No. ________________

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT VELEZ,

Petitioner,

VS.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT VELEZ

Reg. No. 21160-074

1000 Airbase Road

Pollock, Louisiana 71467

Petitioner ***pro se***

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Sixth Circuit committed a clear error in not granting a certificate of appealability.

2. Whether the Government's Evidence Against the Defendant on (Count 4) Violating 18 U.S.C. Section 924 (c) (1) (A) (iii) was Legally Sufficient to Sustain a Conviction.

3. Whether the Aiding and Abetting Theory as Charged to the Jury for the § 924(c) Offense was Constitutionally Sufficient.

4. Whether the District Court's Withdraw of Petitioner's Plea Agreement, Absent the Written Consent of All Parties, Constituted a Violation of Contract Law, Rendering the Decision an Abuse of Discretion.

5. Whether Defendant's Prior Convictions for Career Offender Purposes Categorically Qualify as Crimes of Violence in Light of Mathis.

LIST OF PARTIES

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

1. Robert Velez
2. United States of America

TABLE OF CONTENTS

A. The government was required to prove advance knowledge as an element of the offense.

B. The government failed to present any evidence that petitioner had advance knowledge that a firearm was going to be used.

III. WHETHER THE AIDING AND ABETTING THEORY AS CHARGED TO THE JURY FOR THE § 924(c) OFFENSE WAS CONSTITUTIONALLY SUFFICIENT

A. *Rosemond* is a new Supreme Court decision interpreting a federal statute that substantively defines a criminal offense, which automatically applies retroactively. Such interpretive decisions decides for the entire country how courts should have read the statute since it was enacted.

B. *Rosemond*, Applies Retroactively Because it Places Certain Conduct – Planning a Crime of Violence Without *Actual* (as Opposed to Imputed or Constructive) Knowledge that a Gun Would be Used – Beyond the Authority of the Criminal Law to Proscribe.

C. Actual Innocence is an Exception to Procedural Default in the § 924(c) Context.

IV. WHETHER THE DISTRICT COURT'S WITHDRAW OF PETITIONER'S PLEA AGREEMENT, ABSENT THE WRITTEN CONSENT OF ALL PARTIES, CONSTITUTED A VIOLATION OF CONTRACT LAW, RENDERING THE DECISION AN ABUSE OF DISCRETION

A. Plea agreements are contractual in nature, in interpreting them and enforcing them, courts are to use traditional principles of contract law.

B. Questions regarding the content of the plea agreement are questions of fact, which this court reviews for clear error.

C. In determining if the court misapplied the law or abused its discretion in allowing counsel to withdraw this plea, without the consent of all parties in writing. This Court must examine the plain language of the contract.

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES PAGE NUMBER

STATUES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to the petition and is un-reported.

The decision of the United States District Court for the Eastern District of Tennessee (Greeneville Division) appears at Appendix B to the petition and is reported at *Velez v. United States*, 2017 U.S. Dist. LEXIS 36949 (E.D. Tenn., Mar. 15, 2017) .

The opinion of the United States Magistrate Judge does not appear in this Appendix and is un-reported.

The order denying rehearing by the United States Court of Appeals appears at Appendix C to the petition and is reported at *Velez v. United States*, No. 17-5369, 2017 U.S. App. LEXIS 25269 (Dec. 13, 2017).

The decision of the Sixth Circuit Court of Appeals, denying petitioner's direct appeal appears at Appendix D and is reported at *United States v. Velez,* 485 Fed. Appx. 793, 2012 U.S. App. LEXIS 12957 (6th Cir.), 2012 FED App. 673N (6th Cir.) (6th Cir. Tenn., 2012).

JURISDICTION

The decision of the Court of Appeals was announced on September 1, 2017.

A timely petition for rehearing was denied by the United States Court of Appeals on December 13, 2017, and a copy of the order denying rehearing appears at Appendix C.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> That no one will be deprived of liberty without the 'due process of law'.

U.S. Const., amend. V

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to trial jury.

U.S. Const., amend. VI

18 U.S.C. SECTION 924(c) (1) (A) (iii) provides in pertinent part:

> that a person convicted of using and carrying a firearm during and in relation to a "crime of violence" must be sentenced to a minimum term of imprisonment of five years, to run consecutively to any other sentence imposed, if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> A crime of violence is defined under the § 924(c) force clause as any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," § 924(c)(3)(A), or alternatively under the § 924(c) residual clause as any felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," § 924(c)(3)(B).

18 U.S.C. § 924(c).

18 U.S.C. SECTION 2 provides in pertinent part:

> Whoever commits an offense against the United States or aids, avers, counsels, commands, induces or procures its commission, is punishable as a principal.; or whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2

STATEMENT OF THE CASE

1. Procedural History

The Petitioner was originally indicted by the grand jury for the Eastern District of Tennessee at Greeneville on August 12, 2008. [Doc. 3]. And arrested pursuant to that indictment on September 29, 2008. On November 14, 2008, the grand jury returned a Superseding Indictment. [Doc. 65]. On December 9, 2008, the grand jury returned a Second Superseding Indictment on which Indictment the Petitioner would ultimately be tried. [Doc. 142].

The Second Superseding Indictment contained 17 total counts and charged Petitioner with one count of conspiracy to distribute and possession with the intent to distribute oxycodone in violation of Title 21 U.S.C. Sections 841(a)(1), 841(b)(1)(C) (Second Superseding Indictment, Count 1); one count of using, carrying and discharging a firearm during and in relation to a drug trafficking crime (or aiding and abetting same) in violation of Title 21 U.S.C. Sections 2, 843(b), and 843(d)(1)(Second Superseding Indictment, Counts 5-8, 10); and three counts of a convicted felon in possession of a firearm in violation of Title 18 U.S.C. Section 922(g)(1) (Second Superseding Indictment, Counts 14-16). All remaining counts of the Second Superseding Indictment pertained exclusively to one or more of the eight co-defendants charged by that instrument. Count 16 of the Second Superseding Indictment would ultimately be dismissed by the Government, and so is of no consequence to this appeal.

On March 6, 2009, Petitioner signed a binding plea agreement with the United States in which he agreed to plead guilty to Count One—conspiracy to distribute and posses with intent to distribute oxycodone—in exchange for the United States dropping Counts Four, Five, Six, Seven, Eight, Ten, Fourteen, an Sixteen. By the letter of the contract, this plea became effective on March 9, 2009, after being signed by the last party member, James R. Dedrick, United States Attorney by and through Donald Wayne

Taylor, Assistant United States Attorney. [Doc. 228]. A change of plea hearing was scheduled for March 23, 2009, however (Counsel) Mr. Dan Smith filed a motion to "cancel [the] change of plea hearing" (without Petitioner's consent) and continued to trial on March 18, 2009. [Doc. 231]. The district court granted counsels motion to withdraw Petitioner from this contract and set a date for trial. [Doc. 232].

Notwithstanding, Petitioner proceeded to trial on the remaining counts against him contained in the Second Superseding Indictment on June 19, 2009 (at the time, the Petitioner was represented by counsel Dan R. Smith, Esq.; subsequently, Petitioner was represented by James J. Lonon, after Mr. Smith was relieved of his obligation by Petitioner on or about March 4, 2010). Trail lasted four days. Based on Florida convictions for armed burglary of a dwelling, and felony battery resulting in great bodily harm, permanent disability, or disfigurement, the United States Probation Office deemed Petitioner to be a career offender under §4B1.1 of the United States Sentencing Guidelines. Petitioner received a total offense level of thirty-six, criminal history category of VI, and resulting advisory Guideline range of 444 to 525 months' incarceration. The Court sentenced Petitioner to 444 months imprisonment.

2. Statement of Facts

Petitioner appealed, but the Sixth Circuit affirmed his conviction, sentence, and career offender designation. *See generally United States v. Velez*, 485 F. App'x 793 (6th Cir. 2012).[1] The Supreme Court denied Petitioner's request for a writ of certiorari on October 29, 2012. *Velez v. United States*, 568 U.S. 991, 133 S. Ct. 557, 184 L. Ed. 2d

[1] This opinion is unpublished, therefore a copy is provided at Appendix D.

362 (2012). Less than one year later-on July 3, 2013, Petitioner filed a § 2255 motion articulating nine grounds for relief [Doc. 470]. On March 15, 2017, the district court denied petitioner's motion.

SUMMARY OF ARGUMENT

I.

Petitioner suggests that his case is the atypical one meriting a Certificate of Appealability upon the issues presented herein, pursuant to 28 U.S.C. §2253(c)--Federal Rules of Appellate Procedure, Rule 22 [FRAP]—and 28 U.S.C. § 1651 ["The All Writs Act"]—under the liberal standard set forth by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) and *Buck v. Davis*, 137 S. Ct. 759 (2017).

A. This case concerns the standard of review for issuing a COA.

B. Where Petitioner raises a debatable claim of the denial of a constitutional right, a COA should issue.

C. When a court summarily denies a COA based on a plain error of law. Petitioner's rights are substantially affected.

II.

The basis of this claim is that Government did not meet its burden of proof that Petitioner had requisite foreknowledge that his accomplice to the underlying drug offense, would use or carry a firearm during the commission of the crime. Nor did the Petitioner have specific and purposeful intent to aid and abet this firearm offense.

A. The requisite elements for aiding and abetting a violation of 18 U.S.C.§ 924(c), during and in relation to a drug offense can be found in the Supreme Court case, *Rosemond v. United States*, __ U.S. __, 134 S. Ct. 1240, 188 L. Ed. 2d 248, which held, "[a]n active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun" and also held that the aiding-and-abetting conviction "requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime," *Id.* at 1248-49.

B. Prior to *Rosemond* and *Mathis*, the government could obtain a § 924(c) aiding and abetting conviction by proving that the defendant either knew or *should have known* that a firearm would be used in an underlying crime of violence. *United States v. Hicks*, 79 F. App'x 749 (6th Cir. 2003) (finding a sufficient factual basis for § 924(c) plea, despite defendant's claim that he did not know co-defendant was carrying a firearm until they entered the bank, where defendant continued to participate in the robbery after he saw co-defendant brandishing a gun).

C. When dealing with the compound nature of § 924(c), the prosecutor must show the use or carriage of a gun; so too he must prove the commission of a predicate (violent or drug trafficking) offense. *See Smith v. United States*, 508 U.S. 223, 228, 113 S. Ct. 2050, 124 L. Ed. 2d (1993).

III.

Rosemond and *Mathis* further undercuts Sixth Circuit Precedent Regarding the *Elements* for Aiding and Abetting a § 924(c) Offense.

A. The record will reflect that the aiding and abetting offense that Petitioner was tried on and later convicted, only required the Government to prove the Defendant (1) "knew his cohort used a firearm in the drug trafficking crime" and (2) "knowingly and actively participated in the drug trafficking crime".

B. In *Mathis v. United States*, 136, S. Ct. 2243 (2016), the Court reaffirmed the categorical approach and made a distinction between alternative elements, alternative means and what the Government is required to prove beyond a reasonable doubt in order to apply a statutory sentencing enhancement. The Supreme Court explained in *Richardson v. United States*, 526 U.S. 813, 119 S. Ct. 1707, 143 L. Ed. 985 (1999), that "[f]ederal crimes are made up of factual elements, which are ordinarily listed in the statute that defines the crime" and "[c]alling a particular kind of fact an 'element' carries...[t]he consequence that...a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Id.* at 817.

C. Where the trial court's decision was erroneous, it substantially affected Petitioner's constitutional rights. This overbroad principle of liability which lacks a requirement for "advance knowledge" and "specific and purposeful intent," is broader than the elements of the generic crime required for aiding and abetting a § 924(c) offense and therefore cannot support a § 924(c) conviction.

IV.

Petitioner bases this claim on the fact it was clear error for the trial court to GRANT counsel's motion to withdraw the plea agreement.

A. Plea agreements "are contractual in nature, in interpreting them and enforcing them, we are to use traditional principles of contract law." *United States v. Robinson*, 924 F .2d 612, 613 (6th Cir. 1991).

B. Questions regarding the content of the plea agreement are questions of fact, which this court reviews for clear error. *United States v. Wells*, 211 F .3d 988, 995 (6th Cir. 2000).

C. In order to determine if the court misapplied the law or abused its discretion in allowing counsel to withdraw this plea, without the consent of all parties in writing. This Court must examine what the parties must exercise as an option in exact accord with the contract terms.

V.

This claim is based on the fact Florida's armed burglary and felony battery fail to categorically qualify as a crime of violence in light of *Mathis*, invalidating petitioner's Career Offender designation.

A. In 1995, Florida's burglary statute criminalizes anyone who "unlawfully enters or remains in a structure or conveyance with intent to commit an offense therein, commits burglary. Fla. Stat. § 810.02(1). In 1996, the statute was amended to make it unlawful to enter or remain in a dwelling, structure, or a conveyance. Fla. Stat. § 810.02 (1996). Florida law defines "structure," as "a building of any kind, either temporary or permanent, which has a roof over it, together with the cartilage thereof." Fla. Stat. § 810.011(1) (emphasis added).

B. Under § 784.041, a person commits felony battery if he "(a) [a]ctually and intentionally touches or strikes another person against the will of the other; and (b) [c]auses great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1).

ARGUMENT

I. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMITTED A CLEAR ERROR IN NOT GRANTING A CERTIFICATE OF APPEALABILITY

A. A Prisoner Seeking a COA Must "Only" Prove That Reasonable Jurist Would Find the District Court's Assessments of the Constitutional Claims Debatable or Wrong.

"A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part. [Cite omitted]. We do not require Petitioner to prove, before the issuance of a COA, that some jurist would grant the petition for habeas corpus. Indeed, a claim can be dateable 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. As we stated [before], "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The Petitioner must demonstrate that reasonable jurist would find the district court's assessments of the constitutional claims debatable or wrong.'" [Cite omitted].

B. Because the Constitutional Claims Raised Herein Are Debatable the Court Erred in Not Issuing a COA.

Even under a more conservative view, Petitioner is entitled to the Issuance of the Certificate of Appealability on one or more of the grounds that follow:

(1) The United States Supreme Court has granted certiorari to review a 'similar question in another case:

(2) The Supreme Court or the relevant circuit court has identified the question as open, unresolved, or matter of disagreement among the different circuit courts: At least one Supreme Court Justice, expressing a view not rejected by a majority, has found merit in the claim:

(3) The court of appeals has decided to hear a claim en banc similar to a claim presented in the current appeal:

(4) The relevant circuit court or another district court in the district (or possibly, elsewhere) has granted a probable cause certificate based on the same or a similar issue:

(5) The same or similar issue is pending on appeal in the circuit in another case:

(6) The legal question presented by the Petitioner has never before been decided by the circuit court:

(7) There is a split on the question among different panels or different district judges in the same circuit:

(8) The same or similar issue has been resolved favorably to a petitioner by a state court, a district judge in another district, or a panel in another circuit:

(9) The issue has been the subject of differing or dissenting views among the state court judges who previously adjudicated the claim in another case:

(10) The district court applied a novel interpretation of the law or decided complex or substantial issues when adjudicating a claim

(11) The legal or factual rationale for the district court's ruling is unclear:

(12) The district court decision or prior adverse circuit rulings relied upon case law that has been questioned or undermined by more recent decisions of the circuit or Supreme Court:

(13) The proper adjudication of the claim may require additional evidentiary development:

(14) A reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter, given the actions of the district court or the state or the possible incompetence of Petitioner's counsel:

(15) The severity of the penalty, in conjunction with other factors, prevents a conclusion that the claims are frivolous:

(16) When a court summarily denies a COA based on a plain error of law. Petitioner's rights are substantially affected.

C. When a court summarily denies a COA based on a plain error of law. Petitioner's rights are substantially affected.

The Sixth Circuit Court of Appeals summarily denied several of the claims based on the determination that *Rosemond v. United States*, __ U.S. __, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014); and *Mathis v. United States*, 136, S. Ct. 2243 (2016) *do not* apply retroactively on collateral review. However, this position is: (1) in *clear error* of established precedent.

1. *Rosemond* and *Mathis* apply retroactively on collateral review.

As an initial matter, "[a]n old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review."' *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) (citing *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)). Further, a new rule is defined as a 'rule that...was not 'dictated by precedent existing at the tine the defendant's conviction became final."' *Id.* (quoting *Saffle v. Parks*, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990) (emphasis omitted)).

a. *Rosemond*

In *Rosemond*, the Supreme Court held that a defendant could not be found guilty as an aider and abettor on a § 924(c) charge unless the jury found that the defendant had advance knowledge that the physical perpetrator was in possession of a firearm.

In *Rosemond*, the Supreme Court was clear that its holding merely clarified existing precedent. *See Martinez v. United States*, No. 3:01-CR-229-L(02), 2014 U.S. Dist. LEXIS 93286, 2014 WL 3361748, at *2 (N.D. Tex. July 9, 2014) ("*Rosemond* did not announce a new rule...the Supreme Court was clear that its *Rosemond* holding was dictated by established precedent."); *United States v. Davis*, 750 F.3d 1186, 1192-93 (10th Cir. 2014) (*Rosemond*...holding was dictated by established precedent); *See Montana v. Cross*, 829 F.3d 775, 783-8 (7th Cir. 2016) (holding that *Rosemond* is retroactive), *petition for cert. filed*, (U.S. Dec. 16, 2016) (No. 16-775); *Kerr v. United States*, No. 5:08-CR-302-F-1, No. 5:14-CV-262-F, 2016 U.S. Dist. LEXIS 29412, 2016 WL 958202, at *3, n.4 (E.D.N.C. March 8, 2016) (holding that *Rosemond* is retroactive, as conceded by the Government); *Jackson v. United States*, No. 3:15-cv-00106-MOC, 2015 U.S. Dist. LEXIS 144832, 2015 WL 6455371, at *3 (W.D.N.C. Oct. 26, 2015) (same).

b. *Mathis*

Likewise, *Mathis*, which clarified *Descamps*, cannot be read as creating a new rule. *See Arazola-Galea*, 876 F.3d at 1259 (*Mathis* does not establish a new rule of constitutional law; rather, it clarifies application of the 'categorical' analysis to the [] ACCA []...Our subsequent decisions have confirmed the notion that *Mathis* is a clarification of existing rules rather than a new rule itself.") *id.* (citing *Mathis*, 136 S. Ct. at 2251 (resolving the case on the basis of the Court's "longstanding principles," and explaining that *Taylor* "set out the essential rule governing ACCA cases more than a quarter century ago"); *Martinez-Lopez*, 864 F.3d at 1039; *See Holt v. United States*, 843

F.3d 720 (7th Cir. 2016) (the Government conceding *Mathis* applies retroactively); *United States v. Potter*, No. CR 7:03-21-DCR, 2016 U.S. Dist. LEXIS 145244, 2016 WL 6134533, at *2 (E.D. Ky. Oct. 20, 2016) ("*Mathis*, as a clarification of existing law, applies retroactively on direct appeal and collateral review."); *Sutton v. Quintana*, 2017 U.S. App. LEXIS 20778 (6th Cir. 2017) (*Mathis* applies retroactively").

Because *Rosemond* and *Mathis* did not announce a new rule, but merely clarified existing precedent, the decisions apply retroactively on collateral review and the appeals court violated petitioner's Fifth and Sixth Amendment rights by summarily rejecting his motion for a COA based on the erroneous holding to the contrary.

II. WHETHER THE GOVERNMENT'S EVIDENCE AGAINST THE DEFENDANT ON (COUNT 4) VIOLATING 18 U.S.C. SECTION 924(c) (1)(A)(iii) WAS LEGALLY SUFFICIENT TO SUSTAIN A CONVICTION

The Court of Appeals summarily dismissed this issue based on the rationale that *Rosemond* and *Mathis* did not apply retroactively. For the sake of saving time and space, Petitioner incorporates the argument above concerning *Mathis* and the courts error in not finding it applies retroactively on collateral review. Throughout every stage of this appeal Petitioner has claimed *actual innocence* of aiding and abetting the § 924(c) offense, as now, on writ of certiorari. Therefore, this issue has been preserved and Petitioner is entitled to the cases favorably decided in the interim of this appeal, which, specifically address his claim, *e.g.*, *Rosemond v. United States*, __ U.S. __, 134 S. Ct. 1240, 188 L. Ed. 2d 248; and *Mathis v. United States*, 136, S. Ct. 2243 (2016).

A. The government was required to prove advance knowledge as an element of the offense.

Prior to *Rosemond* and *Mathis*, the government could obtain a § 924(c) aiding and abetting conviction by proving that the defendant either knew or *should have known* that a firearm would be used in an underlying crime of violence. *United States v. Hicks*, 79 F. App'x 749 (6th Cir. 2003) (finding a sufficient factual basis for § 924(c) plea, despite defendant's claim that he did not know co-defendant was carrying a firearm until they entered the bank, where defendant continued to participate in the robbery after he saw co-defendant brandishing a gun)[2]; *See,* Appendix D pp. 5-6) ("[t]he government had to prove that Velez "offered assistance or encouragement to his principal in the commission of a substantive offense." *United States v. Davis*, 306 F .3d 398, 409 (6th Cir. 2002) (quoting *United States v. Webber*, 208 F .3d 545, 553 (6th Cir. 2000)) (internal quotes and citations omitted). Aiding and abetting involves an act by a defendant, which contributes to the execution of a crime, and the intent to aid in its commission. *United States v. Lowery*, 60 F .3d 1199, 1202 (6th Cir. 1995)."

[2] "Assume for example, that an accomplice agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange...In such a circumstance, a jury is entitled to find that the defendant intended only a drug sale-that he never intended to facilitate, and so does not bear responsibility for, a drug deal carried out with a gun." *Rosemond*, 134 S. Ct. 1249-50.

B. . The government failed to present "*any*" evidence that petitioner had advance knowledge that a firearm was going to be used.

Here, Petitioner told his confederate to collect a debt and to *beat him up* if necessary, therefore, the government cannot prove, as required by *Rosemond*, that Petitioner possessed "advanced-knowledge that a confederate would use a gun during the crimes commission." 134 S. Ct. at 1243.

The requisite elements for aiding and abetting a violation of 18 U.S.C.§ 924(c), during and in relation to a drug offense can be found in the Supreme Court case, *Rosemond v. United States*, __ U.S. __, 134 S. Ct. 1240, 188 L. Ed. 2d 248, which held, "[a]n active participant in a drug transaction has the intent needed to aid and abet a §924(c) violation when he knows that one of his confederates will carry a gun" and also held that the aiding-and-abetting conviction "requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime," *Id.* at 1248-49. "[T]he intent must go to the specific and entire crime charged", so, for example in *Rosemond*, to the full scope of a § 924(c) violation-predicate drug crime plus gun use. *Id.* at 1248.

The Court explained, "[t]o aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as something that he wishes to bring about' and 'seek by his action to make it succeed.'" *Id.* (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619, 69 S. Ct. 766, 93 L. Ed. 919 (1949)). Moreover, while *Rosemond* dealt specifically with a jury instruction on the element of intent when aiding and abetting a § 924(c) offense.

As relevant here, codefendant Justin Horton testified that he confronted codefendant Brandon Smallman on July 21, 2008. The purpose of the confrontation was to get money from Smallman that was owed to the Defendant for a drug debt. Horton testified that he went to meet Smallman at the direction of the defendant and that he was prepared to *beat up* Smallman if necessary to get the money. Horton further testified that the defendant did not know that (he) Horton was carrying a firearm to meet with Smallman. Horton also testified that the Defendant was not present at the meeting with Smallman. Horton testified that he fired a shotgun into the air at this confrontation and then fired several rounds from a handgun in the direction of the fleeing Smallman. Horton testified that the Defendant had not requested that he take guns to the meeting and had no idea that shots would be fired. In fact, Horton called the Defendant from the scene of the shooting after Horton had already discharged the firearm and while currently giving chase to Smallman. It was not until this point Defendant became aware of the presence of a firearm and immediately made the legally relevant and moral choice to instruct his confederate to opt out of attempting to collect the money and "drive in the opposite direction." (Trial Transcript of June 18, 2009, pp. 48-107).

Here, the record makes clear that the Defendant was without "advance knowledge" that a firearm was going to be used. That is to say, "knowledge" which would have enabled him to make the relevant legal and indeed moral choice to walk away. *United States v. Cunningham* (2008, CA3 Pa) 517 F .3d 175 (reversing a conviction for aiding and abetting a § 924(c) conviction)); *United States v. Daniels*, 370 F .3d 689, 691 (7th Cir. 2004) ("Evidence doesn't support determination Defendant's idea to use gun or that he procured it"). *See United States v. Thomas*, 987 F .2d 697 (11th Cir. 1993) (finding evidence was insufficient to prove that the defendant aided and abetted co-

conspirators in using or carrying a firearm in violation of 18 U.S.C.§ 924(c); *United States v. Medina*, 32 F .3d 40 (2nd Cir. 1994)(same); *See also, United States v. Richardson*, 793 F .3d 612, 631, 2015 U.S. App. LEXIS 12018, 2015 WL 4174809, at *14 (6th Cir. 2015) (holding that a jury instruction without an "advance-knowledge requirement-violated *Rosemond*".).

III. WHETHER THE AIDING AND ABETTING THEORY AS CHARGED TO THE JURY FOR THE § 924(c) OFFENSE WAS CONSTITUTIONALLY SUFFICIENT

The Court of Appeals summarily dismissed this issue based on the rationale that *Rosemond* and *Mathis* did not apply retroactively. For the sake of saving time and space, Petitioner incorporates the argument above concerning *Mathis* and the courts error in not finding it applies retroactively on collateral review.

A. *Rosemond* is a new Supreme Court decision interpreting a federal statute that substantively defines a criminal offense, which automatically applies retroactively. Such interpretive decisions decides for the entire country how courts should have read the statute since it was enacted.

"[D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct 'beyond the power of the criminal law-making authority to proscribe,' necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Id.* Thus, the Court held that it would be "inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid." *Id.* at 621.

B. *Rosemond*, Applies Retroactively Because it Places Certain Conduct– Planning a Crime of Violence Without *Actual* (as Opposed to Imputed or Constructive) Knowledge that a Gun Would be Used – Beyond the Authority of the Criminal Law to Proscribe.

Rosemond, just like *Bailey*, applies retroactively because it places certain conduct – planning a crime of violence without *actual* (as opposed to imputed or constructive) knowledge that a gun would be used – beyond the authority of the criminal law to proscribe. To hold otherwise would impose "a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose..." *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). *See United States v. Greene*, No.14-c-431-08-CR-124, 2015 U.S. Dist. LEXIS 7871, 2015 WL 347833, at *2 (E.D. Wis. Jan. 23, 2015) (vacating judgment of conviction and applying *Rosemond* retroactively).

C. Actual Innocence is an Exception to Procedural Default in the §924(c) Context.

If Petitioner is correct on his present claim for relief, then he is actually innocent of his § 924(c) conviction, and his § 924(c) sentence is keeping him imprisoned unlawfully. *Cf. United States v. Adams,* 814 F.3d 178 (4th Cir. 2016) (finding the defendant actually innocent of his § 922(g)(1) conviction after a change in law converted the predicate offenses to non-felonies). *See also, Spencer v. United States,* 773 F.3d 1132, 1143 (11th Cir. 2014) (stating that the court "can collaterally review the misapplication of a § 924(c) because...that misapplication results in a sentence that exceeds the statutory maximum.").

IV. WHETHER THE DISTRICT COURT'S WITHDRAW OF PETITIONER'S PLEA AGREEMENT, ABSENT THE WRITTEN CONSENT OF ALL PARTIES, CONSTITUTED A VIOLATION OF CONTRACT LAW, RENDERING THE DECISION AN ABUSE OF DISCRETION

Contrary to the appeals court holding, this error is not contingent on whether counsel's motion was made with petitioner's consent, but rather if the acceptance of the withdraw was invalid by strict letter of the contract.

A. Plea agreements are contractual in nature, in interpreting them and enforcing them, courts are to use traditional principles of contract law.

It is hornbook law that a party must exercise an option in exact accord with the contract terms. Here, Petitioner avers that the Court's error, seriously affected his substantial rights as he received a longer sentence than he would have received had it not been for the Court's failure to adhere to the strict letter of the contract.

B. Questions regarding the content of the plea agreement are questions of fact, which this court reviews for clear error.

In order to determine if the court misapplied the law or abused its discretion in allowing counsel to withdraw this plea, without the written consent of all parties. This Court must examine the mutual intention of the parties to the instrument. It is amongst the recognized canons of construction of statutes, contracts, and grants that what is an much part of it as if expressed in so many words. *U.S. v. Babbitt*, 1 Black, 61, 17 L. Ed. 94. The rule is thus expressed in 2 Kent, Comm. (12th Ed.) § 555:

> "The mutual intention of the parties to the instrument is the great and sometimes the difficult, object of the inquiry, when the terms of it are not free from ambiguity." *Id.*

"If the act done by the party binding can only be done upon a corresponding act being done or allowed by the other party, an obligation of the latter to do or allow to be done the act or thing necessary for the completion of the contract will be necessarily implied." *Southwest Missouri Light Co. v. Joplin,* 101 F.23, 1900 U.S. App. LEXIS 5151 (8th Cir. 1900) (quoting *Black v. Woodrow,* 39 Md. 194; *U.S. v. Speed*, 8 Wall. 77, 19 L. Ed. 449).

D. In determining if, the court misapplied the law or abused its discretion in allowing counsel to withdraw this plea, without the written consent of all parties. This Court must examine the plain language of the contract.

As evident, [Doc. 228, Paragraph Fifteen] of the plea agreement explains, and the Petitioner understood the agreement to mean, "[t]his agreement becomes effective once it is signed by all parties...The defendant also understands that a violation of this plea agreement by the defendant does not entitle the defendant to withdraw the defendant's guilty plea in this case." Paragraph Sixteen goes on to say, "[t]his plea agreement constitutes the full and complete agreement and understanding between the parties concerning the defendant's guilty plea to the above-referenced charges...*The parties understand and agree that the terms of this plea agreement can be modified only in writing signed by all of the parties* and that any other promises, representations, and statements whether made before, contemporaneous, or after this agreement, are null and void." [Doc. 228] (emphasis added).

Turning to the plain language of the plea agreement at issue here is that the plea becomes effective after all parties have signed. Furthermore, this plea agreement could not be modified unless by writing and signed by all parties. The plain language of the contract barred the court from granting counsel's motion to withdraw the plea, after it had become effective. As the record reflects, counsel filed the motion to withdraw the plea without the writing or signatures of all parties. This is a *clear error of law* and an *abuse* *of discretion* whereas, the contract implied required such to modify the effective agreement.

In order to show that the court's abuse of discretion affected his substantial rights under the plain-error analysis, Petitioner claims that the abuse of discretion violated his Fifth Amendment constitutional rights such that the fundamental fairness and integrity of the judicial proceeding were compromised. Petitioner also claims that it affected the outcome of the district court proceeding. As noted above, Petitioner had already accepted the plea and the *contract implied* had already become effective. Had it not been for this error, there is a reasonable probability that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. 668 (1984),. To establish prejudice in this instance, it is necessary to show a reasonable probability that the result of the criminal process would have been more favorable due to a plea to a lesser charge or a sentence of less prison time. *Missouri v. Frye*, 566 U.S. 133, 132 S. ct. 1399, 1409, 182 L. Ed. 2d 379 (2012). Had Petitioner been sentenced to the plea in which he had accepted in writing, his sentencing exposure would have been capped at 20 years. Instead, he was sentenced to 444 months imprisonment. Nearly 17 years more time than he would have otherwise received.

V. WHETHER DEFENDANT'S PRIOR CONVICTIONS FOR CAREER OFFENDER PURPOSES CATEGORICALLY QUALIFY AS CRIMES OF VIOLENCE IN LIGHT OF *MATHIS*

The Court of Appeals summarily dismissed this issue based on the rationale that *Mathis* did not apply retroactively. For the sake of saving time and space, Petitioner incorporates the argument above concerning *Mathis* and the courts error in not finding it applies retroactively on collateral review.

A. Florida's armed burglary fails to categorically qualify as a crime of violence in light of *Mathis.*

In 1995, Florida's burglary statute criminalizes anyone who "unlawfully enters or remains in a structure or conveyance with intent to commit an offense therein, commits burglary. Fla. Stat. § 810.02(1). In 1996, the statute was amended to make it unlawful to enter or remain in a dwelling, structure, or a conveyance. Fla. Stat. § 810.02 (1996). Florida law defines "structure," as "a building of any kind, either temporary or permanent, which has a roof over it, together with the cartilage thereof." Fla. Stat. § 810.011(1) (emphasis added). Similarly, "dwelling" is defined "as a building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the cartilage thereof." Fla. Stat. § 810.011(2) (emphasis added). However, unlike the definition of a structure or dwelling, the definition of "conveyance" does not include a building at all, but rather means "any motor vehicle, ship, vessel, railroad car, aircraft, or sleeping car." Fla. Stat. § 810.011(3); *see also, In re Adams,* 825 F .3d 1283, 2016 WL 3269704 (11th Cir. June 15, 2016).

Under the categorical approach, Florida's burglary statute is not generic for various reasons. It includes "conveyances," as well as "structures," and the Supreme

Court's definition of generic burglary includes only "buildings" and "structures," not "conveyances." *See Taylor v. United States*, 495 U. S. 575, 599, 110 S. Ct. 2143. In addition, as previously stated, under the Florida burglary statute, "structure" is defined as "a building of any kind, either temporarily or permanent, which has a roof over it, together with the cartilage thereof." Fla. Stat. § 810.011(1). The inclusion of cartilage in this definition renders Florida burglary of a structure broader than generic burglary. *James v. United States*, 550 U.S. 192, 212, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007) ("We agree that the inclusion of cartilage takes Florida's underlying offense of burglary outside the definition of 'generic burglary' set forth in *Taylor*, which requires an unlawful entry into, or remaining in, 'a building or other structure.'"), *overruled on other grounds by Samuel Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

The United States Court of Appeals for the Eleventh Circuit held that a Florida burglary conviction under §§ 810.02(1)(b)(1) and 810.011(2) cannot serve as an ACCA predicate offense under the enumerated offense clause and indisputably does not implicate the elements clause. *See United States v. Esprit*, 841 F.3d 1235, 1241 (11th Cir. 2016). Petitioner makes the case that where Florida burglary fails to qualify as a crime of violence under the enumerated offense clause as it is overbroad, fails to qualify under the elements clause because it does not have as an element of violent-physical force, the statute must also fail under the residual clause because Florida burglary does not present a serious potential risk of injury in the ordinary case. *Cf. United States v. Carthorne,* 726 F.3d 503 (4th Cir. 2013) (finding ABPO did not present a serious potential risk of injury in the ordinary case).

B. Florida's Felony Battery Fails to Categorically Qualify as a Career Offender Predicate in light of *Mathis.*

In determining whether Florida' Felony Battery is a crime of violence under the elements clause, the crime must have as an element the "use, attempted use, or threatened use of physical force against a person. Under § 784.041, a person commits felony battery if he "(a) [a]ctually and intentionally touches or strikes another person against the will of the other; and (b) [c]auses great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1).

Under the categorical approach, "a court assesses whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Welch v. United States*, __ U.S. __, 136 S. Ct. 1257, 1262, 194 L. Ed. 2d 387 (2016). That requires the court to evaluate the least of the ways in which a given crime may be committed to determine whether it constitutes a "crime of violence." Here, section § 784.041 is divisible. *See Johnson v. United States*, 559 U.S. 133, 136-37, 130 S. Ct. 1265, 1269, 176 L. Ed. 2d 1 (2010) ("*Curtis Johnson*") (citing *State v. Hearns*, 961 So. 2d 211, 218 (Fla. 2007), for the proposition that, as relevant here, two of the three ways that the prosecution can prove a violation of Fla. Stat. § 784.03(1)(a)(1), which includes the same language as Fla. Stat. § 784.041(1)(a), include by showing that a defendant "intentionally str[uck]" the victim or that he merely "[a]ctually and intentionally touché[d]" the victim).

1. <u>Mere touching does not involve "the use, attempted use, or threatened use of physical force against the person of another."</u>

As relevant here, the first element of Florida's felony-battery requires that the offender have "[a]ctually and intentionally touche[d]...another person against the will of the other." Fla. Stat. § 784.041(1) (a). It is exactly the same as one of the three alternative ways that a person can commit the complete crime of simple battery in Florida under Fla. Stat§ 784.03(1) (a) (1).

Significantly, the Supreme Court has already held that Florida battery, when committed by actually and intentionally touching another against his or her will, does not satisfy the "elements clause." *See Curtis Johnson*, 559 U.S. 133, 130 S. Ct. 1265, 176 L. Ed. 2d 1. As the Supreme Court explained, "[t]he Florida Supreme Court has held that the element of 'actually and intentionally touching' under Florida's battery law is satisfied by any intentional physical contact, 'no matter how slight.'" *Id.* at 138, 130 S. Ct. at 1269-70 (quoting *Hearns*, 961 So. 2d at 218). Even "[t]he most 'nominal contact, 'such as a 'ta[p]...on the shoulder without consent,' ...establishes a violation." *Id.* (quoting *Hearns,* 961 So. 2d at 219).

2. <u>The element of "[c]aus[ing] great bodily harm, permanent disability, or permanent disfigurement" does not make felony battery under Fla. Stat. § 784.041 a "crime of violence" under the elements clause."</u>

As noted, the second element of felony battery under Fla. Stat. § 784.041 requires that the intentional touching from the first element have "cause[d] great bodily harm, permanent disability, or permanent disfigurement." Significantly, however, § 784.041 contains no requirement that the offender intentionally or knowingly cause bodily harm of any type. *T.S. v. State*, 965 So. 2d 1288, 1290 (Fla. 2007). So, a person can be guilty of felony battery in Florida under § 784.041 if the offender taps another person on the shoulder while that person stands near the top of stairs, and the person whose shoulder was tapped is startled or otherwise reacts in such a way that he falls down the stairs and suffers grievous bodily harm. Similarly, a person can be guilty of felony battery in Florida if he tickles another and that person jerks back and, for example, stumbles through an open window.

A crime that occurs in these ways does not qualify under the "elements clause" as a "crime of violence" under Supreme Court precedent. First, it does not involve "physical force" as the Supreme Court expressed its understanding of the phrase in *Curtis Johnson*, 559 U.S. at 140, 130 S.Ct. at 1271. But significantly, the Supreme Court then directed readers to *Flores v. Ashcroft*, 350 F .3d 666, 671-72. At that pincite, *Flores* explained that "violent" force is "the sort that is intended to cause bodily injury, or at a minimum likely to do so." *Flores*, 350 F .3d at 672 (emphasis added).

Second, *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004), also supports the conclusion that felony battery committed by mere touching does not constitute a "crime of violence" under the "elements clause" just because the results of the mere touching were great bodily injury. In *Leocal*, the Supreme Court considered whether the Florida crime of driving under the influence of alcohol ("DUI") and causing serious bodily injury, in violation of Fla. Stat. §316.193(3) (c) (2) satisfied the definition of "crime of violence" under, among other things, 18 U.S.C. § 16's "elements clause," the Court held that it did not have the mens rea requirement of violent, active crimes...." *Id.*

at 11, 125 S. Ct. at 383. As a result, DUI-even DUI involving negligence-does not satisfy the elements clause." *Id.* at 9-10, 125 S. Ct. at 382. And here, Section § 784.041 fares no better under the "elements clause" than DUI statutes at issue in *Leocal.*

Although one may a first glance assume that a statute by the name Felony Battery must constitute a crime of violence. After gauging in actual analysis of the statutes elements a court is lead to the opposite conclusion when the crime is committed by mere touching. For this reason, the Florida's Felony Battery fails to qualify as a crime of violence under the elements clause and likewise, does not present an "intentional" serious potential risk of injury in the ordinary case.

REASONS FOR GRANTING THE PETITION

- **This petition raises an issue wherein, this Court has granted certiorari to review a 'similar question in another case.**

- **This petition raises an issue wherein, the relevant circuit court has identified the question as open, unresolved, or matter of disagreement among the different circuit courts**

- **This matter was decided in a manner that is inconsistent with federal law and raises an important federal issue.**

- **There is a split on the question among different panels or different district judges in the same circuit.**

- **As this issue raises an important federal question, it should be promptly dissolved.**

- **A reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter, given the actions of the district court or the state or the possible incompetence of Petitioner's counsel**

- **This is an instance where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone.**

CONCLUSION

For the foregoing reasons, petitioner Robert Velez respectfully requests that this Court grant this writ of certiorari.

Respectfully submitted,

3/2/18 — Robert Velez

[date]

Petitioner's Signature

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