No. _____

IN THE
Supreme Court of the United States

BOBBY MCGEE JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. McGee was convicted of possessing a firearm as a convicted felon and sentenced under the Armed Career Criminal Act ("ACCA") to 180 months' imprisonment. After this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidating the ACCA's residual clause, Mr. McGee moved to vacate his sentence under 28 U.S.C. § 2255. That motion was denied, and both the district court and the Eleventh Circuit denied Mr. McGee a certificate of appealability ("COA).

The broad question presented by this case is whether the Eleventh Circuit erroneously denied Mr. McGee a COA on whether he was unconstitutionally sentenced above the statutory maximum for his offense. More specifically, however, the narrow questions presented by this petition are whether reasonable jurists can debate the following issues:

(1) Whether a § 2255 movant raising a *Samuel Johnson* claim can satisfy his burden of proof by showing his ACCA sentence may have been based on the residual clause and that under current law, he is not an armed career criminal;

(2) Whether a Florida conviction for robbery under Fla. Stat. § 812.13 qualifies as a "violent felony" under the ACCA's elements clause;[1] and

(3) Whether a Florida conviction for resisting with violence under Fla. Stat. § 843.01 qualifies as a "violent felony" under the ACCA's elements clause.

[1] This Court is currently considering the same question in *Stokeling v. United States*, No. 17-5554 (cert. granted Apr. 2, 2018).

LIST OF PARTIES

Petitioner, Bobby McGee Jr., was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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Bobby McGee Jr. respectfully petitions for a writ of certiorari to review the Eleventh Circuit's judgment.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. McGee's application for a COA in Appeal No. 18-10531 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. McGee's case under 18 U.S.C. § 3231. The district court denied Mr. McGee's 28 U.S.C. § 2255 motion on December 13, 2017. Mr. McGee subsequently filed a notice of appeal and application for a COA in the Eleventh Circuit, which was denied on April 17, 2018. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves the application of the ACCA, 18 U.S.C. § 924(e). The ACCA's sentencing enhancement provision states, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . 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[.]

18 U.S.C. § 924(e)(1).

In relevant part, the ACCA defines a "violent felony" as:

> [A]ny crime punishable by imprisonment for a term 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).

At the time of Mr. McGee's attempted robbery conviction, the Florida robbery statute provided, in relevant part:

> "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) (1986).

At the time of Mr. McGee's resisting-with-violence conviction, the Florida statute regarding that offense provided, in relevant part:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree . . . .

Fla. Stat. § 843.01 (1996).

STATEMENT OF THE CASE

Mr. McGee pled guilty to possessing a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 924(e), and on November 6, 2009, the district court sentenced him under the ACCA to 180 months' imprisonment, followed by 36 months' supervised release. At the time of sentencing, Mr. McGee had the following prior Florida convictions that qualified as ACCA predicate offenses:

PSR Paragraph	Description	Date of Arrest
¶ 29	Attempted Robbery	May 23, 1986
¶ 32	Delivery of Cocaine	March 29, 1989

¶ 33	Battery on a Law Enforcement Officer[2]	March 29, 1989
¶ 39	Delivery of Cocaine[3]	August 20, 1993
¶ 45	Resisting Arrest with Violence Battery on a Law Enforcement Officer[4]	June 7, 1996

Notably, the record is silent about which convictions were relied on to enhance Mr. McGee's sentence under the ACCA.

Mr. McGee did not appeal his conviction or sentence. On March 4, 2011, he filed his first § 2255 motion, alleging his ACCA sentence was unlawful after *Johnson v. United States*, 559 U.S. 133 (2010) (*Curtis Johnson*). Specifically, he asserted that after *Curtis Johnson*, his convictions for resisting with violence and delivery of cocaine no longer qualified as ACCA predicate offenses. The district court denied the motion, finding Mr. McGee procedurally defaulted on his *Curtis Johnson* claim by failing to raise it on direct appeal and that the claim failed on the merits. Both the district court and the Eleventh Circuit denied him a COA.

On June 15, 2016, the Eleventh Circuit granted Mr. McGee authorization to file a second

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[2] PSR paragraph 33 also notes a conviction for resisting an officer *without* violence, which is not an ACCA predicate offense because it is a misdemeanor. However, the *Shepard* documents actually reflect that the conviction is for resisting an officer *with* violence. Regardless, at sentencing, the PSR was adopted without change, so it is clear the district court did not rely on that conviction. Moreover, even if the government may now rely on that conviction, it does not affect this case. Indeed, Mr. McGee has a second conviction for resisting with violence. If that second conviction qualifies as an ACCA predicate offense, then Mr. McGee has three ACCA predicate offenses (one for resisting with violence and two for delivery of cocaine). On the other hand, if that second resisting with violence conviction does not qualify, neither does the first one.

[3] Mr. McGee does not dispute that his two Florida convictions for delivery of cocaine qualify as ACCA predicate offenses.

[4] Mr. McGee maintains that his convictions for battery on a law enforcement officer do not qualify as ACCA predicate offenses. The *Shepard* documents for both convictions reflect that the least culpable act Mr. McGee was charged with was touching an officer against his will, which does not qualify as a "violent felony." *See Johnson v. United States*, 559 U.S. 133 (2010) (*Curtis Johnson*). Given that neither the government nor the district court relied on these convictions below, Mr. McGee does not address them further.

or successive § 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*). Mr. McGee subsequently filed his second § 2255 motion in the district court, raising only one claim—that his ACCA sentence was above the statutory maximum in light of *Samuel Johnson*. Specifically, Mr. McGee argued that his convictions for resisting with violence, attempted robbery, and battery on a law enforcement officer no longer qualify as "violent felon[ies]." The government responded that Mr. McGee: (1) cannot satisfy his burden to prove his ACCA sentence was actually based on the use of the residual clause; (2) procedurally defaulted on his claim; and (3) remains an armed career criminal.[5]

Mr. McGee replied, maintaining that he had only two ACCA predicate offenses—his convictions for delivery of cocaine. He also asserted that the correct test for determining whether a movant has satisfied his burden of proof on a *Samuel Johnson* claim is not whether he can prove he was *actually* sentenced based on the residual clause, but rather that his sentence *may* have been based on the residual clause, and without the use of that clause, he no longer qualified for an ACCA sentence. Finally, Mr. McGee contended that under *Reed v. Ross*, 468 U.S. 1, 17 (1984), he can show cause for his procedural default and prejudice resulting from his erroneous sentence. Mr. McGee therefore requested that the district court vacate his sentence.

On December 13, 2017, the district court denied Mr. McGee's motion.[6] The district court

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[5] The government did not dispute the timeliness or cognizability of Mr. McGee's claim.

[6] The district court declined to address the government's arguments on procedural default. In Mr. McGee's view, the district court's decision not to address that issue was an implicit rejection of the government's argument. *See Beeman v. United States*, 871 F.3d 1215, 1225 (11th Cir. 2017) (Williams, J., dissenting). Because the district court's ruling was not based on procedural default, Mr. McGee will not address that argument herein and relies on the arguments he raised in the district court. However, Mr. McGee would note that reasonable jurists are currently debating this issue. *See United States v. Snyder*, 871 F.3d 1122, 1126–28 (10th Cir. 2017) (holding that a movant's *Samuel Johnson* claim was not reasonably available to him at the time of his direct appeal, and therefore the claim was not procedurally defaulted).

held that Mr. McGee's convictions for attempted robbery and resisting with violence qualified as ACCA predicate offenses. Further, the court held that since the record is silent about what prior convictions were relied on, Mr. McGee cannot satisfy his burden under *Beeman v. United States*, 871, F.3d 1215 (11th Cir. 2017), to show that it is more likely that not that his sentence was *actually* based on the use of the residual clause. The district court concluded by denying Mr. McGee a COA.

Mr. McGee moved for a COA in the Eleventh Circuit, and on April 17, 2018, the court denied the motion in a one-page order, stating:

> Bobby Ree McGee, Jr. moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate sentence. In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2255(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted). Because McGee has failed to make the requisite showing, his motion for a COA is DENIED.

Appendix A.

REASONS FOR GRANTING THE WRIT

I. Reasonably Jurists Can Debate Whether A § 2255 Movant Raising A *Samuel Johnson* Claim Can Satisfy His Burden of Proof By Showing His ACCA Sentence May Have Been Based On The Residual Clause And That Under Current Law, He Is Not An Armed Career Criminal.

There is a split in the circuits about a movant's burden of proof in § 2255 cases where the record is silent or ambiguous on whether a movant was sentenced under the residual clause of the ACCA. *See Dimott v. United States*, 881 F.3d 232, 241–43, 245 n.9 (1st Cir. 2018) (Torruella, J., joining in part and dissenting in part); *United States v. Taylor*, 873 F.3d 476 (5th Cir. 2017) (collecting cases).

The district court here relied on the Eleventh Circuit's decision in *Beeman*, which itself

was a split decision with a dissent. In *Beeman*, the majority concluded that a *Samuel Johnson* claim may be established only if it is "more likely than not" that his ACCA sentence was based on the use of the residual clause. 871 F.3d at 1221–22. A movant cannot satisfy this burden if "it is just as likely that the sentencing court relied on the elements or enumerated crimes clause, solely or as an alternative basis for the enhancement." *Id.* at 1222. Characterizing the inquiry as one of "historical fact," the court stated:

> Certainly, if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause. However, a sentencing court's decision today that [movant's prior conviction] no longer qualifies under present law as a violent felony under the elements clause (and thus could now qualify only under the defunct residual clause) would be a decision that casts very little light, if any, on the key question of historical fact here: whether [at his original sentencing the movant] was, in fact, sentenced under the residual clause only.

Id. at 1224 n.5. Under the *Beeman* majority's standard, a silent record must be construed against a movant, and a movant may not rely on current law to establish that he was sentenced under the residual clause.

In contrast, the *Beeman* dissent urged the court to adopt a rule that, when the sentencing record is inconclusive, *Samuel Johnson* error is established when the movant shows that he could not possibly be sentenced under any other clause of the "violent felony" definition. *Id.* at 1229–30. The dissent emphasized that under its rule, movants would still have to prove that they were more likely than not sentenced under the residual clause, but movants would be able to satisfy that burden by establishing that, if sentenced today, they could not be sentenced under the elements or enumerated-crimes clauses. *Id.*

In *Dimott*, the First Circuit adopted the Eleventh Circuit's approach and held, over dissent, that a § 2255 movant "bears the burden of establishing that it is more likely than not that he was

sentenced solely pursuant to ACCA's residual clause." 881 F.3d at 243. The court said this approach "makes sense" because any other rule would undercut the "presumption of finality" that is an "animating principle of AEDPA" and because "[p]etitioners . . . were certainly present at sentencing and knowledgeable about the conditions under which they were sentenced." *Id.* at 240. Like the Eleventh Circuit, movants in the First Circuit may not rely on current law to prove they were solely sentenced under the residual clause. *Id.* at 243 & n.8.

The Tenth Circuit has adopted an approach that is effectively the same as the Eleventh's. *United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017). In that circuit, a movant must show that his prior convictions would not have been captured by the elements or enumerated crimes clauses under "the relevant background legal environment" at the time of his sentencing. *Id.* The "relevant background legal environment" does not include post-sentencing court decisions, including clarifying decisions. *Id.* at 1129. As a result, movants in the Tenth Circuit may not rely on current law to prove they were sentenced under the residual clause.

In contrast, the Fourth Circuit has adopted a standard that places a lower initial burden on movants. The Fourth Circuit requires a movant show only that his sentence "*may* have been predicated on application of the now-void residual clause, and therefore *may* be an unlawful sentence." *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). Once that threshold is crossed, the court asks whether the *Samuel Johnson* error was harmless. *Id.* at 682 n.4. To answer that question, the court applies current law to determine whether the movant's prior convictions qualify as "violent felon[ies]." *Id.* Under the Fourth Circuit's standard, a silent record is construed in the movant's favor.

The Ninth Circuit also construes a silent record in the movant's favor. Borrowing a principle that originates with *Stromberg v. California*, 283 U.S. 359 (1931), that court concluded

an unclear record establishes *Samuel Johnson* error because "when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017). Like the Fourth Circuit, the Ninth Circuit applies current law to determine if the *Samuel Johnson* error is harmless. *Id.* at 897.

Winston, *Geozos*, and the *Beeman* dissent convincingly explain why the position adopted in *Beeman* (as well as *Dimott* and *Snyder*) is unworkable and unfair.

First, the Beeman standard disregards how ACCA sentencings are actually conducted. District courts need not, and routinely do not, disclose which clause or clauses they rely on when applying the ACCA. *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016) ("Nothing in the law requires a [court] to specify which clause . . . it relied upon in imposing a sentence."). And to the extent a court did state which clause it was relying on, before *Samuel Johnson*, most courts simply relied on the expansive residual clause. The *Beeman* standard, in failing to account for this reality, effectively "penalize[s] a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Winston*, 850 F.3d at 682. Applying *Beeman* will lead to arbitrary results in individual cases and "selective application" of *Samuel Johnson*'s constitutional holding. *Id.* (citing *Chance*, 831 F.3d at 1341).

Second, by focusing solely on "historical facts" without considering intervening Supreme Court precedent, the *Beeman* standard deprives movants in silent-record cases of the only means they may have to prove they were sentenced under the residual clause. In declining to consider intervening Supreme Court precedent—especially cases like *Descamps*, which clarified what the "violent felony" definition always required—*Beeman* incorrectly characterized how movants raising *Samuel Johnson* claims were attempting to satisfy their burdens. As the *Beeman* dissent

noted, there is a difference between raising a *Descamps* claim and relying on *Descamps* to establish that you must have been sentenced under the residual clause. 871 F.3d at 1226 (William, J., dissenting) ("The majority conflates Beeman's argument that he *could not have been sentenced* under the elements clause – made in the context of establishing his *Samuel Johnson* claim – with the argument that he *was improperly sentenced* under the elements clause – which would constitute an untimely *Descamps* claim."). Moreover, ignoring *Descamps* in favor of "historical fact" effectively treats movants differently based on arbitrary factors. For example, movants who have identical prior convictions will be treated differently based solely on when they were sentenced. *See Chance*, 831 F.3d at 1340 (noting the unfairness of ignoring intervening decisions of the Supreme Court in favor of "a foray into a stale record").

Mr. McGee respectfully maintains that the path set forth by *Winston*, *Geozos*, and the *Beeman* dissent strike the correct balance for determining how a movant in a silent-record case satisfies his burden to show *Samuel Johnson* error. At a minimum, reasonable jurists can, and do, debate whether these cases set forth the correct standard for determining whether a movant has satisfied his burden of proof on a *Samuel Johnson* claim.

II. The Ninth And Eleventh Circuits' Disagreement About Whether a Florida Conviction For Robbery Qualifies As A "Violent Felony" Under The ACCA's Elements Clause Shows That Reasonable Jurists Can Debate The Issue.

In *United States v. Fritts*, the Eleventh Circuit held that Florida robbery—whether armed or unarmed—is categorically a "violent felony" under the ACCA. 841 F.3d 937, 943 (11th Cir. 2016).[7] According to the Eleventh Circuit, armed and unarmed robbery qualify as violent felonies for ACCA purposes for the same reason, because overcoming victim resistance is a

[7] This holding has been extended to cover Florida attempted robbery. *United States v. Joyner*, 882 F.3d 1369, 1379 (11th Cir. 2018) ("Based on our precedent, we conclude that Florida attempted robbery is a violent felony under the ACCA.").

necessary element of any Florida robbery offense. 841 F.3d at 942–44 (citing *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997)). Because Florida robbery requires a perpetrator to overcome a victim's resistance, the Eleventh Circuit assumed that Florida robbery categorically requires the use of violent "physical force." *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*) (defining "physical force" under the ACCA as "violent force—that is, force capable of causing physical pain or injury to another person.").

According to *Fritts*, it was irrelevant that Fritts' own conviction pre-dated *Robinson* since *Robinson* simply clarified what the Florida robbery statute "always meant." 841 F.3d at 943. But while *Robinson* clarified that a mere sudden snatching with no victim resistance is simply theft, not robbery, *id.* at 942–44, it did not clarify how much force was necessary to overcome resistance for a Florida robbery conviction. Decades before *Robinson*, however, the Florida Supreme Court had held that the "degree of force" was "immaterial" so long as it was enough to overcome resistance. *Montsdoca v. State*, 93 So. 157, 159 (1922). And the Eleventh Circuit in *Fritts* cited *Montsdoca* as controlling. 841 F.3d at 943.

Although neither *Montsdoca* nor *Robinson* specifically addressed the degree of force needed to overcome resistance under the Florida robbery statute, the Florida intermediate appellate courts have provided clarity about the "least culpable conduct" under the statute in that regard. Several Florida appellate court decisions have confirmed post-*Robinson* that victim resistance in a robbery may well be minimal, and where it is, the degree of force necessary to overcome it is also minimal. Indeed, a review of Florida case law clarifies that a defendant may convicted of robbery even if he uses only a minimal amount of force. A conviction may be imposed if a

defendant: (1) peels back someone's fingers;[8] (2) struggles to escape someone's grasp;[9] (3) engages in a tug-of-war over a purse;[10] (4) pushes someone;[11] (5) shakes someone;[12] (6) bumps someone from behind;[13] or (7) pulls a scab off someone's finger.[14] Under Florida law, a robbery conviction may be upheld based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986);[15] *see also Mims v. State*, 342 So. 2d 116, 117 (Fla. 3d DCA 1977).

The Ninth Circuit recognized this in *United States v. Geozos*, where it held that a Florida conviction for robbery, whether armed or unarmed, fails to qualify as a "violent felony" under the elements clause because it "does not involve the use of violent force within the meaning of ACCA." 879 F.3d 890, 900-01 (9th Cir. 2017). In so holding, the Ninth Circuit found significant that under Florida case law, "any degree" of resistance was sufficient for conviction, and an

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[8] *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th DCA 2000).

[9] *See Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) (discussing *Colby v. State*, 46 Fla. 112, 114 (Fla. 1903) and stating, "[a]lthough 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 to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting W. LaFave, A. Scott, Jr., *Criminal Law* § 8.11(d), at 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000).

[10] *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011).

[11] *Rumph v. State*, 544 So. 2d 1150, 1151 (Fla. 5th DCA 1989).

[12] *Montsdoca v. State*, 93 So. 157, 159–160 (Fla. 1922).

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

[14] *Johnson v. State*, 612 So. 2d 689, 690–91 (Fla. 1st DCA 1993).

[15] 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. *Santiago*, 497 So. 2d at 976.

individual could violate the statute simply by engaging "in a non-violent tug-of-war" over a purse. *Id.* at 900 (citing *Mims* and *Benitez-Saldana*).

In coming to a decision that it recognized was at "odds" with the Eleventh Circuit's holding in *Fritts*, the Ninth Circuit rightly pointed out that "in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, [the Eleventh Circuit] has overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." *Id.* at 901 (citing *Montsdoca*, 93 So. at 159 ("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.")).

As is clear from *Geozos*, the Ninth and Eleventh Circuits' decisions directly conflict about an important and recurring question of federal law: whether the minimal force needed to overcome minimal resistance under the Florida robbery statute categorically meets the level of "physical force" required by *Curtis Johnson* for "violent felon[ies]" within the ACCA elements clause. *See* 559 U.S. at 140 (holding that in the context of a "violent felony" definition, "physical force" means "violent force," which requires a "substantial degree of force.") And indeed, in *Stokeling*, certiorari was granted to resolve that very issue.

Mr. McGee therefore urges this Court to hold this case pending *Stokeling*. And if the Eleventh Circuit is reversed, Mr. McGee respectfully requests that this Court grant the petition to resolve the other issues presented herein.

III. The Tenth And Eleventh Circuits' Disagreement About Whether A Florida Conviction For Resisting with Violence Qualifies As A "Violent Felony" Under The ACCA's Elements Clause Shows That Reasonable Jurists Can Debate The Issue.

Section 843.01 provides: "Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . in the lawful execution of any legal duty, by offering or doing violence to the person

of such officer" commits a felony of the third degree. Much like the analysis above, the question here is whether § 843.01 categorically requires "violent force" or "strong physical force" as an element of conviction. It does not. The lead case is *I.N. Johnson v. State*, 50 So. 529 (Fla. 1909), where the defendant was charged with the offense of "knowingly and willfully resisting, obstructing or opposing the execution of legal process, by offering or doing violence" to an officer. *Id.* at 529.[16] The charging document alleged "a knowing and willful resistance . . . by gripping the hand of the officer and forcibly preventing him from opening the door of the room . . . thereby obstructing the officer in entering the room to make the arrest." *Id.* at 529-30. The Florida Supreme Court found that this allegation met the "violence" element of the statute:

> The allegation that the defendant gripped the hand of the officer, and forcibly prevented him from opening the door for the purpose of maMcGee the arrest under the capias, necessarily involves resistance, and an act of violence to the person of the officer while engaged in the execution of legal process. The force alleged is unlawful, and as such is synonymous with violence.

Id. at 530.

As authoritatively interpreted by the Florida Supreme Court, then, the "violence" element of § 843.01 is satisfied by the use of unlawful force. "Unlawful" force in Florida can be as minor as an unwanted touch, a simple battery proscribed by Fla. Stat. § 784.03. Such a touch, while sufficient to sustain a conviction under § 784.03 or § 843.01, does not contain the degree of force necessary – violent force or strong physical force – to be an ACCA predicate. *Johnson I*, 559 U.S. at 140.

The Florida Supreme Court's decision in *I.N. Johnson* has not been abrogated or overruled. It thus remains good law, and must be followed when determining the least culpable conduct that

[16] The charge was brought under Section 3500 of the General Statutes of 1906, a predecessor to today's § 843.01.

satisfies the elements of a § 843.01 offense. "Sentencing courts . . . are bound to follow any state court decisions that define or interpret the statute's substantive elements because state law is what the state supreme court says it is." *United States v. Howard*, 742 F.3d 1334, 1346 (11th Cir. 2014). "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Marian Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

More recent cases from Florida's district courts of appeal show that, like the gripping of the officer's hand in *I.N. Johnson*, the force involved in "offering or doing violence" under § 843.01 does not meet the degree of force necessary to be considered a "violent felony" under the ACCA. Notably, a "prima facie case" for resisting an officer with violence was established by allegations that the defendant was holding onto a doorknob and "wiggling and struggling" to free himself. *State v. Green*, 400 So. 2d 1322, 1323–24 (Fla. 5th DCA 1981). A conviction for resisting with violence was sustained where the evidence showed the defendant "struggled, kicked, and flailed his arms and legs," even though he never actually struck an officer. *Wright v. State*, 681 So. 2d 852, 853–54 (Fla. 5th DCA 1996). In another case, a driver terminated a consensual encounter with police by speeding off, hitting the officer's hand with the truck's rearview mirror in the process. *Yarusso v. State*, 942 So. 2d 939, 941 (Fla. 2d DCA 2006). It was "undisputed that an act of violence occurred" when the truck's mirror hit the officer's hand. *Id.* at 942. In still another case, the evidence supporting the § 843.01 conviction was that the defendant "scuffled" with police *after* being handcuffed. *Miller v. State*, 636 So. 2d 144, 151 (Fla. 1st DCA 1994); *see also Kaiser v. State*, 328 So. 2d 570, 571 (Fla. 3d DCA 1976) (upholding a conviction for resisting with violence based on "a scuffle" with the officer).

A "scuffle" with an officer does not require the degree of force needed to be an ACCA

predicate any more than does gripping the officer's hand. For example, in *United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013), the Ninth Circuit considered whether an Arizona statute that criminalizes "resisting arrest" and requires use or threatened use of physical force against an officer constituted a crime of violence under USSG § 2L1.2. *Id.* at 1087.[17] The *Flores-Cordero* court noted a decision of the Arizona court of appeals that held a defendant's "struggle to keep from being handcuffed" and "kick[ing] the officers trying to control her" constituted conduct within the scope of the resisting arrest statute "because some physical force was used." 723 F.3d at 1087-88 (citing *State v. Lee*, 176 P.3d 712 (Ariz. Ct. App. 2008)). Thus, the Ninth Circuit determined, "[u]nder prevailing Arizona law, the use of minimal force is sufficient to constitute 'resisting arrest.'" *Id.* Because the state appellate court did not require that defendant's conduct – "instigating a scuffle with officers" – necessarily involve force capable of inflicting pain or causing injury as contemplated by *Johnson I*, the Arizona conviction for resisting arrest was not categorically a crime of violence within the meaning of federal law. *Id.* at 1088.

Mr. McGee recognizes that the Eleventh Circuit has held that resisting an officer with violence under § 843.01 is an ACCA "violent felony," but he respectfully maintains that the court erred in so deciding. *United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012); *United States v. Hill*, 799 F.3d 1318, 1322–23 (11th Cir. 2015). In neither case did the Eleventh Circuit mention the Florida Supreme Court's 1909 decision in *I.N. Johnson*, which is controlling as to the elements of the state crime. Also, in *Romo-Villalobos*, the Eleventh Circuit discounted

[17] USSG § 2L1.2's definition of a "crime of violence" contains an elements clause that is identical to that found in the ACCA. *Compare* USSG § 2L1.2, comment. (n.2) *with* § 924(e)(2)(B)(1). Cases construing the guidelines' elements clause are thus relevant to cases addressing the ACCA's elements clause. *United States v. Green*, 873 F.3d 846, 869 (11th Cir. 2017).

Green's "wiggling and struggling" language, 400 So. 2d at 1323–24, based on the procedural posture of that case. However, by doing that, the Eleventh Circuit failed to consider "the least of the acts criminalized" when conducting its analysis. *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). Discussing *Green*, another circuit court has explained:

> Even construing the facts in favor of the State, there are only so many reasonable inferences "wiggling and struggling" can be read to support. A reasonable jury could not, for example, construe "wiggling and struggling" to mean that there was a brawl. For this reason, we disagree with the Eleventh Circuit's decision to discount *Green* in holding that a conviction under § 843.01 is an ACCA predicate. *United States v. Romo-Villalobos*, 674 F.3d 1246, 1249 (11th Cir. 2012). The Eleventh Circuit gave short shrift to *Green* for the same reason as the United States does here, i.e., the procedural posture. The court emphasized instead other Florida cases where defendants had engaged in more substantial, and more violent, conduct. *See Romo-Villalobos*, 674 F.3d at 1249 (citing cases). But, our job is not to find what kind of conduct is most routinely prosecuted, and evaluate that. Under the categorical approach, we consider only the "minimum conduct criminalized," not the typical conduct punished. *See Moncrieffe*, [569 U.S. at 191].

United States v. Lee, 701 F. App'x 697, 700 & n.1 (10th Cir. 2017).[18] The Tenth Circuit, which did discuss and consider the Florida Supreme Court's decision in *I.N. Johnson*, *id.* at 699, unambiguously found that a conviction under § 843.01 is not an ACCA predicate. *Id.* at 701 ("Having compared the minimum culpable conduct criminalized by § 843.01 to similar forcible conduct deemed not to involve *violent* force, we conclude that a conviction under § 843.01 does

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[18] In *Hill*, the Eleventh Circuit found that § 843.01 qualified as a violent felony because "Florida's intermediary courts have held that violence is a necessary element of the offense." 799 F.3d at 1322 (citing *Rawlings v. State*, 976 So.2d 1179, 1181 (Fla. 5th DCA 2008); and *Walker v. State*, 965 So.2d 1281, 1284 (Fla. 2d DCA 2007) (both cases are also cited in *Romo-Villalobos*, 674 F.3d at 1249). Neither *Rawlings* nor *Walker*, though, discussed the "minimum conduct criminalized by the state statute," *Moncrieffe*, 569 U.S. at 191, that is, the minimum amount of force needed to qualify as "violence" under § 843.01. Those courts' observations that "violence" is an element of a § 843.01 offense thus do not address the quantum of force needed to constitute "violence" in the § 843.01 context. The answer to what constitutes the minimum amount of force needed is found in the Florida Supreme Court's decision in *I.N. Johnson* – the "violence" element of § 843.01 is satisfied by the mere use of unlawful force.

not qualify as an ACCA predicate)"; *id.* ("[W]e hold that a conviction under § 843.01 does not qualify as an ACCA predicate"). The analysis in *Lee*, which considers all the pertinent Florida and United States Supreme Court case law, is compelling, and Mr. McGee respectfully maintains that, at a minimum, reasonable jurists can debate whether a Florida conviction for resisting with violence qualifies as a "violent felony" under the ACCA's elements clause.

CONCLUSION

For the above reasons, Mr. McGee's petition should be granted.

Respectfully submitted,

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Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10531-J

BOBBY REE MCGEE, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Bobby Ree McGee, Jr. moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate sentence. 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 district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted). Because McGee has failed to make the requisite showing, his motion for a COA is DENIED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BOBBY REE MCGEE, JR.,

Petitioner,

v.

CASE NO. 6:16-cv-1353-Orl-31DCI
(6:08-cr-264-Orl-31DCI)

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

This cause is before the Court on a motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 filed by Bobby Ree McGee, Jr. (Doc. 6) and supporting memorandum of law (Doc. 14). The Government filed a response to the § 2255 motion in compliance with this Court's instructions and with the *Rules Governing Section 2255 Proceedings for the United States District Courts*. (Doc. 17). Petitioner filed a reply to the response (Doc. 20).

Petitioner alleges one claim for relief in his § 2255 motion, that he no longer qualifies as an Armed Career Criminal pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding the residual clause of the Armed Career Criminal Act's definition of "violent felony" is unconstitutionally vague).[1] For the following reasons, the Court

[1] The Supreme Court held in in *Welch v. United States*, 136 S. Ct. 1257 (2016), that *Johnson* is retroactive to cases on collateral review.

concludes that Petitioner is not entitled to relief.

I. PROCEDURAL HISTORY

Petitioner was charged by indictment with 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) (Criminal Case 6:08-cr-264-Orl-31DCI, Doc. 1).[2] Petitioner entered a guilty plea to the count as charged (Criminal Case Doc. 26). The Magistrate Judge entered a report and recommendation, recommending the Court accept the guilty plea (Criminal Case Doc. 31). The Court accepted the plea and adjudicated Petitioner guilty (Criminal Case Doc. 34). Petitioner was sentenced pursuant to the Armed Career Criminal Act ("ACCA") to a 180-month term of imprisonment to be followed by three years of supervised release (Criminal Case Doc. 38). Petitioner did not appeal.

Petitioner filed a § 2255 motion in case number 6:11-cv-331-Orl-31DAB, arguing his ACCA sentence was unconstitutional pursuant to *Johnson v. United States*, 559 U.S. (2010) (holding that the Florida felony offense of battery does not have an element of the use of physical force against another person and therefore does not qualify as a violent felony under § 924(e)(1)) (Criminal Case Doc. 41). The Court denied the motion (Criminal Case Doc. 46). On June 20, 2016, the Eleventh Circuit Court of Appeals granted Petitioner leave to file a second or successive § 2255 motion in light of *Johnson*, 135 S. Ct. 2551

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[2] Hereinafter Criminal Case No. 6:08-cr-264-Orl-31DCI will be referred to as "Criminal Case."

(Criminal Case Doc. 52).

II. LEGAL STANDARD

Section 2255 provides federal prisoners with an avenue for relief under limited circumstances:

> 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 attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence

28 U.S.C. § 2255. If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* To obtain this relief on collateral review, however, a petitioner must clear a significantly higher hurdle than would exist on direct appeal. *See United States v. Frady*, 456 U.S. 152, 166 (1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment).

III. ANALYSIS

Petitioner alleges that he is entitled to resentencing pursuant to *Johnson*, 135 S. Ct. 2551 (2015), because he no longer has the requisite prior convictions to qualify under the ACCA (Doc. 14 at 2). Petitioner states that the presentence investigation report ("PSR") did not specify which prior convictions were used as qualifying predicate convictions. *Id.* at 1. Petitioner admits that he has two prior convictions for delivery of cocaine which

qualify as serious drug offenses for the purposes of the ACCA. *Id.* at 2-3. However, Petitioner contends that he does not have a third qualifying conviction because his prior convictions for attempted robbery, resisting an arrest with violence, and battery on a law enforcement officer do not qualify as violent felonies. *Id.* at 3.

Section 924(e) requires the Court to impose a 15-year minimum mandatory sentence for any convicted felon who possesses a firearm or ammunition after have been convicted of three violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1). The term violent felony is defined as any crime punishable by imprisonment for a term exceeding one year and has (1) an element of the use, attempted use, or threatened use of physical force against another person, or (2) is burglary, arson, extortion, involves the 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 Government contends that attempted robbery and resisting an officer with violence qualify as violent felonies under § 924(e)(2)(B). In *United States v. Shotwell*, No. 16-15935, 2017 WL 4022794, at *3 (11th Cir. Sept. 13, 2017), the Eleventh Circuit concluded that a Florida conviction for robbery qualifies as a violent felony because "Florida's robbery statute has always required violence . . . and therefore, has as an element, the use, attempted, use, or threatened use of physical force against the person of another . . . ." In making this finding, the court relied on prior precedent, including *United States v. Lockley*, 632 F.3d 1238, 140 (11th Cir. 2011), in which the Eleventh Circuit held that attempted robbery qualifies as a crime of violence. *See also United States v. Fritts*, 841 F.3d 937 (11th

Cir. 2016) (holding that a Florida conviction for armed robbery qualifies as a violent felony under the ACCA and approving of *Lockley*).

Petitioner contends that these cases are no longer good law in light of *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (defining the phrase illicit trafficking in the federal Controlled Substances Act to determine whether a prior conviction qualifies as an "aggravated felony" under the INA), and *Descamps v. United States*, 133 S. Ct. 2276 (2013) (addressing whether a California burglary conviction qualifies as a violent felony under the elements or enumerated offenses clause of the ACCA). However, the Eleventh Circuit held in *United States v. Razz*, 679 F. App'x 950, 955 (11th Cir. 2017), that *Lockley* and its progeny have not been abrogated by *Moncrieffe* or *Descamps*. Therefore, Petitioner's argument is unavailing, and the Court concludes that his prior conviction for attempted robbery qualifies as a violent felony under the ACCA.

The Eleventh Circuit has also recently reaffirmed that resisting an officer with violence qualifies as a violent felony under the elements clause of the ACCA. *See United States v. Cargill*, No. 17-10237, 2017 WL 3863939, at *2 (11th Cir. Sept. 5, 2017) (citing *United States v. Hill*, 799 F.3d 1318, 1322-23 (11th Cir. 2015) and *United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012)). Therefore, because Petitioner also has two qualifying serious drug offenses, he fails to meet his burden of demonstrating that he no longer qualifies for an ACCA sentence. *See Beeman v. United States*, 871 F.3d 1215, 1223-25 (11th Cir. 2017) (noting the in a § 2255 proceeding, the movant has the burden of proof and

persuasion to show that he is entitled to relief).[3]

The Government also argues that Petitioner is not entitled to relief because he cannot show that he was sentenced using the residual clause (Doc. 17 at 17). The parties note that the PSR in this case does not address the basis for Petitioner's ACCA sentence. In other words, during the sentencing proceeding, the Court did not delineate which prior convictions it was using for ACCA purposes, nor is it apparent if the Court relied on the residual clause (Criminal Case Doc. 44). Furthermore, Petitioner did not object to his ACCA sentence or challenge any of his prior convictions. *Id.* Petitioner fails to demonstrate it is more likely than not that he was sentenced under the residual clause or that "but for the residual clause he would have received a different sentence." *Beeman*, 871 F.3d at 1225. Accordingly, he is not entitled to relief on this claim.

Any of Petitioner's allegations not specifically addressed herein are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner fails to make such a showing. Thus, the Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

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[3] Because the Court has concluded that Petitioner has three qualifying prior convictions under the ACCA, it need not address whether battery on a law enforcement officer qualifies as a violent felony.

1. Petitioner's motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. 6) is **DENIED**.

2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

3. The Clerk of Court is directed to file a copy of this Order in criminal case number 6:08-cr-264-Orl-31DCI and to terminate the motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Criminal Case Doc. 53) pending in that case.

4. Petitioner is **DENIED** a certificate of appealability.

DONE AND ORDERED in Orlando, Florida, this 13th day of December, 2017.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record