APPENDIX A

917 F.3d 1333
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Clifford B. **GANDY**, Jr., Defendant-Appellant.

No. 17-15035
|
(March 6, 2019)

Synopsis

Background: Defendant was convicted in the United States District Court for the Northern District of Florida, D.C. Docket No. 3:16-cr-00055-MCR-1, for possession with intent to distribute cocaine and marijuana, possession of a firearm in furtherance of a drug-trafficking offense, and possession of a firearm by a convicted felon, and was sentenced as career offender under Federal Sentencing Guidelines based on prior convictions for battery and a controlled-substance offense. Defendant appealed.

[Holding:] The Court of Appeals, William Pryor, Circuit Judge, held that under modified categorical approach, defendant's prior conviction under Florida battery statute was crime of violence for purposes of Federal Sentencing Guideline's career offender enhancement.

Affirmed.

Rosenbaum, Circuit Judge, filed separate dissenting opinion.

West Headnotes (14)

[1] **Criminal Law** ⇐ Review De Novo

Court of Appeals reviews de novo whether a battery conviction qualifies as a crime of violence under the Federal Sentencing Guidelines. U.S.S.G. § 4B1.2(a).

Cases that cite this headnote

[2] **Sentencing and Punishment** ⇐ Violent or Nonviolent Character of Offense

"Physical force" required for offense to be crime of violence under Federal Sentencing Guidelines is violent force, that is, force capable of causing physical pain or injury to another person. U.S.S.G. § 4B1.2(a).

1 Cases that cite this headnote

[3] **Sentencing and Punishment** ⇐ Violent or Nonviolent Character of Offense

Federal court may apply the modified categorical approach to determine whether prior offense was crime of violence for purposes of career offender enhancement under Federal Sentencing Guidelines when the statute is divisible, that is, it defines multiple crimes, and a limited class of documents, often called *Shepard* documents, are available to determine what crime, with what elements, a defendant was convicted of. U.S.S.G. § 4B1.1(a).

Cases that cite this headnote

[4] **Sentencing and Punishment** ⇐ Violent or Nonviolent Character of Offense

Shepard documents that court may use in applying modified categorical approach to determine whether prior offense was crime of violence for purposes of career offender enhancement under Federal Sentencing Guidelines may include the charging document, any plea agreement submitted to the court, the transcript of the plea colloquy, or any record of comparable findings of fact adopted by the defendant upon entering the plea. U.S.S.G. § 4B1.1(a).

Cases that cite this headnote

[5] **Sentencing and Punishment** ⇐ Particular offenses

Battery by intentionally causing bodily harm under Florida Law categorically constitutes a crime of violence for purposes of career offender enhancement under Federal Sentencing Guidelines, since a defendant convicted of bodily-harm battery must have intentionally used force capable of causing physical pain or injury to another person. Fla. Stat. Ann. § 784.03(1)(a)(2); U.S.S.G. § 4B1.1(a).

2 Cases that cite this headnote

[6] **Sentencing and Punishment** ⇐ Violent or Nonviolent Character of Offense

There is a demand for certainty in determining whether a defendant convicted under statute that defines multiple crimes is an offense that qualifies as violent crime for purposes of career offender enhancement under Federal Sentencing Guidelines, and thus court can find defendant convicted under divisible statute was convicted of a qualifying offense only if the *Shepard* documents speak plainly in establishing the elements of his conviction. U.S.S.G. § 4B1.1(a).

Cases that cite this headnote

[7] **Sentencing and Punishment** ⇐ Violent or Nonviolent Character of Offense

Federal court ordinarily does not rely on police reports to determine whether defendant was convicted of crime of violence for purposes of career offender enhancement under Federal Sentencing Guidelines under the modified categorical approach because a defendant ordinarily does not admit the conduct described in them, but an arrest report that is incorporated by reference in a plea agreement qualifies as a record of comparable findings of fact adopted by the defendant upon entering the plea that court may consider. U.S.S.G. § 4B1.1(a).

1 Cases that cite this headnote

[8] **Criminal Law** ⇐ Requisites and Proceedings for Entry

Florida law requires a factual basis for a plea to ensure that the facts of the case fit the offense with which the defendant is charged.

Cases that cite this headnote

[9] **Sentencing and Punishment** ⇐ Particular offenses

Under modified categorical approach, gun possession defendant's prior conviction under Florida battery statute, which was divisible, was conviction for bodily harm battery, which was violent crime for purposes of career offender enhancement under Federal Sentencing Guidelines, rather than touching or striking battery; in pleading nolo contendere to the offense, defendant agreed to arrest report that spoke plainly that defendant's offense was bodily harm battery as factual basis of plea, without qualification. Fla. Stat. Ann. § 784.03(1)(a)(2); U.S.S.G. § 4B1.1(a).

2 Cases that cite this headnote

[10] **Sentencing and Punishment** ⇐ Violent or Nonviolent Character of Offense

What matters under the modified categorical approach for determining whether crime of conviction was crime of violence for purposes of career offender enhancement under Federal Sentencing Guidelines is not the offense charged, but what elements the government proved or the defendant admitted committing. U.S.S.G. § 4B1.1(a).

Cases that cite this headnote

[11] **Sentencing and Punishment** ⇐ Violent or Nonviolent Character of Offense

In determining whether crime of conviction was crime of violence for purposes of career offender enhancement under Federal Sentencing Guidelines, under modified categorical approach, when a charging document contains multiple alternative elements from the same divisible statute and the judgment does not specify which elements were proved or admitted, court may still determine the elements by consulting other *Shepard* documents. U.S.S.G. § 4B1.1(a).

Cases that cite this headnote

[12] **Sentencing and Punishment** ⇐ Nature of Conviction or Adjudication

Florida convictions based on nolo contendere plea are treated no differently than convictions based on guilty pleas or verdicts of guilt for purposes of the Federal Sentencing Guidelines. U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[13] **Sentencing and Punishment** ⇐ Violent or Nonviolent Character of Offense

Absence of plea colloquy does not bar district court from consideration of other *Shephard* documents in determining whether crime of conviction was crime of violence for purposes of career offender enhancement under Federal Sentencing Guidelines, under modified categorical approach. U.S.S.G. § 4B1.1(a).

Cases that cite this headnote

[14] **Sentencing and Punishment** ⇐ Violent or Nonviolent Character of Offense

For purposes of determining whether crime of conviction is crime of violence for purposes of career offender enhancement under Federal Sentencing Guidelines, when a statute requires the use of force capable of causing physical pain or injury to another

person, whether that use of force occurs indirectly, rather than directly, as with a kick or punch, does not matter. U.S.S.G. § 4B1.1(a).

Cases that cite this headnote

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Appeal from the United States District Court for the Northern District of Florida, D.C. Docket No. 3:16-cr-00055-MCR-1.

Before WILLIAM PRYOR, and ROSENBAUM, Circuit Judges, and CONWAY, * District Judge.

Opinion

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to decide whether **Clifford Gandy** Jr.'s prior conviction for battery of a jail detainee, Fla. Stat. §§ 784.03, 784.082, qualifies as a "crime of violence" under the Sentencing Guidelines. **Gandy** was convicted of possession with intent to distribute cocaine and marijuana, 21 U.S.C. § 841(a)(1), (b)(1)(C)–(D), possession of a firearm in furtherance of a drug-trafficking offense, 18 U.S.C. § 924(c)(1)(A)(i), and possession of a firearm by a convicted felon, *id.* §§ 922(g)(1), 924(a)(2). Based on **Gandy**'s prior convictions for battery and a controlled-substance offense, the district court classified him as a career offender. United States Sentencing Guidelines Manual § 4B1.1(a) (Nov. 2016). The district court then calculated **Gandy**'s sentencing range as 360 months to life imprisonment and varied downward to impose a 300-month sentence of imprisonment. **Gandy** contends that his prior conviction for battery is not a crime of violence under the Guidelines. He argues that Florida battery is divisible only between "touching and striking" and "intentionally causing bodily harm," and that, under the modified categorical approach, we cannot determine that he was convicted of "intentionally causing bodily harm." Because the record makes clear that

Gandy's conviction for battery necessarily was for "intentionally causing bodily harm," we affirm.

I. BACKGROUND

In June 2016, a grand jury indicted **Gandy** for possession with intent to distribute cocaine and marijuana, ***1336** 21 U.S.C. § 841(a)(1), (b)(1)(C)–(D) (Count 1); possession of a firearm in furtherance of a drug-trafficking offense, 18 U.S.C. § 924(c)(1)(A)(i) (Count 2); and possession of a firearm by a convicted felon, *id.* §§ 922(g)(1), 924(a)(2) (Count 3). After a two-day trial, the jury convicted **Gandy** on all counts. The district court then scheduled a sentencing hearing, and the probation officer prepared **Gandy**'s presentence investigation report.

The probation officer classified **Gandy** as a career offender based on three prior felony convictions: a 2010 *nolo contendere* plea for battery upon a detainee, Fla. Stat. §§ 784.03, 784.082; a 2012 *nolo contendere* plea for felony battery; and a 2013 *nolo contendere* plea for the sale, manufacture, delivery, or possession of a controlled substance with intent to sell. *See* U.S.S.G. § 4B1.1(a). This classification subjected **Gandy** to the increased sentencing ranges that apply to career offenders with multiple counts of conviction one of which is possession of a firearm in furtherance of a drug-trafficking offense, 18 U.S.C. § 924(c). *See* U.S.S.G. § 4B1.1(b)–(c). The probation officer calculated that **Gandy**'s total sentencing range was 360 months to life imprisonment.

Gandy objected to his classification as a career offender on the ground that his battery convictions were not crimes of violence. He asserted that our decision in *United States v. Green (Green I)*, 842 F.3d 1299 (11th Cir. 2016), *opinion vacated and superseded on denial of reh'g*, 873 F.3d 846 (11th Cir. 2017), was wrongly decided and that striking and touching for Florida battery, Fla. Stat. § 784.03, are not divisible. And **Gandy** argued, based on *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), that no documents could be used to determine whether his battery convictions qualified as crimes of violence under the modified categorical approach. *See Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). **Gandy** calculated that his total sentencing range should be 144 to 165 months' imprisonment.

The government responded that **Gandy**'s battery convictions constituted crimes of violence based on *Green I*. In *Green I*, we explained that the Florida simple battery statute is divisible between "touching," "striking," and "intentionally causing bodily harm" battery, and that a court should use the modified categorical approach and consult *Shepard*-approved documents to decide which elements of battery a conviction was based on. 842 F.3d at

1322. And we held that if *Shepard* documents establish that a defendant was convicted of the "striking" element as opposed to the "touching" element of simple battery, then the conviction qualifies as a predicate "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e). *Id.*

With respect to the 2010 conviction, the government submitted four *Shepard* documents. First, the government submitted a charging document that stated that **Gandy** committed a battery upon a jail detainee "by actually and intentionally touching or striking [the victim] ... or by intentionally causing bodily harm to [the victim,] by hitting the victim in the face and head," in violation of Fla. Stat. §§ 784.03, 784.082.

Second, the government submitted **Gandy**'s sentence-recommendation form, which is the equivalent of his plea agreement. The sentence recommendation reflects that **Gandy** pleaded *nolo contendere* to "Battery Upon a Jail Visitor or Other Detainee." The sentence recommendation, which **Gandy** and his state-court counsel signed, also includes the following factual basis:

> ***1337** FACTUAL BASIS: *The arrest report* ... which is a part of the court record filed with the clerk of the court *is hereby incorporated by reference and agreed to by the defendant as a factual basis for this plea* and/or the factual basis is as follows:
>
> ...
>
> On December 11, 2010, deputies responded to the Red Pod in the Escambia County Jail and observed victim Clunion Galloway laying on the floor and bleeding. Victim Galloway stated that he was playing cards with other inmates when he was hit from behind. Victim Galloway did not see who the attacker was.
>
> Video surveillance was reviewed and shows the defendant approached the victim and str[uck] him in the head multiple times causing the victim to fall to the ground. The video then shows the defendant continuing to strike the victim on the ground. The video does not show any provocation.

Gov. Ex. A at 5, *United States v.* ***Gandy***, No. 3:16-cr-00055-MCR-1 (N.D. Fla. Dec. 9, 2016), ECF No. 58-1 (emphasis altered).

Third, the government submitted the arrest report that **Gandy** expressly incorporated as the factual basis for his plea. The arrest report includes the following statement of probable cause:

> On 12/11/2010 ... **Clifford Gandy**, Jr did knowingly and intentionally commit the offense of *Battery Causing Bodily Harm*, as follows.

> On 12/12/10, I was dispatched to [the jail] in reference to a battery complaint. Upon arrival, I made contact with Sergeant Bullion ... who stated that at approximately 2135 hours on 12/11/2010 an inmate attacked another inmate. Sergeant Bullion provided me with their incident report .... The report stated that Deputy Frymire ... responded to the Red Pod where he observed V/Clunion Galloway lying on the floor and bleeding. V/Galloway told Deputy Frymire that he was playing cards when someone hit him from behind. V/Galloway stated that he did not see who hit him. V/Galloway was transported to the Infirmary where he was treated by medical staff. Deputy Frymire stated that S/**Clifford Gandy** later admitted to hitting V/Galloway. S/**Gandy** was also escorted to the Infirmary where he was seen by medical staff.
>
> I was advised by Sergeant Bullion that V/Galloway wished to pursue criminal charges, and he also advised me that there was a video of the incident. Sergeant Buillion played the video for me at which time I observed V/Galloway playing cards. I could then clearly see S/**Gandy** walk up behind V/Galloway and unprovokedly str[ike] V/Galloway in the face which caused V/Galloway to fall down to the ground. S/**Gandy** then continued to strike V/Galloway multiple times on the head. ... Sergeant Bullion took photographs of V/Galloway's injuries which he provided to me. ... V/Galloway had a cut below his right eye, a scratch below his right ear, a bruise on the top of his head, a minor cut on his nose and a cut above his left eye.
>
> S/**Gandy** was charged with *battery causing bodily harm.*

Id. at 11–12 (emphasis added). The report also lists the charge as "Battery Caus[ing] Bodily Harm," and it refers exclusively to the subsection of the statute that **Gandy** violated as section 784.03(1)(a)(2), which addresses "intentionally causing bodily harm."

***1338** Fourth, the government submitted the state-court judgment. The judgment states that **Gandy** pleaded *nolo contendere* to "battery upon a jail visitor or other detainee," in violation of sections 784.03 and 784.082.

In January 2017, the district court entered an order continuing **Gandy**'s sentencing. The court was inclined to agree with **Gandy** that section 784.03 is not divisible between "touching" and "striking" elements, but it explained that it was "clearly" bound by *Green I*. The court also mentioned that it hoped that the issue of the divisibility of the Florida battery statute would be resolved in the then-pending appeal in *United States v. Vail-Bailon*, No. 15-10351 (11th Cir.). **Gandy**'s sentencing was then rescheduled for after we decided that appeal. In August 2017, we issued our opinion in *Vail-Bailon* that felony battery under Fla. Stat. § 784.041 categorically qualifies as a crime of violence under the Sentencing Guidelines. *United States*

v. Vail-Bailon, 868 F.3d 1293, 1308 (11th Cir. 2017) (en banc). After our ruling, the district court rescheduled **Gandy**'s sentencing hearing for September 2017.

At his sentencing hearing, **Gandy** renewed his objection to the career-offender designation. The district court explained that *Green I* remained binding precedent even after *Vail-Bailon*. The district court then overruled the objection.

After that ruling, the government requested and was granted the opportunity to further explain its position. The government first conceded that **Gandy**'s 2012 battery conviction did not qualify as a crime of violence under the career-offender guideline. But the government maintained that **Gandy** was correctly designated a career offender because the 2010 conviction of battery of a detainee qualified as a crime of violence because it constituted "striking" battery under *Green I*.

The government also advanced an alternative argument: even if *Green I* was wrong about the divisibility of Florida battery, **Gandy**'s battery conviction would still qualify as a crime of violence because battery would still be divisible between "touching and striking" and "intentionally causing bodily harm," and the *Shepard* documents leave "no doubt" that **Gandy** pleaded to "intentionally causing bodily harm." **Gandy** responded that a conviction for bodily-harm battery does not require proof of violent force, as required under *Johnson v. United States (Curtis Johnson)*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). According to **Gandy**, one could intentionally cause bodily harm by, for example, "digging a hole and putting a blanket over it or loosening someone's tires," and this would not meet the requirement of the use of violent force. The court never addressed the government's alternative argument.

The court varied downward from the Guidelines range of 360 months to life imprisonment and imposed a 300-month sentence of imprisonment. One week later, we vacated *Green I* and issued a superseding opinion that did not address the divisibility of Florida simple battery. *See United States v. Green (Green II)*, 873 F.3d 846 (11th Cir. 2017). **Gandy** then filed his appeal.

II. STANDARD OF REVIEW

[1] We review *de novo* whether a battery conviction qualifies as a crime of violence under the Sentencing Guidelines. *Vail-Bailon*, 868 F.3d at 1296.

III. DISCUSSION

[2] **Gandy** argues that the district court erred when it classified him as a ***1339** career offender on the ground that his 2010 conviction for battery of a detainee was a crime of violence. To be classified as a career offender, **Gandy** must have at least two prior felony convictions for crimes of violence or controlled-substance offenses. U.S.S.G § 4B1.1(a). A "crime of violence" is defined as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 4B1.2(a)(1). The Supreme Court has defined physical force as "*violent* force—that is, force capable of causing physical pain or injury to another person." *Curtis Johnson*, 559 U.S. at 140, 130 S.Ct. 1265. Because there is no dispute that, for purposes of **Gandy**'s career-offender designation, his conviction for a controlled-substance offense is a predicate offense and that his 2012 battery conviction is not, only the status of **Gandy**'s 2010 battery conviction is at issue.

Gandy was convicted in 2010 under two statutes, Fla. Stat. §§ 784.03, 784.082. Section 784.03 defines the offense of 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.

Fla. Stat. § 784.03(1)(a). Although simple battery is ordinarily a misdemeanor, battery of a jail detainee is classified as felony under another statute. Fla. Stat. § 784.082(3).

[3] [4] Because section 784.03 does not define a crime of violence under the categorical approach, *see Curtis Johnson*, 559 U.S. at 138–40, 130 S.Ct. 1265, we must decide whether the modified categorical approach allows us to conclude that **Gandy**'s conviction qualifies. We may apply the modified categorical approach when the statute is divisible—that is, it "define[s] multiple crimes"—and a limited class of documents, often called *Shepard* documents, are available to determine "what crime, with what elements, a defendant was convicted of." *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016). *Shepard* documents may include the charging document, any plea agreement submitted to the court, the transcript of the plea colloquy, or any "record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard*, 544 U.S. at 20–21, 26, 125 S.Ct. 1254.

The parties agree that the battery conviction cannot be classified as a crime of violence for "striking" battery because section 784.03 is only divisible between "touching or striking" battery and "intentionally causing bodily harm" battery. The parties also agree that "touching or striking" battery does not constitute a crime of violence. But the government argues that because **Gandy** necessarily pleaded to "bodily harm" battery, his conviction still qualifies as a crime of violence.

Because we agree with the government that we can determine that **Gandy** was necessarily convicted of "intentionally causing bodily harm," which qualifies as a crime of violence, we need not decide whether "touching" and "striking" are divisible or whether **Gandy**'s conviction would qualify as "striking" battery. The parties do not dispute, and we agree, that the Florida statute is divisible and that battery by "intentionally causing bodily harm" is a separate element of the offense.

[5] Battery by "intentionally causing bodily harm" categorically constitutes a ***1340** crime of violence. Bodily-harm battery is proved by establishing two elements: the defendant caused bodily harm to another person, and he did so intentionally. *See* Fla. Stat. § 784.03(1)(a)(2). Although, under Florida law, bodily harm is broadly defined to encompass any "slight, trivial, or moderate harm" to a victim, *see Brown v. State*, 86 So.3d 569, 571–72 (Fla. Dist. Ct. App. 2012), and Florida courts have applied the term to a wide range of physical injuries, *see, e.g.*, *Gordon v. State*, 126 So.3d 292, 295–96, 296 n.4 (Fla. Dist. Ct. App. 2011) (bruises); *C.A.C. v. State*, 771 So.2d 1261, 1262 (Fla. Dist. Ct. App. 2000) (scratches, swelling, and puncture marks), all of these injuries satisfy *Curtis Johnson*'s definition of violent force. *See Curtis Johnson*, 559 U.S. at 143, 130 S.Ct. 1265 (explaining that violent force "might consist ... of only that degree of force necessary to inflict pain—a slap in the face, for example"). A defendant convicted of bodily-harm battery must have intentionally used "force capable of causing physical pain or injury to another person," *id.* at 140, 130 S.Ct. 1265, so bodily-harm battery necessarily constitutes a crime of violence.

[6] We next look to the *Shepard* documents for **Gandy**'s battery conviction to determine whether he was necessarily convicted of intentionally causing bodily harm. *See Shepard*, 544 U.S. at 21, 125 S.Ct. 1254 (explaining that the question is "whether the plea had 'necessarily' rested on the fact identifying the [offense]" as a predicate). The Supreme Court has repeatedly stressed that there is a "demand for certainty" in determining whether a defendant was convicted of a qualifying offense. *See Mathis*, 136 S.Ct. at 2257; *see Descamps*, 570 U.S. at 272, 133 S.Ct. 2276 (asking whether the defendant "necessarily" committed the qualifying crime); *Shepard*, 544 U.S. at 21, 125 S.Ct. 1254 (referring to "*Taylor*'s demand for certainty"); *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). As a result, we may conclude that **Gandy** was convicted of a qualifying offense only if the *Shepard*

documents "speak plainly" in establishing the elements of his conviction. *Mathis*, 136 S.Ct. at 2257.

[7] Although the charging document, the judgment, and **Gandy**'s sentence recommendation do not identify which crime within section 784.03 he was convicted of committing, the incorporated arrest report clearly identifies his offense as bodily harm battery. To be sure, we ordinarily do not rely on police reports under the modified categorical approach because a defendant ordinarily does not admit the conduct described in them. *United States v. Rosales-Bruno*, 676 F.3d 1017, 1021 (11th Cir. 2012). But an arrest report that is incorporated by reference in a plea agreement qualifies as a "record of comparable findings of fact adopted by the defendant upon entering the plea" that we may consider. *Shepard*, 544 U.S. at 20, 125 S.Ct. 1254; *see United States v. Diaz-Calderone*, 716 F.3d 1345, 1349–50 (11th Cir. 2013) (holding that a district court may rely on arrest reports if the defendant acknowledges his guilt and implicitly affirms the truth of the arrest report during a plea colloquy).

The incorporated arrest report "speaks plainly" that **Gandy**'s offense was bodily-harm battery. The report begins by listing the charge as "Battery Caus[ing] Bodily Harm," and it refers exclusively to the subsection of the Florida simple battery that **Gandy** violated as section 784.03(1)(a)(2), the "bodily harm" subsection. The report then alleges in its statement of probable cause that "[o]n 12/11/2010 ... [**Gandy**] did knowingly and ***1341** intentionally commit the offense of *Battery Causing Bodily Harm.*" It next describes how **Gandy** attacked his fellow inmate and caused him to suffer a variety of injuries, such as bruising and cuts around the face and head. At the conclusion of the statement of probable cause, the report again lists the charge as "battery causing bodily harm." The arrest report never mentions "touching or striking" battery, nor does it cite the subsection for that type of battery. So the arrest report unambiguously identifies **Gandy**'s offense as bodily harm battery. Because **Gandy** agreed to this description of his offense, he necessarily pleaded *nolo contendere* to bodily harm battery.

At oral argument, **Gandy** argued that we cannot rely on the statements identifying his offense as bodily harm battery because these statements are "legal conclusions." He argued that by agreeing to the police report as the factual basis of his plea, he only agreed to the report's "factual allegations." We disagree.

[8] Florida law requires a factual basis for a plea to ensure "that the facts of the case fit the offense with which the defendant is charged." *Allen v. State*, 876 So.2d 737, 740 (Fla. Dist. Ct. App. 2004) (citation omitted). Because a factual basis is used to compare the factual allegations with the elements of the offense of conviction, *see Williams v. State*, 316 So.2d 267, 273 (Fla. 1975), a factual basis often includes both legal and factual elements so that the comparison between the two may be made explicit. Although we agree with

Gandy that a factual basis consists primarily of factual information, *see Dydek v. State*, 400 So.2d 1255, 1257 (Fla. Dist. Ct. App. 1981) (explaining that "the trial court must receive in the record *factual information* to establish the offense to which the defendant has entered his plea" (emphasis added)), we do not agree that a factual basis excludes all legal conclusions. Our review of Florida caselaw reveals that the factual bases for guilty or *nolo* pleas often include legal descriptions of the elements or offenses that are established by the factual allegations. *See, e.g.*, *Johnson v. State*, 22 So.3d 840, 843 (Fla. Dist. Ct. App. 2009) (explaining that prosecutor's statement of the factual basis for a plea, to which the defendant did not object, included the statement that at "some point between November 15, 2005, and November 27, 2005, Johnson knowingly conspired to sell, purchase, manufacture, deliver, or traffic four grams or more of oxycodone"); *Toson v. State*, 864 So.2d 552, 554 (Fla. Dist. Ct. App. 2004) (including in the factual basis a statement that "the defendant did knowingly enter a dwelling ... with the intent to commit an offense therein"); *Hayden v. State*, 833 So.2d 275, 276 (Fla. Dist. Ct. App. 2002) (providing a factual basis for a defendant who pleaded *nolo contendere* to the offense of robbery with a firearm and a mask that included the statement that "[o]n December 22nd, Marcus Hayden and Dantrell Riley, with a gun and masks ... committed a robbery"). And **Gandy** cites no authority supporting his restrictive view of what constitutes a factual basis under Florida law.

[9] We conclude that because **Gandy** agreed to the arrest report as the factual basis of his plea without qualification, he agreed with the statements describing his offense as bodily-harm battery and that he necessarily pleaded *nolo contendere* to that offense. And our conclusion is consistent with that of the only other Circuit that has addressed whether a defendant's agreement to a police report as a factual basis includes his agreement to the report's ***1342** description of his offense. *See United States v. Almazan-Becerra*, 537 F.3d 1094, 1096, 1099 (9th Cir. 2008) (explaining that where police reports were incorporated as the factual basis of the defendant's plea and described the offense as "sales of marijuana," it established that a defendant who had pleaded guilty to a disjunctive indictment was necessarily convicted of the sale of marijuana as opposed to mere transportation of marijuana).

[10] **[11]** **Gandy** argues that we cannot conclude that he was convicted of bodily harm battery in the absence of an amendment to the charging document that narrows the elements of his conviction, but we disagree. What matters under the modified categorical approach is not the offense charged, but what elements the government proved or the defendant admitted committing. Although a charging document is one possible *Shepard* document that we may consult, it is not the only document. When a charging document contains multiple alternative elements from the same divisible statute and the judgment does not specify which elements were proved or admitted, we may still determine the elements by consulting other *Shepard* documents. For example, in *Diaz-Calderon*, the defendant pleaded *nolo contendere* to an information charging that he "did intentionally touch *or* strike the victim against

that person's will *or* did intentionally cause bodily harm to said person." 716 F.3d at 1348 (alteration adopted) (emphasis added). We determined the basis for the conviction by looking to the factual basis for the plea, which included arrest affidavits, and the plea colloquy. *Id.* at 1349–50. Because the *Shepard* documents establish that **Gandy** admitted committing bodily-harm battery, we reject his argument.

[12] **Gandy** also contends that we may not rely on the factual basis included in his sentence recommendation because, in entering his *nolo contendere* plea, he only "acknowledged that the evidence would be sufficient to support a judgment of conviction under Fla. Stat. § 784.03." But we have repeatedly explained that we treat Florida *nolo* convictions no differently than convictions based on guilty pleas or verdicts of guilt for purposes of the Sentencing Guidelines. *See Green II*, 873 F.3d at 860 (collecting decisions); *see also United States v. Drayton*, 113 F.3d 1191, 1193 (11th Cir. 1997) (holding that a Florida *nolo* conviction constitutes a prior conviction for purposes of the Armed Career Criminal Act). **Gandy**'s argument that we may not consult the factual basis of his *nolo* plea has no merit.

[13] **Gandy** also argues that we cannot rely on the factual basis in the arrest report because, absent a plea colloquy, we cannot determine either that the state court found a factual basis to support the *nolo contendere* plea or that it specifically relied on the factual basis as stated in the arrest report. As we understand it, **Gandy**'s argument suggests that we cannot apply the modified categorical approach unless we have a plea colloquy, as there could always be some question about whether the elements of the conviction stated in a particular *Shepard* document were actually relied upon by the court in accepting the plea. But a plea colloquy is only one of several *Shepard*-approved documents, and we are aware of no authority suggesting that the absence of a plea colloquy bars consideration of other *Shepard* documents.

[14] **Gandy** also renews his argument from the district court that bodily-harm battery does not satisfy the definition of a crime of violence because one may cause ***1343** bodily injury indirectly, such as by "digging a hole and putting a blanket over it or loosening someone's tires." This argument fails because we have held that "[w]hen a statute requires the use of force 'capable of causing physical pain or injury to another person,' whether that use of force 'occurs indirectly, rather than directly (as with a kick or punch), does not matter.' " *United States v. Deshazior*, 882 F.3d 1352, 1357 (11th Cir. 2018) (citation omitted) (quoting *United States v. Castleman*, 572 U.S. 157, 171, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014)).

Gandy was convicted of battery of a jail detainee by intentionally causing bodily harm. His prior conviction constitutes a crime of violence under the Sentencing Guidelines. U.S.S.G. § 4B1.2(a)(1). So he has two qualifying predicate offenses for purposes of his career-offender designation. U.S.S.G. § 4B1.1(a).

IV. CONCLUSION

We **AFFIRM Gandy**'s sentence.

ROSENBAUM, Circuit Judge, dissenting:
I agree with the panel that Fla. Stat. § 784.03 is divisible into two separate offenses—one of which qualifies as a violent felony for purposes of the sentencing guidelines (the "bodily-harm" provision) [1] and one of which does not (the "touch-or-strike" provision) [2]. I also agree that the fact that **Clifford Gandy** Jr.'s plea was one of *nolo contendere* does not change the analysis in this case and that the district court was entitled to look to the arrest report to determine the offense of conviction because the report was incorporated by reference into **Gandy**'s sentence recommendation "as a factual basis."

But I dissent from the panel's application of the modified categorical approach. ***1344** The panel incorrectly applies the modified categorical approach, creating a circuit split in the process. As a result, the panel mistakenly concludes that **Gandy**'s prior conviction for violating § 784.03 was "necessarily" for bodily-harm battery. Since a correct application of the modified categorical approach does not allow us to identify which offense defined in § 784.03 **Gandy** was "necessarily" convicted of committing, I would vacate the sentence and remand for resentencing.

I.

I begin by reviewing the categorical and modified categorical analyses.

As the "first step" of determining whether a defendant's prior conviction qualifies as a "crime of violence" under the Sentencing Guidelines, we apply the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014). Using that method, we "look no further than the statute and judgment of conviction" and ask whether, "on its face," the statute of conviction "requires the government to establish, beyond a reasonable doubt and without exception, an element involving the use, attempted use, or threatened use of physical force against a person for every charge brought under the statute." *Estrella*, 758 F.3d at 1244; *accord United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014); *Donawa v. United States Attorney General*, 735 F.3d 1275, 1281 (11th Cir. 2013). If so, then the conviction

"*necessarily*," *Estrella*, 758 F.3d at 1245 (citation and quotation marks omitted), indicates that the defendant committed an element that involves the "use, attempted use, or threatened use of physical force against the person of another," U.S.S.G. § 4B1.2(a).

Here, the categorical approach does not reveal whether **Gandy** was "necessarily" convicted of a crime that includes as an element the "use, attempted use, or threatened use of physical force against the person of another." As the panel accurately points out, **Gandy**'s judgment reveals only that he was convicted of violating Fla. Stat. § 784.03, which is not categorically a crime of violence. Rather, § 784.03 has two subsections possibly applicable here—one that is not categorically a crime of violence (§ 784.03(1)(a)(1), which makes it a crime to "[a]ctually and intentionally touch[ ] or strike[ ] another person against the will of the other"), *Curtis Johnson v. United States*, 559 U.S. 133, 139, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), and one that is (§ 784.03(1)(a)(2), which makes it a crime to "[i]ntentionally cause[ ] bodily harm to another person"). Because § 784.03 is divisible into one crime that qualifies as a crime of violence and another that does not, the categorical approach cannot help us deduce whether **Gandy**'s conviction under § 784.03 was necessarily for a crime of violence.

We therefore must turn to the modified categorical approach to help us identify, if possible, whether **Gandy** was convicted of the touch-or-strike provision or the bodily-harm provision. *Estrella*, 758 F.3d at 1245. Under the modified categorical approach, we "look to the fact of conviction and the statutory definition of the prior offense, as well as any charging paper and jury instructions" to shed light on what specific offense of a divisible statute the defendant was convicted of. *Id.* (citation and quotation marks omitted). The documents we use for this purpose are often referred to as "*Shepard*" documents. *See Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

Critically, and as the Supreme Court has repeatedly emphasized, courts may use the ***1345** modified categorical approach to determine only " 'which statutory phrase was the basis for the *conviction*.' " *Descamps v. United States*, 570 U.S. 254, 263, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) (emphasis added) (quoting *Curtis Johnson*, 559 U.S. at 144, 130 S.Ct. 1265); *see also Taylor*, 495 U.S. at 602, 110 S.Ct. 2143; *Shepard*, 544 U.S. at 26, 125 S.Ct. 1254. We have previously followed this directive when holding that courts may use *Shepard* documents for only the limited purpose of determining " 'what crime, with what elements, a defendant was *convicted* of.' " *United States v. Gundy*, 842 F.3d 1156, 1168 (11th Cir. 2016) (emphasis added) (quoting *Mathis v. United States*, — U.S. ——, 136 S.Ct. 2243, 2245, 195 L.Ed.2d 604 (2016)). It naturally follows that a court "must not ... consult those documents 'to discover what the defendant actually did.' " *Howard*, 742 F.3d at 1347 (quoting *Descamps*, 570 U.S. at 268, 133 S.Ct. 2276).

Significantly, the modified categorical approach "preserves the categorical approach's basic method," *Descamps*, 570 U.S. at 263, 133 S.Ct. 2276, since the sentencing court ultimately asks whether the records of the defendant's prior case show that, though convicted of a divisible statute, he was "*necessarily convicted*" of a particular provision within that divisible statute that is a crime of violence. *Choizilme v. United States Attorney General*, 886 F.3d 1016, 1023 (11th Cir. 2018) (emphasis added) (citing *Mathis*, 136 S.Ct. at 2249). So we have held that the modified categorical approach requires us to first determine " 'which statutory phrase the defendant was *necessarily convicted* under,' " and if we can do so, to then ask whether that statutory provision defined a crime of violence, using the categorical approach. *United States v. Davis*, 875 F.3d 592, 598 (11th Cir. 2017) (emphasis added) (quoting *Howard*, 742 F.3d at 1345).

On the record here, as shown in the next section, the *Shepard* documents do not allow us to conclude that **Gandy** was "necessarily convicted under" a particular statutory phrase within § 784.03. For that reason, the panel opinion's determination that **Gandy** was "necessarily convicted" of bodily-harm battery is incorrect.

II.

In concluding **Gandy** was "necessarily convicted" of bodily-harm battery and affirming **Gandy**'s sentence, the panel relies on the arrest report in two ways that the modified categorical approach does not permit, even though the report was incorporated "as a factual basis" for the plea. First, the panel opinion appears to contend that where, as here, the factual basis for an offense satisfies the elements of both a qualifying offense and a non-qualifying offense, the district court is entitled to conclude that the defendant was "necessarily" convicted of the qualifying offense. Maj Op. at 1341. And second, the panel opinion seems to conclude that the officer's legal conclusion that **Gandy** committed bodily-harm battery, which appears in the arrest report, means that **Gandy** was "necessarily" convicted of that offense.[3] Maj. Op. at 1340–41.

The panel opinion's first apparent contention contravenes the Supreme Court's "demand for certainty" in determining a ***1346** defendant's prior offense of conviction. *Shepard*, 544 U.S. at 21, 125 S.Ct. 1254. It also conflicts with the Eighth Circuit's well-reasoned decision in *United States v. Horse Looking*, 828 F.3d 744 (8th Cir. 2016), creating a circuit split on that issue. And its second apparent contention is inconsistent with fundamental principles of criminal procedure.

A.

I begin with the panel opinion's apparent contention that, since the factual basis for **Gandy**'s plea would have satisfied the elements of both bodily-harm battery and touch-or-strike battery, the district court was entitled to conclude that **Gandy**'s conviction must have been for bodily-harm battery. We have not previously considered whether a factual basis that satisfies the elements of two crimes—one that qualifies as a crime of violence and one that does not—suffices to show that a defendant charged in the alternative with both crimes was "necessarily" convicted of the qualifying crime. But the Eighth Circuit has. And in *United States v. Horse Looking*, 828 F.3d 744 (8th Cir. 2016), a well-reasoned opinion in a case materially indistinguishable from the one here, that court found that such a factual basis does not—the opposite of today's panel opinion's conclusion.

In *Horse Looking*, the defendant was charged with possessing a firearm after having been previously convicted of a "misdemeanor crime of domestic violence." The applicable statute, in turn, defines that term as a crime that, as relevant here, has as an element "the use or attempted use of physical force, or the threatened use of a deadly weapon." 828 F.3d at 746; *see* 18 U.S.C. §§ 921(a)(33)(A)(ii), 922(g)(9). On appeal to the Eighth Circuit, Horse Looking argued that the court should vacate his conviction and dismiss the indictment because the predicate conviction in his case, which was for South Dakota simple assault domestic violence, was not a "misdemeanor crime of domestic violence" as defined by federal law. *Horse Looking*, 828 F.3d at 746.

As it turned out, the South Dakota simple-assault-domestic-violence statute contained five divisible provisions, and Horse Looking was charged with three of them. *Id.* As relevant here, Horse Looking's underlying South Dakota indictment alleged that Horse Looking "(4) [a]ttempt[ed] by physical menace or credible threat to put another in fear of imminent bodily harm, with or without the actual ability to harm the other person," or "(5) [i]ntentionally cause[d] bodily injury to another which does not result in serious bodily injury." *Id.*; *see* S.D. Codified Laws § 22-18-1. Before the Eighth Circuit, the parties agreed that a conviction under subsection (5) of the South Dakota statute met the federal definition of a "misdemeanor crime of domestic violence" and that a conviction under subsection (4) did not. *Id.* at 747.

Applying the modified categorical approach, the court looked to the South Dakota charging and sentencing documents to determine whether Horse Looking had been convicted of subsection (4) or (5), or both. *Id.* at 747. But those documents revealed only a conviction for violating the statute as a whole, without identifying any particular subsection of conviction. *Id.*

Continuing with the modified categorical approach, the Eighth Circuit next examined the plea colloquy in Horse Looking's South Dakota case. In that colloquy, Horse Looking had said that he and his wife "got into an argument and she became physical and she cut me and I pushed her." ***1347** *Id.* at 748. Horse Looking further explained that when he "pushed" his wife, "she fell down." *Id.* Finally, Horse Looking's attorney volunteered that Horse Looking's wife had "testified that she had some abrasions on her ankle or knee." *Id.*

Based on this factual recitation, the Eighth Circuit concluded that the colloquy "establishe[d] that Horse Looking *could have been* convicted under subsection (5)," which was a misdemeanor crime of domestic violence. *Id.* at 748 (emphasis in original). "But," the court continued, "the colloquy does not exclude the possibility that Horse Looking was convicted under subsection (4)," which was not a misdemeanor crime of violence. *Id.* at 748. And since the court also could not "say that convictions under the two alternatives are mutually exclusive," it acknowledged it could not determine that the factual basis for Horse Looking's plea necessarily excluded one of the subsections of the statute as the offense of his conviction. *Id.*

So the court concluded that "the judicial record d[id] not establish that Horse Looking necessarily *was convicted* of" the qualifying part of the South Dakota statute. *Id.* at 749. Ultimately, then, because "*the state court* did not specify which alternative was the *basis for conviction*," the Eighth Circuit determined that the government could not establish that Horse Looking had been convicted of a "misdemeanor crime of domestic violence." *Id.* (emphasis added). That Horse Looking "*could have*" been convicted of a qualifying offense, the court said, did not meet the Supreme Court's repeated " 'demand for certainty' " when it came to determining whether a defendant had, in fact, been previously convicted of a qualifying predicate offense. *Id.* at 748-49 (quoting *Mathis*, 136 S.Ct. at 2256-57; citing *Descamps*, 570 U.S. at 272, 133 S.Ct. 2276; *Shepard*, 544 U.S. at 21, 125 S.Ct. 1254; *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143).

Gandy's case presents the same problem, and we should have resolved it in the same way. Here, as in *Horse Looking*, the judgment and sentencing documents indicate that **Gandy** was convicted of a general offense, without specifying which particular subsection of that general offense is the offense of conviction. And like Horse Looking, **Gandy** pled guilty to a charging instrument that contained both qualifying and non-qualifying offenses. Also like Horse Looking, **Gandy** admitted to conduct that satisfied the elements of both the qualifying offense and the non-qualifying offense. Neither the South Dakota court in Horse Looking's case nor the Florida court in **Gandy**'s case specified whether the defendant's case was for the qualifying subsection or the non-qualifying subsection. And finally, just as was the case with the factual recitation in *Horse Looking*, the statement of **Gandy**'s actions contained in the arrest report does not exclude the possibility that **Gandy** committed one of the two crimes

ultimately charged in the alternative. So like the Eighth Circuit, we should have concluded that **Gandy**'s past conviction was not "necessarily" for a qualifying offense.

Indeed, the Eighth Circuit did exactly what Supreme Court precedent requires in applying the modified categorical approach. Unfortunately, though, today we do not.[4] And as a result, we arrive at the incorrect answer and create a circuit split in the process.

***1348 B.**

Nor, as the panel opinion seems to suggest, can we find the answer to our dilemma by relying on the officer's arrest-report legal conclusion that **Gandy** committed bodily-harm battery, which he offered to identify his legal authority to make the arrest. It's not that we can't consult the arrest report to help us ascertain the factual basis for **Gandy**'s crime of conviction; we can, since **Gandy** agreed that the arrest report provided a "factual basis" for his plea. But to paraphrase Inigo Montoya in *The Princess Bride*, I do not think the presence of the officer's statement in the arrest report means what the panel opinion thinks it means.[5] *See Mandy Patinkin: Inigo Montoya*, IMDb.com, https://www.imdb.com/title/tt0093779/characters/nm0001597 (last visited Mar. 5, 2019). This is so for two independent reasons: (1) an officer's statement in his arrest report providing a legal conclusion of the offense for which he is arresting a person is not a part of the "factual basis" demonstrating that the defendant, in fact, pled guilty to that particular crime, even when the arrest report is adopted "as a factual basis" for the guilty plea; and (2) only the court, not the arresting officer, has the power to adjudicate a defendant convicted of a crime.

To explain why, I review the purpose of the arresting officer's report in the context of the plea proceeding in **Gandy**'s Florida case. The arresting officer's report was incorporated by reference to the sentence recommendation only "as a factual basis" for **Gandy**'s plea. And the report contained both statements of fact—reporting the actions **Gandy** took that resulted in his arrest—and the officer's statement of the crime he decided to arrest **Gandy** for—bodily-harm battery. But the arresting officer's statement of the crime he arrested **Gandy** for was not a part of the "factual basis" for **Gandy**'s plea. Rather, it served only the purpose of identifying the crime for which the officer arrested **Gandy**.

To understand the impact of the arrest report's limited purpose, we must consider the role of the "factual basis." Florida Rule of Criminal Procedure 3.170 requires a court to determine that, among other things, a "factual basis for the plea" exists before the court may accept a plea. Satisfying this requirement demands the court "ensure that the facts of the case fit the offense with which the defendant is charged." *Williams v. State*, 316 So.2d 267, 271 (Fla. 1975). So merely repeating that the defendant committed a particular crime or saying that

the defendant committed a specific element of a given crime does not accomplish this task. Rather, the "factual basis" must provide the "factual information necessary to establish the elements of the offense." *Id.* at 273.

In applying these concepts, we start with "the offense with which [**Gandy**] [was] charged." *Id.* at 271. Here, **Gandy** was charged in the alternative with having committed bodily-harm battery *or* touch-or-strike battery.

Two elements compose touch-or-strike battery: "(1) actually and intentionally ***1349** touching or striking another person; and (2) [doing so] against the will of the other person." *Khianthalat v. State*, 974 So.2d 359, 361 (Fla. 2008). Among others, the following facts from the arrest report established the two elements of touch-or-strike battery: a video recording showed that **Gandy** "walk[ed] up behind [the victim] and unprovokedly struck [the victim] in the face which caused [the victim] to fall down to the ground. [**Gandy**] then continued to strike [the victim] multiple times in the head." The report further memorialized the victim's statement that he "wished to pursue criminal charges" against **Gandy**.

As for bodily-harm battery, a single element—that the defendant "intentionally caused bodily harm" to the victim—comprises that crime. *See* Fla. Jury Instruction 8.3 Battery. And along with the arrest report's recounting of the specific injuries the victim incurred as a result of **Gandy**'s actions, the same facts from the arrest report that showed **Gandy** undertook actions that meet the elements of touch-or-strike battery likewise demonstrated that **Gandy** engaged in actions that check off bodily-harm battery's single element.

So the facts in the arrest report establishing that **Gandy** undertook actions that specifically satisfied the elements of each charged crime comprise the "factual basis" for **Gandy**'s plea; they showed the particular actions **Gandy** committed that supported the conclusions that he "actually and intentionally touch[ed] or str[uck] another person," "against the will of the other person" and that he "intentionally caused bodily harm" to the victim. They did not simply restate an element of a particular crime or the crime for which **Gandy** was arrested.

By contrast, the officer's legal conclusion that **Gandy** intentionally caused bodily harm to another did no more than restate a crime. It did not "provide the factual information necessary to establish the elements of the offense." *Williams*, 316 So.2d at 273. And since it did not do so, it did not serve as part of the factual basis for **Gandy**'s plea.

Nor do the Florida cases cited in the panel's decision support its position that legal conclusions may properly be part of the factual basis for a Florida guilty plea. *See* Maj. Op. at 1341 (citing *Johnson v. State*, 22 So.3d 840 (Fla. Dist. Ct. App. 2009); *Toson v. State*, 864 So.2d 552 (Fla. Dist. Ct. App. 2004); *Hayden v. State*, 833 So.2d 275 (Fla. Dist. Ct. App.

2002)). Critically, the sufficiency of the factual bases for the guilty pleas of the defendants in those cases was not at issue.[6] So those cases can shed no light on whether legal ***1350** conclusions constitute part of the "factual basis" for a defendant's guilty plea. *Cf. United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38, 73 S.Ct. 67, 97 L.Ed. 54 (1952) (noting that where a particular issue was neither raised in the briefs or argument nor discussed in the opinion of the Court, the case could not serve as binding precedent on the particular point).

United States v. Almazan-Becerra, 537 F.3d 1094 (9th Cir. 2008) ("*Almazan-Becerra II*"), similarly does not help the panel opinion, as the panel's reliance on it rests on another Inigo Montoya type of misunderstanding. The panel cites *Almazan-Becerra* for the notion that "a defendant's agreement to a police report as a factual basis includes his agreement to the report's description of the offense," by which the panel opinion means the arresting officer's statement of the offense for which the defendant is arrested. Maj. Op. at 1341–42. But *Almazan-Becerra* did not use the word "describe" in the way that the panel opinion seems to think it did. Rather, it used that word to refer collectively to the specific facts concerning Almazan-Becerra's actions that the reports at issue in that case documented.

In *Almazan-Becerra*, the federal court had to determine whether Almazan-Becerra had previously been convicted of a drug-trafficking crime to ascertain whether a sentencing enhancement applied to him. *See Almazan-Becerra*, 537 F.3d at 1095. The state complaint to which Almazan-Becerra had pled guilty, as relevant here, charged in the alternative sale or transport of marijuana, under the same general statute. *See United States v. Almazan-Becerra*, 482 F.3d 1085, 1089 (9th Cir. 2007) ("*Almazan-Becerra I*"). Sale of marijuana was a drug-trafficking offense, while transport was not. *See Almazan-Becerra II*, 537 F.3d at 1099.

But since Almazan-Becerra stipulated as a factual basis for his plea to the police reports concerning his arrest, the court considered the contents of the reports to see whether they could resolve whether Almazan-Becerra had been convicted of sale or transport of marijuana. *Id.* at 1099 & 1099 n.2. In so doing, it said that "the police reports unequivocally describe Almazan-Becerra's offensive conduct as selling marijuana ...." *Id.* at 1099. But the court simultaneously expressly "reject[ed]" Almazan-Becerra's contention that the police reports also "*describe[d]* the offense of transporting marijuana ... because the reports state that the police found a bindle of marijuana on the ground where Almazan-Becerra had previously been walking." *Id.* at 1099 n.2 (emphasis added). Rather, the court explained, "[W]hen read as a whole, [the reports] *describe* only one type of offense—selling marijuana. The bindle found on the ground was simply one of several pieces of evidence of that offense." *Id.* (emphasis added).

So contrary to the panel opinion's suggestion, the Ninth Circuit's explanation for why the reports could not also "describe the offense of transporting marijuana" shows that it did not employ that phrase to refer to an officer's statement of the offense for which he arrested the defendant, but rather to the defendant's specific actions documented in the reports. *See id.* at 1099 n.2. Put another way, the Ninth Circuit effectively determined that the particular actions memorialized in the police reports could, in good faith, support only the charge of sale.

But even not considering the principle that an officer's statement identifying the ***1351** crime for which he arrests a person cannot constitute a part of the "factual basis," a second reason also compels the determination that we cannot view the arresting officer's legal conclusion as dispositive. While the arresting officer may have accurately stated the crime for which he arrested **Gandy**, the officer was not responsible for **Gandy**'s prosecution. That was up to the State Attorney. *See* Fla. Stat. § 932.47. It was the State Attorney who selected the charge against him. *See id.* And once the State Attorney charged **Gandy**, only the court could adjudicate **Gandy** guilty of that charge. Fla. R. Crim. P. 3.170.

The following hypothetical illustrates this point more bluntly:

Suppose that the victim in **Gandy**'s case tragically suffered permanent brain damage when **Gandy** hit him. Florida courts have held such an injury constitutes "great bodily harm," an element of aggravated battery. Fla. Stat. § 784.045; *see Montero v. State*, 225 So.3d 340, 343 (Fla. Dist. Ct. App. 2017). Under our hypothetical, suppose the officer arrested **Gandy** for aggravated battery, opining in his arrest report that **Gandy** "did commit the offense of Aggravated Battery Causing Great Bodily Harm, as follows," before setting forth the specific facts supporting **Gandy**'s arrest for that crime. Then suppose that the prosecutor decided to charge only touch-or-strike battery or bodily-harm battery under Fla. Stat. § 784.03—just like here—and she did not charge aggravated battery, in violation of Fla. Stat. § 784.045. Finally, suppose that, just like here, **Gandy** pled guilty to the charged crime and that the court adjudicated him guilty of it.

Under the circumstances of that hypothetical, could a later sentencing court correctly surmise that **Gandy**'s conviction was "necessarily" for aggravated battery?

Inconceivable![7]

The officer's statement that **Gandy** committed the crime for which he was arrested could not define the offense *of conviction*. Only the court could do that because only the court had the power to adjudicate **Gandy** guilty and enter a judgment of conviction on the charge. Under this hypothetical scenario, the court identified Fla. Stat. § 784.03—not Fla. Stat. § 784.045—as the statute of conviction. And the factual basis for **Gandy**'s plea, with its limited purpose,

could not alter the court's judgment and somehow render **Gandy** convicted of § 784.045, even though the court relied on the arresting officer's report as a factual basis for **Gandy**'s plea. So even assuming that the officer's opinion were a part of the factual basis for **Gandy**'s plea, it could not have shed any light on which offense the *Florida court* convicted **Gandy** of.

That principle—that the court, not the arresting officer, adjudicates guilt—applies equally to the case before us. The officer's conclusion that **Gandy** committed bodily-harm battery, and his decision to arrest him on that basis, cannot demonstrate that the *Florida court* convicted **Gandy** of that particular offense. Only the Florida court had the authority to determine the crime of **Gandy**'s conviction. And here, we cannot ascertain the crime for which the Florida court convicted **Gandy**, since the information charged two crimes in the alternative, the factual basis for the plea satisfied the elements of both offenses, and the Florida ***1352** court's judgment reflected only that **Gandy** was convicted of the general crime of battery under § 784.03.

To find otherwise would undermine the role of the Florida courts in adjudicating defendants guilty of Florida crimes. Only the Florida court can determine the offense of conviction. But the panel opinion's reliance, for the purpose of identifying **Gandy**'s crime of conviction, on the arresting officer's legal conclusion that **Gandy** committed the offense of bodily-harm battery steals that role from the Florida court and gives it to the arresting officer. That is not something we should be doing.

We are concerned only with what the Florida court convicted **Gandy** of. And on this record, we are bound to conclude that the Florida court did not "necessarily" convict him of a crime of violence. While it may be tempting to jump to the conclusion that **Gandy** was convicted of bodily-harm battery based on the officer's legal conclusion in his report, we are not authorized to modify a Florida court's judgment of conviction.

III.

For these reasons, I respectfully dissent. In my view, when we apply the modified categorical approach, **Gandy**'s prior conviction for violating Fla. Stat. § 784.03 does not qualify as a crime of violence, so the district court incorrectly sentenced him as a career offender.

All Citations

917 F.3d 1333, 27 Fla. L. Weekly Fed. C 1756

Footnotes

* Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

1 The panel opinion concludes that bodily-harm battery is "necessarily" a crime of violence, though it notes that "under Florida law, bodily harm is broadly defined to encompass any 'slight, trivial, or moderate harm' to a victim." Maj. Op. at 1340. I agree that the injuries described in the two panel-opinion-cited Florida cases interpreting this definition—bruises in one and scratches, swelling, and puncture marks in the other—required the "use ... of physical force" as anticipated by the Supreme Court's interpretation of the elements clause. What is not clear to me after reviewing Florida law is the bottom end of the spectrum of "bodily injury"—that is, what is the most "trivial" or "slight" impact that still counts as "harm" so that it satisfies the definition of "bodily injury"? But because I conclude that we cannot "necessarily" determine that the Florida court convicted **Gandy** of bodily-harm battery, anyway, I do not opine on whether bodily-harm battery is categorically a crime of violence. My dissent therefore assumes without deciding that it is.

2 The panel opinion does not decide whether touch-or-strike battery is itself divisible. Under the methodology of *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 2256-57, 195 L.Ed.2d 604 (2016), however, touch-or-strike battery is not divisible. Touching and striking constitute alternative means—not alternative elements—of the crime. Under *Mathis*, we may ascertain whether striking and touching are alternative elements or alternative means by looking to Florida law identifying the elements of Fla. Stat. § 784.03(1)(a)(1). *See Mathis*, 136 S.Ct. at 2256. In *Khianthalat v. State*, 974 So.2d 359, 361 (Fla. 2008), the Florida Supreme Court set forth the elements of simple battery under § 784.03(a)(1)(a) as "(1) actually and intentionally touching or striking another person; and (2) [doing so] against the will of the other person." Florida's jury instructions for this crime likewise require the jury to determine whether each of these elements has been satisfied. *See* Fla. Jury Instruction 8.3 Battery. Because "touching" and "striking" are listed in the alternative as part of a single element of the crime, they constitute alternative means—not alternative elements—under *Mathis*. *See Mathis*, 136 S.Ct. at 2256-57. As a result, touch-or-strike battery is not divisible.

3 The officer's actual statement was "**Gandy** ... did knowingly and intentionally commit the offense of Battery Causing Bodily Harm, as follows," which preceded a description of the particular facts demonstrating that **Gandy**'s actions, in fact, satisfied the element of that crime.

4 I can appreciate the Eighth Circuit's concern that the "absence of definitive records frustrates the application of the modified categorical approach." *Id.* at 749. But as the Eighth Circuit nonetheless correctly observed, "the Supreme Court has made clear that the vagaries of state court recordkeeping do not justify a different analysis." *Id.* (citing *Johnson*, 559 U.S. at 145, 130 S.Ct. 1265; *Shepard*, 544 U.S. at 22-23, 125 S.Ct. 1254).

5 Montoya's actual quotation, which he offers in response to the character Vizzini's repeated invocation of the word "inconceivable," is "You keep using that word. I do not think it means what you think it means." *Mandy Patinkin: Inigo Montoya*, IMDb.com, https://www.imdb.com/title/tt0093779/characters/nm0001597 (last visited Mar. 5, 2019).

6 Rather, in *Johnson*, the appellant sought to withdraw her guilty plea because she claimed that she did not understand the consequences of the plea agreement and that she was coerced into pleading guilty. *See* 22 So.3d at 843. And in *Toson*, the appellant raised the legal argument that it was fundamental error for him to have been convicted of both dealing in stolen property and grand theft where the conduct involved the stealing of the same property during the same scheme or course of conduct, since Fla. Stat. § 812.025 "expressly prohibits a trial court from adjudicating a defendant guilty of theft and dealing in stolen property in connection with one scheme or course of conduct." 864 So.2d at 555. Finally, in *Hayden*, the appellant asserted that the state trial court erred in sentencing him to a ten-year minimum mandatory term under Fla. Stat. § 775.087(2)(a)(i) because the State's charging document failed to allege that he personally possessed a firearm during the commission of the felony, and Florida courts have held that the State must plead and prove that the defendant had actual physical possession of the firearm during the commission of the felony before the court can impose the § 775.087(2) minimum mandatory sentence. 833 So.2d at 277. In short, none of these appeals in any way challenged the sufficiency of the factual bases supporting the underlying guilty pleas.

7 To be clear, "inconceivable" means exactly what I think it means: "Impossible to comprehend or grasp fully," or, "[s]o unlikely or surprising as to have been thought impossible; unbelievable." *Inconceivable*, The American Heritage Dictionary (5th ed. 2011).

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15035-HH

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

CLIFFORD B. GANDY, JR.,

Defendant - Appellant.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, and ROSENBAUM, Circuit Judges, and CONWAY,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.
ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

* Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

ORD-42

APPENDIX C

828 F.3d 744
United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Cody James HORSE LOOKING, Defendant–Appellant.

No. 15-2739
|
Submitted: February 12, 2016
|
Filed: July 11, 2016

Synopsis

Background: Following denial of his motion to dismiss the indictment, 102 F.Supp.3d 1109, defendant pleaded guilty in the United States District Court for the District of South Dakota, Roberto A. Lange, J., to unlawful possession of a firearm by a person convicted of a misdemeanor crime of domestic violence. Defendant appealed.

[Holding:] The Court of Appeals, Colloton, Circuit Judge, held that defendant's prior conviction for simple assault domestic violence was not necessarily for a misdemeanor crime of domestic violence, and thus, it could not support federal conviction.

Reversed.

West Headnotes (4)

[1] Weapons ⇐ Domestic violence

To determine whether a defendant's conviction qualifies as a misdemeanor crime of domestic violence, as would prohibit defendant from possessing a firearm, the court must apply the "categorical approach," under which the court looks to the statute of conviction to determine whether it necessarily had, as an element, the use

or attempted use of physical force, or the threatened use of a deadly weapon. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9).

3 Cases that cite this headnote

[2] **Weapons** ⇐ Domestic violence

Defendant's prior South Dakota conviction for simple assault domestic violence was not necessarily for a misdemeanor crime of domestic violence, and thus, it could not support federal conviction for unlawful possession of firearm by person convicted of such a crime; indictment charged defendant with violating three subsections of South Dakota assault statute in the alternative, state court did not specify which alternative was basis for conviction, defendant could have been convicted under one subsection, which prohibited attempting by physical menace to put another in fear of imminent bodily harm, without using or attempting to use force, and without threatening use of a deadly weapon, as required to qualify as misdemeanor crime of domestic violence, and neither defendant's plea colloquy, in which he admitted pushing down his wife during argument, nor fact that wife suffered abrasions excluded possibility that he was convicted under this subsection. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9); S.D. Codified Laws §§ 22-18-1, 25-10-34.

5 Cases that cite this headnote

[3] **Weapons** ⇐ Domestic violence

Under the "modified categorical approach" to determine which alternative formed the basis for the defendant's prior conviction under a divisible statute, in order to determine whether the conviction qualified as a misdemeanor crime of domestic violence that would prohibit defendant from possessing a firearm, the court may examine charging documents, plea agreements, plea colloquies, and comparable judicial records to make the determination. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9).

1 Cases that cite this headnote

[4] **Weapons** ⇐ Domestic violence

The sole permissible purpose of the modified categorical approach for determining if defendant's prior conviction was for a misdemeanor crime of domestic violence, as would prohibit defendant from possessing a firearm, is to determine which statutory phrase in a divisible statute was the basis for the conviction. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9).

1 Cases that cite this headnote

*745 Appeal from United States District Court for the District of South Dakota—Pierre

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant was Molly Quinn, AFPD, of Sioux Falls, SD. The following attorney(s) appeared on the appellant brief; Randall B. Turner, AFPD, of Pierre, SD.

*746 Counsel who presented argument on behalf of the appellee was Kevin Koliner, AUSA, of Sioux Falls, SD. The following attorney(s) appeared on the appellee brief; Carrie G. Sanderson, of Pierre, SD.

Before SMITH and COLLOTON, Circuit Judges, and GRITZNER, [1] District Judge.

Opinion

COLLOTON, Circuit Judge.

Cody James Horse Looking was charged in August 2014 with unlawful possession of a firearm by a person "who has been convicted in any court of a misdemeanor crime of domestic violence." *See* 18 U.S.C. § 922(g)(9). Horse Looking moved to dismiss the indictment on the ground that he had not sustained a qualifying prior conviction. The district court denied the motion, and Horse Looking entered a conditional guilty plea, reserving his right to appeal the district court's ruling. We conclude, based on the relevant judicial records under the required analytical approach, that Horse Looking's prior conviction does not meet the definition of a "misdemeanor crime of domestic violence."

Under 18 U.S.C. § 922(g)(9), any person "who has been convicted in any court of a misdemeanor crime of domestic violence" is prohibited from possessing a firearm. A "misdemeanor crime of domestic violence" must have, "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A)(ii). The perpetrator also must have a familial or similar domestic relationship to the victim. *Id.*

In 2010, a grand jury in Hughes County, South Dakota, charged Horse Looking with "Simple Assault Domestic Violence." The South Dakota simple assault statute provides in relevant part:

Any person who:

(1) Attempts to cause bodily injury to another and has the actual ability to cause the injury;

(2) Recklessly causes bodily injury to another;

(3) Negligently causes bodily injury to another with a dangerous weapon;

(4) Attempts by physical menace or credible threat to put another in fear of imminent bodily harm, with or without the actual ability to harm the other person; or

(5) Intentionally causes bodily injury to another which does not result in serious bodily injury;

is guilty of simple assault.

S.D. Codified Laws § 22–18–1. The indictment charged Horse Looking in the alternative with violating subsections (1), (4), and (5). It also alleged that the assault involved a domestic relationship. *See* S.D. Codified Laws § 25–10–34 (requiring the state's attorney to indicate on an indictment whether the charge involves domestic abuse).

[1] To determine whether a conviction qualifies as a misdemeanor crime of domestic violence, we must apply the Supreme Court's "categorical approach." *United States v. Castleman*, —— U.S. ——, 134 S.Ct. 1405, 1413, 188 L.Ed.2d 426 (2014). In that analysis, we look to the statute of conviction to determine whether it "necessarily 'ha[d], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.' " *Id.* (alteration in original) (quoting 18 U.S.C. § 921(a)(33)(A)); *see* ***747** *Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

[2] **[3]** **[4]** The South Dakota assault statute effectively lists at least five separate crimes with different elements. It is, in the parlance of the field, a "divisible statute." *Descamps v. United States*, —— U.S. ——, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013). In that situation, we are directed to apply the "modified categorical approach" to determine which alternative formed the basis for the defendant's conviction. *Id.* at 2285. We may examine charging documents, plea agreements, plea colloquies, and comparable judicial records to make the determination. *Id.*; *Shepard*, 544 U.S. at 26, 125 S.Ct. 1254. The "sole permissible purpose of the modified categorical approach is 'to determine which statutory phrase was the basis for *the conviction*.' " *United States v. Martinez*, 756 F.3d 1092, 1097 (8th Cir. 2014) (quoting *Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)).

The parties agree that subsections (1) and (5) of the South Dakota statute qualify as misdemeanor crimes of domestic violence. Subsection (5) requires proof that the defendant intentionally caused bodily injury; subsection (1) requires an attempt to do so. Because "intentional causation of bodily injury necessarily involves the use of physical force," *Castleman*, 134 S.Ct. at 1414, these two offenses have, as an element, the use or attempted use of physical force.

The parties also agree, however, that subsection (4) does not qualify as a predicate offense. This alternative forbids an attempt "by physical menace or credible threat to put another in fear of imminent bodily harm." An offender might use physical force when attempting by "physical menace" to put another in fear of harm. But he also could violate subsection (4) without using or attempting to use force, and without threatening the use of a deadly weapon, as required by the definition of "misdemeanor crime of domestic violence." Pumping a fist in an angry manner could be sufficient. *Cf. United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999) (holding that a statute forbidding "[a]ny act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive" did not have, as an element, the use or attempted use of force); *United States v. Larson*, 13 Fed.Appx. 439, 439–40 (8th Cir. 2001) (per curiam). Thus, if Horse Looking was convicted under § 22–18–1(4), his federal conviction cannot stand.

We look to judicial records of the state court proceeding in an effort to determine which subsection was the basis for Horse Looking's conviction. *See Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). In *Castleman*, that inquiry was "straightforward": the state-court indictment specified which of several alternative offenses formed the basis for the defendant's conviction. 134 S.Ct. at 1414. Not so here. The indictment charged Horse Looking with violating subsections (1), (4), and (5) of the South Dakota statute in the alternative. The order suspending imposition of sentence and a later order revoking suspended imposition of sentence do not help either. Both say that Horse Looking pleaded guilty "to the charge of Simple Assault Domestic Violence (SDCL 22–18–1)," without specifying under which subsection he was convicted.

The government relies on the guilty plea colloquy to urge that Horse Looking was convicted under subsection (5). At the plea hearing, the court summarized the charges against Horse Looking by stating that "you attempted to cause—you threatened to cause, or you intentionally caused bodily injury to [your wife]." This summary covers ***748** all three subsections: (1) ("attempted to cause ... bodily injury"), (4) ("threatened to cause ... bodily injury"), and (5) ("intentionally caused bodily injury"). When asked what happened, Horse Looking said that he and his wife "got into an argument and she became physical and she cut me and I pushed her." R. Doc. 33-2, at 5. The court then asked "did you threaten some sort

of—to her, was there some injury to her?" Horse Looking answered that he "pushed her," and "she fell down." The court inquired whether that caused "some cuts or bruises," and Horse Looking said he was not aware of any, but his attorney volunteered that the victim "testified that she had some abrasions on her ankle or knee." *Id.* at 6. Based on these facts, the state court found a factual basis for the plea and entered an order suspending imposition of sentence.

The plea colloquy establishes that Horse Looking *could have been* convicted under subsection (5). His attorney admitted that the victim testified to suffering bodily injury in the form of abrasions. Horse Looking's admission that he pushed the victim down supported an inference that he acted intentionally and thus satisfied the general intent element of the offense. *Cf. State v. Boe*, 847 N.W.2d 315, 323 (S.D. 2014) (explaining that aggravated assault is a general intent crime).

But the colloquy does not exclude the possibility that Horse Looking was convicted under subsection (4)—*i.e.*, attempting by physical menace to put another in fear of imminent bodily harm. Horse Looking's push of his wife is sufficient to establish a "physical menace." Physical menace requires "some physical act," *People ex rel. R.L.G.*, 707 N.W.2d 258, 261 (S.D. 2005) (per curiam), and it can include the use of physical force. *People ex rel. A.D.R.*, 499 N.W.2d 906, 911 (S.D. 1993) (applying S.D. Codified Laws § 22–18–1.1(5)). The attempt element requires a general intent to try to put the victim in fear by physical menace. *State v. Schmiedt*, 525 N.W.2d 253, 256 (S.D. 1994) (per curiam). Horse Looking's act of pushing down his wife in the course of an argument also supported a reasonable inference that he intended to put her in fear.

Unlike the situation in *United States v. Fischer*, 641 F.3d 1006 (8th Cir. 2011), we cannot say that convictions under the two alternatives are mutually exclusive. In *Fischer*, the defendant was convicted under a divisible Nebraska assault statute that forbade both (1) intentionally causing bodily injury and (2) threatening another in a menacing manner. *Id.* at 1008. Where the factual basis established that the defendant struck the victim's face and bit her nose, we concluded that "the biting of a victim's nose is an intentional act causing bodily harm and *not merely a threatening act*." *Id.* at 1009 (emphasis added). On that basis, the court ruled that the defendant necessarily was convicted of intentionally causing bodily injury. Under the South Dakota statute, however, the physical menace offense in subsection (4) requires a physical act by the defendant, not merely a threat, so Horse Looking's intentional push does not preclude a conviction under subsection (4). That the victim suffered abrasions on her knee or ankle does not foreclose a conviction for attempting by physical menace to put her in fear of greater bodily harm.

We have been instructed time and again that the categorical approach introduced by *Taylor* created a "demand for certainty" when determining whether a defendant was convicted of a qualifying offense. *Mathis v. United States*, No. 15–6092, — U.S. ——, 136 S.Ct. 2243, 2256–57, 195 L.Ed.2d 604, 2016 WL 3434400, at *11 (U.S. June 23, 2016); *see Descamps*, 133 S.Ct. at 2290 (asking whether the defendant ***749** "necessarily" committed the qualifying crime); *Shepard*, 544 U.S. at 21, 125 S.Ct. 1254 (referring to "*Taylor*'s demand for certainty"); *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143. It is clear that Horse Looking admitted using physical force against his wife, and that he *could have been* found guilty of a crime that has, as an element, the use of force against his wife. But the judicial record does not establish that Horse Looking necessarily *was convicted* of an assault that has the required element. He was charged in the alternative with a non-qualifying assault, and the state court did not specify which alternative was the basis for conviction. The absence of definitive records frustrates the application of the modified categorical approach, but the Supreme Court has made clear that the vagaries of state court recordkeeping do not justify a different analysis. *Johnson*, 559 U.S. at 145, 130 S.Ct. 1265; *Shepard*, 544 U.S. at 22-23, 125 S.Ct. 1254. We are thus constrained to hold that the district court should have dismissed the indictment.

* * *

The judgment of the district court is reversed.

All Citations

828 F.3d 744

Footnotes

1 The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa, sitting by designation.

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APPENDIX D

SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -

JAMAR ALONZO QUARLES,)

Petitioner,)

v.) No. 17-778

UNITED STATES,)

Respondent.)

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Pages: 1 through 66

Place: Washington, D.C.

Date: April 24, 2019

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMAR ALONZO QUARLES,)

Petitioner,)

v.) No. 17-778

UNITED STATES,)

Respondent.)

- - - - - - - - - - - - - - - - - - - -

Washington, D.C.

Wednesday, April 24, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

JEREMY C. MARWELL, Washington, D.C.;
on behalf of the Petitioner.

ZACHARY D. TRIPP, Assistant to the Solicitor General, Department of Justice, Washington, D.C.;
on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-778, Quarles versus United States.

Mr. Marwell.

ORAL ARGUMENT OF JEREMY C. MARWELL

ON BEHALF OF THE PETITIONER

MR. MARWELL: Mr. Chief Justice, and may it please the Court:

For centuries, the essence of burglary has been punishing those who trespass for the purpose of committing a crime. That was the rule at common law. It remained the majority view at the time of ACCA and Taylor. For two main reasons, the Court should confirm that generic burglary retains that traditional requirement of contemporaneous intent, intent at the time of the initial trespass.

First, the sources that matter under Taylor show that "remaining in" was understood as a modest expansion of the traditional offense to cover those who entered lawfully, but then overstay their welcome to commit a crime.

But the government reads Taylor's use of that one word, "remaining in", as a sharp break from that tradition. Under that view, "remaining" would cover anyone who enters unlawfully, regardless of whether they had that burglarious intent at the time of entry as long as the intent was formed later. And nothing in Taylor or the sources that existed at the time of ACCA suggest an intention or acknowledgment of making such a dramatic change.

JUSTICE GINSBURG: Well, something -- something in Taylor tugs the other way; that is, Taylor said that there would be few statutes that were broader than the generic, and even in, what, 1986, there were more than a few statutes that are like the statute before us.

MR. MARWELL: Yes, Justice Ginsburg. The government claims there were six statutes as of -- or six states as of 1986 that had defined remaining-in burglary more broadly than -- than our definition. I think that's well below the threshold. And, in fact, Taylor contemplated that there would be a few. It gave the example of California, in which

shoplifting qualified as burglary.

JUSTICE GINSBURG: I thought --

MR. MARWELL: So --

JUSTICE GINSBURG: -- it was higher? I thought it was somewhere between nine and 14?

MR. MARWELL: Well, the -- the government claims six statutes. There were 29 statutes as of -- 29 jurisdictions as of 1986 that had remaining-in variants, but I think when you -- when you look at how the states had interpreted those and -- and in some cases, at the plain language of the statutes, I think the best reading of where those states were -- it shows that a majority, even of the remaining-in stat -- states, retained the traditional requirement of contemporaneous --

JUSTICE ALITO: Well --

MR. MARWELL: -- intent.

JUSTICE ALITO: -- if we look at the statutes in existence in 1986, and we count only those in which there is a judicial opinion interpreting the statute on the remaining-in question, and not those which contain dicta in cases involving -- where the -- where there was an intent at the time of entry, what is the

breakdown?

MR. MARWELL: Well, as you know, we -- we think you should not only look --

JUSTICE ALITO: I know.

MR. MARWELL: -- at the remaining --

JUSTICE ALITO: You think we should look more broadly. You want us to count all the statutes in which there is no remaining-in burglary to start out with.

MR. MARWELL: Correct --

JUSTICE ALITO: Okay.

MR. MARWELL: -- be -- because Taylor refers -- Taylor instructs to look at how a majority of states define burglary, and --

JUSTICE ALITO: Well, we know that Taylor -- that Taylor's definition of burglary includes "remaining in," does it not?

MR. MARWELL: Correct. And --

JUSTICE ALITO: All right. So then why would we look at the -- the statutes that don't have any remaining-in element at all?

MR. MARWELL: Because the 22 jurisdictions that had just entry burglary show a widespread adherence to that traditional rule, that you needed intent at the time of

entry. And the government's rule, the government's interpretation of the Taylor test takes that away because they say, if you enter unlawfully without any intent at the time and you form intent later, that's burglary. And that's not consistent. That's much broader than the 22 entry states.

But I think -- if -- if I can respond to the question about just looking at the 29.

JUSTICE ALITO: Right.

MR. MARWELL: There are states like Alaska, which has the Arabie decision from 1985; New York, which has the Licata decision from 1971; Connecticut, which has the Belton decision from 1983, where the court said that "remaining in" applies to a lawful entry followed by a subsequent formation of intent.

And I take the point that may not be 100 percent on point with the question, but we think it forecloses the government's reading, again, because they -- that preserves the requirement of intent at initial unlawful entry.

There are also some statutes, Justice Alito, where the plain language of the statute,

we think, supports our view. Maine had a statutory sentencing provision that said you can be punished not only for burglary but also for the offense that you commit after entering or remaining. Maine had that entry or remaining statute.

JUSTICE KAGAN: And I guess what strikes me, Mr. Marwell, is that the distinction just wasn't -- you know, it wasn't really present at that time, that -- that -- that now we can look and see how there really is a split on this question, but in 1986, there were so few cases or -- or statutes that clearly made the distinction and put a state on one side or the other of it.

And if that's the case, if the distinction wasn't salient, why would we assume that Congress meant to incorporate it into the burglary element?

MR. MARWELL: Well, I -- I think the Court typically interprets statutes to assume some degree of continuity with what had come before, and here Taylor acknowledged the common law rule. And we have a number of authorities that suggest that this contemporaneous intent

requirement was -- was the essential thing that differentiated burglary from trespass.

JUSTICE SOTOMAYOR: What do you do with the "surreptitiously" definition that was in existence before 1986? How does that inform our analysis?

MR. MARWELL: So the Court said in Taylor that it -- it was adopting a definition that was very close to the 1984 statute, which had the surreptitious. I think surreptitious helps us. It certainly indicates that remaining was not a continuous state in the sense that the government says it was.

And I think "surreptitiously," as our amicus explains, has a connotation of doing something for a -- for -- for a fraudulent reason or staying -- staying past your welcome for the purpose of committing a crime.

JUSTICE SOTOMAYOR: Justice Alito asked you what the lineup was of states that read it your way and the states that read it the government's way. You mentioned at least three or four that predated 1986 that read it your way.

At 1986, how many states had opined in

the government -- in the government's way?

MR. MARWELL: The government has five where there were judicial decisions in Texas, which adopted a slightly different statutory language that made clear that it was covering anyone who was present in and then committed.

I think -- in our blue brief we -- we cited 15 jurisdictions, 15 of the 29, but I think, again, if -- if we look at the entry states, that gets us 22 as of 1986. And then we get over the -- the hurdle of Taylor --

JUSTICE SOTOMAYOR: Well that's --

MR. MARWELL: -- which is --

JUSTICE SOTOMAYOR: -- 15 is a -- is a third of -- not quite a third, a little less than a third, of the states. Isn't that enough to say that that's what Congress had in mind? If Taylor says only a few would be excluded by its definition, that's a lot more than a few.

MR. MARWELL: Well, we -- Taylor says you're trying to craft a generic burglary definition that aligns with how most states viewed it, viewed burglary, at the time. And we think most states viewed burglary in -- in our way.

And so the government has a different reading. If you adopt our rule, that it -- it will exclude six jurisdictions as of 1986. And I think that's below the threshold that the Court has -- has declined to read a statute in a way that might exclude ten jurisdictions.

JUSTICE SOTOMAYOR: So I'm sorry, what was the 15 you were talking about?

MR. MARWELL: Fifteen are jurisdictions that read "remaining" in our way.

JUSTICE SOTOMAYOR: Oh, I'm sorry, I -- that's not the question I asked.

MR. MARWELL: Oh, I'm sorry.

JUSTICE SOTOMAYOR: As of 1986, how many jurisdictions read it the government's way?

MR. MARWELL: Six.

JUSTICE SOTOMAYOR: Six.

MR. MARWELL: Five -- five using intermediate, mostly intermediate state court decisions, and one was Texas.

JUSTICE SOTOMAYOR: What has -- how -- how large has that number grown since 1986?

MR. MARWELL: So the government cites 18 jurisdictions today. But we think this

Court's decision in Castleman and Stokeling looks -- when it asks the question of how many jurisdictions would be excluded, is looking to the time that Congress adopted the statute.

And I think that makes sense. Otherwise you are interpreting the word "burglary" in ACCA in 1986 to expand potentially in the future without any further congressional action.

And that's why I think in Stokeling and Castleman the Court said we're looking to how many jurisdictions would be excluded as of 1986.

JUSTICE KAVANAUGH: The -- the LaFave treatise at -- at the time said, "far more common today is the burglary statute which covers one who either enters or remains in the premises. This means, of course, that the requisite intent to commit a crime within need only exist at the time the defendant unlawfully remained within."

So how do you respond to that --

MR. MARWELL: So the --

JUSTICE KAVANAUGH: -- contemporaneous evaluation of the law?

MR. MARWELL: So I think that language could -- could support our rule or the government's rule, potentially, but if you look at the rest of what LaFave said, LaFave --

JUSTICE KAVANAUGH: Well, let's just stick with that --

MR. MARWELL: Okay.

JUSTICE KAVANAUGH: -- sentence. How could it -- it said the intent "need only exist at the time the defendant unlawfully remained within."

MR. MARWELL: And -- and we think that "remaining within" refers to that point where somebody overstays their welcome. And I think you can see that by how LaFave discussed the other remaining-in statutes.

They said -- the LaFave treatise said, for instance, it gave one example of what the remaining statutes were intended to do and it's the classic bank customer who comes into the bank while the bank is open and then stays on to steal the bank's money.

That, I think, is the -- is the classic example of what states were trying to get at when they added the words "remaining."

But LaFave then talked about the Texas statute and said Texas has a different -- different words in its statute and it says, if you are present in and you commit a crime, then that's -- that -- that counts as burglary in Texas.

And LaFave said that's -- that was intended to fix potential concerns about proof that would exist in the remaining jurisdictions.

JUSTICE BREYER: Is there any reason to think that the person who stays in the bank, and then, ah, what a nice idea, I'll help myself to some money, is any the less violent or at risk of violence or risk of -- is there any less risk there than when he gets the idea of going into the bank two weeks earlier?

MR. MARWELL: Yes. I think the -- the -- the existence of pre-formed intent, so somebody who comes to the bank with the advance plan to commit another crime shows that they will be more resolute in their desire to accomplish that crime.

It may result in them bringing a weapon because they know they're going to do

that. And I think it aligns with this -- with the fact that ACCA is governing career criminals, trying to select people who have that profit motive to do multiple crimes.

And you look at the fact patterns of the cases that are really the point of disagreement between us and the government, you know, Gaines from the New York Court of Appeals, a homeless person who breaks into a warehouse to get out of the cold, while he's in there decides to grab a jacket and is caught coming out, or the case of young people who break into a house not -- not intending to steal something -- this is the JNS case from Oregon -- take something while they're in there and caught on the way out.

JUSTICE BREYER: There are --

JUSTICE KAGAN: Part of --

JUSTICE BREYER: -- no -- no people who think, well, I want to rob this bank, I'm a little worried about the noise if I break in, or I guess, I want to rob this bank, he thinks it when he's inside.

A night watchman, a teller who forgot to go out -- I don't know if that exists, but I

can't quite figure out -- I'm sure there is some cases both ways, I would think.

MR. MARWELL: So --

JUSTICE BREYER: Anybody ever look at that and --

MR. MARWELL: Well, so Taylor, just -- just to -- Taylor referred to the risk of violence when somebody does an intrusion to commit a crime. And I think that's -- that captures this idea of --

JUSTICE BREYER: Right.

MR. MARWELL: -- of why we care about pre-formed intent.

JUSTICE KAGAN: But -- but part of our understanding of why burglary is a -- is a risky crime is when the burglar meets somebody else, the victim, the police officer, whoever.

And that person is not going to know when the criminal formed his intent.

MR. MARWELL: That -- that's correct. But two -- two points, Justice Kagan: One, it's -- the government's position comes very close to saying that any time you are present somewhere where you're not supposed to be, there's that risk of a violent confrontation.

And Congress did not use the word "trespass" in ACCA. It could have enumerated trespass. I think the government's position comes close to that.

And then, second, I -- I do think there is, you know, a distinction from the -- from the victim or the property owner's perspective of somebody who comes having pre-formed the intent to do something else as opposed to the innocent rationales of somebody who's trespassing for -- by assumption for -- for doing something other than committing a crime.

JUSTICE ALITO: Is the offense we're concerned with here, his third degree home invasion conviction in Michigan, anything like these cases that you've just described?

In that case, as I understand it, he assaulted his girlfriend and then -- and this is what the judge said as the factual basis for his no contest plea -- "The victim reported that Mr. Quarles broke in through a screen window and assaulted her while in the house."

And the judge said, "We certainly can infer that he had an intent to commit an

assault while he was entering." And this establishes that he did commit an assault while he was in the house.

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 ones where the defendant confirmed the accuracy.

But I think under, under the Court's categorical approach, what matters is the text of the Michigan statute, which is very broad. It's as broad as that Texas statute because it says any time you're present in and you -- and you commit.

And if there's a concern about whether the question presented is presented, the government didn't raise that in its brief in opposition. And the Sixth Circuit very clearly engaged with the question of what "remaining in" means.

JUSTICE KAVANAUGH: Taylor didn't say that the statute had to exactly correspond to generic burglary. It said "substantially corresponds"?

MR. MARWELL: That -- that's right. But we think that the -- the -- the -- the element here of contemporaneous intent is

what's been called the most fundamental essence of burglary.

So I think substantial -- it's hard to say that it substantially corresponds if it's missing, you know, the core element.

JUSTICE GINSBURG: When you gave the number six, did that exclude all the states with remaining-in statutes that had not interpreted those statutes?

MR. MARWELL: That's correct. Well, the -- the number six, I think, was how many states at the time of ACCA had -- had clearly adopted the government's reading. And the government says -- identifies only six.

We think the other jurisdictions are most fairly read to have adopted our rule, especially when viewed in light of the background interpretive principles, that you're going to assume a degree of continuity and you're going to not assume that the states had completely reconfigured the offense of burglary just by adding a word "remaining."

JUSTICE GINSBURG: Did that turn out to be the case, states that had remaining-in statutes in 1986 and then interpreted them

later?

MR. MARWELL: Well, some jurisdictions have gone towards the government's view. The government identifies 18 as of today. There are some jurisdictions that have adopted our view, and 19 jurisdictions that have not adopted any remaining-in variant and have stayed only defining burglary as intent at entry. So --

JUSTICE SOTOMAYOR: Give me the count again?

MR. MARWELL: So if the question is what's the headcount today?

JUSTICE SOTOMAYOR: Yes.

MR. MARWELL: Nineteen states retain the intent at entry, so entry only. Three states have remaining statutes and they have adopted our rule. Eighteen states, the government has identified today as adopting their rule.

And I think that leaves 11, that gets us to 51 jurisdictions, where the government implicitly says they haven't resolved the question.

JUSTICE KAGAN: The -- the 18 states