A P P E N D I X

APPENDIX

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17756
Non-Argument Calendar

D.C. Docket Nos. 2:16-cv-14264-DMM,
2:00-cr-14069-DMM-1

RUBIN DEXTER BAXTER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 5, 2017)

Before ED CARNES, Chief Judge, JULIE CARNES, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Rubin Baxter was convicted in 2002 of being a felon in possession of a

firearm. His sentence was enhanced under the Armed Career Criminal Act based on a 1987 Florida conviction for armed robbery, 1987 Florida convictions for armed robbery and kidnapping, and a 1990 conviction for selling and delivery of cocaine. After the Supreme Court's decision in Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015), Baxter filed a motion to vacate his sentence under 28 U.S.C. § 2255, contending that his two Florida armed robbery convictions and his Florida kidnapping conviction no longer qualified as violent felonies under the ACCA. The district court denied that motion but granted a Certificate of Appealability as to whether his 1987 armed robbery convictions qualified as violent felonies.

For a defendant's sentence to be enhanced under the ACCA, he must have at least three earlier convictions for "violent felonies" or "serious drug offenses" at the time he is sentenced. See 18 U.S.C. § 924(e)(1). The ACCA defines a "violent felony" as any 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, [or] involves the use of explosives" (the enumerated offenses clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). Id. § 924(e)(2)(B). In Johnson, the Supreme Court held that the residual clause was unconstitutionally vague, 135 S.

Ct. 2551, and it later made that holding retroactive, Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257 (2017). It follows that, if Baxter's 1987 Florida armed robbery convictions qualified as violent felonies only under the residual clause, he would be entitled to relief under § 2255 because he would have, at most, two past convictions for a violent felony or serious drug offense.[1]

This Court has already concluded, however, that armed robbery convictions under Florida's robbery statute qualify as violent felonies under the ACCA's elements clause. United States v. Fritts, 841 F.3d 937 (11th Cir. 2016). As a result, the Supreme Court's decision in Johnson has no application to this case.

Baxter protests that, at the time he was convicted of armed robbery, "sudden snatching" using "any degree of force" was sufficient to allow a defendant to be convicted of robbery in Florida because the Florida Supreme Court had not yet decided Robinson v. State, 692 So.2d 883 (Fla. 1997). That decision explained that "in 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[:] there must be resistance by the victim that is overcome by the

[1] Baxter does not contend his 1990 conviction for selling and delivering cocaine should not count as a serious drug offense under the ACCA. And we need not consider his contention that his kidnapping conviction does not qualify as a violent felony conviction because that question is beyond the scope of the Certificate of Appealability in this case. Plus, as we explain below, Baxter's two armed robbery convictions do qualify as violent felonies. As a result, even if his kidnapping conviction did not count as a violent felony, Baxter has three convictions for a violent felony or serious drug offense: the two robbery convictions and his conviction for selling and delivering cocaine.

physical force of the offender." Id. at 886. Baxter contends that, before the Robinson decision, Florida's robbery statute did not require the degree of force necessary for a conviction to qualify as an ACCA predicate under the elements clause.

But we squarely rejected that argument in our Fritts decision. 841 F.3d at 942–44. And we are bound by that decision, regardless of whether we agree with it. Perez-Guerrero v. U.S. Att'y Gen., 717 F.3d 1224, 1231 (11th Cir. 2013) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even [if] convinced it is wrong.") (quotation marks omitted) (alteration in original).

Attempting to avoid the inevitable, Baxter argues that Fritts does not apply here because the defendant's armed robbery conviction in that case was obtained within the jurisdiction of Florida's Second District Court of Appeal, but his conviction was obtained within the Fourth District. Baxter claims that when he was convicted of robbery in 1987 the Fourth District, unlike the Second District, had suggested that snatching was sufficient to support a robbery conviction.

That, however, is irrelevant. We are concerned with what sufficed to allow a conviction for burglary in Florida as a whole, not in the Fourth District alone. As we explained in Fritts itself, "[w]hen the Florida Supreme Court in Robinson interpret[ed] the robbery statute, it [told] us what that statute always meant." Fritts, 841 F.3d at 943; accord Rivers v. Roadway Express, Inc., 511 U.S. 298,

312–13, 114 S. Ct. 1510, 1519 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). As a result, Florida's "robbery statute has never included a theft or taking by mere snatching because snatching is theft only and does not involve the degree of physical force needed to sustain a robbery conviction." Fritts, 841 F.3d at 942.

Even if Baxter is right that, before Robinson, the Fourth District Court of Appeal reached a contrary conclusion in its Santiago v. State decision, 497 So.2d 975, 976 (Fla. 4th DCA 1986), we look to state intermediate courts of appeal to determine the content of state law only where the state's highest court has not spoken. See McMahan v. Toto, 311 F.3d 1077, 1080 (11th Cir. 2002) ("[A]bsent a decision from the state supreme court on an issue of state law, we are bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently."). In this case, the Florida Supreme Court has spoken and, as we explained in Fritts, consistently held that mere snatching was never enough to support a robbery conviction. Fritts, 841 F.3d at 942–43. So it does not matter if the Fourth District Court of Appeal (or any other intermediate appellate court) may have thought otherwise.

If Baxter believes that the courts in the Fourth District misapplied state law

by allowing him to be convicted of robbery in 1987 based on mere snatching, that was an issue he should have raised on direct appeal from his armed robbery convictions or in collateral proceedings challenging them. That the Fourth District may have erred in interpreting Florida law in Baxter's robbery cases or in other cases, however, has no bearing on whether convictions under Florida's robbery statute, as a categorical matter, qualify as violent felonies under the ACCA's elements clause. Cf. Descamps v. United States, 570 U.S. ___, 133 S. Ct. 2276, 2283 (2013) (explaining that "[s]entencing courts may look only to the statutory definitions . . . of a defendant's prior offenses, and not to the particular facts underlying those convictions," when determining whether an earlier conviction qualifies as a violent felony under the ACCA) (quotation marks omitted).

Our decision in United States v. Welch, 683 F.3d 1304 (11th Cir. 2012), does not compel a contrary conclusion. There we assumed that, before Robinson, mere snatching did qualify as robbery under Florida law, and we said that: (1) precedent from the Florida Supreme Court suggested that "any degree of force" could support a conviction for robbery; (2) the Florida district courts of appeal were divided on the issue and the district where Welch was convicted had not definitively weighed in; and (3) Welch pleaded guilty before Robinson was decided. Id. at 1311. But all of that is dicta. We ultimately concluded that, even assuming Florida considered snatching to be robbery, a Florida robbery conviction

qualified a violent felony under the ACCA's residual clause. Id. at 1311–14.[2] As a result, any discussion of whether a pre-Robinson robbery conviction qualified as a violent felony under the elements clause was not necessary to our holding and does not bind us now. Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 762 (11th Cir. 2010) ("Statements in an opinion that are not fitted to the facts . . . , or that extend further than the facts of that case . . . , or that are not necessary to the decision of an appeal given the facts and circumstances of the case . . . are dicta. We are not required to follow dicta in our prior decisions. Nor for that matter is anyone else.") (quotation marks and citations omitted). Our decision in Fritts, on the other hand, squarely held that pre-Robinson armed robbery convictions qualify as violent felonies under the elements clause. That decision controls the outcome of this case.[3]

Because Baxter's 1987 armed robbery convictions still qualify as violent felonies in the wake of Johnson, his sentence was properly enhanced under the

[2] The Welch decision's holding, of course, has been abrogated by the Supreme Court's decision in Johnson, 135 S. Ct. 2551, which held that the residual clause was unconstitutionally vague. But the fact that use of the residual clause was later rejected by the Supreme Court does not make the assumptions we indulged to reach that (erroneous) holding any less dicta.

[3] Baxter also cites various post-Robinson cases from the Florida Courts of Appeal to suggest that, even after Robinson, the amount of force necessary to commit a robbery in Florida is not sufficient to bring that offense within the elements clause. But that argument is squarely foreclosed by a long line of precedent from this Court, including Fritts, which has held that, both pre- and post-Robinson violations of Florida's robbery statute do qualify as a violent felonies under the ACCA's elements clause. Fritts, 841 F.3d 937; United States v. Seabrooks, 839 F.3d 1326, 1340–41 (11th Cir. 2016); id. at 1346 (Baldock, J., concurring); United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir. 2006).

ACCA. The district court did not err by denying his § 2255 motion.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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September 05, 2017

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-17756-AA
Case Style: Rubin Baxter v. USA
District Court Docket No: 2:16-cv-14264-DMM
Secondary Case Number: 2:00-cr-14069-DMM-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Tonya L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:16-CV-14264-MIDDLEBROOKS/LYNCH
(00-CR-14069)

RUBIN DEXTER BAXTER,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT AND DENYING MOTION TO VACATE SENTENCE UNDER § 2255

The issue presented is whether Mr. Baxter's two 1987 Florida robbery convictions are predicate offenses under the Armed Career Criminal Act. Mr. Baxter's case is complicated by the fact that he was prosecuted in a district where, and at a time when, sudden snatching served as a basis for a robbery conviction.[1]

I have the benefit of Magistrate Judge Frank J. Lynch, Jr.'s Report and Recommendation (DE 18), Movant's Objections to the Report (DE 19), the Government's Objections to the Report (DE 20), Movant's Supplemental Objections (DE 21), and the Government's Response to Movant's Objections (DE 22). The issues are well briefed by both sides.

BACKGROUND

In 2000, Mr. Baxter was convicted of being a felon in possession of a firearm. A

[1] The presentence investigation report indicates that the offenses for which Mr. Baxter were actually convicted involved force and a gun.

presentence investigation report was prepared. The base offense level was 24, which was increased by two points because the gun Mr. Baxter possessed was stolen. The report listed four prior convictions which were relied upon to determine that Mr. Baxter was an armed career criminal pursuant to 18 U.S.C. § 924(e): armed robbery (87-1278-CF-B), kidnapping (87-1269-CF-B), armed robbery (also in 87-1269-CF-B), and sale and delivery of cocaine (89-2878-CF). As an armed career criminal, Mr. Baxter's offense level was increased to 33. With an offense level 33 and criminal history category VI, the guidelines range was 235-293 months. The statutory minimum term of imprisonment was 15 years and the statutory maximum was life. On April 5, 2002, Judge Donald L. Graham sentenced Mr. Baxter to 235 months' imprisonment.[2]

Mr. Baxter appealed his conviction and sentence. The Eleventh Circuit affirmed. Mr. Baxter then filed a motion to vacate pursuant to § 2255, which was denied. In response to *Johnson*, he filed a second motion to vacate. He obtained leave from the Eleventh Circuit to file this second motion to vacate pursuant to § 2255. Mr. Baxter is represented by counsel.

Magistrate Judge Lynch prepared a Report, recommending that his Motion be denied. The Report finds that Mr. Baxter's robbery convictions are violent felonies under the elements clause and that he still qualifies as an armed career criminal. Both sides objected to the Report. Mr. Baxter objected, in part, to the finding that the robbery convictions are violent felonies. The Government objected to the Report's conclusion that Mr. Baxter had not procedurally defaulted. The Government also objected to the Report's finding that Mr. Baxter has a cognizable claim, "because Baxter has shown nothing more than a mere possibility that the District Court relied on the residual clause in finding that he had three violent felonies under the ACCA . . . ." (DE 20 at 20). The Government continues that "he has failed to demonstrate that he was sentenced

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[2] It is not clear from the record under which ACCA clause – the elements, enumerated, or residual clause – Judge Graham relied upon to determine that Mr. Baxter had three violent felonies.

pursuant to residual clause as required by § 2255(h) or that at the time he was sentenced his prior convictions for strong arm robbery did not qualify as violent felonies under the ACCA's enumerated clause."[3] (*Id.*).

Upon a careful, *de novo* review of the Report, objections, and the record, I agree with the Report's recommendation to deny the Motion. I write briefly to further articulate why Mr. Baxter's robbery convictions qualify as predicate offenses under the ACCA.

The ACCA. A conviction for felon in possession typically carries a statutory maximum sentence of ten years in prison. *See* 18 U.S.C. § 924(a)(2). However, if the defendant has three or more previous convictions for certain types of felonies, he is subject to an enhanced minimum sentence of fifteen years imprisonment with a maximum term of life imprisonment. Title 18 U.S.C. § 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .

As is relevant to this case, the statute defines "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B). The first clause, § 924(e)(2)(B)(i), is typically referred to as the

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[3] It appears that the Government meant the elements clause, not the enumerated clause. Review of the Government's response to the order to show cause, as well as its objections, demonstrates that the Government has never argued that Mr. Baxter's convictions fall under the enumerated clause, which at the time of Mr. Baxter's sentencing, included "burglary, arson, or extortion, involves use of explosives."

elements clause ("has as an element the use, attempted use, or threatened use of physical force against the person of another."). The first part of the second clause, § 924(e)(2)(B)(ii), lists specific offenses—burglary, arson, extortion, offenses involving use of explosives—and is known as the enumerated offense clause. The portion of § 924(e)(2)(B)(ii) covering a conviction that "otherwise involves conduct that presents a serious potential risk of physical injury to another" is referred to as the residual clause.

On June 26, 2015, the Supreme Court held that the residual clause of the ACCA violates due process as it "denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551, 2557 (2015). The residual clause can no longer support a defendant's classification as an armed career criminal. On April 18, 2016, the Supreme Court decided *Welch v. United States*, 578 U.S. __, 136 S. Ct. 1257 (2016), which held that the newly established right recognized in *Johnson* is retroactive to cases on collateral review, such as Mr. Baxter's case.

1987 Florida Robbery Convictions. As explained in the Report, *see* (Report at ¶ 25), and as the Parties agree, whether a 1987 robbery conviction under Fla. Stat. § 812.13(1) is a violent felony under the elements clause is an open question.[4] Indeed, the United States Supreme Court remanded *Welch v. United States*, to the Eleventh Circuit to consider in the first instance whether a 1996 strong arm robbery qualified as a violent felony under the elements clause, 18 U.S.C. § 924(e)(2)(B)(i). 136 S. Ct. 1257, 1268 (2016).

In *Taylor v. United States*, 495 U.S. 575 (1990), the United States Supreme Court held

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[4] In *Seabrooks v. United States*, No. 15-10380 (11th Cir. Oct. 19, 2016), a direct appeal, the Eleventh Circuit held that a 1997 robbery conviction under Fla. Stat. § 812.13(1) is a violent felony under the elements clause of the ACCA. The panel agreed that *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) governed Seabrooks' case. However, the panel did not determine (by a majority) whether a pre-1997 robbery conviction, before *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), would also constitute a violent felony under the ACCA.

that the categorical approach is the method for determining whether a prior conviction qualifies as an ACCA predicate offense. The categorical approach limits the inquiry to the legal definition of the offense of conviction. A court must only consider the elements of the offense and compare those elements with the language in the ACCA. The facts surrounding the actual offense are ignored. The categorical approach also requires the Court to presume that the conviction rested on the least culpable conduct which is criminalized by the statute. *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

The PSR provides that Mr. Baxter has two convictions for strong arm robbery under § 812.13(1).[5] In *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), the Eleventh Circuit held that a conviction under § 812.13(1) was a crime of violence under the elements clause of the sentencing guidelines, U.S.S.G. § 4B1.2(a).[6] The Eleventh Circuit explained:

> The bare elements of § 812.13(1) also satisfy the elements and residual clauses of U.S.S.G. § 4B1.2(a). We have previously discussed the elements of § 812.13(1). As stated above, robbery under that statute requires either the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm. All but the latter option specifically require the use or threatened use of physical force against the person of another. And, once again, we find it inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force. Section 812.13(1) accordingly has, as an element, the "use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1).

632 F.3d at 1244-45.

Although *Lockley* appears to directly address whether Mr. Baxter's robbery conviction is an ACCA predicate offense, Mr. Baxter argues *Lockley* is distinguishable because he was

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[5] He was charged with armed robbery but entered a plea of nolo contendere to the lesser included offense of strong arm robbery.

[6] Courts apply the same analysis to crimes of violence under U.S.S.G. § 4B1.2(a) and to violent felonies under the ACCA. *United States v. Whitson*, 597 F.3d 1218, 1220, n.2 (11th Cir. 2010).

convicted of robbery at a time when certain district courts of appeals – including the Fourth District Court of Appeals where Mr. Baxter was convicted – interpreted Fla. Stat. § 812.13(1) to criminalize sudden snatching. Sudden snatching does not require force other than that to remove the object from the victim. *See, e.g.*, *Santiago v. State*, 497 So. 2d 975 (Fla. 4th DCA 1986).

In "determining whether a defendant was convicted of a 'violent felony,' we [turn] to the version of state law that the defendant was actually convicted of violating." *McNeill v. United States*, 563 U.S. 816 (2011). The 1987 version of the Florida Statutes § 812.13(1) provides:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.

Fla. Stat. § 812.13(1). "If in the course of committing the robbery the offender carried a firearm or other deadly weapon . . . [or other] weapon, then the robbery is a felony of the first degree." § 812.13(2)(a)-(b). If no firearm or weapon was carried, then it is a second degree felony. § 812.13(2)(c).

Both sides contend that the categorical approach governs the analysis, and I agree. I must now determine "whether the conduct criminalized by the statute, including the most innocent conduct, qualifies" as a violent felony. *Torres–Miguel*, 701 F.3d at 167.

The elements clause of the ACCA applies to an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). As defined by the Supreme Court, "the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Curtis Johnson*"). Thus, the "most innocent conduct" criminalized under § 812.13(1) must require the use of *violent* physical force – "unwanted touching" or slight intentional physical contact is not sufficient. *See id.* at 139.

In determining the elements of § 812.13(1), I am bound by the Florida Supreme Court's

interpretation of the statute. *See Curtis Johnson*, 599 U.S. at 138. The Florida Supreme Court has considered the robbery statute on two occasions critical to this case, first in 1976 and then in 1997. In *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976), the Florida Supreme Court explained the type of force required for a robbery conviction:

> In *Montsdoca v. State*, 84 Fla. 82, 93 So. 157 (1922), the 'nice' distinction between robbery and larceny was explained to be the addition to mere taking of a contemporaneous or precedent force, violence, or of an inducement of fear for one's physical safety. Any degree of force suffices to convert larceny into a robbery. Where no force is exerted upon the victim's person, as in the case of a pickpocket, only a larceny is committed. *See Colby v. State*, 46 Fla. 112, 35 So. 189 (1903). The facts developed at McCloud's trial indicate that he gained possession of his victim's purse not by stealth, but by exerting physical force to extract it from her grasp. McCloud's victim carried her handbag by a strap which she continued to hold after the purse had been seized by McCloud. She released the strap only after she fell to the ground. Furthermore, there was evidence the jury could believe which showed that McCloud attempted to kick his victim while she lay on the ground and after the purse had been secured. Although McCloud would have preferred that the jury disbelieve this testimony, the evidence before the jury was adequate to support a verdict of robbery.

335 So. 2d at 258-59. In *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), the Court resolved a split among the district courts of appeal as to "whether the snatching of property by no more force than is necessary to remove the property from a person who does not resist amounts to robbery in Florida under § 812.13(1)." *Id.* at 884-85. The Court explained:

> In accord with our decision in *McCloud*, we find that in 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. The snatching or grabbing of property without such resistance by the victim amounts to theft rather than robbery.

Id. at 886-87. The Court confirmed that "[t]o establish robbery, the taking must be by means of: (1) force or violence; or (2) intimidation by assault or putting in fear." *Id.* at 886.

Of course, the ACCA does not simply require use, attempted use, or threatened use of *physical* force – "it requires violent force—that is, force capable of causing physical pain or

injury to another person." *Curtis Johnson*, 559 U.S. at 140. Thus, the question is whether Florida strong arm robbery, a second degree felony no involving a firearm, requires such violent force. I find that it does.

Although the *McCleod* court stated that "[a]ny degree of force suffices to convert larceny into a robbery," it also stated that robbery requires "a contemporaneous or precedent force, violence, or of an inducement of fear for one's physical safety." 335 So. 2d at 258. Indeed, the force used in *McCleod* ultimately resulted in the victim's death. In *Montsdoca*, the Florida Supreme Court explained

> [T]he distinction between larceny and robbery is a nice one. The criterion which distinguishes these offenses is the violence which precedes the taking. There can be no robbery without violence, and there can be no larceny with it. It is violence that makes robbery an offense of greater atrocity than larceny. Robbery may thus be said to be a compound larceny composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking. . . .
>
> An intent to steal is essential, so is violence or putting in fear. . . .
>
> The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance. . . .
>
> Violence need not be actual to constitute the offense of robbery. It is robbery to create in the person to be despoiled a reasonable apprehension of violence to avoid which he parts with the thing. An assault which has not traveled to a battery, or probably any such array of force as is calculated to create the reasonable apprehension, though short of a technical assault, suffices. The menace must be of a sort to excite reasonable apprehension of danger.

Montsdoca, 93 So. 157, 159 (Fla. 1922).

And although "putting in fear" alone would not necessarily implicate the elements clause of the ACCA, the Florida Supreme Court, as early as 1976, has defined the fear involved in Florida robbery to be "fear for one's physical safety." *McCleod*, 335 So. 2d at 258. I find that to induce fear for one's physical safety, one must employ, at a minimum, a threat of "force capable

of causing physical pain or injury to another person," *Curtis Johnson*, 559 U.S. at 140, which satisfies the elements clause of the ACCA. *See Lockley*, 632 F.3d at 1245.

The fact that Florida district courts of appeals may have interpreted § 812.13(1) differently does not alter my analysis. That is because the Florida Supreme Court had explained prior to Baxter's conviction that robbery requires "a contemporaneous or precedent force, violence, or of an inducement of fear for one's physical safety," *McCleod*, 335 So. 2d at 258, and that "[t]here can be no robbery without violence," *Montsdoca*, 93 So. at 159. Accordingly, I find that *Lockley*'s holding should be extended to pre-1997 Florida robbery. For the reasons stated in *Lockley* and those articulated above, Mr. Baxter's 1987 Florida robbery convictions are a violent felony under the ACCA.

Because I find Mr. Baxter's two 1987 robbery convictions are qualifying violent felonies, I need not determine whether Mr. Baxter's kidnapping conviction is also a violent felony. With the two robbery convictions and a serious drug conviction, Mr. Baxter qualifies as an armed career criminal and his Motion is, therefore, denied.

Pursuant to § 2253(c)(2), a district court may only issue a certificate of appealability when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Finding that Mr. Baxter has made such a showing, I grant Mr. Baxter a certificate of appealability on the following issue: whether Mr. Baxter's two 1987 Florida robbery convictions are predicate offenses under the Armed Career Criminal Act.

It is **ORDERED AND ADJUDGED**:

(1) The Report (DE 18) is **ADOPTED**.

(2) The Motion to Vacate (DE 1) is **DENIED**.

(3) A certificate of appealability is **GRANTED** on the following issue: whether Mr. Baxter's two 1987 Florida robbery convictions are predicate offenses under the Armed Career

Criminal Act.

(4) All pending motions are **DENIED as MOOT**.

(5) The Clerk of Court shall **CLOSE** this case.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 26 day of October, 2016.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record