No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CLIFFORD B. GANDY, JR.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

QUESTIONS PRESENTED

I

Where a divisible offense may be committed two ways, one of which satisfies the "crime of violence" 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)?

II

Whether convictions based upon pleas of *nolo contendere* support the application of the modified categorical approach to establish a Guidelines "crime of violence" 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 crime of violence?

[NOTE: This petition presents the same issues presented in the petition for writ of certiorari filed to review *United States v. Lee*, 2019 WL 2448250 (11th Cir. June 11, 2019), filed contemporaneously herewith.**]**

PARTIES INVOLVED

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases **Page**

Statutes

USSG

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Clifford B. Gandy, Jr., 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 in Case No. 17-15035, on March 6, 2019, affirming the judgment of the District Court for the Northern District of Florida.

OPINION BELOW

The published decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Clifford B. Gandy, Jr.,* 917 F.3d 1333 (11th Cir. 2019), was issued on March 6, 2019, and is attached as Appendix A to this Petition.

JURISDICTION

The Court of Appeals filed its decision in this matter on March 6, 2019. Petitioner moved for rehearing and rehearing *en banc*. The Court of Appeals denied his motion on May 2, 2019. No judge in regular active service on the circuit court requested that the court be polled on rehearing *en banc*. Appendix B. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

GUIDELINE PROVISION INVOLVED

This petition involves the application of USSG § 4B1.2, which provides in pertinent part:

> (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 as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> * * * * *
>
> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 4B1.2(a)(1) (November 1, 2016 Guidelines Manual).

FLORIDA STATUTES INVOLVED

Section 784.03, Florida Statutes, provides:

> (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.

Fla. Stat. § 784.03.

Section 784.082, Florida Statutes, provides, in pertinent part:

> 784.082. Assault or battery by a person who is being detained in a prison, jail, or other detention facility upon visitor or other detainee; reclassification of offenses

Whenever a person who is being detained in a prison, jail, or other detention facility is charged with committing an assault or aggravated assault or a battery or aggravated battery upon any visitor to the detention facility or upon any other detainee in the detention facility, the offense for which the person is charged shall be reclassified as follows:

(1) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

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

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

Fla. Stat. § 784.082

INTRODUCTION

[NOTE: This petition presents the same issues presented in the petition for writ of certiorari filed to review *United States v. Lee*, 2019 WL 2448250 (11th Cir. June 11, 2019), filed contemporaneously herewith.**]**

As explained by the dissenting opinion below, the decision below conflicts with *United States v. Horse Looking*, 828 F.3d 744 (8th Cir. 2016). In each case, the circuit court reflected upon a prior conviction for a "divisible" offense. In each case, the divisible offense encompassed qualifying and non-qualifying predicate offenses. And the prior conviction, in each case, could have been for a qualifying or a non-qualifying offense. Under such circumstances, the circuit court in *Gandy* claimed the power to determine whether the defendant's prior conviction was for a qualifying offense. In *Horse Looking*, however, the circuit court felt constrained by the "demand for certainty" required by *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), and therefore presumed the defendant had been convicted of the non-qualifying offense. *See also*, *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (holding that absent clear indications to the contrary, the federal sentencing court must presume that the prior conviction rested upon nothing more than the least of the acts criminalized). *Gandy* illustrates not only a split of authority among the circuits, but conflict with the controlling authority of this Court. Here, assuming the facts set forth in Gandy's *nolo* plea documents may be deemed reliable, those facts could support either a qualifying or non-qualifying predicate offense: battery by "touching or striking" (non-qualifying), or battery by intentionally causing bodily

harm (qualifying). The circuit court's claim of authority to make the call must be examined for apparent conflict with this court's decisions in *Taylor*, *Shepard*, and *Moncrieffe*.

This case also presents broader issues. The questions are (1) whether the modified categorical approach is justified and appropriate in the interpretation of a prior *nolo* conviction where the rationale offered by the Court to justify the modified approach in the context of a guilty plea does not appear to exist in the *nolo* context, and (2) if the courts of the issuing state would not construe the prior conviction as one for the qualifying divisible offense, does the federal court violate the Full Faith and Credit statute, i.e., overreach the limited powers of the federal judiciary, by construing the judgment as a conviction for the qualifying divisible offense.

Petitioner notes that whether a prior *nolo* conviction supports the application of the modified categorical approach under *Shepard* appears to have piqued the interest of Justice Alito during a recent oral argument in the case of *Quarles v. United States*, Case No. 17-778, argued April 24, 2019. *See infra*, pp 21-22; (Appendix D at 17-19).

STATEMENT OF THE CASE

Petitioner, Clifford Gandy, was found guilty of three offenses by a jury: (1) possession with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and (b)(1)(D); (2) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i); and (3) possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The probation officer prepared a Presentence Investigation Report (PSR). Gandy was classified as a career offender on the basis of three qualifying convictions, a 2010 Florida conviction for battery of a jail detainee, a 2012 Florida conviction for felony battery (simple battery by a repeat offender), and a Florida conviction for a controlled substance offense. Both battery convictions were based upon pleas of *nolo contendere*. The career offender classification requires at least two qualifying predicate offenses.

At sentencing, the government conceded that the 2012 conviction for felony battery by a repeat offender did not qualify as a "crime of violence." Gandy challenged only the 2010 conviction for battery of a jail detainee. Gandy argued that the then-existing authority in the Eleventh Circuit, *United States v. Green (Green I)*, 842 F.3d 1299 (11th Cir. 2016), holding that Florida battery was divisible three ways, between (1) touching, (2) striking, and (3) intentionally causing bodily harm, was wrongly decided. He argued that the "touching or striking" theory of prosecution was indivisible, and that no *Shepard* documents established a conviction for a crime containing an element of physical force.

The government argued that "touching or striking" was divisible, and that the *Shepard* documents established a battery by "striking" which satisfied the element of physical force. The government provided a "sentence recommendation" form, described by the circuit court as "the equivalent of a plea agreement," which incorporated an arrest report. The arrest report was "agreed to by the defendant as a factual basis for the plea and/or the factual basis is as follows." The arrest report then described a battery committed by Mr. Gandy which amounted to violent conduct.

At the time of sentencing, *Green I* was still good law, so the district court found the "touching or striking" theory divisible, and ruled that the incorporated arrest report established a battery by "striking" and a crime of violence. After that ruling, however, the government also argued that even if "touching or striking" was indivisible, the arrest report also established a battery by "intentionally causing bodily harm" which also established an element of physical force and a crime of violence. The district court made no ruling on the latter alternative.

Gandy's guideline range was then set at 360 months to life in prison. The district court sentenced him to a total of 300 months in prison. One week later, the Eleventh Circuit vacated *Green I* and issued a superseding opinion that did not address the government's alternative argument regarding "intentionally causing bodily harm." The circuit court vacated its previous holding that "touching or striking" was divisible and affirmed Green's ACCA sentence on a different ground. *See United States v. Green (Green II)*, 873 F.3d 846 (11th Cir. 2017).

On appeal, Gandy relied on *Descamps* and *Mathis* to argue that the "touching or striking" form of battery was indivisible, and because his conviction could have been based on a mere touching, *Curtis Johnson* compelled the conclusion that he was not convicted of a crime of violence. (*Gandy* Initial Brief at 16, 19-25). Although the district court's ruling did not address the government's alternative argument – that the *Shepard* documents also proved a battery by intentionally causing bodily harm – Gandy addressed the argument in an abundance of caution. Gandy argued that the *Shepard* documents did not prove "bodily harm" battery because: (1) under Florida law, his plea of *nolo contendere* did not constitute an admission of guilt, and any statements made by him in connection with his nolo plea may not be regarded as conclusive; (2) under Florida law, the admission of a "factual basis" to support the *nolo* plea acknowledges merely the existence of a genuine factual dispute sufficient to submit the question of guilt for the charged offense to the fact-finder for resolution and is, therefore, adequate so support entry of a judgment of conviction; and (3) the *Shepard* document do not prove that the Florida court actually entered judgment of conviction for the specific offense of battery by "intentionally causing bodily harm." (Initial Brief at 16-17, 25-36).

In its Response Brief, the government conceded for the first time that the "touching or striking" form of battery was indivisible. (*Gandy* Response Brief at 8, 11-21). But, after having argued in the district court that the *Shepard* documents proved battery by "striking," the government argued on appeal that the documents also proved battery by intentionally causing bodily harm. (Response Brief at 21-34). The

government addressed Gandy's contention that the district court could not rely on the *Shepard* documents because the judgment was entered pursuant to a plea of *nolo contendere*. (Response Brief at 23-34).

In reply, Gandy argued, *inter alia*, that *Shepard* authorized a modified categorical approach in the context of convictions entered pursuant to pleas of guilty. *Shepard* did not hold that the modified categorical approach is justified or appropriate to interpret convictions entered pursuant to pleas of *nolo contendere*. (*Gandy* Reply Brief at 7-8). Noting that guilty pleas involve factual admissions but *nolo* pleas do not, Gandy concluded that "*Shepard* should not be construed to permit the application of the modified categorical approach to prior convictions based upon pleas of nolo contendere." (Reply Brief at 8).

By supplemental letters filed pursuant to Rule 28(j), Gandy bolstered his argument that, under Florida law, any statements made in connection with a plea of *nolo contendere* are legally insufficient to establish any fact asserted therein. (Letter filed Aug. 16, 2018). Appellant also argued that the Full Faith and Credit statute, 28 U.S.C. § 1738, precludes a federal sentencing court from relying on any statements or admissions made during the course of *nolo* proceedings because Florida law forbids such reliance. (Letter filed Aug. 16, 2018). Construing the Florida judgment as a conviction for bodily harm battery accords the judgment a greater scope and effect than is recognized in the courts of Florida and constitutes an overreach of the limited jurisdiction of the federal courts. (Letters filed Aug. 20, 2018 and Aug. 27, 2018).

In its decision, the panel majority stated that it need not decide whether "touching or striking" was divisible "or whether Gandy's conviction would qualify" as a "striking" battery. *Gandy*, 917 F.3d at 1339. According to the majority, the incorporated arrest report, to which Gandy assented, proved that Gandy was necessarily convicted of battery by intentionally causing bodily harm, thus establishing a conviction for a crime of violence. *Id.* at 1341. In so ruling, the majority relied on several facts. Gandy specifically agreed that the arrest report was incorporated in his plea and provided a factual basis to support the *nolo* plea. *Id.* The arrest report charged Gandy specifically with "Battery Caus[ing] Bodily Harm," and referred "exclusively to the subsection of the Florida simple battery that Gandy violated as section 784.03(1)(a)(2), the "bodily harm" subsection." *Id.* at 1340. The arresting officer alleged that Gandy "did knowingly and intentionally commit the offense of *Battery Causing Bodily Harm*." *Id.* at 1341. The report never mentioned battery by "touching or striking." *Id.* The arrest report then described Gandy's attack on a fellow inmate which resulted in bruises and cuts around the inmate's face and head. *Id.* The circuit court concluded: "Because Gandy agreed to this description of his offense, he necessarily pleaded *nolo contendere* to bodily harm battery." *Id.*

Gandy moved for rehearing and rehearing *en banc*. His motion was denied. (Appendix B).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the decision below creates a split of authority among the circuit courts and erodes the rules guiding the modified categorical approach as defined in decisions such as *Taylor, Shepard*, and *Moncrieffe*.

I. The decision below conflicts with *Horse Looking* from the Eighth Circuit, as well as this Court's decisions in *Taylor*, *Shepard*, and *Moncrieffe*.

> (a) The modified categorical approach permits a federal sentencing court to look past the face of a prior judgment to determine from a limited class of documents whether the offense of conviction includes an element of "physical force" as required by the Guidelines definition of "crime of violence."

In *Shepard v. United States*, 544 U.S. 13 (2005), the Court applied the categorical approach in the context of guilty plea cases. There, the Court approved the use of a "modified categorical approach" where the charged offense could have been committed in a variety of ways. In *Shepard*, the charged burglary could have been committed by unlawful entry into a building, ship or vehicle. Only the unlawful entry into a building would establish a generic burglary, an enumerated offense under 18 U.S.C. § 924(e)(2)(B)(ii). In *Shepard*, the Court held that a sentencing court may look to a limited class of documents, i.e., charging document, plea agreement, transcript of plea colloquy confirming the factual basis for the plea, or "some comparable judicial record of this information," to determine that the defendant necessarily pleaded guilty to a generic burglary offense. *Id*. at 26.

The modified categorical approach applies, equally, in determining whether a prior conviction includes an element of physical force under § 924(e)(2)(B)(i). *See Curtis Johnson v. United States*, 559 U.S. 133 (2010). And because the "crime of violence" provision of USSG § 4B1.2 includes the same element of physical force present in the "violent felony" provision of ACCA, federal courts apply the modified categorical approach in the determination of a crime of violence under § 4B1.2 of the Guidelines. *See e.g.*, *United States v. Ramos*, 892 F.3d 599 (3d Cir. 2018); *United States v. Rosales-Bruno*, 676 F.3d 1017 (11th Cir. 2012) (applying modified categorical approach to identical force clause of USSG § 2L1.2, cmt. n. 2); *United States v. Estrella*, 758 F.3d 1239 (11th Cir. 2014) (same).

> (b) If the statute of conviction is divisible, the *Shepard* documents must meet a "demand for certainty" equivalent to formal judicial fact-finding, that the defendant was necessarily convicted of an offense including an element of physical force.

In *Descamps v. United States*, 570 U.S. 254 (2013), the Court clarified that the modified categorical approach applies only where the charged offense sets forth alternative elements rather than alternative means of committing an offense such as burglary. A statute which sets forth alternative elements is described as "divisible." If the jury (or fact-finder) is not required to choose which statutory alternative was committed by the defendant, the statue is "indivisible" and the sentencing court may not employ the modified categorical approach. In *Descamps*, the California statute proscribed burglary by lawful, as well as unlawful, entry. *Id*. at 2282. Under California law, however, the fact-finder (whether jury or judge) was not required to

determine the method of entry. *Id*. at 2293. The statute was therefore indivisible and the modified categorical approach did not apply. *Id*.; *see also Mathis v. United States*, 136 S. Ct. 2243 (2016) (Iowa burglary statute proscribing unlawful entry to building, structure, or land, water or air vehicle, indivisible where jury not required to agree on which of the locations was actually involved).

If the statute is divisible, the federal court may consult *Shepard* documents only to determine which statutory phrase was the basis of the prior conviction. *Descamps*, 570 U.S. at 263. The defendant must have *necessarily* been convicted of the particular provision of the divisible statute that constitutes a "crime of violence." *See Mathis*, 136 S. Ct. at 2249. *Shepard* requires a "demand for certainty," i.e., the functional analog of a jury's verdict which may be satisfied, for example, by the defendant's admissions in the entry of a guilty plea, or judicial findings carrying the "conclusive significance of a prior judicial record." *Shepard*, 544 U.S. at 19-26.

> (c) The decision below assumed that the *Shepard* documents could prove both the qualifying offense of bodily harm battery and the non-qualifying offense of battery by "touching or striking," but erroneously determined that Gandy was convicted of the qualifying offense; the precedents of this Court required the circuit court to presume Gandy was convicted of the least culpable offense.

When entering his plea of *nolo contendere*, Gandy agreed that the arrest report would be "incorporated by reference and agreed to by the defendant as a factual basis" to support his *nolo* plea. The arrest report detailed Gandy's commission of a battery in a violent manner, as a matter of fact. The report described how Gandy struck his victim several times and continued to strike the victim after knocking him to the

ground. The report also described the victim as having suffered various cuts, a scratch and a bruise about the head.

The circuit court noted that the arresting officer specifically identified the crime of arrest as battery by intentionally causing bodily harm. The officer also identified the specific statute forming the basis of the arrest, Fla. Stat. § 784.03(1)(a)(2), which addresses battery by "intentionally causing bodily harm." On these facts, the circuit court determined that Gandy was convicted of "intentionally causing bodily harm," which qualifies as a crime of violence. *Gandy*, 917 F.3d at 1339. Despite the fact that the parties agreed that "touching or striking" battery is indivisible and does not constitute a crime of violence, the panel majority opined that "we need not decide whether 'touching' and 'striking' are divisible or whether Gandy's conviction would qualify as 'striking' battery." *Id*. at 1339. Because the "bodily harm" provision was a divisible means of committing battery, the court could, and did, rely on that provision to affirm Gandy's career offender sentence. *Id.*

The circuit court opined that it "need not decide" whether "touching or striking" battery was divisible. In other words, even in the light most favorable to Gandy, the court's ruling would be the same. In the light most favorable to Gandy, "touching or striking" is indivisible. **[NOTE:** The government has conceded at least twice in this Court that the "touching or striking" prong of Florida battery is indivisible. *See Santos v. United States*, Case No. 18-7096, (Memorandum for the United States at 5); *Franklin v. United States*, Case No. 17-8401, (Memorandum for the United States at 5).**]**. In that case, the crime can be committed by a mere touching and does not

necessarily include an element of physical force. *Curtis Johnson*. In that case, the Florida battery offense is divisible into two crimes, "touch or strike," a non-qualifying offense, and "bodily harm," a qualifying offense. It is well established in Florida law that acts such as beating, hitting, striking, etc. support a conviction for "touching or striking battery." *See e.g.*, *Jomolla v. State*, 990 So.2d 1234 (Fla. 3d DCA 2008) (battery by touching or striking proved by evidence of punching victim in the face and striking victim with cane requiring four stitches over right eye); *State v. Clyatt*, 976 So.2d 1182 (Fla. 5th DCA 2008) (beating victim's head against car window, slapping and punching her in the face and choking victim constituted relevant evidence of battery by touching or striking); *Byrd v. State*, 789 So.2d 1169 (Fla. 3d DCA 2001) (knocking the defendant to the ground constituted battery by touching or striking). It is the case, therefore, that the acts described in the arrest report could support a conviction for either "touch or strike" battery or "bodily harm" battery. It must be observed, parenthetically, that there is no reported decision in the Florida law where a defendant was convicted, specifically, or exclusively, of battery by intentionally causing bodily harm. Petitioner surmises that is because prosecutors always favor the theory of "touching or striking" battery which is much easier to prove.

In this posture, as correctly noted by the dissenting Judge Rosenbaum, the decision below conflicts with *Horse Looking*. The Eighth Circuit, in *Horse Looking*, held that where the factual basis for the defendant's guilty plea could have established multiple variants of the crime of conviction, both qualifying and non-qualifying offenses, the decisional "demand for certainty" was not satisfied, and the

court was constrained to presume the defendant was convicted of the non-qualifying form of the offense. *Horse Looking*, 828 F.3d at 748-49, (citing *Mathis*, 136 S. Ct. 2243, 2256-57; *Descamps*, 133 S. Ct. at 2290; *Shepard*, 544 U.S. at 22-23; *Johnson*, 559 U.S. at 145; *Taylor*, 495 U.S. at 602). In this manner, the decision below creates a conflict with *Horse Looking*. Moreover, the decision erodes the "demand for certainty" required by the Court's well established precedent.

Petitioner alternatively notes the established rule expressed in *Moncrieffe v. Holder*, 569 U.S. 184 (2013):

> Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, . . .

Id. at 190-91, (citing *Curtis Johnson*, 559 U.S. 133, 137). It is often the case, however, that the defendant's conduct constitutes proof of an element of the charged offense. In the case of a divisible statute, the conduct of the defendant may prove an element of both a qualifying and non-qualifying offense. And so it is here, where Gandy's beating and striking of his victim constituted both battery by "touching or striking" and battery by intentionally causing bodily harm, the rule of *Moncrieffe* is just as easily and correctly expressed as: Where the defendant's conduct could have proved both a qualifying and non-qualifying offense, we must presume that the conviction rested upon nothing more than the least of the *elements* criminalized.

This case is worthy of certiorari review because the decision below conflicts with *Horse Looking* on an issue certain to recur, and in a manner likely to erode the established precedents of this Court.

II. The circuit court erred in applying the modified categorical approach because the Florida *nolo* plea documents do not satisfy the "demand for certainty" required by this Court in *Shepard*.

In the proceedings below, the district court did not rule that Gandy had a prior conviction for Florida battery by "intentionally causing bodily harm," a crime of violence under the Guidelines. But the circuit court elected to reach the question, found Gandy had been convicted of "bodily harm" battery, and affirmed the career offender sentence on the basis of an alternative reason evident in the record. Anticipating that possibility, Gandy raised and briefed the question whether the plea documents were adequate, under *Shepard*, to prove he was convicted of "bodily harm" battery. Gandy argued that *Shepard* did not authorize the use of a *nolo* conviction in the application of the modified categorical approach. And he bolstered this argument with the observation that the use of the *nolo* convictions violated the Full Faith and Credit statute, 18 U.S.C. § 1738, by giving greater weight to the Florida judgments than they would bear in the courts of Florida. Although the circuit court did not directly address Gandy's arguments, the following issues and arguments are matters of great concern nationwide and warrant certiorari review.

> (a) In Florida, a plea of *nolo contendere* does not constitute an admission of guilt, and no statement made by the defendant in the course of the proceeding is legally sufficient to establish any fact asserted therein.

In *Shepard*, the Court offered three reasons to support the conclusion that guilty plea proceedings may provide a proper analog to a jury's verdict and justify the

application of a modified categorical approach in the determination of qualifying "violent felonies" under ACCA. First, the pleas involve admissions of guilt, where the defendant admits the specific crime committed on the record. *Id*. at 26. Second, the defendant's admissions eliminate the need for collateral trials on the precise nature of the prior conviction, consistent with Congressional intent under ACCA. *Id*. at 20, 23, (citing *Taylor*). Third, by limiting the sentencing court's inquiry to a narrow class of conclusive records, *Shepard* avoids the possibility that a greater fact-finding role would violate the defendant's Sixth Amendment right to trial by jury. *Id*. at 25-26. Here, the use of *nolo* plea documents is inconsistent with the reasoning expressed in *Shepard* to support a modified categorical approach in the guilty plea context.

The *nolo* plea entered by Gandy falls short of the justification offered by the Court to support a modified categorical approach in the guilty plea context. Florida law is clear. "A plea of nolo contendere does not admit the allegations of the charge in the technical sense but only says that the defendant does not choose to defend." *Vinson v. State*, 345 So. 2d 711, 715 (Fla. 1977); *Grizzard v. State*, 881 So.2d 673, 676-77 (Fla. 5th DCA 2004). The "sole purpose" for the finding of a factual basis to support the plea "is to determine the accuracy of the plea, thereby avoiding a mistake." *Williams v. State*, 316 So.2d 267, 271 (Fla. 1975). The trial judge must "ensure that the facts of the case fit the offense with which the defendant is charged." *Id*. The Florida rules permit the defendant to enter a *nolo* plea "in his or her best interest, while maintaining his or her innocence." Fla. R. Crim. P. 3.172(e). The essential character of the *nolo* plea in Florida did not change when the Florida Supreme Court

amended its rules to require the trial court to find a factual basis to support a plea of *nolo contendere*. *See Williams v. State*, 316 So. 2d 267, 270 (Fla. 1975) (noting the former rule required the trial court to find a factual basis to support a guilty plea, though not a *nolo* plea). Even after the rule amendment, the stipulation to a factual basis to support a *nolo* plea does not constitute proof of the crime committed; rather, it "relieves the state of its burden of proving the factual allegations of the indictment or information." *Maselli v. State*, 446 So.2d 1079, 1080 (Fla. 1984) (applying Rule 3.172(a)) (citing *Bell v. State*, 369 So.2d 932, 934 (Fla. 1979)).

Gandy's "agreement" to a factual basis to support his *nolo* pleas admitted none of the allegations in the arrest reports. He admitted only that he knew what he was charged with and acquiesced to entry of the judgments because it was in his best interest to do so. Gandy agreed that the arrest reports established a factual basis for his pleas of *nolo contendere*. As a matter of Florida law, his "agreement" means that the state would be able to offer evidence that he committed the acts alleged in the arrest reports. Specifically, Gandy posed no objection to the admission of the arrest reports as evidence against him. Gandy agreed not to defend against the state's evidence (no contest). Under ordinary principles of evidentiary burden and persuasion, if the state's evidence is uncontradicted, the judge may reasonably find that the state's evidence has established a factual basis to support the entry of a judgment of guilt. Placing the "agreement" in proper context, Gandy did not admit any of the facts alleged in the arrest reports. "At trial, and still more at plea hearings,

a defendant may have no incentive to contest what does not matter under the law" *Mathis*, 136 S. Ct. at 2253.

> (b) The "factual basis" supporting a *nolo* plea does not mean the acts found to have been committed by the defendant; it means the acts for which evidence would be presented and which create a disputed issue of fact to be resolved by the jury (or fact-finder) and which suffice to support a conviction for the charged offense.

In accepting Gandy's *nolo* plea, the Florida court did not find that Gandy had committed a battery by intentionally causing bodily harm *or* battery by "touching or striking." The purpose of the proceeding was "not to pass upon the sufficiency of the evidence to support a conviction, but rather to determine that a "factual basis" exists before accepting the plea." *Wright v. State*, 376 So. 2d 236, 238 (Fla. 1st DCA 1979). The term "factual basis" means merely that "the court makes inquiry as to the facts sufficient to satisfy itself that a *prima facie* basis exists for the charge against the defendant." *Id.* The term "*prima facie*" means merely "sufficient to establish a fact or raise a presumption unless disproved or rebutted; based upon what appears to be true on first examination, even though it may be later proved to be untrue." *Jefferson v. State*, 264 So. 3d 1019, 1027 (Fla. 2d DCA 2018) (citing Black's Law Dictionary (10th ed. 2014)). In short, the Florida court could not have convicted Gandy, specifically, of battery by intentionally causing bodily harm because the court, as a matter of law, did not find the factual allegations of the arrest report to be true; the court merely found, and Gandy concurred, that the alleged facts constituted a factual basis to support a conviction for the crime charged, i.e., battery by touching or striking or

intentionally causing bodily harm. Gandy's "admissions" do not prove he was convicted of "bodily harm" battery.

Moreover, the statements made by Gandy in the course of his *nolo* proceedings were neither admissible nor legally sufficient to establish the truth of the matters asserted in any subsequent civil or criminal proceeding. Fla. Stat. § 90.410; Fla. R. Crim. P. 3.172(i); *Grizzard v. State*, 881 So.2d 673 (2004); *Wyche v. Florida Unemployment Appeals Comm'n*, 469 So.2d 184 (Fla. 3d DCA 1985); *Kelly v. Dept. of Health and Rehabilitative Services*, 610 So.2d 1375 (Fla. 2d DCA 1992); *Williams v. Castor*, 613 So.2d 97 (Fla. 1st DCA 1993); *Clark v. State*, 452 So.2d 1002 (Fla. 2d DCA 1984); *Landrum v. State*, 430 So.2d 549 (Fla. 2d DCA 1983). Because the finding that Gandy committed his prior battery by violent means cannot be ascertained, as a matter of law, by his assent to the arrest report as a factual basis to support the *nolo* plea, such a finding requires the "mini-trial" forbidden by *Shepard*.

Petitioner notes that the reliance of a federal court on a prior *nolo* conviction to support enhanced sentencing under the modified categorical approach appears to have piqued the interest of Justice Alito during oral argument of the recent *Quarles* case, Case No. 17-778, argued April 24, 2019. Discussing the defendant's prior Michigan burglary conviction, Justice Alito noted that the Michigan judge recited the factual basis for the *nolo* plea: "The victim reported that Mr. Quarles broke in through a screen window and assaulted her while in the house." (Appendix D at 17). From that, Justice Alito concluded: "We certainly can infer that he had the intent to

commit an assault while he was entering." (Appendix D at 17-18). At that point, defense counsel made the same argument Petitioner makes here:

> **MR. MARWELL:** So the – the facts that you've recited, Justice Alito, I think would not be available to a sentencing court. That was a colloquy in the state court where Mr. Quarles pleaded no contest. So he was not asked to confirm those facts. And I think that –
>
> **JUSTICE ALITO:** Well, doesn't – doesn't the judge, in order to accept a no contest plea, have to establish, be satisfied that there is a factual basis for the plea?
>
> **MR. MARWELL:** I think – well, in Michigan law, no contest is – is – is acquiescing in the imposition of punishment but not confirming or denying the facts. And I think under –
>
> **JUSTICE ALITO:** So the judge doesn't have to be satisfied – we'll check it out. Under Michigan law – this is surprising to me – a judge can accept a non – a no contest plea without ascertaining that there is a factual basis for the plea?
>
> **MR. MARWELL:** Even if so, I think under this Court – the way this Court said in *Shepard* and *Mathis*, the kinds of facts that are available to the sentencing judge, those are limited to the ones where the defendant confirmed the accuracy.

(Appendix D at 18-19). It appears that the issue of the applicability of a prior *nolo* conviction under the modified categorical approach was, ultimately, not germane to the Court's resolution of the *Quarles* case. *See Quarles v. United States*, 139 S. Ct. 1872 (2019). Nonetheless, Petitioner brings this exchange to the Court's attention because it demonstrates that the issue will arise in a variety of contexts, may arise from any state, and may have caught the interest of at least one Justice, Alito.

(c) The circuit courts struggle to apply the modified categorical approach in the context of *nolo* and *Alford* pleas, leading to a conflict among the circuits and with *Mathis v. United States*.

A plea entered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), is similar to Gandy's *nolo* plea in the sense that the defendant willingly waives his right to trial and accepts entry of judgment of conviction while maintaining his innocence and without admitting guilt. Under these circumstances, the circuit courts are split on whether a conviction based upon a *nolo* or *Alford* plea can establish a predicate conviction under the modified categorical approach.

One camp holds that a *nolo* plea, or an *Alford* plea, is inadequate to satisfy the demand for certainty required by *Shepard* to establish a conviction for a qualifying "crime of violence" or "violent felony" under the modified categorical approach. In *United States v. Ventura*, 565 F.3d 870 (D.C. Cir. 2009), the issue was whether the defendant's prior Virginia conviction for felonious abduction was a "crime of violence" under the sentencing guidelines. Applying the categorical approach, the court first concluded that the offense was not a generic kidnapping which would constitute a "crime of violence." *Id*. at 878. The court then considered whether, under the modified categorical approach, the defendant was convicted of a generic kidnapping by virtue of his Virginia plea of *nolo contendere*. *Id*.

Under Virginia law, Ventura was deemed to have admitted to the truth of the charge in the indictment. *Id*. at 879. But the indictment broadly embraced conduct that did not constitute a generic kidnapping. *Id*. Ventura said he was "not contesting the charge." *Id*. Although the prosecutor presented a proffer describing a generic

kidnapping, the "judge was not required to accept those facts to convict Ventura." *Id*. "[T]he judge might have inferred that Ventura was pleading nolo contendere because he had violated the abduction statute but had not done all that the government alleged." *Id*. On these facts, the court concluded that the record did not meet the demand for certainty required by *Shepard* to ensure that Ventura was convicted of the generic kidnapping described by the government's proffer. *Id*.

United States v. Alston, 611 F.3d 219 (4th Cir. 2010), embraced similar reasoning in the context of an *Alford* plea. In *United States v. Alston*, 611 F.3d 219 (4th Cir. 2010), the issue was whether the defendant's prior Maryland conviction for second-degree assault constituted a "violent felony" under ACCA. The state prosecutor proffered facts which, if true, would prove a violent felony. Alston did not admit those facts, but agreed that if the case were tried, the State's witnesses would testify as indicated in the proffer. *Id*. at 222. On these facts, the court held that the prosecutor's proffer of a factual basis did not meet the demand for certainty required under the modified categorical approach. *Id*. at 226. The proffer merely provided the court with a means to evaluate the voluntariness of the plea. *Id*., (citing *Alford*, 400 U.S. at 38); *see also*, *United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008) (where prior conviction for Connecticut drug crime was not, categorically, a "controlled substance offense" under federal guidelines, conviction entered pursuant to *Alford* plea did not satisfy *Taylor's* demand for certainty because defendant did not "admit his participation" in the crime nor "confirm the factual basis for the plea").

On the other side of the divide lies the case below, *United States v. Flores-Vasquez*, 641 F.3d 667 (5th Cir. 2011), and *United States v. Guerro-Valasquez*, 434 F.3d 1193, 1197 (9th Cir. 2006). Notably, *Alston* acknowledged that its holding conflicts with *Guerro-Valasquez* by employing a "*but see*" citation signal. *Alston*, 611 F.3d at 224.

Flores-Vasquez holds that an *Alford* plea does not "foreclose the possibility that a defendant can, independently of his plea entry, confirm the prosecutor's proffer of facts," and thereby establish the precise nature of a prior conviction as a qualifying offense under the modified categorical approach. *Flores-Vasquez*, 641 F.3d at 671. In *Flores-Vasquez*, the question was whether the defendant's prior District of Columbia conviction for robbery qualified as a "crime of violence" under the guidelines where the crime may be committed, alternatively, by "stealthy snatching." The defendant argued that the federal court could not rely on the proffer of facts presented in the prior state proceedings because he entered an *Alford* plea. *Id*. at 671. The record disclosed, however, that the defendant would "agree to the attached factual proffer in open court." *Id*. at 672. Moreover, the defendant agreed that the proffer of facts would "be regarded as a true and accurate description of the offense to which [he pleaded] guilty, and of [his] role in that offense." *Id*. On these facts, the court found that the district court did not err, under *Shepard*, in finding that the prior robbery conviction constituted a crime of violence under the guidelines. *Id*. at 673. The court held that *Shepard* required a "legal admission," suggesting some distinction between a legal admission and a factual admission by the defendant.

Flores-Vasquez holds that although an *Alford* plea is not an admission of guilt as a matter of law, the *Alford* plea "does not preclude a sentencing court from relying upon a proffer of facts which was independently confirmed by the defendant." *Id*. at 672. In that case, however, the "sentencing court" was the federal sentencing court charged with determining whether the prior conviction qualifies, for example, as a "crime of violence." In *Flores-Vasquez*, therefore, the federal sentencing court determined for the first time, from the plea colloquy, that the defendant was convicted of the alternative of District of Columbia robbery constituting a "crime of violence."

Flores-Vasquez is consistent with *United States v. Diaz-Calderone*, 716 F.3d 1345 (11th Cir. 2013). In *Diaz-Calderone*, the Eleventh Circuit acknowledged that the defendant's plea of *nolo contendere* did not constitute an admission of guilt as a matter of law. *Id*. at 1351, n. 31, (citing Fla. R. Crim. P. 3.172(e), and *Vinson v. State*, 345 So. 2d 711, 715 (Fla. 1977)). Nonetheless, the circuit court found that *Shepard* authorized the sentencing court to rely on the defendant's admissions in the plea colloquy to conclude that his prior conviction for Florida battery upon a pregnant victim was based upon the violent alternative of the offense and thus constituted a "crime of violence." *Id*. at 1349-51. The circuit court explained that even if the Florida court did not find the offense was committed under the alternative involving an element of physical force, "[a] Florida court finding that the offense was committed violently is not needed where the *Shepard* materials enable the district court to make findings." *Id*. at 1350-51. In other words, the federal sentencing court may determine, *for the first time in a federal sentencing proceeding*, that the defendant was convicted,

under a divisible statute, of the alternative involving an element of physical force and constituting a crime of violence. *See also*, *United States v. Guerrero-Velasquez*, 434 F.3d 1193 (9th Cir. 2006) ("Whether or not a defendant maintains his innocence, the legal implications of a guilty plea are the same in the context of the modified categorical approach under *Taylor*." "An *Alford* plea *is* a guilty plea." That the conviction was the result of an *Alford* plea is immaterial.)

The present case perpetuates this reasoning. By its reliance on *Diaz-Calderone*, the circuit court assumed the power to determine, for the first time in a federal sentencing proceeding, that Gandy was convicted of the alternative of Florida battery that includes an element of physical force, and therefore constitutes a "crime of violence." *Id*. at 1340, 1342 (citing *Diaz-Calderone*, 716 F.3d at 1349-50).

The latter line of cases establish not only conflict with the former, but also conflict with the Court's decision in *Mathis*. In *Mathis*, the Court made clear that the federal sentencing judge "is barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual basis of the prior [guilty] plea.'" *Id*. at 2252. The federal judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id*. The latter cases, including *Flores-Vasquez*, *Diaz-Calderone*, and the present case, assume the power to determine the crime of conviction, in essence to rely on *Shepard* documents to modify or clarify the prior state judgment to determine under a divisible statute whether the defendant was convicted of an alternative constituting a "crime of violence" or "violent felony." On

this point, the Court should grant certiorari review to resolve the conflict among the circuits and with *Mathis*.

> (d) The circuit court exceeded the limited powers of the federal courts under the Full Faith and Credit statute by construing the Florida judgment as a conviction for bodily harm battery where the Florida courts would not construe the judgment that way.

On direct appeal, Gandy argued that construing his prior *nolo* plea agreement as a conviction for battery by intentionally causing bodily harm would violate the Full Faith and Credit statute, 28 U.S.C. § 1738. The statute provides, in pertinent part:

> The records and judicial proceedings of any court of any … State, shall have the same full faith and credit in every court within the United States … as they have by law or usage in the courts of such State, ….

28 U.S.C. § 1738. Under 28 U.S.C. § 1738, the judgment of a state court need be given only "the same credit, validity, and effect . . . which it had in the state where it was pronounced." *Williams v. North Carolina*, 325 U.S. 226, 228 (1945); *Haring v. Prosise*, 462 U.S. 306, 313 n. 6, (1983) ("If the state courts would not give preclusive effect to a prior judgment, "the courts of the United States can accord it no greater efficacy" under § 1738.); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1020 (5th Cir. Unit B 1982) (on rehearing en banc) ("[I]f a state court judgment is subject to collateral attack in the state that rendered it, the judgment may be collaterally attacked in federal court."), *cert. denied*, 464 U.S. 818 (1983).

Here, the circuit court construed Gandy's *nolo* plea agreement to encompass a factual finding that the battery was committed by violent means, and for the proposition that Gandy was convicted of battery by bodily harm. The twin findings,

one factual and one legal, violate the Full Faith and Credit statute for the simple reason that the Florida courts would not recognize either finding. As stated above, the factual assertion that Gandy battered his victim by beating, causing cuts and bruises, would be inadmissible, legally insufficient and subject to collateral attack in any subsequent Florida proceeding, so it should be subject to collateral attack in federal court as well. It necessarily follows that if the Florida courts would not recognize the prior *nolo* conviction as finding of violent battery, the courts would not interpret the conviction as one for intentionally causing bodily harm. Under the Full Faith and Credit statute, the federal courts must observe the Florida law limiting the scope and effect of the *nolo* conviction. Moreover, even if the courts below permitted Gandy to collaterally attack the judgment and the allegations of violent battery, such collateral attack would be the "mini-trial" precluded by *Shepard*, further bolstering the conclusion that the modified categorical approach has no application in the context of a prior judgment based on a plea of *nolo* contendere.

III. The conflict involves important and recurring questions of statutory construction.

To summarize, the present case involves questions of statutory interpretation which have resulted in two conflicts among the circuits and two conflicts with decisions of this Court. The present case conflicts with the decision of the Eight Circuit in *Horse Looking* on whether the federal sentencing court must presume the defendant was convicted of the least culpable offense where the factual basis of the *nolo* plea shows that the defendant could have been convicted of both a qualifying and

non-qualifying crime. Moreover, the Court's decisions in *Taylor*, *Shepard*, and *Moncrieffe* require that the ambiguity be resolved in favor of the defendant.

Second, the Court held in *Shepard* that a federal sentencing court may look beyond the face of a prior judgment, in the context of a guilty plea, to consult a limited class of documents to determine under a "modified categorical approach" whether the defendant was convicted, under a divisible statute, of an alternative constituting a qualifying predicate offense, i.e., "violent felony" (ACCA) or "crime of violence" (Guidelines). This case questions whether the modified categorical approach applies where the prior conviction was based upon a plea of *nolo contendere*, rather than guilty. The use of prior convictions based upon *nolo* pleas is pervasive in federal sentencing, but has not yet received the scrutiny of the Court. The question is of paramount concern nationwide because the rationale offered in *Shepard* to support the use of a modified categorical approach in the guilty plea context does not appear to be satisfied in the context of *nolo* pleas. On this point another conflict among the circuits exists. Furthermore, one line of cases appears to conflict with the Court's decision in *Mathis*, holding that the role of the federal court is limited to determining from the *Shepard* documents whether the court of prior conviction entered judgment for a qualifying alternative under a divisible statute; the federal sentencing court may not determine for the first time that the defendant was convicted of a qualifying alternative offense.

Finally, the petition presents the question whether a federal court overreaches its limited jurisdiction under the Full Faith and Credit statute by construing a prior

state court judgment as one for a qualifying predicate offense where the courts of the issuing state would not construe the judgment that way. This is an extremely important question as it involve the possible abuse of the limited powers of the federal judiciary.

The conflicts and concerns described above should be resolved by the Court and can be resolved only by the Court. Certiorari review is warranted because the circuit courts are divided on important and recurring questions of statutory interpretation. *Clay v. United States*, 537 U.S. 522, 524 (2003); *Shapiro v. United States*, 335 U.S. 1, 4 (1948). The conflicts are clear, and the resolution of the conflicts is dispositive of the case. For these reasons, the present case is worthy of certiorari review.

CONCLUSION

For the reasons stated above, the 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