

A Touchy Subject: The Eleventh Circuit’s Tug-of-War Over What Constitutes Violent “Physical Force”

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I.	INTRODUCTION.....	1131
II.	THE ARMED CAREER CRIMINAL ACT & BACKGROUND PRINCIPLES.....	1132
	A. <i>The Residual Clause</i> & Johnson II	1134
	B. <i>The Elements Clause</i> & Johnson I.....	1135
III.	WELCH AND THE SUMMER OF SOS ORDERS	1136
	A. <i>Welch v. United States</i>	1138
	B. <i>The Summer of SOS Orders</i>	1141
IV.	FLORIDA ROBBERY & THE ELEMENTS CLAUSE	1146
	A. <i>The Florida Robbery Statute</i>	1146
	B. <i>The Pre-Johnson II Cases</i> —Dowd, Lockley, and Welch.....	1147
	C. <i>The Johnson II Aftermath</i> —Seabrooks & Fritts.....	1151
	D. <i>Overcoming Resistance Does Not Require Violent “Physical Force”</i>	1156
V.	FLORIDA FELONY BATTERY & THE ELEMENTS CLAUSE.....	1162
	A. <i>The Florida Felony Battery Statute</i>	1162
	B. <i>The Unpublished Decisions</i> —Eugene, Crawford, and Eady	1163
	C. <i>The Panel Decision in Vail-Bailon</i>	1165
	D. <i>The En Banc Decision in Vail-Bailon</i>	1168

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E. <i>A Touch that Unintentionally Results in Injury Does Not Require Violent “Physical Force”</i>	1171
VI. CONCLUSION	1174

I. INTRODUCTION

In a prosecution for possession of a firearm by a convicted felon, the biggest question is often whether the individual is subject to a sentencing enhancement under the Armed Career Criminal Act (“ACCA”).¹ The charge typically carries a maximum penalty of ten years’ imprisonment.² However, the ACCA increases the statutory range from zero to ten years to fifteen years to life if the individual has three or more prior convictions that qualify as “violent felon[ies]” or “serious drug offense[s].”³

Three routes exist by which a prior conviction can qualify as a “violent felony”—the elements clause, the enumerated-offenses clause, and the residual clause. Before 2015, courts safely housed most offenses within the residual clause.⁴ Then, on June 26, 2015, the Supreme Court issued its monumental decision in *Johnson II*, invalidating the residual clause.⁵ Subsequently, courts across the nation have reevaluated whether offenses that once qualified under the residual clause continue to qualify as ACCA predicate offenses.⁶ Usually, the answer depends on whether the offense qualifies under the elements clause.⁷ That clause requires courts to determine whether an offense has as an element “the use, attempted use, or threatened use of physical force” against another person, or, as the

¹ “The ACCA is one of the most onerous mandatory sentencing provisions found in the federal criminal code.” Katherine Menendez, *Johnson v. United States: Don’t Go Away*, CRIM. JUST., Spring 2016, at 12, 13.

² 18 U.S.C. §§ 922(g)(1), 924(a) (2012).

³ 18 U.S.C. § 924(e) (2012).

⁴ *See infra* Section IV.B.

⁵ *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551, 2563 (2015).

⁶ *See, e.g.*, *United States v. Swopes*, 886 F.3d 668 (8th Cir. 2018) (en banc); *United States v. Jones*, 877 F.3d 884, 887 (9th Cir. 2017); *United States v. Gardner*, 823 F.3d 793, 801–02 (4th Cir. 2016); *United States v. Harris*, 844 F.3d 1260, 1262 (10th Cir. 2017); *United States v. Duncan*, 833 F.3d 751, 753–55 (7th Cir. 2016); *United States v. Priddy*, 808 F.3d 676, 683 (6th Cir. 2015).

⁷ *See supra* note 6.

Supreme Court put it in *Johnson I*, whether the offense requires “violent force.”⁸

Since *Johnson II*, the tension within the Eleventh Circuit has been palpable. There has been substantial and fervent disagreement about the meaning of *Johnson I* and the reach of *Johnson II*, and rightfully so. These decisions are important. They affect whether scores of people are condemned to serve years—if not decades—of additional prison time.⁹ Given the importance of these issues, this Article examines that tension, including three ways the court got it wrong—specifically, the court’s unusual conduct in ruling on requests to file second or successive post-conviction motions based on *Johnson II*, and recent rulings on whether the Florida offenses of robbery and felony battery qualify as ACCA predicate offenses.¹⁰

II. THE ARMED CAREER CRIMINAL ACT & BACKGROUND PRINCIPLES

The ACCA is a recidivist sentencing enhancement that applies to defendants convicted of possessing a firearm as a convicted felon.¹¹ Normally, this conviction carries a statutory maximum sentence of ten years’ imprisonment for such convictions.¹² But if a defendant has three or more prior convictions for a “violent felony” or a “serious drug offense,” the ACCA requires a mandatory minimum sentence of fifteen years.¹³ The ACCA defines a “violent felony” as a crime punishable by more than one year of imprisonment that: (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” (“the elements clause”); (2) “is burglary, arson, or extortion, involves use of explosives” (“the enumerated-offenses clause”); or (3) “otherwise involves conduct

⁸ 18 U.S.C. § 924(e)(2)(B)(i); *Johnson v. United States (Johnson I)*, 559 U.S. 133, 140 (2010).

⁹ See *United States v. Gundy*, 842 F.3d 1156, 1179 (11th Cir. 2016) (Jill Pryor, J., dissenting) (internal citations omitted) (“In recent years, around 700 defendants each year have been convicted in [the Eleventh] Circuit of being a felon in possession of a firearm These numbers . . . mean that thousands of defendants stand to have their sentences increased by at least five years”).

¹⁰ See *infra* Parts IV & V.

¹¹ 18 U.S.C. §§ 922(g)(1), 924(e) (2012).

¹² 18 U.S.C. § 924(a)(2).

¹³ 18 U.S.C. § 924(e)(1).

that presents a serious potential risk of physical injury to another” (“the residual clause”).¹⁴

Determining whether an offense satisfies one of the ACCA clauses implicates several highly technical legal principles, and those principles may apply differently depending on the clause at issue. For example, in analyzing whether a prior conviction qualifies as a “violent felony,” courts must use a categorical approach, examining only the statutory elements of an offense, rather than the facts underlying a conviction.¹⁵ However, the categorical approach is applied differently depending on the clause involved. Under the elements clause and enumerated-offenses clause, courts must assume an offense was committed by the least of the acts criminalized under the state statute.¹⁶ The residual clause, on the other hand, requires

¹⁴ 18 U.S.C. § 924(e)(2)(B).

¹⁵ *Taylor v. United States*, 495 U.S. 575, 602 (1990). The only instance in which a court may look at the records relating to a defendant’s prior conviction is if the defendant’s statute of conviction is “divisible,” meaning the statute sets forth alternative elements that a jury must choose between, and one of the alternatives would not qualify as a “violent felony.” See *Descamps v. United States*, 570 U.S. 254, 257–58 (2013). This is called the *modified* categorical approach, and under this approach, courts may examine a limited universe of judicially-approved materials called *Shepard* documents, including the indictment, jury instructions, and plea agreement, to determine the element under which the defendant was convicted. See *Shepard v. United States*, 544 U.S. 13, 26 (2005). The Supreme Court has cautioned, however, that the modified categorical approach “merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute.” *Descamps*, 570 U.S. at 263. If a statute does not set forth alternative elements, but a single “indivisible” element, the modified categorical approach does not apply. *Id.* at 258–59. Often, the line between a divisible, disjunctively phrased set of *elements* and an indivisible, disjunctively phrased set of factual *means* of accomplishing a single element can be murky. See *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). But the Supreme Court has clarified that elements are the “things [that] must be charged” in a statute for conviction, while means “need not be.” *Id.* at 2256. If a statute comprises indivisible means, courts must apply the categorical approach, without using *Shepard* documents to identify which means was committed. *Id.* at 2255.

¹⁶ *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (citing *Johnson I*, 559 U.S. 133, 137 (2010)) (describing the least-culpable-act rule); see *United States v. Braun*, 801 F.3d 1301, 1305 (11th Cir. 2015) (citing *Johnson I*, 559 U.S. at 138).

courts to determine the conduct and degree of risk involved in the “ordinary case” of an offense.¹⁷

In *Johnson II*, the Supreme Court invalidated the residual clause, forcing courts across the nation to reconsider whether convictions which had qualified under the residual clause still qualified under the elements or enumerated-offenses clauses.¹⁸ Most of these evaluations revolved around the Supreme Court’s interpretation of the elements clause in *Johnson I*.¹⁹

A. *The Residual Clause & Johnson II*

In *Johnson II*, the Supreme Court struck down the ACCA’s residual clause as unconstitutionally vague under the Fifth Amendment’s Due Process Clause.²⁰ According to the *Johnson II* Court, “[t]wo features of the [ACCA’s] residual clause conspire[d] to make it unconstitutionally vague.”²¹ First, it required judges to determine what kind of conduct the “ordinary case” of a crime involves.²² Judges then had to determine whether their judicially-imagined “ordinary case” posed enough of a risk to qualify as a “violent felony.”²³ As the Supreme Court clarified in *Welch v. United States*:

The vagueness of the residual clause rests in large part on its operation under the categorical approach For purposes of the residual clause, then, courts were to determine whether a crime involved a

¹⁷ See *Baptiste v. Att’y Gen.*, 841 F.3d 601, 607–10 (3d Cir. 2016) (contrasting the least-culpable-act inquiry with the ordinary-case inquiry).

¹⁸ *Johnson II*, 135 S. Ct. 2551, 2563 (2015).

¹⁹ See *Johnson I*, 559 U.S. at 140.

²⁰ *Johnson II*, 135 S. Ct. at 2563. The void-for-vagueness doctrine bars the Government from “taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Id.* at 2556 (internal citations omitted).

²¹ *Id.* at 2557; see also *Sessions v. Dimaya*, 138 S.Ct. 1204, 1213 (2018).

²² *Id.* (stating that the ACCA’s residual clause left “grave uncertainty about how to estimate the risk posed by a crime” since “[i]t ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime”).

²³ *Id.* at 2558 (“It is one thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.”).

“serious potential risk of physical injury” by considering not the defendant’s actual conduct but an “idealized ordinary case of the crime.”

The Court’s analysis in *Johnson* [I] thus cast no doubt on the many laws that “require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*.” The residual clause failed not because it adopted a “serious potential risk” standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense. In the *Johnson* [I] Court’s view, the “indeterminacy of the wide-ranging inquiry” made the residual clause more unpredictable and arbitrary in its application than the Constitution allows. “Invoking so shapeless a provision . . . does not comport with the Constitution’s guarantee of due process.”²⁴

Thus, the Supreme Court held that increasing a defendant’s sentence under the residual clause is a denial of due process.²⁵

B. *The Elements Clause & Johnson I*

Without the residual clause, the validity of thousands of ACCA enhancements now depends on whether predicate convictions qualify under the elements clause—in other words, whether certain offenses have as an element the “use, attempted use, or threatened use of physical force” against another person.²⁶ Five years before *Johnson II*, the Supreme Court clarified the limits of what constitutes “physical force” under the elements clause in *Johnson I*.²⁷

Johnson I stemmed from the Eleventh Circuit’s holding that a Florida conviction for simple battery committed by touching another person against his will was a “violent felony” under the ACCA’s

²⁴ *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) (internal citations omitted).

²⁵ *Johnson II*, 135 S. Ct. at 2563.

²⁶ 18 U.S.C. § 924(e)(2)(B)(i) (2012).

²⁷ *Johnson I*, 559 U.S. 133, 140 (2010).

elements clause.²⁸ The Supreme Court granted certiorari to address the “physical force” requirement for the first time.²⁹ The *Johnson I* Court held that in the context of the statutory definition of a “violent felony,” “physical force” means “violent force—that is, force capable of causing physical pain or injury to another person.”³⁰ The Court observed that “[e]ven by itself, the word ‘violent’ . . . connotes a substantial degree of force.”³¹ Notably, in defining “physical force,” the Court relied on *Flores v. Ashcroft*, a Seventh Circuit decision holding that “physical force” means force “intended to cause bodily injury, or at a minimum likely to do so.”³² And because a Florida simple battery committed by a mere “touch” does not categorically require violent force, the Supreme Court held it does not satisfy the elements clause.³³

III. WELCH AND THE SUMMER OF SOS ORDERS

After *Johnson II*, a question of considerable importance was whether prisoners whose sentences were based on the ACCA’s residual clause would be able to benefit from *Johnson II* under 28

²⁸ *United States v. Johnson*, 528 F.3d 1318, 1321 (11th Cir. 2008). The Florida battery statute provides that a simple battery occurs when a person “1. [a]ctually and intentionally touches or strikes another person against the will of the other; or 2. [i]ntentionally causes bodily harm to another person.” § 784.03(1)(a), FLA. STAT. (2017). Because the *Shepard* documents in *Johnson I* did not allow the district court to conclude the battery conviction rested on anything more than the least culpable act, the conviction was presumed to have rested on an intentional, unwanted touching. *Johnson I*, 559 U.S. at 137. Typically, a conviction for simple battery is a misdemeanor, but it becomes a felony if the defendant has a previous battery conviction. § 784.03(1)(b)–(2), FLA. STAT.

²⁹ See Daija M. Page, *Forcing the Issue: An Examination of Johnson v. United States*, 65 U. MIAMI L. REV. 1191, 1197 (2011).

³⁰ *Johnson I*, 559 U.S. at 140 (citing *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003)) (“We think it clear that in the context of a statutory definition of ‘violent felony,’ the phrase ‘physical force’ means violent force—that is, force capable of causing physical pain or injury to another person.”).

³¹ *Id.* (“When the adjective ‘violent’ is attached to the noun ‘felony,’ its connotation of strong physical force is even clearer.”).

³² *Flores*, 350 F.3d at 672.

³³ *Johnson I*, 559 U.S. at 139 (noting that the plain meaning of “force” suggests “a degree of power that would not be satisfied by the merest touching”).

U.S.C. § 2255, the primary vehicle by which prisoners seek to vacate, set aside, or correct their judgments.³⁴ The answer would affect inmates across the nation. And to be sure, the issue was time-sensitive. Under § 2255(f)(3), prisoners have only one year from the date the Supreme Court recognizes a new right to file a § 2255 motion, if the right applies retroactively on collateral review.³⁵ The rules are even stricter for inmates who have previously filed a § 2255 motion.³⁶

Once an inmate files one § 2255 motion, he cannot file a “second or successive” § 2255 motion unless the new right: (1) is “a new rule of *constitutional law*”; (2) “made retroactive . . . by the *Supreme Court*”; and (3) the court of appeals grants the inmate permission to file such a motion.³⁷ Most inmates seeking post-conviction relief

³⁴ 28 U.S.C. § 2255(a) (2012) (“A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.”).

³⁵ 28 U.S.C. § 2255(f)(3) (“A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . . the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . .”). Inmates have one year to file a post-conviction motion, and that one-year clock begins to run based on the occurrence of one of four triggering events. 28 U.S.C. § 2255(f). The most common triggering event is the date the prisoner’s “judgment of conviction becomes final.” 28 U.S.C. § 2255(f)(1). However, another one is when the Supreme Court recognizes a new right, and that new right applies retroactively on collateral review. 28 U.S.C. § 2255(f)(3). When that happens, prisoners have a year from the date of the Supreme Court’s decision to file a § 2255 motion. *Id.*

³⁶ 28 U.S.C. §§ 2244(b), 2255(h) (2012).

³⁷ 28 U.S.C. § 2255(h)(2) (“A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . . a new rule of constitutional law, made retroactive . . . by the Supreme Court, that was previously unavailable.”) (emphasis added); 28 U.S.C. § 2244(b)(2)(A) (“A claim presented in a second or successive habeas corpus application . . . shall be dismissed unless . . . the applicant shows that the claim relies on a new rule of constitutional law, made retroactive . . . by the Supreme Court, that was previously unavailable . . .”) (emphasis added).

based on *Johnson II* had to file “second or successive” § 2255 motions.³⁸ The problem was that the Eleventh Circuit held *Johnson II* was only retroactively applicable in a first § 2255 motion, but not in a second or successive § 2255 motion.³⁹ Therefore, a little more than six months after *Johnson II*, the Supreme Court stepped in once again.⁴⁰ Recognizing that time was of the essence, the Court issued its decision in *Welch v. United States* about three months after granting certiorari (and, remarkably, only nineteen days after oral argument).⁴¹

A. Welch v. United States

The question presented in *Welch* was whether the Eleventh Circuit erred in denying Mr. Welch a certificate of appealability

³⁸ See *In re Leonard*, 655 F. App’x 765, 771–72 (11th Cir. 2016) (Martin, J., concurring) (“Most ACCA prisoners already filed a § 2255 motion years ago, so the only way for them to get relief based on the *Johnson [II]* decision is to come to a court of appeals and ask for permission to file another § 2255 motion in district court.”).

³⁹ Compare *Mays v. United States*, 817 F.3d 728, 737 (11th Cir. 2016) (“[W]e hold that *Johnson* applies retroactively on collateral review to prisoners seeking habeas relief for the first time.”), with *In re Franks*, 815 F.3d 1281, 1283–86 (11th Cir. 2016), abrogated by *In re Thomas*, 823 F.3d 1345 (11th Cir. 2016) (holding that *Johnson II* is not retroactive for purposes of second or successive § 2255 motions because the Supreme Court had not “made” *Johnson [II]* retroactive), and *In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015), abrogated by *In re Thomas*, 823 F.3d 1345 (11th Cir. 2016) (“Although we agree that *Johnson [II]* announced a new substantive rule of constitutional law, we reject the notion that the Supreme Court has held that the new rule should be applied retroactively on collateral review.”). See also *In re McCall*, 826 F.3d 1308, 1311 (11th Cir. 2016) (Martin, J., concurring) (“We were in the minority of courts that, from the beginning, said prisoners could not benefit from *Johnson [II]* if they had already filed an earlier § 2255 motion.”); *In re Leonard*, 655 F. App’x at 777 (Martin, J., concurring) (quoting *In re Franks*, 815 F.3d at 1289 (Martin, J., dissenting)) (“For months, [*Franks*] ‘denied the application of *Johnson [II]* to potentially hundreds of people based on pro se pleadings and without oral argument or briefing.’”).

⁴⁰ *Welch v. United States*, 136 S. Ct. 790, 790 (2016) (mem.) (granting certiorari on January 8, 2016).

⁴¹ *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (reversing the Eleventh Circuit Court of Appeals on April 18, 2016); *In re Leonard*, 655 F. App’x at 773 (Martin, J., concurring) (“Nineteen days later, the *Welch* decision abrogated our court’s precedent . . .”). During those three months, the Eleventh Circuit was the only circuit that refused to stay applications for leave to file second or successive § 2255 motions. See *id.* at 777.

(“COA”)⁴² on, among other things, whether his sentence was unconstitutional in light of *Johnson II*.⁴³ To decide that narrow issue, however, the Court had to resolve a broader legal question—whether *Johnson II* applies retroactively to cases on collateral review.⁴⁴ The answer would affect thousands of inmates in the Eleventh Circuit.⁴⁵ To resolve that question, the Court applied the framework set forth

⁴² Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the denial of a § 2255 motion cannot be appealed unless a circuit judge or district court judge issues a COA. 28 U.S.C. § 2253(c)(1) (2012). To obtain a COA, a movant must make a “substantial showing” that his constitutional right has been denied. 28 U.S.C. § 2253(c)(2). That standard is satisfied if a movant can show that “reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner.” *Slack v. McDaniel*, 529 U.S. 473, 475 (2000). “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the movant] will not prevail.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

⁴³ *Welch*, 136 S. Ct. at 1264. A brief background about Mr. Welch’s case: In 2010, Gregory Welch was sentenced to the ACCA’s mandatory minimum term of 15 years’ imprisonment based, in part, on a 1996 Florida conviction for robbery. *Id.* at 1262. At sentencing, he objected that the conviction did not qualify as a “violent felony” under the ACCA. *Id.* The district court, however, overruled that objection, and on appeal, the Eleventh Circuit affirmed the district court’s ruling. *Id.* at 1263. The district court ruled Welch’s robbery conviction qualified under both the elements clause and the residual clause, but the Eleventh Circuit affirmed based solely on the residual clause. *Id.* The Supreme Court denied certiorari. *Id.* (citing *Welch v. United States*, 568 U.S. 1112 (2013) (mem.) (denying certiorari on January 7, 2013). In December 2013, Mr. Welch moved *pro se* for the vacatur of his sentence under § 2255, arguing that his Florida robbery conviction itself was vague, and his attorney was ineffective by allowing him to be sentenced under the ACCA. *Id.* The district court denied the motion and a COA. *Id.* Mr. Welch appealed and moved for a COA in the Eleventh Circuit. *Id.* In his motion, he noted *Johnson II* was pending in the Supreme Court and argued his ACCA sentence was unconstitutional under the Fifth Amendment. *Id.* In June 2015, less than three weeks before *Johnson II*, the Eleventh Circuit denied Mr. Welch’s motion for a COA. *Id.* After *Johnson II*, Mr. Welch sought an extension of time to petition for reconsideration, but the motion was returned to him unfiled because the time to seek reconsideration had already expired. *Id.* The Supreme Court then granted Mr. Welch’s *pro se* petition for a writ of certiorari. *Id.*

⁴⁴ *Id.* at 1261 (“The present case asks whether *Johnson* is a substantive decision that is retroactive in cases on collateral review.”). Notably, because the United States agreed with Mr. Welch that *Johnson II* applies retroactively, the Supreme Court appointed independent counsel as *amicus curiae* to argue against retroactivity. *Id.* at 1263.

⁴⁵ See *infra* Part III.B.

by Justice O'Connor's plurality opinion in *Teague v. Lane*.⁴⁶ Under *Teague*, the general rule is that "new constitutional rules of criminal procedure" are not retroactively applicable on collateral review.⁴⁷ However, two categories of rules are not subject to this general bar—new substantive rules and new watershed rules of criminal procedure.⁴⁸ The parties in *Welch* agreed that *Johnson II* announced a new rule of constitutional law.⁴⁹ The parties also agreed that the new rule announced in *Johnson II* was not a new watershed rule of criminal procedure.⁵⁰ The question, then, was whether the new rule announced in *Johnson II* was a "substantive rule" or a "procedural rule."⁵¹ The *Welch* Court held that *Johnson II* announced a substantive rule because it changed the *reach* of the ACCA, not the judicial

⁴⁶ *Welch*, 136 S. Ct. at 1264 (discussing *Teague v. Lane*, 489 U.S. 288, 301 (1989) (O'Connor, J., plurality opinion)). *Teague* was decided in the context of a federal collateral challenge to a *state* conviction, while *Welch* involved a challenge to a *federal* conviction. Although the Supreme Court has never explicitly held the *Teague* framework applies under such circumstances, for purposes of this case, the parties and the Court assumed it did. *Id.*

⁴⁷ *Id.* (quoting *Teague*, 489 U.S. at 310).

⁴⁸ *Id.* (quoting *Schiro v. Summerlin*, 542 U.S. 348, 351 (2004) and *Saffle v. Parks*, 494 U.S. 484, 495 (1990)).

⁴⁹ *Id.* ("It is undisputed that *Johnson* announced a new rule."). "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the . . . Government." *Teague*, 489 U.S. at 301. "To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* A holding is only dictated by precedent if it would have been "apparent to all reasonable jurists." *Lambrix v. Singletary*, 520 U.S. 518, 528–29 (1997). However, a case does not announce a new rule "when it is merely an application of the principle that governed a prior decision to a different set of facts." *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013) (internal quotes and alterations omitted) (quoting *Teague*, 489 U.S. at 307).

⁵⁰ *Welch*, 136 S. Ct. at 1264 ("The parties agree that *Johnson* does not fall into the limited second category for watershed procedural rules."). A new watershed rule of criminal procedural implicates "the fundamental fairness and accuracy of the criminal proceedings." *Saffle*, 494 U.S. at 495. "Although the precise contours of this exception may be difficult to discern," the Supreme Court has generally cited *Gideon v. Wainwright*, which held "that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception." *Saffle*, 494 U.S. at 495 (citing *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963)).

⁵¹ *Welch*, 136 S. Ct. at 1264–65. A rule is substantive if it "alters the range of conduct or the class of persons that the law punishes," including rules "that narrow the scope of a criminal statute by interpreting its terms," and "constitutional de-

procedures by which the statute is applied, and therefore, *Johnson II* applied retroactively.⁵² The Court, however, declined to wade into the merits of Mr. Welch’s motion, remanding the case to the Eleventh Circuit to decide whether Mr. Welch’s Florida conviction for robbery still qualified as an ACCA predicate offense under the elements clause.⁵³

B. *The Summer of SOS Orders*

After *Welch* was issued on April 18, 2016, inmates had slightly more than two months—until the one-year anniversary of *Johnson II*—to submit applications to the Eleventh Circuit for leave to file second or successive § 2255 motions, obtain approval, and file the motions in the district court.⁵⁴ Thousands did.⁵⁵

terminations that place particular conduct or persons covered by the statute beyond the [government’s] power to punish.” *Schriro*, 542 U.S. at 351–53. On the other hand, procedural rules regulate “the manner of determining the defendant’s culpability.” *Id.* at 353. For example, rules that alter “the range of permissible methods for determining whether a defendant’s conduct is punishable.” *Id.*

⁵² *Welch*, 136 S. Ct. at 1265. The Court noted that not every decision altering the scope of a statute is a substantive decision. *Id.* at 1268. For example, a decision altering the scope of a procedural statute, such as one regulating the admission of evidence at trial, would itself be a procedural decision, and not retroactive on collateral review. *Id.*

⁵³ *Id.* (“It may well be that the Court of Appeals on remand will determine on other grounds that the District Court was correct to deny Welch’s motion to amend his sentence. For instance, the parties continue to dispute whether Welch’s strong-arm robbery conviction qualifies as a violent felony under the elements clause of the Act, which would make Welch eligible for a 15-year sentence regardless of *Johnson*.”).

⁵⁴ “[A]n inmate has one year to petition for relief, from the date the Supreme Court initially recognized a right, not from the date the Supreme Court held the right to be retroactively applicable.” *In re Jones*, 830 F.3d 1295, 1304 (11th Cir. 2016) (Rosenbaum & Jill Pryor, JJ., concurring) (citing *Dodd v. United States*, 545 U.S. 353 (2005)). Notably, “*Welch* is the Supreme Court’s first ever § 2255 case to make a new rule of constitutional law retroactive less than a year after the rule was announced.” *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016).

⁵⁵ See *In re Jones*, 830 F.3d at 1301 (Rosenbaum & Jill Pryor, JJ., concurring) (“[A]long with our regular workload, in the three months alone since *Welch* issued, we have also received more than 1,800 *Johnson*-based requests for authorization.”); *In re Clayton*, 829 F.3d 1254, 1257 (11th Cir. 2016) (Martin & Pryor, JJ., concurring) (“In the last couple of months, this court has received hundreds of these applications from prisoners who want relief based on the Supreme Court’s

The circumstances under which the Eleventh Circuit rules on these applications are unusual. When ruling on such applications, the court must determine whether the applicant makes a “prima facie showing” that his claim relies on a new rule of constitutional law made retroactive by the Supreme Court.⁵⁶ The applications are typically filed pro se, on a form provided by the Eleventh Circuit, with no briefing.⁵⁷ The court must rule on them within 30 days.⁵⁸ If a claim is rejected, an applicant cannot bring the claim again, even if there is a later change in the law that shows he should have been granted authorization.⁵⁹ What’s more, the Eleventh Circuit’s rulings on these applications cannot be reconsidered by the court or reviewed by the Supreme Court.⁶⁰

ruling in *Johnson*.”); *In re Leonard*, 655 F. App’x 765, 771 (11th Cir. 2016) (Martin, J., concurring) (“Judges on this nation’s courts of appeals have now witnessed a flood of applications coming from inmates who believe that *Johnson* may mean their sentence is no longer valid.”).

⁵⁶ 28 U.S.C. § 2244(b)(3)(C), (d)(1)(C) (2012). A prisoner may also seek authorization when his claim relies on “newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.” 28 U.S.C. § 2255(h)(1) (2012).

⁵⁷ See *United States v. Seabrooks*, 839 F.3d 1326, 1349–50 (11th Cir. 2016) (Martin, J., concurring) (“These applications are almost always filed by prisoners with no lawyers. They include no briefs. In fact, the form used by prisoners for these applications forbids the prisoner from filing briefs or any attachments, unless the form is filed by a prisoner suffering under a death sentence.”).

⁵⁸ 28 U.S.C. § 2244(b)(3)(D) (“The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.”). It seems that the Eleventh Circuit “is the only court to force a decision on every one of these cases within 30 days of filing.” *In re Leonard*, 655 F. App’x at 777 (Martin, J., concurring). Other courts have held that the thirty-day limitations period is advisory rather than mandatory. *Orona v. United States*, 826 F.3d 1196, 1198–99 (9th Cir. 2016) (per curiam); *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997).

⁵⁹ *In re Baptiste*, 828 F.3d 1337, 1340 (11th Cir. 2016) (per curiam) (stating that § 2244(b)(1) provides that a repetitious filing “shall be dismissed,” and noting that the word “shall” does not convey discretion); see *In re Parrish*, No. 17-11523, slip op. at 4 (11th Cir. May 5, 2017) (Martin, J., concurring) (“So we now know that, as he has told us all along, Mr. Parrish’s ACCA sentence is not lawful But again, because this panel made a mistake in denying Mr. Parrish’s first application, *Baptiste* prevents us from even considering his application today.”).

⁶⁰ 28 U.S.C. § 2244(b)(3)(E) (“The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.”).

In the four months after *Welch*, the Eleventh Circuit ruled on hundreds of *Johnson II*-based applications (“SOS orders”).⁶¹ Of the hundreds, 33 were published.⁶² That means the court, racing to issue orders in a short 30-day window, created unreviewable precedent based on forms filled out by *pro se* prisoners. Many, if not most, of those decisions were splintered.⁶³ And in ruling on these applications, the Eleventh Circuit went beyond merely determining whether

“This means no motion for reconsideration, no motion for en banc review, no appeal, and no petition for cert. The decisions [the Eleventh Circuit] make[s] in these cases are therefore, as a practical matter, not reviewable.” *In re Leonard*, 655 F. App’x at 778 (Martin, J., concurring).

⁶¹ See *in re McCall*, 826 F.3d 1308, 1311 (11th Cir. 2016) (Martin, J., concurring) (“[I]n the two months since *Welch*, . . . our court has denied hundreds of applications to file § 2255 motions based on *Johnson [II]* . . .”) (citations omitted).

⁶² See *In re Welch*, 884 F.3d 1319 (11th Cir. 2018); *In re Hernandez*, 857 F.3d 1162 (11th Cir. 2017); *In re Parker*, 832 F.3d 1250 (11th Cir. 2016); *In re Chance*, 831 F.3d 1335 (11th Cir. 2016); *In re Moore*, 830 F.3d 1268 (11th Cir. 2016); *In re Bradford*, 830 F.3d 1273 (11th Cir. 2016); *In re Jones*, 830 F.3d 1295 (11th Cir. 2016); *In re Sams*, 830 F.3d 1234 (11th Cir. 2016); *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016); *In re Anderson*, 829 F.3d 1290 (11th Cir. 2016); *In re Davis*, 829 F.3d 1297 (11th Cir. 2016); *In re Burgest*, 829 F.3d 1285 (11th Cir. 2016); *In re Watt*, 829 F.3d 1287 (11th Cir. 2016); *In re Clayton*, 829 F.3d 1254 (11th Cir. 2016); *In re Smith*, 829 F.3d 1276 (11th Cir. 2016); *In re Hunt*; 835 F.3d 1277 (11th Cir. 2016); *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016); *In re Gordon*, 827 F.3d 1289 (11th Cir. 2016); *In re Parker*, 827 F.3d 1286 (11th Cir. 2016); *In re Sapp*, 827 F.3d 1334 (11th Cir. 2016); *In re Williams*, 826 F.3d 1351 (11th Cir. 2016); *In re Colon*, 826 F.3d 1301 (11th Cir. 2016); *In re Jackson*, 826 F.3d 1343 (11th Cir. 2016); *In re McCall*, 826 F.3d 1308 (11th Cir. 2016); *In re Rogers*, 825 F.3d 1335 (11th Cir. 2016); *In re Hires*, 825 F.3d 1297 (11th Cir. 2016); *In re Adams*, 825 F.3d 1283 (11th Cir. 2016); *In re Hines*, 824 F.3d 1334 (11th Cir. 2016); *In re Fleur*, 824 F.3d 1337 (11th Cir. 2016); *In re Pinder*, 824 F.3d 977 (11th Cir. 2016); *In re Thomas*, 823 F.3d 1345 (11th Cir. 2016); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016); *In re Robinson*, 822 F.3d 1196 (11th Cir. 2016).

⁶³ See, e.g., *In re Parker*, 832 F.3d at 1250–51 (Rosenbaum & Jill Pryor, JJ., concurring); *In re Chance*, 831 F.3d at 1342 (Tjoflat, J., concurring); *In re Jones*, 830 F.3d at 1297–1305 (Rosenbaum & Jill Pryor, JJ., concurring); *In re Gomez*, 830 F.3d at 1228–29 (Carnes, J., concurring); *In re Anderson*, 829 F.3d at 1294–97 (Martin, J., dissenting); *In re Davis*, 829 F.3d at 1300–02 (Carnes, J., dissenting); *In re Clayton*, 829 F.3d at 1256–67 (Martin & Jill Pryor, JJ., concurring); *id.* at 1267–76 (Rosenbaum & Jill Pryor, JJ., concurring); *In re Smith*, 829 F.3d at 1281–85 (Jill Pryor, J., dissenting); *In re Hunt*, 835 F.3d at 1278–89 (Wilson, Jill Pryor, & Rosenbaum, JJ., concurring); *In re Sapp*, 827 F.3d at 1336–41 (Jordan,

an individual made a “prima facie showing.”⁶⁴ Instead, the court combed through each prisoner’s record, publishing orders that delved into the merits of inmates’ *Johnson II* claims, including whether certain offenses have as an element the use of “physical

Rosenbaum, & Jill Pryor, JJ., concurring); *In re Colon*, 826 F.3d at 1306–08 (Martin, J., dissenting); *In re McCall*, 826 F.3d at 1309–12 (Martin, J., concurring); *In re Fleur*, 824 F.3d at 1341–44 (Martin, J., concurring); *In re Pinder*, 824 F.3d at 979–81 (Tjoflat, J., dissenting); *In re Robinson*, 822 F.3d at 1197–1201 (Martin, J., concurring); see also *In re McCall*, 826 F.3d at 1311–12 n.6 (Martin, J., concurring) (listing over 20 splintered decisions in unpublished opinions).

⁶⁴ See *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (quoting *Jordan v. Sec’y., Dep’t of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007)) (stating that a prima facie showing “is a limited determination” and that “[t]he district court is to decide the [§ 2255(h)] issue[s] fresh, or in the legal vernacular, *de novo*.”). The *Moss* Court explained that

[s]hould the district court conclude that [an applicant] has established the statutory requirements for filing a second or successive motion, it shall proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise. Any determination that the district court makes about whether [an applicant] has satisfied the requirements for filing a second or successive motion, and any determination it makes on the merits, if it reaches the merits, is subject to review on appeal from a final judgment or order if an appeal is filed. Should an appeal be filed from the district court’s determination, nothing in this order shall bind the merits panel in that appeal.

Id.

force.”⁶⁵ No other court of appeals did that.⁶⁶ And, as one judge observed, much of this occurred outside public view.⁶⁷ The tension regarding the application of the ACCA’s elements clause after *Johnson II*, however, was not limited to the post-conviction context. With the residual clause gone, a critical question remained—what offenses continue to qualify as ACCA predicates? The answer turns, in large part, on what acts qualify as violent “physical force” under *Johnson I*.

⁶⁵ See *In re Leonard*, 655 F. App’x at 771–72 (Martin, J., concurring) (“[I]n reviewing those applications we have been doing more than what the statute directs. The judges of this court, myself included, have been combing through sealed records from the prisoner’s original sentence hearing to speculate about whether the prisoner would win if we let him file in district court.”); see also *In re McCall*, 826 F.3d at 1311 (Martin, J., concurring); *In re Jones*, 830 F.3d at 1302 (Rosenbaum & Jill Pryor, JJ., concurring) (“We know that some applications erroneously were denied, although we do not know how many.”). This practice of deciding merits issues in published SOS orders raised questions within the Eleventh Circuit about whether such orders are binding outside the unique SOS context. Compare *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (“To be clear, our prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions.”), with *United States v. Seabrooks*, 839 F.3d 1326, 1350 (11th Cir. 2016) (Martin, J., concurring) (“It is neither wise nor just for this type of limited ruling, resulting from such a confined process, to bind every judge on this court as we consider fully counseled and briefed issues in making merits decisions that may result in people serving decades or lives in prison.”). Recently, however, the Eleventh Circuit resolved that issue by holding published SOS orders are binding on direct appeal. *United States v. St. Hubert*, 883 F.3d 1319, 1328–29 (11th Cir. 2018).

⁶⁶ See *In re Hoffner*, 870 F.3d 301, 310 n.13 (3d Cir. 2017) (citing *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016)) (“[W]e do not follow the Eleventh Circuit, which—contrary to our precedent—resolved a merits question in the context of a motion to authorize a second or successive habeas petition.”); *In re McCall*, 826 F.3d at 1312 (Martin, J., concurring) (“[T]his effort sets our court apart . . . other courts are not scrutinizing the merits of these cases at this stage.”); *Id.* at 1312 n.7 (“I am aware of no order from another court of appeals that combs through an applicant’s presentence investigation report to decide the merits of his yet-unfiled motion without ever hearing from a lawyer. And our court has done this in hundreds of cases.”).

⁶⁷ See *In re McCall*, 826 F.3d at 1312 (Martin, J., concurring) (“Our court’s massive effort to decide the merits of hundreds of habeas cases within 30 days each, all over a span of just a few weeks, has been largely hidden from public view. Very few of our orders in these cases are reported or posted on the court’s website, which means no lawyer is likely to see them.”).

IV. FLORIDA ROBBERY & THE ELEMENTS CLAUSE

In *Johnson I*, the Supreme Court observed that the term “physical force” suggests a “substantial degree of force.”⁶⁸ However, before *Johnson II*, most offenses fell within the broad sweep of the residual clause, so courts could avoid engaging in elements clause analyses.⁶⁹ But after *Johnson II*, the elements clause has become the default home for many offenses under the ACCA.⁷⁰ So the following question is more important than ever—what is a “substantial degree of force”?

In *Welch*, the Supreme Court left open whether a Florida conviction for robbery qualifies as a “violent felony” under the elements clause.⁷¹ Since then, the issue has not only placed the Eleventh and Ninth Circuits at odds, but, broadly speaking, created tension among the circuits about the amount of force required.⁷²

A. *The Florida Robbery Statute*

Florida’s robbery statute, Fla. Stat. § 812.13, defines robbery as:

[T]he taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of *force, violence, assault, or putting in fear*.⁷³

⁶⁸ *Johnson I*, 559 U.S. 133, 140 (2010) (“Even by itself, the word ‘violent’ in § 924(e)(2)(B) connotes a substantial degree of force.”).

⁶⁹ See *infra* Part IV.B.

⁷⁰ See generally *Johnson II*, 135 S. Ct. 2551 (2015); *Welch v. United States*, 136 S. Ct. 1257 (2016).

⁷¹ *Welch*, 136 S. Ct. at 1268.

⁷² Compare *United States v. Fritts*, 841 F.3d 937, 940 (11th Cir. 2016), with *United States v. Geozos*, 870 F.3d 890, 900 (9th Cir. 2017).

⁷³ § 812.13(1), FLA. STAT. (2017) (emphasis added). The Florida robbery statute, which was enacted in 1868, has always had a “force” element. The most recent amendment to the statute was in 1992, when the legislature “add[ed] this language: ‘with intent to either permanently or temporarily deprive the person or the owner of the money or other property.’” *United States v. Seabrooks*, 839 F.3d 1326, 1339 n.6 (11th Cir. 2016) (internal citations omitted).

The various degrees of robbery, unchanged since 1974, depend on whether the perpetrator “carried” a firearm, deadly weapon, weapon, or no weapon.⁷⁴ A firearm or weapon that is “carried” by the perpetrator, though, need not have been “used” in the robbery. In fact, the victim need not even be aware of the firearm or weapon.⁷⁵

B. *The Pre-Johnson II Cases—Dowd, Lockley, and Welch*

In 2006, the Eleventh Circuit issued *United States v. Dowd*, the first case to address whether a Florida conviction for armed robbery qualified as a “violent felony.”⁷⁶ In a single sentence, the Court reasoned “without difficulty” that “Dowd’s January 17, 1974, armed robbery conviction is undeniably a conviction for a violent felony [under the ACCA’s elements clause].”⁷⁷ *Dowd*, however, was issued before *Johnson I*, and, for that matter, any of the recent Supreme Court cases clarifying the application of the categorical approach.⁷⁸

⁷⁴ § 812.13(2)(a)–(c), FLA. STAT.

⁷⁵ See *State v. Baker*, 452 So. 2d 927, 929 (Fla. 1984) (“[T]he statutory element which enhances punishment for armed robbery is not the *use* of the deadly weapon, but the mere fact that a deadly weapon was *carried* by the perpetrator. The victim may never even be aware that a robber is armed, so long as the perpetrator has the weapon in his possession during the offense.”); *State v. Burris*, 875 So. 2d 408, 413 (Fla. 2004) (“In *Baker*, we recognized the distinction between carrying a deadly weapon and using a deadly weapon”). “The offense of robbery while armed contains, in addition to its other constituent statutory elements, the element that the accused carried a firearm or other deadly weapon. The elements of the crime do not include displaying the weapon or using it in perpetrating the robbery.” *Williams v. State*, 560 So. 2d 311, 314 (Fla. 1st DCA 1990); see also *United States v. Stokeling*, 684 F. App’x 870, 871 (11th Cir. 2017) (per curiam) (“Our precedents apply to Florida robbery as well as armed robbery because the elements are identical, differing only in what ‘the offender carried’ ‘in the course of committing the robbery.’”) (citing § 812.13, FLA. STAT. (2017)).

⁷⁶ *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006).

⁷⁷ *Id.*

⁷⁸ “*Dowd* did not conduct the required categorical analysis.” *Seabrooks*, 839 F.3d at 1348 (Martin, J., concurring).

Nowhere did the *Dowd* opinion: (1) consult state law to identify the least culpable conduct for which an armed robbery conviction could be sustained; (2) analyze whether that least culpable conduct was encompassed by the generic federal offense; or (3) discuss whether the Florida armed robbery statute was divisible. It only stated the conclusion (again, in one sentence) that a 1974 Florida armed robbery conviction counts as a violent felony.

Considering *Dowd* was issued before *Johnson I*, there was a legitimate question about whether *Dowd* remained binding precedent.⁷⁹

During the summer of SOS orders, the court relied on *Dowd* in at least three published orders to deny authorization to applicants with prior Florida convictions for armed robbery.⁸⁰ At the same time, however, authorization was granted for individuals with Florida convictions for unarmed robbery before 1997⁸¹ and for attempted armed robbery.⁸² The issue came to a head in *United States v. Seabrooks* and *United States v. Fritts*,⁸³ but before turning to those decisions, it is necessary to first discuss the Eleventh Circuit's other pre-*Johnson II* robbery decisions.

The Eleventh Circuit addressed Florida robbery for the first time after *Johnson I* in *United States v. Lockley*.⁸⁴ In *Lockley*, the court considered whether a 2001 Florida conviction for attempted robbery qualified as a "crime of violence" under USSG § 4B1.2, the federal sentencing guideline for career offenders.⁸⁵ Applying the categorical approach, the Eleventh Circuit concluded that the least culpable

Id.

⁷⁹ Compare *id.* at 1339, 1341 (majority opinion) ("My view is that *Dowd* and its progeny control under our prior panel precedent rule."), with *id.* at 1346 (Badlock, J., concurring) ("I would . . . leave for another day the question of the continuing viability of *Dowd*."), and *id.* at 1348 (Martin, J., concurring) ("*Dowd* is no longer good law.").

⁸⁰ *In re Hires*, 825 F.3d 1297, 1302 (11th Cir. 2016) (referencing *Dowd* and holding that the defendant's 1995 Florida robbery conviction qualified as a "violent felony" under the ACCA's elements clause); *In re Thomas*, 823 F.3d 1345, 1349 (11th Cir. 2016) (citing *Dowd* and holding that the defendant's 1980 and 1986 Florida "convictions for armed robbery qualify as ACCA predicates under the elements clause"); *In re Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016) (concluding that the defendant's two Florida robbery-with-a-firearm convictions and his armed robbery conviction "qualify as violent felonies under our binding precedent" in *Dowd* and *Thomas*).

⁸¹ E.g., *In re Pace*, No. 16-11898, slip op. at 3-5 (11th Cir. May 16, 2016); *In re Jackson*, 826 F.3d 1343, 1346-47 (11th Cir. 2016). Prior to 1997, Florida courts were divided on whether sudden snatchings were robberies. *Robinson v. State*, 692 So. 2d 883, 884 (Fla. 1997).

⁸² E.g., *In re Lampley*, No. 16-12465, slip op. at 4-6 (11th Cir. June 15, 2016); *In re James*, No. 16-12548, slip op. at 4-5 (11th Cir. June 8, 2016).

⁸³ See *infra* Part IV.C.

⁸⁴ *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011).

⁸⁵ *Id.* at 1240, 1240 n.1 (stating *Lockley* had a 2001 Florida conviction for attempted robbery); see *United States v. Seabrooks*, 839 F.3d 1326, 1359 (11th Cir. 2016) (Martin, J., concurring) ("*Lockley* considered whether a 2001 Florida

act under the robbery statute was taking an individual's money or property by placing him in fear of death or great bodily harm.⁸⁶ The court found it "inconceivable" that this type of conduct "would not involve the use or threatened use of physical force."⁸⁷ Because the guidelines' commentary stated that "the attempt to commit a 'crime of violence' is itself a 'crime of violence,'" the Eleventh Circuit found that Mr. Lockley's conviction for attempted robbery qualified as a "crime of violence" under the elements clause.⁸⁸ The court alternatively concluded that Mr. Lockley's conviction also qualified under both the residual clause and the guidelines' commentary, which enumerated robbery as a "crime of violence."⁸⁹ Notably,

attempted robbery conviction under § 812.13(1) counts as a 'crime of violence' within the meaning of the identically-worded elements clause of the Sentencing Guidelines."). At that time, the definition of a "violent felony" under the ACCA and a "crime of violence" under the Sentencing Guidelines were substantially similar. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2011), *with* 18 U.S.C. § 924(e)(2)(B) (2012). Moreover, the definitions had identical elements clauses and residual clauses. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2011), *with* 18 U.S.C. § 924(e)(2)(B). Therefore, the Eleventh Circuit considered cases interpreting the language in one definition as authoritative in cases interpreting the language in the other. *Lockley*, 632 F.3d at 1243 n.5 ("Though ACCA's 'violent felony' enhancement and the Guidelines' career offender enhancement differ slightly in their wording, we apply the same analysis to both.").

⁸⁶ *Lockley*, 632 F.3d at 1244–45.

⁸⁷ *Id.* at 1245.

⁸⁸ *Id.* The ACCA has no such commentary, so whether an attempted robbery qualifies as a "violent felony" under the ACCA requires the court to determine whether the least culpable act for committing an attempted robbery has as an element the "use, attempted use, or threatened use of physical force." *See* *United States v. Fritts*, 841 F.3d 937, 941–42 n.6 (11th Cir. 2016) (internal citations omitted). However, even under that analysis, the Eleventh Circuit concluded attempted robbery qualifies as a "violent felony" under the elements clause. *United States v. Joyner*, 882 F.3d 1369, 1378–79 (11th Cir. 2018).

⁸⁹ *Lockley*, 632 F.3d at 1241–46; *In re Jackson*, 826 F.3d 1343, 1347 n.2 (11th Cir. 2016) ("[T]he bulk of *Lockley*'s analysis (at least 13 paragraphs of the opinion) focused on the argument that 'Lockley's prior attempted robbery conviction qualifies as a 'crime of violence' because robbery is an enumerated offense' in § 4B1.2's application note."). In 2016, robbery was removed from the commentary and added to the enumerated-offenses clause. U.S. SENTENCING GUIDELINES MANUAL app. C amt. 798 (U.S. SENTENCING COMM'N 2016).

Lockley did not rely on *Dowd*, arguably suggesting that *Dowd* was no longer good law in light of *Johnson I*.⁹⁰

A year after *Lockley*, the Eleventh Circuit addressed whether a 1996 Florida conviction for robbery qualified as a “violent felony” under the ACCA in *United States v. Welch*.⁹¹ In *Welch*, the Eleventh Circuit held that this conviction qualified as a “violent felony” under the ACCA’s residual clause.⁹² The court, however, declined to address whether such a conviction qualified under the elements clause.⁹³ The year in which *Welch*’s offense occurred—before or after 1997—was critical to the court’s analysis⁹⁴ because Florida law relating to robbery qualitatively changed in 1997.⁹⁵

The *Welch* court explained that in 1976, the Florida Supreme Court stated, “[a]ny degree of force suffices to convert larceny into a robbery.”⁹⁶ Thereafter, “the state courts of appeal were divided on whether a snatching, as of a purse, or cash from a person’s hand, or jewelry on the person’s body, amounted to robbery.”⁹⁷ Then, in 1997, the Florida Supreme Court decided *Robinson v. State*, holding that “for the snatching of property from another to amount to robbery, the perpetrator must employ more than the force necessary to remove the property from the person. Rather, there must be resistance by the victim that is overcome by the physical force of the

⁹⁰ During the summer of SOS orders, however, the Eleventh Circuit relied on *Lockley*’s elements clause holding at least once. See *In re Robinson*, 822 F.3d 1196, 1197 (11th Cir. 2016) (citing *Lockley* and concluding that the defendant’s 1991 Florida conviction for armed robbery has “as an element the use, attempted use, or threatened use of physical force against” another person).

⁹¹ *United States v. Welch*, 683 F.3d 1304, 1305 (11th Cir. 2012). This same defendant would go on to prevail in the Supreme Court on whether *Johnson II* is retroactive to cases on collateral review. See *supra* Part III.

⁹² *Welch*, 683 F.3d at 1312–13.

⁹³ *Id.*

⁹⁴ *Id.* at 1311–12.

⁹⁵ *Id.* at 1311, 1311 n.31 (discussing *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997)).

⁹⁶ *Id.* at 1311; *McCloud*, 335 So. 2d at 258.

⁹⁷ *Welch*, 683 F.3d at 1311.

offender.”⁹⁸ After *Robinson*, Fla. Stat. § 812.131 was enacted to penalize robbery by sudden snatching.⁹⁹ Thus, before *Robinson*, “sudden snatchings” were prosecuted as robberies by “force.”¹⁰⁰

Accordingly, the *Welch* court assumed for purposes of its ACCA analysis that Mr. Welch pled guilty to robbery “at a time when mere snatching sufficed.”¹⁰¹ The *Welch* court discussed *Lockley*, but stated, “*Lockley* does not reach the question of whether robbery by sudden snatching would or would not present ‘a serious risk of physical injury to another’ under the residual clause[.]”¹⁰² As for the elements clause, the court wrote:

[U]nder [*Johnson I*], “physical force” means not merely what “force” means in physics, but “*violent* force—that is, force capable of causing physical pain or injury to another person.” That *Johnson I* discussion was in the context of the elements clause requirement of “physical force,” not the residual clause requirement of “serious risk of potential injury to another.” Arguably the elements clause would not apply to mere snatching, but the issue is not cut and dried. We need not decide whether snatching is sufficiently violent under the elements clause, though, because it suffices under the residual clause.¹⁰³

Once *Johnson II* invalidated the residual clause, the Eleventh Circuit was confronted with the question left open in *Welch*: whether a pre-1997 robbery conviction qualified as a “violent felony” under the elements clause.¹⁰⁴

C. *The Johnson II Aftermath—Seabrooks & Fritts*

In *United States v. Seabrooks*, the court seemingly had the opportunity to address the question left open in *Welch*: whether a pre-1997 Florida armed robbery conviction qualified under the elements

⁹⁸ *Robinson*, 692 So. 2d at 886.

⁹⁹ *Welch*, 683 F.3d at 1311 n.30 (citing § 812.131, FLA. STAT. (2000)).

¹⁰⁰ *Id.* at 1311–12.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1312.

¹⁰³ *Id.* at 1312–13.

¹⁰⁴ *Id.* at 1313.

clause.¹⁰⁵ Ultimately, however, the court was unable to address this question because Mr. Seabrooks' conviction was imposed four months after the Florida Supreme Court's decision in *Robinson*, and was therefore governed by *Lockley*.¹⁰⁶ The court, nevertheless, issued deeply divided dicta about the continuing validity of *Dowd* and whether there was truly a distinction between pre-1997 and post-1997 robberies.¹⁰⁷

Judge Hull, on the one hand, believed *Dowd* remained binding precedent, which was confirmed by the SOS decisions relying on *Dowd*.¹⁰⁸ She also believed that anything *Welch* said about the elements clause was not only dicta "but wrong dicta" because *Robinson* was stating "what the statute always meant."¹⁰⁹ Therefore, according to Judge Hull, there was no distinction between pre-1997 and post-1997 robberies.¹¹⁰ In her view, robberies committed through the use of "force," no matter when they occurred, had always required enough force to overcome a victim's resistance.¹¹¹ And based on *Lockley* and *Dowd*, that type of robbery qualified as a "violent felony" under the elements clause.¹¹²

¹⁰⁵ United States v. Seabrooks, 839 F.3d 1326, 1338 (11th Cir. 2016).

¹⁰⁶ *Id.* at 1341 ("Seabrooks' armed robbery convictions qualify as ACAA-violent felonies under *Lockley*."); *see also id.* at 1346 (Baldock, J., concurring) ("All members of the panel agree that [*Lockley*] answers in the affirmative the question of whether Defendant qualifies as an armed career criminal for federal sentencing purposes."); *id.* (Martin, J., concurring) ("[T]his panel opinion stands only for the rule that our Circuit precedent in [*Lockley*] requires Mr. Seabrooks's 1997 Florida convictions for armed robbery to be counted in support of his 2015 Armed Career Criminal Act ('ACCA') sentence.").

¹⁰⁷ Compare *id.* at 1339, 1341 ("My view is that *Dowd* and its progeny control under our prior panel precedent rule."), with *id.* at 1346 (Badlock, J., concurring) ("I would . . . leave for another day the question of the continuing viability of *Dowd*."), and *id.* at 1348 (Martin, J., concurring) ("*Dowd* is no longer good law.").

¹⁰⁸ *Id.* at 1339–40 ("My view is that *Dowd* and its progeny control under our prior panel precedent rule . . ."); *see also id.* at 1341–43 (stating that neither *Johnson I*, *Descamps*, nor *Mathis* abrogated *Dowd*); *id.* at 1348 n.1 (Martin, J., concurring) ("In her discussion of *Dowd*, Judge Hull writes for herself.").

¹⁰⁹ *Id.* at 1344–45 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994)).

¹¹⁰ *See id.* at 1344.

¹¹¹ *Id.* at 1343–45.

¹¹² *Id.* at 1341 ("*Dowd* and *Lockley* control the outcome of this case.").

Judge Martin, on the other hand, believed *Dowd*'s holding had been abrogated "in light of the clarifications given to us by the Supreme Court about what steps we must take when applying the categorical approach."¹¹³ Nowhere in *Dowd*, Judge Martin stated, did the court: "(1) consult state law to identify the least culpable conduct for which an armed robbery conviction could be sustained; (2) analyze whether that least culpable conduct was encompassed by the generic federal offense; or (3) discuss whether the Florida armed robbery statute was divisible."¹¹⁴ In Judge Martin's view, the Supreme Court's instructions to undertake these steps undermined *Dowd*'s "conclusory mode of analysis 'to the point of abrogation.'"¹¹⁵

Judge Martin also opined that the court's recent reliance on *Dowd* in published SOS orders was of no moment given the unique context in which SOS orders are entered.¹¹⁶ She reasoned:

It is neither wise nor just for this type of limited ruling, resulting from such a confined process, to bind every judge on this court as we consider fully counseled and briefed issues in making merits decisions that may result in people serving decades or lives in prison. The fact that some of this court's limited rulings on these applications referenced *Dowd* should have no bearing on our merits decision here. *Dowd* has been abrogated and no longer binds us on the merits.¹¹⁷

¹¹³ *Id.* at 1348 (Martin, J., concurring); *see id.* ("*Dowd* did not conduct the required categorical analysis. The entirety of *Dowd*'s reasoning occupies one sentence: '*Dowd*'s January 17, 1974, armed robbery conviction is undeniably a conviction for a violent felony [under the ACCA's elements clause].' *Dowd*'s reasoning was not sufficient to support its holding.") (internal citations omitted).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1349 (citing *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)).

¹¹⁶ *Id.* at 1350; *see supra* Part III.B. (discussing the unique context in which SOS orders are issued). However, the Eleventh Circuit has since held such orders are binding on direct appeal. *United States v. St. Hubert*, 883 F.3d 1319, 1328–29 (11th Cir. 2018).

¹¹⁷ *Seabrooks*, 839 F.3d at 1350 (Martin, J., concurring).

As for the distinction between pre-1997 and post-1997 robberies, Judge Martin agreed with Judge Hull insofar as *Robinson* stated that the interpretation of a statute is generally a statement about “what the statute has always meant.”¹¹⁸ But to Judge Martin, the question was not what the statute meant at the time of Mr. Seabrooks’ conviction.¹¹⁹ Instead, she believed the question was “what conduct could have resulted in Mr. Seabrooks’s 1997 convictions under the statute, even if Florida courts were misinterpreting the statute at that time.”¹²⁰

Before the April 1997 decision in *Robinson*, the governing decision was the Florida Supreme Court’s June 1976 opinion in *McCloud v. State*, which “held that a defendant who ‘exert[ed] physical force to extract [a handbag] from [the victim’s] grasp’ had committed robbery because ‘any degree of force suffices to convert larceny into a robbery.’”¹²¹ Thus, in Judge Martin’s view, between June 1976 and April 1997, the least culpable act under the Florida robbery statute was a sudden snatching,¹²² and both the Supreme Court’s directives and the Eleventh Circuit’s mode of analysis in *Welch* required that result.¹²³ Judge Martin went on to conclude that

¹¹⁸ *Id.* at 1351 n.5.

¹¹⁹ *Id.* (“But here our interest is not about divining the true meaning of § 812.13.”).

¹²⁰ *Id.*; *accord id.* at 1351 (citing *McNeill v. United States*, 563 U.S. 816, 820 (2011) (internal quotations omitted)). Courts are still grappling with whether state decisions issued after the defendant’s state conviction was imposed should be relied on when “determining the content of state law . . .” *United States v. Geozos*, 870 F.3d 890, 899 n.8 (9th Cir. 2017).

¹²¹ *Id.* at 1351 (quoting *McCloud v. State*, 335 So. 2d 257, 258–59 (Fla. 1976)).

¹²² *Id.* To explain her view, Judge Martin states the following:

That means that people convicted under § 812.13 after *McCloud* in 1976 (but before *Robinson* in 1997) could have had their convictions sustained under the statute when they merely used “any degree of force.” The U.S. Supreme Court’s instruction to us in *McNeill* does not allow us to ignore this interpretation by the Florida Supreme Court.

Id.; see also *United States v. Stokeling*, 684 F. App’x 870, 874 (11th Cir. 2017) (Martin, J., concurring) (“[T]he year of conviction matters because the least culpable conduct sufficient to support a robbery conviction under Fla. Stat. § 812.13 changed in 1997.”).

¹²³ See *Seabrooks*, 839 F.3d at 1352 (Martin, J., concurring) (stating that *Welch* “binds us whenever we apply the categorical approach to analyze a Florida

a sudden snatching did not qualify as a “violent felony” under the elements clause.¹²⁴ At the end of the day though, despite their disagreements, everyone agreed Mr. Seabrooks’ case was governed by *Lockley*, so Judge Hull’s and Judge Martin’s dueling dicta was ultimately just that—dicta.¹²⁵

Three weeks later, without holding oral argument, Judge Hull made her side of the story binding precedent in *United States v. Fritts*. In *Fritts*, the court held that under *Dowd* and *Lockley*, a 1989 Florida conviction for armed robbery qualified as a “violent felony” under the elements clause.¹²⁶ As a result, all Florida convictions for robbery, regardless of when they occurred, qualify as “violent felon[ies]” under the ACCA’s elements clause.¹²⁷

robbery conviction from a time before the Florida Supreme court decided *Robinson*.”).

¹²⁴ See *Stokeling*, 684 F. App’x at 874 (Martin, J., concurring) (“Sudden snatching with ‘any degree of force,’ plainly does not require the use of ‘a substantial degree of force.’ Neither does it necessarily entail ‘violent force—that is, force capable of causing physical pain or injury to another person.’”) (internal citations omitted).

¹²⁵ See *United States v. Birge*, 830 F.3d 1229, 1233 (11th Cir. 2016) (quoting *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010)) (“As we have explained time and again: ‘[A] decision can hold nothing beyond the facts of that case.’”). Judge Martin stated:

Judge Hull’s remark that the elements of § 812.13 have not changed since the 1970s is not necessary to our decision to affirm Mr. Seabrooks’s sentence. Mr. Seabrooks was convicted after the Florida Supreme Court decided *Robinson*, so his § 812.13 conviction required more than sudden snatching. As a result, we are bound by *Lockley* and must affirm Mr. Seabrooks’s enhanced sentence under the ACCA. I analyze Mr. Seabrooks’s case in a different way than does Judge Hull, but I agree that his conviction and sentence must be affirmed.

Seabrooks, 839 F.3d at 1352 (Martin, J., concurring).

¹²⁶ *United States v. Fritts*, 841 F.3d 937, 940 n.3 (11th Cir. 2016) (“We acknowledge that this opinion uses the discussion in . . . *Seabrooks*. Given that these sections were a single judge concurrence, we now use that same analysis as the panel opinion here.”); *id.* at 943–44 (“In sum, based on our precedent in *Dowd* and *Lockley*, and in light of the Florida Supreme Court’s decisions in *Robinson*, *McCloud*, and *Montsdoca*, we conclude that Fritts’s Florida armed robbery conviction under § 812.13 categorically qualifies as a ‘violent felony’ under the ACCA’s elements clause.”).

¹²⁷ The Eleventh Circuit continues to affirm ACCA sentences predicated on Florida robberies based on *Fritts*. See *Stokeling*, 684 F. App’x at 871; *United States v. Conde*, 686 F. App’x 755, 757 (11th Cir. 2017); *United States v. Burke*,

Since *Fritts*, the Eleventh Circuit has not only declined to rehear the issue en banc, where it could reconsider the issue unencumbered by the weight of prior panel precedent,¹²⁸ but has granted motions for summary affirmance, disposing of appeals without issuing even an unpublished opinion.¹²⁹ Thus, the Eleventh Circuit has made it undeniably clear that it will not reconsider whether Florida robbery is a “violent felony.” Right or wrong, this has “enormous consequences for many criminal defendants who come before [the] [c]ourt.”¹³⁰

D. *Overcoming Resistance Does Not Require Violent “Physical Force”*

One critical point of contention between Judge Hull and Judge Martin is whether the standard set forth by the Florida Supreme Court in *Robinson*—force sufficient to overcome resistance—governs when evaluating the least culpable act for robbery convictions imposed between June 1976 and April 1997.¹³¹ However, in *Seabrooks*, both agreed that after April 1997, the least culpable act is placing a victim in fear, which qualifies under the elements clause.¹³² The truth is, they are both wrong about post-1997 robberies. Even if force sufficient to overcome resistance has always

863 F.3d 1355, 1360 (11th Cir. 2017); *United States v. Everette*, 694 F. App’x 760, 760–61 (11th Cir. 2017).

¹²⁸ *United States v. Everette*, No. 16-11147, slip op. at 2 (11th Cir. July 31, 2017).

¹²⁹ *Hardy v. United States*, No. 17-11275, slip op. at 3 (11th Cir. Aug. 11, 2017) (finding summary affirmance appropriate based on *Fritts*).

¹³⁰ *Stokeling*, 684 F. App’x at 876 (Martin, J., concurring).

¹³¹ Compare *United States v. Seabrooks*, 839 F.3d 1326, 1344 (11th Cir. 2016) (quoting *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922)) (“[S]ince 1922, the Florida Supreme Court has held that ‘the force that is required to make the offense of a robbery is such force as is actually sufficient to overcome the victim’s resistance.’”), with *id.* at 1351 (Martin, J., concurring) (“[P]eople convicted under § 812.13 after *McCloud* in 1976 (but before *Robinson* in 1997) could have had their convictions sustained under the statute when they merely use ‘any degree of force.’”).

¹³² *Id.* at 1340–41; *id.* at 1350 (Martin, J., concurring); see *Stokeling*, 684 F. App’x at 875 (Martin, J., concurring) (quoting *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011)) (“[T]he *Lockley* court correctly identified ‘putting in fear’—and not sudden snatching—as the least culpable conduct in its categorical analysis of Mr. Lockley’s 2001 attempted robbery conviction.”).

been the standard, committing a robbery by “force” is still the least culpable act under the robbery statute because using such force does not categorically require the use of “a substantial degree of force.”¹³³ Therefore, a Florida conviction for robbery never qualifies as a “violent felony.”¹³⁴

Under *Robinson*, a robbery occurs when a victim resists and the defendant uses enough force to overcome that resistance.¹³⁵ Thus, if a victim’s resistance is minimal, the force needed to overcome that resistance is also minimal. Indeed, Florida caselaw is clear that a defendant may be convicted of robbery even if he uses only a minimal amount of force.¹³⁶ A conviction may be imposed if a defendant: (1) bumps someone from behind;¹³⁷ (2) engages in a tug-of-war over

¹³³ Recently, one Eleventh Circuit judge also concluded that overcoming resistance does not require the use of “physical force.” *United States v. Lee*, 886 F.3d 1161, 1169–71 (Jordan, J., concurring).

¹³⁴ 18 U.S.C. § 924(e)(2)(B)(i) (2012); *Johnson I*, 559 U.S. 133, 140 (2010). The Florida robbery statute is indivisible regarding whether a taking was accomplished “by force, violence, assault or putting in fear” because these alternatives are simply different means by which a single element may be satisfied. *See Mathis v. United States*, 136 S. Ct. 2243, 2249, 2256–57 (2016). A jury is not “required” to find one of several alternative options beyond a reasonable doubt. *United States v. Lockett*, 810 F.3d 1262, 1268–69 (11th Cir. 2016). Therefore, it must be presumed that all robbery convictions are based on the least culpable conduct required under the statute. *See Seabrooks*, 839 F.3d at 1340–41 (citing *Lockley*, 632 F.3d at 1244–45); *United States v. Braun*, 801 F.3d 1301, 1305 (11th Cir. 2015) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013)) (“We must presume that the conviction rested upon nothing more than the least of the acts criminalized . . .”). And as explained here, that is a robbery “by force.”

¹³⁵ *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997) (“[I]n order for the snatching of property from another to amount to robbery, the perpetrator must employ more than the force necessary to remove the property from the person. Rather, there must be resistance by the victim that is overcome by the physical force of the offender.”).

¹³⁶ *Id.*

¹³⁷ *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001).

a purse;¹³⁸ (3) pushes someone;¹³⁹ (4) shakes someone;¹⁴⁰ (5) struggles to escape someone's grasp;¹⁴¹ (6) peels back someone's fingers;¹⁴² or (7) pulls a scab off someone's finger.¹⁴³ Indeed, under Florida law, a robbery conviction may be upheld based on "ever so little" force.¹⁴⁴

The Ninth Circuit recently recognized this when it held that a Florida conviction for robbery, regardless of whether it is armed or unarmed, fails to satisfy the elements clause.¹⁴⁵ In so holding, the Ninth Circuit relied on Florida caselaw clarifying that an individual

¹³⁸ Benitez-Saldana v. State, 67 So. 3d 320, 323 (Fla. 2d DCA 2011).

¹³⁹ Rumph v. State, 544 So. 2d 1150, 1151–52 (Fla. 5th DCA 1989).

¹⁴⁰ Montsdoca v. State, 93 So. 157, 159–160 (Fla. 1922).

¹⁴¹ Colby v. State, 35 So. 189, 190 (Fla. 1903). In *Colby*, the defendant was caught during an attempted pickpocketing. *Id.* The victim grabbed the defendant's arm, and the defendant struggled to escape. *Id.* Under the robbery statute in effect at the time, the Florida Supreme Court held it was not a robbery because the force was used to escape, rather than secure the money. *Id.* However, the Florida Supreme Court has made clear that this conduct would have qualified as a robbery under the current robbery statute. *See Robinson*, 692 So. 2d at 887 n.10 ("Although the crime in *Colby* was held to be larceny, it would be robbery under the current version of the robbery statute because the perpetrator used force to escape the victim's grasp."). Indeed, Florida courts have made clear that if a pickpocket "jostles the owner, or if the owner, catching the pickpocket in the act, struggles unsuccessfully to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000) (quoting LAFAYE & SCOTT, JR., *supra*, at 781).

¹⁴² *Sanders v. State*, 769 So. 2d 506, 507–08 (Fla. 5th DCA 2000).

¹⁴³ *Johnson v. State*, 612 So. 2d 689, 690 (Fla. 1st DCA 1993).

¹⁴⁴ *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986). In *Santiago*, the defendant reached into a car and pulled two gold necklaces from around the victim's neck, causing a few scratch marks and some redness around her neck. *Id.*

¹⁴⁵ *United States v. Geozos*, 870 F.3d 890, 900–01 (9th Cir. 2017). The *Geozos* Court correctly stated that whether a robbery was armed or unarmed made no difference because an individual may be convicted of armed robbery for "merely carrying a firearm" during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. *Id.* at 897–901; *see State v. Baker*, 452 So. 2d 927, 929 (Fla. 1984); *State v. Burris*, 875 So. 2d 408, 413 (Fla. 2004); *Williams v. State*, 560 So. 2d 311, 314 (Fla. 1st DCA 1990); *see also United States v. Parnell*, 818 F.3d 974, 977, 980–81 (9th Cir. 2016) (holding that a Massachusetts conviction for *armed* robbery, which requires only the possession of a firearm (without using or even displaying it), does not qualify as a "violent felony" under the ACCA's elements clause).

may violate Florida's robbery statute without using violent force.¹⁴⁶ Although the Ninth and Eleventh Circuits have both recognized that the Florida robbery statute requires an individual use enough force to overcome a victim's resistance, the Ninth Circuit stated that it believed the Eleventh Circuit "overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force."¹⁴⁷

The issue of whether force sufficient to overcome resistance categorically requires the use of violent force is not unique to Florida's robbery statute. It affects robbery statutes throughout the nation. In fact, most states permit robbery convictions where the degree of force used is sufficient to overcome a victim's resistance. Indeed, at least fifteen states use some variation of this standard in the text of their statutes,¹⁴⁸ and several others have adopted it through caselaw.¹⁴⁹ Since *Johnson II*, several circuits have had to reevaluate whether these statutes and others still qualify as "violent felon[ies]" under the ACCA's elements clause.¹⁵⁰ And these courts have

¹⁴⁶ *Geozos*, 870 F.3d at 900–01 (citing *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011)).

¹⁴⁷ *Id.* Indeed, in both *Fritts* and *Seabrooks*, the Eleventh Circuit failed to consult any Florida caselaw about the amount of force required to satisfy the overcoming resistance standard. See *United States v. Fritts*, 841 F.3d 937, 942–44 (11th Cir. 2016); *United States v. Seabrooks*, 839 F.3d 1326, 1344 (11th Cir. 2016).

¹⁴⁸ See ARIZ. REV. STAT. §§ 13-1901, 1902 (2017); CONN. GEN. STAT. § 53a-133(1) (2017); MINN. STAT. § 609.24 (2017); OR. REV. STAT. § 164.395(1)(a) (2017); WIS. STAT. § 943.32(1)(a) (2017); ALASKA STAT. § 11.41.510(a)(1) (2016); DEL. CODE ANN. tit. 11, § 831(a)(1) (2016); HAW. REV. STAT. § 708-841(1)(a) (2016); MO. REV. STAT. §§ 570.010(13), 570.025(1) (2016); WASH. REV. CODE § 9A.56.190 (2016); ALA. CODE § 13A-8-43(a)(1) (2015); NEV. REV. STAT. § 200.380(1)(b) (2015); OKLA. STAT. ANN. tit. 21, §§ 791, 792, 793 (2011); N.Y. PENAL LAW § 160.00(1) (McKinney 2010); ME. REV. STAT. ANN. tit. 17-A, § 651(1)(B)(1) (2006).

¹⁴⁹ See, e.g., *West v. State*, 539 A.2d 231, 234 (Md. 1988); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. Ct. App. 1997); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Stecker*, 108 N.W.2d 47, 50 (S.D. 1961); *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *Winn v. Commonwealth*, 462 S.E.2d 911, 913 (Va. Ct. App. 1995).

¹⁵⁰ See *United States v. Swopes*, 886 F.3d 668 (8th Cir. 2018) (en banc); *United States v. Walton*, 881 F.3d 768 (9th Cir. 2018); *In re Welch*, 884 F.3d 1319 (11th Cir. 2018); *United States v. Jones*, 877 F.3d 884, 887 (9th Cir. 2017); *United States v. Harris*, 844 F.3d 1260, 1262 (10th Cir. 2017); *United States v.*

reached differing conclusions. As a result, significant tension has arisen about the degree of force a state robbery statute must require to satisfy the elements clause.¹⁵¹ The Fourth Circuit's decisions in *United States v. Gardner* and *United States v. Winston* are instructive in this regard.¹⁵²

In *Winston*, the Fourth Circuit held that a Virginia conviction for common law robbery committed by "violence" does not categorically require the use of "physical force."¹⁵³ Such a robbery is committed when a defendant employs "anything which calls out resistance."¹⁵⁴ A conviction may be imposed even if a defendant does not "actual[ly] harm" the victim.¹⁵⁵ Rejecting the government's argument that overcoming resistance satisfies the elements clause, the Fourth Circuit held that the minimal force required under Virginia law does not rise to the level of violent "physical force."¹⁵⁶

In *Gardner*, the Fourth Circuit held that a North Carolina conviction for common law robbery does not qualify as a "violent felony" under the elements clause because it does not categorically require the use of "physical force."¹⁵⁷ A North Carolina common law robbery may be committed by force so long as the force "is sufficient to compel a victim to part with his property."¹⁵⁸ "This definition," the Fourth Circuit stated, "suggests that even *de minimis* con-

Doctor, 842 F.3d 306, 308, 308 n.2 (4th Cir. 2016); *United States v. Duncan*, 833 F.3d 751, 753–55 (7th Cir. 2016); *Seabrooks*, 839 F.3d at 1338; *United States v. Gardner*, 823 F.3d 793, 801–02 (4th Cir. 2016); *United States v. Eason*, 829 F.3d 633, 640 (8th Cir. 2016); *United States v. Parnell*, 818 F.3d 974, 977–78 (9th Cir. 2016); *United States v. Dixon*, 805 F.3d 1193, 1195 n.2 (9th Cir. 2015); *United States v. Priddy*, 808 F.3d 676, 683 (6th Cir. 2015).

¹⁵¹ See *Johnson I*, 559 U.S. 133, 140 (2010) (defining "physical force" as "violent force . . . force capable of causing physical pain or injury to another person.>").

¹⁵² See *Gardner*, 823 F.3d at 804 (4th Cir. 2016); *United States v. Winston*, 850 F.3d 677, 683–84 (4th Cir. 2017).

¹⁵³ *Winston*, 850 F.3d at 683–86.

¹⁵⁴ *Id.* at 684–85 (quoting *Maxwell v. Commonwealth*, 183 S.E. 452, 454 (Va. 1936)).

¹⁵⁵ *Id.* at 685 (quoting *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487, at *3 (Va. Ct. App. Dec. 12, 2000)).

¹⁵⁶ *Id.* at 683–86.

¹⁵⁷ *Gardner*, 823 F.3d at 803–04.

¹⁵⁸ *Id.* at 803 (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)).

tact can constitute the ‘violence’ necessary for a common law robbery conviction under North Carolina law.”¹⁵⁹ The Fourth Circuit then discussed two North Carolina state cases that supported its conclusion.¹⁶⁰ Based on these decisions, the Fourth Circuit held that “the minimum conduct necessary to sustain a conviction for North Carolina common law robbery does not necessarily” require “physical force,” and therefore the offense does not categorically qualify as a “violent felony” under the elements clause.¹⁶¹

Like the Virginia offense described in *Winston* and the North Carolina offense addressed in *Gardner*, a Florida robbery may be committed by force sufficient to overcome a victim’s resistance.¹⁶² As the Fourth Circuit recognized, this definition suggests that so long as a victim’s resistance is slight, a defendant need only use minimal force to commit a robbery.¹⁶³ And, as explained above, Florida caselaw confirms this point.

During the writing of this Article, the issue came to a head in the Supreme Court. Proving the point that this issue affects many individuals, sixteen different petitions simultaneously sought review of whether Florida robbery is a “violent felony” under the ACCA.¹⁶⁴ The Supreme Court granted one of those petitions — *Stokeling v.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 803–04 (discussing *State v. Chance*, No. 07-1491, 2008 WL 2415981, at *3–4 (N.C. Ct. App. 2008) and *State v. Eldridge*, No. 08-1219, 2009 WL 1525333, at *2 (N.C. Ct. App. 2009)).

¹⁶¹ *Id.* at 804.

¹⁶² See *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997).

¹⁶³ Admittedly, the Fourth Circuit relied on *Fritts* in an unpublished opinion to hold that a Florida conviction for robbery qualifies as a “violent felony” under the elements clause. *United States v. Orr*, 685 F. App’x 263, 266 (4th Cir. 2017). The decision in *Orr*, however, was issued before the Ninth Circuit rendered its decision in *Geozos*.

¹⁶⁴ *Stokeling v. United States*, No. 17-5554 (U.S. 2018); *Conde v. United States*, No. 17-5772 (U.S. 2018); *Williams v. United States*, 17-6026 (U.S. 2018); *Everette v. United States*, No. 17-6054 (U.S. 2018); *Jones v. United States*, 17-6140 (U.S. 2018); *James v. United States*, 17-6271 (U.S. 2018); *Middleton v. United States*, No. 17-6276 (U.S. 2018); *Reeves v. United States*, No. 17-6357 (U.S. 2018); *Rivera v. United States*, No. 17-6374 (U.S. 2018); *Shotwell v. United States*, No. 17-6540 (U.S. 2018); *Orr v. United States*, No. 17-6577 (U.S. 2018); *Mays v. United States*, No. 17-6664 (U.S. 2018); *Hardy v. United States*, No. 17-6829 (U.S. 2018); *Wright v. United States*, No. 17-6887 (U.S. 2018); *Baxter v. United States*, 17-6991 (U.S. 2018); *Pace v. United States*, No. 17-7140 (U.S. 2018).

United States — and is holding the rest pending that decision.¹⁶⁵ *Stokeling* is the first elements clause case the Supreme Court has taken since *Johnson I* and provides the Court a much-needed opportunity to reinforce what it said there — that “physical force” requires “a substantial degree of force.”¹⁶⁶ At a minimum, it requires more than the minimal force needed.¹⁶⁷

V. FLORIDA FELONY BATTERY & THE ELEMENTS CLAUSE

Like the Florida robbery issue, the issue of whether a Florida conviction for felony battery qualifies as a “violent felony” under the elements clause has fractured the Eleventh Circuit.¹⁶⁸ The statute has precipitated a tug-of-war over the contours of *Johnson I*’s “physical force” definition. While one side calls for an exclusive focus on the defendant’s act, the other side calls for consideration of the result a defendant’s act has on a victim.¹⁶⁹ A Florida felony battery can be committed through the same “touch” addressed in *Johnson I*, but with the additional element that the defendant’s action unintentionally causes a victim great bodily harm.¹⁷⁰ Considering the Supreme Court has held a touch does not require “violent force,” reviewing the Florida felony battery statute would provide the Court with an ideal opportunity to end this tug-of-war.

A. *The Florida Felony Battery Statute*

Under Fla. Stat. § 784.041(1), 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.”¹⁷¹ Felony battery was created to fill a gap between simple battery under Fla. Stat.

¹⁶⁵ *Stokeling v. United States*, No. 17-5554, 2018 WL 1568030 (U.S. Apr. 2, 2018).

¹⁶⁶ *Johnson I*, 559 U.S. 133, 140 (2010).

¹⁶⁷ *See United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014) (“Minor uses of force may not constitute ‘violence’ in the generic sense.”).

¹⁶⁸ *See generally United States v. Vail-Bailon (Vail-Bailon II)*, 868 F.3d 1293 (11th Cir. 2017) (en banc).

¹⁶⁹ *See id.* at 1303, 1305.

¹⁷⁰ § 784.041(1), FLA. STAT. (2017); *see T.S. v. State*, 965 So. 2d 1288, 1290 (Fla. 2d DCA 2007).

¹⁷¹ § 784.041(1), FLA. STAT. (2017).

§ 784.03(1)(a) and aggravated battery under Fla. Stat. § 784.045(1)(a).¹⁷² The “touching” elements in simple battery, felony battery, and aggravated battery are identical—“[a]ctually and intentionally touch[ing] . . . another person against the[ir] will.”¹⁷³ However, the three differ in their second elements. Simple battery does not have another element, while both felony battery and aggravated battery require that a victim suffer “great bodily harm, permanent disability, or permanent disfigurement.”¹⁷⁴ The difference between the two is that aggravated battery requires that the defendant intend the injury; felony battery does not.¹⁷⁵ Thus, the issue in *United States v. Vail-Bailon* and the following cases is whether a “touch” that unintentionally results in great bodily harm categorically requires the use of “violent force.”¹⁷⁶

B. *The Unpublished Decisions*—Eugene, Crawford, and Eady

Before *Vail-Bailon*, the Eleventh Circuit had issued three unpublished decisions addressing whether a Florida conviction for felony battery requires violent “physical force.”¹⁷⁷ The first decision was *United States v. Eugene*, which was issued in 2011.¹⁷⁸ In *Eugene*, the court was called upon to determine whether felony battery qualified as a “crime of violence” under the federal sentencing guidelines.¹⁷⁹ After discussing *Johnson I* and the elements of felony

¹⁷² See *Jefferies v. State*, 849 So. 2d 401, 404 (Fla. 2d DCA 2003).

¹⁷³ §§ 784.03, 784.041, 784.045, FLA. STAT. (2017).

¹⁷⁴ *T.S.*, 965 So. 2d at 1290 (“The definition of felony battery recites the first prong of the battery definition and adds the element of causing great bodily harm, permanent disability, or permanent disfigurement.”).

¹⁷⁵ *Id.* (“Aggravated battery can thus be seen as . . . felony battery with the added element of intentionally or knowingly causing the great bodily harm.”).

¹⁷⁶ See generally *Vail-Bailon II*, 868 F.3d 1293 (11th Cir. 2017) (en banc).

¹⁷⁷ Unpublished decisions are not binding. 11TH CIR. R. 36-2.

¹⁷⁸ *United States v. Eugene*, 423 F. App’x 908 (11th Cir. 2011). Mr. Eugene also appealed the determination that his Florida conviction for robbery qualified as a “crime of violence,” but because he only preserved the right to appeal the district court’s determination that his felony battery conviction qualified as a “crime of violence,” the Eleventh Circuit dismissed that part of his appeal. *Id.* at 909–10. (“Eugene appeals from his sentence and asks that we determine whether his prior Florida felony convictions for battery and strong arm robbery are crimes of violence under the guidelines.”).

¹⁷⁹ See *id.* at 909–11 (citing *United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010)) (“Because the definitions of ‘violent felony’ under ACCA and

battery, the Eleventh Circuit stated that all “touching[s]” under the statute are not only “capable of causing physical pain or injury to another person,” but must actually do so.¹⁸⁰ Based on this alone, the court held that felony battery categorically requires the use of violent “physical force.”¹⁸¹

The Eleventh Circuit would not address the issue again for three years, until 2014, when it decided *United States v. Crawford*.¹⁸² In *Crawford*, the court was asked to decide whether a felony battery conviction qualified as a “violent felony” under the ACCA’s elements clause.¹⁸³ Giving short shrift to Mr. Crawford’s challenge, the Eleventh Circuit stated in a single sentence that “[t]his offense qualifies as a violent felony under the Act because it ‘has as an element the use, attempted use, or threatened use of physical force against [another] person.’”¹⁸⁴ Five months later, in *United States v. Eady*, the court conducted another cursory analysis of the issue, again holding that a Florida conviction for felony battery is a “violent felony” under the ACCA’s elements clause.¹⁸⁵ The court would not address the issue again until *Vail-Bailon*.

‘crime of violence’ under the sentencing guidelines are virtually identical, we consider cases interpreting one as authority in cases interpreting the other.”).

¹⁸⁰ *Id.* at 911 (internal citations omitted).

¹⁸¹ *Id.*

¹⁸² *United States v. Crawford*, 568 F. App’x 725 (11th Cir. 2014).

¹⁸³ *Id.* at 728 (“Crawford argues that his prior conviction in Florida for felony battery does not qualify as a violent felony . . .”). Although Crawford challenged only the district court’s finding about his felony battery conviction, he also had convictions for “the sale or delivery of a controlled substance within 1,000 feet of a school, the possession of cocaine, manslaughter with a firearm or deadly weapon, attempted armed robbery, and attempted robbery during a home invasion.” *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *United States v. Eady*, 591 F. App’x 711, 719 (11th Cir. 2014) (“[U]nlike convictions for simple felony battery where no injury is required, convictions under § 784.041 require significant bodily harm, disability, or disfigurement. 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.’”). The court held Mr. Eady’s felony battery conviction also qualified as a “violent felony” under the ACCA’s residual clause. *Id.* at 719–20.

C. *The Panel Decision in Vail-Bailon*

In September 2016, the issue of whether Florida felony battery requires violent “physical force” again came before the Eleventh Circuit in *Vail-Bailon*.¹⁸⁶ This time, however, the panel issued a published decision, holding that felony battery is *not* a “crime of violence” under USSG § 2L1.2’s elements clause.¹⁸⁷

Writing for the majority, Judge Rosenbaum cautioned against “judg[ing] a book by its cover” when determining whether a crime with a name like “felony battery” qualifies as a “violent” crime.¹⁸⁸ Instead, “[h]eeding the Supreme Court’s warning,” the *Vail-Bailon* panel “carefully compared the elements of felony battery under Florida law to the ‘elements clause’ of § 2L1.2’s definition of ‘crime of violence.’”¹⁸⁹ The panel presumed that the defendant violated the first prong of the statute through a touch.¹⁹⁰ “Significantly,” the panel observed, “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.’”¹⁹¹ The panel reiterated the *Johnson I* Court’s observation that because a touching can be satisfied by *any* intentional physical contact, it does not require “violent force.”¹⁹² That the felony battery

¹⁸⁶ *United States v. Vail-Bailon (Vail-Bailon I)*, 838 F.3d 1091, 1094 (11th Cir. 2016).

¹⁸⁷ *Id.* at 1098. The Court noted that USSG § 2L1.2’s elements clause “is the same as the elements clauses of the ACCA and the career-offender guideline.” *Id.* at 1094. In determining whether a prior conviction is a “violent felony” under the ACCA’s elements clause, courts may rely on cases interpreting the elements clause under the Guidelines and vice versa. *See id.*; *United States v. Chitwood*, 676 F.3d 971, 975 n.2 (11th Cir. 2012).

¹⁸⁸ *Vail-Bailon I*, 838 F.3d at 1092–93 (“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 definition of ‘crime of violence’ under § 2L1.2 of the Sentencing Guidelines when it is committed by mere touching.”).

¹⁸⁹ *Id.* at 1093.

¹⁹⁰ *Id.* at 1094. Because the panel found that the felony battery statute is divisible, the modified categorical approach applied. *Id.* However, because no *Shepard* documents established the alternative element under which the defendant was convicted—a touch or strike—the panel assumed he violated the first prong of the statute by the least culpable act, a touch. *Id.*

¹⁹¹ *Id.* at 1095 (discussing *Johnson I*, 559 U.S. 133 (2010)) (emphasis added).

¹⁹² *Id.*

statute requires the touching to cause great bodily harm did not change that.¹⁹³

Conversely, the dissent argued that the resulting injury required for felony battery necessarily fulfilled *Johnson I*'s definition of "physical force" because it meant that the touching used force "capable of" causing physical injury.¹⁹⁴ However, the majority criticized the dissent's reasoning as "unmoor[ing]" *Johnson I*'s "physical force" definition "from its context." The majority noted that in support of that definition, the *Johnson I* Court cited the Seventh Circuit's *Flores* decision,¹⁹⁵ which explained that "physical force" means force "intended to cause bodily injury, or at a minimum likely to do so."¹⁹⁶

¹⁹³ *Id.* at 1096.

¹⁹⁴ *Id.* at 1100 (Siler, J., dissenting) ("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.' . . . If something necessarily results from the touching, then the logic is that it had to have been capable of that result from the beginning."). Judge Siler sits on the Sixth Circuit Court of Appeals and was sitting on the panel by designation. *Id.* at 1092 n.*.

¹⁹⁵ *Id.* at 1097 (citing *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003)).

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."

Id.

¹⁹⁶ *Id.* at 1096. The dissent criticized the panel's heavy reliance on *Flores*, arguing that they should solely rely on the "capability" wording in *Johnson I*.

Instead of focusing on the language in *Johnson [I]*, the majority pivots to *Johnson [I]*'s citation to *Flores* . . . Why do we need to speculate about the definition of "physical force" when the Supreme Court provided one in *Johnson [I]*? 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.

Id. at 1100 (Siler, J., dissenting).

Under the *Flores* definition, Mr. Vail-Bailon's felony battery conviction did not categorically require the use of "physical force," because the resulting injury was not a "likely" or "intended" result of the touch.¹⁹⁷ First, "great bodily harm" is not necessarily "likely" to result from a touch.¹⁹⁸ That a touch actually results in "great bodily harm" did not "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."¹⁹⁹ The panel noted that felony battery could be committed, for instance, by an offender who taps another person on the shoulder while that person stands near the top of stairs, causing the person to be startled and fall down the stairs.²⁰⁰ Thus, the *results* of a touching do not alter the *nature* of the touching.²⁰¹

Second, the resulting "great bodily harm" did not have to be "intended."²⁰² That not only excluded the other prong of the *Flores* definition, but also implicated the Supreme Court's decision in *Leocal v. Ashcroft*, which held that the phrase "use . . . of physical force" in the elements clause suggests "a higher degree of intent than negligent or merely accidental conduct."²⁰³ The Florida offense at issue in *Leocal*, driving under the influence (DUI) and causing serious bodily harm, is like felony battery: "Though both offenders intend their actions—mere touching and driving—neither intends the accidental or negligent consequences" ²⁰⁴ Synthesizing both *Leocal* and *Flores*, the *Vail-Bailon* panel found that "when we discuss an action that normally does not cause bodily injury . . . 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."²⁰⁵

¹⁹⁷ *See Id.* at 1096.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1095.

²⁰¹ *Id.* at 1096.

²⁰² *Id.* at 1095.

²⁰³ *Id.* at 1097. *Leocal* was addressing the elements clause in 18 U.S.C. § 16(a), which is substantially similar to the ACCA's elements clause. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

²⁰⁴ *Vail-Bailon II*, 838 F.3d at 1097.

²⁰⁵ *Id.*

Thus, the majority focused on whether the act of touching required the proper degree of force, while the dissent favored a backward-looking analysis, assuming that a touch causing an injury was different from a touch that did not.²⁰⁶ At the end of the day, the *Vail-Bailon* panel found that a touch is a touch—and because the touch in felony battery is no more “likely” or “intended” to result in injury than simple battery, *Johnson I* dictated that felony battery could not satisfy the elements clause.²⁰⁷ The dispute, however, was far from over.

D. *The En Banc Decision in Vail-Bailon*

The tension in the Eleventh Circuit over the proper elements clause analysis came to a head when the court reheard *Vail-Bailon* en banc.²⁰⁸ In a 6–5 decision, the court held that felony battery categorically qualifies as a “crime of violence” under the elements clause.²⁰⁹

Like the dissent in the original panel opinion, the en banc majority shunned the *Flores* analysis in favor of a pure “capability” test.²¹⁰ In the majority’s view, adopting the *Flores* definition would disregard the capability standard explicitly articulated in *Johnson I*.²¹¹ The majority reasoned that “having cited *Flores*, the Supreme Court was aware of how the Seventh Circuit had defined physical force, but the Court deliberately opted for a different definition.”²¹² Thus, while the panel opinion viewed the *Flores* analysis as a harmonious clarification of what “capable of causing physical injury”

²⁰⁶ *Id.* at 1100 (Siler, J., dissenting). Judge Jordan filed a concurring opinion explaining that the Court’s unpublished decisions about felony battery in *Eady*, *Eugene*, and *Crawford* “are flawed and do not constitute persuasive authority,” because none of these cases considered that a touch was the least culpable conduct under the statute. *Id.* at 1098–99 (Jordan, J., concurring).

²⁰⁷ *Id.* at 1098. The majority left for another day the question of whether felony battery committed through a “strike” satisfies the elements clause. *Id.* at 1099 (Jordan, J., concurring).

²⁰⁸ See generally *Vail-Bailon II*, 868 F.3d 1293 (11th Cir. 2017) (en banc).

²⁰⁹ *Id.* at 1308.

²¹⁰ See *id.* at 1301.

²¹¹ *Id.* (“[I]f the Supreme Court in [] *Johnson* [I] had intended to adopt a likelihood-based standard found in *Flores*, it would have simply said so, and not confused the reader by articulating a test that it never intended to be used.”).

²¹² *Id.*

means, the en banc majority viewed *Flores* as an opposing standard.²¹³

Moreover, the en banc majority rejected the argument that its decision would swallow *Johnson I*'s holding that the touch required for a simple battery is not “capable of” causing physical injury.²¹⁴ The majority reasoned that “[t]his argument rests on a faulty premise that every slight touch is always capable of causing pain or injury,” and distinguished between “a statute requiring nothing more than a slight touch” and “a statute requiring a touch that is *forceful enough* to cause great bodily harm.”²¹⁵ Furthermore, the en banc majority was unpersuaded by the same hypotheticals that the panel majority had found convincing because the factual scenarios proposed in the hypotheticals had never occurred in Florida caselaw.²¹⁶ In its view, the hypotheticals were far-fetched and incorrectly applied the least-culpable-act rule.²¹⁷ Thus, the en banc majority did not believe that a touch was a touch. Instead, the resulting injury required by the felony battery statute necessarily meant that the touch was “capable

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* (emphasis added).

²¹⁶ *Id.* at 1305–06.

To our knowledge, there is likewise no case in which tapping, tickling, or lotion-applying—or any remotely similar conduct—has been held to constitute a felony battery under Florida Statute § 784.041. Rather, the real-world examples of Florida felony battery we are aware of all involve conduct that clearly required the use of physical force, as defined by [] *Johnson I* [T]he type of touching that has resulted in felony battery convictions is more along the lines of strangling, dragging, and biting.

Id. at 1306 (citations omitted).

²¹⁷ *Id.* There is currently a circuit split on whether the plain language of a statute, without a supporting case, can establish the least culpable act under a statute. Compare *United States v. Titties*, 852 F.3d 1257, 1274–75, 1275 n.23 (10th Cir. 2017), *Swaby v. Yates*, 847 F.3d 62, 66, 66 n.2 (1st Cir. 2017), *Jean-Louis v. U.S. Attorney Gen.*, 582 F.3d 462, 481 (3d Cir. 2009), *United States v. Lara*, 590 F. App'x 574, 584 (6th Cir. 2014), and *United States v. Grisel*, 488 F.3d 844, 849, 849 n.3 (9th Cir. 2007), with *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc).

of” causing injury.²¹⁸ In other words, a touch under the felony battery statute is more “forceful” than a touch under the simple battery statute.²¹⁹

Judge Wilson’s dissent, by contrast, argued that the touches were the same, and criticized the majority’s capability analysis as “announc[ing] that just one sentence in [] *Johnson I* matters.”²²⁰ In the dissent’s view, the majority’s test “turns not on the amount of force an act involves but rather on the possible consequences of the act. Degree of force is irrelevant.”²²¹ The dissent favored a simpler reading of *Johnson I* that focused on the degree of contact used. Thus, limited contact like taps, touches, and pinches did not qualify as force, while kicks, strikes, punches, and similar degrees of contact did.²²² To the dissent, the “capable of” statement, when read in context with the rest of *Johnson I*’s force analysis, was meant to underscore that “physical force” means “a substantial degree of force”—not “that all contact that is capable of causing pain or injury is ‘physical force.’”²²³ Thus, to the dissent, the case was straightforward: “[f]elony battery can be committed by a mere touching, and [] *Johnson I* told us that a mere touching . . . is not a crime of violence.”²²⁴

²¹⁸ *Vail-Bailon II*, 868 F.3d at 1301. Moreover, because the majority believed the felony battery touch amounted to “physical force” and the touch is intentional, they rejected the argument that the statute does not require the “use of” physical force under *Leocal*. *Id.* at 1307.

²¹⁹ *Id.* at 1301.

²²⁰ *Id.* at 1309 (Wilson, J., dissenting). Judge Rosenbaum also filed a dissent, which was, in large part, also joined by Judge Jordan and Judge Martin. *Id.* at 1314–23 (Rosenbaum, J., dissenting). Judge Rosenbaum’s en banc dissent agrees with Judge Wilson’s *Johnson I* interpretation as well, with an additional focus on the meaning of “use” in the elements clause under cases like *Leocal*. *Id.* at 1315–18. She argues that it is not enough that the felony battery touch be committed intentionally, but that the causation-of-harm prong also requires a mens rea element. *Id.* at 1317. However, the *Leocal* point is less significant where the dispute comes down to the nature of the touch itself, given that the touch is volitional. *Id.* at 1322.

²²¹ *Id.* at 1309 (Wilson, J., dissenting).

²²² *Id.* at 1310.

²²³ *Id.* at 1313.

²²⁴ *Id.* at 1314. Judge Wilson aptly illustrated his position with the following example:

If, while walking down the street, you tap a jogger on the shoulder and the tap startles him, causing him to trip, hit his head,

At the end of the day, each side believed its definition of physical force reflected the purest reading of *Johnson I*. While five judges believed that the *Johnson I* Court intended the capability phrase to underscore the strong *degree* of force required, six believed that the *Johnson I* Court instead meant that an elements clause analysis should begin and end with capability.²²⁵ Consequently, on rehearing en banc, the Eleventh Circuit changed course and held that felony battery categorically requires the use of violent “physical force.”²²⁶

E. *A Touch that Unintentionally Results in Injury Does Not Require Violent “Physical Force”*

The Eleventh Circuit’s dispute about felony battery reflects a fundamental disagreement about the proper reading of *Johnson I*’s “physical force” definition. Because the felony battery statute comprises a volitional act that, by itself, requires minimal contact coupled with an unintentional but serious physical consequence, it provides the ideal vehicle for the Supreme Court to resolve this disagreement. Both sides agree that under *Johnson I*, a mere touch, without more, cannot satisfy the elements clause. However, they disagree on whether the consequences that flow from that touch affects the elements clause analysis.²²⁷

In Mr. Vail-Bailon’s case, the Eleventh Circuit provided at least three possible answers to this question. First, the original panel majority believed that the Supreme Court clarified its capability analysis by citing *Flores*’ analysis and stated that a mere touch was not

and suffer a concussion, have you committed a violent act? Most would say no. But if you punch the jogger and the punch causes him to fall, hit his head, and suffer a concussion, you have undoubtedly committed a violent act. The difference between a non-violent and violent act, then, is the degree of force used. Both a tap and a punch are capable of causing great bodily harm, but a tap involves a limited degree of force while a punch involves a substantial degree of force. Or, in the words of the Sentencing Guidelines, a punch involves “physical force.”

Id. at 1308.

²²⁵ See generally *Vail-Bailon II*, 868 F.3d 1293.

²²⁶ *Id.* at 1307. Recently, the Eleventh Circuit applied *Vail-Bailon*’s felony battery holding to the ACCA. *United States v. Green*, 873 F.3d 846, 869 (11th Cir. 2017).

²²⁷ See *Vail-Bailon II*, 868 F.3d at 1304, 1308; *id.* at 1308–09 (Wilson, J., dissenting).

likely to result in injury, even if it actually did.²²⁸ Second, the panel dissent and the en banc majority believed that the Supreme Court intended its capability language to stand alone and to capture all offenses “capable of” causing physical injury, necessarily including offenses that result in that injury.²²⁹ The best answer, however, lies in the third option—the en banc dissent authored by Judge Wilson.

Judge Wilson’s dissent argues that the capability analysis, read in context with the entirety of *Johnson I*’s emphasis on substantial, violent force, was meant to underscore the strong degree of force required by the elements clause.²³⁰ He notes that the “capable of” language derives meaning from [the force] analysis surrounding it.²³¹ To illustrate that point, Judge Wilson provides a more natural, contextualized reading of *Johnson I*’s “physical force” definition by adding his own bracketed text around the “capable of” language:

[T]he phrase ‘physical force’ means *violent* force [read *a substantial degree of force*]—that is, force [read *a degree of power*] capable of causing physical pain or injury to another person.²³²

Any other reading of the “capable of” language would essentially write out the emphasis on violence found throughout *Johnson I*.²³³ Contrary to the view espoused by the en banc majority, an interpretation that “physical force” includes any offense “capable of” causing physical injury — with no additional context — would, indeed, swallow *Johnson I*’s holding.²³⁴ Under that definition, one would be hard-pressed to come up with *any* offense that would not hold at least a possibility of causing injury or pain.²³⁵ And, under that definition, “a mere touching *does* constitute ‘physical force’”

²²⁸ *Vail-Bailon I*, 838 F.3d 1091, 1096 (11th Cir. 2016). The *Flores* likelihood analysis was essentially a heightened version of the capability test, rather than a pure degree-focused examination of the act of contact.

²²⁹ *Id.* at 1100 (Silver, J., dissenting); *Vail-Bailon II*, 868 F.3d at 1302.

²³⁰ *Id.* at 1312–13 (Wilson, J., dissenting).

²³¹ *Id.* at 1313.

²³² *Id.*

²³³ *Id.* See generally *Johnson I*, 559 U.S. 133 (2010).

²³⁴ *Vail-Bailon II*, 868 at 1313.

²³⁵ *Id.* at 1314 (“Many forms of non-violent conduct have the capacity to cause pain or injury; pinching and tapping, for example, both can at the very least result in a person suffering pain.”).

because a touch is theoretically “capable of” causing pain or injury.²³⁶ But as Judge Wilson aptly put it, “[a] spitball that happens to cause great bodily harm is still just a spitball. A mere touching that happens to cause great bodily harm is still just a mere touching.”²³⁷

Thus, it makes little sense that the Supreme Court would create a test that would dictate the opposite conclusion of its own holding.²³⁸ Given that the Supreme Court “took the time to pen a thorough discussion of ‘physical force’ . . . [w]e should take that entire discussion into account. When we do, it is apparent that the [capability] sentence does not discard degree of force for a capacity test.”²³⁹ Although *Johnson I* held that a mere touch is not enough force,²⁴⁰ there is significant disagreement over the proper form that an elements clause analysis should take: a degree-of-force focus or a capability-of-causing-injury focus. Although *Stokeling* will provide guidance on the amount of force required, Florida robbery has no harm element.²⁴¹ Therefore, it may not resolve the issue addressed in *Vail-Bailon*. Given the Supreme Court’s silence on this issue and the significant need for greater guidance on the elements clause analysis, the Supreme Court should review the Florida felony battery issue to clarify whether an offense that requires great bodily

²³⁶ *Id.*

Any unwanted touching could cause pain or injury. A tap on a pedestrian’s shoulder could distract the pedestrian causing her to collide with another person and suffer injury. A student’s spitball could hit its victim in the eye causing injury. A pat on the back could startle the victim causing her to jerk her body and suffer pain. A child’s innocent pinching of his friend could cause the friend to experience a sharp pain.

Id.

²³⁷ *Id.* at 1312. Judge Wilson also rejected the en banc majority’s view that the hypotheticals involving touches that resulted in great bodily harm were far-fetched—one, because the hypotheticals were realistic scenarios in his view, and two, because the text of the felony battery statute and Florida courts explicitly defined the act as a touch. *Id.* at n.4.

²³⁸ *Id.* at 1313.

²³⁹ *Id.* at 1314.

²⁴⁰ *Id.*; *Johnson I*, 559 U.S. 133, 140 (2010).

²⁴¹ § 812.13(1), FLA. STAT. (2017).

harm necessarily requires the use of “a substantial degree of force.”²⁴²

VI. CONCLUSION

To be sure, this is a touchy subject. The social and economic stakes are high. These issues affect thousands of individuals now and into the future, consigning them to years of additional imprisonment. The disagreements throughout the circuits show there are no easy answers. Indeed, this tug-of-war has *forced* the Supreme Court to step in. Certainly, violent individuals deserve stiff sentences. However, the desire to see violent individuals punished does not give courts license to disregard the Supreme Court’s directives about the application of the elements clause. Hopefully, the Supreme Court will use *Stokeling* as an opportunity to illuminate what it meant in *Johnson I* — that “physical force” requires a substantial degree of force.

²⁴² *Johnson I*, 559 U.S. at 140 (2010).