

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2026

THOMAS SHEELY, JR.

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

HECTOR A. DOPICO
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

APPENDIX

TABLE OF APPENDICES

Decision of the Eleventh Circuit Court of Appeals,

United States v. Sheely,

186 F.4th 1338 (11th Cir. Aug. 13, 2026) A-1

Decision of the Eleventh Circuit Court of Appeals,

United States v. Vail-Bailon,

838 F.3d 1091 (11th Cir. 2016) (en banc) A-2

Indictment,

United States v. Sheely,

No. 21-cr-80113-DMM (S.D. Fla. Aug. 11, 2021)..... A-3

Transcript of Resentencing,

United States v. Sheely,

No. 21-cr-80113-DMM (S.D. Fla. Nov. 21, 2024)..... A-4

Amended Judgment and Commitment,

United States v. Sheely,

No. 21-cr-80113-DMM (S.D. Fla. Nov. 21, 2024)..... A-5

A-1

186 F.4th 1338

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Thomas James SHEELY, Jr., Defendant-Appellant.

No. 24-13967

|

Filed: 08/13/2026

Synopsis

Background: Defendant pled guilty in the United States District Court for the Southern District of Florida, No. 9:21-cr-80113-DMM-1, [Donald M. Middlebrooks, J.](#), to being felon in possession of firearm and ammunition, and he appealed. The Court of Appeals, [2024 WL 4003394](#), affirmed in part, vacated in part, and remanded. On remand, the District Court, [Middlebrooks, J.](#), resentenced defendant, and defendant appealed.

[Holding:] The Court of Appeals, [Lagoa](#), Circuit Judge, held that defendant's Florida felony battery conviction qualified as "crime of violence" under Sentencing Guidelines' elements clause.

Affirmed.

[Rosenbaum](#), Circuit Judge, concurred and filed opinion.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (9)

[1] Criminal Law 🔑 [Review De Novo](#)

Court of Appeals reviews interpretation and application of Sentencing Guidelines de novo. [U.S.S.G. § 1B1.1 et seq.](#)

[2] Criminal Law 🔑 [Review De Novo](#)

Court of Appeals reviews district court's determination that prior conviction qualifies

as "crime of violence" de novo. [U.S.S.G. § 2K2.1\(a\)\(3\)](#).

[3] Courts 🔑 [Number of judges concurring in opinion, and opinion by divided court](#)

Under, prior-panel precedent rule, prior panel's decision remains binding on all subsequent panels unless and until it is overruled or undermined to point of abrogation by Supreme Court or by Court of Appeals sitting en banc.

[4] Courts 🔑 [Number of judges concurring in opinion, and opinion by divided court](#)

For Supreme Court decision to undermine panel precedent to point of abrogation, decision must be clearly on point and clearly contrary to panel precedent.

[5] Courts 🔑 [Number of judges concurring in opinion, and opinion by divided court](#)

If Supreme Court never discussed circuit precedent and did not otherwise comment on precise issue before prior panel, circuit precedent remains binding.

[6] Courts 🔑 [Number of judges concurring in opinion, and opinion by divided court](#)

Even if reasoning of intervening high court decision is at odds with prior appellate court decision, that does not provide appellate court with basis for departing from its prior decision; instead, to abrogate circuit precedent, Supreme Court or Court of Appeals en banc must demolish and eviscerate all fundamental props of prior-panel precedent.

[7] Courts 🔑 [Number of judges concurring in opinion, and opinion by divided court](#)

In addition to being squarely on point, doctrine of adherence to prior precedent also mandates that intervening Supreme Court case actually

abrogate or directly conflict with, as opposed to merely weaken, prior panel's holding.

[8] Courts 🔑 Number of judges concurring in opinion, and opinion by divided court

When Supreme Court decides case on fragmented basis and no single rationale explaining result enjoys assent of five Justices, its holding may be viewed as that position taken by those Members who concurred in judgments on narrowest grounds.

[9] Sentencing and Punishment 🔑 Offense or adjudication in other jurisdiction

Defendant's Florida felony battery conviction qualified as "crime of violence" under Sentencing Guidelines' elements clause for purpose of enhancing his sentence for being felon in possession of firearm and ammunition. 18 U.S.C.A. § 922(g)(1); Fla. Stat. Ann. § 784.041; U.S.S.G. § 2K2.1(a)(3).

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:21-cr-80113-DMM-1

Attorneys and Law Firms

Michael Brenner, Daniel Matzkin, Webb Daniel Friedlander, LLP, Atlanta, GA, George Espy Doty, III, DOJ-USAO Southern District of Florida, Miami, FL, Laura Thomas Rivero, U.S. Attorney Service - SFL, Miami, FL, for Plaintiff - Appellee.

Robert E. Adler, Federal Public Defender's Office Southern District of Florida, West Palm Beach, FL, Brenda Greenberg Bryn, Fort Lauderdale, FL, Hector Alejandro Dopico, Miami, FL, for Defendant - Appellant.

Before Rosenbaum, Lagoa, and Marcus, Circuit Judges.

Opinion

Lagoa, Circuit Judge:

***1340** Thomas Sheely, Jr., appeals his sentence of 84 months' imprisonment for possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Sheely contends the district court improperly enhanced his sentence under U.S.S.G. § 2K2.1(a)(3), arguing that after *Borden v. United States*, 593 U.S. 420, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021), Florida felony battery no longer qualifies as a crime of violence under the elements clause of the Sentencing Guidelines. This Court, however, in *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc), previously held that felony battery under Fla. Stat. § 784.041 is a "crime of violence" within the meaning of the Sentencing Guidelines' elements clause. See 868 F.3d at 1308.

After careful consideration of the parties' arguments and with the benefit of oral argument, we conclude that *Borden* did not abrogate *Vail-Bailon* and that *Vail-Bailon* still controls. We thus affirm Sheely's sentence.

I. FACTUAL AND PROCEDURAL HISTORY

On April 28, 2021, officers with the West Palm Beach Police Department responded to alerts of two firearm rounds being discharged. The officers spoke to a victim, who stated that someone had fired at him while he was inside his vehicle. Later that day, the officers took Sheely into custody, as his appearance and attire matched the description provided by the victim and another witness to the incident. The officers also found a firearm, two magazines, thirty rounds of ammunition, and two shell casings in the area. In addition to facilitating DNA testing on swabs collected from the firearm, officials conducted a criminal history check on Sheely. This confirmed that Sheely had previously been convicted of felony offenses: (i) felony battery and attempted robbery in Florida in 2006; (ii) manslaughter in Florida in 2006; (iii) felony battery on detention facility staff in Florida in 2008; and (iv) felon in possession of a firearm, carrying a concealed firearm, and possession of cocaine and marijuana in Florida in 2017.

On August 11, 2021, a federal grand jury indicted Sheely on one count for possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Sheely subsequently entered into a written plea agreement with the government and pleaded guilty to the charge in the indictment. Along with this agreement, Sheely stipulated to facts that supported his guilty plea, including details of his prior felony convictions. Sheely was referred to the

U.S. Probation Office for the preparation of a pre-sentence investigation (“PSI”) report.

Prior to sentencing, a probation officer prepared Sheely's original PSI report (the “2022 PSI”). The 2022 PSI noted that Sheely pleaded guilty to the one-count indictment charging him under § 922(g)(1). The 2022 PSI then detailed terms of the parties’ plea agreement,¹ in addition to the *1341 underlying facts about Sheely's criminal conduct. With this context, the probation officer began with a base offense level of 26 under § 2K2.1(a)(1), since the offense involved a “semiautomatic firearm that is capable of accepting a large capacity magazine” and Sheely had committed the offense after “sustaining at least two felony convictions of either a crime of violence or a controlled substance offense[.]” namely attempted robbery and manslaughter. The probation officer then applied a four-level enhancement under what was then § 2K2.1(b)(6)(B), because Sheely had used or possessed a firearm or ammunition in relation to another felony offense, “shooting into or throwing deadly missiles into [a] dwelling[],” in violation of Fla. Stat. § 790.19. This resulted in an adjusted offense level of 30. The probation officer then applied a three-level reduction for acceptance of responsibility, under §§ 3E1.1(a) and 3E1.1(b), resulting in a total offense level of 27.

Based on Sheely's criminal history, the probation officer calculated that the record amounted to 12 criminal history points, placing Sheely in the criminal history category of V. Ordinarily, with a total offense level of 27 and a criminal history category of V, the guideline imprisonment range would be 120 to 150 months. But, under 18 U.S.C. § 924(a)(2), the statutory maximum term was ten years; the 2022 PSI thus designated the guideline range at 120 months’ imprisonment.² See U.S.S.G. § 5G1.1(c)(1). And as the offense was regarded as a Class C felony, the guideline range for the supervised release term was set at one to three years. The probation officer did not identify any factors that would warrant a departure or a variance from these guidelines.

Sheely objected to the 2022 PSI, asserting that neither his prior manslaughter conviction nor his prior attempted robbery conviction qualified as a “crime of violence” and therefore should not factor into the base offense level calculation. The probation officer rejected Sheely's objection and concluded that both manslaughter and attempted robbery qualify as “crimes of violence,” given the underlying facts of Sheely's convictions.³

In response to Sheely's objection, the government maintained that the manslaughter and attempted robbery convictions both qualified as “crimes of violence” under § 4B1.2 and were properly included in the 2022 PSI's calculation of the base offense level. And the government also raised a separate objection,⁴ contending that the 2022 PSI overlooked a third conviction for felony battery, which it argued qualified as a “crime of violence” and would therefore increase Sheely's base offense level under § 2K2.1(a). For this position, the government relied on *United States v. Green*, 873 F.3d 846 (11th Cir. 2017), which, it noted, relied on *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc). In response, Sheely stated that *Vail-Bailon* did not address the *mens rea* issue later discussed in *1342 *Borden v. United States*, 593 U.S. 420, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021), which, he asserted, affects the definition of a “crime of violence” under § 4B1.2(a)(1). In *Borden*, the Supreme Court held that a criminal offense does not count as a “violent felony” under the Armed Career Criminal Act's (ACCA) elements clause if the offense requires only a *mens rea* of recklessness,⁵ 593 U.S. at 423, 141 S.Ct. 1817, and Sheely posited that Florida felony battery may be committed with recklessness or indifference to the risk of causing great bodily harm, *i.e.*, without the requisite *mens rea*, so it does not qualify as a “crime of violence.”

At sentencing, the district court accepted Sheely's plea and addressed the parties’ objections to the 2022 PSI. First, it overruled Sheely's objections regarding the two convictions for manslaughter and attempted robbery. Then, it turned to the government's argument that felony battery is a “crime of violence” and Sheely's prior conviction would be a basis to enhance his base offense level. Sheely's counsel reiterated his position that *Borden* “ha[d] called into question” *Vail-Bailon*. The district court concluded that *Vail-Bailon* remained binding precedent and the 2022 PSI should have included Sheely's felony battery conviction in the calculation of his base offense level. Based on its determinations, the district court sentenced Sheely to a term of 105 months’ imprisonment, to run concurrent with any sentence subsequently imposed in state court, followed by three years of supervised release. It entered its judgment that same day.

Sheely then appealed his conviction and sentence, arguing, in part, that the district court erred in using his three prior convictions for attempted robbery, manslaughter, and felony battery to enhance his sentence as those convictions did not qualify as “crimes of violence” under § 4B1.2. Though

we affirmed Sheely's conviction, we agreed that attempted robbery and manslaughter do not qualify as “crimes of violence” for purposes of § 4B1.2. *United States v. Sheely*, 2024 WL 4003394, at *1 (11th Cir. Aug. 30, 2024). We therefore vacated his sentence and remanded for resentencing, as the district court's reliance on these two convictions to enhance Sheely's sentence required vacatur. *Id.* In doing so, we took no position on the “contested question” of Sheely's remaining prior conviction for Florida felony battery. *Id.* at *6.

On remand, the district court ordered the parties to submit supplemental briefing and directed the U.S. Probation Office to prepare a revised sentencing packet with an updated guideline range calculation. Compared with the 2022 PSI, the revised PSI (the “2024 PSI”) assigned a base offense level of 22 under § 2K2.1(a)(3), now relying on only the felony battery conviction as a prior felony conviction for a “crime of violence.” The probation officer then applied the same enhancements and reductions as in the 2022 PSI, resulting in a total offense level of 23. Given Sheely's criminal history, which remained in criminal history category V, the 2024 PSI revised the guideline imprisonment range to 84 to 105 months.

The 2024 PSI's revised guideline range aligned with the range that the government proposed in its supplemental briefing. But the government noted that this recalculation hinged on how the district court resolved whether Florida felony battery qualifies as a “crime of violence” for the purposes of § 2K2.1(a). The government *1343 asserted that Sheely's felony battery conviction remained a “crime of violence,” since *Borden* did not conflict with nor abrogate *Vail-Bailon*, which still controlled. Sheely, by contrast, argued that Florida felony battery was not a “crime of violence” after *Borden*. Like the government, Sheely recognized that the district court would need to resolve this specific issue.

At the resentencing hearing following remand, the district court found that it remained bound by *Vail-Bailon* and that Sheely's prior conviction for Florida's felony battery qualified as a crime of violence under *Vail-Bailon*. Based on a guideline range of 84 to 105 months' imprisonment, the district court sentenced Sheely to 84 months' imprisonment, along with three years of supervised release.

Sheely timely filed the present appeal.

II. STANDARD OF REVIEW

[1] [2] We review the interpretation and application of the Sentencing Guidelines *de novo*. *United States v. Dupree*, 57 F.4th 1269, 1272 (11th Cir. 2023) (en banc). Accordingly, we review a district court's determination that a prior conviction qualifies as a “crime of violence” *de novo*. *United States v. Wilson*, 392 F.3d 1243, 1245 (11th Cir. 2004) (referencing *United States v. Fuentes–Rivera*, 323 F.3d 869, 871 (11th Cir. 2003)).

III. ANALYSIS

On appeal, Sheely argues that the district court erred in enhancing his sentence, pursuant to § 2K2.1(a)(3), based on his previous conviction for Florida felony battery under Fla. Stat. § 784.041.⁶ Sheely contends that Florida felony battery does not qualify as a “crime of violence” within the Sentencing Guidelines' elements clause after the Supreme Court's decision in *Borden*. Sheely, however, acknowledges that in *Vail-Bailon* this Court sitting *en banc* held that Florida felony battery categorically qualifies as a “crime of violence,” but he argues that the *en banc* majority did not consider the *mens rea* required for an elements clause offense, which *Borden* has since clarified.

[3] [4] [5] [6] [7] Under our prior-panel precedent rule, *Vail-Bailon* remains “binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.” *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). “For a Supreme Court decision to undermine panel precedent to the point of abrogation, the ‘decision must be clearly on point’ and ‘clearly contrary’ to the panel precedent.” *Edwards v. U.S. Att'y Gen.*, 97 F.4th 725, 743 (11th Cir. 2024) (emphasis in original) (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003)). Indeed, if the Supreme Court “‘never discussed’ our precedent and did not ‘otherwise comment[] on’ the precise issue before the prior panel, our precedent remains binding.” *United States v. Dubois*, 139 F.4th 887, 892–93 (11th Cir. 2025) (alteration in original) (quoting *United States v. Vega-Castillo*, 540 F.3d 1235, 1238 (11th Cir. 2008)). “Even if the reasoning of an intervening high court decision is at odds with a prior appellate court decision, that does not provide the appellate court with a basis for departing from its prior decision.” *Vega-Castillo*, 540 F.3d at 1237.

Instead, to abrogate our precedent, the Supreme Court (or this Court en banc) must “ ‘demolish’ and ‘eviscerate’ ” all the “ ‘fundamental props’ ” of the prior-panel precedent. *Dubois*, 139 F.4th at 893 (quoting *1344 *Del Castillo v. Sec’y, Fla. Dep’t of Health*, 26 F.4th 1214, 1223 (11th Cir. 2022)). “In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel.” *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009).

In *Vail-Bailon*, this Court addressed the question of whether a conviction for Florida felony battery in violation of Fla. Stat. § 784.041 qualifies as a crime of violence. 868 F.3d at 1295. Citing *Curtis Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), Vail-Bailon argued that the offense does not require the use of physical force. *Id.* at 1297. But unlike Florida’s simple battery statute, which was at issue in *Curtis Johnson*, Florida felony battery “requires more than a slight unwanted touch.” *Id.* at 1298. Vail-Bailon asked that this Court define physical force as that which is “likely to cause pain,” rather than force that is merely capable of causing pain. *Id.* at 1300. This Court rejected this argument, holding that the controlling definition of physical force is “violent force ... capable of causing physical pain or injury.” *Id.* at 1302 (quoting *Curtis Johnson*, 559 U.S. at 140, 130 S.Ct. 1265). Vail-Bailon also relied on *Leocal v. Ashcroft*, 543 U.S. 1, 125, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), in which the Supreme Court held that the Florida DUI statute does not satisfy the elements clause because it “does not require that the defendant intentionally use any force at all against another person.” *Id.* at 1307. This Court also rejected this argument because Florida felony battery “requires an *intentional* use of force.” *Id.* (emphasis in original). Ultimately, this Court held that Florida felony battery qualifies as a crime of violence under the Sentencing Guidelines. *Id.* at 1295. In so holding, we noted that felony battery “was intended to fill a gap between simple battery, which ... is committed when the offender subjects his victim to any type of unwanted physical contact, and aggravated battery, which ... is committed when the offender commits a battery and thereby intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement to his victim.” *Id.* at 1298–99 (citation modified). “All three forms of battery require intentional conduct ... that is against the will of the victim.” *Id.* at 1299. This Court thus concluded that a conviction for Florida felony battery requires that the defendant use “physical force,” defined as “force capable of causing physical pain or injury,” and, thus, the offense qualifies as a

crime of violence within the elements clause. *Id.* at 1302, 1308 (quoting *Curtis Johnson*, 559 U.S. at 140, 130 S.Ct. 1265).

After this Court decided *Vail-Bailon*, the Supreme Court issued its decision in *Borden*. In *Borden*, the defendant pled guilty to possession of a firearm as a felon, and his sentence was enhanced under ACCA’s elements clause, with reckless aggravated assault in violation of Tennessee law as a predicate offense. 593 U.S. at 424–25, 141 S.Ct. 1817. The Supreme Court in a plurality opinion reversed the defendant’s enhanced sentence and remanded for further proceedings. *Id.* at 445, 141 S.Ct. 1817. The plurality opinion concluded that criminal offenses with a *mens rea* of recklessness could not qualify as a “violent felony” under the ACCA’s elements clause. *Id.* at 423–24, 141 S.Ct. 1817 (plurality opinion); *id.* at 446, 141 S.Ct. 1817 (Thomas, J., concurring).

In a separate opinion decided on different statutory grounds, Justice Thomas reached the same conclusion as the four-justice plurality. *Id.* at 446, 141 S.Ct. 1817 (Thomas, J., concurring). While the plurality focused its attention on the phrase *1345 “against the person of another,” Justice Thomas “rest[ed] [his] analysis instead on ... ‘use of physical force.’ ” *Id.* at 446, 141 S.Ct. 1817. Thus, albeit for a different reason, Justice Thomas agreed with the plurality’s conclusion that an offense that may be committed recklessly cannot be a crime of violence within the definition set out in the elements clause. *Id.* “[A] crime that can be committed through mere recklessness does not have as an element the use of physical force because that phrase has a well-understood meaning applying only to intentional acts *designed to cause harm*.” *Id.* (citation modified).

[8] As a preliminary consideration, *Borden* is a plurality opinion. We thus cannot construe *Borden* in the broad manner that Sheely proposes. Under the Supreme Court’s own framework, when it decides a case on a fragmented basis and “no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]’ ” *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)); see also *Greater Birmingham Ministries v. Sec’y of State for State of Ala.*, 992 F.3d 1299, 1319 n.31 (11th Cir. 2021) (“We are cognizant of the fact that we are required to impose the narrowest ground of the Supreme Court’s plurality decision[.]”). And in

other instances, when we have evaluated whether *Borden*'s reach has extended to other crimes, we have interpreted the plurality decision narrowly. See, e.g., *Somers v. United States*, 66 F.4th 890, 895 (11th Cir. 2023) ("So the narrowest holding of the five-justice majority—which is what we are bound by, ...—was only that the elements clause excludes reckless conduct."). Thus, the Supreme Court in *Borden* held only that an offense that can be satisfied with a *mens rea* of recklessness cannot qualify as a "violent felony" under the ACCA's elements clause. *Id.* at 423, 141 S.Ct. 1817.

Moreover, *Borden* did not address the same statute. *Vail-Bailon* holds that felony battery under Fla. Stat. § 784.041 is a "crime of violence" within the meaning of the Sentencing Guidelines' elements clause. See 868 F.3d at 1308. *Borden*, by contrast, concerned reckless aggravated assault under Tennessee law. 593 U.S. at 424, 141 S.Ct. 1817. Nor did *Borden* cite our decision in *Vail-Bailon* or engage with the reasoning underlying that decision. Additionally, *Borden* does not cite any of the precedents upon which *Vail-Bailon* relied.

Borden also did not abrogate this Court's own case law. In *United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010), we held that a conviction "predicated on a *mens rea* of recklessness does not satisfy the 'use of physical force' requirement" for a "crime of violence." *Id.* at 1336; see also *United States v. Carter*, 7 F.4th 1039, 1045 (11th Cir. 2021). Thus, even before *Borden* was decided, we had already determined that an offense with a *mens rea* of recklessness could not qualify as a "crime of violence." Indeed, the plurality opinion in *Borden* itself recognized our prior conclusion "that only a statute confined to purposeful or knowing conduct can count" as such a "violent felony." 593 U.S. at 425 n.2, 141 S.Ct. 1817 (citing *United States v. Moss*, 920 F.3d 752, 756 (11th Cir. 2019), *opinion reinstated*, 4 F.4th 1292 (11th Cir. 2021) (en banc)). Since *Borden* did not alter this Court's existing precedent, it did not "demolish" and "eviscerate" all the "fundamental props" of our prior-panel precedent in *Vail-Bailon*. *Dubois*, 139 F.4th at 893 (citations omitted).

[9] It thus cannot be said that *Borden* is "clearly on point" and "clearly contrary" *1346 to *Vail-Bailon*. *Edwards*, 97 F.4th at 743 (quoting *Garrett*, 344 F.3d at 1292). Unable to argue that *Borden* abrogated or overruled *Vail-Bailon*, Sheely instead contends that *Vail-Bailon* did not address the "separate and distinct" *mens rea* question later resolved in *Borden*. Sheely, however, is mistaken as the *mens rea* issue was expressly briefed to the *en banc* court and was considered

through hypotheticals advanced by the appellant and rejected by the Court. We held in *Vail-Bailon* that felony battery under Fla. Stat. § 784.041 requires an intentional act to use physical force against the victim that is capable of causing physical pain or injury. *Vail-Bailon* thus remains binding precedent in this Circuit, and we conclude that the district court did not err in determining that Sheely's Florida felony battery conviction qualifies as a "crime of violence" for the purpose of enhancing his sentence.

IV. CONCLUSION

Because *Vail-Bailon* remains binding precedent in this Circuit, we conclude that the district court did not err in enhancing Sheely's sentence, pursuant to § 2K2.1(a)(3), based on his previous conviction for Florida felony battery. We thus affirm Sheely's sentence.

AFFIRMED.

Rosenbaum, Circuit Judge, Concurring:

I concur fully in the panel opinion. I write separately only to explain why the Supreme Court's plurality opinion in *Borden v. United States*, 593 U.S. 420, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021) (plurality opinion), does not affirmatively support the conclusion that Thomas Sheely, Jr., urges: that Florida felony battery no longer qualifies as a "crime of violence" under the elements clause of the Sentencing Guidelines. Rather, except for Justice Thomas's opinion, *Borden* is agnostic about the question.

In *Borden*, the Supreme Court considered whether "a criminal offense can count as a 'violent felony' [under the Armed Career Criminal Act] if it requires only a [less culpable] *mens rea* ... than purpose or knowledge." *Id.* at 423, 141 S.Ct. 1817. The Court concluded it cannot. *Id.* But the four-Justice plurality and Justice Thomas reached this answer for different reasons. And the four-Justice plurality's decision not to adopt Justice Thomas's reasoning requires the conclusion that *Borden*'s plurality opinion does not affirmatively support Sheely's argument that, under *Borden*, Florida felony battery doesn't qualify as a "crime of violence" under the Sentencing Guidelines.

I start with the definition of "violent felony" under the ACCA's elements clause: "[a]n offense qualifies as a violent felony under that clause if it 'has as an element the use,

attempted use, or threatened use of physical force against the person of another.’ ” *Id.* at 424, 141 S.Ct. 1817 (quoting 18 U.S.C. § 924(e)(2)(B)(i)).

Justice Thomas reasoned that offenses that require a *mens rea* that is less than purposeful or knowing don’t qualify as “crime[s] of violence” because the phrase “use of physical force” in the elements clause “has a well-understood meaning applying only to intentional acts *designed to cause harm*.” *Id.* at 446, 141 S.Ct. 1817 (Thomas, J., concurring in the judgment) (emphasis added) (citation omitted).

If Justice Thomas’s position had won the day, then Sheely would be right that *Borden* had abrogated *United States v. Vail-Bailon*, 868 F.3d 1293, 1299 (11th Cir. 2017) (en banc). To explain why, we must consider the Florida crime of felony battery under Fla. Stat. § 784.041. To commit Florida felony battery, a person must “(1)(a) [a]ctually and intentionally touch[] or strike[] another person against the will of the other; and (b) cause[] great bodily *1347 harm, permanent disability, or permanent disfigurement.” Fla. Stat. § 784.041(1).

As the first element of the crime spells out, this statute demands “intentional conduct.” *Vail-Bailon*, 868 F.3d at 1299. But Florida courts have explained that felony battery’s second element does not require a defendant to have intended or known that “great bodily harm” would result from their intentional touch or strike. *T.S. v. State*, 965 So. 2d 1288, 1290–91 (Fla. Dist. Ct. App. 2007); see also *Vail-Bailon*, 868 F.3d at 1306 (“[T]he prosecution is not required to prove that the defendant had the specific intent to cause the level of physical harm that the victim suffered in order to sustain a conviction for felony battery.”). In other words, a person can be convicted of Florida felony battery even though they didn’t “design[]” their intentional act “to cause harm,” *Borden*, 593 U.S. at 446, 141 S.Ct. 1817 (Thomas, J., concurring in the judgment) (citation omitted). So under Justice Thomas’s reasoning, Florida felony battery would not qualify as a

“crime of violence” under the Sentencing Guidelines, and *Vail-Bailon* would be abrogated.

But the four Justices in the plurality opinion did not share Justice Thomas’s reasoning. Rather, the plurality homed in on the language “against ... another” in the elements clause. See *id.* at 431, 141 S.Ct. 1817 (plurality opinion). As the plurality opinion explained, this language “modifies[] the ‘use of physical force.’ ” *Id.* And “ ‘use of force’ denotes volitional conduct.” *Id.* Plus, the plurality opinion continued, “the pairing of volitional action with the word ‘against’ supports the word’s oppositional, or targeted, definition.” *Id.* So this language in the elements clause “covers purposeful and knowing acts, but excludes reckless conduct.” *Id.* at 432, 141 S.Ct. 1817.

As a result, the plurality opinion has nothing to say about whether Florida felony battery qualifies as a “crime of violence.” After all, Florida felony battery requires a “purposeful and knowing act[],” *id.*—namely, an intentional touch or strike. And in *Vail-Bailon*, we said that the intentional touch or strike Florida felony battery requires necessarily involves physical force, so it qualifies as a “crime of violence” under the elements clause. 868 F.3d at 1306. It’s just that Florida felony battery doesn’t require a “purposeful and knowing” result from the intentional touch. But the four-Justice plurality opinion didn’t adopt Justice Thomas’s view that a crime must have required the defendant to have engaged in an act “designed to cause harm.” Yet Justice Thomas’s reasoning is necessary to conclude that *Borden* abrogated *Vail-Bailon*. As a result, we can’t accept Sheely’s argument that *Borden* affirmatively supports the conclusion that Florida felony battery is not a “crime of violence” under the Sentencing Guidelines’ elements clause.

All Citations

186 F.4th 1338, 31 Fla. L. Weekly Fed. C 1611

Footnotes

- 1 The parties agreed to recommend a conditional “two-level, or, if applicable, a three-level” reduction for acceptance of responsibility, as per § 3E1.1, and that the instant sentence would run concurrent to any sentence imposed by the Florida 15th Judicial Circuit for Case No. 2022CF003899AMB. That state court case stemmed from Sheely’s May 14, 2022 arrest, during which officers approached him while he was subject

to an outstanding arrest warrant and discovered he possessed, among other things, a firearm that was later found to be reported stolen. The government agreed that it would not seek any upward variance from the advisory guideline range based on Sheely's timely acceptance of responsibility. Sheely agreed to forfeit "voluntarily and immediately, any right, title, and interest to any firearm and ammunition involved in or used in the commission of the offense alleged in the Indictment[.]"

- 2 Congress has since amended [18 U.S.C. § 924](#) to provide a statutory maximum of fifteen years imprisonment for violations of [18 U.S.C. § 922\(g\)](#). See [18 U.S.C. § 924\(a\)\(8\)](#).
- 3 Sheely objected to the facts set forth in the corresponding paragraphs of the 2022 PSI, arguing they were based on arrest affidavits and not documents required by [Shepard v. United States](#), 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).
- 4 The government acknowledged this objection was untimely, coming after the final PSI and addendum were issued.
- 5 The term "violent felony" in ACCA is " 'virtually identical' " to "crime of violence" in § 4B1.1, hence our "decisions about one apply to the other." [Gilbert v. United States](#), 640 F.3d 1293, 1309 n.16 (11th Cir. 2011) (en banc) (citations omitted); see [18 U.S.C. § 924\(e\)\(2\)\(B\)\(i\)](#).
- 6 Our analysis does not address Florida felony battery under either [Fla. Stat. § 784.03\(2\)](#) or [§ 784.07\(2\)\(b\)](#).

A-2



KeyCite Red Flag

On Rehearing en Banc [United States v. Vail-Bailon](#), 11th Cir.(Fla.),
August 25, 2017

838 F.3d 1091

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Eddy Wilmer VAIL–BAILON, Defendant–Appellant.

No. 15–10351

|

(September 28, 2016)

|

Rehearing En Banc Granted,
Opinion Vacated November 21, 2016

Synopsis

Background: Defendant pled guilty in the United States District Court for the Southern District of Florida, No. 9:14-cr-80117-KLR-1, to illegally reentering United States after previously being deported. Defendant appealed.

[Holding:] The Court of Appeals, [Rosenbaum](#), Circuit Judge, held that defendant's prior Florida conviction for felony battery did not qualify as crime of violence.

Vacated and remanded.

[Jordan](#), Circuit Judge, filed concurring opinion.

Siler, Circuit Judge, filed dissenting opinion.

West Headnotes (9)

[1] Criminal Law **Review De Novo**

Court of Appeals reviews de novo issue of whether a prior conviction qualifies as a crime of violence under Sentencing Guidelines. [U.S.S.G. § 1B1.1 et seq.](#)

[1 Case that cites this headnote](#)

[2] Sentencing and Punishment **Construction in general**

Proper interpretation of the Sentencing Guidelines requires the court to account for both the individual guidelines and the commentary. [U.S.S.G. § 1B1.1 et seq.](#)

[3] Sentencing and Punishment **Construction in general**

Court of Appeals gives language of Sentencing Guidelines, like language of a statute, its plain and ordinary meaning, because as with Congress, the Court presumes that Sentencing Commission said what it meant and meant what it said. [U.S.S.G. § 1B1.1 et seq.](#)

[4] Sentencing and Punishment **Commentary and policy statements**

Court of Appeals follows Sentencing Guidelines commentary unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline. [U.S.S.G. § 1B1.1 et seq.](#)

[5] Sentencing and Punishment **Other particular offenses**

In determining whether a crime qualifies as a crime of violence under the Sentencing Guidelines enhancement for illegal entry based on a prior deportation for commission of a crime of violence, the Court of Appeals generally employs a categorical approach. [U.S.S.G. § 2L1.2\(b\)\(1\)\(A\).](#)

[6] Sentencing and Punishment **Other particular offenses**

Under categorical approach for determining whether a crime qualifies as a crime of violence under Sentencing Guidelines enhancement for illegal entry based on a prior deportation for commission of a crime of violence, a court assesses whether a crime qualifies as a violent felony in terms of how the law defines offense

and not in terms of how an individual offender might have committed it on a particular occasion; that requires court to evaluate the least of ways in which a given crime may be committed to determine whether it constitutes a crime of violence. [U.S.S.G. § 2L1.2\(b\)\(1\)\(A\)](#).

[7] **Sentencing and Punishment** 🔑 Other particular offenses

In determining whether a crime qualifies as a crime of violence under the Sentencing Guidelines enhancement for illegal entry based on a prior deportation for commission of a crime of violence, a modified categorical approach is used when a statute is divisible, meaning that it sets forth alternative elements of the same crime, to allow courts to evaluate whether the particular alternative version of the crime under which the defendant was convicted satisfies the definition of crime of violence. [U.S.S.G. § 2L1.2\(b\)\(1\)\(A\)](#).

1 Case that cites this headnote

[8] **Sentencing and Punishment** 🔑 Other particular offenses

In determining whether a crime qualifies as a crime of violence under the Sentencing Guidelines enhancement for illegal entry based on a prior deportation for commission of a crime of violence, if a statute is divisible, courts look to see whether documents appear in the record and can answer under which alternative version of the statutory elements a defendant was convicted; if so, the court evaluates the alternative version of the statute under which the defendant was convicted to determine whether his crime meets the definition of crime of violence. [U.S.S.G. § 2L1.2\(b\)\(1\)\(A\)](#).

[9] **Sentencing and Punishment** 🔑 Other particular offenses

Defendant's prior Florida conviction for felony battery did not qualify as a crime of violence under sentencing guideline imposing 16-level enhancement for having been previously deported after a conviction for a felony crime

of violence; Florida offense could have been committed by mere touching and contained no requirement that offender intentionally or knowingly caused bodily harm. [Fla. Stat. Ann. § 784.041](#); [U.S.S.G. § 2L1.2\(b\)\(1\)\(A\)](#).

6 Cases that cite this headnote

Attorneys and Law Firms

***1092** [Wifredo A. Ferrer](#), [Laura Thomas Rivero](#), [Kathleen Mary Salyer](#), [John C. Shipley](#), Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, [Brandy Brentari Galler](#), U.S. Attorney's Office, West Palm Beach, FL, for Plaintiff–Appellee.

[Robert E. Adler](#), Federal Public Defender's Office, West Palm Beach, FL, [Brenda Greenberg Bryn](#), Federal Public Defender's Office, Fort Lauderdale, FL, [Michael Caruso](#), Federal Public Defender's Office, Miami, FL, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:14–cr–80117–KLR–1

Before [JORDAN](#), [ROSENBAUM](#) and [SILER](#),* Circuit Judges.

Opinion

[ROSENBAUM](#), Circuit Judge:

When I was growing up, my parents told me not to judge a book by its cover. The Supreme Court has expressed an analogous concern about concluding that a crime qualifies as a violent crime under the Armed Career Criminal Act (“ACCA”), based solely on the name of the crime. See *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 2560, 192 L.Ed.2d 569 (2015) (discussing whether Connecticut’s offense of “rioting at a correctional institution,” a crime that the Supreme Court characterized as “certainly sound[ing] like a violent felony,” qualifies as a violent felony under the residual clause of the ACCA).¹

This case raises the question of whether the Florida crime of felony battery—a crime that, from its name, may sound like a crime of violence—actually satisfies the ***1093** definition of “crime of violence” under § 2L1.2 of the Sentencing Guidelines when it is committed by mere touching. Heeding

the Supreme Court’s warning, we have carefully compared the elements of felony battery under Florida law to the “elements clause” of § 2L1.2’s definition of “crime of violence.” Based on our review, we now hold that felony battery under Fla. Stat. § 784.041 does not qualify as a “crime of violence” under § 2L1.2 when it is committed by mere touching. For this reason, we vacate Vail–Bailon’s sentence and remand for resentencing.

II.

Vail–Bailon pled guilty to illegally reentering the United States after previously being deported, in violation of 8 U.S.C. §§ 1326(a) and (b)(1). Section 1326(b)(1) increases the penalty for simple illegal reentry (§ 1326(a)) when the defendant illegally reenters the United States after deportation following conviction of, among other things, a felony (though not an “aggravated felony”). In Vail–Bailon’s case, Vail–Bailon reentered after deportation following his conviction for felony battery under Fla. Stat. § 784.041.

In the presentence investigation report (“PSI”), the Probation Office recommended increasing Vail–Bailon’s base offense level by 16, pursuant to U.S.S.G. § 2L1.2(b)(1)(A), because, the Probation Office concluded, Vail–Bailon’s prior conviction for felony battery qualified as a “crime of violence” under that guideline. Vail–Bailon objected to the PSI’s proposed 16–level enhancement, contending that felony battery under Florida law does not categorically constitute a “crime of violence.” The government took the opposite position.

At the sentencing hearing, the district court overruled Vail–Bailon’s objection to the PSI and concluded that felony battery under Florida law categorically satisfies the definition of “crime of violence” under U.S.S.G. § 2L1.2(b)(1)(A). As a result, Vail–Bailon’s offense level increased by 16, based on the prior conviction for felony battery. The district court sentenced Vail–Bailon to 37 months’ imprisonment. Vail–Bailon now appeals.

III.

[1] [2] [3] [4] We review *de novo* the issue of whether a prior conviction qualifies as a “crime of violence” under the Sentencing Guidelines. *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014). Proper interpretation of

the Sentencing Guidelines requires us to account for both the individual guidelines and the commentary. *United States v. Fulford*, 662 F.3d 1174, 1177 (11th Cir. 2011) (citation omitted). In doing so, we give the language of the Sentencing Guidelines, “like the language of a statute, ... its plain and ordinary meaning, ... because as with Congress, we presume that the Sentencing Commission said what it meant and meant what it said.” *Id.* (citations, internal quotation marks, and modification omitted). And we follow the Guidelines commentary “unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” *United States v. Jordi*, 418 F.3d 1212, 1216 (11th Cir. 2005) (quoting *Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993)).

IV.

Section 2L1.2, the guideline at issue here, imposes a 16–level enhancement on a defendant who previously was deported after “a conviction for a felony that is ... (ii) a crime of violence.” U.S.S.G. § 2L1.2(b)(1)(A). The Application Notes to § 2L1.2 explain that the term “crime of *1094 violence” includes, among other qualifying crimes, any offense under state law “that has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 2L1.2(b)(1)(A) cmt. n.1(B)(iii). We refer to this clause as the “elements clause” of § 2L1.2’s definition of “crime of violence.” See *United States v. Romo–Villalobos*, 674 F.3d 1246, 1248 (11th Cir. 2012) (per curiam). Because it is the same as the elements clauses of the ACCA and the career-offender guideline, cases construing the “elements clauses” of any of these three provisions are instructive here. *Id.*

With this framework in mind, we consider whether Fla. Stat. § 784.041 qualifies as a “crime of violence” under § 2L1.2. 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).

[5] [6] In determining whether a crime qualifies as a “crime of violence,” we generally employ a categorical approach. *Welch v. United States*, — U.S. —, 136 S.Ct. 1257, 1262, 194 L.Ed.2d 387 (2016). 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.” *Id.* (citations and internal quotation marks omitted). That requires us to evaluate the least of the ways in which a given crime may be committed to determine whether it constitutes a “crime of violence.”

[7] [8] Besides the categorical approach, however, the Supreme Court has also approved a modified categorical approach when a statute is divisible—meaning that it sets forth alternative elements of the same crime—to allow courts to evaluate whether the particular alternative version of the crime under which the defendant was convicted satisfies the definition of “crime of violence.” See *Mathis v. United States*, — U.S. —, 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016). If a statute is divisible, courts look to see whether documents approved under *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), appear in the record and can answer under which alternative version of the statutory elements a defendant was convicted. See *Mathis*, 136 S.Ct. at 2250. If so, the court evaluates the alternative version of the statute under which the defendant was convicted to determine whether his crime meets the definition of “crime of violence.”

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. Hearn*, 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 touche[d]” the victim). But since the parties agree that no *Shepard*-approved documents establish under which alternative element Vail–Bailon was convicted, we must assume that Vail–Bailon violated the statute by “[a]ctually and intentionally touch[ing]” another when we determine whether Vail–Bailon’s conviction qualifies as a “crime of violence.” See *Curtis Johnson*, 559 U.S. at 137, 130 S.Ct. at 1269.

A. Mere touching does not involve “the use, attempted use, or threatened use of physical force against the person of another.”

[9] As relevant here, the first element of Florida’s felony-battery law requires *1095 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).²

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 *Hearn*, 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 *Hearn*, 961 So.2d at 219).

But the phrase “physical force” that appears in the “elements clause” necessarily refers to “*violent* force—that is, force capable of causing physical pain or injury to another person.” *Id.* at 140, 130 S.Ct. at 1271 (citing *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003)). Indeed, the joining of the words “violent” and “felony,” or, in the case of § 2L1.2, “crime” and “of violence,” renders the “connotation of strong physical force” required to satisfy the “elements clause” “even clearer.” See *id.* For these reasons, the Supreme Court has concluded that mere touching does not involve the “use, attempted use, or threatened use of physical force against the person of another” under the “elements clause.” See *id.* at 143–44, 130 S.Ct. at 1272.

B. 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”

As we have 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, as Vail–Bailon asserted at oral argument and the government expressly conceded, 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 either startled or otherwise reacts in such a way that he falls

down the stairs and suffers grievous bodily harm. Similarly, Vail–Bailon argued at oral argument—and the government did not challenge his interpretation—that 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 ***1096** a “crime of violence” under Supreme Court precedent. First, it does not involve “physical force” as the Supreme Court expressed its understanding of that phrase in *Curtis Johnson*. In *Curtis Johnson*, the Supreme Court explained that “the phrase ‘physical force’ means violent force—that is, force capable of causing physical pain or injury to another person.” 559 U.S. at 140, 130 S.Ct. at 1271. But significantly, the Supreme Court then directed readers to see *Flores*, 350 F.3d at 672. 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).

The *Flores* definition necessarily excludes Florida felony battery committed by mere touching. As we have established, a person may violate § 784.041 with no intent to cause bodily injury, so the first part of *Flores*’s definition of “physical force” relied on by the Supreme Court in *Curtis Johnson* does not apply.

And since the Supreme Court held in *Curtis Johnson* that mere intentional and actual touching does not qualify as “violent in nature,” it necessarily concluded that Florida battery by mere touching is not conduct that is likely to cause bodily injury. As a result, Florida battery by mere touching does not satisfy the second part of *Flores*’s definition of “physical force” that the Supreme Court relied on in *Curtis Johnson*.

Nor can it be that, in a given case, the fact that a mere touching actually does result in great bodily harm somehow changes the character of the mere touching from an action that is not likely to result in bodily harm to one that is likely to result in bodily harm. In other words, the results of a specific incident of mere touching do not alter the fact that the nature of mere touching, in and of itself, as the Supreme Court concluded in *Curtis Johnson*, is not likely to result in bodily harm. So Florida felony battery by mere touching cannot qualify as a “crime of violence,” no matter what the injury resulting from the mere touching might turn out to be.

Also, notice considerations dictate that the inquiry into whether a crime qualifies as a “crime of violence” under the “elements clause” should be forward-looking, from the perspective of the wrongdoer, not backward-looking in hindsight. That way, when a person is held responsible for committing a “crime of violence,” that person either intended to commit a “crime of violence” or should have known before committing the act that resulted in the conviction that it was at least likely that his act would cause bodily harm. But since the Supreme Court has already concluded that mere touching is not likely to result in bodily injury, we cannot expect a person who engages in mere touching to believe that his actions will cause bodily injury.

Second, *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), also supports our 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.” Because § 16’s “elements clause” is materially indistinguishable from § 2L1.2’s “elements clause,” *Leocal*’s analysis is pertinent here.³

***1097** The Supreme Court characterized the issue in *Leocal* as involving “whether state DUI offenses similar to the one in Florida, which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, qualify as a crime of violence.” *Id.* at 6, 125 S.Ct. at 380. As the Court saw it, the key consideration of the “elements clause” concerns the requirement that a crime of violence be one involving the “use ... of physical force *against the person or property of another.*” *Id.* at 9, 125 S.Ct. at 382 (emphasis in original). And, significantly, the Supreme Court expounded on that phrase as “most naturally suggest[ing] a higher degree of intent than negligent or merely accidental conduct.” *Id.* Indeed, the Supreme Court emphasized that the phrase “crime of violence,” when considered in conjunction with § 16’s reliance on the use of physical force against another person, “suggests a category 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.

Section 784.041 fares no better under the “elements clause” than the DUI statutes at issue in *Leocal*. A person who commits felony battery by mere touching intends to engage in mere touching, and that mere touching negligently or accidentally results in great bodily harm under § 784.041, just as a person who commits DUI that causes serious bodily injury under the statutes under review in *Leocal* intends to engage in driving while under the influence, and that driving accidentally or negligently results in serious bodily injury to another. Though both offenders intend their actions—mere touching and driving—neither intends the accidental or negligent consequences—great bodily harm under § 784.041 and serious bodily injury under § 316.193(3)(c)(2). And we do not rely on the consequences of the driving or the mere touching to determine whether, categorically, the crime involves the use, attempted use, or threatened use of force looking forward from the offender’s perspective. Instead, under *Leocal*, when we discuss an action that normally does not cause bodily injury—in *Leocal*, driving, and here, mere touching—that element of a crime can qualify the crime as a “crime of violence” under the “elements clause” only if the offender engages in it with some type of intent to harm another.

The dissent suggests that we look at the phrase “force capable of causing physical pain or injury to another person” from *Curtis Johnson* in isolation, without the context provided by the Supreme Court’s immediate citation to *Flores*. We respectfully disagree for three reasons.

First, this argument reads the Supreme Court’s statement unmoored from its context. Citations to circuit-court opinions such as *Flores* do not find their way into Supreme Court opinions by accident. The Supreme Court’s reliance on *Flores* must mean something. The dissent’s argument does not account at all for the Supreme Court’s reliance on *Flores*, which very clearly puts into context what the Supreme Court had in mind when it used the phrase on which the government relies. Ignoring the citation to *Flores* would deprive the Supreme Court’s discussion of the meaning of “physical,” and thus, “violent,” force of its intended connotation—force that is “intended to cause bodily injury, or at a minimum likely to do so.” See *Curtis Johnson*, 559 U.S. at 140, 130 S.Ct. at 1271 (citing *Flores*, 350 F.3d at 672).

***1098** Second, the dissent’s proposed interpretation of “physical force” would require us to disregard the lessons of *Leocal*. *Leocal* reinforces our conclusion that intent to engage in force that is, at a minimum, likely to cause bodily injury,

matters. If we determined whether a crime involved “force capable of causing physical pain or injury to another person” by whether, in fact, the crime actually caused physical pain or injury to another person, the DUI offenses that resulted in serious bodily injury in *Leocal* would necessarily qualify as “crimes of violence” under the “elements clause” since they all caused serious bodily injury. But we know that these offenses do not qualify as “crimes of violence” under the “elements clause.” And that’s because the phrase on which the dissent relies cannot be read in isolation, untethered from its context and Supreme Court precedent.

Third, holding someone responsible for committing a “crime of violence” when the person engaged in, for example, nothing more than tapping another on the shoulder or tickling another, is inconsistent with the Supreme Court’s expressed understanding of the term “crime of violence.” As we have noted, the Supreme Court has opined that the term “crime of violence” “suggests a category of violent, active crimes ...,” *Curtis Johnson*, 559 U.S. at 140, 130 S.Ct. at 1271 (quoting *Leocal*, 543 U.S. at 11, 125 S.Ct. at 383) (internal quotation marks omitted)—a category that clearly does not include mere touching, shoulder-tapping, or tickling. In short, Florida felony battery, when committed by mere touching, does not satisfy the “elements clause” of the definition of “crime of violence” contained in § 2L1.2 of the Guidelines.

V.

Though we can understand the temptation to conclude, based on its name, that a crime called “felony battery” categorically constitutes a “crime of violence,” engaging in actual analysis of the elements of “felony battery” leads to the opposite conclusion when the crime is committed by mere touching. But nothing we have said here today precludes a court from finding that a defendant engaged in a “crime of violence” if *Shepard* documents reflect that a defendant was convicted of felony battery for striking another, as opposed to by mere touching of another. Because the record in this case does not satisfy that showing, we **VACATE** Vail–Bailon’s sentence and **REMAND** for resentencing.

VACATED AND REMANDED.

JORDAN, Circuit Judge, concurring:

I join Judge Rosenbaum’s opinion for the court in full and add the following comments.

In three unpublished cases, we have previously held that the crime of felony battery in Florida, as set forth in Fla. Stat. § 784.041, has as an element “the use, attempted use, or threatened use of physical force against the person of another.” See *United States v. Eady*, 591 Fed.Appx. 711, 719 (11th Cir. 2014); *United States v. Eugene*, 423 Fed.Appx. 908, 911 (11th Cir. 2011); *United States v. Crawford*, 568 Fed.Appx. 725, 728 (11th Cir. 2014). Although these decisions are not binding, see 11th Cir. R. 36–2, I write separately to explain why they are flawed and do not constitute persuasive authority.

In *Eady* (a case where I served on the panel), we held that felony battery under § 784.041 qualified as a “violent felony” under the elements clause of the ACCA. See 591 Fed.Appx. at 719. Our elements clause analysis in *Eady*, however, started from the incorrect premise that Florida’s felony battery statute “has a single, indivisible set of elements,” and that “hitting” was the least culpable conduct under the *1099 statute. See *id.* at 719–20 (“It is incorrect to say that a person can ‘actually and intentionally’ hit another person *and* cause ‘great bodily harm, permanent disability, or permanent disfigurement’ without using ‘force capable of causing physical pain or injury.’”) (emphasis in the original). *Eady* is wrong because the Supreme Court has explained that the first element for Florida simple battery (which is the same for Florida felony battery) is divisible and can be accomplished by any intentional touching, “no matter how slight.” See *Johnson v. United States*, 559 U.S. 133, 138, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (citing *State v. Hearn*, 961 So.2d 211, 218 (Fla. 2007)). *Eady* therefore is not persuasive here.

In *Eugene*, we recognized that felony battery under § 784.041 can be committed by any intentional touching yet held that it categorically qualified as a “crime of violence” under U.S.S.G § 4B1.2(a)(1), the career offender guideline. See 423 Fed.Appx. at 911. But we did not perform an elements clause analysis in *Eugene*. Nor did we explore the possibility that a touch as insignificant as a tap on the shoulder can satisfy the first element of the offense. Instead, we concluded that “each touching that violates the felony battery statute is not only capable of causing physical pain or injury to another person ... it must also actually cause great or permanent physical harm or injury to another person.” See *id.* (internal quotation marks omitted). As we now explain in more detail, § 784.041’s second element—“[c]aus[ing] great bodily harm, permanent disability, or permanent disfigurement”—on its

own does not change the nature of the first element that we know encompasses even the “slightest unwanted physical touch.” See *Johnson*, 559 U.S. at 137, 130 S.Ct. 1265.

And finally, in *Crawford* we summarily concluded, without any analysis, that Florida felony battery satisfied the definition of “violent felony” under the ACCA. See 568 Fed.Appx. at 728 (citing the elements clause under 18 U.S.C. § 924(e)(2)(B)(i) without explanation). It goes without saying that *Crawford*, which is bereft of analysis, does not help us to resolve the issue here.

In sum, our three unpublished opinions in *Eady*, *Eugene*, and *Crawford* fall short of persuasively explaining how a Florida felony battery by *any* intentional touching—including a tap or even a tickle—can categorically satisfy the definition of “crime of violence” under the elements clause of § 2L1.2. I therefore agree that Florida felony battery under § 784.041 does not categorically have as an element “the use, attempted use, or threatened use of physical force against the person of another” when it is committed by a mere touching. Because § 784.041 is divisible, our decision leaves open the possibility that a district court may use the modified categorical approach in a case where *Shepard*-approved documents confirm that the defendant’s felony battery conviction was based on the striking of another. That approach was not available here due to the absence of such documents.

SILER, Circuit Judge, dissenting.

I respectfully dissent from the majority opinion that Vail–Bailon’s prior conviction for felony battery in violation of Fla. Stat. § 784.041 fails to qualify as a crime of violence under USSG § 2L1.2. I do not quarrel with the procedure outlined in the majority opinion as to how we approach the analysis. Moreover, I agree with Part III. A. that mere touching does not meet the definition of “violent force.” As the majority states, that constitutes the misdemeanor crime of simple battery under Fla. Stat. § 784.03(1)(a). See *1100 *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 1270–71, 176 L.Ed.2d 1 (2010)(*Curtis Johnson*).

Nevertheless, I disagree with the conclusions made in Part II. B. that the crime described in Fla. Stat. § 784.041 is not a “crime of violence” under the “elements clause.” The Supreme Court defined “physical force” under the Armed Career Criminal Act (ACCA) as a “violent force—that is, force capable of causing physical pain or injury to another person.” *Id.* (citing *Flores v. Ashcroft*, 350 F.3d 666, 672

(7th Cir. 2003)). Although *Johnson* involved the definition of “physical force” under the ACCA, we have previously observed that the “elements clause” for “violent felony” under the ACCA and “crime of violence” under USSG § 2L1.2(b)(1)(B) “is the same.” See *United States v. Romo–Villalobos*, 674 F.3d 1246, 1248 (11th Cir. 2012). Instead of focusing on the language in *Johnson*, the majority pivots to *Johnson*’s citation to *Flores*, in which the Seventh Circuit defined “physical force” as “the sort that is intended to cause bodily injury, or at a minimum likely to do so.” *Flores*, 350 F.3d at 672. However, we should not rely on *Flores*, but we should follow the definition of “physical force” offered in *Johnson*, “force capable of causing physical pain or injury to another person.” 559 U.S. at 140, 130 S.Ct. at 1271. Why do we need to speculate about the definition of “physical force” when the Supreme Court provided one in *Johnson*? The Supreme Court was aware of the mens rea language used in *Flores* and chose not to use it. Instead, the operative word is “capability”—that is, the crime must be capable of causing physical injury. See *id.*

To be found guilty of violating § 784.041, the defendant must be more than capable of causing bodily injury since he must in fact cause “great bodily harm.” The majority states that “[n]or can it be that, in a given case, the fact that a mere touching actually does result in great bodily harm somehow change[] the character of the mere touching from an action that is not likely to result in bodily harm to one that is likely to result in bodily harm.” However, the issue from *Johnson* is whether the defendant’s action is *capable* of causing bodily injury, not whether it is likely to cause injury. If something necessarily results from the touching, then the logic is that it had to have been capable of that result from the beginning.

The majority also attempts to analogize § 784.041 to the statute at issue in *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). That case involved a violation of Fla. Stat. § 316.193(c)(2) for driving under the influence of alcohol (DUI) and causing serious bodily injury. The Court held that a violation of § 316.193(c)(2) did not constitute a “crime of violence” under 18 U.S.C. § 16. The majority suggests that the DUI statute at issue in *Leocal* contains an element with a similar mens rea as § 784.041—intentionally driving a vehicle. But that is not the proper element to analogize the “touching” element in this case. Rather, the Supreme Court was concerned in *Leocal* that a person could be found guilty under § 316.193(c)(2) without any intentional use of force, that is, someone could be convicted by negligently or accidentally hitting a person with a vehicle. It is this missing hitting element in § 316.193(c)(2) that distinguishes *Leocal* from the present case. Unlike in the statute in *Leocal*, even in the least culpable formulation of § 784.041, a defendant must engage in intentional force by intending to touch someone.

In conclusion, I would find that the crime of felony battery under Florida law satisfies the “elements clause” of the definition of “crime of violence” contained in § 2L1.2 of the Guidelines. Therefore, I *1101 would affirm the sentence in the district court.

All Citations

838 F.3d 1091, 26 Fla. L. Weekly Fed. C 809

Footnotes

- * The Honorable Eugene E. Siler, Jr., United States Court of Appeals for the Sixth Circuit sitting by designation.
- 1 The Supreme Court’s comments arose in the context of considering the residual clause of the ACCA’s definition of “violent felony.” But the principle that we cannot determine whether a crime sounds like it should be a violent felony simply by considering the name of the crime remains the same, whether we are discussing the residual clause or the elements clause of the ACCA’s definition of “violent felony,” or, as here, the elements clause of U.S.S.G. § 2L1.2’s definition of “crime of violence.”
- 2 Under Fla. Stat. § 784.03(1)(a), a person commits the crime of simple battery in Florida when that 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.

[Section 784.03\(1\)\(a\)\(1\)](#) sets forth two alternative ways of violating the statute, with [§ 784.03\(1\)\(a\)\(2\)](#) listing a third.

- 3 [Section 16](#)'s "elements clause" defines a "crime of violence," in pertinent part, as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Aug 11, 2021

ANGELA E. NOBLE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
21-80113-CR-MIDDLEBROOKS/MATTHEWMAN
CASE NO. _____

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

UNITED STATES OF AMERICA

v.

THOMAS JAMES SHEELY, JR.,

Defendant.

INDICTMENT

The Grand Jury charges that:

COUNT 1

Possession of a Firearm and Ammunition by a Convicted Felon
(18 U.S.C. § 922(g)(1))

On or about April 28, 2021, in Palm Beach County, in the Southern District of Florida, the defendant,

THOMAS JAMES SHEELY, JR.,

knowingly possessed a firearm and ammunition in and affecting interstate and foreign commerce, knowing that he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of Title 18, United States Code, Section 922(g)(1).

It is further alleged that the firearm and ammunition are:

- (a) One (1) Smith and Wesson, Model SD40VE, .40 caliber pistol;
- (b) Eight (8) rounds of .40 caliber ammunition bearing the head-stamp "CBC" "40 S&W" and twenty-two (22) rounds of .40 caliber ammunition bearing the head-stamp "PMC" "40 S&W," recovered from the firearm described in (a); and
- (c) Two (2) rounds of .40 caliber ammunition bearing the head-stamp "PMC" "40 S&W" recovered from the vicinity of 7th Street and Clear Lake Avenue, West Palm Beach, Florida.

FORFEITURE ALLEGATIONS

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

2. Upon conviction of a violation of Title 18, United States Code, Section 922(g) as alleged in this Indictment, the defendant shall forfeit to the United States any firearm and ammunition involved in or used in the commission of such offense, pursuant to Title 18, United States Code, Section 924(d)(1).

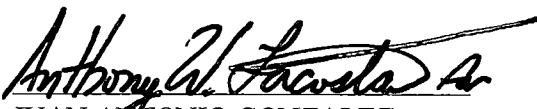
3. The property subject to forfeiture as a result of the alleged offense, includes, but is not limited to, the following:

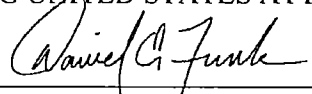
- (a) One (1) Smith and Wesson, Model SD40VE, .40 caliber pistol;
- (b) Eight (8) rounds of .40 caliber ammunition bearing the head-stamp "CBC" "40 S&W" and twenty-two (22) rounds of .40 caliber ammunition bearing the head-stamp "PMC" "40 S&W," recovered from the firearm described in (a); and
- (c) Two (2) rounds of .40 caliber ammunition bearing the head-stamp "PMC" "40 S&W" recovered from the vicinity of 7th Street and Clear Lake Avenue, West Palm Beach, Florida.

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

A TRUE BILL

FOR PERSON


JUAN ANTONIO GONZALEZ
ACTING UNITED STATES ATTORNEY


DANIEL E. FUNK
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

CASE NO. _____

v.

CERTIFICATE OF TRIAL ATTORNEY*

THOMAS JAMES SHEELY, JR.

Superseding Case Information:

Defendant.

Court Division: (Select One)

_____ Miami	_____ Key West
_____ FTL ☒	_____ WPB _____ FTP

New defendant(s)	Yes _____ No _____
Number of new defendants	_____
Total number of counts	_____

- I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
- I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.
- Interpreter: (Yes or No) No
List language and/or dialect _____
- This case will take 3 days for the parties to try.
- Please check appropriate category and type of offense listed below:

(Check only one)

I	0 to 5 days	☒
II	6 to 10 days	_____
III	11 to 20 days	_____
IV	21 to 60 days	_____
V	61 days and over	_____

(Check only one)

Petty	_____
Minor	_____
Misdem.	_____
Felony	☒

- Has this case previously been filed in this District Court? (Yes or No) No

If yes: Judge _____

Case No. _____

(Attach copy of dispositive order)

Has a complaint been filed in this matter?

(Yes or No) Yes

If yes: Magistrate Case No. _____

21-8273-SMM

Related miscellaneous numbers: _____

Defendant(s) in federal custody as of _____

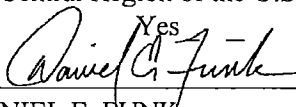
OPEN WARRANT

Defendant(s) in state custody as of _____

Rule 20 from the District of _____

Is this a potential death penalty case? (Yes or No) No

- Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to August 9, 2013 (Mag. Judge Alicia O. Valle)? Yes _____ No ☒
- Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to August 8, 2014 (Mag. Judge Shaniek Maynard)? Yes _____ No ☒
- Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to October 3, 2019 (Mag. Judge Jared Strauss)? Yes _____ No ☒



 DANIEL E. FUNK

ASSISTANT UNITED STATES ATTORNEY

Court No. A5501915

*Penalty Sheet(s) attached

REV 6/5/2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____

PENALTY SHEET

Defendant's Name: THOMAS JAMES SHEELY, JR.

COUNT	VIOLATION	U.S. CODE	MAX. PENALTY
1	Possession of a firearm and ammunition by a convicted felon	18 U.S.C. § 922(g)(1)	10 years imprisonment \$250,000 fine 3 years of supervised release \$100 special assessment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO: 21-cr-80113-DMM

THOMAS JAMES SHEELY, JR.,

November 21, 2024

Defendant.

10:20 a.m.

West Palm Beach, Florida

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

RESENTENCING

BEFORE THE HONORABLE DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

For the Government:

DANIEL FUNK, AUSA
United States Attorney's Office
99 N.E. 4th Street
Miami, Florida 33132

For the Defendant:

ROBERT E. ADLER, AFPD
Federal Public Defender's Office
250 S. Australian Avenue, Suite 400
West Palm Beach, Florida 33401

STENOGRAPHICALLY
REPORTED BY:

SHAMELLE "SHELLY" KELLEY, RPR
Official Court Reporter
400 N. Miami Avenue
Miami, Florida 33128
Shamelle_Kelley@flsd.uscourts.gov

1 P R O C E E D I N G S

2 THE COURT: This is the case of the United States v.
3 Thomas James Sheely, Jr., Case No. 21-80113. It's a
4 resentencing.

5 I've reviewed a number of documents, probably most
6 importantly the opinion of the Eleventh Circuit. But I've
7 also reviewed the briefing you all submitted. There was a
8 government memorandum, a defendant's sentencing memorandum,
9 and a supplemental briefing and a supplemental authority
10 submitted by the government. Does that cover the findings?

11 MR. ADLER: It does, Your Honor, yes.

12 MR. FUNK: Yes, Your Honor.

13 THE COURT: Mr. Funk, I can't figure out where you
14 are. You've got two different things. In your latest filing,
15 where you send that Eleventh Circuit recent decision, you
16 suggest 120 months. Before that, you suggested the top of the
17 guideline of, I think, 83 to 105 months.

18 MR. FUNK: I'm sorry, Judge. The guideline
19 calculation -- it's not just suggesting, the guideline
20 calculation would be that if the attempted robbery were
21 considered a crime of violence; however, the Office is taking
22 the position that on Mr. Sheely's direct appeal, that because
23 we took the position that attempted robbery didn't apply or
24 wasn't a crime of violence and admitted error for it to come
25 back on remand for resentencing, that in Mr. Sheely's case

1 alone, despite the fact that the Eleventh Circuit recently
2 issued that decision --

3 THE COURT: Yeah, but their decision's armed
4 robbery, isn't it -- attempted armed robbery? Doesn't that
5 make a difference?

6 MR. FUNK: That armed robbery would not be a crime
7 of violence?

8 THE COURT: No. They said the armed robbery was,
9 but he wasn't ever convicted of attempted armed robbery, was
10 he?

11 MR. FUNK: No. The robbery was not armed. It was
12 two individuals. And the elements of that offense to which he
13 was convicted in the attempted robbery did not include
14 "armed."

15 THE COURT: All right. But this new opinion deals
16 with armed robbery, as I read it -- the one you just sent me?

17 MR. FUNK: I believe it does, Judge.

18 THE COURT: Okay. So you agree the guideline is 84
19 to 104 months. Is that where you are?

20 MR. FUNK: I thought the top was 105, I believe.
21 Unless I'm misreading or -- or misnoted it.

22 THE COURT: I don't know. The sheet probation gave
23 me said it's 84 to 104.

24 PROBATION OFFICER GAGLIARDI: Oh, yes, Your Honor,
25 it's 105 -- 84 - 105.

1 THE COURT: 105? It's 84 to 105?

2 PROBATION OFFICER GAGLIARDI: Yes, Your Honor.

3 THE COURT: All right.

4 PROBATION OFFICER GAGLIARDI: For an Offense Level
5 of 23 and a Category IV is 84 to 105.

6 THE COURT: All right.

7 And you're suggesting 105?

8 MR. FUNK: 105, because of Vail-Bailon being the --
9 this current standing of the law that the felony battery would
10 be a crime of violence. We're not arguing that the Court, in
11 this particular case, should take attempted robbery as being a
12 crime of violence, that the appropriate guideline sentence for
13 Mr. Sheely would be 105 months, and that based on the 3553
14 factors that that would be the appropriate sentence.

15 THE COURT: Okay.

16 Mr. Adler, you make this mens rea argument and count
17 justices and judges on the Eleventh Circuit, but isn't that --
18 wouldn't I have to be on the Eleventh Circuit to accept those
19 arguments?

20 MR. ADLER: I can see the Court's position in regard
21 to that.

22 THE COURT: I mean, it looks like Vail-Bailon, if
23 that's how you pronounce it, applies to me, doesn't it?

24 MR. ADLER: Well, we tried to distinguish it --
25 actually, that was my case originally, Judge, many, many years

1 ago. But I understand the Court's position. We've made our
2 position known in --

3 THE COURT: I mean, but your position's based
4 largely on Judge Rosenbaum's dissent, isn't it?

5 MR. ADLER: It is, Your Honor.

6 THE COURT: Okay. I don't see how I have that
7 latitude. I think Vail-Bailon -- is it Bailon (pronouncing)?
8 How do you pronounce it, since it's your case?

9 MR. ADLER: Bailon.

10 THE COURT: Bailon? Vail-Bailon?

11 I think United States vs. Vail-Bailon controls,
12 which is 868 F.3d 1293. And while you present interesting
13 arguments that may persuade the Eleventh Circuit or the
14 Supreme Court, I don't think anything -- I can follow them.

15 Why do you think -- you suggest -- why did Rosenbaum
16 say it's contested -- the issue -- in the order here?

17 MR. ADLER: Well, perhaps she's looking to other
18 jurisdictions which, you know, have indicated that there has
19 to be some mens rea requirement in order to hold a statute
20 like this, and I think that's what we've argued.

21 THE COURT: But they were bound the same as me --
22 weren't they? -- unless they could distinguish Vail-Bailon.

23 MR. ADLER: Perhaps, Judge.

24 THE COURT: Okay. Well, I think I've got to follow
25 that. So I'm going to find that the advisory guideline is 84

1 to 105 months. What's your recommendation?

2 MR. ADLER: Okay, that's correct, Judge. I would
3 like you to hear from his father first.

4 THE COURT: All right.

5 THE DEFENDANT'S FATHER: Good day.

6 THE COURT: Good morning.

7 THE DEFENDANT'S FATHER: My son is a very excellent
8 person. He got out of jail, and he immediately went to
9 school. He started working. And just something happened,
10 caught up with him from the past. I don't know. But he's a
11 very good person. He has a child, which I'm looking out for
12 right now for him. And if we could lighten his sentence in
13 any kind of way.

14 MR. ADLER: How old is his son?

15 THE DEFENDANT'S FATHER: His son is three. He'll be
16 four in a few more months.

17 THE COURT: Thank you, sir.

18 THE FATHER: He's been working and trying to get his
19 self together. But a lot of things happen to a lot of people,
20 but I'm sure that he will do the right thing if you give him
21 that chance.

22 THE COURT: Thank you, sir.

23 MR. ADLER: Your Honor, Mr. Sheely would like to
24 address the Court. But before he does, I'd ask the Court to
25 consider a low-end sentence which was a low-end sentence

1 previously. A number of reasons for this:

2 The PSI does reflect that he was a good worker. If
3 you look at his last job, he was working as a dishwasher at a
4 restaurant. They just said he was a very good worker; they'd
5 hire him back; it was a shame that he'd been arrested.

6 Since he's been incarcerated, he finished a drug
7 abuse course, he finished an anger management course, and he's
8 working to take occupational courses because he's very
9 motivated that when he gets out, he wants to connect with his
10 son.

11 His family is very supportive, as you've heard from
12 his father. His mother has been very supportive, so he'll
13 have that support to hopefully prevent any recidivism in the
14 future. But I think he has used this opportunity to reflect
15 and to establish some goals for himself and to leave behind
16 those peoples and situations that got him into serious trouble
17 in the past. So we'd ask the Court to consider the low end of
18 84 months.

19 THE COURT: All right. Thank you.

20 And, Mr. Sheely, you want to speak? You're not
21 required to, but I want to make sure you know you have the
22 opportunity.

23 THE DEFENDANT: Yes, sir.

24 Well, one thing I wanted to speak on was me and my
25 lawyer was talking about the 4A1.1, and I'm talking about the

1 3 -- I was trying to figure out how -- like this right here:

2 It says, "In a case in which the defendant received
3 two or more prior sentences as a result of convictions for
4 crimes of violence that are treated as a single sentence, the
5 -- I mean, one point is added under 4A1.1(e) for each such
6 sentence that did not result in any additional points under
7 Statute 4A1.1(a), (b), or (c). A total up to three points may
8 be added under 4A1.1(e). For purposes of this guideline,
9 crime of violence has the meaning given that term in
10 4B1.2(a)."

11 And the thing of what I was trying to understand --
12 okay? I understand that felony battery is violent; right?
13 But the felony battery came with the attempted robbery. And
14 then on that day I was convict -- I had a conviction of that
15 and the manslaughter altogether, all three charges was brought
16 underneath that. I'm saying how would that still affect me?
17 If --

18 THE COURT: Well, the attempted robbery is not being
19 counted for purposes of career offender.

20 PROBATION OFFICER GAGLIARDI: Do you want me to
21 answer?

22 THE COURT: Yeah. What's the situation here?

23 PROBATION OFFICER GAGLIARDI: With the -- so the
24 felony battery -- and I think we're talking about the
25 manslaughter and the charges in paragraph 35 -- they're not

1 counted as single sentences because they all have intervening
2 arrests.

3 So because they were sentenced on the same day but
4 they have intervening arrests and you committed them on
5 different days and then were arrested, got out, and committed
6 the next one arrested, got out, and then the next one, they're
7 counted as separate sentences.

8 THE DEFENDANT: Okay. Okay. I apologize.

9 PROBATION OFFICER GAGLIARDI: Oh, that's no problem.

10 THE DEFENDANT: I was going to ask y'all, so -- I
11 mean, what I'm really going to say is the thing that I want to
12 do when I get out in the future is I want to be more focused
13 on my ability in art. You know, I'm an artist. I know how to
14 draw. I do like doing music. So I may not be making music no
15 more, I might be more of a music writer.

16 The thing I want to do is I want to be able to get
17 it -- I'm trying to figure out how can I -- do y'all think
18 y'all can help me with housing or something like that where I
19 can -- because I want to be able to support myself in, like,
20 the moment I'm getting out. I don't want to take chances of
21 going back and doing the same thing over and over. One thing
22 I do know is insanity is when you're doing the same thing over
23 and over, expecting a different result.

24 I got out of prison after doing 12 years and came
25 back in 52 days. And I know that, okay, I'm going back to the

1 same house, the same place, the same environment. And I want
2 to change up my environment. So I'm trying to figure out if
3 y'all could help me with that. Like, is it a halfway -- would
4 I have to go to a halfway house somewhere in Georgia or
5 something like that? Or how would that work out for me right
6 there?

7 THE COURT: I don't know if I know the answer to
8 that. I mean, the best thing you can do is take advantage of
9 courses and all while you're there. The Bureau of Prisons
10 will make a decision towards the end of your term whether or
11 not a halfway house is something that might work or not. But
12 that's not a decision I can make.

13 THE DEFENDANT: Do you know whether there's any -- I
14 wanted to do CDLs too.

15 THE COURT: Wanted to do what?

16 THE DEFENDANT: CDLs, my driving. How can I take
17 that --

18 THE COURT: Your commercial driver's thing?

19 THE DEFENDANT: You know, because I'm going without
20 a driver's license as it is. But the thing I want to do is I
21 have family members that come to me all the time, telling me
22 to take my CDLs. You know any facilities I could go to that
23 would help me with that?

24 THE COURT: Yeah, I don't know the answer to that
25 question. I think the best thing to do is talk to the people

1 at the prison about all the coursework you can take so it'll
2 prepare you for when you get out.

3 Okay. This case is back on remand from the Eleventh
4 Circuit. The defendant was initially sentenced to 105 months.
5 The Court of Appeals has determined that two of the offenses
6 did not qualify him for career offender status.

7 The recalculation of the guidelines is a Level 23,
8 Criminal History Category IV, 84 to 105 months. The
9 government asked for 105-month sentence. The defendant's
10 requested a low-end sentence. I sentenced him to the low ends
11 of the guidelines last time. And so I think a low-end
12 sentence here is adequate and no greater than necessary to
13 meet the ends of the justice system.

14 And so considering the guidelines, as well as 3553
15 factors, it's the judgment of the Court that Defendant Thomas
16 James Sheely, Jr., is committed to the Bureau of Prisons for
17 84 months. Upon release from imprisonment, the defendant
18 should be placed on supervised release for three years.
19 Within 72 hours of release, the defendant shall report in
20 person to the probation office in the district to which he's
21 released.

22 While on supervised release, the defendant shall
23 comply with mandatory and standard conditions of supervised
24 release which include not committing any crime, being
25 prohibited from possessing a firearm or other dangerous

1 device. He shall not possess a controlled substance and
2 cooperate in the collection of DNA.

3 The defendant shall also comply with the following
4 special conditions: permissible search requirement, mental
5 health treatment, substance abuse treatment, and any unpaid
6 special assessment, all noted in Part F of the presentence
7 report. It's further ordered that the defendant pay to the
8 United States a special assessment of \$100.

9 So the total sentence is 84 months' imprisonment,
10 three years' supervised release, and a \$100 special
11 assessment.

12 Now that the sentence has been imposed. Does the
13 defendant or his counsel object to the Court's findings of
14 fact or the manner in which sentence was pronounced?

15 MR. ADLER: No additional objections, Your Honor.

16 THE COURT: Mr. Sheely, you have a right to appeal
17 the sentence imposed. Any notice of appeal must be filed
18 within 14 days. Failure to file notice within that period
19 will constitute a waiver of your right to appeal.

20 Okay. Good luck to you, sir.

21 MR. ADLER: May I have one moment, please?

22 THE COURT: Sure.

23 (Attorney/client confer off the record.)

24 MR. ADLER: Nothing further, Judge.

25 THE COURT: Okay. Thank you.

(Concluded at 10:46 a.m.)

C E R T I F I C A T E

I, Shamelle D. Kelley, Registered Professional Reporter, do hereby certify that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter.

Dated this 10th day of January, 2025.

s/Shamelle D. Kelley

Shamelle D. Kelley, RPR
Federal Official Court Reporter

\$	abuse (7:7) (12:5)	best (10:8) (10:25)	Dated (13:12)
\$100 (12:8) (12:10)	accept (4:18)	bound (5:21)	deals (3:15)
1	added (8:5) (8:8)	briefing (2:7) (2:9)	decision's (3:3)
10:20 (1:6)	additional (8:6) (12:15)	brought (8:15)	defendant's (2:8) (6:5) (6:7) (6:15) (11:9)
10:46 (13:1)	address (6:24)	Bureau (10:9) (11:16)	Defender's (1:19)
104 (3:19) (3:23)	adequate (11:12)	C	despite (3:1)
105 (2:17) (3:20) (3:25) (4:1) (4:5) (4:7) (4:8) (4:13) (6:1) (11:4) (11:8)	ADLER (1:18) (2:11) (4:16) (4:20) (4:24) (5:5) (5:9) (5:17) (5:23) (6:2) (6:14) (6:23) (12:15) (12:21) (12:24)	calculation (2:19) (2:20)	determined (11:5)
105-month (11:9)	admitted (2:24)	came (8:13) (9:24)	device (12:1)
10th (13:12)	advantage (10:8)	career (8:19) (11:6)	difference (3:5)
12 (9:24)	advisory (5:25)	Category (4:5) (11:8)	different (2:14) (9:5) (9:23)
120 (2:16)	AFPD (1:18)	caught (6:10)	direct (2:22)
1293 (5:12)	ago (5:1)	CDLs (10:14) (10:16) (10:22)	dishwasher (7:3)
14 (12:18)	agree (3:18)	certify (13:9)	dissent (5:4)
2	alone (3:1)	chance (6:21)	distinguish (4:24) (5:22)
2024 (1:5)	altogether (8:15)	chances (9:20)	DISTRICT (1:1) (1:11) (11:20)
2025 (13:12)	AMERICA (1:2)	change (10:2)	DNA (12:2)
21 (1:5)	anger (7:7)	charges (8:15) (8:25)	documents (2:5)
21-80113 (2:3)	apologize (9:8)	child (6:11)	DONALD (1:10)
21-cr-80113-DMM (1:4)	appeal (2:22) (12:16) (12:17) (12:19)	Circuit (2:6) (2:15) (3:1) (4:17) (4:18) (5:13) (11:4)	draw (9:14)
23 (4:5) (11:7)	Appeals (11:5)	collection (12:2)	driver's (10:18) (10:20)
250 (1:19)	applies (4:23)	commercial (10:18)	driving (10:16)
3	appropriate (4:12) (4:14)	committed (9:4) (9:5) (11:16)	drug (7:6)
3 (8:1)	argued (5:20)	committing (11:24)	E
33128 (1:24)	arguing (4:10)	comply (11:23) (12:3)	each (8:5)
33132 (1:16)	argument (4:16)	Concluded (13:1)	elements (3:12)
33401 (1:20)	arguments (4:19) (5:13)	conditions (11:23) (12:4)	Eleventh (2:6) (2:15) (3:1) (4:17) (4:18) (5:13) (11:3)
35 (8:25)	armed (3:3) (3:4) (3:6) (3:8) (3:9) (3:11) (3:14) (3:16)	confer (12:23)	end (7:17) (10:10)
3553 (4:13) (11:14)	arrested (7:5) (9:5) (9:6)	connect (7:9)	ends (11:10) (11:13)
3d (5:12)	arrests (9:2) (9:4)	consider (6:25) (7:17)	environment (10:1) (10:2)
4	art (9:13)	considered (2:21)	error (2:24)
400 (1:19) (1:24)	artist (9:13)	considering (11:14)	establish (7:15)
4A1.1 (7:25) (8:5) (8:7) (8:8)	assessment (12:6) (12:8) (12:11)	constitute (12:19)	excellent (6:7)
4B1.2 (8:10)	attempted (2:20) (2:23) (3:4) (3:9) (3:13) (4:11) (8:13) (8:18)	contested (5:16)	expecting (9:23)
4th (1:15)	Attorney/client	controlled (12:1)	F
5	Attorney's (1:15)	controls (5:11)	facilities (10:22)
52 (9:25)	AUSA (1:14)	convict (8:14)	factors (4:14) (11:15)
7	Australian (1:19)	convicted (3:9) (3:13)	Failure (12:18)
72 (11:19)	authority (2:9)	conviction (8:14)	father (6:3) (6:5) (6:7) (6:15) (6:18) (7:12)
8	Avenue (1:19) (1:24)	convictions (8:3)	Federal (1:19) (13:15)
83 (2:17)	B	cooperate (12:2)	felony (4:9) (8:12) (8:13) (8:24)
84 (3:18) (3:23) (3:25) (4:1) (4:5) (5:25) (7:18) (11:8) (11:17) (12:9)	Bailon (5:7) (5:9) (5:10)	count (4:16)	figure (2:13) (8:1) (9:17) (10:2)
868 (5:12)	based (4:13) (5:3)	counted (8:19) (9:1) (9:7)	file (12:18)
9	battery (4:9) (8:12) (8:13) (8:24)	courses (7:8) (10:9)	filed (12:17)
99 (1:15)	Beach (1:6) (1:20)	coursework (11:1)	filing (2:14)
A	behind (7:15)	Court's (4:20) (5:1) (12:13)	find (5:25)
ability (9:13)		cover (2:10)	findings (2:10) (12:13)
able (9:16) (9:19)		crime (2:21) (2:24) (3:6) (4:10) (4:12) (8:9) (11:24)	finished (7:6) (7:7)
		crimes (8:4)	firearm (11:25)
		current (4:9)	
		D	
		dangerous (11:25)	
		DANIEL (1:14)	

FLORIDA (1:1) (1:6) (1:16) (1:20) (1:24) flsd (1:25) focused (9:12) following (12:3) foregoing (13:9) four (6:16) FUNK (1:14) (2:12) (2:13) (2:18) (3:6) (3:11) (3:17) (3:20) (4:8) future (7:14) (9:12)	indicated (5:18) individuals (3:12) initially (11:4) insanity (9:22) interesting (5:12) intervening (9:1) (9:4) into (7:16) isn't (3:4) (4:17) (5:4) issued (3:2) it'll (11:1)	moment (9:20) (12:21) months (2:16) (2:17) (3:19) (4:13) (6:1) (6:16) (7:18) (11:4) (11:8) (11:17) (12:9) mother (7:12) motivated (7:9) music (9:14) (9:15) must (12:17) myself (9:19)	possess (12:1) possessing (11:25) prepare (11:2) presentence (12:6) prevent (7:13) previously (7:1) prior (8:3) prison (9:24) (11:1) Prisons (10:9) (11:16) probably (2:5) probation (3:22) (3:24) (4:2) (4:4) (8:20) (8:23) (9:9) (11:20) problem (9:9) PROCEEDINGS (1:8) (13:10) Professional (13:8) prohibited (11:25) pronounce (4:23) (5:8) pronounced (12:14) pronouncing (5:7) PSI (7:2) Public (1:19) purposes (8:8) (8:19)
G	J	N	Q
GAGLIARDI (3:24) (4:2) (4:4) (8:20) (8:23) (9:9) Georgia (10:4) gets (7:9) getting (9:20) goals (7:15) gov (1:25) Government (1:13) (2:8) (2:10) (11:9) greater (11:12) guideline (2:17) (2:18) (2:19) (3:18) (4:12) (5:25) (8:8) guidelines (11:7) (11:11) (11:14)	jail (6:8) JAMES (1:5) (2:3) (11:16) January (13:12) job (7:3) judges (4:17) judgment (11:15) jurisdictions (5:18) justice (11:13) justices (4:17)	necessary (11:12) new (3:15) noted (12:6) notice (12:17) (12:18) November (1:5) number (2:5) (7:1)	qualify (11:6) question (10:25)
H	K	O	R
halfway (10:3) (10:4) (10:11) happen (6:19) happened (6:9) health (12:5) he'd (7:5) held (13:11) He'll (6:15) (7:12) help (9:18) (10:3) (10:23) hereby (13:9) himself (7:15) hire (7:5) History (11:8) hold (5:19) hopefully (7:13) hours (11:19) house (10:1) (10:4) (10:11) housing (9:18) however (2:21)	KELLEY (1:23) (1:25) (13:8) (13:13) (13:14) known (5:2)	object (12:13) objections (12:15) occupational (7:8) offender (8:19) (11:6) offense (3:12) (4:4) offenses (11:5) Office (1:15) (1:19) (2:21) (11:20) OFFICER (3:24) (4:2) (4:4) (8:20) (8:23) (9:9) OFFICIAL (1:8) (1:23) (13:15) old (6:14) opinion (2:6) (3:15) opportunity (7:14) (7:22) order (5:16) (5:19) ordered (12:7) originally (4:25) our (5:1)	rea (4:16) (5:19) read (3:16) reasons (7:1) recalculation (11:7) received (8:2) recent (2:15) recently (3:1) recidivism (7:13) recommendation (6:1) reflect (7:2) (7:14) regard (4:20) Registered (13:8) release (11:17) (11:18) (11:19) (11:22) (11:24) (12:10) released (11:21) remand (2:25) (11:3) report (11:19) (12:7) Reporte (13:15) REPORTED (1:23) Reporter (1:23) (13:9) REPORTER'S (1:8) requested (11:10) required (7:21) requirement (5:19) (12:4) RESENTENCING (1:9) (2:4) (2:25) restaurant (7:4) result (8:3) (8:6) (9:23) reviewed (2:5) (2:7) robbery (2:20) (2:23)
I	L	P	
I'd (6:24) immediately (6:8) importantly (2:6) imposed (12:12) (12:17) imprisonment (11:17) (12:9) incarcerated (7:6) include (3:13) (11:24)	largely (5:4) last (7:3) (11:11) latest (2:14) latitude (5:7) leave (7:15) Level (4:4) (11:7) license (10:20) lighten (6:12) look (7:3) looking (5:17) (6:11) looks (4:22) lot (6:19) low (7:17) (11:10) low-end (6:25) (11:10) (11:11) luck (12:20)	Palm (1:6) (1:20) paragraph (8:25) Part (12:6) particular (4:11) past (6:10) (7:17) pay (12:7) peoples (7:16) perhaps (5:17) (5:23) period (12:18) permissible (12:4) person (6:8) (6:11) (11:20) persuade (5:13) placed (11:18) please (12:21) point (8:5) points (8:6) (8:7) position (2:22) (2:23) (4:20) (5:1) (5:2) position's (5:3)	
	M		
	management (7:7) mandatory (11:23) manner (12:14) manslaughter (8:15) (8:25) meaning (8:9) meet (11:13) members (10:21) memorandum (2:8) mens (4:16) (5:19) mental (12:4) Miami (1:16) (1:24) MIDDLEBROOKS (1:10) misnoted (3:21) misreading (3:21)		

(3:4) (3:6) (3:8) (3:9) (3:11) (3:13) (3:16) (4:11) (8:13) (8:18) ROBERT (1:18) Rosenbaum (5:15) Rosenbaum's (5:4)	(12:5) such (8:5) suggest (2:16) (5:15) suggested (2:16) suggesting (2:19) (4:7) Suite (1:19) supervised (11:18) (11:22) (11:23) (12:10) supplemental (2:9) support (7:13) (9:19) supportive (7:11) (7:12) Supreme (5:14) system (11:13)	What's (6:1) (8:22) while (5:12) (10:9) (11:22) Within (11:19) (12:18) without (10:19) worker (7:2) (7:4) wouldn't (4:18) writer (9:15)
S	T	Y
s/Shamelle (13:13) saying (8:16) says (8:2) school (6:9) search (12:4) self (6:19) send (2:15) sent (3:16) sentence (4:12) (4:14) (6:12) (6:25) (8:4) (8:6) (11:9) (11:10) (11:12) (12:9) (12:12) (12:14) (12:17) sentenced (9:3) (11:4) (11:10) sentences (8:3) (9:1) (9:7) sentencing (2:8) separate (9:7) serious (7:16) shall (11:19) (11:22) (12:1) (12:3) shame (7:5) SHAMELLE (1:23) (1:25) (13:8) (13:14) SHEELY (1:5) (2:3) (4:13) (6:23) (7:20) (11:16) (12:16) Sheely's (2:22) (2:25) sheet (3:22) SHELLY (1:23) since (5:8) (7:6) single (8:4) (9:1) situation (8:22) situations (7:16) somewhere (10:4) son (6:7) (6:14) (6:15) (7:10) sorry (2:18) SOUTHERN (1:1) speak (7:20) (7:24) special (12:4) (12:6) (12:8) (12:10) standard (11:23) standing (4:9) started (6:9) STATES (1:1) (1:2) (1:11) (1:15) (2:2) (5:11) (12:8) status (11:6) statute (5:19) (8:7) STENOGRAPHICALLY stenographically-reported Street (1:15) submitted (2:7) (2:10) substance (12:1)	taking (2:21) talk (10:25) talking (7:25) (8:24) they'd (7:4) THOMAS (1:5) (2:3) (11:15) thought (3:20) three (6:15) (8:7) (8:15) (11:18) (12:10) together (6:19) too (10:14) top (2:16) (3:20) total (8:7) (12:9) towards (10:10) TRANSCRIPT (1:8) (13:10) treated (8:4) treatment (12:5) tried (4:24) trouble (7:16) true (13:9)	y'all (9:10) (9:17) (9:18) (10:3)
	U	
	underneath (8:16) UNITED (1:1) (1:2) (1:11) (1:15) (2:2) (5:11) (12:8) Unless (3:21) (5:22) unpaid (12:5) Upon (11:17) uscourts (1:25)	
	V	
	Vail-Bailon (4:8) (4:22) (5:7) (5:10) (5:11) (5:22) violence (2:21) (2:24) (3:7) (4:10) (4:12) (8:4) (8:9) violent (8:12)	
	W	
	waiver (12:19) wantants (7:9) we'd (7:17) weren't (5:22) We've (5:1) (5:20)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

UNITED STATES OF AMERICA

v.

THOMAS JAMES SHEELY, JR.**Date of Original Judgment: 10/5/2022**§ **AMENDED JUDGMENT IN A CRIMINAL CASE**

§

§

§ Case Number: **9:21-CR-80113-DMM(1)**§ USM Number: **02095-510**

§

§ Counsel for Defendant: **Robert E. Adler**

§

§ Counsel for United States: **Daniel E. Funk**

**Amended pursuant to Eleventh Circuit Court of Appeals
Mandate for resentencing (DE 59)**

THE DEFENDANT:

☒	pleaded guilty to count(s)	One
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense

18:922(g)(1) – Possession of a Firearm and Ammunition by a convicted felon

Offense Ended

04/28/2021

Count

1

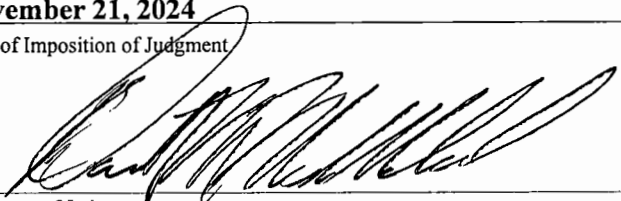
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

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

November 21, 2024

Date of Imposition of Judgment



Signature of Judge

DONALD M. MIDDLEBROOKS**UNITED STATES DISTRICT JUDGE**

Name and Title of Judge

November 21, 2024

Date

DEFENDANT: THOMAS JAMES SHEELY, JR.
CASE NUMBER: 9:21-CR-80113-DMM(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

EIGHTY-FOUR (84) MONTHS as to Count 1.

☒ The court makes the following recommendations to the Bureau of Prisons:
The Defendant be designated to a facility in or as close to South Florida as possible.

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: THOMAS JAMES SHEELY, JR.
CASE NUMBER: 9:21-CR-80113-DMM(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **THREE (3) YEARS.**

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

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: THOMAS JAMES SHEELY, JR.
CASE NUMBER: 9:21-CR-80113-DMM(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.flsp.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: THOMAS JAMES SHEELY, JR.
CASE NUMBER: 9:21-CR-80113-DMM(1)

SPECIAL CONDITIONS OF SUPERVISION

Mental Health Treatment: The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

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

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

Unpaid Restitution, Fines, or Special Assessments: If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: THOMAS JAMES SHEELY, JR.
CASE NUMBER: 9:21-CR-80113-DMM(1)

CRIMINAL MONETARY PENALTIES

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$100.00	\$0.00	\$0.00	\$0.00	

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- | | | |
|---|-------------------------------|--|
| ☐ the interest requirement is waived for the | ☐ fine | ☐ restitution |
| ☐ the interest requirement for the | ☐ fine | ☐ restitution is modified as follows: |

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **\$0.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of \$25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.

** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.

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

DEFENDANT: THOMAS JAMES SHEELY, JR.
CASE NUMBER: 9:21-CR-80113-DMM(1)

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payments of \$100.00 due immediately, balance due

It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

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

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

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

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
FORFEITURE of the defendant's right, title and interest in certain property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTa assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.