NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JIMMY LEE FRANKLIN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Brenda G. Bryn
Assistant Federal Public Defender
Counsel of Record
One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Does a Florida robbery conviction categorically require the use of "*violent* force" as defined in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) due to its "overcoming resistance" element, if that element – as interpreted by the Florida appellate courts – can be satisfied by such minor conduct as bumping the victim, unpeeling the victim's fingers to take money from his hand, or engaging in a tug-of-war over a purse?

2. (a) Is the "touch or strike" language in the Florida battery offense indivisible, under *Descamps* v. United States, 570 U.S. ___, 133 S.Ct. 2276 (2013) and *Mathis v. United States*, ___ U.S. ___, 136 S.Ct. 2243 (2015)? (b) If so, did the Eleventh Circuit err in holding a Florida conviction for battery on a law enforcement officer categorically requires the use of "*violent* force" as defined in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), given the Court's holding in *Curtis Johnson* that a battery by touching categorically does not meet the ACCA elements clause (c) If not, did the Eleventh Circuit err in considering undisputed factual allegations in the Pre-Sentence Investigation Report pursuant to the "modified categorical approach"?

3. Did the Eleventh Circuit err under *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003) and *Buck v. Davis*, 137 S.Ct. 759, 773-774 (2017) in denying Petitioner a certificate of appealability since both issues above are debatable among reasonable jurists?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

INTERESTED PARTIES ii

TABLE OF AUTHORITIES v

PETITION 1

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 14

A. The Eleventh and Ninth Circuits are intractably divided on whether a Florida robbery conviction categorically requires the *Curtis Johnson* level of "violent force," and certiorari has been granted to resolve the circuit conflict on that issue 14

B. The decision below is wrong because Fritts was wrong in holding Florida robbery is categorically an ACCA "violent felony." 17

C. The decision below is wrong because the Eleventh Circuit applies an erroneous COA standard 19

D. The decision below is wrong because the "touch and strike" language in the Florida simple battery statute is indivisible, and the least culpable conduct under the statute – a nominal touching – is categorically non-violent. At the very least, reasonable jurists could debate the divisibility of the Florida battery statute, and for that reason, whether a BOLEO conviction categorically qualifies as a "violent felony" within the elements clause 24

E. The decision below is wrong because, even if the "touch and strike" language were divisible, and the "modified categorical approach" were therefore permissible, that approach does not permit a court to consider undisputed factual allegations in a PSI to uphold an ACCA sentence. At the very least, reasonable jurists could debate the district court's application of the modified categorical approach in that regard 31

F. The instant case presents an ideal vehicle for certiorari on the BOLEO issues, and the applicable COA standard 35

CONCLUSION....35

APPENDIX

Order of the United States Court of Appeals Eleventh Circuit denying a certificate of appealability, *Jimmy Lee Franklin v. United States*, (11th Cir. Jan. 2, 2018) (No. 17-14495) A-1

Indictment (No. 06-20709-CR-CMA) A-2

Judgment in a Criminal Case A-3

Motion to Correct Sentence Under 28 U.S.C. § 2255 .... A-4

Report of Magistrate Judge Following Granting by 11th Cir. Re: Permission to File Successive Motion to Vacate A-5

Petitioner's Objections to the Report of Magistrate Judge A-6

Governments Objections to the Report of Magistrate Judge A-7

District Court's Order Denying 28 U.S.C. § 2255 Motion to Vacate and Denying Certificate of Appealability A-8

Petitioner's *Pro Se* Motion for Reconsideration A-9

District Court's Order Denying *Pro Se* Motion for Reconsideration A-10

TABLE OF AUTHORITIES

CASES:

Apprendi v. New Jersey,

530 U.S 466 (2000) 32

Barefoot v. Estelle,

463 U.S. 880 (1983).. 11-12

Benitez-Saldana v. State,

67 So.3d 320 (Fla. 2nd DCA 2011) 12, 15-16, 18

Beverly v. United States,

Slip op. (11th Cir. Nov. 22, 2017) (No. 17-11527),

pet. for cert. filed Feb. 8, 2018 (No. 17-7747)..20

Buck v. Davis,

___ U.S. ___, 2017 WL 685534 (U.S. Feb. 22, 2017) ....i, 11-12, 20-22

Davis v. United States,

Slip op. (11th Cir. May 10, 2017) (No. 17-10924),

pet. for cert. filed Aug. 8, 2017 (No. 17-5543)..20

Descamps v. United States,

___ U.S. ___, 133 S.Ct. 2276 (2013)..i, 6, 9, 24, 26, 30-35

Flores v. Ashcroft,

350 F.3d 666 (7th Cir. 2003) 18

Franklin v. United States,

Case No. 09-20046-CIV-Altonaga 4

Franklin v. Warden, FCC Coleman-Medium,

Case no. 5:11-cv-43-OC-38TBS..4

Franklin v. United States,

Slip op. (11th Cir. Jan. 2, 2018) (No. 17-14495) 1

Gordon v. Sec'y, Dep't of Corr.,

479 F.3d 1299 (11th Cir. 2007) 21

Hamilton v. Sec'y, Fla. Dep't of Corr.,

793 F.3d 1261 (11th Cir. 2015) 20-22

Hayes v. State,

780 So.2d 918 (Fla. 1st DCA 2001) 15, 18

In re Jimmy Franklin,

Case No. 16-12528-J (11th Cir. June 14, 2015) 6

In re Hires,

825 F.3d 1297 (11th Cir. 2016) 7

In re Welch,

___ F.3d ___, 2018 WL 1325013 (11th Cir. March 15, 2018)..35

Jaimes v. State,

51 So.3d 445 (Fla. 2010)..28

James v. United States,

550 U.S. 192 (2007)...28

James v. United States,

Slip op. (11th Cir. July 5, 2017) (No. 17-1109),

pet. for cert. filed Oct. 3, 2017 (No. 17-6271) 20

Johnson v. United States ("*Curtis Johnson*"),

559 U.S. 133 (2010)..i, 4-5, 7-10, 13, 16-18, 23, 28-32, 35

Johnson v. United States ("Samuel Johnson"),

___ U.S.___, 135 S.Ct. 2551 (2015)...5

Johnson v. State (“Winston Johnson”),

612 So.2d 689 (Fla. 1st DCA 1993) 15, 18

Lambright v. Stewart,

220 F.3d 1022 (9th Cir. 2000) 11

Lawrence v. Florida,

421 F.3d 1221 (11th Cir. 2005) 21

Mathis v. United States,

___ U.S. ___, 136 S.Ct. 2243 (2016).....................................i, 7, 13, 24-26, 29-30, 32, 35

Mayfield v. Woodford,

270 F.3d 915 (9th Cir. 2001) 12

Miller-El v. Cockrell,

537 U.S. 322 (2003)...i, 11-12, 20-22

Mims v. State,

342 So.2d 883 (Fla. 3rd DCA 1977)... 15-16

Moncrieffe v. Holder,

___ U.S. ___, 133 S.Ct. 1678 (2013)...6, 25

Montsdoca v. State,

93 So.157 (Fla. 1922).. 13-14

Parnell v. United States,

818 F.3d 974 (9th Cir. 2016) 15

Patterson v. New York,

432 U.S. 197 (1977)...28

Richardson v. United States,

526 U.S. 813 (1999)..28

Robinson v. State,

692 So. 2d 883 (Fla. 1997)..14

Rozier v. United States,

701 F.3d 681 (11th Cir. 2012) 5, 7

Sanders v. State,

769 So. 2d 506 (Fla. 5th DCA 2000) 6, 15, 18

Santiago v. State,

497 So. 2d 975 (Fla. 4th DCA 1986) 15

Shepard v. United States,

544 U.S. 13 (2005)...10, 33

Slack v. McDaniel,

529 U.S. 473 (2000).. 11, 19-20

State v. Baker,

452 So.2d 927 (Fla. 1984)...15

State v. Hearns,

961 So.2d 211 (Fla. 2007)..29, 31

State v. Weaver,

957 So.2d 586 (Fla. 2007)... 28-29

Stokeling v. United States,

pet. for cert granted, ___ S.Ct. ____,

2018 WL 1568030 (April 4, 2018) (No. 17-5554) 16, 19, 35

Tompkins v. Sec'y, Dep't of Corr.,

557 F.3d 1257 (11th Cir. 2009) 21

Turner v. Warden, Coleman FCI (Medium),

709 F.3d 1328 (11th Cir. 2013) 8

United States v. Birge,

830 F.3d 1229 (11th Cir. 2016) 30

United States v. Braun,

801 F.3d 1301 (11th Cir. 2015) 7, 34

United States v. Castleman,

572 U.S. __, 134 S. Ct. 1405 (2014).................... 18-19

United States v. Fritts,

841 F.3d 937 (11th Cir. Nov. 8, 2016),

cert denied, 137 S.Ct. 2264 (June 19, 2017)....................8-9, 12-14, 16-19, 22, 35

United States v. Geozos,

870 F.3d 890 (9th Cir. Aug. 29, 2017)....................12-13, 15-17

United States v. Green,

842 F.3d 1299 (11th Cir. Nov. 30, 2016),

vacated and amended, 873 F.3d 846 (11th Cir. Sept. 29, 2017),

pet. for cert. filed Dec. 20, 2017 (No. 17-7299). 8-9, 31

United States v. Gundy,

842 F.3d 1156 (11th Cir. 2016) 30

United States v. Howard,

742 F.3d 1334 (11th Cir. 2014) 25

United States v. Kaley,

579 F.3d 1246 (11th Cir. 2009) 30

United States v. Lockett,

810 F.3d 1262 (11th Cir. 2016) 24-26, 33

United States v. Lockley,

632 F.3d 1238 (11th Cir. 2011) 6

United States v. McCloud,

818 F.3d 591 (11th Cir. 2016) 10, 34-35

United States v. Ramirez-Flores,

743 F.3d 816 (11th Cir. 2014) 34

United States v. Vail-Bailon,

868 F.3d 1293 (11th Cir. Aug. 25, 2017) (en banc) 22-23

United States v. Wade,

458 F.3d 1273 (11th Cir. 2006) 5, 7

Welch v. United States,

___ U.S. ___, 136 S.Ct. 1257 (2016) 12, 22

STATUTES AND OTHER AUTHORITY:

U. S. Const. Amend. VI 32-33

18 U.S.C. § 922(g)(1) 2

18 U.S.C. § 924(e)(2)(B)(i) 2

18 U.S.C. § 924(e) 4

28 U.S.C. § 2241 4

28 U.S.C. § 2253 2

28 U.S.C. § 2253(c)(2) 11, 13, 19-20

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2255 .... 2, 6

28 U.S.C. § 2255(h) 5

Fed. R. Civ. P. 59(e) 10-11

Fla. Std. Jury Instr. (Crim.) 8.3 27

Fla. Std. Jury Instr. (Crim.) 8.11 27

Fla. Stat. § 784.03 3

Fla. Stat. § 784.04(1)(a)(1) 27-28

Fla. Stat. § 784.041 22

Fla. Stat. § 784.07 3

Fla. Stat. § 784.07(1)(a) 26

Fla. Stat. § 784.07(2)(a) 28

Fla. Stat. § 784.07(2)(b) 26

Fla. Stat. § 812.13 2-3

Fla. Stat. § 812.13 (1996) 2-3

Supreme Court Rule 13.1 2

Part III of the Rules of the Supreme Court of the United States 2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

No:

JIMMY LEE FRANKLIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JIMMY LEE FRANKLIN respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's order denying a certificate of appealability to Petitioner to appeal the district court's denial of his motion to vacate his enhanced ACCA sentence pursuant to 28 U.S.C. § 2255, *Jimmy Lee Franklin v. United States*, Slip op. (11th Cir. Jan. 2, 2018) (No. 17-14495), is included as Appendix A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals denying Petitioner a certificate of appealability to appeal the district court's denial of his motion to vacate pursuant to 28 U.S.C. § 2255, was entered on January 2, 2018. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

(e)(2) As used in this subsection – . . .

> **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, ... , that –
>
> > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another.

28 U.S.C. § 2253. Appeal

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceedings in which the detention complained of arises out of process issued by State court; or
>
> (B) the final order in a proceeding under section 2255

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Fla. Stat. § 812.13. Robbery (1996)

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree . . .

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree . . .

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree . . .

(3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

Fla. Stat. § 784.03 Battery

(1) A person commits battery if he:

> (a) Actually and intentionally touches or strikes another person against the will of the other; or
>
> (b) Intentionally causes bodily harm to an individual.
>
> (2) Whoever commits battery shall be guilty of a misdemeanor of the first degree . . .

Fla. Stat. § 784.07 Assault or battery of law enforcement officers

(2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer . . ., while the officer . . . is engaged in the lawful performance of his duties, the offense for which the person is charged shall be reclassified as follows:

> (a) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.
>
> (b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

STATEMENT OF THE CASE

On November 16, 2006, Petitioner was charged with being a previously convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1) and § 924(e). On August 8, 2007, he pled guilty to that offense, and on October 16, 2007, the district court sentenced him to the minimum mandatory term of 180 months imprisonment as an Armed Career Criminal, followed by 5 years supervised release. Petitioner's ACCA enhancement was predicated upon Florida convictions for a 1986 robbery with a firearm and aggravated assault; a 1987 battery of a law enforcement officer; and two 1996 attempted armed robberies. Without the ACCA enhancement, Petitioner faced an advisory Guideline range of 63-78 months imprisonment, and a statutory maximum term of 10 years imprisonment – which he has now overserved.

On January 2, 2009, Petitioner filed a first motion to vacate under 28 U.S.C. § 2255, arguing *inter alia* that his counsel had rendered ineffective assistance at his sentencing by failing to challenge his BOLEO conviction as an ACCA predicate, and since as a matter of law, it did not qualify. *Franklin v. United States*, Case No. 09-20046-CIV-Altonaga. The district court, however, denied that motion.

After this Court's decision in *Curtis Johnson v. United States*, 559 U.S. 133 (2010) ("*Curtis Johnson*"), Petitioner filed a petition pursuant to 28 U.S.C. § 2241 in the Middle District of Florida, arguing that his BOLEO conviction was not properly counted as a violent felony in light of that decision. *See Franklin v. Warden, FCC Coleman-Medium*, Case No. 5:11-cv-43-OC-38TBS. The district court, however, denied that petition, holding that Petitioner had not shown his "actual innocence" of the ACCA enhancement as was required to meet the "savings clause" and succeed on a § 2241 claim, for two reasons: First, *Curtis Johnson* permitted the court to use the

modified categorical approach to determine if a battery offense qualified as a violent felony under the ACCA elements clause, and when making that determination, then-controlling Eleventh Circuit precedent (*Rozier v. United States*, 701 F.3d 681, 686 (11th Cir. 2012) and *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006)) permitted the court to rely upon undisputed facts alleged in his Pre-Sentence Investigation Report ("PSI"). Here, the court found, the never-disputed facts alleged in the PSI as to Petitioner's BOLEO offense did not demonstrate the "slight" touching that *Curtis Johnson* found did not qualify as a crime of violence, but rather, a "physical altercation."[1] Second, the district court found, under then-existent precedent, BOLEO alternatively qualified as a violent felony under the ACCA's residual clause, and for that reason as well, Petitioner was properly sentenced.

On May 17, 2016, within a year of the Supreme Court's decision in *Samuel Johnson v. United States*, __ U.S. ____, 135 S.Ct. 2551 (June 26, 2015) ("*Samuel Johnson*") declaring the ACCA's residual clause unconstitutionally vague and therefore void, Petitioner sought authorization from the Eleventh Circuit to file a second or successor ("SOS") § 2255 motion challenging the legality of his ACCA sentence because his Florida armed robbery, attempted armed robbery, and aggravated assault convictions no longer qualified as "violent felonies" within the ACCA's elements clause. On June 14, 2014, the Eleventh Circuit found Petitioner had made the *prima facie* showing required by 28 U.S.C. § 2255(h), and authorized him to file a SOS

[1] The court noted that the PSI had alleged (in ¶32) that:

> On January 27, 1987, a Dade Correctional Officer (CO) was strip searching the defendant after a contact visit. The CO found a bag of suspect marijuana on the floor of the search area. The CO picked up the suspect marijuana and attempted to hand it to another CO, who was inside the control booth. The defendant grabbed the CO's hand in an attempt to retrieve the marijuana. The defendant became angry and broke the glass of the control booth on the sixth floor of the Dade County Jail. The defendant was subdued by other COs and was taken to the first floor holding cell. The marijuana was impounded.

motion. *In re Jimmy Franklin*, Case No. 16-12528-J, Order at 3 (11th Cir. June 14, 2015).

Accordingly, petitioner filed a successor motion to vacate his sentence pursuant to 28 U.S.C. §2255, arguing that in light of *Samuel Johnson* and the elimination of the ACCA's residual clause, it was now clear that his convictions for Florida armed robbery, attempted armed robbery, and aggravated assault were no longer "violent felonies" within the ACCA's elements clause, and he had been erroneously sentenced as an Armed Career Criminal. With particular regard to the robberies, he asserted that *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2011) and *Descamps v. United States*, 133 S.Ct. 2275 (2013) had abrogated the elements clause holding of *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) that an attempted robbery offense met the elements clause. He pointed out that Florida's standard robbery instruction confirmed that the second element for conviction – that "force, violence, assault, or putting in fear was used in the course of the taking" – was indivisible under *Descamps*. And, he argued, it was clear from Florida caselaw such as *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000), that the quantum of "force" necessary to "overcome a victim's resistance" in Florida will vary depending upon the degree of resistance by the victim; it would be slight if the resistance itself were slight; and the type of "violent, pain-causing, injury-risking force required by *Curtis Johnson*" was most definitely not required for conviction in every case.

The government responded that under settled Eleventh Circuit precedent, Petitioners' previously-counted armed robbery, attempted armed robbery, and aggravated assault convictions remained violent felonies under the ACCA's elements clause, and thus, he had suffered no due process violation. Moreover, while acknowledging that his Florida BOLEO conviction did *not* categorically qualify as a violent felony, the government argued that it nonetheless qualified under the modified categorical approach. The modified categorical approach was permissible

with regard to a BOLEO predicate, the government claimed, since the Eleventh Circuit had found the underlying battery statute to be divisible in *United States v. Braun*, 801 F.3d 1301 (11th Cir. 2015), in accordance with *Curtis Johnson*, 559 U.S. at 136-137, where this Court had held that battery could be proven "in one of three ways," and "explicitly referred to the three prongs of the battery statute as 'elements.'" As such, the government argued, those prongs were not mere "means" of committing the crime under *Mathis v. United States*, 136 S.Ct. 2243 (2016).

Finally, the government claimed – citing *In re Hires*, 825 F.3d 1297, 1302 (11th Cir. 2016); *Rozier v. United States*, 701 F.3d 681, 686 (11th Cir. 2012); and *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) – "[w]hen engaging in this modified categorical approach, the Court is permitted to rely on undisputed facts in the PSI, which are deemed admitted by a defendant." The government pointed out that Petitioner had not objected to ¶ 32 of his PSI, which alleged that in the January 27, 1987 offense he had grabbed the hand of a correctional officer in an attempt to retrieve a bag of marijuana that fell to the ground during a strip search, and thereafter broke the glass of the control booth. And, it noted with significance, Petitioner's § 2241 petition had been denied by a district judge in the Middle District of Florida, based upon those very facts which the court found did not show a "slight" touching, but instead, a "physical altercation." *Samuel Johnson*, the government argued, had not changed the analysis, and it urged the district court to find similarly here. Since "all of the Movant's convictions satisfy the elements clause of the ACCA," the government argued, "*Samuel Johnson* affords him no relief."

On May 5, 2017, the magistrate judge issued a report recommending denial of Petitioner's § 2255 motion. The magistrate judge found as a threshold matter, citing *Curtis Johnson*, 559 U.S. at 136-137 (which in turn had cited *State v. Hearns*, 961 So.2d 211, 218 (Fla. 2007)), that "[a] conviction for battery on a law enforcement officer **does not** qualify as a violent felony for

purposes of the ACCA." But even without the BOLEO conviction, the magistrate judge found, Petitioner's convictions for armed robbery, attempted armed robbery, and aggravated assault qualified him as an Armed Career Criminal. As to the robbery convictions, the magistrate noted that in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), the Eleventh Circuit had held that all Florida robbery convictions qualified as violent felonies within the ACCA elements clause. And as to the assault conviction, the Eleventh Circuit had held in *Turner v. Warden, Coleman FCI (Medium)*, 709 F.3d 1328, 1337-38 & n. 6 (11th Cir. 2013) that a Florida aggravated assault conviction with a deadly weapon was an ACCA violent felony. Since Petitioner's armed robbery, attempted armed robbery, and aggravated assault convictions remained valid ACCA predicate offenses, the magistrate concluded, he had not shown that in light of *Johnson* he was no longer an Armed Career Criminal. Accordingly, the magistrate judge recommended denial of the § 2255, and denial of a certificate of appealability.

Petitioner objected to the magistrate judge's findings that his two 1986 and two 1996 convictions were each separate ACCA predicates. Since the convictions on both dates each arose from a single criminal event, he explained, they were to be counted as a single conviction. And therefore he argued, even if the magistrate judge were correct that each of these charges still qualified as an ACCA violent felony (which he continued to dispute), he did not have three separately-countable predicates under the ACCA.

The government, while agreeing with the magistrate's recommendation that relief be denied, lodged its own objection to the finding that BOLEO did not qualify as a violent felony. On that point, the government pointed out, in the recent decision in *United States v. Green*, 842 F.3d 1299 (11th Cir. Nov. 30, 2016), the Court had held that the felony battery statute was divisible, citing *Curtis Johnson*, 559 U.S. at 136-137. *Green*, the government argued, confirmed

the correctness of its previous argument that simple battery was divisible into touching, striking, and causing bodily harm, and that the modified categorical approach applied. And indeed, it reiterated, under prior circuit precedent the modified categorical approach permitted the court to rely upon undisputed PSI facts in determining the offense of conviction.

In light of those objections, the district court reviewed the record *de novo*, and issued an order finding that Petitioner remained an Armed Career Criminal, but for a different reason than that stated by the magistrate judge. As a threshold matter, the district court agreed that neither the three 1986 convictions nor the two 1996 convictions arose from offenses "committed on occasions different from one another." Rather, the court found, each of these cases "must be counted as one conviction" for ACCA purposes. In order for the ACCA sentence to stand, "each of the three Florida cases must contain at least one conviction for a violent felony."

That standard was satisfied here, the court explained because the armed robbery and attempted armed robbery convictions categorically qualified as violent felonies under the ACCA's elements clause according to *Fritts*,[2] and the BOLEO conviction qualified as a violent felony under the modified categorical approach. On the latter point, the district court agreed with the government's objection, rejected the magistrate judge's contrary conclusion, and explained:

> Relying on *Curtis Johnson*, the Report summarily concludes battery on a law enforcement officer does not qualify as a violent felony under the ACCA. (See Report 18 (citing *Curtis Johnson*, 559 U.S. at 136-37) (other citations omitted)). But *Curtis Johnson* does not preclude use of a Florida battery conviction to support an ACCA enhancement if violent force was actually used in committing the battery. Instead, recognizing the battery statute is divisible and contains disjunctive elements, the Supreme Court determined courts should apply the modified categorical approach to decide "which version of the offense [the] defendant was convicted of." *Descamps*, 133 S.Ct. at 2284 (alteration added); *see Curtis Johnson*, 559 U.S. at 136.

[2] The court found it unnecessary to address the 1986 assault, since the 1986 armed robbery qualified and was part of the same criminal episode.

> Under the modified categorical approach, the Court may consider *Shepard* documents including charging documents, plea agreements, and transcripts of plea colloquies to determine which stator phrase describes Movant's conviction. *Curtis Johnson*, 559 U.S. at 144 (citations omitted). Undisputed statements in a presentence investigation report may also be considered. *United States v. McCloud*, 818 F.3d 591, 595-96 (11th Cir. 2016) (citations omitted).

Since Petitioner "did not object to the PSI and its summary of the battery offense," the court found, his BOLEO conviction constitutes "a third prior conviction for a violent felony, which, together with the convictions for armed robbery and attempted armed robbery, sustain his ACCA enhancement." The district court acknowledged that it had rejected Petitioner's constitutional claim on the merits, and denied him a certificate of appealability finding no debatable issue.

On August 10, 2017, Petitioner filed a timely *pro se* motion for reconsideration pursuant to Fed. R. Civ. P. 59(e), arguing that the court's finding that his BOLEO conviction qualified as a violent felony constituted "manifest error" after *Mathis v. United States*, 136 S.Ct. 2243 (2016), since the "touching or striking" language in Fla. Stat. § 784.03(1)(a) was "one element with two alternative means." As such it was "manifest error" to apply the "modified categorical approach," he argued, and also to rely upon undisputed PSI facts under that approach. Based on *Shepard v. United States*, 544 U.S. 13 (2005), and *Descamps* he explained, "undisputed statements describing the nature of [his] prior conviction could not be used when reviewing a *Johnson* claim[] under the modified categorical approach." There was no other evidence before the court to show that he did anything other than touch the officer. And indeed, he argued, even the PSI facts showed no more than a touching.

The next day, August 11, 2017, the district court issued an order denying the Rule 59(e) motion. The court found "no error with regard to the Court's use of the PSI," nor any other "manifest error." It asserted:

> [T]he Court properly relied on the PSI prepared for the Movant's sentence at issue in this habeas proceeding, not the PSI of an unrelated case. *See United States v. Ramirez-Flores*, 743 F.3d 816, 823 (11th Cir. 2014) (citation omitted) (considering undisputed facts in a presentence report in using modified categorical approach*);* *cf. United States v. Braun*, 801 F.3d 1301, 1305-06 (11th Cir. 2015) (holding a sentencing court may not rely on a presentence report from an unrelated proceeding and the district court erred in relying on the PSI prepared for a prior conviction for felony possession of a firearm).

On October 4, 2017, Petitioner appealed from the denial of his §2255 motion and his Rule 59(e) motion. And on October 16, 2017, Petitioner filed a motion for certificate of appealability ("COA") with the Eleventh Circuit, setting forth the "debatable among reasonable jurists" standard governing the decision to grant a COA, and multiple reasons why reasonable jurists could debate whether he was entitled to relief. As to the legal standard, Petitioner argued:

> A certificate of appealability ("COA") must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant need *not* show that he would win on the merits; he must "sho[w] that 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) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).
>
> The Supreme Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Under the "debatable among reasonable jurists" standard, the fact that there is adverse circuit precedent is not preclusive. If, for example, there is a split among various courts on the question, that will satisfy the standard for obtaining a COA. *See Lambright v. Stewart*, 220 F.3d 1022, 1028-29 (9th Cir. 2000).
>
> However, even a circuit split is not a prerequisite for a COA. Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court has been adamant that it will "*not* require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, *a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail*." *Miller-El*, 537 U.S. at 338 (emphasis added); *see also Buck v. Davis*, 137 S.Ct. l759, 774 (U.S. Feb. 22, 2017)(citing and following *Miller-El* on that point; "That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he

> failed to make a preliminary showing that his claim was debatable;" "[W]hen a reviewing court . . . inverts the statutory order or operations and 'first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage;" "*Miller-El* flatly prohibits" denying a COA based upon adjudication of the merits").
>
> Ultimately, any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001). According to the Supreme Court, a COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). That is not the case here.

Here, Petitioner argued, reasonable jurists would find the district court's ruling debatable in multiple respects. As a threshold matter, he noted, reasonable jurists not only "could" debate, but were hotly debating that that very moment whether any Florida robbery conviction (including armed or attempted robbery) categorically qualified as an ACCA predicate. Notwithstanding the Eleventh Circuit's holding in *Fritts* that all Florida robbery convictions categorically qualified as ACCA violent felonies because they required overcoming "victim resistance," the Ninth Circuit had harshly criticized the assumptions and lack of analysis in *Fritts*, and reached a directly opposite conclusion from the Eleventh Circuit on the Florida robbery statute, in *United States v. Geozos*, 870 F.3d 890 (9th Cir. Aug. 29, 2017). According to the Ninth Circuit, a Florida armed robbery conviction did *not* categorically qualify as an ACCA violent felony since Fla. Stat. § 812.13(1) – both by its text, and as interpreted by the Florida courts – did *not* require the use of "violent force." On the latter point, the Ninth Circuit noted with significance that in *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011), the court had upheld a Florida robbery conviction where the only force used was a "tug-of-war" over a purse. In the Ninth Circuit's view, the Eleventh Circuit in *Fritts* had "overlooked the fact that if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." 870 F.3d at 901

(also citing *Montsdoca v. State*, 93 So. 157, 159 (1922) ("[t]he degree of force used is immaterial")). Given the Ninth Circuit's criticism of the Eleventh Circuit in *Geozos*, Petitioner argued, the Eleventh and Ninth Circuit were intractably divided on whether a Florida robbery conviction categorically required the *Curtis Johnson* level of "*violent* force." With the recent decision in *Geozos*, he had clearly met the *Slack* standard.

But, he argued, he had also met that standard as to his BOLEO offense for multiple reasons. First, it was debatable among reasonable jurists whether the "touch or strike" language in the Florida simple battery statute – and therefore, the BOLEO statute – was divisible into two separate *offenses*, or whether "touch or strike" is a single indivisible element in all Florida battery statutes, which should have precluded application of the modified categorical approach here. As support, he cited Florida's standard battery instruction which did not require the jury to choose between "touching and striking," and thus, according to *Mathis*, these were simply alternative means not elements. *Curtis Johnson*, he argued, was not to the contrary. However, he argued, even *if* the statutory "touch or strike" language set forth alternative elements, reasonable jurists would still debate whether – after *Descamps* and *Mathis*, and consistent with the Sixth Amendment – it was permissible under the modified categorical approach for the district court to rely upon undisputed factual allegations in a PSI to uphold an ACCA sentence.

The Eleventh Circuit, however, refused to grant Petitioner a COA on any of these issues. On January 2, 2018, Judge Gerald B. Tjoflat issued a terse, one-line order denying him a COA – stating simply: "Appellant's motion for certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2)." No explanation was provided.

REASONS FOR GRANTING THE WRIT

A. The Eleventh and Ninth Circuits are intractably divided on whether a Florida robbery conviction categorically requires the *Curtis Johnson* level of "*violent* force," and certiorari has been granted to resolve the circuit conflict on that issue.

In *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), the Eleventh Circuit held that Florida robbery is categorically an ACCA violent felony. *Id.* at 943. The court, notably, did not analyze Fritts' armed robbery conviction any differently than an unarmed robbery conviction. According to the Eleventh Circuit, both convictions failed to qualify as an ACCA violent felony for the same reason: namely, according to *Robinson v. State,* 692 So.2d 883, 886 (Fla. 1997), overcoming victim resistance is a necessary element of any Florida robbery offense. 841 F.3d at 942-944. The court assumed from the mere fact of "victim resistance," and the perpetrator's need to use some physical force to overcome it, that the offense was categorically a violent felony.

According to *Fritts*, it was irrelevant that Fritts' own conviction pre-dated *Robinson* since *Robinson* simply clarified what the Florida robbery statute "always meant." 841 F.3d at 943. But while *Robinson* did clarify that a mere sudden snatching without any victim resistance is simply theft, not robbery, *id.* at 942-944, what *Robinson* did *not* clarify was how much force was actually necessary to overcome resistance for a Florida robbery conviction. Notably, decades before *Robinson*, in *Montsdoca v. State*, 93 So. 157 (1922), the Florida Supreme Court had held that the "degree of force" was actually "immaterial" so long as it was sufficient to overcome resistance. *Id.* at 159. And the Eleventh Circuit in *Fritts* cited *Montsdoca* as controlling as well. 841 F.3d at 943.

Although neither *Montsdoca* nor *Robinson* specifically addressed what degree of force is necessary to overcome resistance under the Florida robbery statute, the Florida intermediate appellate court have provided clarity as to the "least culpable conduct" under the statute in that

regard. Notably, several Florida appellate court decisions have confirmed post-*Robinson* that victim resistance in a robbery may well be quite minimal, and where it is, the degree of force necessary to overcome it is also minimal. Specifically, Florida courts have sustained robbery convictions under Fla. Stat. § 812.13 where a defendant has simply: (1) bumped someone from behind, *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001); (2) engaged in a tug-of-war over a purse, *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011); (3) peeled back someone's fingers in order to take money from his clenched fist, *Sanders v. State*, 769 So.2d 506, 507 (Fla. 5th DCA 2000); or (4) otherwise removed money from someone's fist, knocking off a scab in the process, *Winston Johnson v. State*, 612 So.2d 689, 690-91 (Fla. 1st DCA 1993).

As one Florida court paraphrased the Florida standard, a robbery conviction may be upheld in Florida based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986). And as another court stated, the victim must simply resist "in any degree;" where "any degree" of resistance is overcome by the perpetrator, "the crime of robbery is complete." *Mims v. State*, 342 So.2d 116, 117 (Fla. 3rd DCA 1977).

The Ninth Circuit recognized this in *United States v. Geozos*, 879 F.3d 890 (9th Cir. 2017), where it held that a Florida conviction for robbery, whether armed or unarmed, fails to qualify as a "violent felony" under the elements clause because it "does not involve the use of violent force within the meaning of ACCA." *Id.* at 900-901.[3] In so holding, the Ninth Circuit found significant that under Florida caselaw, "any degree" of resistance was sufficient for

[3] The *Geozos* Court correctly stated that whether a robbery was armed or unarmed makes no difference because an individual may be convicted of armed robbery for "merely *carrying* a firearm" during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. 870 F.3d at 900-9901 ("As an initial matter, the armed nature of each of Defendant's convictions does not make the conviction one for a violent felony;" citing *State v. Baker*, 452 So. 2d 927, 929 (Fla. 1984); following *Parnell v. United States*, 818 F.3d 974, 978–81 (9th Cir. 2016), which held that a Massachusetts conviction for *armed* robbery, which required only the possession of a firearm without using or even displaying it, does not qualify as a "violent felony" under the ACCA's elements clause))(emphasis in original).

conviction, and an individual could violate the statute simply by engaging "in a non-violent tug-of-war" over a purse. *Id.* at 900 (citing *Mims* and *Benitez-Saldana*).

Notably, the Ninth Circuit – in coming to a decision that it recognized was at "odds" with the Eleventh Circuit's holding in *Fritts* – rightly pointed out that the Eleventh Circuit, "in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force." *Id.* at 901 (citing *Montsdoca*, 93 So. at 159 ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance"))(emphasis in the original).

As is clear from *Geozos*, the Ninth and Eleventh Circuits' decisions directly conflict on an important and recurring question of Federal law: namely, whether the minimal force required to overcome minimal resistance under the Florida robbery statute categorically meets the level of "physical force" required by *Curtis Johnson v. United States*, 559 U.S. 133 (2010), for "violent felonies" within the ACCA elements clause. *See id.* at 140 (holding that in the context of a "violent felony" definition, "physical force" means "*violent* force," which requires a "substantial degree of force.") And indeed, just today, in *Stokeling v. United States*, ___ S.Ct. ___, 2018 WL 1568030 (April 2, 2018) (No. 15-7250), certiorari was granted to resolve that very issue.

The Court should hold the instant case pending its decision in *Stokeling*, and – if the Eleventh Circuit's decision following *Fritts* is vacated – vacate the decision below as well, and remand with directions that Petitioner be sentenced without the ACCA enhancement.

B. The decision below is wrong because *Fritts* was wrong in holding Florida robbery is categorically an ACCA "violent felony."

The Eleventh Circuit made unwarranted assumptions in *Fritts* as to the level of force required to overcome resistance. Not only did the court disregard the common law roots of this requirement; it disregarded that the Florida courts' interpretation of "overcoming resistance" to this day has been consistent with the approach at common law: the degree of force used is "immaterial." As the Ninth Circuit correctly noted in *Geozos*, the "Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." 870 F.3d at 901. In overlooking that key point, and failing to consult the intermediate appellate decisions illuminating the scope of Florida's "overcoming resistance" element, the court below committed a clear error of law under this Court's precedents that infected its ultimate conclusion.

The Eleventh Circuit has consistently ignored this Court's precedents, which confirm that not all "force" qualifies as "physical force" for purposes of the ACCA elements clause. Notably, when *Curtis Johnson* defined the term "physical force" as "violent force—that is, force capable of causing pain or injury to another person," 559 U.S. at 140, both before and after that 15-word definition, the Court made clear that "violent force" was measured by the "degree" or "quantum" of force. *Id.* at 139, 140, 142 (referring to "substantial degree of force" involving "strength," "vigor," "energy," "pressure," and "power"). While a mere nominal touching did not meet that standard, the only specific conduct *Curtis Johnson* mentioned as necessarily involving the requisite degree of "violent force" was a "slap in the face," since the force used in slapping someone's face would necessarily "inflict pain." *Id.* at 143. Beyond that single example of a

classic battery by striking, the Court did not mention any other category of conduct that would inflict an "equivalent" degree of pain or injury to categorically meet its new "violent force" definition.

Thereafter, in *United States v. Castleman*, 572 U.S. __, 134 S. Ct. 1405 (2014), in the course of adopting the broader common-law definition of "physical force" for a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), rather than *Curtis Johnson*'s "*violent* force" definition, the Court emphasized that that "domestic violence" encompasses a range of force broader than 'violence' *simpliciter*." *Id.* at 1411 n.4 (emphasis in original). Relevant here, the Court observed that "most physical assaults committed against women and intimates are relatively minor," and include "pushing, grabbing, [and] shoving." *Id.* at 1412 (citations omitted). The Court opined that such "[m]inor uses of force may not constitute 'violence' in the generic sense." *Id*. As one such "example," the Court pointed out that, in *Curtis Johnson*, it had cited "with approval" *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003), where the Seventh Circuit had noted that it was 'hard to describe . . . as 'violence'" "a squeeze of the arm [that] causes a bruise." *Id.*

That deliberate approval suggests that the dividing line between violent and non-violent "force" lies somewhere between a slap to the face and a bruising squeeze of the arm. On that view, certainly the "bump" (without injury) in *Hayes* would constitute similarly "minor" and thus non-violent force. The same is also true of unpeeling the victim's fingers without injury in *Sanders*. And even though the grabbing of an arm during a tug-of-war in *Benitez-Saldana* caused "an abrasion," and there was a "slight injury" to the victim's hand by the offender's grabbing money and tearing off a scab in *Winston Johnson,* just like the bruising squeeze to the arm discussed in *Castleman*, which likewise resulted in a minor injury, such conduct does not

constitute "violence" in the generic sense.

Finally, it is notable that Justice Scalia—writing only for himself—opined in *Castleman* that shoving, grabbing, pinching, and hair pulling would all meet the *Curtis Johnson* definition of "*violent* force," since (in his view) each of these actions was "capable of causing physical pain or injury." *Id.* at 1421-1422 (Scalia, J., concurring in the judgment). Significantly, however, no other member of the Court joined that view. That is so because such conduct—constituting more than an unwanted touch, but less than a painful slap to the face—entails only a minor use of force, not strength, vigor, or power. It thus lacks the degree of force necessary to qualify as violent. And because Florida robbery may unquestionably be committed by such conduct, it is not categorically a violent felony under the ACCA's elements clause.

The Court should hold Petitioner's case pending its decision in *Stokeling*, and – if the Court reverses the Eleventh Circuit's decision following *Fritts* – "GVR" for resentencing without the ACCA enhancement. However, even if the Court were to agree with the Eleventh Circuit that Florida robbery is categorically a violent felony, it should still find that the court below erred in failing to grant Petitioner a COA on the separate issue of whether his Florida BOLEO conviction was likewise an ACCA violent felony. As the district court correctly recognized, if *either* Petitioner's robbery convictions *or* his BOLEO conviction do not qualify as ACCA violent felonies, his enhanced sentence must be vacated.

C. The decision below is wrong because the Eleventh Circuit applies an erroneous COA standard.

In the one-line order issued by the Eleventh Circuit denying Petitioner a COA to appeal the district court's rulings that his robbery and BOLEO priors qualified as ACCA predicates, the Eleventh Circuit did not acknowledge that as interpreted by this Court in *Slack v. McDaniel*, a "substantial showing of a denial of a constitutional right" under 28 U.S.C. § 2253(c)(2) requires a

showing *only* that reasonable jurists could debate whether "the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further," 463 U.S. 880, 893 n. 4 (1983) (citation omitted) – not that Petitioner would win on the merits.

Although the Eleventh Circuit did not explain why it believed reasonable jurists could not debate whether either Petitioner's robbery or BOLEO convictions were countable ACCA violent felonies, it has explained in analogous cases raising the same Florida robbery challenge, that according to its precedent in *Hamilton v. Sec'y, Fla. Dept. of Corr.,* 793 F.3d 1261, 1266 (11th Cir. 2015), a COA may not be granted where binding circuit precedent forecloses a claim, and *Fritts* forecloses such a claim. *See Beverly v. United States*, Slip op. at 7-10 (11th Cir. Nov. 22, 2017) (No. 17-11527), *pet. for cert filed* Feb. 8, 2018 (No. 17-7747) ; *James v. United States*, Slip op. at 5-7 (11th Cir. July 5, 2017) (No. 17-1109) , *pet. for cert. filed* Oct. 3, 2017 (No. 17-6271); and *Davis v. United States*, Slip op. at 2-13 (11th Cir. May 10, 2017) (No. 17-10924), *pet. for cert. filed* Aug. 8, 2017 (No. 17-5543). Presumably, in denying the COA here, the Eleventh Circuit likewise followed its precedent in *Hamilton* in concluding that, since *Fritts* remained binding precedent, reasonable jurists could not debate whether Petitioner's Florida robbery conviction qualified him for the ACCA enhancement.

But indeed, in consistently denying COAs in Florida robbery cases based upon *Fritts* and *Hamilton*, the Eleventh Circuit has quite egregiously misapplied the COA standard. The rule in *Hamilton* is inconsistent with the COA standard articulated in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S.Ct. 759 (2017). In *Buck*, the Court confirmed that "[u]ntil a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). "At the COA stage, the only question is whether the

applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a baseless and wrong rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit's approach, COAs may not be granted where binding circuit precedent forecloses a claim "because reasonable jurists will follow controlling law." *Hamilton,* 793 F.3d at 1266 ("we are bound by our Circuit precedent, not by Third Circuit precedent, and circuit precedent "is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent") (citation omitted); *see also Tompkins v. Sec'y, Dep't of Corr.,* 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005).

The Eleventh Circuit's unique COA rule places too heavy a burden on movants at the COA stage. As this Court explained in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,"

> it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, as this Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch*, 136 S. Ct. at 1264. Here, that plainly is not the case with regard to whether Florida is a "violent felony," since the Ninth Circuit Court of Appeals has issued a decision that directly conflicts with *Fritts* on that very issue, and the Court has granted certiorari to resolve the debate between reasonable jurists on that issue.

As to whether Petitioner's Florida BOLEO conviction also qualified as a "violent felony," it is impossible to even speculate as to the basis for Judge Tjoflat's ruling that there was no possible debate on that issue. This was not a *Hamilton* issue, as indeed – in January 2018 when the COA was denied by the court of appeals – there was (and still is) no binding Eleventh Circuit "precedent" on whether BOLEO qualifies as a "violent felony" within the ACCA elements clause. While there was indeed a circuit decision that had resolved the divisibility question previously, namely, *United States v. Green*, 842 F.3d 1299, 1322-1324 (11th Cir. Nov. 30, 2016), that decision was vacated by the *Green* panel on September 29, 2016, at which time it issued a revised decision – avoiding the divisibility question entirely – in light of the intervening decision in *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. Aug. 25, 2017) (en banc), and the en banc court's case-dispositive holding that because the Florida felony battery offense under Fla. Stat. § 784.041 required the causation of great bodily harm, a conviction under that statute

categorically met the ACCA's elements clause.[4] *See United States v. Green*, 873 F.3d 846, 850, 868-869 (11th Cir. Sept. 29, 2017), *pet. for cert filed* Dec. 20, 2018 (No. 17-7299).

As recognized by the en banc court in *Vail-Bailon*, but ignored by Judge Tjoflat in the order below, the question of whether the "touch or strike" language in the underlying Florida simple battery statute is divisible remained an open question that the court "need not reach," in light of its categorical holding. *See id.* at 1297 n. 3 (noting that "[t]he majority in the now-vacated panel opinion in this case assumed that Florida Statute § 784.041 is divisible because it can be violated either by touching or striking," but that "[b]ecause we hold that Florida felony battery under § 784.041 categorically qualifies as a crime of violence, ***we need not reach the question whether the statute is divisible***")(emphasis added).

The en banc court in *Vail-Bailon* left open, to be resolved in a different case – such as the instant one – the broader question of whether the "touch or strike" language in all Florida battery statutes (including the BOLEO statute) is divisible, permitting application of the modified categorical approach, or rather, whether "touch or strike" is legally indivisible. *See Vail-Bailon, id.* at 1297 n.3. The ruling by the court below that an admittedly open issue of law was not even debatable among reasonable jurists, was clearly erroneous. For the reasons set forth in Part D below, reasonable jurists most definitely can debate whether the "touch or strike" language in the Florida BOLEO statute is divisible, and whether Petitioner's BOLEO conviction was an ACCA violent felony.

---

[4] Notably, in finding that the fact "[t]hat the 'touching' identified in the Florida felony battery statute actually 'caused' the significant injury called for by the statute logically suggests that the force used in administering the touch was necessarily 'capable' of causing that injury," *id.* at 1302, the *Vail-Bailon* court distinguished the offenses of simple battery and by extension, BOLEO. *Id.* at 1301 ("a statute requiring nothing more than a slight touch does not categorically qualify as physical force under the capability-based definition applied by *Curtis Johnson*, as opposed to a statute requiring a touch that is forceful enough to cause great bodily harm, which is what the Florida felony battery statute requires").

D. The decision below is wrong because the "touch and strike" language in the Florida simple battery statute is indivisible, and the least culpable conduct under the statute – a nominal touching – is categorically non-violent. At the very least, reasonable jurists could debate the divisibility of the Florida battery statute, and for that reason, whether a BOLEO conviction categorically qualifies as a "violent felony" within the elements clause.

In analyzing whether Petitioner's BOLEO offense qualified as an ACCA violent felony, the district court applied the modified categorical approach. But the district court's threshold divisibility ruling was wrong under both Eleventh Circuit and this Court's precedent. It directly contravened the Eleventh Circuit's reasoning in *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016), and this Court's confirming decision in *Mathis v. United States*, 136 S.Ct. 2243 (June 23, 2016). The district court did not attempt to grapple with the dictates of these controlling precedents in either its original order denying Petitioner's § 2255 motion, or its subsequent order denying his motion for reconsideration. The latter, notably, correctly argued that the court had committed a "manifest error" under *Mathis* by treating the BOLEO statute as divisible.

In *Descamps v. United States*, 133 S.Ct. 2276 (2013), this Court clarified that in determining whether an offense qualifies as an ACCA violent felony, courts must apply the "categorical approach" unless the offense is "divisible" into alternative elements. Only if some alternative elements constitute a "violent felony" while others do not, is the district court permitted to employ the "modified categorical approach," which allows it to consider the limited class of documents identified in *Shepard v. United States*, 544 U.S. 13 (2005), to determine the actual offense of conviction. If the offense of conviction is indivisible, however, the "modified [categorical] approach . . . has no role to play." *Descamps*, 133 S.Ct. at 2285-2286. The court must determine categorically – that is, by examining the elements of the offense, not its underlying facts – whether the actual offense of conviction qualifies as an ACCA "violent felony." *Id.* at 2283-2285. And under the categorical approach, the court is required to "presume

that the conviction rested upon nothing more than the least of the acts criminalized." *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014) (citing *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013)).

In *Lockett*, the Eleventh Circuit rightly acknowledged that the threshold divisibility "inquiry can't end with simply looking at whether the statute is written disjunctively." 810 F.3d at 1268. The key to "figuring out" whether a disjunctively-worded statute is divisible under *Descamps*, the Court explained, is whether the jury is "*required*" to find one of several "alternative elements beyond a reasonable doubt, rather than just convict under a statute that happens to list alternative definitions or alternative means for the same crime without requiring jurors to pick which one applies." 810 F.3d at 1267. "[T]he text of a statute," *Lockett* recognized, "won't always tell us if a statute is listing alternative means or definitions, rather than alternative elements." *Id.* at 1268. Rather, *Lockett* acknowledged, it is necessary to "'look to the state's courts to answer this question.'" *Id.* at 1270 (citing *Howard*, 742 F.3d at 1341). Generally, the Court noted in *Lockett*, the state's standard jury instructions "will make clear" whether a jury *must* find a statutory factor unanimously beyond a reasonable doubt. If so, that factor is an "element;" if not, it is an alternative "means" of committing a single, indivisible offense. *Id.* at 1269, 1271.

This Court's ensuing decision in *Mathis* validated *Lockett*'s analysis in this regard. For indeed, the Court was clear in *Mathis* that a statute that merely "spells out various factual ways of committing some component of the offense – a jury need not find (or a defendant admit) any particular item" – is indivisible. 136 S.Ct. at 2249. For that reason, the Court held, the disjunctively-worded Iowa burglary statute was overbroad and indivisible, since "a jury need not agree" on which of the alternative locations specified was burglarized. *Id.* at 2250. Notably, the

Supreme Court in *Mathis* confirmed the correctness of the Eleventh Circuit's mandate in *Howard* and *Lockett* that in determining whether a statutory alternative is an element or means, sentencing judges must follow state courts decisions that definitively answer that question. 136 S.Ct. at 2256. But if there is no decision that authoritatively answers the "element or means?" question, the Court acknowledged, jury instructions would definitely clarify whether a statutory alternative is an element the prosecutor must prove to the jury beyond a reasonable doubt, or rather, "only a possible means of commission" on which proof beyond a reasonable doubt is not required. *See* 136 S.Ct. at 2249, 2256-2257. *Lockett* and *Mathis* thus should have been instructive to the district court in determining whether the "touch or strike" language in the Florida BOLEO statute, Fla. Stat. § 784.07(2)(b), is divisible into separate elements, or rather is a single indivisible element.

Section 784.07(2)(b) raises a misdemeanor simple battery under § 784.04(1)(a) to a third degree felony, based upon the simple fact that the victim is a law enforcement officer. Notably, other than the special status of the victim, the elements of the Florida BOLEO offense are no different than those in a simple battery. That offense occurs when a person:

> 1. Actually and intentionally *touches or strikes* another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.

In *Descamps*' terms, the simple battery statute is unquestionably divisible into the two separate offenses set forth in the two numbered paragraphs above. However, after *Lockett* and *Mathis* the first offense is not *further* divisible into two additional offenses – touching and striking – simply because of the disjunctive wording of provision (1) above. For indeed, just as was the case with the disjunctively-worded statutes considered in *Lockett* and *Mathis*, Florida's standard jury instructions and its caselaw both clarify that "touch or strike" are simply alternative "means" of committing a single indivisible *element* of the offense.

It is clear from Florida's standard battery instructions that Florida juries are never instructed to choose between and agree upon the "touch" or "strike" alternatives. The standard jury instruction for simple battery provides:

> To prove the crime of Battery, the State must prove the following element beyond a reasonable doubt:
>
> *Give 1 or 2 as applicable.*
>
> 1. [(Defendant) intentionally touched or struck (victim) against [his] [her] will.]
>
> 2. [(Defendant) intentionally caused bodily harm to (victim)].

Fla. Std. Jury Instr. (Crim.) 8.3; *see* Fla. Stat. § 784.03(1)(a). The BOLEO offense is plainly a derivative of simple battery, and the standard jury instruction for BOLEO shows that its first element is indeed, simple battery:

> To prove the crime of Battery on a [Law Enforcement Officer]. . . , the State must prove the following four elements beyond a reasonable doubt:
>
> 1. (Defendant)
>
> [intentionally touched or struck (victim) against [his] [her] will]
>
> [intentionally caused bodily harm to (victim)] . . . .

Fla. Std. Jury Instr. (Crim.) 8.11.

These standard instructions make clear that both simple battery, and its derivative, BOLEO, each have only a *single* alternative first element. The two bracketed items represent alternative versions of that element, effectively creating two forms of simple battery. Critically, however, the first alternative element of simple battery, which is identical to the first element of BOLEO, is *not* itself further divisible. If "touching or striking" instead stated alternative "elements," the standard instructions for these offenses plainly would have bracketed those phrases, requiring the court to instruct the jury on the applicable alternative, and requiring the jury

to find that alternative beyond a reasonable doubt.[5] That would have created two distinct simple battery/BOLEO crimes: battery/BOLEO by touching, and battery/BOLEO by striking. But the standard instructions do no such thing. They make clear that there is only one form of simple battery under § 784.04(1)(a)(1), and only one form of BOLEO by "touching or striking" under § 784.07(2)(a). In both simple battery and BOLEO, the standard instructions indicate, touching and striking are simply alternative "means," not elements.

And indeed, Florida's standard battery instructions are quite consistent with Florida Supreme Court precedent. In *State v. Weaver*, 957 So.2d 586 (Fla. 2007), for instance, where the prosecution charged the defendant with battery by intentionally touching or striking a law enforcement officer, but the trial court instructed the jury on both the "touching or striking" alternative and the "causing bodily harm" alternative, the Florida Supreme Court repeatedly recognized that "touching or striking" and "causing bodily harm" constituted two "forms" of simple battery, with "touching or striking" representing a single "form." *See id.* at 587-89. Then, a few years later, summarizing *Weaver*, the Florida Supreme Court reiterated that "intentional touching or striking" is one "form" of simple battery. *Jaimes v. State*, 51 So.3d 445, 449 (Fla. 2010). That characterization could not have been correct if touching and striking were alternative elements.

Although the district court cited *Curtis Johnson*, 559 U.S. at 136, as support for its finding that "the battery statute is divisible and contains disjunctive elements," upon close examination,

---

[5] *See Patterson v. New York*, 432 U.S. 197, 2010 (1977)(the Due Process Clause requires the prosecution "to prove beyond a reasonable doubt all of ***the elements*** included in the definition of the offense of which the defendant is charged")(emphasis added); *Richardson v. United States*, 526 U.S. 813, 817 (1999)("[c]alling a particular kind of fact ***an 'element'*** carries certain legal consequences," and "[t]he consequence that matters for this case is that a jury in a federal criminal case cannot convict unless the jury unanimously finds that the Government has proved each element") (emphasis added).

the cited discussion in *Curtis Johnson* actually supports the argument that touching and striking are alternative means, not elements. Specifically, after reciting the alternative elements of the simple battery statute, the *Curtis Johnson* Court stated: "Because the elements of the offense are disjunctive, the prosecution can prove battery in one of three ways. It can prove that the defendant 'intentionally caused bodily harm,' that he 'intentionally struck' the victim, or that he merely 'actually and intentionally touched' the victim." 559 U.S. at 136-37 (internal citation and brackets omitted). That observation comports with the analysis above: Florida simple battery has a single, divisible element, and there are "three ways" (*i.e.*, means) of satisfying it, with touching and striking representing two of those three alternative "ways."

In making that observation, the Court cited *State v. Hearns*, 961 So.2d 211 (Fla. 2007). *Hearns* recited the two alternative elements of simple battery, and then stated that the offense could be committed by "three separate acts." *Id.* at 218. In the parlance of *Mathis*, that meant that simple battery has two alternative elements ("touching or striking" and "causing bodily harm"), comprised of three alternative means (touching, striking, and causing bodily harm). While admittedly, *Hearns* also loosely used the term "elements" to describe these alternatives, the Florida Supreme Court was not using that term in the strict *Mathis*-sense. At no time did it hold that touching and striking are themselves alternative "elements" that, as understood by *Mathis*, a prosecutor must selectively charge and prove, and a jury must unanimously find, beyond a reasonable doubt. Were it otherwise, *Hearns* would be irreconcilable with Florida's longstanding standard jury instructions, and with the Florida Supreme Court's post-*Hearns* decisions in *Weaver* and *Jaimes* stating that there are only "two forms" of simple battery (*i.e.*, 1) battery by touching or striking; and 2) battery by causing bodily harm. That reading of *Hearns* would be implausible, since it was decided two weeks before *Weaver*, with both opinions authored by the same jurist.

In any event, even if *Curtis Johnson* could be interpreted differently, that would not preclude Petitioner's indivisibility argument. For notably, the passage in *Curtis Johnson* cited by the district court was included only in the "background" section of the opinion. And therefore, it was dicta. The Court explained that, because the record in that case was devoid of any *Shepard* documents, it was required to assume that the battery offense there at issue involved only a touching. *Curtis Johnson*, 559 U.S. at 137. As a result, the divisibility of the simple battery statute was entirely irrelevant and unnecessary to the Court's analysis. Thus, even if the cited passage in *Curtis Johnson* could be read to suggest that touching and striking are alternative elements as the district court found, that passage is dicta and therefore not binding precedent. *See United States v. Birge*, 830 F.3d 1229, 1233 (11th Cir. 2016) (reiterating that "dicta is not binding on anyone for any purpose") (citation omitted); *United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (explaining that "dicta is defined as those portions of an opinion that are not necessary to decide the case," whereas "the holding of a case is . . . comprised of both the result of the case and those portions of the opinion necessary to that result") (citations omitted).

And indeed, not only was the cited passage in *Curtis Johnson* dicta, but it pre-dated by several years both *Descamps*, which cemented the fundamental concept of divisibility, and *Mathis*, which clarified the critical distinction between elements and means in a disjunctively-worded statute, and, for the very first time, definitively "instruct[ed] courts how to discern 'elements' from 'means.'" *United States v. Gundy*, 842 F.3d 1156, 1162 (11th Cir. 2016). Thus, *Curtis Johnson* could not have possibly conducted the divisibility analysis required by post-*Descamps*, now-binding precedent. Again, *Mathis* refined that analysis in a major way: no longer may courts assume that a statute is divisible merely because it is phrased disjunctively. Rather, courts must now determine whether the statutory alternatives are elements or means, and *Mathis*

offered direction on how to make that determination. As explained above, and argued in the pending petition for writ of certiorari in *Green*, No. 17-7299 at 34-37, a post-*Mathis* analysis here compels the conclusion that touching and striking are means, not elements.

At the very least, reasonable jurists could have found the district court erred in concluding that the Florida BOLEO statute was divisible, and that the "modified categorical approach" was permissible to determine if Petitioner had been convicted of striking rather than touching a police officer. Indeed, reasonable jurists not only "could" – but likely *would* – have found, based upon Florida's standard instructions and caselaw, that the "touch or strike" language in the statute sets forth a single indivisible element; that the court was required to apply the categorical approach and assume the offense was committed in the least culpable way; and that here the least culpable way of committing the offense was by a mere touching, which requires only the most nominal, *de minimis* contact. *Curtis Johnson*, 559 U.S. at 138 (citing *Hearns*, 961 So.2d at 218-219).

Since *Curtis Johnson* squarely held that a battery by touching does not require "physical force" within the meaning of the elements clause, that holding should have controlled this case. The district court should have held that the "modified categorical approach" had "no role to play" here, and just like the California burglary offense in *Descamps*, that the Florida BOLEO offense is categorically overbroad. 133 S.Ct. at 2285-2286. At the very least, reasonable jurists would strenuously debate its resort to the "modified categorical approach," for all of the above reasons.

E. The decision below is wrong because, even if the "touch and strike" language were divisible, and the "modified categorical approach" were therefore permissible, that approach does not permit a court to consider undisputed factual allegations in a PSI to uphold an ACCA sentence. At the very least, reasonable jurists could debate the district court's application of the modified categorical approach in that regard.

Even if the "touch or strike" language in the BOLEO statute were divisible as the district court found, reasonable jurists would still debate whether the district court nonetheless erred

under the "modified categorical approach" in basing its determination that Mr. Franklin was convicted of "striking" rather than "touching" upon undisputed factual allegations in his PSI.

Here, as in *Curtis Johnson*, the record was devoid of any approved *Shepard* documents establishing whether Petitioner's offense involved a touching or striking. And notably, in such circumstances, the Court has been adamant that the battery offense in question must be assumed to have involved only a touching, and the battery-by-touching offense analyzed categorically. *See Curtis Johnson*, 559 U.S. at 137 ("Since nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts, his conviction was a predicate conviction . . . only if "actually and intentionally touching" another person constitutes the use of "physical force" within the meaning of [the elements clause].")(internal citation and brackets omitted).

Reasonable jurists would find that the district court should have analyzed Petitioner's offense as a touching in a similar, categorical manner. For indeed, a federal court's reliance upon undisputed PSI "facts" to enhance a defendant's sentence beyond the otherwise applicable statutory maximum violates the Sixth Amendment. See *Descamps*, 133 S.Ct. at 2287-2288 (the categorical approach is predicated upon the Sixth Amendment since only an elements-based approach can "avoid the Sixth Amendment concerns that would arise from sentencing courts making findings of fact that properly belong to juries;" 133 S.Ct. at 2287-2288 (citing *Apprendi v. New Jersey*, 530 U.S 466, 490 (2000)); *Mathis*, 136 S.Ct. at 2252 (in order to comply with *Apprendi*, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense;" the federal judge "is prohibited from conducting such an inquiry himself; . . [h]e can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.")

In order to ensure that the federal sentencing judge does no more than find the fact of a prior conviction, the Court has strictly limited the information that the judge may consider. In *Shepard v. United States*, 544 U.S. 13, 15 (2005), the Court held that courts are "limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." What these so-called *Shepard* documents have in common is that they are "conclusive records made or used in adjudicating guilt." *Id.* at 21; *see id.* at 23 ("confin[ing]" the class of permissible documents "to records of the convicting court approaching the certainty of the record of conviction"). That accords with their function in the modified categorical approach – namely, to permit the court to identify the elements (and only the elements) for which the defendant was convicted. *Descamps*, 133 S.Ct. at 2284.

In light of the foregoing, reasonable jurists could and would find that relying on undisputed PSI "facts" to justify Petitioner's ACCA enhancement violated his Sixth Amendment rights. His federal PSI is not a *Shepard*-approved document. Not only is it not a "conclusive record[] made or used in adjudicating guilt," *Shepard*, 544 U.S. at 21, but it was not a part of the state criminal proceedings at all. Unlike true *Shepard* documents, a federal PSI does not communicate the elements of the offense for which the defendant was convicted; rather, it communicates only extraneous factual information and impermissibly encourages speculation regarding "what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct." *Descamps*, 133 S.Ct. at 2288. Thus, even if there was no objection to the factual allegations contained in the PSI, that has no constitutional significance. Instead, what matters is that the defendant did not invoke or waive his constitutional right to have a jury find these "facts" beyond a reasonable doubt during the earlier criminal proceeding. *Lockett*, 810 F.3d at 1272

("The constitutional question in ACCA sentencing isn't what facts went unchallenged during a plea hearing. It's whether the defendant knowingly and intelligently waived her Sixth Amendment right to a jury deciding each of the facts necessary to convict her. If a jury would not have been required to find a specific fact, a court can't later use this fact as the basis for longer imprisonment. 'The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances;'" citing *Descamps*).

The district court did not grapple with these Sixth Amendment issues at all, as indeed, the Sixth Amendment problem was not presented in any of the Eleventh Circuit "precedents" the district court purported to follow. Notably, *United States v. Braun*, 801 F.3d 1301 (11th Cir. 2015) predated *Mathis*, as did the two other post-*Descamps* decisions the district court cited in its order denying the Rule 59(e) motion as further support for its decision to rely upon undisputed statements in the PSI under the "modified categorical approach:" namely, *United States v. McCloud*, 818 F.3d 591, 595-596 (11th Cir. 2016) and *United States v. Ramirez-Flores*, 743 F.3d 816, 823 (11th Cir. 2014). *McCloud* relied upon undisputed PSI facts to address a completely different legal question (the "different occasions" question) under the ACCA. And *Ramirez-Flores* was a Guideline case, and as such, the district court in that case, unlike this one, was not enhancing the defendant's sentence above the statutory maximum. There was no Sixth Amendment problem to even consider in *Ramirez-Flores*. In short, none of these decisions should have had even persuasive value for the district court or the court of appeals, particularly after *Mathis* further solidified the Sixth Amendment underpinnings of the categorical approach.

Admittedly, after issuing the order denying the COA in this case, the Eleventh Circuit held

in a now-precedential decision – again, without considering *Mathis* – that under the modified categorical approach it could look at "the undisputed facts in the PS[I], 'in order to determine which of the multiple crimes listed in the statute the defendant was convicted of committing.'" *In re Welch*, ___ F.3d. ___, 2018 WL 1325013 at *5 (11th Cir. March 15, 2018)(citing *McCloud*). Accordingly, even if the Court were to GVR this case with directions to grant a COA on this issue, the Eleventh Circuit will be compelled by its post-*Mathis* precedent – *Welch* – to approve the district court's consideration of undisputed PSI facts under the modified categorical approach. Petitioner's only hope for relief, accordingly, is that the Court will reconsider this ill-founded rule in the Eleventh Circuit, and overturn it.

F. The instant case presents an ideal vehicle for certiorari on the BOLEO issues, and the applicable COA standard

If the Florida robbery issue is not resolved favorably to Petitioner in *Stokeling*, the instant case would present an ideal vehicle for the Court to not only resolve several important and recurring issues affecting the Florida battery predicates that have arisen in the wake of *Curtis Johnson*, *Descamps*, and *Mathis*, but also clarify the COA standard. The divisibility of the Florida battery statute, as well as the propriety of considering factual allegations in a PSI under the modified categorical approach, were issues fully preserved before both the district court and the court of appeals here. And again, determination that *either* Florida robbery *or* Florida BOLEO is not a qualifying ACCA predicate would be case-dispositive for Petitioner. Without even one of these predicates, his 180-month sentence could not stand.

CONCLUSION

The Court should hold this case pending resolution of the Florida robbery issue in *Stokeling*. If *Fritts* is overturned, it should GVR this case. Alternatively, the Court should grant certiorari on the BOLEO and COA issues.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Brenda G. Bryn*
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
April 2, 2018