APPENDIX

INDEX TO APPENDICES

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17552
Non-Argument Calendar

D.C. Docket No. 6:11-cr-00206-GAP-GJK-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH L. HARRIS,
a.k.a. Kenneth Leander Harris,

Defendant-Appellant.

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

(November 28, 2017)

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

PER CURIAM:

A jury convicted Kenneth Harris of three counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) and (b), three counts of using and carrying a firearm during those Hobbs Act robberies, in violation of 18 U.S.C. § 924(c)(1)(A), and one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1). The district court sentenced him to 188 months each on the Hobbs Act robbery convictions, to run concurrently; 84, 300, and 300 months on the § 924(c)(1)(A) convictions, to run consecutively; and 180 months on the firearm possession conviction under the Armed Career Criminal Act, to run concurrently with the Hobbs Act robbery sentences. Harris appeals that 872-month sentence.

Harris first contends that his § 924(c)(1)(A) convictions must be vacated because his companion Hobbs Act robbery convictions do not qualify as "crime[s] of violence" under § 924(c)(1)(A). See 18 U.S.C. § 924(c)(1)(A) (providing that any person who uses or carries a firearm "during and in relation to any crime of violence" is subject to certain mandatory minimums). Binding precedent forecloses that argument. See Smith v. GTE Corp., 236 F.3d 1292, 1300 n.8 (11th Cir. 2001) ("[Under the] prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court."). Harris was convicted of

committing Hobbs Act robbery "by means of actual and threatened force, violence, and fear of injury," and as a result his "companion conviction[s] for Hobbs Act robbery . . . clearly qualif[y] as . . . 'crime[s] of violence' under the use-of-force-clause in § 924(c)(3)(A)." In re Fleur, 824 F.3d 1337, 1340–41 (11th Cir. 2016); see 18 U.S.C. § 924(c)(3)(A) (defining a "crime of violence" as a felony having "as an element the use, attempted use, or threatened use of physical force against the person or property of another"). Harris's argument that In re Fleur is not binding because it involved an application to file a second or successive petition under 28 U.S.C. § 2255 fails because we have held that "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." In re Lambrix, 776 F.3d 789, 794 (11th Cir. 2015).

Harris also contends that the district court erred in sentencing him as an armed career criminal based on three 1991 Florida felony convictions for robbery with a firearm. Binding precedent also forecloses that argument. At the time of his convictions, Florida law defined "robbery" as the "taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1), (2)(a) (1987). We have held that a conviction for armed robbery under that statute "categorically qualifies as a violent

felony under the ACCA's elements clause." United States v. Fritts, 841 F.3d 937, 942 (11th Cir. 2016). Harris argues that Fritts is wrong, but the prior panel precedent rule "is not dependent upon a subsequent panel's appraisal of the initial decision's correctness," and he cites no en banc or Supreme Court decision overruling Fritts. Smith, 236 F.3d at 1300 n.8, 1301–02 (quotation marks omitted). As a result, the district court correctly determined that Harris's three Florida armed robbery convictions are qualifying ACCA felonies.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17552-AA

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

KENNETH L. HARRIS,
a.k.a. Kenneth Leander Harris,

Defendant - Appellant.

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

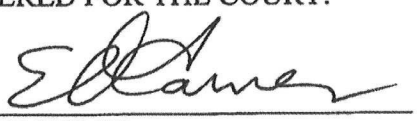
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, MARTIN, and JILL PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



CHIEF JUDGE

ORD-42

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO. 6:11-cr-206-Orl-31GJK

KENNETH L. HARRIS,

Defendant.

ORDER

This case comes before the Court for resentencing of Defendant on Counts One, Six, and Nine pursuant to the April 20, 2016 Order granting in part and denying in part Petitioner's 28 U.S.C. § 2255 Motion. (Doc. 129). Defendant raised fifteen grounds in his § 2255 Motion, and the Court granted relief solely as to a portion of ground eight. (*Id.*). Specifically, the Court determined that Defendant's life sentences pursuant to 18 U.S.C. § 3559 for his Hobbs Act robbery convictions in Counts One, Six, and Nine exceeded the maximum allowed by law and are improper. (*Id.* at 15). Consequently, the Court appointed counsel to represent Defendant in relation to his resentencing on these counts. (Doc. 133).

Prior to the resentencing hearing, counsel for Defendant filed a Memorandum on the Application of Sentencing Enhancers Under 18 U.S.C. § 924 to Hobbs Act and Pre-1997 Florida Robbery Statutes ("Memorandum"). (Doc. 143). The Government filed a response to Defendant's Memorandum. (Doc. 145). Among the issues raised in

Defendant's Memorandum, Defendant argues that the sentences for his 18 U.S.C. § 924(c)(1)(A) convictions in Counts Two, Seven, and Ten are improper in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) because his convictions for Hobbs Act robbery do not qualify as crimes of violence. (Doc. 143 at 2-9). Defendant further argues that he does not qualify for sentencing enhancement under the Armed Career Criminal Act ("ACCA") because his 1991 Florida robbery convictions do not qualify as violent felonies.[1] (*Id.* at 143 at 13-23).

The pivotal issue for consideration in this case is the appropriate sentences to be imposed for Counts One, Six, and Nine as determined in the § 2255 Order. Initially, the Court notes that to the extent Defendant's arguments are premised on the holding in *Johnson*, it is not clear that *Johnson* is applicable to the residual clause in § 924(c)(3)(B) or in this case generally. *See, e.g., Jones v. United States*, No. CR608-008, 2016 WL 4472973, at *3 (S.D. Ga. Aug. 24, 2016) (concluding that the petitioner, who was convicted of §§ 924(c)(1)(A)(ii) and 2, "was not enhanced based on any factor made unconstitutional under *Johnson.*"). Regardless, to the extent Defendant argues that his Hobbs Act robbery convictions are not crimes of violence such that his sentences and convictions under 18 U.S.C. § 924(c)(1)(A) in Counts Two, Seven, and Ten are improper, the Court rejects this argument. *See In re Fleur,* 824 F.3d 1337, 1341 (11th Cir. 2016) ("In sum, Saint Fleur pled

[1] Defendant has one conviction for robbery without a firearm. PSR at ¶ 73. Because Defendant has four additional convictions for robbery with a firearm, the Court will not consider this prior conviction for ACCA purposes.

guilty to using, carrying, and discharging a firearm during the Hobbs Act robbery set forth in Count 4, which robbery offense meets the use-of-force clause of the definition of a crime of violence under § 924(c)(3)(A). This means Saint Fleur's sentence would be valid even if *Johnson* makes the § 924(c)(3)(B) residual clause unconstitutional."); *see also United States v. Hancock*, 168 F. Supp. 3d 817, 824 (D. Md. 2016) ("[T]he Court finds that Hobbs Act robbery has an element the use, attempted use or threatened use of physical force against the person or property of another and therefore constitutes a categorical crime of violence."); *United States v. Collins*, No. 1:14-CR-302-TWT-AJB, 2016 WL 1639960, at *31, n. 18 (N.D. Ga. Feb. 9, 2016), *report and recommendation adopted*, No. 1:14-CR-302-TWT, 2016 WL 1623910 (N.D. Ga. Apr. 25, 2016) (noting "it appears that Hobbs Act robbery is a 'crime of violence' under both the categorical approach and the modified categorical approach"); *Wallace v. United States*, No. CR 116-048, 2016 WL 4147164, at * 1 (S.D. Ga. Aug. 4, 2016) ("[A] petitioner's companion conviction for Hobbs Act robbery forecloses any possibility of relief under *Johnson*."). Consequently, Defendant's sentences for Counts Two, Seven, and Ten carry mandatory minimum consecutive sentences of 7, 25, and 25 years respectively and are not subject to change.

Turning to Defendant's argument that his 1991 robbery with a firearm convictions, *see* PSR at ¶¶ 71, 72, 74, 75, do not qualify as violent felonies under the ACCA, resulting in his sentence for Count Eight being improper and his guidelines calculation for Counts One, Six, and Nine being erroneous, the Court rejects this argument in light of *United*

States v. Seabrooks, No. 15-10380, 2016 WL 6090860 (11th Cir. Oct. 19, 2016) and *United States v. Fritts*, No. 15-15699, 2016 WL 6599553 (11th Cir. Nov. 8, 2016).[2] In holding that a 1989 Florida robbery with a firearm conviction qualifies as a violent felony under the ACCA, the *Fritts* Court explained "based on our precedent in [*United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006)] and [*United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011)], and in light of the Florida Supreme Court's decisions in [*Robinson v. State*, 692 So. 2d 883 (Fla. 1997)], [*McCloud v. State*, 335 So. 2d 257 (Fla. 1976)], and [*Montsdoca v. State*, 93 So. 157 (Fla. 1922)], we conclude that [the defendant's] Florida armed robbery conviction under § 812.13 categorically qualifies as a 'violent felony' under the ACCA's elements clause." *Fritts*, 2016 WL 6599553, at *5. Therefore, Defendant's 1991 Florida robbery with a firearm convictions categorically qualify as violent felonies under the elements clause of the ACCA. Thus, Defendant's sentence of 15 years on Count Eight under the ACCA is correct.

Having rejected the arguments offered by Defendant, the Court concludes that Defendant's total offense level for Counts One, Six, and Nine is 33 and his criminal history category is IV. Thus, Defendant's guideline range for these counts is 188 to 235 months,

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[2] The Court notes that Defendant has four robbery with a firearm convictions committed on May 2, May 5, and May 7, 1991. Two of the offenses were committed on May 5, 1991. *See* PSR at ¶¶ 72, 74. For purposes of applying the ACCA in this case, the Court relies on only one of the May 5, 1991 offenses.

and the Court will impose a sentence within this range for Counts One, Six, and Nine.[3]

DONE AND ORDERED in Orlando, Florida, this 10th day of November, 2016.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record
Kenneth L. Harris

[3] Because these counts are grouped with Count Eight and Count Eight has a mandatory minimum sentence of 180-months, the low end of the guidelines range is only eight months greater than the mandatory minimum sentence.