No. 19-5085

IN THE
SUPREME COURT OF THE UNITED STATES

DARREN L. LEE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER

***RICHARD M. SUMMA**
ASSISTANT FEDERAL PUBLIC DEFENDER
Florida Bar No. 890588
227 N. Bronough Street, Suite 4200
Tallahassee, Florida 32301
Telephone: (850) 942-8818
FAX: (850) 942-8809
Attorney for Petitioner

* Counsel of Record

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ISSUE I

> Where a divisible offense may be committed two ways, one of which satisfies the "violent felony" element of physical force, and one of which does not, and where the factual basis for the plea could establish either offense, may the federal sentencing court find the defendant was necessarily convicted of the qualifying offense, as in the case below, or must the federal court presume the defendant was convicted of the non-qualifying offense, as in *United States v. Horse Looking*, 828 F.3d 744 (8th Cir. 2016)?

The government addressed Petitioner's claim that the record of his prior Florida convictions did not meet *Shepard's*[1] "demand for certainty" because his admissions could support either a conviction for battery by "touching or striking," a non-qualifying crime, or battery by "intentionally causing bodily harm," a qualifying "violent felony." The government responded by arguing that

> this Court has never required that offenses be mutually exclusive in order for the modified categorical approach to apply.

(BIO at 10). The government's retort actually militates for, rather than against, certiorari review. In this respect, the government's position conflicts with *Mathis v. United States*, 136 S.Ct. 2243 (2016), which holds that the federal sentencing court can "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id*. at 2252. When the district court considers a defendant's prior convictions under ACCA, the court does not

[1] *Shepard v. United States*, 544 U.S. 13 (2005).

impose a conviction. Nor does the court modify a conviction. The sentencing court can do no more than determine the nature of the conviction imposed by the prior state (or federal) court. *Mathis*; *Descamps v. United States*, 570 U.S. 254, 278 (2013) ("A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction."). In the government's view, however, if the state court failed to identify which portion of a divisible statute provided the basis for the defendant's conviction, the federal court may make the call. (BIO at 10-11). The government's position cannot be squared with *Mathis* and *Descamps*.

A defendant's admissions *may* support a conviction for either a qualifying or a non-qualifying variant of a divisible offense (if the court of conviction so finds). This circumstance foreshadowed the conflict which arose between the present case and *United States v. Horse Looking*, 828 F.3d 744 (8th Cir. 2016). *Horse Looking* held that the factual basis for the defendant's guilty plea *could have* established multiple variants of a domestic violence offense. One variant qualified as a "misdemeanor crime of domestic violence" and the other did not. *Id*. at 748-49. Because the South Dakota court did not specify which variant formed the basis of the defendant's conviction, the Eighth Circuit Court of Appeals held that the prior conviction failed to meet the "demand for certainty" required by *Taylor*,[2] *Shepard* and *Mathis*, and was constrained to presume the defendant was convicted of the non-qualifying

[2] *Taylor v. United States*, 495 U.S. 575 (1990).

variant of the crime. *Horse Looking*, 828 F.3d at 748-49. In other words, under *Mathis*, the federal sentencing court was not empowered to determine which variant of the divisible offense formed the basis of the prior conviction. *Horse Looking*, 828 F.3d at 749.

Here, in contrast, the district court found that the factual allegations "incorporated by reference" in Petitioner's nolo plea agreement *could* support a conviction for either the non-qualifying alternative of battery by "touching or striking" or the qualifying alternative of battery by "intentionally causing bodily harm."

> The district court stated that the fact that the *Shepard* documents could also support a conviction for touch or strike battery under Fla. Stat. § 784.03(1)(a)(1) did not disqualify Lee's aggravated battery and felony battery convictions from serving as ACCA predicate offenses because the *Shepard* documents allowed the district court itself to find that Lee was convicted of a violent felony – bodily harm battery under Fla. Stat. § 784.03(1)(a)(2).

(Pet. App. A, p.6). The district court assumed the authority to decide, for the first time in the federal sentencing proceeding, which variant of the crime formed the basis of Petitioner's prior convictions. *Id*.

The circuit court concurred:

> A finding by the state court that the offense was committed violently is not required when we are able to make that determination based on the available *Shepard* documents. See [*United States v. Diaz-Calderone*, 716 F.3d 1345, 1350-51 (11th Cir. 2013)].

(Pet. App. A, p.11).

The government attempted to distinguish *Horse Looking* from the present case by arguing that the plea agreement in *Horse Looking* did not incorporate facts that "would be irrelevant to a conviction for one of the two crimes under debate. . . " (BIO at 13-14). In other words, the government argued that "the facts about the bodily harm suffered by the victims here" would be irrelevant in a prosecution for touching or striking battery. (BIO at 14). But the premise is incorrect. Evidence that the victim suffered bodily harm such as bruises, cuts, scrapes and abrasions, is always relevant to prove that the defendant "struck" the victim and was, thereby, guilty of battery by touching or striking. See e.g., *Jomolla v. State*, 990 So. 2d 1234 (Fla. Dist. Ct. App. 2008); *State v. Clyatt*, 976 So. 2d 1182 (Fla. Dist. Ct. App. 2008); *Byrd v. State*, 789 So. 2d 1169 (Fla. Dist. Ct. App. 2001).

In the proceeding below, the circuit court articulated a clear rule – where a state judgment and supporting *Shepard* documents do not specify whether the defendant was convicted of a qualifying or non-qualifying variant of a divisible offense, a federal district court may determine, for the first time in a federal sentencing proceeding, whether the defendant was convicted of a qualifying violent felony. The rule of the Eleventh Circuit conflicts with the Court's decision in *Mathis*. The government's claim that the conflict is "recent, shallow and undeveloped" (BIO at 14), underestimates the fact that the decision below conflicts with multiple Court decisions demanding certainty in the prior state court judgment, i.e., *Taylor*, *Shepard*, and *Mathis*.

The government also fails to recognize that the Eleventh Circuit appears to be the only circuit holding that the federal sentencing court has the power to determine, *for the first time at sentencing*, that a prior state court actually convicted the defendant of a statutory alternative constituting a "violent felony." A recent case from the Ninth Circuit is on "all fours" with *Horse Looking*. See *United States v. Shelby*, 2019 WL 4508341 (9th Cir. Sept. 19, 2019) (after examination of *Shepard* documents, district court could not determine whether state court convicted defendant of the violent alternative of Oregon first-degree robbery; therefore, modified categorical inquiry was at an end and prior conviction did not qualify as a violent felony under ACCA). The present case also conflicts were a number of other circuits which recognize the rule that a federal sentencing court can do no more than ascertain the precise nature of the conviction imposed by the state court of conviction. See e.g., *United States v. Furlow*, 928 F.3d 311 (4th Cir. 2019); *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019); *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018); *United States v. Peppers*, 899 F.3d 211 (3rd Cir. 2018); *United States v. Faust*, 853 F.3d 39 (1st Cir. 2017).

The Eleventh Circuit established a precedential rule to be followed, *ad infinitum*, in the circuit. Because the rule conflicts with that of the Eight Circuit in *Horse Looking*, the Ninth Circuit in *Shelby*, and the Court's decisions in *Taylor*, *Shepard*, *Descamps* and *Mathis*, Petitioner's case is worthy of certiorari review.

ISSUE II

> Whether convictions based upon pleas of *nolo contendere* support the application of the modified categorical approach to establish a "violent felony" where the Florida convictions do not incorporate admissions of guilt like the guilty pleas in *Shepard v. United States*, 544 U.S. 13 (2005), and whether the district court violated the Full Faith & Credit statute because Florida courts would not construe the prior judgments to encompass findings of battery by "intentionally causing bodily harm" necessary to establish the physical force element of a violent felony?

Whether prior convictions based upon nolo pleas qualify for the application of a modified categorical approach is a matter of nationwide concern because of the widespread use of such convictions to support federal sentencing enhancements. As explained in the petition, the Court, in *Shepard*, articulated three reasons to support the application of the modified approach in cases involving prior *guilty* pleas. The Court did not hold that the modified approach applied equally to convictions based upon *nolo* pleas. Here, the government makes no effort to argue that the reasons supporting the modified approach apply equally to prior convictions based upon nolo pleas.

In the absence of logical support, the government argues first that *Shepard* authorizes a modified approach in the nolo context based upon any admission in the record (even in police reports) demonstrating the factual basis for the nolo plea. (BIO at 8-9). To support this claim, the government cites *United States v. Almazan-Becerra*, 537 F.3d 1094, 1097-1100 (9th Cir. 2008), and *United States v. Castillo-Morales*, 507 F.3d 873, 876 (5th Cir. 2007). The Court should find these decisions unpersuasive as they both involve prior guilty pleas, not nolo pleas.

The government next argues that nolo convictions are treated "no differently than convictions based on guilty pleas or verdicts of guilt" for federal sentencing purposes (BIO at 8), echoing the view of the circuit court and its reliance on *United States v. Gandy*, 917 F.3d 1333, 1341-42 (11th Cir. 2019), and *United States v. Drayton*, 113 F.3d 1191, 1193 (11th Cir. 1997). Decisions such as *Drayton* hold merely that a nolo conviction is a "conviction" for federal sentencing purposes. If a "conviction" was all that was required, the government's argument would be forceful. But if a "conviction" was all that was required, *Johnson v. United States*, 559 U.S. 133 (2010), would have been decided differently. As demonstrated in *Johnson*, the categorical approach requires more than a conviction, it requires a conviction for a generic crime or a crime having an element of violent force. A Florida battery conviction may not qualify under ACCA's force clause. The rule of *Drayton* does not apply here.

The government argues, specifically, that a number of courts hold that nolo convictions may be relied upon to support the modified categorical approach.[3] But those decisions were based upon rulings that, in the respective states, a plea of nolo contendere, like a plea of guilty, constitutes an admission to the facts alleged in the charging document. The government likewise argues that a plea of nolo contendere,

[3] (BIO at 14-15) (citing *United States v. Cartwright*, 678 F.3d 907, 915 (10th Cir.), *cert. denied*, 568 U.S. 952 (2012); *United States v. Williams*, 664 F.3d 719, 722-23 (8th Cir. 2011), *overruled on other grounds*, *United States v. Tucker*, 740 F.3d 1177 (8th Cir. 2014); *United States v. Snyder*, 643 F.3d 694, 697-98 (9th Cir. 2011), *cert. denied*, 566 U.S. 941 (2012); *United States v. Kappell*, 418 F.3d 550, 558, 560-61 (6th Cir. 2005), *cert. denied*, 547 U.S. 1056 (2006)).

in Florida, constitutes an admission of guilt and an admission of the elemental facts of the charge. (BIO at 15). Even under the government's view, Petitioner's Florida pleas of nolo contendere are inadequate to support findings of violent felonies under the modified categorical approach because the elemental facts alleged do not distinguish between the non-qualifying alternative of "touching or striking" and the qualifying alternative of "bodily harm."

Two questions follow: (1) whether Petitioner's nolo pleas constituted admissions to allegations constituting the offense of battery by intentionally causing bodily harm, and (2) whether the state court convicted Petitioner, specifically, of battery by intentionally causing bodily harm. Only the second question could result in a disposition adverse to Petitioner. The first cannot harm him because facts constituting bodily harm battery also *could* constitute battery by touching or striking. The government argues that Petitioner's plea agreements incorporated by reference the allegations in the arrest reports, the alleged facts supported a battery by bodily harm, Petitioner agreed to those facts and was thereby convicted of the violent alternative of the divisible offense, i.e., battery by intentionally causing bodily harm.

The government's view is based upon an incorrect interpretation of Florida law. The government argues that under Florida law, a plea of nolo contendere "'admits the facts for the purpose of the pending prosecution' and is the same as a guilty plea insofar as it gives the court the power to punish." (BIO at 15) (citing *Mills v. State*, 840 So. 2d 464, 466 (Fla. Dist. Ct. App. 2003) (quoting *Vinson v. State*, 345

So. 2d 711, 715 (Fla. 1977)). The *Mills* court, however, mischaracterized the *Vinson* decision which, to be accurate, stated:

> A plea of nolo contendere has been determined to be equivalent to a guilty plea *only* insofar as it gives the court the power to punish.

Vinson, 345 So. 2d at 715 (emphasis added). The government's argument overlooks the operation of Fla. Stat. § 90.410, which states that evidence of a plea of nolo contendere is "inadmissible in any civil or criminal proceeding." Furthermore, "[e]vidence of statements made in connection with any of the pleas or offers is inadmissible [except in a prosecution for perjury]." Fla. Stat. § 90.410; see also *State v. Raydo*, 713 So. 2d 996 (Fla. 1998) ("Evidence of . . . a plea of nolo contendere . . . is *inadmissible in any civil or criminal proceeding*.") (quoting Fla. Stat. § 90.410 (1995)) (emphasis in original). The government also overlooks the operation of Florida Rule of Criminal Procedure 3.172(i) which provides that statements made in connection with a plea of nolo contendere are not admissible against the defendant in any subsequent civil or criminal proceeding. See also, C. Ehrhardt, *Florida Evidence*, § 410.1, (2019 Ed.).

Petitioner's nolo plea agreements also included acknowledgments of his rights. As to the offense of battery of a pregnant victim, the acknowledgement stated that "I have discussed with my attorney all of the ramifications or consequences of entering a plea of guilty or nolo contendere to these charges." (Doc. 38-1 at 7). Under Florida law, the "ramifications and consequences" of entering a plea of nolo contendere include the understanding that Petitioner did not admit guilt to the charge against

him; he pled no contest. In addition, Petitioner understood that any statements made by him in connection with his nolo plea did not constitute formal admissions and could not be used against him in any subsequent civil or criminal proceeding. Fla. Stat. § 90.410; Fla. R. Crim. P. 3.172(i). See, C. Ehrhardt, *Florida Evidence*, § 410.1, (2019 Ed.).

The same "acknowledgement of rights" was incorporated into his nolo plea for felony battery. (Doc. 38-3 at 13). Petitioner understood, correctly, that any statements made in connection with his nolo plea did not constitute formal admissions and could not be used against him in any subsequent civil or criminal proceeding.

Under Florida law, the specific factual allegations made against Mr. Lee in the arrest reports, to which he assented as establishing *prima facie* evidence of the charges against him, did not constitute "admissions" in the sense required by *Shepard*, i.e., factual findings carrying the degree of reliability equivalent to a jury's verdict. The government's interpretation of Florida law is incorrect.

With respect to the Full Faith and Credit statute, 28 U.S.C. § 1738, the government is correct that Petitioner did not rely on the statute in the district court, although he did present the argument on direct appeal. Nonetheless, the argument is proper for the Court's consideration because it was fully briefed on direct appeal and presents additional support for a specifically preserved argument – that the Florida courts of conviction did not adjudicate Petitioner guilty of the qualifying violent felony of battery by intentionally causing bodily harm. See *Lebron v. National*

Railroad Passenger Corp., 513 U.S. 374, 379 (1995) (a party may present any argument in support of a properly presented federal claim; a new argument may support a consistent claim). Since the district court and the circuit court passed upon the question whether Petitioner had been convicted of the qualifying violent felony of battery by intentionally causing bodily harm, Petitioner may rely on the Full Faith and Credit statute to support his contention that he was not convicted of that specific qualifying offense. The courts of the State of Florida would not construe the prior judgments as convictions for the specific offense of battery by intentionally causing bodily harm. Under the Full Faith and Credit statute, the federal courts may not construe the judgment that way.

Although it is a widespread practice in federal sentencing to rely upon prior nolo convictions to establish qualifying offenses under the modified categorical approach, the practice has never been tested in this Court. The present case presents the logical third step in a trilogy of decisions explicating the modified categorical approach in the context of prior jury verdicts, *Taylor*, guilty pleas, *Shepard*, and here, nolo pleas. Certiorari review is warranted because the practice is widespread, impacts a variety of federal sentencing statutes, and the sentencing consequences are severe. Certiorari is also warranted because the federal courts, by relying on nolo convictions in the application of the modified categorical approach, may be exceeding or abusing the limits of their authority under the Full Faith and Credit statute.

CONCLUSION

For the reasons above and in the Petition, this Court should grant the writ.

Respectfully submitted,

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER

S/Richard M. Summa
***RICHARD M. SUMMA**
ASSISTANT FEDERAL PUBLIC DEFENDER
Florida Bar No. 890588
227 N. Bronough Street, Suite 4200
Tallahassee, Florida 32301
Telephone: (850) 942-8818
FAX: (850) 942-8809
Attorney for Petitioner

* Counsel of Record