IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10483-D

JEROME BANNISTER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Jerome Bannister is a federal prisoner serving a 180-month sentence after pleading guilty in 2009 to possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1). He did not file a direct appeal. He filed this counseled 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence asserting that he was no longer subject to enhancement under the Armed Career Criminal Act ("ACCA") in light of Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015). He asserted his 1995 Florida convictions for robbery and robbery with a deadly weapon did not qualify under the ACCA's elements clause

because at the time of his convictions robbery could be committed by mere snatching. He further asserted his Florida conviction for lewd or lascivious battery under Fla. Stat. Ann. § 800.04 is not an enumerated offense and this Court has expressly held it does not involve the use, attempted use, or threatened use of force, citing United States v. Harris, 608 F.3d 1222 (11th Cir. 2010). Finally, Mr. Bannister asserted his conviction for resisting arrest with violence did not qualify under the elements clause because it only required general intent and de minimis force.

A Magistrate Judge issued a report and recommendation ("R&R") recommending Mr. Bannister's § 2255 motion be denied. The Magistrate Judge reasoned that Mr. Bannister's armed robbery, unarmed robbery, and resisting arrest with violence convictions still qualified as predicate offenses. The Magistrate Judge declined to address whether his conviction for lewd and lascivious battery could also serve as an ACCA predicate offense. Over Mr. Bannister's objections, the District Court adopted the R&R, denied his § 2255 motion, and denied a certificate of appealability ("COA").

Mr. Bannister now seeks a COA from this Court. He asserts that reasonable jurists have debated, and continue to debate, whether a pre-1997 Florida robbery conviction has as an element of the use of violent force. He asserts that United States v. Fritts, 841 F.3d 937 (11th Cir. 2016) is not controlling because the

defendant's conviction in that case was in the Florida Second District Court of Appeal, while Mr. Bannister's case was in the Fourth District Court of Appeal, which, at the time of his conviction, had held that robbery could be committed by mere snatching.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the [D]istrict [C]ourt's assessment of the constitutional claims debatable or wrong," or the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000) (quotations omitted). Beyond that, "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted), cert. denied, 136 S. Ct. 1661 (2016).

The ACCA states that a person who violates § 922(g) and has three previous convictions for violent felonies or serious drug offenses shall be imprisoned for not less than fifteen years. 18 U.S.C. § 924(e)(1). It defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year 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 prong of this definition is sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes" and, finally, what is commonly called the "residual clause." United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012).

On June 26, 2015, the Supreme Court in Johnson held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. Johnson, 135 S. Ct. at 2557–58, 2563. The Court clarified that they were not calling into question the application of the elements clause and the enumerated crimes of the ACCA's definition of a violent felony. Id. at 2563. In Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257, 1264–65, 1268 (2016), the Supreme Court thereafter held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review.

The presentence investigation report ("PSR") indicated that Mr. Bannister was subject to enhancement as an armed career criminal based his prior convictions for (1) robbery on March 6, 1995, (2) armed robbery with a deadly weapon on March 15, 1995, and (3) lewd or lascivious battery and resisting arrest with violence in 2001. Mr. Bannister did not object at sentencing to the PSR's

facts or its calculation of his guideline range and the District Court adopted the PSR without alteration.

Here, Mr. Bannister has failed to demonstrate that reasonable jurists would find the District Court's denial of his § 2255 motion debatable or wrong. After Johnson, Mr. Bannister has three prior offenses that qualify as crimes of violence under the remaining clauses of the ACCA. As to his conviction for resisting arrest with violence, this Court has held that the Florida offense of resisting an officer with violence constitutes a violent felony under the elements clause. See United States v. Hill, 799 F.3d 1318, 1322–23 (11th Cir. 2015).

Further, Mr. Bannister's 1995 Florida convictions for robbery and armed robbery qualify under the elements clause. In United States v. Seabrooks, a panel of this Court held that a defendant's August 1997 Florida armed robbery conviction qualified under the ACCA's elements clause, but the panel did not reach a consensus about whether a pre-1997 conviction could qualify as a predicate offense because before 1997 it was possible to be convicted of Florida robbery for a nonviolent sudden snatching. 839 F.3d 1326, 1343–36 (11th Cir. 2016). Shortly after Seabrooks, this Court held that pre-1997 Florida robbery convictions were categorically violent felonies under the ACCA's elements clause. 841 F.3d at 944. Given our Court's binding precedent in Fritts, reasonable jurists would not debate whether, post-Johnson, Mr. Bannister's 1995 Florida robbery conviction qualifies

as a violent felony under the ACCA's elements clause. Mr. Bannister's argument that his robbery convictions are no longer crimes of violence is therefore foreclosed by binding circuit court precedent. See Hamilton, 793 F.3d at 1266.

Because Mr. Bannister has three offenses that still qualify as ACCA predicate offenses, he cannot make a substantial showing of the denial of a constitutional right. His motion for a COA is therefore **DENIED**.

Beverly B. Martin
UNITED STATES CIRCUIT JUDGE