

No. _____

IN THE
Supreme Court of the United States

ALEXANDER JOSE JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The broad question presented by this case is whether the Eleventh Circuit Court of Appeals erroneously denied Mr. Jones a certificate of appealability (“COA”) on the following two issues: (1) whether the district court erred in holding that Mr. Jones was procedurally barred from challenging his Armed Career Criminal Act (ACCA) sentence based on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*); and (2) whether Mr. Jones was unconstitutionally sentenced above the statutory maximum for his offense of possession of a firearm by a convicted felon.

More specifically, the narrow question presented is whether reasonable jurists can, at a minimum, debate the issues of whether Florida convictions for robbery, aggravated assault, and resisting with violence qualify as “violent felon[ies]” under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).

Additionally, Mr. Jones seeks this Court’s review of whether the Eleventh Circuit’s rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a COA.

LIST OF PARTIES

Petitioner, Alexander Jose Jones, 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

Alexander Jose Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Jones' application for a COA in Appeal No. 17-11969 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Jones' case under 18 U.S.C. § 3231. The district court denied Mr. Jones' 28 U.S.C. § 2255 motion on March 1, 2017. Mr. Jones subsequently filed a notice of appeal and application for a COA in the Eleventh Circuit, which was denied on October 26, 2017. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

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

In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(1).

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

[A]ny crime punishable by imprisonment for a term exceeding one year . . . that

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another

18 U.S.C. § 924(e)(2)(B).

The Antiterrorism and Effective Death Penalty Act of 1996 provides, in pertinent part:

- (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.

28 U.S.C. § 2253(c).

At the time of Mr. Jones’ robbery conviction, the Florida robbery statute provided, in relevant part:

“Robbery” means the taking of money or other property which may be the subject of larceny from the person or custody of another, 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.

Fla. Stat. § 812.13(1) (1996).

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

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

Fla. Stat. § 843.01 (2009).

At the time of Mr. Jones’ aggravated assault conviction, Florida defined an “assault” as:

[A]n 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 (1995). In turn, Florida defined an “aggravated assault” as either: (1) an “assault” “with a deadly weapon” but “without [the] intent to kill”; or (2) an “assault” with the “intent to commit a felony.” Fla. Stat § 784.021 (1995).

STATEMENT OF THE CASE

Mr. Jones was convicted of possession of a firearm by a convicted felon, and on December 15, 2014, he was sentenced under the ACCA to 180 months' imprisonment. At sentencing the district court found that Mr. Jones had the following prior Florida convictions that qualified as ACCA predicate offenses:

Description	Sentencing Date
Aggravated Assault	May 4, 1995
Robbery	January 25, 1996
Possession of Cocaine with Intent to Sell or Deliver	September 22, 2004
Possession of Cocaine with Intent to Sell ¹	September 14, 2006
Battery on a Law Enforcement Officer (two counts) and Obstructing or Opposing an Officer with Violence ²	March 30, 2009
Fleeing and Attempting to Elude ³	October 3, 2013

Mr. Jones did not appeal his conviction or sentence.

In September 2015, Mr. Jones filed a motion to vacate his sentence under § 2255. Subsequently, counsel was appointed to represent Mr. Jones, and an amended § 2255 motion was filed asserting one claim—that after *Johnson II*, his sentence was unconstitutional. Mr. Jones acknowledged that his two drug convictions continued to qualify as ACCA predicate offenses, but maintained that after *Johnson II*, his remaining convictions were not “violent felon[ies]” under the

¹ Mr. Jones is not challenging the use of his two drug convictions as ACCA predicate offenses.

² At sentencing, the Government argued that although Mr. Jones' convictions for battery on a law enforcement officer and obstructing or opposing an officer with violence were each “violent felonies,” the three convictions could only qualify as a single predicate offense because all three were committed on the same occasion. The government concedes that Mr. Jones' convictions for battery on a law enforcement no longer qualify as ACCA predicate offense, so these convictions need not be addressed.

³ The government also concedes that Mr. Jones' conviction for fleeing and eluding no longer qualifies as an ACCA predicate offense, so this conviction need not be addressed.

ACCA's elements clause, and he therefore did not have the three predicate offenses necessary to sustain his ACCA sentence.⁴

After Mr. Jones filed his memorandum, this Eleventh Circuit decided *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), holding that the offense of Florida robbery categorically qualifies as a "violent felony" under the ACCA's elements clause, regardless of when the conviction was imposed.

In January 2017, the government responded to Mr. Jones' § 2255 motion, arguing that Mr. Jones procedurally defaulted his *Johnson II* claim, and that, on the merits, his ACCA sentence still remains valid because, in addition to his two drug convictions, his convictions for robbery, resisting with violence, and aggravated assault qualify as "violent felonies" under the ACCA's elements clause.⁵

Mr. Jones replied, stating that he recognized that *Fritts* was binding on the district court and the district court was therefore required to deny his motion, but for the purposes of further review, Mr. Jones maintained *Fritts* was incorrectly decided.⁶ Regarding the government's procedural default argument, Mr. Jones asserted that assuming *arguendo* he has procedurally defaulted his claim, he can show cause for and prejudice from the default.

⁴ The other definitions of "violent felony" are inapplicable here. Neither robbery, resisting with violence, nor aggravated assault are enumerated in § 924(e)(2)(B)(ii), and the residual clause of that subsection has been found to be unconstitutionally void for vagueness. *Johnson II*, 135 S. Ct. at 2557. Mr. Jones' prior convictions qualify as ACCA predicates, if at all, only under the so-called "elements clause."

⁵ The government, however, conceded that Mr. Jones' convictions for battery on a law enforcement officer and fleeing and attempting to elude no longer qualify as predicate offenses.

⁶ Mr. Jones also continued to maintain his convictions for aggravated assault and resisting with violence were no longer ACCA predicate offenses.

The district court denied Mr. Jones' § 2255 motion on March 1, 2017, holding that he procedurally defaulted his *Johnson II* claim. Specifically, the district court found that Mr. Jones could not establish prejudice to meet the cause and prejudice exception for defaulted claims because Mr. Jones continued to have five prior convictions that qualified as "violent felonies."⁷ The district court also denied Mr. Jones a COA. On April 28, 2017, Mr. Jones filed a timely notice of appeal.

On May 5, 2017, Mr. Jones filed an application with the Eleventh Circuit, requesting a COA on the issues of whether his *Johnson II* claim was procedurally defaulted and whether it was meritorious. On October 26, 2017, the Eleventh Circuit denied Mr. Jones' application. The court stated that under binding Eleventh Circuit precedent, "No COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." Appendix A. Because the Eleventh Circuit had previously held that Florida convictions for robbery, resisting with violence, and aggravated assault qualified as "violent felon[ies]" under the ACCA's elements clause, the Eleventh Circuit found that reasonable jurists would not debate the district court's conclusion that Mr. Jones could not show the required prejudice to be excepted from the procedural default rule. *Id.*

⁷ The district court found it debatable whether Mr. Jones showed cause for the default, but assumed that he did.

REASONS FOR GRANTING THE WRIT

I. The Ninth and Eleventh Circuits' Disagreement About Whether a Florida Conviction for Robbery Qualifies as a "Violent Felony" under the ACCA's Elements Clause Shows that Reasonable Jurists Can Debate the Issue.

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 be 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;⁸ (2) engages in a tug-of-war over a purse;⁹ (3) pushes someone;¹⁰ (4) shakes someone;¹¹ (5) struggles to escape someone's grasp;¹²

⁸ *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001).

⁹ *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011).

¹⁰ *Rumph v. State*, 544 So. 2d 1150, 1151 (Fla. 5th DCA 1989).

¹¹ *Montsdoca v. State*, 93 So. 157, 159–160 (Fla. 1922).

¹² *Colby 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 qualify as a robbery under the current robbery statute, which is at issue in this case. *See Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) ("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).

(6) peels back someone’s fingers;¹³ or (7) pulls a scab off someone’s finger.¹⁴ 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).¹⁵

The Ninth Circuit recently recognized this in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), 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. 870 F.3d at 898–901.¹⁶ In so holding, the Ninth Circuit relied on 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

¹³ *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th DCA 2000).

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

¹⁵ In *Santiago*, the defendant reached into a car and pulled two gold necklaces from around the victim’s neck, causing a few scratch marks and some redness around her neck. *Santiago*, 497 So. 2d at 976.

¹⁶ 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 firearm” during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. 870 F.3d at 898–901; 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 *United States v. Parnell*, 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).

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,¹⁷ and several others have adopted it through case law.¹⁸ Since this Court struck down the ACCA 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.¹⁹ 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 v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*) (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.*

¹⁷ 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).

¹⁸ 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).

¹⁹ See *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016); *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 at 978 (9th Cir. 2016); *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).

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.*

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 a Florida conviction for robbery qualifies as a “violent felony” 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.

II. The Tenth and Eleventh Circuits’ Disagreement About Whether a Florida Conviction for Resisting with Violence Qualifies as a “Violent Felony” under the ACCA’s Elements Clause Shows that Reasonable Jurists Can Debate the Issue.

Section 843.01 provides: “Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . in the lawful execution of any legal duty, by offering or doing violence to the person of such officer” commits a felony of the third degree. Similar to the analysis above, the question here is whether § 843.01 categorically requires “violent force” or “strong physical force” as an element of conviction. It does not. The lead case is *I.N. Johnson v. State*, 50 So. 529 (Fla. 1909), where the defendant was charged with the offense of “knowingly and willfully resisting, obstructing or opposing the execution of legal process, by offering or doing violence” to an officer.

Id. at 529.²⁰ The charging document alleged “a knowing and willful resistance . . . by gripping the hand of the officer and forcibly preventing him from opening the door of the room . . . thereby obstructing the officer in entering the room to make the arrest.” *Id.* at 529-30. The Florida Supreme Court found that this allegation met the “violence” element of the statute:

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

Id. at 530.

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

The Florida Supreme Court’s decision in *I.N. Johnson* has not been abrogated or overruled. It thus remains good law, and must be followed when determining the least culpable conduct that satisfies the elements of a § 843.01 offense. “Sentencing courts . . . are bound to follow any state court decisions that define or interpret the statute’s substantive elements because state law is what the state supreme court says it is.” *United States v. Howard*, 742 F.3d 1334, 1346 (11th Cir. 2014). “Neither this Court nor any other federal tribunal has any authority to place a construction

²⁰ The charge was brought under Section 3500 of the General Statutes of 1906, a predecessor to today’s § 843.01.

on a state statute different from the one rendered by the highest court of the State.” *Marian Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

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

A “scuffle” with an officer does not require the degree of force needed to be an ACCA predicate any more than does gripping the officer’s hand. For example, in *United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013), the Ninth Circuit considered whether an Arizona statute that criminalizes “resisting arrest” and requires use or threatened use of physical force

against an officer constituted a crime of violence under USSG § 2L1.2. *Id.* at 1087.²¹ The *Flores-Cordero* court noted a decision of the Arizona court of appeals that held a defendant’s “struggle to keep from being handcuffed” and “kick[ing] the officers trying to control her” constituted conduct within the scope of the resisting arrest statute “because some physical force was used.” 723 F.3d at 1087-88 (citing *State v. Lee*, 176 P.3d 712 (Ariz. Ct. App. 2008)). Thus, the Ninth Circuit determined, “[u]nder prevailing Arizona law, the use of minimal force is sufficient to constitute ‘resisting arrest.’” *Id.* Because the state appellate court did not require that defendant’s conduct – “instigating a scuffle with officers” – necessarily involve force capable of inflicting pain or causing injury as contemplated by *Johnson I*, the Arizona conviction for resisting arrest was not categorically a crime of violence within the meaning of federal law. *Id.* at 1088.

Mr. Jones recognizes that the Eleventh Circuit has held that resisting an officer with violence under § 843.01 is an ACCA “violent felony,” but he respectfully maintains that the court erred in so deciding. *United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012); *United States v. Hill*, 799 F.3d 1318, 1322–23 (11th Cir. 2015). In neither case did the Eleventh Circuit make any mention of the Florida Supreme Court’s 1909 decision in *I.N. Johnson*, which is controlling as to the elements of the state crime. Also, in *Romo-Villalobos*, the Eleventh Circuit discounted *Green*’s “wiggling and struggling” language, 400 So. 2d at 1323–24, based upon the procedural posture of that case. However, by doing that, the Eleventh Circuit failed to consider

²¹ USSG § 2L1.2’s definition of a “crime of violence” contains an elements clause that is identical to that found in the ACCA. Compare USSG § 2L1.2, comment. (n.2) with § 924(e)(2)(B)(1). Cases construing the guidelines’ elements clause are thus relevant to cases addressing the ACCA’s elements clause. *United States v. Green*, 873 F.3d 846, 869 (11th Cir. 2017).

“the least of the acts criminalized” when conducting its analysis. See *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). Discussing *Green*, another circuit court has explained:

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

United States v. Lee, 701 F. App’x 697, 700 & n.1 (10th Cir. 2017).²² The Tenth Circuit, which did discuss and take into account the Florida Supreme Court’s decision in *I.N. Johnson*, *Id.* at 699, unambiguously found that a conviction under § 843.01 is not an ACCA predicate. *Id.* at 701 (“Having compared the minimum culpable conduct criminalized by § 843.01 to similar forcible conduct deemed not to involve *violent* force, we conclude that a conviction under § 843.01 does not qualify as an ACCA predicate”); *id.* (“[W]e hold that a conviction under § 843.01 does not qualify as an ACCA predicate”). The analysis in *Lee*, which takes into account all of the pertinent

²² In *Hill*, the Eleventh Circuit found that § 843.01 qualified as a violent felony because “Florida’s intermediary courts have held that violence is a necessary element of the offense.” 799 F.3d at 1322 (citing *Rawlings v. State*, 976 So.2d 1179, 1181 (Fla. 5th DCA 2008); and *Walker v. State*, 965 So.2d 1281, 1284 (Fla. 2d DCA 2007) (both cases are also cited in *Romo-Villalobos*, 674 F.3d at 1249). Neither *Rawlings* nor *Walker*, though, discussed the “minimum conduct criminalized by the state statute,” *Moncrieffe*, 569 U.S. at 191, that is, the minimum amount of force needed to qualify as “violence” under § 843.01. Those courts’ observations that “violence” is an element of a § 843.01 offense thus do not address the quantum of force needed to constitute “violence” in the § 843.01 context. The answer to what constitutes the minimum amount of force needed is found in the Florida Supreme Court’s decision in *I.N. Johnson* – the “violence” element of § 843.01 is satisfied by the mere use of unlawful force.

Florida and United States Supreme Court case law, is compelling, and Mr. Jones respectfully maintains that, at a minimum, reasonable jurists can debate whether a Florida conviction for resisting with violence qualifies as a “violent felony” under the ACCA’s elements clause.

III. The Internal Disagreement within the Eleventh Circuit about Whether a Florida Conviction for Aggravated Assault Qualifies as a “Violent Felony” under the ACCA’s Elements Clause Shows that Reasonable Jurists Can Debate the Issue.

Mr. Jones acknowledges that *Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1337–38 & n.6 (11th Cir. 2013), held that aggravated assault in violation of Fla. Stat. § 784.021 is a “violent felony” under the ACCA’s elements clause, and that the Eleventh Circuit recently reaffirmed *Turner*’s binding effect in *United States v. Golden*, 854 F.3d 1256, 1256–57 (11th Cir. 2017). However, the *Golden* Court noted that although *Turner* remained binding, “some members of our court have questioned the continuing validity of *Turner* in light of cases like *Descamps v. United States*, 133 S. Ct. 2276 (2013).” *Id.*

Perhaps the most compelling evidence that reasonable jurists can debate whether aggravated assault meets the elements clause in light of such precedent is the well-reasoned concurring opinion in *Golden*, which urged the Eleventh Circuit to revisit *Turner* by rehearing *Golden* en banc. *Id.* at 1257–60 (Jill Pryor, J. concurring).

Golden’s concurring opinion explains that *Turner* was incorrectly decided because it failed to consider the least of the acts criminalized by the aggravated assault statute. *Id.* Although the *Turner* Court applied a categorical approach, the Eleventh Circuit assumed the aggravated assault statute requires an *intentional* act—the mens rea required by the elements clause—without consulting Florida caselaw. *Id.* (citing *United States v. Palomino Garcia*, 606 F.3d 1317, 1334–36 (11th Cir. 2010)). Florida caselaw would have revealed that aggravated assault may be committed with a *mens rea* of “culpable negligence,” which is akin to recklessness. *Id.* (citing

LaValley v. State, 633 So. 2d 1126 (Fla. 5th DCA 1995); *Kelly v. State*, 552 So. 2d 206 (Fla. 5th DCA 1989)); *see also Green v. State*, 315 So. 2d 499 (4th DCA 1975); *DuPree v. State*, 310 So. 2d 396 (Fla. 2nd DCA 1975); *see generally United States v. Garcia-Perez*, 779 F.3d 278, 285 (5th Cir. 2015) (equating Florida’s “culpable negligence” standard with “recklessness”). And, as held by *United States v. Rosales-Bruno*, 676 F.3d 1017 (11th Cir. 2012), and confirmed by *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Eleventh Circuit is bound by Florida courts’ rulings on substantive elements of a state offense in determining whether the offense qualifies as a violent felony. *Id.* The *Golden* concurrence thus concludes:

Had *Turner* looked to the elements of aggravated assault under Florida law as interpreted by Florida courts, **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 . . . **Circuit law should not compel district courts to continue applying *Turner* now that the Supreme Court has revealed the error of *Turner*’s approach.** Although I am bound to concur in the judgment in this case, I believe we as a full court should use [this case] as an opportunity to overrule *Turner* and square our precedent with our own earlier precedents, Florida law, and the Supreme Court’s recent decisions.

Id. (emphasis added).

Clearly, at least one member of the Eleventh Circuit believes that Florida aggravated assault does not qualify as a “violent felony” under the elements clause. Moreover, this jurist suggests that if the issue is revisited en banc with full consideration of Supreme Court precedent, *Turner* may be overruled. Therefore, reasonable jurists can at least debate whether Mr. Jones’ aggravated assault conviction continue to qualify as an ACCA predicate offense and accordingly, whether he was erroneously sentenced above the statutory maximum.

IV. The Eleventh Circuit’s rule that a COA may not be granted where binding circuit precedent forecloses a claim erroneously applies the COA standard articulated by this Court in *Miller-El* and *Buck*.

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). “Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.” *Buck*, 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). “At the COA stage, the only question is whether the applicant has shown that ‘jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.’” *Id.* (quoting *Miller-El*, 537 U.S. at 327). “This threshold question should be decided without ‘full consideration of the factual or legal bases adduced in support of the claims.’” *Id.* (quoting *Miller-El*, 537 U.S. at 336). “When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.” *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule effectively requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit’s rule, COAs may not be granted where binding circuit precedent forecloses a claim. *See Hamilton v. Sec’y, Dep’t of Corr*, 793 F.3d 1261 (11th Cir. 2015) (“[R]easonable jurists will follow controlling law.”); *see also Tompkins v. Sec’y, Dep’t of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec’y, Dep’t of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005).

To be sure, the Eleventh Circuit framed its decision in Mr. Jones’ case using the proper terms—that reasonable jurists would not debate whether Mr. Jones is entitled to relief—but reached its conclusion by essentially deciding the case on the merits, that he would be unsuccessful

on appeal because there is binding circuit precedent on whether Florida convictions for robbery, resisting with violence, and aggravated assault qualify as “violent felon[ies]” under the ACCA’s elements clause. *See Buck*, 137 S. Ct. at 773; Appendix A. The Eleventh Circuit’s rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

[W]hen a court of appeals properly applies the COA standard and determines that a prisoner’s claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and “first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,” it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El*, 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Buck, 137 S. Ct. at 774.

Indeed, as this Court stated in *Miller–El*, “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” 537 U.S. at 338. A COA should be denied only where the district court’s conclusion is “beyond all debate.” *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). Here, we know that is not the case, particularly because both other circuit courts and members of the Eleventh Circuit have arrived at different conclusions on these issues.

Because the Eleventh Circuit’s rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled to relief, Mr. Jones respectfully requests that this Court grant this petition to review the Eleventh Circuit’s erroneous application of the COA standard.

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11969-D

ALEXANDER JOSE JONES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Alexander Jones, a federal prisoner, pled guilty to possession of a firearm by a convicted felon and was sentenced to 180-months imprisonment under the Armed Career Criminal Act ("ACCA"). At sentencing, the District Court found that Mr. Jones had several prior Florida convictions that qualified as ACCA predicate offenses, including (1) aggravated assault, in violation of Fla. Stat. § 784.021; (2) robbery, in violation of Fla. Stat. § 812.13; (3) two counts of possession of cocaine with intent to sell or deliver, in violation of Fla. Stat.

§ 893.13; and (4) obstructing an officer with violence, in violation of Fla. Stat.

§ 843.01. Mr. Jones did not appeal his conviction or sentence.

In September 2015, Mr. Jones filed this 28 U.S.C. § 2255 motion to vacate, and counsel was appointed to represent him. Counsel subsequently filed an amended § 2255 motion, asserting that Mr. Jones's ACCA conviction and sentence were unconstitutional in light of Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015). In his motion, Mr. Jones acknowledged that his two Florida cocaine convictions continued to qualify as ACCA predicate offenses, but maintained that his remaining convictions were no longer ACCA predicates. He argued that as a result, he did not have the three predicate offenses necessary to sustain his ACCA sentence. In January 2017, the government responded, arguing that Mr. Jones's Johnson claim was procedurally defaulted because he failed to raise it on direct appeal. The government also argued that his ACCA sentence remained valid in any case, because all of Mr. Jones's Florida convictions continued to qualify as ACCA predicates.

The District Court first noted that Mr. Jones had not advanced his Johnson claim on direct appeal. Therefore, unless Mr. Jones showed cause and prejudice, his Johnson claim was procedurally defaulted. The court determined that because Johnson was decided after Mr. Jones's conviction became final, Mr. Jones had made a sufficient showing of cause. But the court also determined that Mr. Jones

had failed to make a showing of actual prejudice because he had at least five prior Florida convictions that qualified as ACCA predicates.

The District Court concluded that Mr. Jones's convictions for aggravated assault, obstructing and opposing an officer with violence, possession of cocaine with intent to sell, and robbery all qualified as ACCA predicates after Johnson. First, the District Court noted that this Court's holdings in United States v. Hill, 799 F.3d 1318 (11th Cir. 2015) and United States v. Romo-Villalobos, 674 F.3d 1246 (11th Cir.2012), interpret Fla. Stat. 843.01 (obstructing an officer with violence) to require the offender to use physical force against the person of another. Therefore that offense qualified as an ACCA predicate under the statute's elements clause, which was unaffected by the Johnson decision. The District Court also found that Mr. Jones's Florida robbery and aggravated assault convictions likewise qualified as ACCA predicates under the statute's elements clause, due to this Court's holdings in United States v. Fritts, 841 F.3d 937, 944 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017) (concluding that Florida armed robbery conviction under § 812.13 categorically qualifies as a "violent felony" under the ACCA's elements clause), and Turner v. Warden Coleman FCI, 709 F.3d 1328, 1338 (11th Cir. 2013) (concluding that Florida aggravated assault under § 784.021 qualifies as a violent felony for purposes of the ACCA).

Finally, the District Court noted that Jones's convictions for possession of cocaine with intent to sell were "serious drug offenses" under the ACCA, and therefore continued to qualify as ACCA predicates, because Johnson's void for vagueness analysis was limited to the ACCA's residual clause. The court ultimately found that Mr. Jones's Johnson claim was procedurally defaulted and denied Mr. Jones's § 2255 motion. The court also denied Mr. Jones a certificate of appealability ("COA") in the same order.

Mr. Jones appealed the District Court's denial of his § 2255 motion. He then moved for leave to appeal in forma pauperis ("IFP"), which the District Court granted. He now seeks a COA from this Court.

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). Where the District Court has denied a habeas motion on the merits, the prisoner must demonstrate that "reasonable jurists would find the [D]istrict [C]ourt's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). No COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law. Gordon v. Sec'y, Dep't of Corr., 479 F.3d 1299, 1300 (11th Cir. 2007).

"Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the

defendant is barred from presenting that claim in a § 2255 proceeding.” McKay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011) (quotation omitted). A procedural default may be excused, however, if the movant establishes (1) “cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error,” or (2) a fundamental miscarriage of justice, which means actual innocence. See id. (quotation and emphasis omitted)

Under the ACCA, any person who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense is subject to a mandatory minimum sentence of fifteen years imprisonment. 18 U.S.C. § 924(e)(1). The ACCA defines the term “violent felony” as any crime punishable by a term of imprisonment exceeding one year that:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the “elements clause,” while the second prong contains the “enumerated crimes” and, finally, what is commonly called the “residual clause.” United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012). The statutory definition of “serious drug offense” includes:

an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law . . .

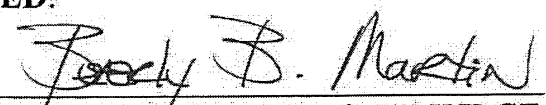
18 U.S.C. § 924(e)(2)(A) (ii). Both violent felonies and serious drug offenses qualify as ACCA predicates. Id.

On June 26, 2015, the Supreme Court held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. Johnson, 135 S. Ct. at 2557–58, 2563. The Supreme Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause, the enumerated crimes of the ACCA’s definition of a violent felony, or the definition of a serious drug offense. Id. at 2563. On April 18, 2016, the Supreme Court held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257, 1265 (2016).

This Court has determined that obstructing and opposing an officer with violence, under Fla. Stat. § 843.01, categorically constitutes a violent felony under the ACCA, Hill, 799 F.3d at 1322; that possession of cocaine with intent to sell under Fla. Stat. § 893.13(1)(a) qualifies as a “serious drug offense” under the ACCA, see United States v. Smith, 775 F.3d 1262, 1268 (11th Cir. 2014); that

Florida aggravated assault categorically qualifies as a violent felony under the ACCA's elements clause, Turner, 709 F.3d at 1340–42; and that Florida robbery qualifies as a violent felony under the ACCA because it categorically satisfies the elements clause of § 924(e), see Fritts, 841 F.3d at 938–43. These cases remain good law post-Johnson, as they analyzed the relevant offenses under either the ACCA's elements clause or the statute's definition of a serious drug offense, neither of which were impacted by Johnson's void for vagueness analysis. See Johnson, 135 S. Ct. at 2557–58, 2563.

Reasonable jurists would not debate the District Court's dismissal of Mr. Jones's § 2255 motion. Even if the Supreme Court's decision in Johnson established cause for Jones's failure to challenge the constitutionality of his ACCA conviction and sentence on direct appeal, he has not demonstrated that he suffered prejudice. Under this Court's precedent, Mr. Jones's Florida convictions for aggravated assault, robbery, possession of cocaine with intent to sell, and obstructing an officer with violence all qualify as ACCA predicate offenses, even post-Johnson. See Fritts, 841 F.3d at 938–43; Turner, 709 F.3d at 1340–42; Hill, 799 F.3d at 1322; Smith, 775 F.3d at 1268. Because reasonable jurists will follow controlling precedent, no COA should issue. Gordon, 479 F.3d at 1300. Mr. Jones's motion for a COA is therefore **DENIED**.


UNITED STATES CIRCUIT JUDGE

Appendix B

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

ALEXANDER JOSE JONES,

Petitioner,

vs.

**Case No. 8:15-cv-2206-T-27TBM
Crim. Case No. 8:14-cr-281-T27TBM**

UNITED STATES OF AMERICA,

Respondent.

_____ /

ORDER

BEFORE THE COURT is Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence and Memorandum in Support (Dkts. 18, 24), the United States' opposition (Dkt.29), and Petitioner's Reply (Dkt. 30). The motion to vacate is DENIED.

The motion raises a single ground for relief:

GROUND ONE: Increasing Mr. Jones' sentence under the Armed Career Criminal Act's residual clause violated due process. See *Johnson v. United States*, 135 S.Ct. 2551 (2015); *Welch v. United States*, 136 S.Ct. 1257 (2016).

(A) The U.S. Supreme Court has declared the Armed Career Criminal Act's residual clause unconstitutionally vague, holding that increasing a defendant's sentence under that clause violates due process. Mr. Jones' sentence was enhanced based in part on prior convictions that can only qualify as ACCA predicates under the residual clause. He thus is not an armed career criminal, and his unconstitutional sentence should be vacated.

Procedural history

Petitioner was charged with possessing 28 grams or more of cocaine base (Count One), possessing a firearm in furtherance of a drug trafficking crime (Count Two), and felon in possession

of firearms (Count Three) (Cr. Dkt. 1). He pleaded guilty to Count Three pursuant to a Plea Agreement (Cr. Dkts. 21, 27), and was sentenced to 180 months as an armed career criminal under 18 U.S.C. § 924(e), followed by supervised release (Cr. Dkt. 40).¹ He did not appeal.

Procedural default

The United States contends that although Petitioner's *Johnson* claim is cognizable, it is procedurally defaulted because he failed to raise it on appeal. Under the procedural default rule, a defendant must raise an available challenge to his conviction or sentence on appeal or he will be barred from raising it in a § 2255 motion. *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004). Where, as here, a cognizable claim has not been raised on appeal, the defendant must either demonstrate cause and prejudice resulting from the claimed violation, or actual factual innocence, to overcome the procedural default. *Id.*

"To show cause, the petitioner must demonstrate 'some objective factor external to the defense' that impeded his effort to raise the claim properly . . ." *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010). Cause can be demonstrated where the legal basis for a claim was not "reasonably available to counsel." *Id.*, quoting *Reed v. Ross*, 468 U.S. 1, 16 (1984). And once cause is established, the petitioner must show actual prejudice from the alleged constitutional violation, or

¹ Section 924(e)(1) provides, in pertinent part:

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,

establish a fundamental miscarriage of justice. *Id.*, citing *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977).

Although Petitioner objected to several of his prior convictions at sentencing, he did not challenge the constitutionality of the ACCA's residual clause or appeal his sentence (Cr. Dkt. 49 at 26-31). His claim is therefore procedurally defaulted, unless he can demonstrate either cause and prejudice or a colorable showing of actual innocence.²

Petitioner contends that he has shown cause for his procedural default because "the legal basis of his claim was unavailable at the time for filing his direct appeal." (Dkt. 30 at 2). A claim is not "reasonably available" if the Supreme Court decision establishing the claim: (1) explicitly overrules Supreme Court precedent; (2) overturns a longstanding and widespread practice to which the Supreme Court has not spoken "but which a near-unanimous body of lower court authority has expressly approved"; or (3) disapproves a practice that the Supreme Court "arguably has sanctioned in prior cases." *Reed*, 468 U.S. at 17. And "[b]y definition, when a case falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a . . . court to adopt the position that [the Supreme Court] has ultimately adopted," and "[c]onsequently, the failure . . . to have pressed such a claim . . . is sufficiently excusable to satisfy the cause requirement." *Id.*

² Petitioner does not rely on the actual innocence exception to the procedural default rule, and rightly so. To show the type of "miscarriage of justice" that will excuse a procedural bar, a petitioner must make "a colorable showing of actual innocence." *Isaacs v. Head*, 300 F.3d 1232, 1255 (11th Cir. 2002), quoting *Bailey v. Nagle*, 172 F.3d 1299, 1306 (11th Cir.1999) (citations and quotations omitted). The actual innocence exception is "exceedingly narrow in scope" and "requires proof of actual innocence, not just legal innocence." *Ward*, 592 F.3d at 1157, quoting *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001), cert. denied, 535 U.S. 926 (2002). And in the federal sentencing context, a petitioner must show that he is *factually* innocent of the conduct or underlying crime that serves as the predicate for an enhanced sentence. *McKay v. United States*, 657 F.3d 1190, 1199 (11th Cir.) ("We thus decline to extend the actual innocence of sentence exception to claims of legal innocence of a predicate offense justifying an enhanced sentence."), cert. denied, 133 S.Ct. 112 (2012). Since Petitioner argues only legal innocence of his armed career criminal enhancement, the "miscarriage of justice" exception to the procedural default rule is inapplicable.

Petitioner contends that his case falls within the first category. He argues that he was indicted in 2014, after the Supreme Court held that the ACCA's residual clause was not unconstitutionally vague in *James v. United States*, 127 S. Ct. 1586 (2007). Petitioner also relies on *Sykes v. United States*, 131 S. Ct. 2267 (2011). According to Petitioner, "*James* remained binding precedent until the Supreme Court overruled it in *Samuel Johnson* in 2015, after Mr. Jones' conviction became final."

Notwithstanding Petitioner's contention, *James* did not expressly address the constitutionality of the ACCA's residual clause, commenting only in a footnote that it was not persuaded that the residual clause was unconstitutionally vague, as urged by the dissent. *Id.* at 210, n 6. In *Sykes*, the Court stepped closer, holding that it was "within congressional power to enact" the residual clause, which "instructs potential recidivists regarding the applicable sentencing regime if they again transgress," and "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.'" *Id.* at 15. And *Johnson* seemingly recognized that neither *James* nor *Sykes* definitively determined the constitutionality of the ACCA's residual clause: "The brief discussions of vagueness in *James* and *Sykes* homed in on the imprecision of the phrase 'serious potential risk'; neither opinion evaluated the uncertainty introduced by the need to evaluate the riskiness of an abstract ordinary case of a crime." *Johnson*, 135 S. Ct. at 2563.

Be that as it may, *Johnson* expressly overruled *James* and *Sykes*, holding that the residual clause of the ACCA is unconstitutionally vague. *Id.* at 2557, 2563 ("We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled.").

And the substantive rule announced in *Johnson* was made retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

While one could reasonably debate whether the “brief discussions of vagueness in *James* and *Sykes*” constitute binding Supreme Court precedent, and whether the decision in *Johnson* was so novel that it would not have been reasonably available to Petitioner on appeal, suffice it to say that Petitioner’s *Johnson* claim involves a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. I will therefore assume, for purposes of the procedural default rule, that Petitioner has made a sufficient showing of cause.

Notwithstanding, he fails to make a showing of actual prejudice. As will be shown, independent of the ACCA’s residual clause, Petitioner has at least five prior convictions qualifying as violent felonies or serious drug offenses under the ACCA. The United States contends therefore, and Petitioner concedes, that his motion to vacate must be denied on the merits.

Merits

Under the ACCR, a defendant who has three or more convictions for a “violent felony” or serious drug offense faces a minimum of fifteen years and a maximum of life in prison. 18 U.S.C. § 924(a)(2). The ACCA defines “violent felony” as:

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*.

Id. at § 924(e)(2)(B) (emphasis added).

And “serious drug offense” means:

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law . . .

Id. at § 924 (e)(2)(ii).

As noted, the residual clause, which defines a “violent felony” as any crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another” was declared unconstitutionally vague in *Johnson*. 135 S.Ct. at 2557-58. As the United States correctly urges, however, the holding in *Johnson* was limited to the residual clause, and has no impact on the “remainder of the [ACCA’s] definitions of a violent felony.” *Id.* at 2563 (“Today’s decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony.”); *United States v. Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015). And *Johnson* has no bearing on the statutory definition of “serious drug offense.” See *United States v. Darling*, 619 Fed. Appx. 877, 880 n. 5(11th Cir. 2015).³

Independent of the ACCA’s residual clause, Petitioner has at least five prior convictions for violent felonies or serious drug offenses under the ACCA. His 2009 conviction for obstructing and opposing an officer with violence under Fla. Stat. § 843.01 (Cr. Dkt. 42, ¶ 42) categorically constitutes a violent felony under the ACCA. *United States v. Hill*, 799 F.3d at 1322-23; *United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012). And he has two prior convictions for possessing cocaine with intent to sell under Fla. Stat. § 893.13(1)(a), (Cr. Dkt. 42, ¶¶ 38, 39), both of which constitute “serious drug offenses” under the ACCA. *United States v. Smith*, 775 F.3d

³ The United States concedes that Petitioner’s prior conviction for fleeing and attempting to elude under Fla. Stat. § 316.1935 (Cr. Dkt. 42, ¶ 45) no longer qualifies as a violent felony under the ACCA. See *United States v. Adams*, 815 F.3d 1291, 1292 n. 3 (11th Cir. 2016). The United States likewise acknowledges that his prior conviction for battery on a law enforcement officer does not categorically qualify as a violent felony under the ACCA’s elements clause, or under a modified categorical approach. (Dkt. 13 at 8); See *United States v. Braun*, 801 F.3d 1301, 1308 (11th Cir. 2015).

1262, 1268 (11th Cir. 2014) (violation of Fla. Stat. § 893.13(1) constitutes a serious drug offense under the ACCA), *cert. denied*, 135 S.Ct. 2827 (2015); Fla. Stat. § 775.082(3)(c) (second degree felony punishable by term of imprisonment not to exceed 15 years).

Moreover, Petitioner's 1996 Florida conviction for aggravated assault with a deadly weapon (Cr. Dkt. 42, ¶ 30) qualifies categorically as a violent felony under the ACCA's elements clause. *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013) (conviction of aggravated assault under Fla. Stat. § 784.021 will always include "as an element the ... threatened use of physical force against the person of another," and therefore qualifies as a violent felony under the ACCA), abrogated on other grounds recognized by *United States v. Hill*, *supra*.. Petitioner acknowledges the holding in *Turner*, but challenges its rationale. Notwithstanding, *Turner*, is binding precedent.

Finally, as Petitioner concedes (Dkt. 30 at 2), his 1995 Florida robbery conviction (Cr.Dkt. 42, ¶ 31) under Fla. Stat. § 812.13 likewise qualifies as a violent felony under the ACCA because it categorically satisfies the elements clause of § 924(e). *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016); *See United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011); *In Re Robinson*, 2016 WL 1583616, at * 1 (11th Cir. Apr. 19, 2016); *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) (Florida armed robbery is "undeniably" conviction for a violent felony under ACCA); *United States v. Jenkins*, 2016 WL 310281, at * 5 (11th Cir. June 3, 2016).

For these reasons, Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (Dkt. 18) is **DENIED**. The Clerk is directed to close this case.

Certificate of Appealability

A certificate of appealability ("COA") under Rule 22, Fed. R. App. P.⁴ and 28 U.S.C. § 2253⁵ will not issue. While it need not be shown that an appeal will succeed, *see Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003), to justify issuance of a COA, it must be demonstrated that reasonable jurists would find this court's assessment of Petitioner's constitutional claim debatable or wrong and that jurists of reason would find it debatable whether this court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001). Since Petitioner concedes that his petition should be denied on the merits, and jurists of reason would not find it debatable that Petitioner was not prejudiced from the claimed *Johnson* error, he cannot make that threshold showing. *See Slack*, 529 U.S. at 485.

DONE AND ORDERED this 1st day of March, 2017.


JAMES D. WHITEMORE
United States District Judge

Copies to: Counsel of Record

⁴ "Certificate of Appealability. (1) In a . . . 28 U.S.C. §§ 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. . . . If no express request for a certificate is filed, the notice of appeal constitutes as request addressed to the judges of the court of appeals." Rule 22, Fed. R. App. P.

⁵ "[I]n . . . a proceeding under section 2255 . . . , the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held . . . (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – . . . (B) the final order in a proceeding under section 2255 . . . (2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).