

IN THE
Supreme Court of the United States

ALBERT NEDD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

Donna Lee Elm
Federal Defender

Adam Labonte, Counsel of Record
Research and Writing Attorney
Fla. Bar No. 115143
Federal Defender's Office
400 North Tampa St., Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-Mail: Adam_Labonte@fd.org

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Reply to the Brief of the United States in Opposition	1
A. The Eleventh Circuit Erred in Denying a Certificate of Appeal- ability	1
1. The Eleventh Circuit’s Decision Conflicts with <i>Welch</i>	1
2. Reasonable Jurists Could Also Debate Whether Florida Aggravated-Assault Convictions Constitute Violent Felonies Under the ACCA’s Elements Clause	2
3. The Eleventh Circuit Erred in Denying a COA.....	6
4. Petitioner’s Case Warrants a COA.....	7
B. Petitioner Alternatively Requests that this Court Hold his Petition Pending the Decision in <i>Stokeling</i>	9
Conclusion	10

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bennett v. United States</i> , 868 F.3d 1, <i>withdrawn and vacated as moot</i> , 870 F.3d 34 (1st Cir. 2017).....	4
<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017)	7
<i>Descamps v. United States</i> , 570 U.S. 254 (2013)	3, 4
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015).....	1, 2, 7, 8
<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	4
<i>Kramer v. United States</i> , 797 F.3d 493 (7th Cir. 2015)	7
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	3, 4
<i>Moncrieffe v. Holder</i> , 569 U.S. 184 (2013)	3, 4
<i>Nedd v. United States</i> , No. 17-13289 (11th Cir. Aug. 7, 2017).....	8
<i>Singh v. United States</i> , 375 F. App'x 671 (8th Cir. 2010).....	7
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	6
<i>Stokeling v. United States</i> , No. 17-5554, 138 S. Ct. 1438 (Apr. 2, 2018)	1, 9, 10
<i>Tompkins v. Secretary, Dep't of Corr.</i> , 557 F.3d 1257 (11th Cir. 2009).....	6
<i>Turner v. Warden Coleman FCI (Medium)</i> , 709 F.3d 1328 (11th Cir. 2013).....	3, 6
<i>United States v. Booker</i> , 240 F. Supp. 3d 164 (D.D.C. 2017).....	8
<i>United States v. Fields</i> , 863 F.3d 1012 (8th Cir. 2017).....	5
<i>United States v. Fogg</i> , 836 F.3d 951 (8th Cir. 2016).....	5
<i>United States v. Fritts</i> , 841 F.3d 937 (11th Cir. 2016).....	9

TABLE OF AUTHORITIES – cont’d

Cases	Page(s)
<i>United States v. Garza</i> , 371 F. App’x 481 (5th Cir. 2010), <i>cert. granted, judgment vacated</i> , 562 U.S. 1210 (2011)	6, 7
<i>United States v. Geozos</i> , 870 F.3d 890 (9th Cir. 2017).....	9
<i>United States v. Golden</i> , 854 F.3d 1256 (11th Cir. 2017), <i>cert. denied</i> , 138 S. Ct. 197 (2017)	3, 4, 6
<i>United States v. Harper</i> , 875 F.3d 329 (6th Cir. 2017)	5
<i>United States v. Lockley</i> , 632 F.3d 1238 (11th Cir. 2011)	9
<i>United States v. Middleton</i> , 883 F.3d 485 (4th Cir. 2018).....	5
<i>United States v. Rosales-Bruno</i> , 676 F.3d 1017 (11th Cir. 2012).....	3
<i>United States v. Verwiebe</i> , 874 F.3d 258 (6th Cir. 2017).....	5
<i>United States v. Windley</i> , 864 F.3d 36 (1st Cir. 2017).....	4
<i>Voisine v. United States</i> , 136 S. Ct. 2272 (2016).....	3, 4, 5
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016)	1, 2, 6, 7
Statutes	
18 U.S.C. § 921	4
18 U.S.C. § 924.....	<i>passim</i>
28 U.S.C. § 2255	1, 2

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

The district court sentenced Petitioner Albert Nedd to the 15-year mandatory-minimum sentence under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), based on the following Florida convictions: three aggravated-assault convictions, a robbery conviction, and a resisting-with-violence conviction. Doc. 48; PSR ¶ 22. Petitioner respectfully requests that this Court issue a certificate of appealability (COA), because reasonable jurists could debate, after this Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*), whether his aggravated-assault convictions qualify for the ACCA enhancement and his 28 U.S.C. § 2255 motion should have been granted.

After Mr. Nedd filed his petition, this Court granted certiorari to resolve whether Florida robbery constitutes a violent felony under the ACCA’s elements clause, 18 U.S.C. § 924(e)(2)(B)(i). *See Stokeling v. United States*, 138 S. Ct. 1438 (Apr. 2, 2018). Mr. Nedd alternatively requests that this Court hold his petition pending the decision in *Stokeling*.

A. The Eleventh Circuit Erred in Denying a Certificate of Appealability

1. The Eleventh Circuit’s Decision Conflicts with *Welch*

The government contends that the Eleventh Circuit’s decision to deny Petitioner Nedd a COA does not conflict with any decision of this Court. BIO at 6. The government is incorrect.

In *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016), this Court reviewed the Eleventh Circuit’s decision to deny a COA to a petitioner who had been sentenced

under the ACCA based (in part) on a prior Florida strong-arm robbery conviction. The Eleventh Circuit denied the COA before the Court issued its decision in *Samuel Johnson* invalidating the ACCA's residual clause. *Id.* After the Court decided *Samuel Johnson*, the Court concluded that reasonable jurists could debate whether Welch was entitled to 28 U.S.C. § 2255 relief. *Id.* at 1268. The Court reached this conclusion, even though the parties continued to dispute whether Welch's prior robbery conviction qualified as a violent felony under the ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i). *Id.*

Based on *Welch*, Petitioner should likewise be granted a COA. Petitioner has contended that, after *Samuel Johnson*, he no longer qualifies for the ACCA sentence. Although the parties have continued to dispute whether Petitioner's aggravated-assault convictions qualify as violent felonies under the ACCA's elements clause, *Welch* resolves that the COA should have been granted.

2. Reasonable Jurists Could Also Debate Whether Florida Aggravated-Assault Convictions Constitute Violent Felonies Under the ACCA's Elements Clause

After *Samuel Johnson* invalidated the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii), an aggravated-assault conviction can only qualify as a "violent felony" under the elements clause, § 924(e)(2)(B)(i) (including a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). Reasonable jurists could also debate whether Florida aggravated-assault convictions qualify as violent felonies under the elements clause.

In a concurring decision, the Honorable Jill Pryor opined that Eleventh Circuit precedent holding that Florida aggravated-assault convictions qualify under the elements clause is wrong. *United States v. Golden*, 854 F.3d 1256, 1257-60 (11th Cir.), *cert. denied*, 138 S. Ct. 197 (2017) (Pryor, J.) (disagreeing with *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328 (11th Cir. 2013)). Judge Pryor reached this conclusion based on prior Eleventh Circuit precedent requiring an examination of state law to determine the elements of Florida offenses, and this Court’s intervening decisions that require the same elements-based approach. *Id.* at 1258-60 (citing *United States v. Rosales-Bruno*, 676 F.3d 1017 (11th Cir. 2012); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 136 S. Ct. 2243 (2016)). Based on her review of Florida law, Judge Pryor determined:

Had *Turner* looked to the elements of aggravated assault under Florida law as interpreted by Florida courts, it would have been clear that the offense cannot qualify as a violent felony under the elements clause because a conviction can be obtained where the defendant merely was reckless.

Id. at 1260.

The government suggests that Judge Pryor’s concurrence has been undermined by this Court’s decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016) (BIO at 9-10), in one instance referring to Judge Pryor’s opinion as a “pre-*Voisine* concurrence.” BIO at 11. Judge Pryor, however, had this Court’s 2016 opinion in *Voisine*, as well as this Court’s opinions in *Moncrieffe*, *Descamps*, and *Mathis*,

available to her at the time of her 2017 concurrence when she concluded that the Eleventh Circuit was wrong. *See Golden*, 865 F.3d at 1257-60.

Moreover, the government's response only reinforces that a COA is warranted in Petitioner's case. *See* BIO at 9-10. In *Voisine*, this Court addressed the definition of a "misdemeanor crime of violence" in 18 U.S.C. § 921(a)(33)(A) and declined to apply this decision outside that context. 136 S. Ct. at 2280 n.4 (emphasis added). The ACCA, § 924(e), includes only prior felony convictions – i.e., a "violent felony." *See Johnson v. United States*, 559 U.S. 133, 141-42 (2010) (*Curtis Johnson*) (rejecting government's argument to "import into th[e] definition of 'violent felony' . . . a meaning derived from a common-law misdemeanor") (emphasis in original). Further, the ACCA is worded differently than § 921(a)(33)(A) and requires that the prior felony offense have as an element the use, attempted use, or threatened use of physical force "against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). For this reason, the First Circuit has declined to extend *Voisine* to the ACCA's elements clause and maintained that prior convictions resting upon recklessness do not qualify as violent felonies. *See* BIO at 10; *Bennett v. United States* 868 F.3d 1, 18-20 (concluding that Maine aggravated-assault conviction is not a violent felony), *withdrawn and vacated as moot*, 870 F.3d 34 (1st Cir. 2017) (vacated after petitioner passed); *United States v. Windley*, 864 F.3d 36, 37 n.2 (1st Cir. 2017) (endorsing and adopting the reasoning of *Bennett* to conclude that Massachusetts reckless assault and battery conviction is not a violent felony).

Other judges have similarly concluded that *Voisine* is inapplicable to the ACCA's elements clause (or the sentencing guidelines' identically-worded elements clause), and that intentional conduct is therefore required. *See United States v. Middleton*, 883 F.3d 485, 498 (4th Cir. 2018) (Floyd, Harris, JJ., concurring in part and concurring in the judgment) ("I would additionally conclude that the Supreme Court's recent decision in *Voisine* . . . does not control how we should construe the ACCA force clause."); *United States v. Harper*, 875 F.3d 329, 330-33 (6th Cir. 2017) (decision of three judges disagreeing with *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017), because the guidelines require that physical force be used "against the person of another").¹ After *Voisine*, the Eighth Circuit has taken an offense-specific approach, concluding (over one dissent) that a reckless drive-by-shooting prior conviction qualifies as a violent felony under the elements clause,² but that a Missouri assault conviction (which may rest upon reckless driving that results in injury) does not.³

These opinions thus demonstrate that jurists of reason could debate whether a prior conviction resting upon recklessness qualifies as a violent felony. The government does not dispute that Florida law establishes that a prior aggravated-assault conviction may rest upon recklessness. *See* BIO at 6-12. Accordingly, jurists

¹ Petitions for writ of certiorari are pending before this Court in *Harper* (No. 17-7613) and *Verwiebe* (No. 17-8413).

² *See United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016); *id.* at 957 n.2 (Bright, J., dissenting).

³ *United States v. Fields*, 863 F.3d 1012, 1015-16 (8th Cir. 2017).

of reason could debate whether Petitioner's prior convictions qualify as violent felonies for ACCA purposes.

3. The Eleventh Circuit Erred in Denying a COA

Based on the foregoing, "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). The Eleventh Circuit thus erred in denying Petitioner a COA.

The government nonetheless contends that the Eleventh Circuit did not err, because the court of appeals could rely upon its own binding precedent (*i.e.*, *Golden* and *Turner*) to deny the COA. BIO at 11-12. In support of this position, the government cites *Tompkins v. Secretary, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009), declining to issue a COA when binding precedent resolves an issue. BIO at 11. This Court, however, is not bound by the Eleventh Circuit's precedent and may grant a COA. *See, e.g., Welch*, 136 S. Ct. at 1263-64, 1268.

Moreover, the Eleventh Circuit's practice of declining to issue a COA based on its own binding precedent is illogical. That practice would foreclose a COA when the Eleventh Circuit has binding precedent that conflicts, as here, with opinions of other circuits or judges. *See* Reply Argument A.2, *supra*. Such divergent views, however, demonstrate that jurists of reason could reasonably debate the issue and therefore that the petitioner has met the COA standard. *See, e.g., United States v. Garza*, 371 F. App'x 481, 482 (5th Cir. 2010) (district court granted COA "[i]n light of a circuit split," where Fifth Circuit precedent foreclosed relief), *vacated and remanded*, 562

U.S. 1210 (2011); *Singh v. United States*, 375 F. App'x 671, 672 (8th Cir. 2010) (discussing that district court granted COA, although there was contrary Eighth Circuit precedent, in light of split with Eleventh Circuit). Indeed, even the dissenting view of an individual judge – such as Judge Pryor here – warrants a COA. *See, e.g., Kramer v. United States*, 797 F.3d 493, 502 (7th Cir. 2015) (discussing district court's granting of the COA).

Contrary to the government's assertion (BIO at 6-7, 11-12), the Eleventh Circuit's practice of denying a COA based on its own binding precedent is contrary to decisions of this Court. This Court has made clear that, to obtain a COA, a petitioner need only "make a preliminary showing that his claim was debatable." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017). Thus, a COA should be denied only where the district court's conclusion is "beyond all debate." *Welch*, 136 S. Ct. at 1264. Here, the conclusion is not "beyond all debate." *See* Reply A.1-2, *supra*. The Eleventh Circuit therefore erred in denying a COA.

4. Petitioner's Case Warrants a COA

The government lastly argues that Petitioner's case is a poor vehicle because he has not challenged the district court's procedural default ruling. BIO at 12. The district court's procedural default ruling, however, was based on the merits; the court concluded that, in light of the Eleventh Circuit elements clause precedent, "Petitioner still has at least three ACCA-qualifying convictions, and the [*Samuel*] *Johnson* decision does not provide a basis to overcome the procedural bar." Pet. App. A-2 at 4 (footnote omitted). As Petitioner has shown, before the court of appeals and this

Court, reasonable jurists could debate (and are debating) this conclusion. *See* Reply A.2, *supra*; Application for Certificate of Appealability at 6-10, *Nedd v. United States*, No. 17-13289 (11th Cir. Aug. 7, 2017). Accordingly, Petitioner has demonstrated that a COA is warranted.

Moreover, reasonable jurists could debate whether *Samuel Johnson* overcomes the procedural bar. For example, in *United States v. Booker*, 240 F. Supp. 3d 164, 170 (D.D.C. 2017), the district court concluded that the petitioner had met the cause-and-prejudice exception to the procedural default bar based upon *Samuel Johnson*. As for cause, the court determined that at the time of Booker's appeal, no one could have reasonably foreseen that this Court would change course and rule that the residual clause is unconstitutionally void. *Id.* The court further determined that Booker had been prejudiced by his ACCA sentence, which increased the statutory penalties to require a 15-year mandatory-minimum sentence. *Id.*

Reasonable jurists could thus debate whether *Samuel Johnson* overcomes the procedural bar here. At the time for filing Petitioner's direct appeal (2013), no one could have anticipated that this Court would change course and decide (in 2015) that the residual clause is void for vagueness. And, as Petitioner has demonstrated above, reasonable jurists could debate whether he qualifies for the ACCA enhancement and has been prejudiced. *See* Reply A.2, *supra*. Petitioner accordingly asks that this Court grant his petition.

B. Petitioner Alternatively Requests that this Court Hold his Petition Pending the Decision in *Stokeling*

In *Stokeling*, the Court will decide whether Florida robbery is a “violent felony” under the ACCA’s elements clause. The Eleventh Circuit has held that Florida robbery statute falls within the elements clause, but it has done so without analyzing state court decisions that make clear that a Florida robbery conviction may rest upon the minimal force that is needed to overcome a victim’s minimal resistance. The Ninth Circuit expressly disagreed with the Eleventh Circuit’s conclusion, after undertaking the analysis based upon Florida court decisions. *Compare United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2264 (2017), *with United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017).

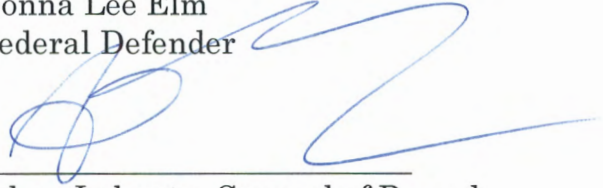
This Court’s resolution in *Stokeling* may affect the ACCA enhancement in Petitioner’s case. This Court’s analysis of the Florida statute, and decisions of the Florida courts addressing that statute, may require a reassessment – with a proper view of the Florida offense – whether a Florida aggravated-assault conviction qualifies as a violent felony. Indeed, as discussed above, Judge Pryor of the Eleventh Circuit has concluded that the Eleventh Circuit’s decision as to aggravated assault was wrongly decided in light of Florida law governing that statute. Moreover, this Court’s further analysis of the meaning of “physical force” may affect the conclusion of whether an aggravated-assault conviction qualifies as a violent felony. Accordingly, Petitioner respectfully asks this Court to hold his case pending the decision in *Stokeling*.

CONCLUSION

Based on his petition for a writ of certiorari and the foregoing reply, Petitioner Albert Nedd respectfully requests that this Court grant his petition or, alternatively, hold this case pending the decision in *Stokeling*.

Respectfully submitted,

Donna Lee Elm
Federal Defender



Adam Labonte, Counsel of Record
Research and Writing Attorney
Fla. Bar No. 115143
Federal Defender's Office
400 North Tampa St., Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-Mail: Adam_Labonte@fd.org
Counsel of Record for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

ALBERT NEDD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

CERTIFICATE OF SERVICE

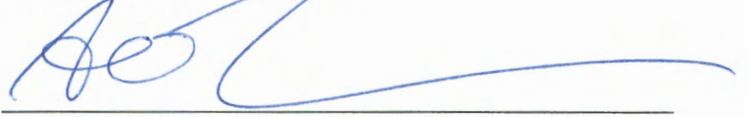
I HEREBY CERTIFY, pursuant to Supreme Court Rule 29.5(b), that on this 31st day of May, 2018, true copies of the Reply to Brief of the United States in Opposition were sent via Federal Express to the Clerk, United States Supreme Court, One First Street, N.E., Washington, D.C. 20543; and to the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

All parties required to be served have been served.

EXECUTED this 31st day of May, 2018.

Donna Lee Elm
Federal Defender

Rosemary Cakmis
Assistant Federal Defender
Chief, Appellate Division

A handwritten signature in blue ink, appearing to read 'A. Labonte', is written over a horizontal line.

Adam Labonte
Florida Bar No. 115143
Research and Writing Attorney
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-Mail: Adam_Labonte@fd.org
Counsel of Record for Petitioner