

This Court has attempted to vigilantly ensure such uniformity by repeatedly granting review to clarify proper application of the categorical approach. *See, e.g.*, *Mathis v. United States*, 579 U.S. __, 136 S. Ct. 2243 (2016) (clarifying when statutes are divisible for modified categorical approach); *Descamps v. United States*, 570 U.S. __, 133 S. Ct. 2276 (2013) (holding that modified categorical approach is inapplicable to indivisible statutes); *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (re-affirming and clarifying application of categorical approach in immigration context); *Nijhawan v. Holder*, 557 U.S. 29 (2009) (declining to apply categorical approach to particular immigration statute); *Shepard v. United States*, 544 U.S. 13 (2005) (limiting class of documents that may be considered under modified categorical approach). But given the uncertainty created by *Duenas-Alvarez*, and the prevalence of the categorical approach, the Court's intervention in this area is warranted yet again since the Court resolved *Sims* without reaching the circuit conflict on *Duenas-Alvarez*.

The minority view adopted by the en banc Fifth and Eleventh Circuits will have troubling repercussions if not corrected. Under that view, the scope of a predicate offense can be ascertained only by examining the particular facts contained in the universe of reported cases. That limited universe, however, will seldom reflect the true scope of the offense. The reported case law can be skewed or sparse due to the relative novelty of an offense, prosecutorial discretion, and—most importantly—the ubiquity of guilty pleas. *See Aparicio-Soria*, 740 F.3d at 157-158 ("It may be that Maryland prosecutors tend to charge too many offenders with resisting arrest when they could charge far more serious crimes, or it may be that we have a skewed

universe of cases from the hundreds of resisting arrest convictions sustained each year."); *see also United States v. Davis*, 875 F.3d 592, 606 (11th Cir. Nov. 7, 2017) (Rosenbaum, J., concurring in part) (noting that "only a handful of the numerous cases prosecuted under § 784.041 have published opinions in them. As a result, we have no way of knowing the scope of what Florida has actually prosecuted under that statute").

This Court has recognized that "ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (citing Department of Justice statistics). And not only do guilty pleas rarely generate reported decisions concerning the scope of substantive law, but indeed, there are a host of other reasons why defendants may not appeal or there may not be a state court opinion addressing the reach of the statute. Plainly, therefore, "a lack of published cases or appellate-level cases does not imply a lack of convictions." *Nunez v. Holder*, 594 F.3d 1124, 1137 n. 10 (9th Cir. 2010).

The charging, plea, and appeal practices under a statute cannot change the scope of the offense, which, at bottom, derives from the statute enacted by the legislature. *See Castillo-Rivera*, 853 F.3d at 239 (Dennis, J., dissenting). By precluding courts from relying on the plain statutory language, that application of the categorical approach will ensure an artificial analysis—one where the least culpable conduct used by the courts does not represent the least culpable conduct actually prohibited by the statute. At the very least, such a troubling application and extension of *Duenas-Alvarez* warrants this Court's close scrutiny.

The effects of *Vail-Bailon* in this regard have already been felt outside the Eleventh Circuit, and in diverse contexts far removed from that here. For example, in *In re Aspilaire*, 2017 WL 5377562 (BIA Sept. 18, 2017), the Board of Immigration Appeals followed *Vail-Bailon* to reject the contention of a lawful permanent U.S. resident subject to a removal order that the

absence of Florida prosecutions for possession of antique firearms was irrelevant under *Ramos*. To the contrary, the Board found citing *Vail-Bailon*, the absence of any reported prosecutions was dispositive. *Id.* at *5. As the Board of Immigration Appeals correctly recognized, the en banc majority in *Vail-Bailon* had "implicitly reject[ed] the understanding of the realistic probability doctrine reflected in *Ramos*." *Id.*

C. The minority approach to *Duenas-Alvarez*, followed by the court below, is wrong.

The dissenting opinions in *Vail-Bailon*, as well as the many contrary circuit opinions cited above, persuasively explain why the Eleventh Circuit's en banc majority improperly applied *Duenas-Alvarez*. No reported case is necessary to confirm what the statutory language plainly says: that Florida felony battery may be committed by a touching. And this Court has already correctly explained that "[t]he Florida Supreme Court has held that the element of 'actually and intentionally touching' under Florida's battery law is satisfied by *any* intentional physical contact, 'no matter how slight.'" *Curtis Johnson*, 559 U.S. at 138 (quoting *Hearns*, 961 So.2d at 218). Thus, the law is clear that Florida felony battery – which incorporates the same "touches or strikes" language from the simple battery statute, definitively construed by the Florida Supreme Court in *Hearns* and this Court in *Curtis Johnson* – may be committed by only a mere (slight) touching. The identical words in these two interconnected statutes enacted by the Florida legislature form a cohesive statutory scheme. They cannot logically have different "plain meanings."

In *Duenas-Alvarez*, this Court was concerned with a defendant who sought to establish a statute's overbreadth in an unlikely way that was unsupported by the plain statutory language. The Court therefore required a reported case in order to avoid the exercise of legal imagination. But no such imagination is required where, as here, the plain statutory language, as well as

precedent from the state's highest court, establishes that the statute is overbroad. Applying *Duenas-Alvarez* as the minority of courts currently do under such circumstances contravenes the categorical approach. The elements of the offense ultimately derive from the statute enacted by the legislature; elements cannot be circumscribed by chance facts in the limited universe of cases that are appealed and the resulting appellate decisions. If a statute is newly enacted, infrequently charged, or has not generated many reported decisions—a distinct possibility given that most cases are resolved by guilty pleas—the approach of the en banc majorities in the Eleventh and Fifth Circuits would still require courts to disregard the plain statutory language when ascertaining the least culpable conduct. Nothing in law or logic justifies that anomalous approach.

Certiorari should be granted to resolve the circuit conflict on this issue once and for all. Justice plainly cannot be a function of geography, and with each passing day, similarly-situated defendants in the Fifth and Eleventh Circuits are being prejudiced by their divided en banc courts' misunderstanding of *Duenas-Alverez*, and misapplication of the categorical approach.

A ruling in Petitioner's favor would definitively abrogate *Vail-Bailon*'s overly-rigid "realistic probability" analysis. And indeed, that analysis was integral to the result reached in that case – and here. The *Vail-Bailon* majority's "capability-based definition" of "*violent* force" was not itself determinative of whether a Florida felony battery conviction met the elements clause. What *was* determinative, under the majority's "capability-based definition," was its interpretation and application of the "realistic probability" standard of *Duenas-Alvarez*. The majority's dispute with the dissenters in *Vail-Bailon* ultimately came down to whether the plain "touches" language of the felony battery statute confirmed that the statute was categorically overbroad for the same reason the simple battery statute was found overbroad in *Curtis Johnson*,

or whether a different meaning of the same word "touches" in the felony battery statute was compelled by the facts in the handful of reported § 784.041(1) cases. The majority's vote for the latter came from blind deference to the "case-specific" language in *Duenas-Alvarez,* without regard for a different statutory context. And that is what ultimately decided Vail-Bailon's case. *See Vail-Bailon*, 868 F.3d at 1301 (acknowledging that "a statute requiring nothing more than a slight touch does not categorically qualify as physical force under the capability-based definition applied by *Curtis Johnson*, as opposed to a statute requiring a touch that is forceful enough to cause great bodily harm, which is what the Florida felony battery statute requires").

If, upon a grant of certiorari in this case, the Court rejects the minority approach to *Duenas-Alvarez* articulated by the Eleventh Circuit majority in *Vail-Bailon*, it should reverse the judgment below which adhered to *Vail-Bailon* in every respect. Notably, because the *Vail-Bailon* majority refused to credit the plain language of the Florida felony battery statute, and presumed—based upon a handful of reported cases—that a Florida felony battery requires a touch "more forceful" than the "nominal conduct" in a simple battery, 868 F.3d at 1305, the Eleventh Circuit has never considered the relevant question for analyzing a Fla. Stat. § 784.041(1) conviction under the categorical approach and the "least culpable conduct" rule of *Moncrieffe*: namely, whether a battery by a *mere* touching, which unintentionally causes great bodily harm, is a "violent felony."

That precise question was not before the Court in *Curtis Johnson v. United States*, 559 U.S. 133 (2010) since the Florida simple battery statute there at issue did not contain a causation of harm element. Nor was that question before the Court in *United States v. Castleman*, 134 S.Ct. 1405 (2014), since the Tennessee domestic assault statute there at issue required the intentional or knowing causation of harm. *Id.* at 1414. Nor was that question before the Court in *Stokeling*

v. United States, 139 S.Ct. 544 (2019), since the Florida robbery statute there at issue did not include a causation of harm element, but rather an "overcoming resistance" element which does not exist in Fla. Stat. § 784.041(1). The Court was clear in *Stokeling* that although the crime of Florida robbery categorically involved the use of "violent force" due to its overcoming resistance element, the "nominal" contact necessary for the Florida battery statute at issue in *Curtis Johnson* involved a degree of force "different in kind" from that in a Florida robbery. *Id.* at 553. Indeed, the Court clarified, the overcoming resistance element in Florida robbery involved "a degree of power that would not be satisfied by the merest touching," *id.* (citing *Curtis Johnson*, 559 U.S. at 139). The Court confirmed in *Stokeling* that a crime that can be committed through a *mere* touching – without "resistance or even physical aversion on the part of the victim" but only some contact that is "unwanted" – is not an ACCA "violent felony." *Id.*

If the Court clarifies in this case that *Duenas-Alvarez* does not require an actual prosecuted case to confirm what the Florida felony battery statute's plain language states, namely, that it can be violated by a mere unwanted touching just like Florida's identically-worded simple battery statute, the Court should vacate and remand this case to the Eleventh Circuit to consider in the first instance whether the causation of great bodily harm unintentionally by a *mere* touching is categorically a "violent felony" under *Curtis Johnson*.

IV. The Eleventh Circuit consistently misapplies the COA standard set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S.Ct. 759 (2017) to cut off appellate review when reasonable jurists both within and outside that circuit would debate the correctness of its decisions.

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). Although Judge Rosenbaum did not specifically cite these precedents in the order below, given that she was the author of the panel decision in *Vail-Bailon* and of one of the two dissents from the en banc decision, the *Hamilton* rule is the only possible explanation for her finding that in light of *Vail-Bailon*, reasonable jurists could not debate whether Florida felony battery is an ACCA "violent felony."

The Eleventh Circuit's *Hamilton* rule 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 v. United States*, 136 S. Ct. 1257, 1264 (2016). That was *not* the case here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

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

Fort Lauderdale, Florida
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