No. ____

IN THE

Supreme Court of the United States

CEDRICK PONDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14290
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-22455-DLG,
1:05-20664-DLG-1

CEDRICK PONDER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(August 7, 2019)

Before MARCUS, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Cedrick Ponder appeals the district court's denial of his authorized second or successive 28 U.S.C. § 2255 motion to vacate his sentence for being a felon in

possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Mr. Ponder argues that the sentence—which was enhanced to a mandatory minimum 15 years pursuant to the Armed Career Criminal Act (ACCA), *see* 18 U.S.C. § 924(g)(1)—is unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015). After the district court denied his motion, but before briefing in this appeal commenced, we issued *Beeman v. United States*, 871 F.3d 1218 (11th Cir. 2017), which established a § 2255 movant's burden when seeking relief under *Johnson*.

Assuming that Mr. Ponder could satisfy the requirements of *Beeman*, we affirm the denial of § 2255 relief. We have held that both Florida aggravated assault and Florida robbery—Mr. Ponder's two unchallenged convictions—satisfy the ACCA's elements clause. *See Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1337–39 (11th Cir. 2013): *United States v. Lockley*, 632 F.3d 1238, 1246 (11th Cir. 2011). *See also Stokeling v. United States*, 139 S. Ct. 544, 555 (2019) (holding that Florida robbery satisfies the ACCA's elements clause). As Mr. Ponder concedes, these cases constitute binding precedent for this panel. Accordingly, we affirm.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CLOSED CIVIL CASE

Case No. 16-22455-CIV-GRAHAM/SIMONTON
Case No. 05-20664-CR-GRAHAM

CEDRIC PONDER,

Movant
vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court originally on Movant's Motion to Vacate Sentence Pursuant to Title 28 U.S.C. § 2255, attacking his sentence entered in Case No. 05-20664-CR-DLG. [D.E. 1]. This matter is now before the Court on the Magistrate Judge's Report and Recommendation on Movant's Motion to Vacate Pursuant to 28 U.S.C. § 2255 [D.E. 12], as well as Movant's objection to the Magistrate Judge's Report and Recommendation. [D.E. 13].

THE COURT has conducted a de novo review of the record and is otherwise fully advised in the premises. For the following reasons, Movant's Motion to Vacate Sentence Pursuant to Title 28 U.S.C. § 2255 is **DENIED**.

I. BACKGROUND

This matter was initiated when Movant Cedric Ponder,

through counsel, filed a motion attacking his sentence for being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). [D.E 1]. In his motion, Movant challenges the constitutionality of his enhanced sentence as an armed career criminal. The Armed Career Criminal Act ("ACCA") requires a mandatory minimum sentence of 15 years in prison for any defendant who violates 18 U.S.C. § 922(g) and has three prior convictions for a "violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). Movant argues that his prior convictions of aggravated assault, robbery, and carjacking no longer qualify as predicate offenses under the ACCA in light of the Supreme Court's ruling in Johnson v. United States, 576 U.S. 135 (2010). The Johnson court held that the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) was unconstitutionally vague.

This matter was referred to United States Magistrate Judge Andrea M. Simonton. [D.E. 11]. Magistrate Judge Simonton issued a Report and Recommendation advising this Court to deny Movant's Motion to Vacate Pursuant to 28 U.S.C. § 2255. [D.E. 12 at 1]. Specifically, the Magistrate Judge concluded that Movant's prior convictions of aggravated assault, robbery, and carjacking met the 18 U.S.C. § 924(c)(3)(A) "use of force" clause definition of a "crime of violence." Consequently, there is no Johnson-related defect in Movant's conviction and sentence and no basis for relief.

II. DISCUSSION

Movant's Motion to Vacate Pursuant to 28 U.S.C. § 2255 is denied because Movant's prior convictions for aggravated assault, robbery, and carjacking are violent felonies. Thus, he qualifies as an armed career criminal under the ACCA.

A. Movant's Objections

Movant timely filed objections to the Magistrate Judge's Report and Recommendation. Therein, he argues that his three prior Florida convictions for aggravated assault, robbery, and carjacking were improperly considered as qualifying "violent felonies" under the ACCA. Additionally, Movant requests that a certificate of appealability be issued should this Court adopt the Report and Recommendation. [D.E. 13 at 1]. The Court addresses each issue in turn.

i. Florida aggravated assault

Movant argues that the Report and Recommendation errs by relying on Turner v. Warden Coleman FCI, 709 F.3d 1328 (11th Cir. 2013), as binding precedent. [D.E. 12 at 17]. Turner held that an aggravated assault conviction under Fla. Stat. § 784.021 qualified as a violent felony within the ACCA's elements clause because, "by its definitional terms, the offense necessarily includes an assault, which is 'an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so.'" Id. at 1338.

Although Movant "acknowledges [Turner's] precedent," Movant contends that Turner is "irreconcilable with the binding precedent that preceded it" and thus is not controlling under the prior panel precedent rule. [D.E. 13 at 2-4]. Specifically, Movant argues that Turner is "irreconcilable with both United States v. Rosales-Bruno, 676 F.3d 1017 (11th Cir. 2012), requiring the court to consider state substantive law, and United States v. Palomino Garcia, 606 F.3d 1317 (11th Cir. 2010), holding that a mens rea of recklessness does not satisfy the elements clause." [D.E. 13 at 15].

Nevertheless, following the prior panel precedent rule, the Court is bound by Turner, which affirmed the district court and held that "a conviction under section § 784.021 will always include 'as an element the ... threatened use of physical force against the person of another,'" and thus qualifies as a violent felony under the ACCA. Turner, 709 F.3d at 1338. Additionally, the Eleventh Circuit recently affirmed Turner's precedential force in United States v. Golden, 854 F.3d 1256, 1256-57 (11th Cir. 2017)[1]. The Golden court held "Turner is binding. . . [and] even if Turner is flawed, that does not give us, as a later panel, the authority to disregard it." Id. at 1257. On this point, the Court is bound by Turner until it is overruled or

[1] Petition for a Writ of Certiorari pending before the Supreme Court. (NO. 17-5050).

undermined to the point of abrogation by a decision of the Supreme Court or by the Eleventh Circuit, sitting *en banc*. United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008).

As a result, Movant's aggravated assault conviction constitutes a "violent felony" under the ACCA and provided proper predicate for the Court to sentence him to a mandatory minimum term.

ii. Florida robbery

Although acknowledging the Eleventh Circuit's holding in United States v. Seabrooks, 839 F. 3d 1326 (11th Cir. 2016) and United States v. Fritts, 841 F. 3d 937 (11th Cir. 2016), finding that Florida robbery convictions under Fla. Stat. § 812.13 categorically qualify as violent felonies under the ACCA, Movant contends the holdings were wrongfully decided. Specifically, Movant objects because he believes that the Eleventh Circuit's precedent is not in line with the Supreme Court's holding in Curtis Johnson - that "physical force" requires "a substantial degree of force." 559 U.S. 133, 140 (2010).

Notwithstanding Movant's objection, the Eleventh Circuit held that Fla. Stat. § 812.13(1) requires either the use of force or violence, the 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." United States v.

Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011). The Lockley court found 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." Id. Additionally, the Eleventh Circuit recently held that a conviction under Fla. Stat. § 812.13 qualifies as a violent felony pursuant to the ACCA. See United States v. Conde, No. 16-11876, 2017 WL 1485021, at *2 (11th Cir. Apr. 26, 2017). The Conde court affirmed the district court and held that a conviction under the Florida robbery statute "has always required violence beyond mere snatching, and, therefore, has an element the use, attempted use, or threatened use of physical force against the person of another and thus qualifies as a violent felony under the element clause of the ACCA." Id.

The Eleventh Circuit has therefore clarified that a conviction under the Florida statute for robbery satisfies the elements clause of the ACCA and qualifies as a violent felony. Accordingly, Movant's 1998 and 1999 Florida robbery convictions provided a proper predicate for sentencing under the ACCA.

iii. Florida carjacking

As for Movant's convictions for carjacking, in United States v. Marious, No. 16-12154, 2017 WL 473841, at *963 (11th Cir. Feb. 6, 2017), the court affirmed the district court and held that the court did not err in counting a defendant's prior

convictions for carjacking as predicate offenses for sentencing under the ACCA. The Marious court found that because the elements of the Florida carjacking statute mirrored those elements of the Florida robbery statute, which qualifies as a violent felony, carjacking also satisfies the elements clause. Id.

As such, Movant's 1998 and 1999 convictions for carjacking qualify as violent felonies under the elements clause of the ACCA and provided a proper predicate for the court to sentence him to a mandatory minimum term pursuant to the ACCA[2].

For the reasons stated above, the Court DENIES Movant's Motion To Vacate Pursuant to Title 28 U.S.C. § 2255 attacking his sentence entered in case No. 05-20664-CR-DLG.

B. Movant's Request for a Certificate of Appealability

Finally, Movant requests that the Court issue a certificate of appealability ("COA"). [D.E. 13 at 1]. To obtain a COA under 28 U.S.C. § 2253(c), Movant must make a substantial showing of the denial of a constitutional right. Under Barefoot v. Estelle, 463 U.S. 880, 893 (1983), a demonstration of a denial of a constitutional right includes showing that "reasonable jurists

[2] Movant's 1998 conviction qualifies as a violent felony under the ACCA's enumerated clause because the conviction includes robbery. Thus, the undersigned need not reach the issue of whether Florida kidnapping and burglary convictions qualify as violent felonies, because that determination does not alter the finding.

could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Here, the specific issue to be considered is whether Turner correctly held that aggravated assault under Florida law constitutes a violent felony. For the offense to satisfy the definition of "violent felony" under the elements clause, "the least of the acts criminalized" must have as an element the actual, attempted, or threatened use of physical force against another person. United States v. Golden, 854 F.3d 1256, 1258 (11th Cir. 2017) (Pryor, J., concurring). Specific disputes arose from Judge Pryor in her concurrence. Judge Pryor stated that Turner was right to apply a categorical approach; however, Turner reached the wrong conclusion because it "failed to consider the least culpable of the acts Florida criminalizes in its aggravated assault statute." Id. at 1258. She contends that "had Turner looked to the elements of aggravated assault under Florida law . . . it would have been clear that the offense cannot qualify as a violent felony under the elements clause because a conviction can be obtained where the defendant merely was reckless." Id. at 1260. Furthermore, following Eleventh Circuit binding precedent, "a conviction predicated on a mens rea of recklessness does not satisfy the 'use of physical force'

requirement" of the elements clause. Id. at 1258. (quoting United States v. Palomino Garcia, 606 F.3d 1317, 1336 (11th Cir. 2010)).

As such, the Court finds a "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further,"" Slack v. McDaniel, 529 U.S. 473, 484 (2000), and thus **GRANTS** a certificate of appealability pursuant to 28 U.S.C. § 2255 (c)(3).

III. CONCLUSION

In conclusion, Movant's three prior convictions for aggravated assault, robbery, and carjacking are violent felonies under the ACCA. Additionally, the Court issues a certificate of appealability. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Report and Recommendation [D.E. 12] is hereby **AFFIRMED, ADOPTED and RATIFIED** in its entirety. It is further

ORDERED AND ADJUDGED that Movant's Motion to Vacate Pursuant to 28 U.S.C. § 2255 [D.E. 1] is **DENIED**. It is further

ORDERED AND ADJUDGED that a certificate of appealability shall issue in this case. The specific issue to be considered is whether Turner correctly held that aggravated assault under Florida law constitutes a violent felony. It is further

ORDERED AND ADJUDGED that the Clerk of Court shall **CLOSE** this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of July, 2017.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Simonton
All Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22455-CIV-GRAHAM/SIMONTON
(Crim. Case No. 05-20664-CR-GRAHAM)

CEDRIC PONDER,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

OBJECTIONS TO REPORT AND RECOMMENDATION

Cedric Ponder, through undersigned counsel, respectfully files these objections to the Report and Recommendation issued by Magistrate Judge Simonton (Civ. DE 12, hereinafter "R&R"), recommending that this Court deny Mr. Ponder's 28 U.S.C. § 2255 motion. (DE 1). Although the R&R does not make a recommendation regarding the issuance of a certificate of appealability (hereinafter "COA"), Mr. Ponder requests that a COA issue if this Court ADOPTS the R&R. Additionally, because Mr. Ponder has served in excess of the statutory maximum and is currently serving an illegal sentence, he respectfully requests that the Court expedite this matter or grant him an immediate, unsecured bond.

Mr. Ponder will discuss each prior conviction the magistrate judge found to be a "violent felony" in turn.

Florida Aggravated Assault (1997 conviction)

In finding that aggravated assault under Florida law is a violent felony, the magistrate court cites to *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013). In that case, the Eleventh Circuit Court of Appeals held that an aggravated assault conviction under §784.021 qualified as a violent felony within the ACCA's elements clause since "by its definitional terms, the offense necessarily includes an assault which is 'an intentional, unlawful threat by word or act *to do violence* to the person of another, coupled with an apparent ability to do so." *Id.* at 1338 (emphasis in original). Therefore, the *Turner* Court reasoned, "a conviction under section 784.021 will always include 'as an element the . . . threatened use of physical force against the person of another." *Id.* Mr. Ponder acknowledges that precedent[1] and preserves the issue for further review through the arguments below.

In reaching that conclusion, however, *Turner* looked **only** to the face of the Florida statute and its use of the word "intentional." However, before *Turner*, the Eleventh Circuit (and the Supreme Court) had made clear that, in order to determine whether an offense satisfied the elements clause, federal courts "are bound by Florida courts' determination and construction of the substantive

[1] The magistrate court also points to the recently-decided *United States v. Golden*, 854 F.3d 1256 (11th Cir. 2017), in support of finding Florida aggravated assault to be a violent felony. Indeed, the *Golden* panel acknowledges the possibility that *Turner's* reasoning was flawed, and Circuit Judge J. Pryor calls for the full court to take the opportunity to overrule *Turner*. *Id.* at 1257, 1260 (Pryor, J. concurring in judgment).

elements of that offense." *United States v. Rosales-Bruno*, 676 F.3d 1017, 1021 (11th Cir. 2012) (citing *Curtis Johnson v. United States*, 559 U.S. 133, 138 (2010)). Here, as previously explained, despite the statute's use of the word "intentional," the Florida courts have held that a person may be convicted of assault upon a *mens rea* of "culpable negligence" – which is akin to "recklessness." *See Kelly v. State*, 552 So.2d 206, 208 (Fla. 5th DCA 1989) ("Where, as here, there is no proof of an intentional assault on the victim, that proof may be supplied by proof of conduct equivalent to willful and reckless disregard for the safety of others"); *DuPree v. State*, 310 So.2d 396 (Fla. 2nd DCA 1975)(defendant's "conduct must be equivalent to culpable negligence"); *see generally United States v. Garcia-Perez*, 779 F.3d 278, 285 (5th Cir. 2015) (equating Florida's "culpable negligence" standard with "recklessness").

In addition, before the Court decided *Turner*, both the Supreme Court and the Eleventh Circuit had held that the offense must "have as an element" the active and intentional employment of force, which requires more than negligence or recklessness. *See Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004) (the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" the phrase "use . . . of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct"); *United States v. Palomino Garcia*, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally,

and could be committed recklessly, it did not "have as an element the use of physical force;" citing and following *Leocal*).

Turner is thus irreconcilable with the binding precedent that preceded it. As a result, not only was *Turner* wrongly decided, but it is not controlling. It is well-established that, under the Eleventh Circuit's prior panel precedent rule, in the event of a conflict between two published panel decisions, the Eleventh Circuit must follow the earlier decision. *See, e.g.*, *Walker v. Mortham*, 158 F.3d 1177, 1188 (11th Cir. 1998) ("when circuit authority is in conflict, a panel should look to the line of authority containing the earliest case, because a decision of a prior panel cannot be overturned by a later panel"). Here, *Turner* is irreconcilable with both *Rosales-Bruno*, requiring the court to consider state substantive law, and *Palomino-Garcia*, holding that a *mens rea* of recklessness does not satisfy the elements clause. And, because both of those circuit precedents pre-dated *Turner*, that decision is not controlling here under the prior panel precedent rule.

The magistrate court also cites to Mr. Ponder's application for leave to file his motion to vacate pursuant to 28 U.S.C. § 2255, *In re Ponder*, Case No. 16-12522, in support of finding Florida aggravated assault a violent felony. R&R, p.15. However, the Eleventh Circuit has made abundantly clear that its published orders adjudicating those applications have no precedential value outside of that context. *See, e.g., In re Jackson*, 826 F.3d 1343, 1351 (11th Cir. June 24, 2016) ("Nothing about our ruling here binds the District Court, which must decide the timeliness

issue fresh, or in the legal vernacular, de novo. And when we say every aspect, we mean every aspect.") (citation omitted); *In re Rogers,* 825 F.3d 1335, 1340 (11th Cir. June 17, 2016) ("nothing we pronounce in orders on applications to file successive § 2255 motions binds the district court"). Thus, the Eleventh Circuit's pronouncements in *In re Ponder* do not bind the district court, and this Court should find that Florida aggravated assault is no longer a "violent felony" for purposes of the ACCA.

Florida Robbery (1998 and 1999 convictions)

Mr. Ponder also objects to the R&R finding that his prior convictions for robbery are violent felonies. R&R, pp. 17-22. Mr. Ponder recognizes that the Eleventh Circuit's holding in *United States v. Seabrooks*, 839 F. 3d 1326, (11th Cir. 2016) and *United States v. Fritts*, 841 F. 3d 937 (11th Cir. 2016), as cited in the R&R, found that Florida robbery convictions under Fla. Stat. § 812.13 categorically qualify as violent felonies under the ACCA. However, Mr. Ponder also asserts that those cases were wrongly decided and objects to the R&R's finding to preserve this issue for further review. The Eleventh Circuit's holdings in both *Seabrooks* and *Fritts* that Florida robbery and armed robbery convictions categorically qualify as "violent felonies" based upon prior circuit precedent, has resulted in direct conflicts with the decisions of other circuit courts of appeals. Petitions for certiorari to the United States Supreme Court have been filed in and are pending in both of those cases.

Specifically, Mr. Ponder objects to the reasoning in those decisions because Florida, like most states, permits a conviction for robbery based on the use of force so long as the degree of force used is sufficient to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). The Fourth and Eleventh Circuits, however, have notably reached different conclusions regarding whether a state robbery statute incorporating such a standard categorically satisfies the "physical force" prong of the elements clause, which the Court clarified in *Curtis Johnson* necessitates "*violent* force, that is, force capable of causing pain or injury to the person of another." 559 U.S. at 140.

In *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), the Fourth Circuit held that the offense of common law robbery by "violence" in North Carolina does not qualify as a "violent felony" under the elements clause because it does not categorically require the use of "physical force." 823 F.3d at 803-804. Notably, the Fourth Circuit determined from a thorough review of North Carolina appellate law in *Gardner* that North Carolina common law robbery by means of "violence" may be committed by any force "sufficient to compel a victim to part with his property." *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). "'The degree of force used is immaterial.'" *Id.* (also quoting *Sawyer*). And indeed, the Fourth Circuit concluded, *Sawyer*'s definition "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.* (emphasis in original).

The Fourth Circuit discussed two North Carolina state cases that supported that conclusion. *Id.* (discussing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008), and *State v. Eldridge*, 677 S.E.2d 14 (N.C. Ct. App. 2009)). In *Chance*, an appellate court upheld a robbery conviction where the defendant simply pushed the victim's hand off a carton of cigarettes; that was sufficient "actual force." And in *Eldridge*, the court upheld a robbery conviction where a defendant merely pushed the shoulder of an store clerk, causing her to fall onto shelves while the defendant took possession of a TV. Based on those decisions, the Fourth Circuit concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require "physical force," and therefore the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*

Like the North Carolina offense addressed in *Gardner*, a Florida robbery may be committed by the minimal force sufficient to overcome a victim's resistance. But it has also always been the law in Florida (as in North Carolina) that the degree of force is "immaterial." *Montsdoca v. State*, 93 So.157, 159 (Fla. 1922). As the Fourth Circuit recognized, a standard requiring that force overcome resistance, but reaffirming that the degree of force used is "immaterial," suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery.

And indeed, Florida's case law confirms this point. *See Johnson v. State*, 612 So. 2d 689, 690 (Fla. 1st DCA 1993) (finding force sufficient to tear a scab off

victim's finger was enough to sustain conviction for robbery); *Sanders v. State*, 769 So. 2d 506, 507-508 (Fla. 5th DCA 2000) (affirming a strongarm robbery conviction where the defendant merely peeled back the victim's fingers before snatching money from his hand; explaining that the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by Sanders;" confirming that no more resistance, or "force" than that was necessary for a strongarm robbery conviction under § 812.13(1)); *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001) (upholding conviction for robbery by force based upon testimony of the victim "that her assailant 'bumped' her from behind with his shoulder and probably would have caused her to fall to the ground but for the fact that she was in between rows of cars when the robbery occurred," and did not fall); *Benitez -Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011) (rejecting defendant's argument that actual "violence" was necessary for a strongarm robbery conviction in Florida, and that his act of "engaging in a tug-of-war over the victim's purse" could not constitute robbery because it "was not done with violence or the threat of violence;" holding that it was sufficient that there was "the use of force to overcome the victim's resistance").

Had the Fourth Circuit heard Seabrooks' case, it likely would have found after surveying Florida caselaw that, like the robbery in *Gardner*, Florida robbery may be committed by using only a *de minimis* degree force, and therefore does not categorically require the use of "physical force." The act of peeling back the victim's

fingers in *Sanders* is functionally equivalent to the act of pushing away the victim's hand in *Chance*. Both acts allowed the defendants to overcome the victim's resistance and remove the cigarettes (in *Chance*) and the cash (in *Sanders*) from the victim's grasp. But neither act rises to the level of "*violent* force' required by *Curtis Johnson*. And plainly, the "bump" in *Hayes* is indistinguishable from the "push" in *Eldridge*. If anything, the "push" in *Eldridge* was more forceful in that it caused the victim to fall onto shelves, while the victim in *Hayes* did not even fall.

Mr. Ponder objects because he believes that the Eleventh Circuit's precedent is not in line with the Supreme Court's holding in *Curtis Johnson* – that "physical force" requires "a substantial degree of force." 559 U.S. at 140.

Florida Carjacking (1998 and 1999 convictions)

Under Florida Statute 812.133, carjacking is simply a robbery that deprives a person of their automobile—and that robbery can occur by"[f]orce, violence, assault, or putting in fear was used in the course of the taking." Fla. Stat. § 812.133(1). *See also Cruller v. State*, 808 So.2d 201, 204 (Fla. 2002). Referring to the preceding arguments that carjacking can be committed without the requisite "violent physical force" contemplated in *Curtis Johnson*, Mr. Ponder's carjacking priors cannot serve as ACCA predicates. *See Williams v. State*, 863 So.2d 1257, 1257 (Fla. 4th DCA 2004) (affirming carjacking conviction where defendant stood next to victim's door, did not verbally threaten her, said "don't get nervous," and victim jumped out of the car and ran away).

A Certificate of Appealability Should Issue

Mr. Ponder also objects that the R&R is silent on whether a certificate of appealability be issued. A certificate of appealability (COA) is required to appeal the denial of a 28 U.S.C. § 2255 petition for writ of habeas corpus. To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further."'" *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4, 103 S. Ct. 3383, n.4 (1983)). *See also Henry v. Dep't of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999).

A petitioner need not establish that he will win on the merits in order make the "substantial showing" required to obtain a COA; he need only demonstrate that the questions he raises are debatable among reasonable jurists. The Supreme Court has emphasized that a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 1039 (2003). Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered. *See Barefoot*, 463 U.S. at 893; *Miniel v.*

Cockrell, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

As noted herein, reasonable jurists currently are debating many of these issues. First, in *Hylor v. United States*, Civ. No. 16-21497-CV-UU (S. D. Fl. Feb. 28, 2017) (DE 25), District Judge Ungaro found that reasonable jurists could debate whether Florida aggravated assault qualifies as an ACCA violent felony, as there exists a District split on the issue, citing *United States v. Marcel Henderson*, Crim. No. 11-10200-RWZ (D. Mass. Feb. 7, 2017) (DE 249) (holding that Florida aggravated assault is not categorically a violent felony under the ACCA). Thus, a COA must issue as there exists a split opinion on whether Florida aggravated assault still qualifies as an ACCA predicate. Additionally, The seeming circuit-split on whether Florida robbery is categorically a violent felony is evidence that reasonable jurists are debating the matter—thus a COA should issue.

If this Court adopts the R&R in this case, Mr. Ponder requests that a certificate of appealability issue because the questions raised herein are debatable among reasonable jurists.

Respectfully Submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY certify that on **June 5, 2017**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/ Katie Carmon*

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22455-CIV-GRAHAM/SIMONTON
(05-20664-CR-GRAHAM)

CEDRIC PONDER,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION ON MOVANT'S MOTION TO VACATE PURSUANT TO 28 U.S.C. § 2255 (JOHNSON CASE)

Presently pending before this Court is Movant Cedric Ponder's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255, ECF No. [1]. This matter is referred to the undersigned Magistrate Judge by the Honorable Donald L. Graham, United States District Judge, ECF No. [11]. The Government has filed a Response to the Motion, ECF No. [8], and the Movant has filed a Reply, ECF No. [9]. The Movant has also filed a Notice of Supplemental Authority, ECF No. [10]. For the reasons discussed below, the undersigned recommends that the Motion to Vacate be DENIED.

I. BACKGROUND

The instant matter was initiated when the Movant, Cedric Ponder, ("Movant" or "Ponder") filed a Motion to Correct Sentence pursuant to 28 U.S.C. § 2225, contending that he was improperly sentenced under the Armed Career Criminal Act's ("ACCA") "residual clause" in 18 U.S.C. § 924(e)(2)(B)(ii), that was held to be unconstitutionally vague by the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015).[1]

[1] **As discussed in detail, *infra*, the Supreme Court in *Johnson* held that the ACCA's residual clause is unconstitutionally vague because the residual clause 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.**

In the underlying criminal matter, on December 5, 2005, Cedric Ponder was charged in Case No. 05-CR-20664-GRAHAM in a two-count Superseding Indictment with possession of a firearm by a convicted felon in violation of 18 U.S.C. §922(g)(1) and 924(e) (Count One); and, witness tampering, in violation of 18 U.S.C. §§1512(b)(1) and (2) (Count Two), along with a forfeiture claim, CR-ECF No. [24].[2] On February 9, 2007, Ponder entered a guilty plea to Count 1 of the indictment pursuant to a plea agreement.[3] In his plea agreement, Ponder acknowledged that the Court was required to impose a mandatory minimum 15-year prison sentence, CR-ECF No. [46] at ¶ 4.[4]

The presentence investigative report ("PSI") identified several prior Florida felony criminal convictions for Ponder, as follows:

a) 1997 conviction for aggravated assault with a deadly weapon, [PSI at ¶ 27];

b) 1998 conviction for kidnapping, robbery, and carjacking, [PSI at ¶ 28];

c) 1999 conviction for robbery, carjacking, kidnapping, and burglary with assault [PSI at ¶ 29]. Ponder did not raise any objections to the PSI. The sentencing hearing was held on April 2, 2007, wherein the Court adopted the PSI, without objection. On April 22,

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[2] References to the record in the underlying criminal case will be designated "CR-ECF," followed by the appropriate docket entry number.

[3] On January 9, 2006, Ponder entered a guilty plea to Count One of the Superseding Indictment, CR-ECF No. [31]. However, on March 23, 2006, prior to sentencing, Ponder's Counsel filed a Motion to Withdraw based upon Ponder's contention that his counsel had wrongfully advised him as to the sentence he was facing, CR-ECF No. [38]. That Motion was granted and new counsel was appointed to represent Ponder, CR-ECF No. [39]. After a competency evaluation was conducted, Ponder entered a plea of guilt pursuant to a plea agreement on February 9, 2007.

[4] 18 U.S.C. § 924 (e)(1) states: "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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)."

2007, the Court entered a judgment adjudicating Ponder guilty of being a felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1), and sentenced him to 180 months as an armed career criminal, CR-ECF Nos. [49] [50].

The Movant did not take a direct appeal, ECF No. [1] at 2. On April 14, 2008, the Movant filed his first Motion to Vacate Sentence under 28 U.S.C. § 2255, alleging ineffective assistance of counsel, ECF No. [1] at 2. (*See also* Case No. 08-21004-CIV-DLG, ECF No. [1]). That Motion was denied by the District Court and Ponder did not appeal that decision, ECF No. [1] at 2.

Before the instant Motion to Vacate was filed, the Movant filed an application with the Eleventh Circuit Court of Appeals on May 17, 2016, seeking an order authorizing the district court to consider a second or successive motion to vacate pursuant to 18 U.S.C. § 2255, based upon the Supreme Court's ruling in *Johnson*. (See No. 16-12522-J, 11th Cir. June 10, 2016). In denying that application and determining that Ponder was not entitled to relief, the Eleventh Circuit opined that Ponder's robbery convictions under Florida law qualified as a violent felonies notwithstanding the holding in *Johnson.* In addition, the Court concluded that pursuant to the holding in *United States v. Lockley*, 632 F. 3d 1238, 1255 (11th Cir. 2011), Ponder's Florida aggravated assault conviction also categorically qualified as a violent felony under the ACCA.

After the Eleventh Circuit rejected Ponder's first *Johnson*-based § 2255 challenge, Ponder filed a second application seeking Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence, ECF No. [6] at 10. The Eleventh Circuit granted

Ponder's second application.[5] Ponder's second Motion to Vacate his Sentence pursuant to § 2255 has now been fully briefed and is ripe for disposition.

For the reasons discussed below, the undersigned concludes that Ponder's second Motion to Vacate should be denied.

II. THE POSITIONS OF THE PARTIES

In his Motion, Ponder contends that he presents a cognizable challenge pursuant to 28 U.S.C. § 2255(a) because he was incorrectly sentenced under the ACCA to a term that exceeds the statutory maximum. Ponder asserts that he is no longer an armed career criminal because the prior convictions that the Court relied on to sentence him as an

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[5] In granting that application, the Eleventh Circuit concluded that its prior ruling in *United States v. Lockley*, 632 F. 3d 1238, 1244 (11th Cir. 2011), that the Court had relied on in rejecting Mr. Ponder's first *Johnson* challenge, did not apply to pre-2000 robbery convictions under Florida law, and thus did not apply to Ponder's 1998 and 1999 Florida robbery convictions, ECF No. [6] at 6.

The Court in *Lockley* had determined that Florida robbery convictions under Florida Statute § 812.13 qualified as crimes of violence under the elements clause of section §4B1.2 of the Federal Sentencing Guidelines. That holding was limited by *In Re Jackson*, 826 F.3d 1343 (11th Cir. 2016), when the Eleventh Circuit determined that the holding in *Lockley* did not apply to pre-2000 Florida robbery convictions. The Court in *Jackson* reasoned that because prior to 2000 a defendant could commit a robbery under a section of the Florida robbery statute that did not require force, e.g., sudden criminal snatching, *Lockley*, which considered a post-1999 Florida robbery statute, did not apply to a 1971 robbery conviction. *In re Jackson* was decided on June 24, 2016, between the time that Ponder filed his first and second applications seeking to file a successive 2255 motion.

The undersigned notes that subsequent to the Eleventh Circuit's ruling in *Jackson*, the Eleventh Circuit in *United States v. Seabrooks*, 839 F.3d 1326, 1342–43 (11th Cir. 2016), considered whether Florida robbery constituted a violent felony under the ACCA and concluded that *Lockley's* holding was not based on a time divide before and after the Florida robbery statute was amended in 1999. *United States v. Seabrooks*, 839 F.3d 1326, 1342–43 (11th Cir. 2016), petition for cert. filed (Feb. 16, 2017) (No. 16-8072). The Court in *Seabrooks* addressed the holding in *Jackson*, and observed that *Jackson's* suggested temporal limitation on *Lockley*, was dicta, and further concluded that there had not been a "new" Florida robbery statute enacted in 2000, but rather only an enactment of a sudden snatching statute codified at Fla. Stat. §812.131. Thus, it is likely that had Ponder's application been submitted to the Eleventh Circuit after the holding in *Seabrooks*, his successive request for relief would have been denied as Ponder would not be able to establish a prima facie case for the requested relief.

armed career criminal no longer qualify as predicate offenses in light of the Supreme Court's ruling in *Johnson*. Specifically, Ponder asserts that because *Johnson* made clear that the District Court was not allowed to rely on the unconstitutionally vague residual clause of the ACCA to determine whether he had three prior violent felonies, this court must now determine whether the convictions relied upon satisfy the definition of violent felony under the ACCA's enumerated clause or elements clause, in order for those convictions to be used to enhance his sentence. Ponder contends that pursuant to the Supreme Court's holdings in *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1682 (2013) and *Descamps v. United States*, 1133 S. Ct. 2276 (2013), this Court is required to apply the strict categorical analysis to his Florida state convictions in making that determination. Ponder explains that the categorical approach requires courts to look only to the statutory definitions, *i.e.,* the elements of a defendant's prior convictions and not the particular facts underlying those convictions. If the least of the acts criminalized in that statute do not qualify as a violent felony, then a conviction based on that statute cannot satisfy the violent felony definition under the ACCA. Ponder argues that when this approach is properly applied, to his convictions for aggravated assault, robbery/carjacking, kidnapping and/or burglary of a conveyance with assault, those offenses no longer qualify as violent felonies, and may not be relied upon by the district court in enhancing his sentence under the ACCA.

In response, the Government first contends that the Movant's claim is procedurally barred because Ponder failed to raise, in a direct appeal, challenges to his prior Florida convictions being designated by the District Court as predicate offenses under the ACCA,

ECF No. [8] at 2.[6] The Government contends that in order to overcome this hurdle, the Movant must show that he had cause for failing to assert his claim on direct appeal and that he was prejudiced by that failure; something that the Government contends Ponder is unable to do under the facts of this case. The Government further argues that Ponder is not able to demonstrate actual innocence as an alternative to the cause and prejudice requirement. The Government also contends that Ponder's claims fail on their merits because his two Florida state convictions for robbery and one conviction for aggravated assault qualify as violent felonies under the elements clause of the ACCA. Thus the Government asserts that Ponder has three prior violent felonies that were properly relied on at sentencing to enhance his sentence, and is not entitled to relief.

In his Reply, Ponder argues that his failure to raise a challenge to the vagueness of the ACCA's residual clause at sentencing is excused because the claim was not reasonably available prior to the Supreme Court's ruling in *Johnson*. Ponder additionally argues that he was prejudiced by the Court's improper reliance on the ACCA residual clause because Ponder is no longer an armed career criminal and received a sentence above the statutory maximum. As to the merits of his claim, Ponder argues that the Florida statute for robbery was amended in 1999, after Ponder's convictions, to distinguish between robbery by force and robbery by a "sudden snatching," which is a crime that does not qualify as a violent felony under the ACCA's elements clause. Ponder argues that when the appropriate categorical analysis is applied, his Florida robbery convictions fail to establish the requisite degree of force to qualify as violent felonies. Similarly, Ponder argues that because the Eleventh Circuit has failed to apply the proper

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[6] Movants are required to seek to have their sentences set aside/vacated within one year of the ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* was decided on June 26, 2016, and the pending Motion was filed on June 24, 2016, thus Ponder's Motion was timely. The Government does not challenge Ponder on this basis.

analysis set forth by the Supreme Court to determine whether a conviction for aggravated assault under Florida law qualifies as a violent felony, this court could not rely on his conviction for aggravated assault to enhance his sentence under the ACCA.

Ponder argues that he did not have three prior violent felonies at the time of his sentence and therefore was not an armed career criminal under the ACCA and his sentence should be vacated. As discussed in detail below, the undersigned concludes that Ponder's arguments lack merit.

III. LAW & ANALYSIS

A. *Violent Felonies Under the ACCA*

The ACCA provides for a mandatory minimum sentence of 15 years in prison for any defendant who violates 18 U.S.C. § 922(g) and has three prior convictions for a "violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). Under the ACCA, a violent felony is defined as any crime punishable by imprisonment for a term exceeding one year that: (1) has as an element the use, attempted use, or threatened use of physical force against the person of another (the "elements clause"); or (2) is burglary, arson, or extortion, or involves the use of explosives (the "enumerated clause"); or (3) otherwise involves conduct that presents a serious potential risk of physical injury to another (the "residual clause"). 18 U.S.C. § 924(e)(2)(B)(i) and (ii); *Mays v. United States*, 817 F.3d 728, 730-31 (11th Cir. 2016). In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court held that the imposition of an increased sentence under the "residual clause" of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii) violates due process because it is unconstitutionally vague. That holding, however, did not call into question the validity of the elements clause or the enumerated offense clause of the ACCA. *Id*. at 2563.

Thus, to be entitled to § 2255 relief under *Johnson*, a movant must demonstrate that his ACCA sentence was predicated on the now-voided residual clause. *Jasmin v.*

***United States*, No. 3:16-cv-761-J-32JBT, 32016 WL 6071663, *3 (M.D. Fla. Oct. 17, 2016) (citations omitted). A movant's sentence is not predicated on the residual clause if he has three or more prior convictions for a "violent felony," as defined by the still-valid elements clause or enumerated offense clause, or a "serious drug offense." *See In re Thomas,* 823 F.3d 1345, 1349 (11th Cir. 2016).**

B. *The Movant's Claim Is Not Procedurally Barred*

Before reaching the merits of the Movant's claims, the undersigned first disposes of the Government's contention that the Movant has defaulted on the claims raised in his current Motion to Vacate by failing to raise those claims on direct appeal.

At the outset, it is worth noting that the Supreme Court has made clear that *Johnson* claims may be raised in the first instance in a claim seeking collateral relief. In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court held that *Johnson* announced a new substantive rule of constitutional law that had retroactive effect in cases on collateral review. Consistent with the Supreme Court's holdings in *Johnson* and *Welch*, the Eleventh Circuit has held that federal prisoners who can make a prima facie showing that they previously were sentenced, at least in part, in reliance on the ACCA's now-voided residual clause are entitled to file a second or successive § 2255 motion in the district court. See *In re Robinson*, No. 16–11304, 822 F.3d 1196, 1197, 2016 WL 1583616 (11th Cir. Apr. 19, 2016) (holding that *In re Franks*, 815 F.3d 1281 (11th Cir. 2016), which had held that Johnson claims brought by ACCA offenders cannot satisfy the statutory requirements for filing a second or successive § 2255 motion, is no longer good law). Given the Supreme Court and Eleventh Circuit rulings, it makes little sense for a prisoner in Ponder's position to be denied relief based on his failure to challenge his sentence on direct appeal on the very grounds that the Supreme Court has determined provides a new substantive rule of constitutional law for which collateral relief had not

been previously available.

Moreover, arguably, any dispute that Ponder procedurally defaulted his right to seek collateral relief based on a claim arising under *Johnson* by failing to raise that argument on direct appeal was resolved on July 11, 2016, when an Eleventh Circuit panel granted Ponder's second application to file a successive Motion to Vacate and preliminarily concluded that Ponder had established a *prima facie* basis for relief as required under 28 U.S.C. § 2255(h).[7] Significantly, although the Court only addressed whether Ponder was entitled to file a successive § 2255 motion, the Court did not reject Ponder's second application based on his failure to raise a *Johnson* claim on direct appeal, or otherwise allude to a procedural default on that basis.

That aside, the Government correctly notes that generally, claims not raised on direct appeal are considered procedurally defaulted and may not be raised on collateral review. *Massaro v. United States*, 538 U.S. 500, 504 (2003). An equitable exception to the procedural default rule applies when a petitioner can demonstrate cause and actual prejudice. *Bousley v. United States*, 523 U.S. 614, 622 (1998). Assuming *arguendo* that

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[7] 28 U.S.C. § 2255 provides the following in relevant part,

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Thus the plain language of § 2255(h)(2) only requires that a successive petition contain a previously unavailable rule of constitutional law, made retroactive to cases on collateral appeal. 28 U.S.C. § 2255(h). However, in practice appellate courts often conduct an expansive review of a successive *Johnson* petition's prospective underlying merits prior to granting or denying leave to file. See *In re McCall*, 826 F.3d 1308, 1311 (11th Cir. 2016) (Martin, J., concurring).

Ponder was required to raise a claim under *Johnson* on direct appeal prior to filing the instant motion, the undersigned concludes that he has satisfied the cause and prejudice requirement to excuse his procedural default. The Movant contends that he did not challenge whether his underlying convictions qualified as ACCA violent felonies on appeal because prior to *Johnson,* such convictions had been accepted by Courts to meet the residual clause requirements. The undersigned agrees. Prior to *Johnson*, the Eleventh Circuit held in numerous cases that an armed robbery conviction is "undeniably a conviction for a violent felony." *James v. Warden*, 550 F. App'x 835, 837 (11th Cir. 2013); *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) ("we have affirmed, when unchallenged on appeal, that a robbery conviction in violation of Fla. Stat. Ann. § 812.13 is a predicate offense under the ACCA."); *United States v. Gandy*, 710 F.3d 1234, 1238 (11th Cir. 2013) (same); *see also United States v. Welch*, 683 F.3d 1304, 1310–14 (11th Cir. 2012) (holding that a conviction under § 812.13(1) is a violent felony), *cert. denied*, 133 S.Ct. 913, (2013). Further, prior to *Johnson*, the Eleventh Circuit, consistent with earlier Supreme Court rulings, held that the ACCA residual clause was not unconstitutionally vague. *See U.S. v. Turner*, 530 Fed Appx. 866 (11th Cir. 2013) (stating "The Supreme Court has held that the violent felony residual clause in the ACCA 'states an intelligible principle and provides guidance that allows a person to conform his or her conduct to the law.'" (citing S*ykes v. United States*, 131 S.Ct. 2267, 2277, (2011). Accord *United States v. Chitwood*, 676 F.3d 971 at 978 n. 3 (11th Cir. 2012) (same); *United States v. Weeks*, 711 F3d 1255, 1262 (11th Cir. 2013) (stating "the Supreme Court has twice expressed the view that the residual clause of the ACCA is not unconstitutionally vague, which effectively forecloses us from adopting a contrary conclusion.") (citations omitted).

In addition, the Movant clearly suffered prejudice in failing to raise these claims earlier because he is currently serving a minimum 15 year sentence, which would not

have been imposed without a finding that Ponder qualified as an armed career criminal under the ACCA. See *Chatfield v. United States*, 2017 WL 1066776 at *5 (S.D. Fla. March 2, 2017) (citing *Mays v. United States*, 817 F.3d 728, 737 (11th Cir. 2016) ("[A]n illegal sentence warrants habeas relief" where a "sentencing error 'affects the defendant's substantial rights and seriously affects the fairness, integrity, or public reputation of the judicial proceedings.'"); see also *United States v. Sanchez*, 586 F.3d 918, 930 (11th Cir. 2009) (holding that an error resulting in a sentence above the statutory maximum meets even the plain error standard) (internal quotation marks omitted)). Ponder thus has established cause and prejudice to excuse any purported procedural default.

One other point requires discussion related to Ponder's successive § 2255 motion. Although the Eleventh Circuit granted Ponder's second application to file a successive petition, in so doing, the Court cautioned that the Court did not conclusively resolve whether Ponder met all of the § 2255(h) successive petition requirements. Rather, the Eleventh Circuit panel concluded that the record at Ponder's 2006 sentencing was unclear as to whether Ponder was sentenced under the ACCA's residual clause or whether he was sentenced under the ACCA's elements clause. This determination was significant because the Eleventh Circuit's then-recent ruling in *Jackson* called into question whether Ponder's pre-2000 Florida robbery convictions would also qualify as violent felonies under the elements clause of the ACCA, rather than the residual clause that had been determined to be unconstitutionally vague. Therefore, the Court granted Ponder's second application so that "the district court [could] decide and tell [the Eleventh Circuit] what it did at the 2006 sentencing and why." ECF No. [6] at 6-7. The panel Court stated that the district court "must decide whether or not Ponder was sentenced under the residual clause in 2006, whether the new rule in *Johnson* is implicated as to Ponder's other prior convictions, and whether the 2255(h) 'applicant has established the [§2255(h)] statutory

requirements for filing a second or successive motion.'" ECF No. 6 at 8. The Eleventh Circuit panel directed that only then should the district court proceed to consider the merits of the motion, along with any defenses and argument the respondent may raise, ECF No. [6] at 8.[8]

The Eleventh Circuit's instruction in this regard raises the unsettled question of how a movant like Ponder must satisfy his/her burden when seeking to file a successive §2255 motion. Different Eleventh Circuit panels have reached different conclusions on this issue. In *in re Moore*, an Eleventh Circuit panel stated in dicta:

> **[T]he district court cannot grant relief in a § 2255 proceeding unless the movant meets his burden of showing that he is entitled to relief, and in this context the movant cannot meet that burden unless he proves that he was sentenced using the residual clause and that the use of that clause made a difference in the sentence. If the district court cannot determine whether the residual clause was used in sentencing and affected the final sentence—if the court cannot tell one way or the other—the district court must deny the § 2255 motion.**

***In re Moore,* 830 F.3d 1268, 1273 (11th Cir. 2016). In other words, *Moore* urges that if the district court cannot determine from the record that a defendant was definitively sentenced under the residual clause, the district court should deny the movant relief, because he/she has failed to establish entitlement to relief based upon the Supreme Court's ruling in *Johnson*, which only pertained to the residual clause of the ACCA.**

However, *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016), a case decided by a

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[8] **Notably, the concurrence contended that the panel's determination should have been limited to whether Ponder made a prima facie showing under 2255(h). Further, the concurrence urges that the district court should not only consider what it did in 2006 but should decide de novo whether Ponder is now subject to an enhanced sentence under the ACCA. However, because the undersigned concludes that Mr. Ponder is not entitled to relief since as discussed below, all of the prior Florida convictions for robbery, aggravated assault and car jacking qualify as violent felonies under the elements clause of the ACCA, the distinctions between the approach of the panel and the concurrence are not germane to the resolution of this case.**

different Eleventh Circuit panel, directly conflicts with the dicta in *Moore*. While also dicta, the *Chance* panel stated that the *Moore's* panel's approach was wrong because it imposed an unfair burden on movants and *Moore* suggested that district courts should ignore recent Supreme Court decisions such as *Descamps v. United States*, 133 S.Ct. 2276 (2013), and *Mathis v. United States*, 136 S.Ct. 2243 (2016), "unless the sentencing judge uttered the magic words 'residual clause.'" *Id*. at 1340-41. Under the *Chance* panel's analysis, Ponder is entitled to relief if he can establish by a preponderance of the evidence that: (1) the record does not refute his assertion that the sentencing Court may have relied on the residual clause in applying the ACCA enhancement, in violation of *Johnson*, and (2) under current binding precedent—including but not limited to *Johnson*, *Mathis,* and *Descamps*—his Florida convictions no longer qualify as ACCA "crimes of violence." *See e.g. Curry v. United States*, Nos. 16–CV–22898, 05–CR–20399, 2016 WL 6997503, at *3 (S.D. Fla. Nov. 30, 2016) (finding *Chance* persuasive and declining to follow *Moore's* suggestion that successive petitioners must prove the Court relied upon the ACCA residual clause "in fact" at sentencing); *Leonard v. United States*, 2016 WL 4576040, at *3 (S.D. Fla. Aug. 22. 2016) (applying similar test in granting successive *Johnson*-based petition); *Simmons v. United States*, 2016 WL 4536092, at *1 (S.D. Fla. Aug. 31, 2016) (same).

In this case, the sentencing hearing transcript does not state whether Ponder was sentenced under the "residual clause" and thus, under the *Moore* approach, Ponder has failed to meet his § 2255(h) burden and is not entitled to relief. However, even if the less stringent approach put forth in *Chance* is followed, and the Court assumes that Ponder was sentenced pursuant to the now-unconstitutional residual clause, his sentence was proper because his prior Florida convictions still qualify as violent felonies under the ACCA.

C. *The Movant's Prior Convictions are Violent Felonies Under the ACCA*

As discussed above, following the Supreme Court's rulings in *Johnson* and *Welch*, a Court faced with the question presented here, whether a prior conviction qualifies as a non-residual clause violent felony for purposes of imposing a mandatory minimum sentence pursuant to the ACCA, must determine whether the prior conviction satisfies either the enumerated clause or the elements clause independent from the residual clause.[9] In *United States v. Razz*, the Eleventh Circuit explained,

> **To determine whether a prior conviction falls within the ACCA's elements clause, we apply the 'categorical approach.' This means we look only to the elements of the statute under which the defendant was convicted, and not at the facts underlying the prior conviction. . . If the 'least of the acts criminalized' by the statute does not have as an element actual, attempted, or threatened use of violent force or a substantial degree of force against another person, then the defendant's conviction under that statute is not a violent felony within the meaning of the elements clause. . .Thus, when applying the categorical approach, we must identify the 'least culpable conduct' prohibited by the statute of conviction and presume that the defendant's conviction rested on 'nothing more' than this conduct. To identify the least culpable conduct, we look to how state courts interpret the statute. . .And as part of this step, we must analyze 'the version of state law that the defendant was actually convicted of violating.'**

***United States v. Razz*, No. 16-10111, 2017 WL 631655, *2-3 (11th Cir. Feb. 16, 2017) (citations omitted). In this case, neither the Court nor the PSI stated at sentencing which of Ponder's prior convictions provided the three predicate convictions for his ACCA sentence. Nonetheless, applying the above categorical analysis to Ponder's prior Florida convictions that the Court may have relied upon, it is clear that his convictions in 1997 for aggravated assault with a deadly weapon, in 1998 for kidnapping, robbery, and carjacking,**

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[9] **In this case, it is undisputed that the prior convictions at issue are not ones identified in the enumerated clause, and thus, the undersigned must determine whether those convictions meet the elements clause of the ACCA.**

and in 1999 for robbery, carjacking, kidnapping, and burglary with assault qualify as violent felonies notwithstanding the Supreme Court's ruling in *Johnson*. The undersigned addresses each of those prior convictions, in turn.

1997 Conviction for Aggravated Assault with a Deadly Weapon

Ponder first contends that his 1997 conviction for aggravated assault with a deadly weapon no longer qualifies as a predicate ACCA offense. In this regard, Ponder contends that a conviction for aggravated assault under Florida Statute §784.02 may be found with a mens rea of "culpable negligence," which lacks the intentional element of force required under the ACCA, ECF No. [1] at 11-12.

The Eleventh Circuit rejected this argument on June 10, 2016 when it denied Ponder's first application seeking an order authorizing the district court to consider a second or successive motion to vacate. *See In re Ponder*, Case No. 16-12522. The panel Court reasoned that because a conviction for aggravated assault requires proof that the defendant threatened "to do violence" to another, a conviction for aggravated assault would always include as an element, the threatened use of physical force against the person of another, ECF No. [6] at 5-6 citing *Turner v. Warden FCI (Medium)*, 709 F. 3d 1328, 1337-38 (11th Cir. 2013). The Eleventh Circuit thus concluded that Ponder's conviction for aggravated assault with a deadly weapon in 1997 satisfied the elements clause of the ACCA. The Eleventh Circuit's determination on that issue is still valid notwithstanding the fact that on July 12, 2016, the Eleventh Circuit granted Ponder's second application seeking an order authorizing the district court to consider a second or successive motion to vacate based on a recent ruling regarding the Florida robbery statute. *See In Re Ponder*, No. 16-13594 (July 11, 2016), ECF No. [6]. Nothing in the Eleventh Circuit's July 12, 2016 opinion granting Ponder's second application indicates that the Eleventh Circuit reversed or altered its initial determination that his aggravated

assault conviction qualified as a violent felony under the ACCA in the post-*Johnson* era.

Moreover, in Florida, "[a]n 'aggravated assault' is an assault: (a) With a deadly weapon without intent to kill; or (b) With an intent to commit a felony." Fla. Stat. § 784.021. An assault, for its part, is "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Fla. Stat. § 784.011. In *Turner v. Warden Coleman FCI (Medium)*, the Eleventh Circuit made clear that a Florida conviction for aggravated assault under § 784.021 is categorically a violent felony under the ACCA's elements clause. *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1337–38 & n.6 (11th Cir. 2013), *abrogated on other grounds* by *Johnson*, 135 S.Ct. 2551. The Court in *Turner* noted that it was not necessary to review the underlying facts of the conviction to classify aggravated assault as a violent felony because, by its own terms, the offense required a threat to do violence to the person of another.

Ponder acknowledges that the Eleventh Circuit in *Turner* held that a conviction for aggravated assault under Florida law qualifies as a predicate offense for purposes of the ACCA, but contends that the Court's ruling was in error in light of the Supreme Court's ruling in *Descamps v. United States*, 133 S. Ct. 2276 (2013) and the Eleventh Circuit's ruling in *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014). Ponder contends that *Descamps* and *Howard* command that a court apply a strict element-by-element comparison under the categorical approach and follow any state court decision that defines the state statute's substantive elements. Ponder argues that because the aggravated assault statute has been interpreted by the Florida courts to require no more than "culpable negligence," a conviction under that statute categorically is not a violent felony. The argument continues that because the Eleventh Circuit in *Turner* failed to

consider how Florida courts interpreted the *mens rea* element for aggravated assault, this court may not consider his conviction for aggravated assault to be a violent felony.

Somewhat recently, an Eleventh Circuit panel rejected this very argument in *United States v. Golden*, No. 15-15624, 2017 WL 343523, *1 (11th Cir. Jan. 24, 2017). In *Golden*, the Court considered whether a Florida conviction for aggravated assault constituted a crime of violence under the sentencing guidelines.[10] The Court answered that query affirmatively and cited the Court's prior holding in *Turner.* The Court in *Golden* noted that although the method in which the court in *Turner* analyzed the elements of aggravated assault had been criticized by some other Eleventh Circuit panels, the *Turner* holding was still binding and could not be disregarded.[11] Accordingly, the undersigned concludes that, pursuant to *Turner*, Ponder's 1997 Florida conviction for aggravated assault with a deadly weapon remains a predicate conviction for purposes of the ACCA.

1998 Conviction for Kidnapping, Robbery and Carjacking and 1999 Conviction for Robbery, Carjacking, Kidnapping and Burglary with Assault

Movant also contends that his 1998 conviction for kidnapping, robbery and carjacking and his 1999 conviction for robbery, carjacking, kidnapping and burglary with assault no longer may be used to establish prior violent felony convictions for purposes

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[10] Although *Golden* presented a Federal Sentencing Guidelines challenge, the Court in *Golden* relied on *Turner* which presented a challenge under the ACCA. In addition, for purposes of determining whether the "crime of violence" or "violent felony" requirement is met, the same element by element analysis applies. *See e.g. United States v. Razz*, 2017 WL 631655, at *3 n.1 (11th Cir. Feb. 16, 2017) (stating elements clause in section 4B1.2(a) of Guidelines was identical to the ACCA's elements clause).

[11] *Turner* has been criticized for reaching the wrong conclusion in applying the categorical approach to determine whether aggravated assault under Florida law was a violent crime because *Turner* failed to consider that under Florida caselaw, aggravated assault may be proven with less than intentional conduct, including recklessness. See e.g. *United States v. Golden*, No. 15-15624, 2017 WL 343523, *1 (11th Cir. Jan. 24, 2017) (Pryor, J. concurring) (citing *United States v. Palomino Garcia*, 606 F. 2d 1317, 1334-36 (11th Cir. 2010)). Nonetheless, published three-judge orders issued under § 2244(b) are binding precedent in this circuit. *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015).

of the ACCA.

Ponder asserts that the crime of robbery under Florida law does not qualify as a violent felony once the categorical approach is applied to the relevant Florida statute.[12] Movant's contention is without merit. By way of background, in 2011 in *Lockley*, the Eleventh Circuit, applying the categorical approach, evaluated whether a Florida robbery conviction under § 812.13(1) categorically qualified as a "crime of violence" under the force clause of the career offender guidelines, which contains a force clause identical to the force clause in the ACCA. *United States v. Lockley*, 632 F.3d 1238, 1240 & n.1 (11th Cir. 2011).[13] The court explained that § 812.13(1) requires either the use of force or violence, the 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." *Id*. at 1245. The court therefore found "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." *Id*.[14] Thus, the Eleventh Circuit held that a conviction under § 812.13(1) categorically qualified

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[12] Ponder does not dispute that both his 1998 and 1999 convictions included a conviction for robbery under Florida law. Thus, if robbery under Florida law is a violent felony then the sentencing court was permitted to rely on those convictions notwithstanding the fact that those convictions included other crimes that may not now qualify as violent felonies after *Johnson.*

[13] The Florida Statute at issue defines robbery as follows: "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. State. § 812.13(1). The Parties do not dispute that this is the applicable Florida Robbery statute for Mr. Ponders' conviction.

[14] In *Lockley*, the Eleventh Circuit cited *Magnotti v. State*, 842 So.2d 963 (Fla. 4th DCA 2003), a Florida state court case that stated, "[t]he fear contemplated by [§ 812.13] is the fear of death or great bodily harm." 632 F.3d at 1242.

as a predicate under the force clause of the career offender guidelines. *Id.*[15]

As explained above, in this case, in granting Ponder's application to file the instant Motion to Vacate, a panel of the Eleventh Circuit opined that the Eleventh Circuit's ruling in *In Re Jackson*, 826 F. 3d 1343 (11th Cir. 2016), held that the finding in *Lockley* did not apply to pre-2000 Florida robbery convictions, because prior to 2000, pursuant to Florida court rulings, a defendant could commit robbery under the "sudden criminal snatching" section of that statute which Florida courts construed as not requiring force. Thus, following *Jackson*, logically, Ponder's request that his sentence be vacated because his 1998 and 1999 convictions for robbery under Florida law did not qualify as violent felonies could not be denied based upon *Lockley* which only applied to post-2000 robbery convictions.

However, very recently in *United States of America v. Conde*, No. 16-11876, 2017 WL 1485021 (11th Cir. April 26, 2017), the Eleventh Circuit, in an unpublished opinion, affirmed a district court's imposition of a sentence under the ACCA based upon three 1992 Florida robbery convictions. The Court stated that a conviction under the Florida robbery statute "has always required violence beyond mere snatching, and, therefore, has an element the use, attempted use, or threatened use of physical force against the person of another and qualifies as a violent felony under the element clause of the ACCA." *Id.* at *2. The Eleventh Circuit has therefore clarified that convictions under the Florida statute for robbery satisfy the elements clause of the violent felony definition under the ACCA,

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[15] One court has held that the "putting in fear" element in Florida's robbery statute is sufficient to meet the use, attempted use or threatened use of physical force of the ACCA elements prong. See e.g. *United States v. Chisolm*, 166 F. Supp. 3d 1279 (M.D. Fla. Oct. 29, 2015) (citing *Lockley* and rejecting defendant's assertion that "putting in fear" does not necessarily require a threatened use of physical force.).

whether those convictions occurred before or after the year 2000.[16] Further, the Eleventh Circuit has generally confirmed the continued viability of *Lockley's* holding, in the post-*Johnson* era. *See,* e.g., *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) (finding *Lockley* binding on whether defendant's Florida robbery conviction qualified as an ACCA predicate under the force clause), petition for cert. filed (Nov. 8, 2016) (No. 16-7883); *United States v. Seabrooks*, 839 F.3d 1326, 1342–43 (11th Cir. 2016) (same), petition for cert. filed (Feb. 16, 2017) (No. 16-8072). Accordingly, Ponder's 1998 and 1999 Florida robbery convictions provided a proper predicate for the court to sentence him to a mandatory minimum term pursuant to the ACCA.

Notwithstanding the foregoing, the Movant contends that if the categorical analysis required under *Descamps* and *Moncrieff* were applied, which were issued after *Lockley*, his robbery conviction would not qualify as a violent felony.[17] In *Moncrieffe v. Holder*, the

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[16] It is for this reason that the district court's opinion in *Michael Lee v. United States of America*, No. 16-61460-CIV-ALTONAGA (S.D. Fla. Aug. 23, 2016), which Ponder filed as Supplemental Authority, ECF No. [10], which predated *Conde* and found the Florida's robbery statute is not a violent felony, is not persuasive.

[17] It bears noting that the Eleventh Circuit has held that *Descamps* is not retroactive for purposes of a second or successive § 2255 Motion, because *Descamps* did not announce a new rule of constitutional law but rather merely interpreted an existing statute, and thus cannot satisfy the requirements of § 2255(h)(2). See 28 U.S.C. § 2255(h)(2). *See Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016) (concluding that *Descamps* was only retroactive in the context of an initial § 2255 motion to vacate because it did not announce a new rule, but instead merely clarified existing precedent regarding the application of the ACCA as a matter of statutory interpretation).

In this case, the Eleventh Circuit did not grant Ponder's second application based upon a claim that the Court in *Lockley* failed to correctly apply the categorical approach to his robbery convictions as required by *Descamps*; rather, the Eleventh Circuit's grant of Ponder's second application was based upon the Court's then-recent holding in *Johnson*, that *Lockely* did not reach pre-2000 Florida robbery convictions. As discussed above, the Court has since indicated that Florida robbery qualifies as a violent felony even if the robbery occurred prior to 2000. Thus, the Court could deny the instant petition for failing to meet the requirements of § 2255(h) on this basis, however, for judicial efficiency, the undersigned addresses the substance of Ponder's challenge to the robbery conviction based upon *Descamps*.

Supreme Court considered whether a Georgia conviction for "the social sharing of a small amount of marijuana" was equivalent to the generic federal offense of illicit drug trafficking and therefore an "aggravated felony" under the Immigration and Nationality Act. *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1682 (2013). In concluding that it was not, the Supreme Court consulted Georgia caselaw construing the crime of possession with intent to distribute marijuana to determine that the least of the acts the state law criminalized was not encompassed by the generic illicit drug trafficking offense. *Id.* at 1684–86. Thereafter, in *Descamps v. United States,* the Supreme Court made clear that federal courts construing state criminal statutes for purposes of deciding whether the state criminal offense constitute a violent felony under ACCA must "focus on the elements, rather than the facts, of a crime." *Descamps v. United States*, 133 S.Ct. 2276, 2285, (2013).[18]

However, in *United States v. Razz*, 2017 WL 631655, at * 4 (11th Cir. Feb. 16, 2017), the reviewing court rejected a similar challenge regarding the correct application of *Moncrieffe* and *Descamps* to the defendant's Florida conviction for robbery. The defendant in *Razz* argued that that his 2013 robbery with a weapon no longer qualified as conviction for a violent felony within the meaning of the ACCA's elements clause because *Lockley* was abrogated by *Descamps* and *Moncrieffe*. However, the Court concluded that the court in *Lockley* took all the formal steps required by *Descamps, Moncrieffe*, and the

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[18] In *Descamps*, the Court expressly left unanswered "the question whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it." *Id*. at 2291. The Eleventh Circuit, noting that "[t]he Descamps decision did nothing to undermine the holding of our *Rosales–Bruno* decision," continued to rely on state judicial rulings interpreting state criminal statutes when deciding whether those crimes constituted violent felonies. *United States v. Howard*, 742 F.3d 1334, 1346 n.5 (11th Cir. 2014); see *United States v. Lockett*, 810 F.3d 1262, 1270 (11th Cir. 2016) ("What elements South Carolina prosecutors are required to prove for a burglary conviction is a question of South Carolina law. And so we look to the state's courts to answer this question." (citing *Howard*, 742 F.3d at 1346)).

other categorical approach cases. The Court further observed that even if the *Lockley* panel failed to consider all the relevant Florida decisions, including those that concluded that the "put in fear" element of Florida robbery did not require a threat of force, the Court was bound by *Lockley* under the prior panel precedent rule "unless and until it is overruled by [the Eleventh Circuit] court *en banc* or by the Supreme Court." *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003).

Similarly, as for Ponder's convictions for carjacking, in *United States v. Marious*, No. 16-12154, 2017 WL 473841, *1 (11th Cir. Feb 6, 2017), the Court concluded that the elements of the Florida "carjacking" statute mirrored those elements of the Florida robbery statute, and thus concluded that the district court did not err by counting a defendant's prior conviction for carjacking under Florida law as predicate offense for purposes of sentencing the defendant as a career offender. *Id* at *2, citing *Cruller v. State*, 808 So. 2d 201, 204 (Fla. 2002). As such, Ponder's 1998 and 1999 convictions for robbery and carjacking qualify as violent felonies under the elements clause of the ACCA.[19]

Thus, because Mr. Ponder still has three qualifying violent felony convictions for purposes of sentencing pursuant to the elements clause of the ACCA, the Movant has failed to demonstrate a basis upon which this Court may grant habeas relief.

IV. CONCLUSION

Accordingly, for the reasons stated herein, is hereby

RECOMMENDED **that Cedric Ponder's Motion to Vacate pursuant to 28 U.S.C. § 2255, ECF No. [1] be** DENIED**.**

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[19] **The undersigned need not reach the issue of whether Florida kidnapping and burglary convictions qualify as violent felonies, because that determination does not alter the finding that Mr. Ponder's 1998 conviction qualifies as a violent felony under the ACCA because that conviction included a conviction for robbery, which is clearly a violent felony under the ACCA.**

The parties will have fourteen days to file written objections to this Report and Recommendation for consideration by the United States District Judge to whom this case is assigned. Any request for an extension of this deadline must be made within seven calendar days from the date of this Order. Pursuant to Eleventh Circuit Rule 3-1, and accompanying Internal Operating Procedure 3, the parties are hereby notified that failure to object in accordance with 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions.

DONE AND SUBMITTED **in Miami, Florida, on June 1, 2017.**

Andrea M. Simonton

ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

Copies furnished via CM/ECF to:
The Honorable Donald L. Graham,
United States District Judge
All counsel of record

APPENDIX E

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

CEDRIC PONDER

_____/

JUDGMENT IN A CRIMINAL CASE

Case Number: 05-20664-CR-GRAHAM(s)

USM Number: 64502-004

Counsel For Defendant: Adrienne J. Goodman, Esq.
Counsel For The United States: Marcus Christian
Court Reporter: Carleen Horenkamp

The defendant pleaded guilty to Count One of the Indictment.
The defendant is adjudicated guilty of the following offense:

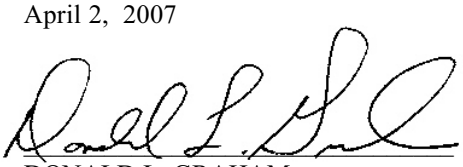
TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)(1)	Possession of a Firearm by a Convicted Felon	May 3, 2005	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The remaining Counts in the Indictment is dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
April 2, 2007



DONALD L. GRAHAM
United States District Judge

April 17, 2007

DEFENDANT: CEDRIC PONDER
CASE NUMBER: 05-20664-CR-GRAHAM(s)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **180 Months**. The defendant shall receive credit for time served as applicable by statute.

The Court makes the following recommendation(s) to the Bureau of Prisons: The Court recommends that the defendant participate in the 500 Hour Residential Drug Treatment Program administered by the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: CEDRIC PONDER
CASE NUMBER: 05-20664-CR-GRAHAM(s)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons. The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CEDRIC PONDER
CASE NUMBER: 05-20664-CR-GRAHAM(s)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall participate in an approved treatment program for mental health/substance abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: CEDRIC PONDER
CASE NUMBER: 05-20664-CR-GRAHAM(s)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.00		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: CEDRIC PONDER
CASE NUMBER: 05-20664-CR-GRAHAM(s)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$100.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment is payable immediately to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Forfeiture of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement of forfeiture. The United States shall submit a proposed order of forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.