No. _____

IN THE
Supreme Court of the United States

LESLEY WILLIAM COTTMAN,

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 FOR REVIEW

This petition presents the following questions:

I. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*) applies to the mandatory guidelines, and if so, whether Mr. Cottman's Florida convictions for robbery qualify as "crimes of violence" under U.S.S.G. § 4B1.2's element's clause.

II. Whether published orders issued by a circuit court under 28 U.S.C. § 2244(b)(3), and in the context of applications to file second or successive 28 U.S.C. § 2255 motions (SOS context), constitute binding precedent outside that context.

III. Whether the Eleventh Circuit Court of Appeals erroneously denied Mr. Cottman a certificate of appealability ("COA") on the issue of whether he was sentenced above the statutory maximum. More specifically, whether reasonable jurists can, at a minimum, debate the issue of whether a Florida conviction for robbery qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).

LIST OF PARTIES

Petitioner, Lesley William Cottman, 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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PETITION FOR A WRIT OF CERTIORARI

Lesley William Cottman respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his motion for a certificate of appealability (COA) on the issue of whether his mandatory guidelines sentence, enhanced under the Armed Career Criminal Act (ACCA) and the residual clause of § 4B1.2, is unconstitutional in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*).

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Cottman's application for a COA in Appeal No. 17-13006-E is provided in Appendix A. The district court order dismissing his § 2255 motion to vacate sentence and denying COA is provided in Appendix B.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Cottman's case under 18 U.S.C. § 3231. The district court denied Mr. Cottman's 28 U.S.C. § 2255 motion on May 3, 2017. See Appendix B. Mr. Cottman subsequently filed a notice of appeal and application for a COA in the Eleventh Circuit, which was denied on October 24, 2017. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 924. Penalties (ACCA)

> (e)(1) 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[.]

(e)(2) As used in this subsection – . . .

> (B) the term 'violent felony' means any 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 . . .

Fla. Stat. § 812.13 Robbery (1986)

"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.

If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . .

Fla. Stat. § 812.13 Robbery (1996)

"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 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.

If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . .

28 U.S.C. § 2244(b)(3) Finality of Determination

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2253(c) Appeal

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Mr. Cottman pled guilty to conspiracy to possess with intent to distribute 5 kilograms or more of cocaine (count one), possession of a firearm in furtherance of a drug trafficking crime (count two), and felon in possession of a firearm (count four), and on July 1, 2003, he was sentenced under the Armed Career Criminal Act (ACCA) to 262 months' imprisonment on counts one and four, followed by 60 months' imprisonment on count two, for a total of 322 months' imprisonment and 60 months' supervised release.[1] At the time of sentencing, the PSR noted two prior convictions that qualified Mr. Cottman for enhancement as a career offender, both for Florida robbery convictions. PSR ¶ 41. At sentencing, the Court found Mr. Cottman was an armed career criminal based on four previous Florida robbery convictions. Civ. Doc. 18. at 4.[2] Mr. Cottman did not appeal.

On June 15, 2016, Mr. Cottman filed a *pro se* motion to vacate his sentence pursuant to 28 U.S.C. § 2255 based on *Johnson*, 135 S. Ct. 2551, arguing that his ACCA and mandatory guidelines career offender sentence was imposed in violation of his right to due process based on *Johnson II*.

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[1] Without the career offender or ACCA enhancements, Mr. Cottman's base offense level would have been 34 and total offense level would have been 31 for a guidelines range of 188-235 months. PSR ¶ 38. With the career offender enhancement, his base offense level increased to 37 and total offense level to 34 for a guidelines range of 262-327. PSR ¶ 43. The career offender enhancement then controlled the ACCA offense level; increasing the enhanced base offense level from 34 to 37 ("the career offender offense level is 37, and the armed career criminal offense level is 34. The greatest of these offense levels is 37; therefore, the defendant's enhanced offense level is 37.) PSR ¶ 47. Thus, while Mr. Cottman received a low-end of the guidelines sentence from the district court, the career offender enhancement increased the low-end of his guidelines by an additional 74 months. At the time of his sentencing, the guidelines were mandatory.

[2] References to Mr. Cottman's underlying § 2255 proceeding, case number 8:16-cv-1575-T-24TBM, will be cited as "Civ. Doc."

Because Mr. Cottman's right to relief turns on whether his Florida robbery convictions qualify as "violent felonies" under the ACCA's elements clause, he filed an unopposed motion to stay his § 2255 proceedings pending the Eleventh Circuit's decision in *United States v. Fritts*, Eleventh Circuit Case No. 15-15699. The district court granted the motion.

On November 8, 2016, the Eleventh Circuit issued its decision in *Fritts*, holding that Florida armed robbery categorically qualifies as a "violent felony." *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016). In light of the decision in *Fritts*, Mr. Cottman's case was reopened and § 2255 briefing commenced. Mr. Cottman maintained that *Fritts, United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016), *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), and *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006) were wrongly decided, and that his robbery convictions do not qualify as predicate offenses for enhancement. On May 3, 2017, the district court denied the § 2255 motion and a COA.

In the order denying the § 2255 motion, the court denied Mr. Cottman's career offender claim finding that the claim was untimely as it was "foreclosed by the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017)." Appendix B at 3. The court also denied the ACCA claim finding that Mr. Cottman has four prior robbery convictions that satisfy the ACCA after *Johnson*, that were committed on separate occasions, all of which categorically satisfy the elements clause of the ACCA.[3] Appendix B at 4. While *not* relied on for the enhancement at Mr. Cottman's original sentencing, the district court also found that Mr. Cottman's prior conviction for Florida obstructing or opposing an office with violence (resisting with violence)

[3] The Court noted that Mr. Cottman has five prior robbery convictions, however, "[t]wo of the robberies were committed on the same day, Case. No. 86-8429X." Appendix B at 2 n.1. ACCA enhancement predicate offenses must be "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

satisfies the ACCA. *Id.* However, the district court noted that because the obstructing conviction was committed on the same occasion as one of Mr. Cottman's four predicate robberies, "it cannot be counted separately." *Id.* at 5; *see also* 18 U.S.C § 924(e)(1). On June 30, 2017, Mr. Cottman filed a timely notice of appeal.

On July 21, 2017, Mr. Cottman filed an application for a COA with the Eleventh Circuit. In his application, he recognized that the Eleventh Circuit's binding precedent precluded a finding that his robbery convictions were not "violent felonies," but maintained that the court's precedent was incorrect and reasonable jurists could still debate the issue. Mr. Cottman also noted that since *Fritts* was rendered, both circuit and district judges in the Eleventh Circuit had granted COAs on the issue. Regarding the merits of the issue, Mr. Cottman explained, among other things, that under Florida law, a robbery committed "by force" requires minimal force and therefore cannot qualify as a "violent felony" under the ACCA's elements clause. In his motion, Mr. Cottman also argued that his motion was timely and that reasonable jurists could debate whether *Johnson II* invalidated § 4B1.2(a)(2)'s residual clause. Additionally, while recognizing the contrary authority, Mr. Cottman argued that Florida obstructing or opposing with violence (resisting with violence) should no longer be an enhancement predicate post-*Johnson.*[4] Finally, Mr. Cottman argued that *In re Griffin* is no longer good law, and even if it were, it does not bind the Circuit Court since it arose in the unique context of an application for leave to file a second or successive § 2255 motion.

On October 24, 2017, the Eleventh Circuit denied Mr. Cottman's application for a COA. The Circuit Court stated:

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[4] Because the obstruction is Mr. Cottman's only arguable "crime of violence" or "violent felony" conviction, other than robbery, this petition is dispositive based on robbery.

> Jurists of reason could not debate the district court's rejection of Mr. Cottman's claim that his ACC-enhanced sentence was invalid because his prior Florida convictions no longer qualified as predicate offenses post-*Johnson*. In *United States v. Fritts*, this Court held that Florida robbery qualifies as a violent felony notwithstanding *Johnson*. 841 F.3d at 938. Mr. Cottman argued that *Fritts* was wrongly decided, but it binds us unless and until it is overruled by this Court sitting en banc or the Supreme Court. *United States v. Archer*, 531 F.3d 134, 1352 (11th Cir. 2008).
>
> . . .
>
> Nor could jurists of reason debate the correctness of the district court's rejection of Mr. Cottman's career offender claim. . . . the Supreme Court and this Court have held that *Johnson* does not apply to career offender claims such as Mr. Cottman's. *Beckles v. United States*, 137 S. Ct. 886 (2017); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

Appendix A at 3-4.[5]

[5] *In re: Griffin* is an Eleventh Circuit published order denying an application to file a second or successive § 2255 motion.

REASONS FOR GRANTING THE WRIT

Johnson renders the mandatory guidelines' § 4B1.2 residual clause unconstitutionally vague.

I. _Beckles_ confirms that _Johnson II_ applies to the mandatory guidelines, and renders the guidelines' residual clause unconstitutionally vague.

In *Beckles*, this Court held that the *advisory* sentencing guidelines are not susceptible to constitutional vagueness challenges because they "do not fix the permissible range of sentences," not because the guidelines' residual clause is any less vague than the ACCA's.[6] 137 S. Ct. at 892. Not only did the Court repeatedly limit its holding to "advisory" guidelines,[7] its reasoning depended on the distinction between advisory and mandatory guidelines. As the Court explained, the guidelines "were initially binding on district courts," but "this Court in *Booker* rendered them 'effectively advisory.'" *Id.* at 894 (quoting *Booker*, 543 U.S. at 245). The guidelines are now just "one of the sentencing factors" courts must consider. *Id.* at 893 (citing § 3553(a)). Courts "may no longer rely exclusively on the guidelines range," and the guidelines no longer "'constrain [district courts'] discretion.'" *Id.* at 894 (citation omitted). The guidelines "do not mandate any specific sentences" any more than the other § 3553(a) factors. *Id.* at 896. Because "the advisory guidelines do not fix the permissible range of sentences," but "merely guide the exercise of a

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[6] *See Beckles*, 137 S. Ct. at 890 ("This Court held in [*Samuel Johnson*] that the identically worded residual clause in the [ACCA] was unconstitutionally vague.")

[7] The Court expressly and repeatedly limited its holding to the "advisory" guidelines. *Id.* at 896 (emphasis added) ("We hold *only* that the *advisory* Sentencing guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine."); *see also id.* at 890 ("Because we hold that the *advisory* guidelines are not subject to vagueness challenges under the Due Process Clause, we reject petitioner's argument.") (emphasis added); *id.* at 895 ("[W]e hold that the *advisory* sentencing guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness.") (emphasis added); *id.* at 897 ("Because the *advisory* sentencing guidelines are not subject to a due process vagueness challenge, § 4B1.2(a)'s residual clause is not void for vagueness.") (emphasis added).

court's discretion," they "are not subject to a vagueness challenge under the Due Process Clause." *Id.* at 892. The Supreme Court's reliance on this distinction confirms that *Johnson II* renders § 4B1.2's residual clause in the *mandatory* guidelines unconstitutionally vague.

The Court also distinguished the advisory guidelines from the mandatory guidelines in explaining why the "advisory guidelines do not implicate the twin concerns underlying the vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* As to notice, "even perfectly clear guidelines could not provide notice to a person who seeks to regulate his conduct so as to avoid . . . an enhanced sentence under the career-offender guideline [because] the sentencing court retains discretion to impose the [same] enhanced sentence . . . 'based on a disagreement with the Commission's views.'" *Id.* (quoting *Pepper*, 562 U.S. at 501). Under the mandatory regime, however, a defendant had a substantial due process interest in a sentence within the mandatory range. *Burns v. United States*, 501 U.S. 129, 138 (1991). After *Booker*, "'[t]he due process concerns that . . . require notice in a world of mandatory guidelines no longer' apply." *Beckles*, 137 S. Ct. at 894 (quoting *Irizarry v. United States*, 553 U.S. 708, 714 (2008)). Any due process expectation of a sentence within the guideline range "'did not survive our decision in [*Booker*], which invalidated the mandatory features of the guidelines.'" *Id.* (quoting *Irizarry*, 553 U.S. at 713).

Similarly, the "advisory guidelines also do not implicate" the vagueness doctrine's concern with preventing arbitrary enforcement. *Id.* at 894. District courts do not "enforce" the advisory guidelines but rely on them "merely for advice in exercising [their] discretion." *Id.* at 895. The mandatory guidelines, by contrast, "[bound] judges and courts in . . . pass[ing] sentence in criminal cases," *Mistretta v. United States*, 488 U.S. 361, 391 (1989), and "[had] the force and effect of laws, prescribing the sentences criminal defendants [were] to receive," *id.* at 413 (Scalia, J.,

dissenting).[8] The Court's holding and reasoning thus confirm that *Johnson II* renders the mandatory guidelines' residual clause unconstitutionally vague.

Thus, the denial of Mr. Cottman's career offender claim as untimely is improper. It is indisputable that in *Johnson*, this Court announced a new rule of constitutional law that is retroactively applicable in collateral review. *See Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) (holding that the new rule announced in *Johnson* applies retroactively to cases on collateral review).[9] Mr. Cottman timely invoked the right recognized in *Johnson*, as required under § 2255(f)(3). He does not seek to break new ground, but asks the court to apply *Johnson*'s principles to his case. The only distinction between this case and *Johnson* is that the mandatory guidelines, not the ACCA, fixed the sentence. The text and mode of analysis of the residual clauses of the ACCA and the career-offender guideline are identical. Since Mr. Cottman's motion was filed within one year of this Court's decision in *Johnson* and relies on the new rule announced in *Johnson*, his motion is timely under § 2255(f)(3).

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[8] The courts of appeals have recognized that similar to statutes, the mandatory guidelines set the minimum and maximum terms authorized. "Before *Booker*, the guidelines were the practical equivalent of a statute." *Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013); *see also Brown v. Caraway*, 719 F.3d 583, 588 (7th Cir. 2013) ("For a prisoner serving a sentence imposed when the guidelines were mandatory, . . . the guidelines had the force and effect of law."); *Narvaez v. United States*, 674 F.3d 621, 630 (7th Cir. 2011) (erroneous career offender designation "illegally increased" sentence "beyond that authorized"). Due to the "legal force" of the mandatory guidelines, an erroneous career offender designation under the mandatory guidelines was greater than the "maximum authorized by law." *United States v. Foote*, 784 F.3d 931, 942 (4th Cir. 2015). "[T]here is no doubt" that the mandatory guidelines were "law" and that an erroneous career offender designation "results in a sentence substantively not authorized by law." *United States v. Doe*, 810 F.3d 132, 160 (3d Cir. 2015); *see also In re Hubbard*, 825 F.3d 225, 234–35 (4th Cir. 2016) (rejecting government's argument that mandatory guidelines "do not change the range of legally permissible outcomes"); *In re Patrick*, 833 F.3d 584, 588–89 (6th Cir. 2016) (same).

[9] In *United States v. Roy*, --- F. Supp. 3d ---, 2017 WL 4581792 (D. Mass. Oct. 13, 2017), the court found that the rule announced in *Johnson II* retroactively applies to career-offender residual clause in the mandatory guidelines.

II. *In re Griffin* is no longer good law, and even if it were, it would not bind this Court since it arose in the unique context of an application for leave to file a second or successive § 2255 motion.

Mr. Cottman acknowledges that in *Griffin*, this Court concluded that its holding in *Matchett*, declaring the advisory guidelines immune from vagueness, also applied to the mandatory guidelines. *In re Griffin*, 823 F.3d 1350, 1354–56 (11th Cir. 2016). But *Griffin* was decided before the Supreme Court granted certiorari in, let alone decided, *Beckles*.

For the following four reasons, *Beckles* has undermined *Griffin* to the point of abrogation. First, the *Griffin* Court stated that mandatory guidelines cannot be unconstitutionally vague because they "do not define illegal conduct"; instead, they merely guide judges in "sentencing convicted criminals." *Id.* at 1354. *Beckles*, however, reaffirmed that the vagueness doctrine applies not only to "laws that define criminal offenses," but also to "laws that *fix the permissible sentences* for criminal offenses." 137 S. Ct. at 892; *see also Johnson II*, 135 S. Ct. at 2557 ("These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences."). The mandatory guidelines did just that. They prescribed the sentence to be imposed, set the minimum and maximum sentences authorized by law, and had the "force and effect of laws." *United States v. Booker*, 543 U.S. 220, 234, 259 (2005).

Second, the *Griffin* Court asserted there is no constitutional right to be sentenced under the guidelines; therefore, according to the Court, the "limitations the guidelines place on a judge's discretion cannot violate a defendant's right to due process . . . ." 823 F.3d at 1355. But *Beckles* reaffirmed that the guidelines are subject to constitutional requirements. *See Beckles*, 137 S. Ct. at 895 ("Our holding today does not render the advisory guidelines immune from constitutional scrutiny."); *id.* at 894 ("[D]ue process concerns ... require notice in a world of mandatory guidelines."); *Burns*, 501 U.S. at 138 (same); *Booker*, 543 U.S. at 226–44 (holding that the Sixth

Amendment requires facts that increase a mandatory guideline range to be proved to a jury beyond a reasonable doubt); *Peugh v. United States*, 133 S. Ct. 2072, 2083–85 (2013) (holding that a retrospective increase in the advisory guidelines violates the *Ex Post Facto* Clause).

Third, the *Griffin* Court stated that receiving notice of a career offender sentence via a presentence report "accord[s] adequate due process." 823 F.3d at 1355. *Beckles*, however, clarified that the vagueness doctrine requires notice prior to the PSR, when the defendant might "regulate his conduct so as to avoid particular penalties within the statutory range," not after he has been convicted and is awaiting sentencing. 137 S. Ct. at 894; *see United States v. Pawlak*, 822 F.3d 902, 909–10 (6th Cir. 2016) (vagueness doctrine requires "ex ante notice"), *abrogated on other grounds by Beckles v. United States*, 137 S. Ct. 886 (2017).

Finally, the *Griffin* Court asserted that *Johnson II* could not be retroactive to the mandatory guidelines because it "does not alter the statutory range set by Congress" or "produce a sentence that exceeds the statutory maximum." 823 F.3d at 1355. Even if there were any such requirement, and there is not, *see Welch*, 136 S. Ct. at 1264–65, the mandatory guidelines set the minimum and maximum sentences authorized by law, and those ranges were set by Congress—through both its delegation of law-making power to the Commission and its approval of the guidelines. *See* 28 U.S.C. §§ 994(a)(1), 994(p); *Booker*, 543 U.S. at 242–43; *Mistretta*, 488 U.S. at 393–94.

Even assuming *arguendo* that *Griffin* remains good law, it is still not binding here given that it arose in the unique context of an application for leave to file a second or successive § 2255 motion. Published SOS orders have no precedential value beyond the SOS context. Although this Court has held that published SOS orders have precedential effect in *In re Lambrix*, 776 F.3d 789, 793–94 (11th Cir. 2015), that decision was itself published in the SOS context, and therefore

any conclusion about the reach of *Lambrix* outside the SOS context is dicta. As this Court has explained: "A decision can hold nothing beyond the facts of that case." *United States v. Birge*, 830 F.3d 1229, 1233 (11th Cir. 2016).

One member of this Court recently explained why SOS orders should not be binding outside the SOS context:

> [Rulings on SOS applications are] made under a statutory directive that sets them apart from merits decisions that result from the deliberative process required of United States appellate courts.
>
> When Courts of Appeals rule on applications from prisoners who want to file a second or successive habeas petition, the governing statute limits our role to merely deciding whether a prisoner has made a prima facie showing that his claim involves "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). And because the decision on whether to allow a second or successive motion is not a ruling on the merits of a prisoner's habeas claims, the process by which we make these rulings falls well short of what one expects for decisions requiring precedential deference. These applications are almost always filed by prisoners with no lawyers. They include no briefs. In fact, the form used by prisoners for these applications forbids the prisoner from filing briefs or any attachments, unless the form is filed by a prisoner suffering under a death sentence. . . . . The statute requires us to act on these applications within thirty days. 28 U.S.C. § 2244(b)(3)(D). Unlike our Court's merits decisions, the statute strictly prohibits any review of our rulings on these applications. *Id.* § 2244(b)(3)(E). Our Court has even ruled that we can't consider a prisoner's application if that prisoner has already made substantively the same claims in an earlier application. *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016). This makes it possible for a three-judge ruling (or even a two-judge ruling) on one of these applications to say things rejected by every other member of the court.
>
> It is neither wise nor just for this type of limited ruling, resulting from such a confined process, to bind every judge on this court as we consider fully counseled and briefed issues in making merits decisions that may result in people serving decades or lives in prison. . . . [T]his court's limited rulings on these applications . . . should have no bearing on our merits decision here.

Seabrooks, 839 F.3d at 1349–50 (Martin, J., concurring); *see also United States v. Rosales-Acosta*, No. 16-10090, 2017 WL 562439, at *3 (11th Cir. Feb. 13, 2017) (stating that a published order on an SOS application may not be controlling outside that context).

It is also worth mentioning that even when an SOS application is granted, that grant has no binding effect on the § 2255 proceeding that follows in the district court. *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007) (holding that the district court should decide every aspect of such a case "fresh or in the legal vernacular, *de novo*"). Moreover, if the district court then denied the subsequent § 2255 motion under its *de novo* review, on appeal, nothing in this Court's order authorizing the motion would be binding on the subsequent merits panel. *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013). Thus, given that *Griffin* was issued in the unique SOS context, it does not bind this Court in considering Mr. Cottman's initial § 2255 motion. However, to the extent the Court feels bound to follow *Griffin*, Mr. Cottman maintains that *Griffin* was wrongly decided.

III. Mr. Cottman would not have been a career offender under § 4B1.2 without the residual clause invalidated after *Johnson*.

After *Johnson*, Mr. Cottman no longer has two prior convictions that would qualify as § 4B1.2 predicate offenses. The PSR indicates that Mr. Cottman is a career offender due to

(a) Robbery, Hillsborough County Circuit Court, Case No. 96-3030, a felony crime of violence, sentenced on August 9, 1996, and

(b) Robbery, Hillsborough County Circuit Court, Case No. 86-7581X, a felony crime of violence, sentenced on June 8, 1989.

PSR ¶ 41; *see also* PSR ¶¶ 66, 54. Prior to *Johnson II*, a conviction for robbery under Fla. Stat. § 812.13 qualified as a "crime of violence" under the residual clause. However, with the text of § 4B1.2 stripped of its residual clause, its commentary designating robbery as a "crime of violence" cannot survive. *Stinson v. United States*, held that a guideline's commentary must yield where it "is inconsistent with, or a plainly erroneous reading," of the guideline it purports to interpret. 508 U.S. 36, 38 (1993). Here, with the residual clause excised from the text of § 4B1.2, the

commentary's designation of Mr. Cottman's offense as a "crime of violence" becomes inconsistent with the text's remaining definitions of that term. Robbery was not one of the offenses enumerated in the text of § 4B1.2(a)(2). Nor does it have as an element the use, attempted use, or threatened use of physical force against the person of another under § 4B 1.2(a)(1). Absent the residual clause, § 4B1.2's commentary identifying robbery as a "crime of violence" no longer explains or interprets that guideline's remaining text.

Nevertheless, assuming *arguendo* Mr. Cottman's career offender designation remains unchanged, the sentencing package doctrine would be applicable if his ACCA designation was vacated, as his sentence on counts one and four were interdependent. It is well-established that the sentencing process is a holistic and interconnected endeavor. *See United States v. Fowler*, 749 F.3d 1010, 1014–15 (11th Cir. 2014). Thus, even if Mr. Cottman's guideline range were unchanged, he would still have a lower mandatory minimum on count four, would no longer be an armed career criminal, and may have evidence of post-sentencing rehabilitation to present to the district court. *See Pepper v. United States*, 562 U.S. 476 (2011) (holding that post-sentencing rehabilitation is a proper consideration under the § 3553(a) factors); *see also Dean v. United States*, 137 S. Ct. 1170 (2017) (regarding Mr. Cottman's consecutive sentence on count two). The mere fact that his guideline range may remain the same does not necessarily dictate that he would receive the same sentence he received over fourteen years ago. In fact, Mr. Cottman's co-defendant's ACCA designation was vacated based on *Johnson II*, despite his career offender designation remaining in place and no reduction in his total offense level from his original sentencing, and he received a downward variance at resentencing.[10]

[10] *See United States v. Ronnie Dixon*, Case Nos. 8:02-cr-397-T-24TBM, 8:16-cv-1832-T-24TBM.

IV. Whether published orders issued by a circuit court under § 2244(b)(3), and in the context of applications to file second or successive § 2255 motions, constitute binding precedent outside that context.

The Eleventh Circuit erred in denying Mr. Cottman's COA application because *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016) is not binding outside the SOS context. The Eleventh Circuit has held that published orders in the SOS context have precedential effect in this circuit. *In re Lambrix*, 776 F.3d at 794. However, *Lambrix* was itself a published decision in the SOS context, and reasonable jurists could debate whether any conclusion about the reach of *Lambrix* outside the SOS context is dicta. As the Eleventh Circuit itself has explained: "A decision can hold nothing beyond the facts of that case." *Birge*, 830 F.3d at 1233.

One member of the Eleventh Circuit recently explained why SOS orders should not be binding outside the SOS context:

> When Courts of Appeals rule on applications from prisoners who want to file a second or successive habeas petition, the governing statute limits our role to merely deciding whether a prisoner has made a prima facie showing that his claim involves "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). And because the decision on whether to allow a second or successive motion is not a ruling on the merits of a prisoner's habeas claims, the process by which we make these rulings falls well short of what one expects for decisions requiring precedential deference. These applications are almost always filed by prisoners with no lawyers. They include no briefs. In fact, the form used by prisoners for these applications forbids the prisoner from filing briefs or any attachments, unless the form is filed by a prisoner suffering under a death sentence. Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence, U.S. Ct. of Appeals Eleventh Circuit (last updated Jan. 2, 2001), http://www.ca11.uscourts.gov /sites/default/files/courtdocs/clk/Form2255APP.pdf. The statute requires us to act on these applications within thirty days. 28 U.S.C. § 2244(b)(3)(D). Unlike our Court's merits decisions, the statute strictly prohibits any review of our rulings on these applications. Id. § 2244(b)(3)(E). Our Court has even ruled that we can't consider a prisoner's application if that prisoner has already made substantively the same claims in an earlier application. *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016). This makes it possible for a three-judge ruling (or even a two-judge ruling) on one of these applications to say things rejected by every other member of the court.

> It is neither wise nor just for this type of limited ruling, resulting from such a confined process, to bind every judge on this court as we consider fully counseled and briefed issues in making merits decisions that may result in people serving decades or lives in prison.

Seabrooks, 839 F.3d at 1349–50 (Martin, J., concurring) (footnote omitted); *see also United States v. Rosales-Acosta*, No. 16-10090, 2017 WL 562439, at *3 (11th Cir. Feb. 13, 2017) (stating that that a SOS order may not be controlling because of the unique context in which it was issued).

Additionally, grants in second or successive § 2244 applications have no binding effect on the § 2255 proceeding that follows in the district court. *Jordan*, 485 F.3d at 1358 (holding that the district court should decide every aspect of such a case "fresh or in the legal vernacular, *de novo*"). Moreover, when the district court denies a § 2244 application under its *de novo* review, on appeal, nothing in the Eleventh Circuit's order authorizing the second or successive § 2255 motion would be binding on the merits panels. *In re Moss*, 703 F.3d at 1303. Thus, this is another reason to doubt the precedential value of orders published in the SOS context and based on the foregoing, Mr. Cottman respectfully requests that this Court grant this petition to review whether orders published in the SOS context are binding outside that context.

Florida robbery does not qualify as a "violent felony" after *Johnson II*.

V. The Ninth and Eleventh Circuit's Conflict 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.

Since this Court's decision in *Johnson II*, striking down the ACCA's residual clause as unconstitutionally vague, several circuit courts of appeals have issued published decisions on whether various state robbery statutes qualify as "violent felon[ies]" under the ACCA's elements clause. As a result of the differing conclusions these courts have reached, a direct conflict has emerged about the degree of force necessary for a robbery offense to qualify as a "violent felony."

In Florida, a robbery occurs where an individual commits a taking using only the amount of force necessary to overcome a victim's resistance. Thus, if a victim's resistance is minimal, then the force needed to overcome that resistance need only be minimal. Two terms ago, in *Welch*, 136 S. Ct. at 1268, this Court left open the question of whether a Florida conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause. Since then, the issue has placed the Eleventh and Ninth Circuit at odds. *Compare Fritts*, 841 F.3d 937, *with United States v. Geozos*, --- F.3d ---, No. 17-35018, 2017 WL 3712155 (9th Cir. Aug. 29, 2017). Given the split that has emerged, Mr. Cottman submits that at a minimum, he should have been granted a COA on the issue, because reasonable jurists debate this issue.

This Court's resolution of the issue presented by this petition would not only resolve the direct conflict between the Ninth and Eleventh Circuits, but would provide much-needed guidance on how to determine whether a state offense has as an element the use of "physical force," as that term was defined in *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*). It is respectfully submitted that this petition presents an ideal vehicle to clarify the requirements for the issuance of COAs, as well as the scope of the ACCA's elements clause.

Under Florida's robbery statute, a robbery occurs where a taking is accomplished using enough force to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Thus, if a victim's resistance is minimal, the force needed to overcome that resistance is similarly minimal. Indeed, a review of Florida case law clarifies that a defendant may convicted of robbery even if he uses only a *de minimis* amount of force. A conviction may be imposed if a defendant: (1) bumps someone from behind;[11] (2) engages in a tug-of-war over a purse;[12] (3)

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

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

pushes someone;[13] (4) shakes someone;[14] (5) struggles to escape someone's grasp;[15] (6) peels back someone's fingers;[16] or (7) pulls a scab off someone's finger.[17] Indeed, 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).[18]

Mr. Cottman's convictions were for robbery, not armed robbery. However, the Ninth Circuit recently recognized this in *Geozos*, where it held that a Florida conviction for robbery, regardless of whether it is armed or unarmed, fails to qualify as a "violent felony" under the elements clause. 2017 WL 3712155 at *6–*8.[19] In so holding, the Ninth Circuit relied on

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

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

[15] *Colbey v. State*, 46 Fla. 112, 114 (Fla. 1903). In *Colby*, the defendant was caught during an attempted pickpocketing. *Id.* The victim grabbed the defendant's arm, and the defendant struggled to escape. *Id.* Under the robbery statute in effect at the time, the Florida Supreme Court held it was not a robbery because the force was used to escape, rather than secure the money. *Id.* However, the Florida Supreme Court has made clear that this conduct would have qualified as a robbery under the current robbery statute, which is at issue in this case. *See Robinson v. State*, 692 So. 2d at 887 n.10 ("Although 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).

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

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

[18] 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.

[19] The *Geozos* Court correctly stated that whether a robbery was armed or unarmed made no difference because an individual may be convicted of armed robbery for "merely carrying a

Florida caselaw which clarified that an individual may violate Florida's robbery statute without using violent force, such as engaging "in a non-violent tug-of-war" over a purse. *Id.* (citing *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011)). And while both the Ninth and Eleventh Circuits have recognized the Florida robbery statute requires an individual use enough force to overcome a victim's resistance, the Ninth Circuit, in coming to a decision that it recognized was at "odds" with this Eleventh Circuit's holding in *Fritts*, stated that it believed the Eleventh Circuit "overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." *Id.*

Florida is not alone in its use of a resistance-based standard. In fact, most states permit robbery convictions where the degree of force used is sufficient to overcome a victim's resistance. Indeed, at least fifteen states use some variation of this standard in the text of their statutes,[20] and several others have adopted it through case law.[21] Since this Court struck down the ACCA

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firearm" during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. 2017 WL 3712155 at *6–*8; *see State v. Baker*, 452 So. 2d 927, 929 (Fla. 1984); *State v. Burris*, 875 So. 2d 408, 413 (Fla. 2004); *Williams v. State*, 560 So. 2d 311, 314 (Fla. 1st DCA 1990); *see also Parnell v. United States*, 818 F.3d 974, 978–81 (9th Cir. 2016) (holding that a Massachusetts conviction for *armed* robbery, which requires only the possession of a firearm (without using or even displaying it), does not qualify as a "violent felony" under the ACCA's elements clause).

[20] *See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz .Rev. Stat. §§ 13-1901, 1902; Conn. Gen. Stat. § 53a-133(1); Del. Code Ann. tit. 11, § 831(a)(1); Haw. Rev. Stat. § 708-841(1)(a); Me. Rev. Stat. tit. 17-A, § 651(1)(B)(1); Minn. Stat. § 609.24; Mo. Rev. Stat. §§ 570.010(13), 570.025(1); Nev. Stat. § 200.380(1)(b); N.Y. Penal Law § 160.00(1); Okla. Stat. tit. 21, §§ 791, 792, 793; Or. Rev. Stat. § 164.395(1)(a); Wash. Rev. Code § 9A.56.190; Wis. Stat. § 943.32(1)(a).

[21] *See, e.g.*, *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W.2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1988); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *Winn v. Commonwealth,* 462 S.E.2d 911, 913 (Va. 1995).

residual clause in *Johnson II*, several circuits have had to reevaluate whether these robbery statutes and others still qualify as "violent felon[ies]" under the ACCA's elements clause.[22] These courts have reached differing conclusions, and as a result, significant tension has arisen regarding the degree of force a state robbery statute must require to categorically satisfy the "physical force" prong of the elements clause. *See Johnson I*, 559 U.S. at 140 (defining "physical force" as "*violent* force . . . force capable of causing physical pain or injury to another person.") (emphasis in original). The Fourth Circuit's decisions in *United States v. Gardner, 823 F.3d 793 (4th Cir. 2016)*, and *United States v. Winston*, 850 F.3d 677, 683–86 (4th Cir. 2017), are instructive in this regard.

In *Winston*, the Fourth Circuit held that a Virginia conviction for common law robbery committed by "violence" does not categorically require the use of "physical force." *Id.* Such a robbery is committed where a defendant employs "anything which calls out resistance." *Id.* (quoting *Maxwell v. Commonwealth*, 165 Va. 860 (1936)). Indeed, a conviction may be imposed even if a defendant does not "actual[ly] harm" the victim. *Id.* (quoting *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487 (Va. Ct. App. Dec. 12, 2000)). Rejecting the government's argument that overcoming resistance requires violent "physical force," the Fourth Circuit held that the *de minimis* force required under Virginia law does not rise to the level of violent "physical force." *Id.*

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[22] *See Seabrooks*, 839 F.3d 1326; *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016); *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016); *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015); *Parnell*, 818 F.3d 974; *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017); *United States v. Doctor*, 843 F.3d 306 (4th Cir. 2016); *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016); *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015).

In *Gardner*, the Fourth Circuit held that the offense of common law robbery 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 803–04. A North Carolina common law robbery may be committed by force so long as the force is "is sufficient to compel a victim to part with his property." *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). "This definition," the Fourth Circuit stated, "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 then 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)). Based on these 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 Virginia offense described in *Winston* and the North Carolina offense addressed in *Gardner*, a Florida robbery may be committed by force sufficient to overcome a victim's resistance. As the Fourth Circuit recognized, this definition implicitly suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery. And, as explained above, Florida case law confirms this point.

Given the circuit split between the Ninth and Eleventh Circuits, and the tension among the other circuits, reasonable jurists can, and do, debate whether Mr. Cottman's Florida convictions for robbery qualify as "violent felon[ies]" after *Johnson II*. This case presents an ideal vehicle for the Court to resolve the circuit split discussed herein and reinforce what it said in *Johnson I*—

that "physical force" requires "a substantial degree of force." 559 U.S. at 140. At a minimum, it requires more than the *de minimis* force required for a robbery conviction under Florida law.[23]

The issue presented by this petition was fully preserved below and is dispositive — if Mr. Cottman's prior robbery convictions do not qualify as "violent felon[ies]" under the ACCA's elements clause, then Mr. Cottman is ineligible for enhanced sentencing under the ACCA.

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[23] Currently, there are no less than sixteen pending certiorari petitions – fifteen from the Eleventh Circuit, and one from the Fourth Circuit – raising the issue of the status of Florida robbery as a "violent felony." For the Eleventh Circuit petitions, see *Stokeling v. United States*, No. 17-5554 (petition filed Aug. 4, 2017); *Davis v. United States*, No. 17-5543 (petition filed Aug. 8, 2017); *Conde v. United States,* No. 17-5772 (petition filed Aug. 24, 2017); *Phelps v. United States,* No. 17-5745 (petition filed Aug. 24, 2017); *Williams v. United States,* No. 17-6026 (petition filed Sept. 14, 2017); *Everette v. United States*, No. 17-6054 (petition filed Sept. 18, 2017); *Jones v. United States,* No. 17-6140 (petition filed Sept. 25, 2017); *James v. United States*, No. 17-6271 (petition filed Oct. 3, 2017); *Middleton v. United States,* No. 17-6276 (petition filed Oct. 3, 2017); *Rivera v. United States,* No. 17-6374 (petition filed Oct. 12, 2017); *Shotwell v. United States*, No. 17-6540 (petition filed Oct.. 17, 2017); *Michael Mays v. United States*, No. 17-6664 (petition filed Nov. 2, 2017); *Hardy v. United States,* No. 17-6829 (petition filed Nov. 9, 2017); *Pace v. United States*, No. 17-7140 (petition filed Dec. 18, 2017). For the Fourth Circuit petition, see *Orr v. United States,* No. 17-6577 (petition filed Oct. 26, 2017).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13006-E

LESLEY WILLIAM COTTMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Lesley William Cottman is a federal inmate serving a total 322-month sentence after pleading guilty to 1 count of conspiracy to possess with intent to distribute 5 kilograms or more of a mixture containing cocaine, 1 count of possession of a firearm during and in relation to a drug-trafficking crime, and 1 count of being a felon in possession of a firearm. He was sentenced in 2003 as a career offender, U.S.S.G. § 4B1.2(a)(2), and an Armed Career Criminal, 18 U.S.C. § 924(e) (the Armed Career Criminal Act, or "ACCA"). Both impose enhanced penalties when, as relevant here, a defendant previously has been convicted of violent felonies—two for the career offender enhancement and three for ACCA.

By way of background, although Mr. Cottman's presentence investigation report ("PSI") did not indicate which of his prior convictions served as predicates for the ACCA and career offender enhancements, it noted that he had five prior Florida convictions for robbery and one

prior Florida conviction for obstructing or opposing an officer with violence. The PSI stated that Mr. Cottman committed: (1) one robbery on March 26, 1986; (2) one robbery on March 29, 1986; (3) two robberies on April 16, 1986; and (4) one robbery and one obstructing-an-officer-with-violence offense on February 28, 1996.

Mr. Cottman filed a 28 U.S.C. § 2255 motion to vacate his sentence in June 2016 based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). He argued that *Johnson* rendered invalid both is career offender and ACCA enhancements. The district court denied Mr. Cottman's § 2255 motion. The court concluded that Mr. Cottman's career offender claim was foreclosed by the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), holding that the advisory guidelines cannot be void for vagueness, and this Court's decision in *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016), holding that the formerly mandatory guidelines—under which Mr. Cottman was sentenced—cannot be void for vagueness. And, because Mr. Cottman couldn't rely on *Johnson* to obtain relief from his career offender sentence, the district court concluded that this aspect of his § 2255 motion was untimely because it should have been brought within a year of his conviction and sentence being final.

The district court also concluded that Mr. Cottman's ACCA claim was foreclosed by precedent. In *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), *cert denied*, 137 S. Ct. 2264 (2017), this Court held that Florida robbery qualified as a violent felony under ACCA notwithstanding *Johnson*. And his conviction for resisting an officer with violence also qualified notwithstanding *Johnson*. *United States v. Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015). Because Mr. Cottman indisputably committed at least three "violent felonies" on separate occasions, his ACCA enhancement was valid under *Fritts*. The district court denied Mr. Cottman a certificate of appealability ("COA").

Mr. Cottman now moves this Court for a COA. 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) (quotations omitted). When reviewing a district court's denial of a § 2255 motion, this Court reviews "findings of fact for clear error and questions of law *de novo*." *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009). When the district court denied the movant's claims in part on procedural grounds, the movant must demonstrate that reasonable jurists would find debatable (1) whether the motion states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484.

Jurists of reason could not debate the district court's rejection of Mr. Cottman's claim that his ACC-enhanced sentence was invalid because his prior Florida convictions no longer qualified as predicate offenses post-*Johnson*. In *United States v. Fritts*, this Court held that Florida robbery qualifies as a violent felony notwithstanding *Johnson*. 841 F.3d at 938. Mr. Cottman argues that *Fritts* was wrongly decided, but it binds us unless and until it is overruled by this Court sitting en banc or the Supreme Court. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). It is indisputable that Mr. Cottman committed robberies on separate occasions in March 1986, April 1986, and February 1996. Thus, the district court clearly was correct when it concluded that he has three predicates for an ACCA-enhanced sentence.

Nor could jurists of reason debate the correctness of the district court's rejection of Mr. Cottman's career offender claim. Mr. Cottman's convictions and sentence became final on July

14, 2003,[1] which was ten days after the district court entered its judgment in Mr. Cottman's criminal proceedings. *Mederos*, 218 F.3d at 1253; Fed. R. App. P. 4(b)(1)(A)(i) (2005).[2] Mr. Cottman then had until July 15, 2004, to file a timely § 2255 motion. 28 U.S.C. § 2255(f). However, Mr. Cottman failed to file the instant § 2255 motion until June 2016, which was almost 12 years after the § 2255(f)(1) limitations period had run. Section 2255(f)(3) permits Mr. Cottman to make a claim based on *Johnson*,[3] but the Supreme Court and this Court have held that *Johnson* does not apply to career offender claims such as Mr. Cottman's. *Beckles v. United States*, 137 S. Ct. 886 (2017); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016). Thus, he cannot rely on § 2255(f)(3) to restart his limitations period, and, as the district court concluded, his challenge to his career offender status was untimely. *See Zack v. Tucker*, 704 F.3d 917, 918, 921–26 (11th Cir. 2013) (en banc) (explaining that AEDPA's statute of limitations "requires a claim-by-claim approach to determine timeliness.").[4]

Accordingly, because reasonable jurists would not debate the district court's denial of Mr. Cottman's § 2255 motion, his motion for a COA is DENIED. 28 U.S.C. § 2253(c)(2); *Slack*, 529 U.S. at 484.

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[1] The ten-day period for filing a timely notice of appeal expired on Saturday, July 12, 2003. Thus, Mr. Cottman had until the following Monday, July 14, 2003, to file a timely notice of appeal.

[2] The Federal Rules of Appellate Procedure were amended in 2009 to increase the time to file a direct appeal in a criminal proceeding to 14 days. Fed. R. App. P. 4(b)(1)(A)(i) (2009).

[3] That section permits the limitations period to begin to run from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

[4] Mr. Cottman argues that *Griffin* only applies in the second or successive context, but this Court recently rejected that assertion. *See Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017).

UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LESLEY WILLIAM COTTMAN

Petitioner,

v.

CASE NO. 8:16-cv-1575-T-24TBM
8:02-cr-397-T-24TBM

UNITED STATES OF AMERICA,

_____/

ORDER

This case is before the Court on Petitioner Lesley William Cottman's Motion to Vacate pursuant to 28 U.S.C. § 2255 (Civ. Doc. 1), Supporting Memorandum (Civ. Doc. 2), and Supplemental Memorandum pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015) (Civ. Doc. 13). The United States filed a response to the § 2255 motion (Civ. Doc. 16), to which Petitioner filed a reply (Civ. Doc. 17). After due consideration, the Court finds that an evidentiary hearing is not necessary, and Petitioner's motion should be denied.

I. Background

Petitioner pled guilty to conspiracy to distribute and possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. § 846 and § 841(b)(1)(A)(ii) (count one), possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A) (count two), and felon in possession of a

firearm in violation of 18 U.S.C. § 922(g) and § 924(e)(1) (count four). On July 1, 2003, the Court sentenced Petitioner as a career offender and an armed career criminal to a term of imprisonment of 262 months on counts one and four of the indictment, followed by 60 months on count two, for a total sentence of 322 months.[1] Petitioner did not appeal.

II. Discussion

Petitioner argues that his sentence as an armed career criminal and career offender was imposed in violation of the Constitution and laws of the United States and should be vacated. His claim is based on *Johnson*, in which the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague, a decision that was made retroactive on collateral review by the Supreme Court in *Welch v. United States*, 136 S. Ct. 1257 (2016). Petitioner submits that the Florida offenses of resisting arrest with violence and robbery, which served as predicate offenses for his classification as an armed career offender and career criminal, no longer qualify as "violent felonies" and his armed career criminal and career offender sentences must be vacated.

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[1]The Pre-sentence Investigation Report ("PSR") recommended that Petitioner be treated as an armed career criminal under the Armed Career Criminal Act, as well as a career offender under the sentencing guidelines. Petitioner's PSR stated he had five prior robbery convictions and one prior conviction for obstructing or opposing an officer with violence. (Two of the robberies were committed on the same day, Case No. 86-8429X, and one of the robberies and the obstruction were committed on the same day, Case No. 93-3030.)

A. Career Offender

The United States argues that Petitioner's challenge to his career offender designation is untimely and foreclosed by the Supreme Court's decision in *Bĕckles v. United States*, 137 S. Ct. 886 (2017). The Court agrees. *Beckles* held that the United States Sentencing Guidelines' residual clause remains valid after *Johnson* because the advisory Sentencing Guidelines, unlike the ACCA, "are not subject to a vagueness challenge under the Due process Clause" and that § 4B1.2(a)(2)'s residual clause is not void for vagueness. *Id.* at 892. Therefore, Petitioner's claim is untimely under § 2255(f)(1). His conviction became final years ago, and since *Johnson* does not apply to Petitioner's career offender sentence, § 2255(f)(3) does not apply to extend the time for filing a § 2255 motion.

Petitioner tries to distinguish his case from *Beckles* when he argues in his reply that he was sentenced under the mandatory sentencing guidelines rather than the advisory guidelines and thus *Beckles* is not binding. However, Petitioner acknowledges that the Eleventh Circuit case of *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016), recognizes that the logic and principles in *Matchett* also govern guideline sentences when the Guidelines were mandatory. *See U.S. v. Matchett*, 802 F.3d 1185, 1193–96 (11th Cir. 2015). Petitioner simply argues in his reply that *In re Griffin* was wrongly decided. Petitioner's career offender challenge is dismissed as untimely.

B. Armed Career Criminal Act

At sentencing, the Court found Petitioner was an armed career offender based on four previous robbery convictions. Pursuant to § 924(e)(1), a defendant is an armed career offender under the ACCA and subject to an enhanced sentence if he violates section 18 U.S.C. § 922(g) and has at least three prior felony convictions of either a crime of violence or a serious drug offense committed on occasions different from one another. Petitioner, while recognizing that the binding precedent in the Eleventh Circuit holds that a conviction for Florida robbery categorically qualifies as a "violent felony," argues that after *Johnson,* his prior convictions for robbery no longer qualify as violent felonies under the ACCA, and therefore, his sentence as an armed career criminal should be vacated and set aside.

In response, the Government argues that Petitioner has at least four prior felony convictions that satisfy the ACCA after *Johnson*. He has four Florida robbery convictions committed on separate occasions, all of which categorically satisfy the elements clause of the ACCA. In addition, the Government argues that Petitioner's prior Florida conviction for obstructing or opposing an officer with violence is a crime of violence for purposes of the ACCA. The Court agrees.

The Eleventh Circuit has determined that a robbery conviction under Florida Statute § 812.13 has as an element the use, attempted use, or threatened use of physical force against another person. *United States v. Lockley,* 632 F.3d 1238, 1245 (11th Cir.

2011); *United States v. Fritts,* 841 F.3d 937, 941–42 (11th Cir. 2016); *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016). Thus, a conviction under Florida Statute § 812.13 satisfies the ACCA's elements clause.

Petitioner has the following four Florida state court robbery convictions committed on separate occasions: Case No. 86-7581X, Case No. 868429X, Case No. 86-11308, and Case No. 96-3030. It makes no difference that Petitioner committed the robberies before 1997. *See Fritts,* 841 F.3d at 942–44. Petitioner's previous robbery convictions are violent felonies under 18 U. S. C. §924(e)(2)(B)(i) (the elements clause).

Petitioner's prior conviction for obstructing or opposing an officer with violence in violation of Florida Statute § 843.01 (Case No. 96-3030) is also a violent felony under the elements clause. *United States v. Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015)(stating "that a prior conviction for resisting an officer with violence categorically qualifies as a violent felony under the elements clause of the ACCA"). However, because the obstructing or opposing an officer with violence was committed on the same occasion as one of Petitioner's robberies, it cannot be counted separately. Petitioner's claim that he is no longer an armed career criminal after *Johnson* is denied.

III. Conclusion

Petitioner has at least three prior violent felony convictions that satisfy the ACCA after *Johnson*. In addition, *Johnson's* void for vagueness holding as to the ACCA's residual clause does not extend to the United States Sentencing Guidelines and the career

offender classification. Therefore, for the reasons stated above, Petitioner's claim that his sentence should be vacated because it was imposed in violation of the Constitution and the laws of the United States is denied.

The Court recognizes that the Government has also argued that Petitioner has procedurally defaulted his claim. However, as stated above, Petitioner is not entitled to relief based on the merits of his claims, and therefore, the Court will not address the procedural default argument.

ACCORDINGLY, for the reasons expressed, it is **ORDERED AND ADJUDGED** that:

(1) Petitioner's Motion to Vacate (CV-Doc. 1; CR-Doc. 64) is **DENIED**.

(2) The Clerk is directed to enter judgment for the United States in the civil case and then to **CLOSE** the civil case.

CERTIFICATE OF APPEALABILITY DENIED

Petitioner is not entitled to a certificate of appealability. He has not shown that reasonable jurists would debate that he has made a substantial showing of the denial of a constitutional right. 28 U.S.C.§ 2253(c)(2). *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the same reason, he is not entitled to appeal *in forma pauperis*.

DONE AND ORDERED at Tampa, Florida, on May 3, 2017.

Susan C. Bucklew

SUSAN C. BUCKLEW
United States District Judge

Copies to: Counsel of Record