APPENDIX

APPENDIX

A-1

798 Fed.Appx. 443
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Denard STOKELING, Defendant-Appellant.

No. 19-11003
|
Non-Argument Calendar
|
(January 6, 2020)

Synopsis

Background: Defendant, who had three prior felony convictions, including a Florida conviction for robbery, entered a guilty plea in the United States District Court for the Southern District of Florida, No. 1:15-cr-20815-JLK-1, James Lawrence King, Senior District Judge, to possessing a firearm and ammunition after having been convicted of a felony and was sentenced to 73 months' imprisonment. Government appealed. The United States Court of Appeals for the Eleventh Circuit, 684 Fed.Appx. 870, vacated the sentence and remanded for resentencing. Certiorari was granted. The Supreme Court, 139 S.Ct. 544, affirmed. On remand for resentencing, the District Court sentenced defendant to 180 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals held that:

defendant was not prejudiced by district court's failure to advise him that government had to prove defendant knew he was a felon when he possessed the firearm and ammunition, and

defendant's challenge of his sentence on ground that his Florida conviction did not involve violent force was barred by law of the case doctrine.

Affirmed.

Procedural Posture(s): Appellate Review.

Attorneys and Law Firms

***444** Nicole D. Mariani, Lisa Tobin Rubio, Emily M. Smachetti, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, for Plaintiff - Appellee

Brenda Greenberg Bryn, Federal Public Defender's Office, Fort Lauderdale, FL, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Defendant - Appellant

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:15-cr-20815-JLK-1

Before WILLIAM PRYOR, GRANT and TJOFLAT, Circuit Judges.

Opinion

PER CURIAM:

Denard Stokeling challenges his conviction, following his plea of guilty, and his sentence of 180 months of imprisonment for being a felon in possession of a firearm and ammunition. 18 U.S.C. §§ 922(g)(1), 924(e)(1). In an earlier appeal by the government, we vacated Stokeling's sentence of 73 months of imprisonment because the district court erred by failing to count his prior conviction in Florida for robbery, Fla. Stat. § 812.13, as a violent felony and to sentence him as an armed career criminal. *United States v. Stokeling*, 684 F. App'x 870 (11th Cir. 2017). The Supreme Court affirmed and remanded for resentencing. *Stokeling v. United States*, —— U.S. ——, 139 S. Ct. 544, 202 L.Ed.2d 512 (2019). Stokeling then filed this appeal. But before Stokeling filed his initial brief, the Supreme Court decided *Rehaif v. United States*, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019), which abrogated our precedent holding that the government did not have to prove a defendant's knowledge of his status as a felon, *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019). Stokeling now argues that we should vacate ***445** his conviction because his indictment failed to allege and because he was not advised during his change of plea hearing that he had to know he was a felon barred from possessing firearms and ammunition. Stokeling also argues that his prior conviction for robbery is not a violent felony under the Armed Career Criminal Act. We affirm.

I. BACKGROUND

Stokeling pleaded guilty to "knowingly possess[ing] a firearm and ammunition in and affecting interstate and foreign commerce ... [after] having been previously convicted of a crime punishable by imprisonment for a term exceeding one year...." 18 U.S.C. §§ 922(g)(1), 924(e)(1). In his factual proffer, Stokeling admitted "he had been previously convicted of home invasion, kidnapping, and robbery and ... sentenced to twelve years in prison" for those "felony offense[s]" before possessing the firearm and ammunition. During his change of plea hearing, Stokeling acknowledged that he had not been induced or coerced to plead guilty; that he understood the charges against him; and that the factual proffer described his offense accurately. Stokeling also acknowledged he was "voluntarily entering [his] plea with knowledge of the potential penalty" under the Armed Career Criminal Act and "underst[ood] that should the Court find that he is subject to the enhancement, that he would then be subject to the 15-year mandatory minimum with the possible maximum sentence of life."

The district court rejected the recommendations in Stokeling's presentence investigation report to classify him as an armed career criminal and to impose a sentence between 180 and 188 months of imprisonment. *Id.* § 924(e). The district court examined the facts underlying Stokeling's conviction in 1997 for robbery with a deadly weapon, Fla. Stat. § 812.13, and decided it did "not qualify under the existing law" as a violent felony under the Act. The district court recalculated Stokeling's advisory sentencing range without the statutory enhancement and sentenced him to 73 months of imprisonment. The government appealed.

We vacated Stokeling's sentence and remanded for the district court to resentence him as an armed career criminal. *Stokeling*, 684 F. App'x at 872. We stated that a long line of our precedents held that a conviction in Florida for robbery categorically qualified as a violent felony under the elements clause of the Act, even if based on "the least culpable of the[ ] acts criminalized by Florida Statutes § 812.13(1)." *Id.* at 871 (citations and internal quotation marks omitted). And we stated that those precedents foreclosed Stokeling's argument that, before 1999, a robbery could have been committed without violent force by a sudden snatching, *see* Fla. Stat. § 812.131, because the robbery statute never included theft by mere snatching and always required the use or threatened use of physical force to overcome resistance by the victim. *Stokeling*, 684 F. App'x at 871 (discussing *United States v. Fritts*, 841 F.3d 937, 942–44 & n.7 (11th Cir. 2016)).

The Supreme Court affirmed our judgment. *Stokeling*, 139 S. Ct. 544. The Supreme Court highlighted that the term "physical force" in the elements clause of the Act means "force capable of causing physical pain or injury to another person." *Id.* at 553–54 (discussing *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)). The Court next explained that the force used need only be "sufficient to overcome a victim's resistance" and create the potential for, but not necessarily cause, pain or injury. *Id.* at 554. And it concluded that "[r]obbery under Florida law ... qualifie[d] as a 'violent ***446** felony' " because the defendant had to use or threaten to use physical force to overpower his victim, which "correspond[ed] to that level of force" required in the elements clause of the Act. *Id.* at 554–55.

On remand to the district court, Stokeling filed supplemental objections to his presentence report. He argued that a conviction under the Florida robbery statute did not qualify as a violent felony because it punished only "putting [a victim] in fear," Fla. Stat. § 812.13(1). The government responded that Stokeling's argument was barred by the law of the case.

The district court overruled Stokeling's objections and sentenced him to 180 months of imprisonment. The district court asked Stokeling for "any other objection," and he responded, "There is currently a case before the Supreme Court called Rehaif versus United States ... out of the Eleventh Circuit" and its "precedent is to the contrary."

II. STANDARDS OF REVIEW

We review for plain error Stokeling's new arguments concerning the sufficiency of his indictment, *see Reed*, 941 F.3d at 1020, and the voluntariness of his guilty plea, *see United States v. Moriarty*, 429 F.3d 1012, 1018–19 (11th Cir. 2005). To prevail under plain error review, Stokeling must prove an error occurred that was plain and that affected his substantial rights. *See Reed*, 941 F.3d at 1021. We review *de novo* whether the law of the case doctrine barred Stokeling from relitigating the classification of his prior conviction as a violent felony. *See United States v. Green*, 764 F.3d 1352, 1355 (11th Cir. 2014).

III. DISCUSSION

Stokeling makes two arguments. First, he argues that we must vacate his conviction because his indictment failed to allege that he knew he was a felon, as required by *Rehaif*, and because he entered his plea without being apprised of all the elements of his crime. Second, he argues that he was erroneously resentenced as an armed career criminal because a robbery by "putting in fear," Fla. Stat. § 812.13(1), cannot qualify as a violent felony.

Stokeling waived the defect in his indictment. Stokeling's plea of guilty waived all nonjurisdictional defects in his proceeding. *See United States v. Brown*, 752 F.3d 1344, 1347 (11th Cir. 2014). He may obtain relief from his guilty plea only if he identifies a defect that affected the power of the district court to enter its judgment. *See id.* at 1350–51 (discussing *United States v. Cotton*, 535 U.S. 625, 630–31, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)). *Rehaif* clarified that a defendant's knowledge of his status as a felon is an element of the offense of being a felon in possession of a firearm, 139 S. Ct. at 2200, but the omission of a mens rea element from an indictment does not divest the district court of subject matter jurisdiction to adjudicate a criminal case. *See Brown*, 752 F.3d at 1350–51, 1353–54. Stokeling's indictment was defective because it failed to allege that he knew he was a felon, but Stokeling waived that nonjurisdictional defect by pleading guilty.

The government concedes that, because a defendant's knowledge of his status as a felon is an element of the crime of being a felon in possession, *Rehaif*, 139 S. Ct. at 2200, the district court erred under *Rehaif* when it failed to advise Stokeling during his plea colloquy that the government had to prove that he knew he was a felon when he possessed the firearm and ammunition. Federal Rule of Criminal Procedure 11 requires the district court to "inform the defendant of ... and determine that [he] understands ... the nature ***447** of each charge to which [he] is pleading" during the change of plea hearing. Fed. R. Crim. P. 11(b)(1)(G). Nevertheless, we agree with the government that Stokeling cannot obtain a vacatur of his conviction because he "show[s] [no] reasonable probability that, but for the error, he would not have entered [his] plea." *Moriarty*, 429 F.3d at 1020 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004)).

Stokeling does not argue that he would not have pleaded guilty had he been told he had to know he was a felon barred from possessing firearms and ammunition. His silence is unsurprising because he admitted in his factual proffer and affirmed during his plea colloquy that he had three prior convictions for serious felonies, he had served 12 years in prison, and he was subject to a sentence enhancement for being an armed career criminal. *See United States v. Gonzalez–Mercado*, 808 F.2d 796, 800 n.8 (11th Cir. 1987) ("there is a strong presumption that the statements made during the colloquy are true"). Because the record establishes that Stokeling knew of his status as a felon, he cannot prove that he was prejudiced by the error during his plea colloquy.

Stokeling's remaining challenge to his sentence is barred by the law of the case. Under that doctrine, a party is barred from relitigating an issue that a court necessarily or by implication decided against him in an earlier appeal. *United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005). Our earlier decision, which the Supreme Court affirmed, *Stokeling*, 139 S. Ct. 544, that Stokeling's prior conviction for robbery constitutes a predicate offense under the Armed Career Criminal Act is the law of the case. And that determination bars Stokeling's argument that robbery by putting in fear does not involve violent force.

None of the exceptions to the law of the case doctrine apply. Stokeling identifies no new evidence or an intervening change in the law. *See Stoufflet v. United States*, 757 F.3d 1236, 1240 (11th Cir. 2014). Nor does a manifest injustice result from applying the law of the case doctrine to Stokeling. *See id.*

IV. CONCLUSION

We **AFFIRM** Stokeling's conviction and sentence.

All Citations

798 Fed.Appx. 443

A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11003-GG

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DENARD STOKELING,

Defendant - Appellant.

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

BEFORE: WILLIAM PRYOR, GRANT and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

ORD-41

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

15-20815-CR-KING/TORRES

CASE NO._____

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(e)(1)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

DENARD STOKELING,

Defendant.
_____/

INDICTMENT

The Grand Jury charges that:

On or about August 27, 2015, in Miami-Dade County, in the Southern District of Florida, the defendant,

DENARD STOKELING,

having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).

FORFEITURE ALLEGATIONS

1. The allegations of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **DENARD STOKELING**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 922(g)(1), as alleged in this Indictment, the defendant, **DENARD STOKELING**, shall forfeit to the United States of America any firearm or ammunition involved in or used in the commission of such violation.

All pursuant to Title 18, United States Code, Section 924(d)(1), and the procedures set forth in Title 21, United States Code, Section 853, as made applicable by Title 28, United States Code, Section 2461(c).

A TRUE BILL

FOREPERSON

/s/ Semmit Ndo

WIFREDO A. FERRER
UNITED STATES ATTORNEY

/s/ Daya Nathan

DAYA NATHAN
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA **CASE NO.** _____

v.

DENARD STOKELING,

Defendant.
_____ /

Superseding Case Information:

Court Division: (Select One)

X	Miami	___	Key West		
___	FTL	___	WPB	___	FTP

New Defendant(s) Yes _____ No ___
Number of New Defendants _____
Total number of counts _____

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
List language and/or dialect _____

4. This case will take 2-3 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	x	Petty	
II	6 to 10 days		Minor	
III	11 to 20 days		Misdem.	
IV	21 to 60 days		Felony	x
V	61 days and over			

6. Has this case been previously filed in this District Court? (Yes or No) No
If yes:
Judge: Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) No
If yes:
Magistrate Case No. _____
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of August 27, 2015 (released on bond October 5, 2015)
Rule 20 from the District of
Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? Yes _____ No x

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? Yes _____ No x

DAYA NATHAN
ASSISTANT UNITED STATES ATTORNEY
FLORIDA BAR NO. 74392

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: DENARD STOKELING

Case No: _____

Count #: 1

Possession of a Firearm and Ammunition by a Convicted Felon

Title 18, United States Code, Sections 922(g)(1) and 924(e)(1)

***Max. Penalty:** Life Imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 1:15-CR-20815-CR-JLK-1

UNITED STATES OF AMERICA

vs

DENARD STOKELING

Miami, Florida
March 2, 2016
Wednesday

Scheduled 2:00 p.m.
2:03 p.m. to 2:16 p.m.

(Pages 1 - 15)

CHANGE OF PLEA HEARING

BEFORE THE HONORABLE BARRY L. GARBER
UNITED STATES MAGISTRATE JUDGE
JAMES LAWRENCE KING FEDERAL BUILDING

APPEARANCES:

FOR THE GOVERNMENT:
DANIEL CERVANTES, ESQ.
United States Attorney's Office
99 N.E. 4th Street
Miami, Florida 33132

FOR THE DEFENDANT:
STEWART GLENN ABRAMS, ESQ.
Federal Public Defender's Office
150 West Flagler Street
Suite 1700
Miami, Florida 33130-1556

STENOGRAPHICALLY
REPORTED BY:
GLENDA M. POWERS, RPR, CRR, FPR
Official Court Reporter
United States District Court
400 North Miami Avenue, Room 08S33
Miami, Florida 33128

(Call to the order of the Court:)

THE COURT: Good afternoon. Be seated.

COURTROOM DEPUTY: Calling Case Number 15-20815, Criminal, King, United States of America versus Denard Stokeling.

Counselors, please state your appearances for the record.

MR. CERVANTES: Good afternoon, Your Honor. Daniel Cervantes on behalf of the United States standing in for AUSA Daya Nathan.

THE COURT: All right.

MR. ABRAMS: Good afternoon, Judge. Stewart Abrams, Assistant Federal Defender on behalf of Denard Stokeling, who is present.

THE COURT: All right. Would you approach the podium with your client?

MR. ABRAMS: Yes, sir.

THE COURT: Would you state the purpose of your appearance today, Mr. Abrams.

MR. ABRAMS: Yes, Your Honor. It is Mr. Stokeling's intention this afternoon to enter a guilty plea to the one-count indictment.

THE COURT: All right. Will you swear the defendant, please.

COURTROOM DEPUTY: Please raise your right hand.

Do you solemnly swear or affirm that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

THE DEFENDANT: Yes.

THE COURT: Mr. Stokeling, I want you to understand that you have a right to have these procedures before a United States District Judge.

I'm a United States Magistrate Judge, but I understand that you, your attorney, and the Government have agreed to proceed before me; is that correct?

THE DEFENDANT: Yes.

THE COURT: Government?

MR. CERVANTES: Yes, Your Honor.

THE COURT: You've been placed under oath. That oath requires you to answer all questions truthfully. Should you not do so, I want you to understand that you could be charged with perjury or making a false statement, either of which are very serious offenses. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: I'm going to be asking a number of questions of you. If you don't understand them, I want you to feel free to ask Mr. Abrams or me to explain them to you.

All right?

THE DEFENDANT: Yes, sir.

THE COURT: Tell me your full name.

THE DEFENDANT: Denard Stokeling.
THE COURT: Where were you born?
THE DEFENDANT: Miami, Florida.
THE COURT: And how old are you?
THE DEFENDANT: I'm 38 years old.
THE COURT: How far have you gone in school?
THE DEFENDANT: Eleventh grade.
THE COURT: Have you been treated recently for any mental illness or addiction to any type of narcotics?
THE DEFENDANT: No, sir.
THE COURT: And as you stand before the Court at this time, are you under the influence of any drug, medication, or alcoholic beverage?
THE DEFENDANT: No, sir.
THE COURT: Have you received a copy of the indictment that sets forth the charge against you and have you had an opportunity to discuss that with your attorney?
THE DEFENDANT: Yes, sir.
THE COURT: Do you understand the nature of the charge to which you're pleading guilty?
THE DEFENDANT: Yes, sir.
THE COURT: We'll talk about that in a moment.
Are you fully satisfied with the representation that Mr. Abrams has given you in this case?
THE DEFENDANT: Yes, sir.

THE COURT: Now, there's no plea agreement, but has there been an agreement with regard to disposition of this case, Mr. Abrams?

MR. ABRAMS: Your Honor, in exchange for Mr. Stokeling's guilty plea, the Government has agreed that Mr. Stokeling should be entitled to a three-level adjustment for acceptance of responsibility and would recommend sentence at the low end of the applicable guidelines, provided that Mr. Stokeling makes the required disclosures to the probation office during preparation of the pre-sentence report.

THE COURT: All right.

MR. ABRAMS: Judge, as long as you're asking, one more thing.

THE COURT: Yes, sir.

MR. ABRAMS: Mr. Stokeling is pleading guilty to the indictment, which charges a violation of 18 U.S.C., Section 922(g), and also, it specifically makes reference to the sentence enhancement for the Armed Career Criminal Act under 18 U.S.C., Section 924(e). We are plea --

THE COURT: That changes the level of possible punishment.

MR. ABRAMS: Yes, sir. And we wanted to notice the Court that we are voluntarily entering the plea with knowledge of the potential penalty of the 15-year minimum mandatory to life.

Mr. Stokeling's intention today is to plead guilty to the 922(g), which is the maximum penalty of 10 years, but he understands that should the Court find that he is subject to the enhancement, that he would then be subject to the 15-year mandatory minimum with the possible maximum sentence of life.

So I just say that on the record because Mr. Stokeling does acknowledge the charge that he's pleading guilty to and that 924(e) is part of the indictment.

THE COURT: All right.

MR. ABRAMS: He's not acknowledging his being subject to the enhancement.

THE COURT: All right. You understand what your attorney told me?

THE DEFENDANT: Yes, sir.

THE COURT: And do you agree with everything that he said?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Has anyone made any promise or assurance in order to get you to pled guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone threatened you in any way in order to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Do you understand the terms -- well, not the plea agreement then.

Has anyone attempted in any way to force you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone otherwise threatened you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone made any promises or assurances of any kind to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you pleading guilty of your own free will simply because you are guilty as charged in the indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Now, the offense to which you are pleading guilty is a felony offense, and upon your acceptance of your plea of guilty, the Court then will adjudicate you guilty of that offense.

And such adjudication will carry with it a loss of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any type of firearm.

Do you understand, those are the things that you would lose as a result of being adjudged guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Are you a citizen of the United States?

THE DEFENDANT: Yes, sir.

THE COURT: The maximum possible penalties are, as Mr. Abrams has described to you, and I'll go over those again.

With regard to the underlying offense, without considering the career criminal aspect, possible maximum of 10 years imprisonment, followed by a term of supervised release of up to three years and a fine of up to $250,000.

Is there a forfeiture provision in the indictment?

MR. CERVANTES: Yes, Your Honor.

THE COURT: All right. In addition to that, you would be subject to forfeiture as set forth in the indictment. By your plea of guilty, you are waiving or giving up your right to contest any forfeiture. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Now, should you be also prosecuted pursuant to the Career Criminal Act, then the penalty would change; and the penalty would be a minimum mandatory 15 years and up to possible life imprisonment. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Any questions about what the penalties would be?

THE DEFENDANT: No, sir.

THE COURT: Now, do you understand the possible consequences of your plea of guilty plea that we've discussed so far?

THE DEFENDANT: Yes, sir.
THE COURT: Do you have any questions about it whatsoever?
THE DEFENDANT: No, sir.
THE COURT: Now, in order to fashion an appropriate sentence in this case, the Court will rely upon several factors, such as the advisory sentencing guideline range, possible departure from those ranges, and also other statutory considerations.
Mr. Abrams, have you discussed with your client how the guideline range may affect his sentence?
MR. ABRAMS: Yes, sir.
THE COURT: Do you understand what Mr. Abrams told you?
THE DEFENDANT: Yes, sir.
THE COURT: Do you have any questions about the guideline range and its use in your sentence?
THE DEFENDANT: No, sir.
THE COURT: Now, the Court will not be able to determine what your advisory guideline range is until a pre-sentence report has been prepared by the probation department. And upon completion of that report, you and/or the Government have the right to file objections to all or part of it, and the Court then would have to rule upon those objections, and the sentence ultimately imposed may be different in any estimate that your attorney might have given

you. Do you understand, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Now, once your advisory guideline range has been determined, the Court, under certain circumstances, can depart upward or downward from that range and would consider other statutory sentencing factors that could result in the imposition of a sentence that's either greater or lesser than the guideline range. Do you understand, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you also understand that in the federal system there is no such thing as parole any longer?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand also that under certain circumstances you and/or the Government have the right to appeal any sentence that's been imposed or raise any other issue that you think should be considered on appeal.

Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand by entering your plea of guilty you will have waived or given up your right to a trial in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Again, I'm going to ask a series of questions of you; and if you don't understand them, feel free to ask Mr. Abrams or me to explain them.

Do you understand that you have a right to plead not guilty and to persist in that plea of not guilty; and if you did so, then you'd have the right to a trial by jury.

You would enter that trial presumed to be innocent of any criminal charges and that presumption of innocence would remain with you until such time as the Government, if it can, overcomes it by a proof of your guilt beyond a reasonable doubt.

If you chose to go to trial, you'd have the right to the assistance of an attorney; one appointed by the Court should you not be able to afford one.

And at the trial you have the right to see and hear all the witnesses that testify against you and have your attorney cross-examine them.

And on your own part, you have the right to decline to testify or offer a defense, unless you voluntarily chose to do so; and if you went to trial, you'd also have the right to compel the attendance of any witnesses that you wish to testify on your own behalf. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you went to trial and decided not to testify or offer a defense, those facts cannot be used against you during the course of that trial.

Now, do you further understand that by entering your plea of guilty and upon acceptance of that plea by the Court,

there will be no trial and you will have waived or given up your right to a trial, as well as those other rights that we've discussed. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about what we discussed so far?

THE DEFENDANT: No, sir.

THE COURT: Now, the nature of the charge to which you are pleading guilty simply is as follows:

That you were on the date alleged in the indictment and in Miami-Dade County in the Southern District of Florida, that you had been convicted of a felony involving a sentence in excess of one year, and that you did unlawfully possess and obtain a weapon and ammunition, which it was obtained through interstate or foreign commerce, and that such was a violation of the appropriate statute. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about the charge whatsoever?

THE DEFENDANT: No, sir.

THE COURT: Do you understand now that upon the entry of your plea of guilty a pre-sentence report would be prepared.

In order for that report to be prepared, it's necessary for you and your attorney to meet with the probation officer and furnish such information as may be needed to prepare that

report. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Also, in addition to the penalties that I've mentioned, there's a special assessment in the amount of $100 which must be paid at the time of sentencing.

Now, I'd ask you, sir, how do you plead to the charge set forth in the single count in the indictment, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: It's the finding of the Court in the case of the United States of America versus Denard Stokeling that the defendant is fully competent and capable of entering an informed plea, that the defendant is aware of the nature of the charges and the consequences of his plea of guilty, and the plea is a knowing and voluntary plea supported by an independent basis in fact containing all of the material elements of the offense; the plea is, therefore, accepted and the defendant is now adjudicated guilty of such offense.

Now, I note the defendant is in custody.

Is it the recommendation of the Government that he remain in custody pending sentence?

MR. CERVANTES: Yes, Your Honor.

THE COURT: That recommendation is made an order of the Court.

I understand there's a stipulation of facts that's been

prepared by the Government and defense, entered into by both; is that correct?

MR. ABRAMS: Yes, sir.

THE COURT: Does the defense agree that that stipulation sets forth facts which, if the case went to trial, would constitute proof of this defendant's guilt beyond a reasonable doubt?

MR. ABRAMS: Yes, Your Honor.

THE COURT: Does the Government agree?

MR. CERVANTES: Yes, Your Honor.

THE COURT: All right. Is there anything further to be considered by the Court at this time, Mr. Abrams?

MR. ABRAMS: No, sir.

THE COURT: Government?

MR. CERVANTES: No, Your Honor.

THE COURT: All right. Good luck to you, Mr. Stokeling.

THE DEFENDANT: Thank you, Your Honor.

MR. ABRAMS: Thank you, Judge.

COURTROOM DEPUTY: All rise.

(Proceedings concluded at 2:16 p.m.)

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

May 26th, 2016
DATE

/s/Glenda M. Powers
GLENDA M. POWERS, RPR, CRR, FPR
United States District Court
400 North Miami Avenue, 08S33
Miami, Florida 33128

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 1:15-CR-20815-CR-JLK-1

UNITED STATES OF AMERICA

vs

DENARD STOKELING

Miami, Florida
April 28, 2016
Thursday

Scheduled 10:30 a.m.
10:39 a.m. to 11:32 a.m.

(Pages 1 - 27)

SENTENCING HEARING

BEFORE THE HONORABLE JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
JAMES LAWRENCE KING FEDERAL BUILDING

APPEARANCES:

FOR THE GOVERNMENT:
DAYA NATHAN, ESQ.
United States Attorney's Office
99 N.E. 4th Street
Miami, Florida 33132

FOR THE DEFENDANT:
STEWART ABRAMS, ESQ.
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Miami, Florida 33130-1556

STENOGRAPHICALLY REPORTED BY:
GLENDA M. POWERS, RPR, CRR, FPR
Official Court Reporter
United States District Court
400 North Miami Avenue, Room 08S33
Miami, Florida 33128

(Call to the order of the Court:)

THE COURT: Thank you. Be seated, please.

We have scheduled this morning a hearing in the United States versus Mr. Stokeling.

May I have your appearances, please, of the Government.

MS. NATHAN: Good morning, Your Honor. Daya Nathan for the United States. Present with me at counsel table and available to testify, if necessary, is ATF Case Agent Jason Selsa.

THE COURT: Thank you. And for the defense.

MR. ABRAMS: Good morning, Judge. Stewart Abrams, Assistant Federal Defender on behalf of Denard Stokeling, who is present.

THE COURT: All right. I have reviewed the pleadings and documents and the pre-sentence investigation report.

I will inquire, the pre-sentence investigation report indicates under the portion dealing with objections that on April 20th, counsel, defense counsel, Mr. Abrams, filed a 12-page memorandum outlining objections to the pre-sentence report, and the probation officer has advised the Court of the that and has stated -- or summarized the objection.

But let me -- in determining first, as we must, the sentencing guidelines, let me inquire, are there -- well, let me just ask Mr. Abrams, would you outline what the status is, at this point; is there an objection?

MR. ABRAMS: Yes, there is, Judge. We have objected to the prior convictions contained in three paragraphs in the pre-sentence investigation report which are utilized to enhance Mr. Stokeling's guidelines to that of an armed career criminal, under 18 U.S.C., Section 924(e).

Traditionally, the convictions, particularly having to do with robbery, were relied upon in the residual clause of 924(e), to cause an individual to be eligible for the sentence enhancement.

But as we know from the Johnson decision, the residual clause has been determined to be unconstitutional and, therefore, it can no longer be relied on for that enhancement.

We have argued and provided case law as to reasons why these 18 and 20-year old convictions of Mr. Stokeling, under Florida law, as they existed in 1995 and in 1997, should no longer qualify as predicate convictions for the enhancement, particularly, the robbery conviction in PSI, paragraph 25.

So, Judge, it is our position that the guidelines are properly calculated at 46 to 57 months and that would be the guidelines without the armed career criminal enhancement; otherwise --

THE COURT: Just one second. To the court reporter, would you, please, would you make this work for me?

(Discussion held off the record.)

THE COURT: Would you back up. And you were telling me

that the 18, 20-year-old convictions should not be utilized in the calculation of the guideline, the advisory guideline range under the Johnson case; and you were then saying that under your calculations -- and that's when I looked over here to see what you were --

MR. ABRAMS: Yes, sir.

THE COURT: Repeat that, about the -- what you think the guideline range should be.

MR. ABRAMS: Yes, sir. We believe that the guideline range is appropriately calculated at 46 to 57 months, and that would be Mr. Stokeling's guidelines without the application of the Armed Career Criminal Act.

THE COURT: And right now -- all right, I see in the paperwork the recommendation. Just tell me orally; and then, if need be, if we're going to use any witnesses or testimony, we will get to that in just a minute.

Ms. Nathan, try and respond to just the legal part of it, please.

MS. NATHAN: Yes, Your Honor. The Government did file a written response at docket entry 39.

With respect to the defendant's argument that his prior robbery convictions no longer qualify as predicate offenses under the ACCA, as argued in our written response, this is simply incorrect, under the case law of this circuit and the case law of the Florida Supreme Court and Florida Courts of

Appeal.

In Lockley, which is a binding decision on this circuit, that's at 632 F.3d 1238, the Eleventh Circuit held that robbery -- the robbery statute, at 812.13 of the Florida Statutes -- was a crime of violence.

That was a career offender decision.

However, the Court's language in that decision is very important. The Court noted that the plain language of that statute satisfied the requirement of violence, because that Eleventh Circuit panel found it inconceivable that any act which caused the victim to fear death or great bodily harm would not involve the use or threatened use of physical force.

I will note, Your Honor, that Welch, which is a Eleventh Circuit decision that was cited by Mr. Abrams, stated:

"We see no reason not to apply Lockley to a case addressing whether Florida robbery is a "violent felony" under the ACCA."

So, Eleventh Circuit precedent has held that Florida robbery, 812.13, is a violent felony. Now, responding to --

THE COURT: Wouldn't that -- excuse me.

But can a Court just simply write those words into -- wouldn't it depend, to a large extent, on the facts of the incident, whatever it was?

I mean, you know, if it's a factual issue, and that, then, under the definition that the two of you are talking

about, would indicate that it would be a case-by-case determination on and whether the Court, in reviewing the facts, thought that it placed a person in fear of life, and so on.

So, can we resolve this short of -- or without having sworn testimony about what happened, which is very unlikely to get, because 20 years ago the witnesses aren't around; but other peoples' opinions about that will vary, the whole spectrum, from zero to a hundred percent; I mean, you know, and so how do we get at the factual basis upon which I can determine whether the cases you cite from the circuit -- and he cites from the Supreme Court -- whether they warrant the enhancement being applied by the Court or not?

Can you help me out on that.

What's your viewpoint on that?

MS. NATHAN: Yes, Your Honor, my pleasure.

While there are circumstances in which the Court would need to review the factual basis of the underlying conduct to determine whether it qualifies, there are also circumstances where the Court does not, and this is one of those.

The reason being, Your Honor, at the time of defendant's prior conviction, Florida Statute 812.13, under Florida Supreme Court precedent at that time, necessarily required a level of force that satisfies the ACCA.

The Florida Supreme Court had held that in order to be convicted of Florida robbery under the statute under which

defendant was convicted, there must be -- the perpetrator must employ more than the force necessary to remove the property from the person, that is the victim, and there must be resistance by the victim that is overcome by the physical force of the offender.

So, Your Honor, without reaching the specific facts of this case -- and I will note, the uncontested facts of the PSI do state that the defendant grabbed the victim by the neck, so I don't think there's a disconnect between what's in the PSI and what was required by the Florida Supreme Court.

But at the time the defendant was convicted of the robbery set forth in paragraph 25, it had to be that the defendant used a certain level of force, and that level of force is sufficient under the United States Supreme Court's decision in Johnson, as physical force, which, under the elements clause, constitutes a prior violent felony.

THE COURT: All right. Thank you.

Anything in rebuttal?

MR. ABRAMS: Your Honor, we recognize the Robinson case, which Ms. Nathan was just talking about, which is the Florida Supreme Court case.

However, as noted in Curtis Johnson -v- United States, which is at 559 U.S. 133, 2010, even though there may have been force in this case, or the offense which Mr. Stokeling was convicted of, is defined under Florida law as robbery.

The Johnson case notes that physical force, as is used in 18 U.S.C., Section 924(e), is equal to violent force, which is force capable of causing physical pain or injury.

That is also referenced in United States versus Welch, 683 F.3d, 1304, so -- and something else which is significant and ties into this, which Ms. Nathan's referenced, the Lockley decision.

The Lockley decision occurred after there were changes in the Florida Statute having to do with robbery.

At the time Mr. Stokeling committed his robbery offense, which was in 1995, robbery included "robbery by sudden snatch."

"Sudden snatching" being the taking of something, the physical taking of something, including jewelry from another person.

The Welch decision, when considering robbery, decided that case against the defendant. However, the Welch case, in determining that robbery under Florida law constituted a predicate offense for Armed Career Criminal Act enhancement relied on the residual clause; the residual clause, which has now been determined to be unconstitutional.

Welch, with respect to the categorical approach and -- or the elements clause -- I'm sorry -- the elements clause of 924(e) determined that -- let's see.

Welch said "that Johnson discussion was in the context

of the elements clause requirement of "physical force," not the residual clause requirement of "serious risk" of potential injury to another. Arguably, the elements clause would not apply to mere snatching, but the issue is not cut and dried."

Consequently, at the time that Mr. Stokeling was convicted of his offense, sudden snatching or the snatching of a necklace from someone was considered robbery; as was more physically active, physically involved robbery, taking something from the person and, in the commission of doing that, doing so violently.

When you consider under the elements clause of the Armed Career Criminal Act whether an offense qualifies for enhancement, the Court has to look to the least of the acts criminalized in determining whether the generic offense -- that being the offense of robbery as it existed in 1995 -- qualifies the individual for enhancement.

Well, the Welch decision and other decisions found that under the residual clause, yes, it did. However, the residual clause is no longer something which we can rely on to determine whether a prior conviction qualifies an individual for enhancement; and in the Welch decision, as they said, the issue's not "cut and dry."

And here, where we're talking sudden snatch -- which doesn't necessarily involve the use of violent force -- the use of violent force, which is necessary under Welch to qualify as

a predicate conviction -- where, at the time Mr. Stokeling was convicted, the act and commission of the act of robbery could have been committed without violent force -- it is our position that, as the law existed in regard to Mr. Stokeling when his offense occurred, when he was sentenced under Florida law, when sudden snatch was not a separate offense from robbery, his 1995 conviction cannot be used as a predicate offense.

THE COURT: All right. Thank you very much.

I'm going to rely upon, as we all do -- we all must or -- in terms of the trying to determine the factual background, along which the Government's position that an enhancement of the guideline range should be applied to -- while looking at paragraph 25, page eight of the pre-sentence report, quote:

"The defendant was riding on the handlebars of the bicycle when he jumped off, approached the victim and said" quote within a quote -- "give me all you got, give me your jewelry" -- unquote within the quote.

Now continuing the quote from the PSI:

"The victim attempted to walk away when the defendant grabbed her by the neck and tried to remove her necklaces. The victim held onto her necklaces when the other male grabbed them from her neck and gave them to the defendant. The victim was identified approximately two weeks later," and so on, end of quote.

Based upon that and taking into consideration that these events occurred on October 26th, 1995, which would be whatever it would be -- 20, 21 years ago -- and the impossibility of getting any more current or up-to-date information by live witnesses who would be able to competently testify under the rules, the Federal Rules of Evidence, the Court finds and holds that these facts do not qualify under the existing law to justify an enhancement as it is recognized under sentencing guidelines.

Therefore, the Court finds that the appropriate guideline range would be -- would result in 46 to 57 months and will apply and sentence within the guideline range.

The defense motion is granted.

MS. NATHAN: Your Honor --

THE COURT: Now -- yes, let's move on from there. Yes?

MS. NATHAN: May I speak to the appropriate guideline range, now that the Court has ruled that the ACCA mandatory minimum does not apply?

THE COURT: All right. I had assumed -- thank you, yes. I had mistakenly assumed there was no dispute, depending on that issue.

What do you suggest is the appropriate guideline range?

MS. NATHAN: Your Honor, it's my position that the appropriate guideline range is a base offense level of 24, minus three, which comes to 21, for a range of 70 to 87 months.

The reason for that, Your Honor, is Mr. Abrams' calculation relies on a base offense level of 20 in, I believe it's 2(k)2.1. But, in essence, that calculation rests on his assertion that Mr. Stokeling does not have two felony convictions of either a crime of violence or a controlled substance offense.

Under 2(k)2.1(a)(2), the base offense level is 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.

Now, I will note first, Your Honor, with respect to the controlled substance offense, that Mr. Stokeling does have a conviction under Florida law for sale and manufacture/delivery of cocaine, which qualifies under the Smith decision, the Eleventh Circuit decision in Smith, as a controlled substance offense.

Second, Your Honor, with respect to whether Mr. Stokeling has a second conviction that's a crime of violence.

I understand that Your Honor has ruled that the offense set forth in paragraph 25 is not a violent felony under the ACCA. However, the residual clause is still alive and well under the sentencing guidelines.

In United States versus Matchett, the Eleventh Circuit held that a vagueness challenge to the sentencing guidelines

cannot stand and, therefore, the residual clause is still alive and valid.

So Your Honor could conclude that the paragraph 25 offense is a violent felony under the sentencing guidelines.

But even without that, there's the offense set forth in paragraph 28, which is the robbery, armed home invasion, robbery with a deadly weapon, kidnapping with a weapon, unlawful possession of a firearm by a convicted felon.

That offense, Your Honor, undoubtedly, is a violent crime and would, therefore, qualify as --

THE COURT: All right. Oh -- no, go ahead.

MS. NATHAN: Yes, it would, therefore, qualify as a second offense.

THE COURT: Thank you. I didn't mean to -- Mr. Abrams, no one can argue that the home invasion and all that sort of thing being a violent crime.

MR. ABRAMS: Judge, we did raise objections to the two other prior convictions that are -- that Ms. Nathan is relying on. We do recognize the Smith decision in the Eleventh Circuit with respect to controlled substances. But we also did address in our objection why the -- well, the first charge --

THE COURT: Go ahead and tell me. We have one conviction, the drug conviction, which clearly qualifies.

Now she's talking about the other one being the second offense.

MR. ABRAMS: Yes, sir.

THE COURT: And she just named them and they're in paragraph 28, and so on. Why wouldn't home invasion and that sort of thing, why wouldn't that be a violent crime?

MR. ABRAMS: Judge, we addressed that in our pleadings.

THE COURT: Well, you tell me now so I don't have to go looking.

MR. ABRAMS: That's fine. First, Judge, part of that is robbery.

THE COURT: Microphone.

MR. ABRAMS: Yes, I'm sorry.

Part of that conviction in PSI paragraph 28 has to do with robbery, and we would adopt the same argument that we raise with respect to PSI, paragraph 25.

With respect to the kidnapping, Judge, there was -- and using a weapon, there are several aspects to the Florida statutes with respect to using, possessing, carrying a weapon, and the Eleventh Circuit and Supreme Court have spoken to the carrying of a weapon during the commission of an offense.

And even though there may be multiple aspects of the offense, the offense that Mr. Stokeling was charged with included the act of carrying a firearm, which has been determined in and of itself not to be a violent felony.

The brandishing is. The carrying is not.

So, again, if you look to the least of the acts

criminalized by the conduct with which the person being sentenced is charged -- and again, we're dealing with a conviction that is 18 years old -- the act of carrying a firearm is not a violent felony.

With respect to the kidnapping, Florida courts -- and this was addressed in Robinson -v- State, as well as Curtis Johnson -v- United States, which I previously cited, and again, 130 Supreme Court 1265:

"Florida courts have held to mean that abduction or confinement is intended by the defendant to isolate or insulate the intended victim from meaningful contact or communication with the public. Robinson noted that a kidnapping conviction can be based upon evidence that the victim did not at the time know he or she was being confined or abducted.

"A kidnapping accomplished in this way uses no force, specifically, no violent force, as mandated by Curtis Johnson -v- United States. The kidnapping statute is, thus, overbroad and cannot serve as a -- quote/unquote -- violent felony."

So again, you go by the name of the case, and it sounds like it's very violent and it's very serious and, indeed, the offense of kidnapping implies a very serious offense.

However, when applying these enhancements, Judge, we look to the generic offense -- not to the facts of those offenses -- and we look to the least serious way that that offense can be accomplished.

Brandishing a weapon does constitute serious.

Carrying a weapon does not.

And again, if the kidnapping, which he pled to and he was charged -- part of the charge again was --

THE COURT: And served 12 years, indicating the State Judge thought it was pretty serious stuff; so arguing the interpretation of those acts by a written legal opinion is kind of balancing -- well, go ahead and finish up your argument then.

MR. ABRAMS: Yes, sir. Judge, I would point out to you, though -- and Your Honor correctly noted the sentence -- however, I'd also note that Mr. Stokeling was sentenced for the offenses enumerated in PSI paragraphs 25 and 27 and 28 all on the same day; so that sentence encompassed everything that he was charged with for those three acts, going back, again, 18 and 20 years.

THE COURT: Okay.

MR. ABRAMS: So just in sum, Judge, if there is -- when you look to the least of the acts criminalized and how those actions could be accomplished under the state of the law as it existed when those offenses occurred, if those acts did not necessarily have -- necessarily involve a violent act, they don't qualify and, therefore, do not serve as predicate convictions and should not count even in determination of the base offense level.

THE COURT: All right. The motion and interpretation of the sentencing guidelines, the appropriate provisions that require that the factual convictions, that there be at least two shown or established to be either involvement with cocaine and other drugs, or crimes of violence, I think that this pre-sentence investigation report clearly establishes the two elements have been -- are there and, therefore, the defense summation or the theory upon which it is, the Court does not follow.

It sustains the Government's objection to that.

It then finds -- I find that the two acts -- that the essential two acts for the enhancement to apply, to the extent of the range -- the resulting range of 70 to 87 months have been shown and are part of this record, therefore, the defense objection is denied.

The Government's position is accepted.

The brandishing of firearm, victims, under the circumstances outlined in this and the quotes on the PSI, page 10, "don't make me get violent with you," and all that sort of thing, I can't think of anything more violent than some of the things that have occurred here in this prior conviction, very serious matter.

And analysis, while it was an interesting analysis by defense, is rejected.

The Court finds that the applicable range now should

be, I believe it is -- and I ask the Government to submit to the contrary if they disagree -- should be level 24, with 3 points off with acceptance of responsibility, it comes out to a level of 21, I believe, which would be, I think, 70 to 87 months' guideline range.

What's the Government's position with respect to that calculation? Is that in accordance with what you were arguing about the range, the calculated months?

MS. NATHAN: Yes, Your Honor.

THE COURT: All right.

The Court so finds, therefore, the Court will treat this matter as a -- in that range which results in a range of 70 to 87 months -- or intends to sentence within the guideline range, within, but I will hear your summation in five minutes.

We'll take a five-minute recess -- well, we'll go ahead now. I'll hear your summation as to what -- well, first, let me ascertain, are there witnesses here for either side on this sentencing phase now? On the sentencing phase now?

MR. ABRAMS: Yes, sir.

COURTROOM DEPUTY: Yes, Your Honor.

THE COURT: Well, we'll take that in five minutes then, and the Government may also have witnesses, or not, but we'll take a five-minute recess. We're dealing with where the sentence should fall within the guideline range.

COURTROOM DEPUTY: All rise.

(Recess taken from 11:10 a.m. to 11:19 a.m.)

COURTROOM DEPUTY: All rise. The United States District Court is now back in session.

THE COURT: Please be seated. We will take the testimony that either side wishes to establish in the record or for the record, after which we will have closing arguments; and that includes the defendant or anybody else that wishes to speak, this is the time to speak.

MR. ABRAMS: Yes, sir. Sir, we would call Mr. Stokeling's mother, Adrianne Stokeling.

THE COURT: All right. Let her step to the podium and will you administer the oath, Ms. Williams?

COURTROOM DEPUTY: Raise your right hand, please.

Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

ADRIANNE STOKELING: I do.

COURTROOM DEPUTY: Thank you.

MR. STEWART: Could you please tell the Judge who you are.

ADRIANNE STOKELING: Good morning, Your Honor. My name is Adrianne Stokeling. I'm Denard Stokeling's mother.

So far, this boy has been a good boy. He have helped me out a whole lot, because I have health problems. He helps my mother out, go to the store for her.

He set a good example for his son and his nephews by

letting them know that if they do the wrong thing, they'll likely end up in prison somewhere. So I just hope that you'd have mercy on my son, please. Thank you.

THE COURT: Thank you.

Next witness.

MR. ABRAMS: Your Honor, Mr. Stokeling would like to simply rely on the comments that I will make to the Court on his behalf.

THE COURT: All right. For the Government, any witnesses that you have at this time?

MS. NATHAN: No, Your Honor.

THE COURT: Thank you.

Mr. Abrams, I will hear from you as to your submission on behalf of the defendant.

MR. ABRAMS: Yes, sir.

Judge, I was prepared to argue a sentence of 46 months, which would have been the low end of the guidelines without the enhancements to the base offense level.

The low end of the guidelines now is 70 months. We'd ask Your Honor to impose sentence at the low end of that range.

Mr. Stokeling pled guilty to the offense charged in this case. The sentence -- he is in a higher criminal history, he does have some prior convictions, as Your Honor notes from the legal argument that Your Honor entertained.

The most series of those prior convictions occurred in

1995 and 1997, almost 18, 20 years ago. And Mr. Stokeling was released in 2008, which is why those convictions count in the calculation of his criminal history category and why now, at the low end of his guidelines, he's looking at a sentence of just under six years, and that's at the low end of the guidelines.

He is 38 years old. He does have a past, but again, he demonstrated that he was away from that past.

He does have a pending case in Dade County which is the case that he was -- it's related to this case. It's the case that he was arrested on and which resulted in the federal charge. And we would ask Your Honor to impose Mr. Stokeling's sentence to run concurrently with that state case, which bears case number "F," as in Frank, 15-017823.

So, Judge, bottom line is, Judge, we, respectfully, would recommend a sentence at the low end of the guidelines, recognizing that Mr. Stokeling did, in fact, enter a guilty plea in this case and ask for a sentence of 70 months, and again, to run concurrent with the pending state matter.

Thank you.

THE COURT: Mrs. Nathan.

MS. NATHAN: Yes, Your Honor. Thank you.

Your Honor, I've reviewed the letters that were submitted by Mr. Abrams on behalf of Mr. Stokeling, and I note only that with regards to the assertion that since

Mr. Stokeling was released from custody in 2008, he has stayed out of trouble, I disagree with that assertion.

This federal case arose as a result of a burglary investigation in Miami Beach. The case that Mr. Abrams asked for concurrent sentencing with that's set forth in paragraph 45 of the PSR, while Mr. Stokeling was charged in the state with possession of a firearm by a convicted felon, he was also charged with burglary of an unoccupied structure.

And that burglary had occurred approximately a month before he was arrested by the Miami Beach detectives for the felon-in-possession charge.

That burglary involved the burglary of Mr. Stokeling's employer. And as set forth in the uncontested facts of the PSR, as well as the factual proffer, Miami Beach detectives had identified Mr. Stokeling based on a tattoo in the surveillance video from that burglary.

So I just want to note, Your Honor, that this was not independently Mr. Stokeling's first encounter with law enforcement -- or first encounter with criminal activity since his release.

Nothing further from the Government, Your Honor.

THE COURT: All right. Anything rebuttal?

MR. ABRAMS: Well, Judge, just to characterize that properly, actually, it was his first contact because the cases happened at the same time. So they are related, the pending

state case, as well as this case, they both arose out of -- as, I guess, we learned in law school -- the same transaction or occurrence and, therefore, we would ask that Your Honor impose a sentence to run at the same time with both. I note that he had not had a problem since the time he was released up until his arrest on that matter.

THE COURT: All right. Upon consideration of all the factors elucidated and set forth in U.S.C. Section 3553, and after consideration of the submission -- the oral submission of counsel for both sides and the letters of recommendation that are included in the record, it is the judgment of the Court that you, Denard Stokeling, be remanded to custody of the Bureau of Prisons for a period of 73 months or until otherwise discharged by due process of law.

That will be followed by a supervised release period of two years, during which time you shall not commit any other crimes; you're prohibited from possessing a firearm or any dangerous device or any controlled substance; shall cooperate in the collection of DNA evidence and comply with the following standard -- with all the standard conditions of supervised release in the Southern District of Florida, including permissible search, substance abuse treatment, both as set forth in the pre-sentence investigation report at Part G.

The amount of $100 assessment is herewith made for -- upon conviction of this count, and the Court makes two

findings:

One, that you're unable to pay a fine, therefore, no fine is imposed. And secondly, that the sentence herewith imposed run, if it is applicable under the rules and regulations of the appropriate state and federal jurisdictions, concurrently with. It is to run concurrently with your state case when it is concluded, or as it progresses, and the state case is Number 15-017823.

So, with that having been pronounced, the sentence being pronounced, you're now advised, you have a right under U.S. versus Jones to object to any -- to object to the Court's sentence or the manner in which it was pronounced.

And I tell you and your counsel -- as your counsel well knows -- it's not necessary for you to repeat anything heretofore said; all of that will be preserved in the record for your use if you need it on your appeal.

But under that, under U.S. versus Jones, is there anything additional that needs to be said for the defendant.

Mr. Abrams?

MR. ABRAMS: There are two matters which we would like to preserve, Judge.

First, we would, respectfully, object to the Court's consideration of -- and I know this sounds repetitive, but it isn't -- the prior convictions in determining Mr. Stokeling's base offense level.

The sentencing guidelines are in the process of being amended. And as of August of this year, the residual clause which Ms. Nathan addressed will no longer be available for purposes of relying on prior convictions to determine the base offense level.

Objection number two is that we would, respectfully, object to any reliance which was given to the facts contained in the pre-sentence investigation report for application of those prior convictions for enhancements because those do not constitute proper Shepherd documents. That's all.

THE COURT: The objections are noted.

Does the Government have any objections?

MS. NATHAN: Yes, Your Honor. Just to preserve our right to appeal, as well, the Government objects to the Court's conclusion that Mr. Stokeling does not qualify under the ACCA and, more specifically, that he does not have three predicate conditions for either serious drug offenses or violent felonies.

THE COURT: The defendant is advised that he has a right to appeal; if he can't afford a lawyer, one will be appointed for him upon an appropriate motion and showing of indigency.

Is there any statement regarding or recommendation by the family or the defense as to his place of confinement that you wish the Court to make?

Mr. Abrams?

MR. ABRAMS: Yes, sir. Your Honor, Mr. Stokeling came to the federal system from the state system on a writ, which means upon the conclusion of this proceeding he should be returned to state custody.

We would ask that Your Honor recommend to the Bureau of Prisons that he be designated to a State of Florida Department of Corrections facility for service of his sentence, that will implement Your Honor's order that the sentences run currently.

THE COURT: You're asking me to recommend to the state where he should be placed within the state?

MR. ABRAMS: No, sir. To the Federal Bureau of Prisons, to recommend that they designate a State of Florida facility.

Your Honor recommends --

THE COURT: I don't have any authority to tell them what to recommend; do I? I just have the authority -- I have some discretion about saying that I recommend a local facility so he will be available to meet with his family, and things like that, but I can't tell the State of Florida to --

MR. ABRAMS: No, sir. You're telling the Bureau of Prisons. You see, if --

THE COURT: What are you asking me to do, specifically?

MR. ABRAMS: Recommend to the Bureau of Prisons that the Federal Bureau of Prisons designate a State of Florida

Department of Corrections facility.

THE COURT: Any objection to this?

MS. NATHAN: No, Your Honor.

THE COURT: Granted. All right. He's remanded into the custody of the United States Marshal.

COURTROOM DEPUTY: All rise. Court is in recess.

(Proceedings concluded at 11:32 a.m.)

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

May 17th, 2016 /s/Glenda M. Powers
DATE GLENDA M. POWERS, RPR, CRR, FPR
United States District Court
400 North Miami Avenue, 08S33
Miami, Florida 33128

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United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

DENARD STOKELING

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:15-20815-CR-KING-001

USM Number: 08673-104

Counsel For Defendant: Stewart G. Abrams, AFPD
Counsel For The United States: Daya Nathan, AUSA
Court Reporter: Glenda Powers

The defendant pleaded guilty to Count One of the Indictment.
The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)(1) and 924(e)	Possession of a firearm and ammunition by a convicted felon	August 27, 2015	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
4/28/2016

JAMES LAWRENCE KING
United States District Judge

April 28, 2016

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **SEVENTY-THREE (73) Months to run concurrent with State case no. F15017823.**

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a State of Florida facility.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **TWO (2) Years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$100.00		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$100.00** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution,(7) penalties, and (8) costs, including cost of prosecution and court costs.

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684 Fed.Appx. 870 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Denard STOKELING, Defendant-Appellee.

No. 16-12951
|
(April 6, 2017)

Attorneys and Law Firms

Robert Craig Juman, Nicole D. Mariani, Wifredo A. Ferrer, Daya Nathan, Laura Thomas Rivero, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellant

Stewart Glenn Abrams, Michael Caruso, Federal Public Defender, Ian McDonald, Federal Public Defender's Office, Miami, FL, Brenda Greenberg Bryn, Federal Public Defender's Office, Fort Lauderdale, FL, for Defendant-Appellee

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:15-cr-20815-JLK-1

***871** Before WILLIAM PRYOR, MARTIN, and BOGGS, * Circuit Judges.

Opinion

PER CURIAM:

This appeal presents the question whether a conviction for Florida robbery, Fla. Stat. § 812.13, from before Florida passed a "robbery by sudden snatching" statute in 1999, Fla. Stat. § 812.131, categorically qualifies as a violent felony under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The district court did not enhance the sentence of Denard Stokeling under the Act because it held that his robbery conviction was not a violent felony. The United States appealed. Stokeling argues that before 1999, Florida robbery included robbery by sudden snatching, so it did not always require sufficient force to constitute a violent felony. But this argument is foreclosed by our precedents. *E.g.*, *United States v. Fritts*, 841 F.3d 937, 943–44 (11th Cir. 2016). We vacate and remand.

We have held many times that a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the Act, even if it occurred before 1999. *See, e.g.*, *id.* at 938, 943–44 (conviction from 1989); *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) (conviction from 1974). And in *Fritts*, we specifically rejected the argument that the sudden-snatching statute changed the elements of Florida robbery. 841 F.3d at 942–44. We explained that the Florida Supreme Court has held that Florida robbery "has *never* included a theft or taking by mere snatching because snatching is theft only and does not involve the degree of physical force needed to sustain a robbery conviction." *Id.* at 942. "Th[e] new sudden snatching statute was apparently needed *because* ... [ ]robbery[ ] did not cover sudden snatching where there was no resistance by the victim and no physical force to overcome it." *Id.* at 942 n.7 (emphasis added).

Our precedents apply to Florida robbery as well as armed robbery because the elements are identical, differing only in what "the offender carried" "in the course of committing the robbery." Fla. Stat. § 812.13. Our precedents rely on the shared force element in section 812.13(1) and do not mention the additional requirements for armed robbery in section 812.13(2). For example, this Court is bound by *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), which held that "Florida robbery is categorically a crime of violence under the elements of even the least culpable of these acts criminalized by Florida Statutes § 812.13(1)." *Fritts*, 841 F.3d at 941. Stokeling cannot circumvent this holding, even if he presents arguments the prior panel did not consider. *See Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006).

The district court also applied the incorrect method to determine whether a conviction is a violent felony under the Act. The parties agree that the district court erroneously looked to the underlying facts of Stokeling's crime. But the district court should have applied the "categorical approach," which "look[s] only to the elements of the crime, not the underlying facts of the conduct," *United States v. Braun*, 801 F.3d 1301, 1304–05 (11th Cir. 2015).

The force element of Florida robbery satisfies the elements clause of the Act. The Act defines a violent felony as any crime that "has as an element the use, ***872** attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). An element of Florida robbery is "the use of force, violence, assault, or putting in fear," Fla. Stat. § 812.13, which requires "resistance by the victim that is overcome by the physical force of the offender." *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997).

We **VACATE** Stokeling's sentence and **REMAND** for resentencing.

MARTIN, Circuit Judge, concurring:

I agree with the majority that our Circuit precedent dictates that Mr. Stokeling's prior robbery conviction under Fla. Stat. § 812.13 qualifies as a violent felony as that term is defined by the elements clause of the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e). See United States v. Fritts, 841 F.3d 937, 943–44 (11th Cir. 2016). However, I believe Fritts was wrongly decided.

The Fritts panel did not engage in the categorical analysis the Supreme Court instructed us to use when deciding whether a person's prior conviction requires a longer sentence under ACCA. When it turned its back on the required categorical approach, the Fritts panel failed to give proper deference to McCloud v. State, 335 So.2d 257 (Fla. 1976), the controlling Florida Supreme Court case interpreting § 812.13 from 1976 to 1997. In McCloud, Florida's highest court held that taking by "any degree of force" was sufficient to justify a robbery conviction. Id. at 258–59 (emphasis added). The result of the mistakes in Fritts is that people like Mr. Fritts will serve longer prison sentences that are not authorized by law. Although Mr. Stokeling is not one of those people (he was convicted after the Florida Supreme Court decided Robinson v. State, 692 So.2d 883 (Fla. 1997), which abrogated McCloud's "any degree of force" holding), our reliance on Fritts here gives me the opportunity to talk about what went wrong in that case and why it matters.

I.

The ACCA caps a federal prison sentence for a felon in possession of a firearm at ten years. 18 U.S.C. § 924(a)(2). That is except when the felon has three or more felony convictions, and those felonies are violent or are otherwise serious crimes, his sentence cannot be less than fifteen years. Id. § 924(e). The ACCA defines "violent felony" in more than one way. Id. § 924(e)(2)(B). The Supreme Court has told us that one of those definitions—the "residual clause"—is unconstitutionally vague. Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 2557–58, 192 L.Ed.2d 569 (2015). As a result, a person's prior robbery conviction can serve as a basis for an ACCA sentence enhancement only if it meets another definition of "violent felony" from what is known as ACCA's "elements clause." 18 U.S.C. § 924(e)(2)(B)(i) ("As used in this subsection ... the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year ... that has as an element the use, attempted use, or threatened use of physical force against the person of another."). So a prior robbery conviction can serve as an ACCA predicate only if it has "as an element the use, attempted use, or threatened use of physical force against the person of another." Id.

When deciding whether a person's prior conviction qualifies as one requiring a longer sentence under ACCA, courts must first apply what is called the formal categorical approach. Under this approach, we do not look at the facts that resulted in the earlier conviction. Descamps v. United States, 570 U.S. ——, 133 S.Ct. 2276, 2283, 186 L.Ed.2d 438 (2013). Instead, Supreme Court precedent requires us to look only to ***873** the elements of the statute under which the person was convicted. See Mathis v. United States, 579 U.S. ——, 136 S.Ct. 2243, 2251, 195 L.Ed.2d 604 (2016). We must decide whether, in order to be convicted under a given statute, a person was required to use, attempt to use, or threaten to use physical force against another person.

In keeping with this, I will apply the formal categorical approach to decide whether a conviction under § 812.13 counts as a violent felony under the ACCA. If a defendant could have been convicted under § 812.13 without the use, attempted use, or threatened use of "violent force," Curtis Johnson v. United States, 559 U.S. 133, 140, 130 S.Ct. 1265, 1271, 176 L.Ed.2d 1 (2010) (interpreting "physical force" in the elements clause), or a "substantial degree of force," United States v. Owens, 672 F.3d 966, 971 (11th Cir. 2012) (holding that second-degree rape in Alabama doesn't require "physical force" as defined by Curtis Johnson), against another person, then that defendant's prior conviction under § 812.13 can't be a "violent felony" under the ACCA's elements clause.

In recent years, the Supreme Court has clarified the analytical steps that make up the formal categorical approach. In taking that approach, we must first "presume that the

conviction rested upon nothing more than the least of the acts criminalized" by the state statute. Moncrieffe v. Holder, 569 U.S. 184, 133 S.Ct. 1678, 1684, 185 L.Ed.2d 727 (2013) (alterations adopted and quotation omitted). This is often referred to as the "least culpable conduct." See Donawa v. U.S. Att'y Gen., 735 F.3d 1275, 1283 (11th Cir. 2013) (citing Moncrieffe, 133 S.Ct. at 1685). To identify the least culpable conduct criminalized by the statute, we look to the state courts' interpretations of the statute. See Curtis Johnson, 559 U.S. at 138, 130 S.Ct. 1265 ("We are [ ] bound by the Florida Supreme Court's interpretation of state law ... in determining whether a felony conviction for battery under Fla. Stat. § 784.03(2) meets the definition of 'violent felony' in 18 U.S.C. § 924(e)(2)(B)(i)."); see also United States v. Rosales-Bruno, 676 F.3d 1017, 1021 (11th Cir. 2012) ("[W]e look to Florida case law to determine whether a conviction under § 787.02 necessarily involves the employment of 'physical force' as that term is defined by federal law."). And as part of this step, we have to analyze "the version of state law that the defendant was actually convicted of violating." McNeill v. United States, 563 U.S. 816, 821, 131 S.Ct. 2218, 2222, 180 L.Ed.2d 35 (2011).

Second, after identifying the least culpable conduct, we then have to figure out whether "those acts are encompassed by the generic federal offense." Moncrieffe, 133 S.Ct. at 1684 (alteration adopted). In the elements clause context, this means we examine whether the least culpable conduct involved the use, attempted use, or threatened use of violent force or a substantial degree of force. If it didn't, then under the formal categorical approach, the defendant's earlier conviction is not a violent felony.

II.

These recent Supreme Court cases tell us that a § 812.13 unarmed robbery conviction sustained while McCloud was controlling Florida law does not fall within the ACCA's elements clause. First, heeding the Supreme Court's instruction that we should "turn[ ] to the version" of § 812.13 that a defendant was "actually convicted of violating," McNeill, 563 U.S. at 821, 131 S.Ct. at 2222, we must look to what the Florida state courts said about the conduct that could support a robbery conviction under § 812.13 at the time the defendant ***874** was convicted. More to the point, we must look to how Florida courts defined the least culpable conduct —in this case, the smallest degree of force—sufficient to support a § 812.13 robbery conviction at that time.

Section 812.13 defines robbery as the taking of money or property with intent to deprive when "in the course of the taking there is the use of force, violence, assault, or putting in fear." From 1976 to 1997, the controlling precedent from the Florida Supreme Court held that "[a]ny degree of force suffices to convert larceny into a robbery." McCloud, 335 So.2d at 258 (emphasis added). So during that time period, Florida law was clear that conduct involving "any degree of force," like sudden snatching, was enough to justify a robbery conviction.

In keeping with the deference federal courts owe states' interpretations of their own criminal statutes, this Court has recognized and accepted Florida's view of what it took to sustain a conviction under the Florida robbery statute when McCloud was the controlling precedent. In United States v. Welch, 683 F.3d 1304 (11th Cir. 2012), this Court used the formal categorical approach to determine that sudden snatching was the least culpable conduct that could support a 1996 Florida robbery conviction. Id. at 1311–12. This decision was necessary to Welch's holding that the 1996 Florida robbery conviction was categorically a violent felony under the residual clause. Id. at 1313–14. Our precedent therefore binds us to Welch's conclusion that sudden snatching was the least culpable conduct covered by § 812.13 when McCloud was the controlling Florida case defining that statute.

Having identified the least culpable conduct, we are next required to decide whether this conduct necessarily involves the use, attempted use, or threatened use of violent force or a substantial degree of force. It doesn't. Sudden snatching with "any degree of force," McCloud, 335 So.2d at 258, plainly does not require the use of "a substantial degree of force." Owens, 672 F.3d at 971. Neither does it necessarily entail "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. at 1271. This means a conviction for Florida unarmed robbery during the time McCloud was controlling should not count as a violent felony within the meaning of the elements clause.

III.

In reaching its (erroneous) conclusion that a 1989 armed robbery conviction under § 812.13 falls within the elements clause under the formal categorical approach, the Fritts panel

sidestepped McCloud's "any degree of force" holding by looking instead to our own court's previous decision in United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011). See Fritts, 841 F.3d at 940–42. And when it did, that panel stretched Lockley well past its limits.

Lockley held that a 2001 Florida attempted robbery conviction under § 812.13(1) categorically counts as a "crime of violence" within the meaning of the identically-worded elements clause of the Sentencing Guidelines. See 632 F.3d at 1240–41, 1244–45. But Lockley looked to Florida law as it existed in 2001, when Mr. Lockley was convicted, and not as it existed in 1989, when Mr. Fritts was convicted. Id. at 1240 n.1, 1242. Again, the year of conviction matters because the least culpable conduct sufficient to support a robbery conviction under Fla. Stat. § 812.13 changed in 1997. As I've set out above, the controlling Florida Supreme Court case from 1976 to 1997 (McCloud) held that conduct involving "any degree of force," was enough for a robbery conviction. ***875** 335 So.2d at 258. However, in 1997 the Florida Supreme Court shifted course and held that robbery requires the perpetrator to use "more than the force necessary to remove the property from the person"—that is, "physical force" that "overcome[s]" the "resistance [of] the victim." Robinson, 692 So.2d at 886.

A Florida robbery conviction could no longer be supported by "any degree of force" after the Florida Supreme Court decided Robinson in 1997. For that reason, the Lockley court correctly identified "[p]utting in fear"—and not sudden snatching—as the least culpable conduct in its categorical analysis of Mr. Lockley's 2001 attempted robbery conviction. 632 F.3d at 1244. But again, the Supreme Court has told us to look at what state courts required for a conviction at the time of that conviction. See McNeill, 563 U.S. at 821, 131 S.Ct. at 2222. And our 2011 federal court ruling doesn't change the fact that before the 1997 Florida Supreme Court ruling in Robinson the least culpable conduct for which someone could be convicted of robbery in Florida was sudden snatching with any degree of force. Lockley looked, as it should have, to a different time, so it did not apply to Mr. Fritts's appeal and has no bearing on any robbery convictions sustained while the Florida Supreme Court's 1976 ruling in McCloud was still good law.

The Fritts panel insisted that Lockley isn't limited to post-Robinson robberies—but instead applies to all Florida robberies—because § 812.13 has never included sudden snatching. Fritts, 841 F.3d at 943. As support, it pointed to language in Robinson suggesting that § 812.13 has always required more than sudden snatching. Id. It also emphasized that when the Florida Supreme Court interprets a Florida statute, "it tells us what that statute always meant." Id. But again, this reasoning ignores what the Supreme Court told us about how to conduct the categorical analysis. [1] See McNeill, 563 U.S. at 821, 131 S.Ct. at 2222 ("The only way to answer this backward-looking question is to consult the law that applied at the time of that conviction."). McCloud was controlling Florida Supreme Court law from 1976 to 1997, and it said "any degree of force" could support a robbery conviction. 335 So.2d at 258. Regardless of how the Florida Supreme Court characterized McCloud in its Robinson decision, there is no erasing the fact that conduct involving minimal force was prosecuted as robbery when McCloud was the controlling precedent. See, e.g., Santiago v. State, 497 So.2d 975, 976 (Fla. 4th DCA 1986) (upholding a robbery conviction because robbery required only "ever so little" force).

Another problem with Fritts's reliance on Robinson for the proposition that § 812.13 has never included sudden snatching is that it was plainly foreclosed by our own decision in Welch. In looking to the version of § 812.13 under which Mr. Welch was convicted, the Welch panel acknowledged and even discussed Robinson, but it did not adopt Robinson's suggestion that sudden snatching had never been sufficient to support a conviction under § 812.13. Welch, 683 F.3d at 1311–12. Rather, it identified sudden snatching as the least culpable conduct for which a person could be convicted under the statute because Mr. Welch pleaded guilty in 1996—before Robinson was decided. Id. And 1996 was "a time when the controlling ***876** Florida Supreme Court authority held that 'any degree of force' would convert larceny into a robbery." Id. at 1311 (quoting McCloud, 335 So.2d at 258–59).

* * *

Fritts was wrong to suggest that all unarmed robbery convictions under Fla. Stat. § 812.13 are violent felonies as defined by ACCA's elements clause because use of "any degree of force" could support a § 812.13 conviction from 1976 to 1997. This mistake will continue to have enormous consequences for many criminal defendants who come before our Court. For that reason, and even though Fritts's mistakes do not affect Mr. Stokeling, I feel compelled to explain the error in Fritts's statement, relied on here by the majority, that § 812.13 "has never included a theft or taking by mere [sudden] snatching." Fritts, 841 F.3d at 942.

All Citations

684 Fed.Appx. 870 (Mem)

Footnotes

* Honorable Danny J. Boggs, United States Circuit Judge for the Sixth Circuit, sitting by designation.

1 It's generally true that when a court interprets a statute it tells us what the statute has always meant. But here our interest is not in divining the true meaning of § 812.13. Rather, our interest is in understanding what conduct could have resulted in convictions under the statute between 1976 and 1997, even if Florida courts were misinterpreting the statute during that time.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)	No. 15:cr:20815
	)	
vs.	)	Miami, Florida
	)	
DENARD STOKELING,	)	
	)	March 7, 2019
Defendant.	)	10:00 A.M.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES LAWRENCE KING

APPEARANCES:

For the Government: MS. DAYA NATHAN
United States Attorney's Office
99 NE 4th Street
Miami, Florida 33132

For the Defendant: MR. STEWART GLENN ABRAMS
Federal Public Defender's Office
150 West Flagler Street
Miami, Florida 33130

MS. BRENDA BRYN
Federal Public Defender's Office
One East Broward Boulevard
Suite 1100
Fort Lauderdale, Florida 33301

VERNITA ALLEN-WILLIAMS
Official Court Reporter
United States District Court
400 N. Miami Avenue
Miami, Florida 33128
(305) 523-5100

10:02AM

10:02AM THE COURT: Thank you. Please announce your appearances for the government.

10:02AM MS. NATHAN: Good morning, Your Honor. Daya Nathan on behalf of the United States. Also present at counsel table is the case agent, who was with ATF at the time of this case, Jason Scelsa.

10:03AM THE COURT: Thank you.

10:03AM MR. ABRAMS: Good morning, Judge. Stewart Abrams, Assistant Federal Public Defender, on behalf of Denard Stokeling. I am accompanied today by Brenda Bryn, who is also an Assistant Federal Public Defender.

10:03AM But, notably, Miss Bryn is the attorney who has handled Mr. Stokeling's appeal; did the cert. petition, and argued this matter before the United States Supreme Court.

10:03AM THE COURT: Congratulations on all your hard work, and good to see you. All right.

10:03AM MR. ABRAMS: Your Honor, Mr. Stokeling is not present.

10:03AM THE COURT: Well, let's everybody be seated; except Mr. Abrams.

10:03AM What's your motion? What motion are you making? What do you want the Court to do?

10:03AM MR. ABRAMS: Well, right now I anticipated Mr. Stokeling would be present for our hearing. He is at FDC. I assumed he would be here this morning.

10:04AM THE COURT: The government is supposed to follow-up on these things. So did anybody give anybody notice? All I do is sign an order setting a hearing. It went out to everybody.

Does the government know anything about where the defendant is?

MS. NATHAN: Your Honor, my understanding was that Mr. Stokeling was at FDC and would be present. I have to check with my office regarding whether the subsequent paperwork was submitted when the sentencing was reset. I thought it was, but I'd have to check on the docket to make sure, Judge. I can look at that now.

THE COURT: Miss Williams, does the docket sheet reflect anything about this, Joyce? It happens every time I have a hearing anymore. Three weeks ago the -- yes, approximately -- the probation officer didn't show up, which is all right. I mean I'm just reciting some facts here.

And then the next week the government didn't show up, and then the last week the -- I guess the probation officer did and did a marvelous job. The young woman was the only government person that was here.

MR. ABRAMS: We have him here, Judge.

THE COURT: Don't interrupt me. That's all right. Get him seated and everything. Thank you.

And then the last week I forget who it was -- the

10:05AM defense maybe -- oh, the court reporter was tied up in another hearing.

10:05AM So I'm glad we finally got everybody here. Thank you, marshals. A little bit late on getting him delivered. Usually you all are very prompt.

10:05AM All right. We're here on the motion that is set today for a hearing on, I believe it is, for reconsideration of sentencing in light of the Supreme Court decision.

10:06AM Would the government bring me up to date on what we have here this morning.

10:06AM MS. NATHAN: Yes, Your Honor. Mr. Stokeling was sentenced by Your Honor to a non-armed career criminal act, ACCA, sentence.

10:06AM At issue was whether Florida robbery counts as a violent felony under that act. Mr. Stokeling has, among other convictions --

10:06AM THE COURT: Joyce, I need a yellow pad up here. Thank you. Excuse me. Go ahead.

10:06AM MS. NATHAN: Yes, Your Honor. Among other convictions, Mr. Stokeling has two prior convictions for Florida robbery.

10:06AM The United States appealed to the Eleventh Circuit, arguing that those Florida robbery convictions counted under the ACCA as predicate convictions. The Eleventh Circuit held that those robberies did, in fact, count.

10:07AM Specifically, they held: An element of Florida robbery is the use of force, violence, assault, or putting in fear which requires resistance by the victim that is overcome by the physical force of the offender.

10:07AM The Eleventh Circuit held in Mr. Stokeling's own case that that force element of Florida robbery satisfied the elements clause of the ACCA; and, therefore, vacated Mr. Stokeling's sentence and remanded the case for resentencing.

10:07AM Subsequently, Judge --

10:07AM THE COURT: Let me see here now. So basically at his original sentencing -- I'm going through some facts that will refresh my recollection -- I held that this did not qualify and sentenced him accordingly; gave him the benefit of that, did not enhance his sentence as the sentencing guidelines suggested under certain facts and circumstances. Am I correct on that?

10:08AM MS. NATHAN: That's correct, Your Honor.

10:08AM THE COURT: And so then he was sentenced, basically, on the offense for which he was originally indicted. Which was?

10:08AM MS. NATHAN: A felon in possession of a firearm.

10:08AM THE COURT: Okay. Felon in possession of a firearm. And that sentence was, please, how much? What was the amount?

10:08AM MR. ABRAMS: 73 months.

10:08AM MS. NATHAN: 73 months, Your Honor.

10:09AM THE COURT: 73 months. All right. And then, thereafter? I interrupted you. You were starting to tell me that apparently the Appellate Court for the Eleventh Circuit sent it back saying: Yes, it does count. And you should have a resentencing and apply in your judgment, depending on the facts, a new sentence.

10:09AM What did we sentence him to on that occasion?

10:09AM MS. NATHAN: So that hadn't happened yet, Judge, because in the meantime Mr. Stokeling petitioned to the Supreme Court and that petition was granted and his case was heard before the Supreme Court.

10:09AM The Supreme Court held that Florida robbery satisfies the force requirement of the elements clause of the ACCA, and that Florida robbery qualifies as a violent felony and as a predicate under the ACCA.

10:09AM THE COURT: Wait just a minute. ACCA is? What is that an acronym for, ACCA?

10:10AM MS. NATHAN: That's the Armed Career Criminal Act, Your Honor.

10:10AM THE COURT: Thank you. Okay. So under the Armed Career Criminal Act the Supreme Court said that Florida robbery is an offense, depending on the corresponding, I presume, under the facts of a given case, whether or not there was force and violence that put the person in or could

have put the victim in fear of serious consequences, or whatever, that arose to a level that the force was necessary to take the necklace off her neck or the gun out of her face or his face, whatever it was. That was hypothetical. I wasn't referring to this.

Is that a sort of one sentence --

MS. NATHAN: Well, Judge, the Eleventh Circuit held that Florida robbery is categorically a violent felony. And what that means, Your Honor, is we don't look to the facts.

They say: What is required to prove Florida robbery, the level of force that is required, that categorically qualifies.

And the Eleventh Circuit stated, again: An element of Florida robbery is the use of force, violence, assault, or putting in fear.

And the Eleventh Circuit concluded that that element required the requisite level of force to qualify as force under the Supreme Court's precedence in Johnson and to, therefore, qualify under the elements clause of the Armed Career Criminal Act.

The Supreme Court similarly, Your Honor, held: Robbery under Florida law corresponds to that level of force -- and they're referencing the Supreme Court's prior decision in Johnson -- and, therefore, qualifies as a violent felony under ACCA's elements clause. For these reasons, we

10:12AM affirm the judgment of the Eleventh Circuit.

10:12AM So both the Supreme Court and the Eleventh Circuit have held in Mr. Stokeling's case itself -- Mr. Stokeling's appeal and then his case before the Supreme Court -- that Florida robbery categorically qualifies. Which means we don't look to the underlying facts; we look to the statute of conviction.

10:12AM THE COURT: Thank you for refreshing my recollection. Obviously, I came in this morning with -- well, obviously, I had read through the Eleventh Circuit opinion when it came out, but that was some months ago.

10:13AM And I thought that somewhere in there they had said that we had to make some sort of determination about whether or not the specific instances of the act -- the Armed Career Criminal Act required or depended upon a finding by the trial court, as reviewed by the circuit, for enough force to put the person in some sort of fear or trepidation; the victim.

10:13AM If I am mistaken on that or in error on that, help me out with all this.

10:13AM MS. NATHAN: Yes, Your Honor.

10:13AM THE COURT: The Eleventh Circuit opinion was -- let me see. What's the date here just to refresh me? The October term? Well, apparently -- oh, here it is. Yes, January 15, 2019. So this is only March. It wasn't that long ago. Go ahead.

10:14AM MS. NATHAN: Yes, Your Honor. The Eleventh Circuit's opinion was issued in April of 2017, and then the Supreme Court's opinion was issued, I believe, in January of 2019, as Your Honor referenced.

10:14AM The Eleventh Circuit's opinion, which Your Honor was asking about, said, quote: The parties agree that the district court erroneously looked to the underlying facts of Stokeling's crime. But the district court should have applied the categorical approach, which looks only to the elements of the crime; not the underlying facts of conduct.

10:14AM So in this case, Your Honor, we would not look at the underlying facts; we would look at the elements.

10:15AM And in the next paragraph, which I previously read to Your Honor, the Eleventh Circuit concluded that the elements of the crime require the requisite force; and, therefore, it qualifies under the Armed Career Criminal Act; which is, again, the same conclusion that the Supreme Court reached when it affirmed the judgment of the Eleventh Circuit.

10:15AM THE COURT: Okay. Very good. And that brings us to where we are today. Sort of a factual background of the proceedings, and I thank you very much. I'll hear from you in a moment, but let's find out what Mr. Abrams and Mrs. Bryn or Miss Bryn may have to add to this. Mr. Abrams.

10:15AM MR. ABRAMS: Yes, sir. Judge, we defended the

10:15AM sentence which Your Honor imposed, going to the Eleventh
10:15AM Circuit, as well as to the Supreme Court, and we would like
10:16AM to do that again.
10:16AM We believe that Your Honor appropriately sentenced
10:16AM Mr. Stokeling without the Armed Career Criminal Act
10:16AM enhancement, and we believe, regardless of the decision of
10:16AM the Supreme Court in Mr. Stokeling's case, that the Supreme
10:16AM Court has now essentially confused and made much more
10:16AM confusing the standards for applying the elements clause than
10:16AM those which existed in 2015 when Mr. Stokeling was arrested
10:16AM and prosecuted and sentenced before Your Honor and the
10:16AM individual who stands before you today.
10:16AM I would like to defer to Ms. Bryn, who can provide
10:16AM more detail in regard to the analysis for Your Honor.
10:16AM But essentially it is our position that Mr.
10:16AM Stokeling was properly sentenced by Your Honor when he was
10:16AM originally sentenced, and we ultimately are going to ask Your
10:16AM Honor to sentence him exactly the same way that you sentenced
10:16AM him before. I would like to defer to Ms. Bryn.
10:17AM THE COURT: Well, haven't two courts -- the
10:17AM Eleventh Circuit and the Supreme Court -- said that my
10:17AM analysis originally or my evaluation and the sentencing,
10:17AM exercising the discretion that we always do at the trial
10:17AM level, of attempting to evaluate all the circumstances of the
10:17AM facts, and arrive at a fair and reasonable sentence, and we

10:17AM do that in every case -- but my analysis at that time has been held by the Eleventh Circuit and the Supreme Court to be mistaken or wrong, if you please.

10:17AM And I might as well be blunt. I'm not trying to soft pedal this. That is a reflection on my judgment in that case. They simply said that I had to adopt a categorical approach and not to consider certain elements of -- well, it says what it says.

10:18AM But basically they said: Judge, you just made a mistake, and on these cases it's a categorical approach. If they're convicted of robbery, that you have to apply the enhancements and add on the additional --

10:18AM Is it five years, I believe? What is it? You would know.

10:18AM MR. ABRAMS: It would enhance Mr. Stokeling's sentence from 73 months to 180 months. It's very significant. It more than doubles.

10:18AM THE COURT: How many years? Talk in terms of years.

10:18AM MR. ABRAMS: Yes, sir. From six years, one month; to 15 years.

10:18AM THE COURT: Oh. It's even more of an enhancement than I thought. All right. So we're talking about six years, one month or six years, roughly, to -- I don't round off figures. I am of the personal conviction, as you

10:19AM all know, that I realize and recognize that one day, one week, one month, can be a terrible length of time or certainly years in terms of six to 15 years can be an extremely long period of time to be in jail.

All right. Now then, do you wish to make an argument on the basis of the analysis of the opinion in this case? I had really -- I had forgotten about this being out of my court -- out of this district and out of this division. I knew that the Supreme Court had considered two of my cases since the new justice was appointed. But I digress.

All right. Then I would be pleased to hear from you, whatever summation you wish to make with reference to the -- you and Ms. Bryn or either one of you. I would appreciate it, Ms. Bryn, if you could bring your paperwork up here -- take your time -- to the podium.

MS. BRYN: Sure.

THE COURT: I can hear you better up here and the court reporter can as well. Thank you so much.

MS. BRYN: Good morning, Your Honor.

THE COURT: I congratulated you. I knew when he said that you had argued it there and it still goes; not many people get to argue cases in the Supreme Court of the United States in the course of their career. And here you are, already having passed that high water mark in your profession, leaving you: What do you do next? Academic

question; not serious. What do you do to top it?

MS. BRYN: Another Supreme Court case.

THE COURT: You go back again, yes. All right. Let me hear your analysis of this case as the Supreme Court and the Eleventh Circuit have pronounced the facts.

MS. BRYN: Your Honor, today we're asking you, as Mr. Abrams said, to impose the same sentence that you did at the original sentencing but for different reasons.

It's correct, as the government has stated, that the Eleventh Circuit was clear that we need to apply a categorical approach. And the Eleventh Circuit also held that a robbery by force qualifies, meets the elements clause language, which requires violent force. And the Supreme Court as well held that whenever an offense like robbery requires overcoming resistance, that meets the elements clause.

But the Supreme Court did not declare that all robbery offenses, that every single way of committing a robbery qualifies. It only addressed the question that I raised, and I drafted that question very narrowly. I only asked the Supreme Court to consider whether a robbery by force meets the elements clause if that force is very slight. And the Supreme Court said: Slight force is enough.

But I didn't ask the Supreme Court to consider every way of committing a Florida robbery, and under the

10:23AM statute there is an alternative way. Your Honor started to reference it before when you talked about fear.

There are actually two alternative ways of committing a robbery, and the jury doesn't have to choose. When the Florida juries are convicting someone of robbery, they are told that if the defendant used force or putting in fear, that's a robbery. So our argument to you today is that Stokeling cannot be read beyond the facts that were presented and the arguments that were presented to the Supreme Court in Stokeling.

And, actually, during the argument Justice Gorsuch started to ask about another way of committing robbery; the putting in fear. And he said to the government -- to the assistant solicitor general: Doesn't putting in fear sink your case? Isn't that a problem for you?

And the solicitor general responded: Well, Stokeling hasn't challenged putting in fear before this court, and that's true. We only challenged force, and we got our answer on force. The answer on force is that slight force is enough.

But putting in fear, to put someone in fear in Florida doesn't require any force, any touching. It doesn't require a word.

There is a case that we cited in our objections from 1966; it's Flagler versus State. And basically what

10:24AM happened there, someone was sitting in the car, the defendant
10:24AM opened the door, sat in the passenger seat, took a purse that
10:24AM was potentially on the floor or whatever, not off the body,
10:24AM and exited. And the court said: That's enough for putting
10:24AM in fear. No touching, no word, nothing.
10:25AM So that is the question that we are presenting to
10:25AM you today is the alternative way of committing robbery; a
10:25AM robbery by putting in fear, is that categorically a violent
10:25AM felony?
10:25AM And the answer to that question is that it's not.
10:25AM And the Supreme Court in Curtis Johnson said that: We have
10:25AM to defer to how each state interprets their own laws. And
10:25AM the way Florida interprets putting in fear, the victim
10:25AM doesn't even have to be in fear.
10:25AM The question is: Would a reasonable person be put
10:25AM in fear? It's a reasonable person standard. And we all know
10:25AM from tort law as well that whenever there is a reasonable
10:25AM person standard, it's a negligence standard.
10:25AM And the Supreme Court held in a case called Leocal
10:26AM that negligence is insufficient for the elements clause. We
10:26AM need a higher mens rea; intent, potentially recklessness, but
10:26AM negligence is not enough.
10:26AM So what we're asking you to do today is to follow
10:26AM the Supreme Court in Leocal, which predated all of these
10:26AM cases which the Eleventh Circuit has not addressed in our

10:26AM case, in the Stokeling case, nor did it address in the Lockley case that the Eleventh Circuit followed.

In Leocal the Supreme Court said that driving -- that was a driving under the influence case. And the Supreme Court said: Negligence doesn't meet the elements clause. And the Florida robbery statutes allows a jury to convict on a negligence reasonable person standard.

Now we talked about the categorical approach. And what the categorical approach says is that: If any means of violating the statute is overbroad, that renders the conviction as a whole overbroad. Now we know that -- and the Eleventh Circuit has confirmed this -- that the --

THE COURT: I'm sorry. That last statement here, now we know that it's overbroad. And so then your logical conclusion; if the state court consideration by a jury or a judge in a criminal matter involves -- as you suggest it does -- the possibility that the jury would say, would decide whether or not the person is guilty or not guilty of the robbery that they have under consideration in that case involved a reasonable or unreasonable question mental state on the part of the victim of putting them in fear; and for that reason then -- and that's where then you moved on to the Eleventh Circuit.

For that reason let me inquire of you your opinion: Whether or not then your argument would invalidate,

10:28AM invalidate every robbery conviction in the state court since
10:28AM the state statute is not clear or has not said anything about
10:29AM this reasonableness and made it a categorical?
10:29AM So to take it to its logical conclusion, I am
10:29AM asking you -- I'm not trying to tell you what to say here,
10:29AM but I'm asking you: Would that have the effect then of
10:29AM eliminating anybody that came up for this consideration of
10:29AM felon in possession of a firearm after convictions of
10:29AM robberies?
10:29AM It would eliminate any consideration of a robbery
10:29AM conviction, would it not, because every jury that convicts
10:29AM somebody of robbery in Florida could under the present law
10:29AM you suggest or you argue would have in mind -- unless perhaps
10:29AM a jury instructions could maybe have cured it in a given case
10:30AM -- but, generally speaking, if a jury can sit there and be
10:30AM deliberating whether or not the victim at the time was in
10:30AM fear or not in fear; and if not in fear or in fear, either
10:30AM way, acquit or convict.
10:30AM But if they acquitted, there would be no further
10:30AM involvement at our level when we got to applying the
10:30AM sentencing guidelines and enhancement factors.
10:30AM So logically then wouldn't it mean that every
10:30AM single robbery conviction could not then be considered at
10:30AM this level which, as a categorical approach, which the
10:30AM Supreme Court seems to have said and the Eleventh Circuit

seems to have said: Judge, you've just got to. You can't go into the background of each of the robbery convictions because they may have been on a mistaken impression that fear was a factor. That's a long question --

MS. BRYN: Yes, I understand.

THE COURT: -- I'm asking. Just do your best with it.

MS. BRYN: Sure. Let me answer that in a few ways. First of all, in every one of these categorical approach cases that come to you, to the Eleventh Circuit, or to the Supreme Court, the question is: Does this category of offense, does this crime, is it categorically excluded from being an ACCA predicate? And sometimes the Supreme Court has said yes.

In the Descamps case they said: All California burglaries have to be thrown out as ACCA predicates because that type of offense can be committed in a way that it doesn't require the use of force. So in Leocal -- the case I was talking about -- they said no DUI convictions.

But we are not saying anything or asking you to hold anything about all robberies. We're asking you only to look at the Florida robbery statute.

Every robbery statute is different. Not every robbery statute has putting in fear. Not every robbery statute is indivisible. Ours is indivisible.

10:32AM THE COURT: Every robbery conviction in Florida is different you said?

10:32AM MS. BRYN: No. Every robbery statute from different states are different.

10:32AM THE COURT: How about Florida? That's the one in this case I have to decide.

10:32AM MS. BRYN: And that would be and that is our position: That even if the force means of committing the offense is sufficient for the elements clause, the alternative, putting in fear means, is not.

10:32AM And that is what the categorical approach says: If any means is overbroad, that requires that the conviction as a whole is overbroad and cannot be counted.

10:33AM That is, I guess, the price we pay for having a categorical approach is that we're not going to look at the actual facts. But that's a choice that was made by Congress and by the Supreme Court, and we have to apply the law, and that's the analysis that is dictated by the categorical approach.

10:33AM So we need to look at what is the least culpable conduct. The Supreme Court said that in the Moncrieffe case. You don't look at the most culpable conduct; you look at the least culpable conduct. And the least culpable conduct under this statute -- different from other states but our statute -- is putting in fear. And because we have case law that

10:33AM makes eminently clear that this is a reasonable person
10:33AM standard -- the person doesn't have to be in fear actually,
10:33AM there is no actual threat, no word, no gesture, no touching
10:34AM -- that means that the offense does not involve the use or
10:34AM threatened use of violent force and that is the standard.
10:34AM So we are asking you to apply the categorical
10:34AM approach by looking at the least culpable conduct under the
10:34AM statute -- which I think the government acknowledges that
10:34AM putting in fear is the least culpable means -- and because --
10:34AM THE COURT: And then not count that robbery or
10:34AM those two robberies that we have here; we look at each of
10:34AM them and say that the jury could have found that they were
10:34AM using the reasonable man approach, which --
10:34AM MS. BRYN: They instruct the juries actually in
10:34AM Florida -- I believe in my reply memo I quoted the jury
10:34AM instruction. And they specifically tell the jury that -- I
10:34AM can read it to you. Let me just find it. The jury
10:35AM instruction says --
10:35AM I can't seem to locate it at the moment, but it is
10:35AM in the objections. And the everyday juries in Florida are
10:35AM being instructed with this reasonable person standard for the
10:35AM putting in fear. And because the statute is drafted in such
10:35AM a way that they don't have to give a special verdict -- was
10:35AM the offense committed by force or was it committed by
10:35AM personal fear, did you apply the reasonable person standard

10:35AM -- there doesn't need to be any specificity and there never is, so that's why under --

THE COURT: The instruction, you're saying the judge told the jury: You're free to engage in your analysis on the facts of this case, you're free to determine whether or not the victim was in actual fear or not? Or words to that effect?

MS. BRYN: Yes. Actually, I was looking at the wrong document.

THE COURT: Why didn't the judge direct a verdict and not even send it to the jury if that was what he was going to tell the jury?

MS. BRYN: Well, there is no reason to direct it. I mean that's Florida standard. I mean that's fine to convict someone in Florida, and the Florida courts can write their laws and apply their laws however they want.

The question is: When someone is convicted in that way, does --

THE COURT: My question is: Why are Florida judges giving that instruction?

MS. BRYN: Well, because the case law dating back to, like, 1966.

THE COURT: Did they do this in this case?

MS. BRYN: Well, I believe this was a plea. I believe that -- that's correct, Mr. Stokeling's prior cases

10:36AM were pleas.

10:36AM THE COURT: So my individual case here today does
10:36AM not involve jury trials where the jury made a determination
10:37AM within mind that they could acquit him if they found that he
10:37AM did not place a person in fear or trepidation or threat or
10:37AM whatever.

10:37AM So that being the case: Then how can this be on
10:37AM this record -- and we're bound by this record. We're not
10:37AM going to take more testimony and so on into this element.

10:37AM And if we have a plea of guilty to robbery per se,
10:37AM then the jury never got to the point of considering was a
10:37AM person in fear or not. Maybe they should have, but that
10:37AM would be up to the trial judge to decide whether the facts of
10:37AM the case met the statute. Well, again --

10:37AM MS. BRYN: May I?

10:37AM THE COURT: I keep thinking of a jury trial, but
10:37AM there was no trial.

10:37AM MS. BRYN: The reason that that makes no difference
10:37AM here, Your Honor, is that we're only looking at the jury
10:37AM instructions to determine what an element of the offense
10:38AM includes. There doesn't have to be a jury trial. We know
10:38AM from the instructions, and I did find it, and it says: If
10:38AM the circumstances were such as to ordinarily induce fear in
10:38AM the mind of a reasonable person, that is sufficient. Actual
10:38AM fear need not be shown.

10:38AM So because the Florida courts have written their jury instructions in such a broad manner to comply with their case law, we know that the element of putting in fear, it's force or putting in fear, that element includes a reasonable person mens rea for putting in fear; while force requires something else.

10:38AM So when you plead guilty, you only admit the elements of the crime. So in pleading guilty, Mr. Stokeling admitted that he committed robbery as defined in Florida under their law, which includes this reasonable person standard.

10:39AM But when we come to the Armed Career Criminal Act and the categorical approach, the Supreme Court has been clear: There has to be a match. The state crime has to match the elements clause. If the state will allow robbery convictions on much broader facts than what we consider to be a violent felony -- which means the use or an actual threat of force -- then that crime doesn't qualify.

10:39AM And so the Supreme Court, as I said, said no California burglary qualifies. That's what the categorical approach requires.

10:39AM THE COURT: But they didn't do that in this opinion in Mr. Strickland -- I'm sorry, in Mr. Stokeling's case.

10:40AM MS. BRYN: Right. Because they weren't asked to consider this alternative means. But we know that's part of

10:40AM their analysis because in their prior cases they've said that.

10:40AM So all I'm asking you to do here is say, yes, we understand that Stokeling held that if you commit a Florida robbery by force, even the slight force that's necessary meets the elements clause. But they couldn't have said anything about putting in fear because the only question they had involved overcoming resistance, and there's no overcoming resistance in a robbery by putting in fear.

10:40AM In the example I showed you or I spoke to you about, the Flagler case, there was no touching, there was no threat, there was nothing. He got in the car, he picked up the purse, and he exited the car, and that was enough because it's a reasonable --

10:40AM THE COURT: On this record we have no evidence about what it was.

10:40AM MS. BRYN: This record doesn't matter under the categorical approach, Your Honor.

10:40AM THE COURT: It matters to this Court and to the courts of appeal when they consider what the judge did, when they look at the record and they try to define what my reasoning was and why I arrived at a certain place, so the record is very important.

10:41AM We don't have any of the facts of the two robbery convictions in Florida except the certificate that he was

10:41AM convicted of robberies and he pled guilty in this case. This
10:41AM case originally before me was a guilty plea?
10:41AM MS. BRYN: Yes, it was, Your Honor.
10:41AM THE COURT: So he pled guilty to that, and that's
10:41AM the record in this case.
10:41AM I understand, I think, your theory. I understand
10:41AM what you're saying. Is there anything further?
10:41AM MS. BRYN: Yes. The last point I want to make is
10:41AM that -- and this is a point that I did address in our
10:41AM pleadings: That the Eleventh Circuit decisions are -- can --
10:41AM in terms of what's binding on this Court and what you need to
10:41AM follow, your first duty and every judge's duty in the federal
10:42AM court system is to follow the Supreme Court in the first
10:42AM instance. And where there is a Supreme Court case saying
10:42AM negligent crimes don't qualify, the Court has to follow that.
10:42AM That same idea applies to the third predicate for
10:42AM the act enhancement here, which is the Florida possession
10:42AM with intent to distribute crime under Florida Statute 89313.
10:42AM There is a decision by the Eleventh Circuit that we
10:42AM acknowledge, United States versus Smith, that held that even
10:42AM though there is no mens rea under the Florida statute, they
10:42AM don't have to prove that the person even knew he had a drug
10:42AM that he distributed, that's sufficient.
10:42AM And subsequent to the Smith case there have been
10:42AM two Supreme Court cases, Elonis and McFadden, that have made

10:42AM eminently clear that no offense that will have penalties like this can have no mens rea. That is contrary to the presumption at common law, in statutory law, as construed in Staples and longstanding rules of statutory construction that an offense where someone has no mens rea cannot result in such harsh penalties.

10:43AM And so I would ask the Court to, as an alternative way of finding that Mr. Stokeling is no longer an armed career criminal, it's either because robbery by putting in fear doesn't qualify, it's overbroad; or because the Smith case has been undermined to the point of abrogation by the subsequent Supreme Court decisions that have reaffirmed that mens rea is a crucial element of any statute that results in harsh penalties like the one we have here. Thank you.

10:44AM Do you have any further questions, Your Honor?

10:44AM THE COURT: Not at this point.

10:44AM MS. BRYN: Thank you.

10:44AM THE COURT: Thank you very much. All right. Ms. Nathan, would you bring your papers up to the podium and let me hear your submission. Yes, ma'am.

10:44AM MS. NATHAN: Yes, Your Honor. Your Honor, I'd first like to start with the Supreme Court's decision in Stokeling, and again reiterate to this Court that this defendant sitting before you today, this is his own case before the Supreme Court. This is not a different case that

10:45AM we are now applying a holding to another defendant. This is this defendant, Mr. Stokeling's own process through the court system; going from this court, to the Eleventh Circuit, to the Supreme Court.

The Supreme Court held in Mr. Stokeling's very case that Florida robbery counts under the Armed Career Criminal Act. Now, they did not qualify that. They did not say: Florida robbery, except for putting in fear.

And I agree with Ms. Bryn that that issue was not particularly raised by Mr. Stokeling. It was his petition to the Supreme Court. But the Supreme Court decision, Your Honor, did not suggest in any way, shape, or form that there was a carve out to their decision; that Florida robbery counts under the ACCA as a predicate offense.

Now, as acknowledged in Ms. Bryn's objections, Mr. Stokeling did raise the issue of putting in fear before the Eleventh Circuit when he appealed to the Eleventh Circuit, and the Eleventh Circuit rejected that argument. The Eleventh Circuit rejected that argument when it held -- and, again, Judge, Mr. Stokeling's own case -- the Eleventh Circuit held that: An element of Florida robbery is the use of force, violence, assault, or putting in fear. The Eleventh Circuit held that that element in its entirety satisfied the elements clause.

And in reaching that decision, the Eleventh Circuit

10:47AM cited binding Eleventh Circuit precedent. And what I mean by
10:47AM binding, Judge, is that it was published opinions that --
10:47AM contrary to the defendant's argument here today -- have not
10:47AM been abrogated or called into question. But the Eleventh
10:47AM Circuit cited a prior decision by the Eleventh Circuit itself
10:47AM in the case of United States versus Lockley, L-o-c-k-l-e-y.
10:47AM In that case, Your Honor, the Eleventh Circuit
10:47AM analyzed the putting in fear prong of Florida robbery; the
10:47AM least culpable means of committing the act. And the Eleventh
10:47AM Circuit held that the putting in fear prong was sufficient to
10:47AM satisfy the force requirement of the Armed Career Criminal
10:47AM Act.
10:47AM The Lockley decision, Your Honor, was in 2011. And
10:48AM the Eleventh Circuit has subsequently and repeatedly held
10:48AM that that decision is still good law. Notably, there was a
10:48AM case entitled United States versus Seabrooks,
10:48AM S-e-a-b-r-o-o-k-s. This case was in 2016 before the Eleventh
10:48AM Circuit. And in that case the Eleventh Circuit held that
10:48AM Lockley was still good law, and the Eleventh Circuit
10:48AM summarized the Lockley court's analysis of why the putting in
10:48AM fear prong satisfies the elements clause of the ACCA.
10:48AM There have been other decisions, Your Honor, of the
10:48AM Eleventh Circuit; including United States versus Fritts,
10:48AM F-r-i-t-t-s, where the Eleventh Circuit has said: Lockley is
10:48AM still good law. We follow it.

10:49AM So under that Lockley decision, Your Honor, which is still good law, the putting in fear prong of Florida robbery satisfies the elements clause of the ACCA. And in Mr. Stokeling's own appeal and in the Eleventh Circuit's own decision remanding the case for resentencing, the Eleventh Circuit stated: This court is bound by United States versus Lockley.

And as I noted previously, the defense raised before the Eleventh Circuit the argument that they're raising here today: That the putting in fear prong is not enough. But the Eleventh Circuit held otherwise in Mr. Stokeling's own appeal, which is the law of this case, Your Honor.

So for those reasons, Your Honor -- which are that the Supreme Court's decision doesn't contain any carve out, that the Eleventh Circuit has repeatedly held that the putting in fear prong is sufficient to satisfy the elements clause, the force that is required by the elements clause of the ACCA, and that in Mr. Stokeling's own case before the Eleventh Circuit, the Eleventh Circuit held that the elements clause -- I'm sorry -- that the elements of Florida robbery which require the use of force, violence, assault, or putting in fear is sufficient; that Mr. Stokeling's Florida robbery convictions qualify.

Now, Your Honor asked the question of: If the Court were to rule that putting in fear is not enough, what

10:50AM would happen to all these Florida robbery convictions? And
10:50AM Your Honor is right. If the Court were to find that putting
10:50AM in fear is not enough, Florida robbery, in violation of
10:50AM Florida Statute 812.13, which is the precise statute that Mr.
10:50AM Stokeling was convicted of and the precise statute that was
10:50AM addressed in Seabrooks, Fritts, Lockley, and in Mr.
10:50AM Stokeling's own cases -- could not qualify. And that's
10:51AM simply not what the Eleventh Circuit or the Supreme Court
10:51AM have ever held.
10:51AM Your Honor, in the Lockley decision the Eleventh
10:51AM Circuit stated -- after analyzing Florida law regarding the
10:51AM putting in fear prong -- that it involves an act causing the
10:51AM victim to fear death or great bodily harm; death or great
10:51AM bodily harm. And that was part of the court's analysis in
10:51AM concluding that the putting in fear prong satisfied the
10:51AM standard of force required under the ACCA.
10:51AM Now, Your Honor, Mr. Stokeling's counsel has also
10:51AM raised the issue of mens rea as it pertains to Mr.
10:51AM Stokeling's prior drug conviction. And I'll remind the Court
10:51AM that in the first sentencing the Court ruled that Mr.
10:51AM Stokeling's drugs conviction does qualify as a serious drug
10:51AM offense.
10:51AM The Smith case, which Ms. Bryn mentioned, is a 2014
10:52AM published decision of the Eleventh Circuit that states that
10:52AM the drug offense under which Mr. Stokeling was convicted

10:52AM counts as a serious drug offense.

10:52AM The defense cites to two cases of the Supreme
10:52AM Court, Elonis and McFadden -- those are both 2015 decisions
10:52AM of the Supreme Court -- in arguing that Smith has been
10:52AM abrogated. Your Honor, the Eleventh Circuit has addressed
10:52AM this very argument.

10:52AM In the case of United States versus Scott,
10:52AM S-c-o-t-t, it's a 2017 unpublished decision by the Eleventh
10:52AM Circuit, the Eleventh Circuit addressed the defense's
10:52AM argument that Elonis and McFadden abrogate the Eleventh
10:52AM Circuit's prior decision in Smith; and, therefore, Smith
10:52AM should not be followed. And the Eleventh Circuit rejected
10:52AM that argument. The Eleventh Circuit held that those Supreme
10:53AM Court cases do not abrogate Smith. Smith is still the law of
10:53AM this circuit, and Smith should be followed.

10:53AM In sum, Your Honor, Mr. Stokeling's prior
10:53AM convictions for robbery and Mr. Stokeling's prior drug
10:53AM conviction, all three qualify as predicate offenses under the
10:53AM ACCA. And the United States, therefore, asks for a sentence
10:53AM of 15 years.

10:53AM THE COURT: Now, specifically -- thank you. But a
10:53AM specific question here.

10:53AM What is pending before me today? We have one
10:53AM original sentencing, which both of you reviewed with me what
10:53AM we did at that time. That was reversed with instructions by

10:53AM the Eleventh Circuit to resentence and to apply the two robbery convictions to the calculation, which would, we know, increase it by about nine and a half years, approximately; going from six years up to about 15 or 16, whatever.

Then that went to the Supreme Court, and the Supreme Court said it's a categorical approach. And Ms. Bryn has pointed out very carefully that she didn't ask them to go as far as they did and so on. She's made her argument on this point. But it came back.

Now we're in the posture here procedurally where we are -- I presume it is the government's position or I ask you to tell me what the government's position is. I presume you're saying: Judge, all you're called upon to do here in following the appellate decisions is to impose a sentence today that changes your sentence that you imposed at the original sentencing back -- when was it? 2017 or '16? Whenever that was. When was it? If you have that handy, Mr. Abrams, the date?

MR. ABRAMS: It was 2015 I believe, Judge.

THE COURT: 2015?

MR. ABRAMS: I'm sorry. April 28, 2016.

THE COURT: 2016?

MR. ABRAMS: Yes, sir.

THE COURT: So am I correct that one of the issues before me is simply a question of following whichever

10:55AM 1 interpretation the Court believes is the correct
10:55AM 2 interpretation of these factors; but to either impose a new
10:55AM 3 sentence of a 16-year sentence; or leave the sentence alone
10:56AM 4 as it was imposed in the original instance?
10:56AM 5 That's really all that's before me at this point.
10:56AM 6 Am I correct, or am I missing something?
10:56AM 7 MS. NATHAN: You're right, Judge. The Eleventh
10:56AM 8 Circuit vacated Mr. Stokeling's original --
10:56AM 9 THE COURT: Speak into the microphone. Yes?
10:56AM 10 MS. NATHAN: The Eleventh Circuit vacated Mr.
10:56AM 11 Stokeling's sentence and remanded the case for resentencing.
10:56AM 12 And in the Eleventh Circuit's opinion, they concluded that
10:56AM 13 the robbery convictions satisfied the elements clause.
10:56AM 14 That's the government's position.
10:56AM 15 THE COURT: Boiling that down is, simply saying:
10:56AM 16 Judge, apply the enhancement provisions and sentencing
10:56AM 17 guidelines and sentence him to the 180 months or whatever it
10:56AM 18 was. Isn't that what they said do; you know, in language we
10:57AM 19 can understand?
10:57AM 20 MS. NATHAN: Yes, Your Honor. You know, Your
10:57AM 21 Honor, sometimes they issue a mandate that says exactly what
10:57AM 22 to do, meaning: You must impose this sentence I suppose.
10:57AM 23 But in this case they said: Florida robbery
10:57AM 24 counts. Under the categorical approach, it counts. And we
10:57AM 25 vacate the sentence where Your Honor held that it didn't

10:57AM count and remand it for resentencing.

10:57AM So it's the government's position that when the
10:57AM Eleventh Circuit said Florida robbery counts and the Supreme
10:57AM Court said Florida robbery counts, and there is no -- despite
10:57AM the arguments made by defense counsel -- it's the
10:57AM government's position that Eleventh Circuit and Supreme Court
10:57AM law sitting here today state that Florida robbery counts,
10:57AM that Your Honor should impose a sentence of 15 years based on
10:57AM Mr. Stokeling's two prior convictions for Florida robbery and
10:57AM his prior serious drug offense conviction.

10:57AM THE COURT: And the guideline range, I believe, at
10:58AM that time was 180 months to 188 months, plus some other
10:58AM requirements of the law.

10:58AM That being true -- if that's correct, 180 months.
10:58AM Does that come out to the 15?

10:58AM MS. NATHAN: Yes, Your Honor, 15 years is
10:58AM 180 months. And Your Honor is correct for the guideline
10:58AM range.

10:58AM THE COURT: So the appellate court is sending it
10:58AM back. The only discretion the Eleventh Circuit gave me in
10:58AM their opinion, according to your analysis, would be between
10:58AM 180 and 188 months.

10:58AM Obviously, if this Court was of the original
10:58AM judgment that 180 months was too severe a sentence and did
10:58AM not impose it then, certainly I would not be reasonably

10:59AM thinking 188 months would fit things better and be a fairer
10:59AM sentence. We're talking about imposing a sentence at this
10:59AM point of that 180 months. That is basically your position.
10:59AM I mean you've got all the arguments about the words.
10:59AM And, of course, Mrs. Bryn and Mr. Abrams are
10:59AM arguing that, no, I do not have to impose that; I'm not
10:59AM required by the Eleventh Circuit mandate or the Supreme Court
10:59AM analysis to do that, and I can and should impose a sentence,
10:59AM which I did impose.
10:59AM Which I think you told me at the outset of this
11:00AM hearing was --
11:00AM MS. NATHAN: The original sentence, Your Honor, was
11:00AM 73 months.
11:00AM THE COURT: 73, yes, you did tell me. So basically
11:00AM that's all that's before me at this point as to one of those
11:00AM two factors, based on whether or not I conclude that the
11:00AM Supreme Court decision and the Appellate Court decisions are
11:00AM susceptible to the legal analysis and the legal reasoning
11:00AM that the defense counsel has submitted or not.
11:00AM So that's the issue. I'm getting back to the issue
11:00AM on this record; on this record. All right. Thank you. I
11:00AM wanted to get your position clear on that. Thank you.
11:00AM Ms. Bryn, I had earlier said that you would have an
11:01AM opportunity to reply if there is anything that you wish to
11:01AM add that you haven't covered. And I ask you the same

11:01AM question: Is my analysis of what is pending before me
11:01AM correct; that is, that it's one or the other, depending on
11:01AM which analysis I take?
11:01AM MS. BRYN: Yes, you are correct, Your Honor.
11:01AM THE COURT: All right.
11:01AM MS. BRYN: However, the basic principle of law that
11:01AM we're dealing with here is that a court cannot -- the holding
11:01AM of the case does not extend beyond the issues that were
11:01AM presented.
11:01AM So even though, yes, we have the Eleventh Circuit
11:01AM ruling in this case that a Florida robbery by force
11:01AM qualifies, or the Supreme Court ruling that a Florida robbery
11:01AM by force qualifies, neither the Eleventh Circuit, nor the
11:01AM Supreme Court in this case have specifically addressed the
11:01AM putting in fear issue.
11:02AM And I acknowledge, of course, that there is a
11:02AM precedent of this Court, the Lockley case.
11:02AM THE COURT: Well, how can we consider these other
11:02AM arguments about what was the original sentence? That was
11:02AM done. It's final. The time has long since passed for
11:02AM appealing from any of that. That's over with.
11:02AM The Eleventh Circuit has spoken, the Supreme Court
11:02AM has spoken, and they have simply said that enhancing, as the
11:02AM sentencing guidelines require, and as the law requires, that
11:02AM I made a mistake and: Judge, go ahead and enhance.

11:02AM I can't consider here today taking more testimony about another theory on drugs or anything else. It's just we're here on a plea of guilty and we're here on what we're here on and it seems to me that we can't --

11:02AM I have here a whole bunch of objections to the PSI that was -- that may have been -- the date isn't on it, but that may have been the original one, but I'm limited by this record. So the record is what it is as far as what occurred up to those points. So you're saying? Continue.

11:03AM MS. BRYN: This is what I'm saying: That a mandate needs to be construed very limitedly. And, in fact, there is an exception to the mandate that gives the Court discretion to consider issues if the prior decision was incorrect, and I have explained why -- and I'm happy to detail it further -- that the Lockley decision that was cited by the Eleventh Circuit in this case did not acknowledge Supreme Court law, and Your Honor is bound --

11:03AM THE COURT: Now the reasons I gave at the original sentencing -- and perhaps it's more appropriately asked of Mr. Abrams. As a matter of fact, I think I should.

11:04AM The question I'm about to ask is: What were my reasons other than, of course, obviously a conviction that the enhancement was so severe that it should not be applied, it was an unjust or an unreasonable sentence?

11:04AM And other than that -- which I understand -- Mr.

11:04AM Abrams, what was my announced reasoning of why we did not apply the enhancement?

MR. ABRAMS: Your Honor, you determined that the robbery conviction under Florida law did not qualify as a predicate conviction for the enhancement.

THE COURT: It was on the basic issue that went up?

MR. ABRAMS: Yes, sir.

THE COURT: All right. Thank you very much.

MS. BRYN: Thank you.

THE COURT: Did you wish to finish?

MS. BRYN: Yes. I'd just like to say, again, we are asking you, Your Honor, to impose the same sentence and reach the same conclusion; that the robbery conviction didn't qualify, but for a reason that you didn't consider at the last sentencing, but a reason that under the law is valid, under Supreme Court law because we understand that for an enhancement that does result in such severe penalties, a reasonable person standard.

The negligent standard is not a sufficient mens rea, and that is an issue that affects both the Florida robbery conviction here, because it can be committed only with a mens rea of negligence, a reasonable person standard, and it affects whether the Florida 89313 conviction, the drug offense is a serious drug offense for purposes of this enhancement because it also doesn't have or require any mens

11:06AM rea, even less than negligence; no mens rea. You need not have any knowledge that you're even distributing a drug in Florida. You can think it's baby powder. You don't have to know.

11:06AM And for that reason, to impose a 15-year enhanced sentence based on a prior conviction, which either has a mens rea of negligence when we're talking about the Florida robberies, or for the drug offense no mens rea, really is unjust. It's inconsistent with all of the Supreme Court precedents.

11:06AM And I will let you know that this case, the issue of the drug offense -- whether the Florida drug offense qualifies -- is about to go to the Supreme Court. The Solicitor General of the United States has agreed that the Supreme Court should consider this issue because there is a conflict among the circuits on this issue, and there is a conflict with Supreme Court law as well which dictates mens rea must be an element of any crime that will result in such a harsh penalty.

11:07AM So I ask Your Honor to consider that in choosing between these alternatives here. These are arguments that were not pressed in the same way at the original sentencing, they are not precluded by the Eleventh Circuit's decision or by the Supreme Court, and you have the discretion to consider these issues and the duty really to follow the Supreme

11:07AM Court's law on these issues about mens rea. Thank you, Your Honor.

11:07AM THE COURT: Thank you, Ms. Bryn. All right. The defendant will stand with his counsel at table there.

11:07AM Pursuant to the submission here today and after consideration of the United States Supreme Court in Stokeling v. United States, and the Eleventh Circuit opinion earlier pronounced in the same case, the Court believes it is the responsibility and duty to follow those, as they are rather plainly written as being a categorical approach to this matter, rejects the motions of the defense, denies the motions to resentence at the same original sentence that the Court felt was appropriate under the circumstances, and will impose the following sentence of 180 months, which is at the low end of the guideline range.

11:09AM The Court finds if it needs to again at this resentencing that the guideline range under the sentencing guideline range reflects a total offense level of -- it looks like that is 30, three zero, Criminal History Category V, which provides for a discretionary sentence within the range of 180 to 188 months.

11:09AM The Court has already expressed its view that the 180 months is very severe in this case, but it is the low end of the guideline range, and the Court exercised its discretion to impose the sentence of 180 months commitment to

11:09AM 1 the Bureau of Prisons or until otherwise discharged by due
11:10AM 2 process of law.
11:10AM 3 No fine is imposed, the Court finding you're unable
11:10AM 4 to pay a fine.
11:10AM 5 Upon your release from prison, you will serve a
11:10AM 6 term of two years supervised release, during which you are
11:10AM 7 ordered to report to the probation officer in the district
11:10AM 8 where you're released.
11:10AM 9 While on supervised release the defendant shall not
11:10AM 10 commit any other crimes, you are precluded from possessing a
11:10AM 11 firearm or other dangerous device, shall not possess any
11:11AM 12 controlled substance, shall cooperate in the collection of
11:11AM 13 DNA evidence, shall comply with the standard conditions of
11:11AM 14 supervised release in the Southern District of Florida, and
11:11AM 15 the probation office hereof; including the special condition
11:11AM 16 of permissible search, substance abuse treatment as noted in
11:11AM 17 Part G of the original presentence investigation report
11:11AM 18 entered some years ago, and impose the immediate payment of
11:11AM 19 the $100 assessment as required by law. Let me see here
11:11AM 20 about the special assessment. Yes.
11:11AM 21 You're advised you have a right to appeal from this
11:11AM 22 sentence. And if you wish to do so, you must appeal within
11:11AM 23 -- I believe it is 14 days or whatever the requirement is.
11:12AM 24 You have capable counsel that represented you from
11:12AM 25 the Federal Public Defender's Office, Mr. Abrams and Ms.

11:12AM Bryn. And I will instruct them to carefully consider it and make a determination after discussing with their client what they wish to do. But do not let the appellate period go by without being carefully observed and take an appeal if you deem it appropriate, but you must do so within that time. Is it 14 days?

MR. ABRAMS: Yes, sir.

THE COURT: 14 days. Now, other than that, I ask the defense: Other than all of the arguments that you have raised here this morning and earlier in the two courts -- the United States Supreme Court and the Eleventh Circuit, which you need not repeat here at this time -- do you have any objection? All of those arguments are fully preserved to the defendant to raise on appeal.

Do you have any objection to the sentence or the manner in which it was pronounced, Mr. Abrams?

MR. ABRAMS: Judge, one item I would add. From the original sentence you imposed, his federal sentence to run concurrently with state sentence F, as in Frank, 15-017823. We would ask that you again run this sentence concurrently with the state sentence.

THE COURT: Thank you for bringing that to my attention. Yes, it is my intent to make that same finding and ruling that it run concurrently with that sentence. Subject to law regulations about concurrency.

11:13AM But I recommend that be done. I urge the parties, the Bureau of Prisons, and the state authorities, to take that into effect and cause that to happen. I urge them to do that. That's granted.

11:13AM Other than that, any other objection? With the full understanding that everything you have said here today, this Court has ordered fully preserved to the defendant so that he has a right to bring it up on appeal if he wishes to do so.

11:14AM MS. BRYN: Your Honor, I just want to preserve one issue for appeal. Currently Eleventh Circuit law precludes --

11:14AM THE COURT: If my statement didn't do it, I'm directly saying it shall happen. Now, if the Appellate Court wants to reverse me on that, they can do so; but you will have to urge it or somebody will. And I don't know who is going to urge it, but what's the point? I make orders; now, they have effect. And if the Appellate Court wants to reverse me, of course they have the right to do that, and I respect that.

11:14AM But certainly a bland statement that says: I am protecting a defendant by saying that every argument he has made, he has this Court's full authority to not repeat it now. Not regurgitate it ad nauseam is what I am saying now.

11:15AM MS. BRYN: This is a different issue.

11:15AM THE COURT: Now, if there is something you want to tell me beyond that, what is it?

11:15AM MS. BRYN: I'll be very brief. There is currently a case before the Supreme Court called Rehaif versus United States. It is a case out of the Eleventh Circuit. So the Eleventh Circuit precedent is to the contrary.

11:15AM THE COURT: You didn't mention that in your argument to me?

11:15AM MS. BRYN: No. It's impossible for you to rule in our favor, and that's why I did not.

11:15AM THE COURT: Did you argue it here today? In all of the cases you argued, did you argue that case?

11:15AM MS. BRYN: No, I didn't.

11:15AM THE COURT: Why not? I gave you the opportunity.

11:15AM MS. BRYN: Because it is impossible for you to rule in our favor now. The law is contrary, and the law in every state --

11:15AM THE COURT: She wishes to add one case to her statement. Motion granted.

11:15AM Does the government have any objection to the sentence or the manner in which it has been imposed?

11:15AM MS. NATHAN: No, Your Honor.

11:15AM THE COURT: All right. The defendant is remanded to the custody of the United States Marshal.

11:15AM MR. ABRAMS: Thank you, Judge.

C E R T I F I C A T E

I, VERNITA ALLEN-WILLIAMS, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable JAMES LAWRENCE KING, one of the judges of said Court, at Miami, Florida, on March 7, 2019.

/s/Vernita Allen-Williams
Official Court Reporter
United States District Court
Southern District of Florida

11:16AM

A-9

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

DENARD STOKELING

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:15-20815-CR-KING-001

USM Number: 08673-104

Counsel For Defendant: Stewart G. Abrams, AFPD, Brenda Bren, AFPD
Counsel For The United States: Daya Nathan, AUSA
Court Reporter: Vernita Allen-Williams

The defendant pleaded guilty to Count One of the Indictment.
The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)(1) and 924(e)	Possession of a firearm and ammunition by a convicted felon	August 27, 2015	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
3/7/2019

JAMES LAWRENCE KING
United States District Judge

March 7, 2019

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **ONE HUNDRED EIGHTY (180) Months to run concurrent with State case no. F15-017823**.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a State of Florida facility.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **TWO (2) Years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$100.00		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$100.00** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution,(7) penalties, and (8) costs, including cost of prosecution and court costs.