No. _____

IN THE
Supreme Court of the United States

ERNEST KING,

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

Whether a Florida conviction for robbery under Fla. Stat. § 812.13 qualified as a "violent felony" under the Armed Career Criminal Act's elements clause.[1]

[1] This Court is currently considering the same question in *Stokeling v. United States*, No. 17-5554 (cert. granted Apr. 2, 2018). Therefore, this petition should be held pending *Stokeling* and disposed of as appropriate in light of that decision.

LIST OF PARTIES

Petitioner, Ernest King, 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

Ernest King respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion, *King v. United States*, No. 16-11082, 2018 WL 565263 (11th Cir. Jan. 25, 2018), is unpublished and is provided in Appendix D.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over this criminal case under 18 U.S.C. § 3231. The district court denied Mr. King's 28 U.S.C. § 2255 motion on February 11, 2016. Appendix A. Mr. King filed a notice of appeal, and the Eleventh Circuit Court of Appeals granted him a certificate of appealability (COA). Appendix B. Mr. King moved for an initial hearing en banc, which was denied. Appendix C. On January 25, 2018, the Eleventh Circuit affirmed the denial of Mr. King's § 2255 motion. Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the ACCA, 18 U.S.C. § 924(e). The ACCA's enhanced sentencing 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 Florida robbery statute in effect at the time of Mr. King's conviction provides, in pertinent part:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> 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 (1991).[2]

STATEMENT OF THE CASE

Mr. King pled guilty, without a plea agreement, to two drug counts (counts one and two), carrying a firearm during and in relation to a drug trafficking crime (count three), and possession of a firearm by a convicted felon (count six). On March 6, 2007, the district court sentenced Mr. King to 300 months' imprisonment (240 months on counts one, two and six, to run concurrently,

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[2] Mr. King has a 1991 Florida conviction for robbery. However, he also has a 1996 Florida conviction for armed robbery. In October, 1992, the statutory definition of robbery was amended to its present form, which reads:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

See 1992 Fla. Sess. Law Serv. Ch. 92-155 (C.S.S.B. 166) (WEST).

followed by 60 months on count three, to run consecutively) and 120 months' supervised release (120 months on counts one and two, and 60 months on counts three and six, all to run concurrently).[3] His 240-month sentence on count six was imposed under the Armed Career Criminal Act (ACCA).

On August 28, 2015, Mr. King moved to vacate his sentence under § 2255, and supplemented that motion with a claim based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), arguing that his ACCA sentence on count six was unconstitutional.[4] As to Mr. King's non-*Johnson* claims, those were dismissed as time-barred. However, Mr. King's *Johnson* claim was denied on the merits. The district court found that his ACCA sentence was still valid after *Johnson* based, in part, on his two pre-1997 Florida convictions for robbery and armed robbery.

Mr. King timely appealed, and on November 9, 2016, the Eleventh Circuit granted him a certificate of appealability (COA) on the following issue: "Whether [Mr.] King was erroneously sentence above the statutory maximum as an armed career criminal on Count 6, in light of *Johnson* . . . ." Appendix B.

The day before Mr. King was granted his COA, the Eleventh Circuit issued *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), holding that all Florida robbery convictions, no matter when they were imposed, qualify as "violent felonies" under the ACCA's elements clause. Because of that ruling, Mr. King moved for initial hearing en banc, but that motion was denied. Appendix C.

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[3] Counts one and two carried a 240-month mandatory minimum because of a 21 U.S.C. § 851 enhancement filed by the government, and count three carried mandatory consecutive 60-month term of imprisonment. 18 U.S.C. § 924(c)(1)(D)(ii).

[4] *Johnson* held the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557. *Johnson* applies retroactively on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

On January 25, 2018, the Eleventh Circuit affirmed the denial of Mr. King's § 2255 motion. Appendix D. The court held that given *Fritts*, Mr. King's "challenge to his ACCA sentence fails, and the district court did not err in denying his § 2255 motion."

On April 2, 2018, this Court agreed to hear whether a Florida conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause. *Stokeling v. United States*, No. 17-5554, 2018 WL 1568030 (U.S. Apr. 2, 2018).

REASONS FOR GRANTING THE WRIT

The Ninth and Eleventh Circuits Are at Odds Regarding Whether a Florida Conviction for Armed Robbery Qualifies as a "Violent Felony" under the ACCA's Elements Clause, and Certiorari has been Granted to Resolve the Conflict.

In *United States v. Fritts*, the Eleventh Circuit held that Florida robbery—whether armed or unarmed—is categorically a "violent felony" under the ACCA. 841 F.3d 937, 943 (11th Cir. 2016). According to the Eleventh Circuit, armed and unarmed robbery qualify as violent felonies for ACCA purposes for the same reason, because overcoming victim resistance is a necessary element of any Florida robbery offense. 841 F.3d at 942–44 (citing *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997)). Because Florida robbery requires a perpetrator to overcome a victim's resistance, the Eleventh Circuit assumed that Florida robbery categorically requires the use of violent "physical force." *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*) (defining "physical force" under the ACCA as "violent force—that is, force capable of causing physical pain or injury to another person.")

According to *Fritts*, it was irrelevant that Fritts' own conviction pre-dated *Robinson* since *Robinson* simply clarified what the Florida robbery statute "always meant." 841 F.3d at 943. But while *Robinson* did clarify that a mere sudden snatching with no victim resistance is simply theft, not robbery, *id.* at 942–44, what it did not clarify was how much force was necessary to overcome

resistance for a Florida robbery conviction. Decades before *Robinson*, however, the Florida Supreme Court had held that the "degree of force" was "immaterial" so long as it was enough to overcome resistance. *Montsdoca v. State*, 93 So. 157, 159 (1922). And the Eleventh Circuit in *Fritts* cited *Montsdoca* as controlling as well. 841 F.3d at 943.

Although neither *Montsdoca* nor *Robinson* specifically addressed what degree of force is necessary to overcome resistance under the Florida robbery statute, the Florida intermediate appellate courts have provided clarity about the "least culpable conduct" under the statute in that regard. Several Florida appellate court decisions have confirmed post-*Robinson* that victim resistance in a robbery may well be minimal, and where it is, the degree of force necessary to overcome it is also minimal. Indeed, a review of Florida case law clarifies that a defendant may convicted of robbery even if he uses only a minimal amount of force. A conviction may be imposed if a defendant: (1) peels back someone's fingers;[5] (2) struggles to escape someone's grasp;[6] (3) engages in a tug-of-war over a purse;[7] (4) pushes someone;[8] (5) shakes someone;[9]

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

[6] *See Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) (discussing *Colby v. State*, 46 Fla. 112, 114 (Fla. 1903) and stating, "[a]lthough the crime in *Colby* was held to be larceny, it would be robbery under the current version of the robbery statute because the perpetrator used force to escape the victim's grasp."). Indeed, Florida courts have made clear that if a pickpocket "jostles the owner, or if the owner, catching the pickpocket in the act, struggles to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting W. LaFave, A. Scott, Jr., *Criminal Law* § 8.11(d), at 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000).

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

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

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

(6) bumps someone from behind;[10] or (7) pulls a scab off someone's finger.[11] 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);[12] *see also Mims v. State*, 342 So. 2d 116, 117 (Fla. 3d DCA 1977).

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

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

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

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

[12] 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.

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

Mr. King therefore urges this Court to hold this case pending *Stokeling*. And if the Eleventh Circuit is reversed, Mr. King respectfully requests that this Court vacate the decision below and remand with directions that Mr. King be resentenced without the ACCA enhancement.

CONCLUSION

For these reasons, the petition should be granted.

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Appendix A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ERNEST KING,

Petitioner,

Case No. 8:15-CV-2018-T-24MAP
8:06-CR-110-T-24MAP

UNITED STATES OF AMERICA,

Respondent.
_____/

O R D E R

This cause comes on for consideration of Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Cv-D-1; Cr-D-186), his memorandum of law in support (Cv-D-2), the Government's response in opposition thereto (Cv-D-13), and Petitioner's Request to Supplement According to Civil Procedure Rule 15(a) in the Interest of Justice (Cv-D-12).

By way of background, in June 2006, Petitioner was charged in a Superseding Indictment with conspiracy to possess with the intent to distribute five (5) kilograms or more of cocaine (Counts One and Two), knowingly carrying a firearm during and in relation to a drug trafficking crime (Count Three), and possession of a firearm by a convicted felon (Count Six). (Cr-D-26.) On June 17, 2006, the Government filed a notice of prior conviction pursuant to 21 U.S.C. § 851 advising that Petitioner had a prior felony drug conviction and, if convicted of Counts One and Two, he was subject to an enhanced mandatory minimum sentence of 20 years imprisonment. (Cr-

D-29.)

On October 11, 2006, the Government filed its Notice of Maximum Penalties, Elements of the Offense, and Factual Basis. (Cr-D-67.) Therein, the Government advised the Petitioner faced a minimum mandatory sentence of imprisonment of 20 years and a maximum sentence of life imprisonment as to Counts One and Two; a minimum term of imprisonment of five years and a maximum of life imprisonment as to Count Three, said term of imprisonment to run consecutively to any other term of imprisonment imposed; and a mandatory minimum of 15 years imprisonment and a maximum term of life imprisonment as to Count Six. On October 13, 2006, Petitioner entered a straight up guilty plea to Counts One, Two, Three and Six of the Superseding Indictment. (Cr-D-190.) At the guilty plea hearing, the magistrate judge advised Petitioner of the minimum and maximum penalties associated with the offenses. (Id. at p. 6-8.) Petitioner acknowledged that no promises had been made to convince him to plead guilty. (Id. at p. 4-5.)

Thereafter, Probation issued a Presentence Investigation Report ("PSI"). According to the PSI, Petitioner qualified for a career offender enhancement because he had two prior convictions for crimes of violence (robbery and armed robbery with a firearm). (PSI ¶ 36.) Probation also determined that Petitioner was subject to an armed career criminal enhancement resulting in a mandatory term of imprisonment of 15 years as to Count Six. (PSI ¶ 40 and

99.)

On March 6, 2007, the Court sentenced Petitioner to a term of imprisonment of 240 months as to Counts One, Two, and Six to run concurrent and a consecutive 60-month term of imprisonment as to Count Three.[1] Petitioner did not appeal.

On August 25, 2015, more than eight years after Petitioner's sentencing, Petitioner filed a § 2255 motion claiming that he is actually, factually and legally innocent of the armed career offender enhancement, the sentencing enhancement pursuant to 21 U.S.C. § 851, and the career offender enhancement. He claims his counsel was ineffective in failing to raise these claims earlier. Petitioner further claims his counsel misinformed him that he faced a mandatory life sentence if he proceeded to trial and, as such, his plea was involuntary. Finally, he claims his attorney refused to file an appeal despite Petitioner's request. Petitioner requests that he be resentenced without the armed career criminal enhancement.

In his motion to amend, Petitioner, relying on Johnson v. United States, 135 S.Ct. 2551 (2015), claims that his sentence is unconstitutionally vague and in violation of the Fifth Amendment. He also claims that various Guideline provisions violate Johnson's ruling that the residual clause of the Armed Career Criminal Act is

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[1] There is no transcript of the sentencing hearing. The court reporter advised that the material is not available. See Cv-D-13, p. 2, n.2.

unconstitutional and, as such, the enhancements also violate the Fifth Amendment.

The Government responds that the majority of Petitioner's claims are time barred. It concedes that Petitioner timely challenges his armed career criminal and career offender designations pursuant to Johnson, but contends that Petitioner is nonetheless not entitled to relief.

Discussion

There is a one-year statute of limitations period on the filing of all non-capital habeas petitions and motions attacking sentence in federal courts. 28 U.S.C. § 2255(f). Unless one of the three exceptions applies as provided in § 2255(f)(2)-(4), the statutory period begins to run on "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). Where the defendant does not pursue a direct appeal, his conviction becomes final when the time expires for filing a direct appeal. Mederos v. United States, 218 F.3d 1252, 1253 (11th Cir. 2000).

Petitioner's conviction became final on March 29, 2007, when his time to file a notice of appeal of the judgment expired.[2] He had one year from that date, until March 29, 2008, to file a § 2255 motion. Therefore, unless he can show one of the exceptions

[2] At the time of Petitioner's sentencing, a notice of appeal had to be filed within 10 business days after the entry of the judgment. Fed.R.App.P. 4(b)(1)(A)(I) (2007). The Court entered the Judgment in a Criminal Case on March 12, 2007. (Cr-D-129.)

applies, Petitioner's claims are time-barred because he filed the instant § 2255 motion on August 25, 2015, which is clearly past the one-year deadline from the date on which his conviction became final.

I. Petitioner's Johnson's Claims

Petitioner argues that he is actually innocent of the ACCA enhancement, the § 851 enhancement, and the career offender enhancement in light of the Supreme Court's recent ruling in Johnson. While no court within the Eleventh Circuit has held that Johnson is retroactive on collateral review for purposes of a first petition, the Government concedes retroactivity.[3] Given the Government's concession, the Court assumes Petitioner's Johnson claims are timely.

A. ACCA Enhancement

Section 924(e)(1) provides for a minimum mandatory sentence of 15 years for any person who is convicted of being a felon in possession of firearms or ammunition under § 922(g) and has three previous convictions for a violent felony or serious drug offense.

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[3] The Eleventh Circuit in In re Rivero, 797 F.3d 986, 989 (2015), found that Johnson does not apply retroactively to cases seeking successive collateral relief. The Eleventh Circuit confirmed that ruling recently in In re Franks, --- F.3d ----, No. 15-15456, 2016 WL 80551 (11th Cir. Jan 6, 2016). The court in Rivero, however, noted in dicta that "if Rivero-like the petitioner in Bousley – were seeking a first collateral review of his sentence, the new substantive rule from Johnson would apply retroactively. 797 F.3d at 991. The United States Supreme Court recently granted certiorari to decide the issue of retroactivity. Welch v. United States, No. 15-6418, ---- S.Ct. ----, 2016 WL 90594, at *1 (U.S. Jan. 8, 2016).

18 U.S.C. § 924(e)(1). The statute defines a "violent felony" as a crime punishable by imprisonment of more than 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, 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 last clause of § 924(e)(2)(B)(ii) was commonly referred to as the "residual clause." United States v Petite, 703 F.3d 1290, 1293 (11th Cir. 2013).

The Supreme Court in Johnson held that the "residual clause" of the ACCA violates the Constitution's guarantee of Due Process due to vagueness. 135 S.Ct. at 2557-58. The Supreme Court specifically noted that it did "not call into question application of the Act to the four enumerate offenses, or the remainder of the Act's definition of a violent felony." Id. at 2563.

Thus, the question here is whether Petitioner's armed career criminal designation still stands after Johnson. Among Petitioner's criminal history are convictions for robbery, carrying a concealed firearm, resisting an officer with violence, possession of cocaine and marijuana, armed robbery with a firearm, and fleeing and eluding law enforcement. A review of the PSI shows that it does not indicate which prior convictions were the predicate offenses for armed career criminal enhancement. (PSI ¶ 40.) Petitioner contends that his convictions for carrying a concealed

firearm, resisting arrest with violence, and fleeing and eluding law enforcement do not constitute violent felonies.

The Government concedes that fleeing and eluding no longer qualifies as a violent felony. (Cv-D-13, p. 9.) Furthermore, the Eleventh Circuit recently found that a Florida aggravated fleeing and eluding conviction can no longer be considered a violent felony for purposes of ACCA enhancement. United States v. Petrucelli, No. 14-13469, --- Fed. Appx. ----, 2016 WL 66701, at *2 (11th Cir. Jan. 6, 2016) (per curiam). As such, Petitioner's 2004 conviction for fleeing and eluding law enforcement (PSI 54) is not a predicate conviction for purposes of the armed career criminal enhancement.

Similarly, Petitioner's 1990 conviction for carrying a concealed firearm (PSI ¶ 49) is also not a predicate offense. In this regard, the Florida offense of carrying a concealed weapon is no longer considered a violent felony to enhance a defendant's sentence under the ACCA. United States v. Canty, 570 F.3d 1251, 1255 (11th Cir. 2009).

However, Petitioner's convictions for robbery in Case Number CRC90-11895CFANO in the Circuit Court for Pinellas County (PSI ¶ 48) and armed robbery with a firearm in Case Number 96-1411-CFC in the Circuit Court of Alachua County (PSI ¶ 53) both constitute violent felonies for purposes of the ACCA. Specifically, the Eleventh Circuit has repeatedly found that robbery under Florida law constitutes a violent felony under the elements clause of the

ACCA. United States v. Johnson, --- Fed. Appx. ----, 2015 WL 7740578, at *6 (11th Cir. Dec. 2, 2015) (per curiam) (Florida armed robbery is a predicate felony "which has as an element the threatened use of force against the person of another"); Yawn v. FCC Coleman - Medium Warden, 614 Fed. Appx. 644, 645 (11th Cir. 2015) (per curiam) ("Yawn was convicted of armed robbery, Fla. Stat. § 812.13, which qualifies as a violent felony because it 'has as an element the use, attempted use, or threatened use of physical force against the person of another,' 18 U.S.C. § 924(e)(2)(B)(I)"); United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir. 2006) ("Dowd's January 17, 1974, armed robbery conviction is undeniably a conviction for a violent felony"); accord United States v. Oner, 382 Fed Appx 893, 896 (11th Cir. 2010) (per curiam) (district court did not err in finding Oner's conviction for Florida armed robbery qualified as a violent felony).

Here, the Government presented evidence demonstrating that Petitioner was convicted of two counts of robbery in violation of Fla. Stat. § 812.13 on January 7, 1991 and sentenced as a youthful offender to a term of four years. Petitioner was also convicted of robbery with a firearm, deadly weapon in violation of Fla. Stat. § 812.13 on December 17, 1996 and sentenced to 118.8 months. Given the controlling law of the Eleventh Circuit, these two convictions qualify as predicate convictions for the armed career criminal

enhancement.[4]

Petitioner's third predicate conviction for purposes of the armed career criminal enhancement is for resisting an officer with violence in Case Number CRC90-11896CFANO-C in violation of Fla. Stat. § 843.01 dated January 7, 1991. (Cv-D-13-1, p. 14.) Recently, the Eleventh Circuit in United States v. Hill, 799 F.3d 1318, 1322-23 (11th Cir. 2015) (per curiam), determined, post-Johnson, that a Florida conviction for "resisting an officer with violence categorically qualifies as a violent felony under the elements clause of the ACCA."

Because the Government has proved that Petitioner still has three predicate violent felony convictions, Petitioner's armed career offender designation was not in error and he is not entitled to relief as to this claim.[5]

B. Sections 841 & 851 Statutory Enhancement

Johnson does not apply to Petitioner's claim relating to the

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[4] The fact that Petitioner was sentenced as a youthful offender does not prevent the conviction from being counted as a predicate offense. "[A] prior state conviction for which the defendant was sentenced as a youthful offender under state law may be counted as a predicate offense for ACCA purposes so long as the defendant received an adult conviction and a sentence of more than one year and one month." United States v. Ortiz, 413 Fed. Appx. 114, 119 (11th Cir. 2011) (per curiam) (citation omitted). According to the PSI, Petitioner was certified to adult court prior to his entry of a guilty plea. (PSI ¶ 48.) As indicated, Petitioner was sentenced to a term of imprisonment of four years. (Id.)

[5] As Petitioner has three violent felonies, the Court need not address whether either of Petitioner's drug offenses constitutes a "serious drug offense" for purposes of the armed career criminal enhancement.

his 20-year mandatory minimum sentence pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 851. Section 841(b)(1)(A) provides that, "[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment...." 21 U.S.C. § 841(b)(1)(A). A "felony drug offense" is "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marijuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44). The definition of "felony drug offense" set forth in § 802(44) and not the ACCA controls the enhancement under § 841.

According to the PSI, Petitioner was convicted of possession of cocaine (Case No. CRC95-3943CFANO). (PSI ¶ 51.) A conviction for possession of cocaine pursuant to Fla. Stat. § 893.13(6)(a) constitutes a felony drug offense. United States v. Neal, 520 Fed. Appx. 794, 795 (11th Cir. 2013) (per curiam); United States v. Vereen, 173 Fed. Appx. 810 (11th Cir. 2006) (per curiam). Thus, Petitioner's drug offense qualified as a felony drug offense that enhanced his mandatory minimum sentence as to Counts One and Two to 20 years. As such, the § 851 enhancement was properly applied as to those Counts.

Petitioner argues his drug offense cannot constitute a felony drug offense because Florida law lacks a mens rea element. In support of his contention, Petitioner relies on Descamps v. United States, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). Descamps does not apply retroactively on collateral review. Abney v. Warden, 621 Fed. Appx. 580, 584 (11th Cir. 2015) (per curiam).

Furthermore, Petitioner fails to recognize that his prior drug conviction for possession of cocaine was in 1995 when guilty knowledge was required as an element of the Florida offense. Chicone v. State, 684 So.2d 736, 738, 743-44 (Fla. 1996) (finding guilty knowledge of the presence of the substance as well as knowledge of illicit nature of the items he possessed are elements of the crime); Scott v. State, 808 So.2d. 166, 170-72 (Fla. 2002).[6] Thus, even if Descamps were applicable here, Petitioner would not be entitled to relief.

C. Career Offender and Other Sentencing Guidelines Claims

Petitioner's Johnson claims as they relates to the career offender enhancement as defined in U.S.S.G. § 4B1.1 and the other Guideline sections are without merit.[7] The Eleventh Circuit has

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[6] In 2002, the Florida Legislature enacted Florida Statute § 893.01 providing that "knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter." Fla. Stat. § 893.101(2).

[7] In addition to the career offender guidelines, Petitioner claims U.S.S.G. § 2K2.1 is unconstitutional. A review of the PSI demonstrates that § 2K2.1 was not applied in determining Petitioner's guideline range.

held that "the decision of the Supreme Court in Johnson is limited to criminal statutes that define elements of a crime or fix punishments" and does not apply to the advisory sentencing guidelines. United States v. Machett, 802 F.3d 1185, 1193-94 (11th Cir. 2015). As such, Petitioner is not entitled to relief.

Furthermore, even assuming arguendo that Johnson invalidated the residual clause of § 4B1.2(a)(2), Petitioner's career offender designation would still stand because Petitioner has two robbery offenses that constitute "crimes of violence."[8] United States v. Lockey, 632 F.3d 1238, 1241-45 (11th Cir. 2011) (Florida attempted robbery satisfies elements clause of § 4B1.2(a)).

D. Johnson-related Ineffective Assistance Claim

Petitioner's Johnson-related ineffective assistance of counsel claim also fails. Claims of ineffective assistance of counsel require a showing of the two-prong test as set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). In order to succeed under the Strickland test, a movant has the burden of proving: (1) deficient performance by counsel; and (2) prejudice resulting therefrom. Id. at 687.

The first prong of the Strickland test requires the Court to determine whether trial counsel performed below an "objective

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[8] Petitioner's claim that his Florida drug convictions do not meet the definition of "controlled drug offenses" for purposes of the career offender enhancement is irrelevant. The PSI demonstrates that the enhancement was not based on any drug offense. (PSI ¶ 36.)

standard of reasonableness," while viewing counsel's challenged conduct on the facts of the particular case at the time of counsel's conduct. 466 U.S. at 688, 690. Notably, there is a strong presumption that counsel rendered adequate assistance and made all significant decisions with reasonable and competent judgment. Id.

A counsel's performance is deficient if, given all the circumstances, his performance falls outside of accepted professional conduct. Strickland, 466 U.S. at 690. "Judicial scrutiny of counsel's performance must be highly deferential," and "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken "might be considered sound trial strategy." Chandler v. United States, 218 F.3d 1305, 1313-14 (11th Cir.2000) (en banc) (quoting Strickland, 466 U.S. at 689 and Darden v. Wainwright, 477 U.S. 168 (1986)). Rather, for counsel's conduct to be unreasonable, a petitioner must show that "no competent counsel would have taken the action that his counsel did take." Chandler, 218 F.3d at 1315.

With regard to the second prong, a reasonable probability is a "probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A petitioner must show a "substantial, not just conceivable, likelihood of a different result." Cullen v. Pinholster, --- U.S. ----, 131 S.Ct. 1388, 1403 (2011) (citation omitted). Petitioner must "affirmatively prove

prejudice" to meet the second prong of an ineffective assistance of counsel claim. Strickland, 466 U.S. at 693.

If a petitioner does not satisfy both prongs of the Strickland test, "he will not succeed on an ineffective assistance claim." Zamora v. Dugger, 834 F.2d 956, 958 (11th Cir. 1987). See also Weeks v. Jones, 26 F.3d 1030, 1037 (11th Cir. 1994). Therefore, a court may resolve a claim of ineffective assistance of counsel based solely on lack of prejudice without considering the reasonableness of the attorney's performance. Waters v. Thomas, 46 F.3d 1506, 1510 (11th Cir. 1995) (citing Strickland, 466 U.S. at 697).

Here, Petitioner fails to show prejudice resulting from his counsel's failure to object to the sentencing enhancements. As set forth above, Johnson does not afford Petitioner relief from the imposed sentences. As Petitioner's sentences remain valid after Johnson, he fails to meet the second prong of the Strickland test.

II. Petitioner's Remaining Claims

Petitioner contends that his remaining claims of an involuntary plea and ineffective assistance of counsel related to his guilty plea and in failing to file an appeal are timely under § 2255(f)(3) and (4). They are not, and the claims are therefore time-barred.

Section 2255(f)(3) provides that the statute of limitations runs 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." Petitioner contends that Alleyne v. United States, 133 S.Ct. 2151 (2013), Descamps, United States v. Windsor, --- U.S. ----, 133 S.Ct. 2675 (2013), and Missouri v. Frye, 132 S. Ct. 1399 (2012), were recently recognized to be applicable on collateral review. That is not the case.

In Alleyne, the Supreme Court found that "any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Id. at 2155. Alleyne is not retroactive on collateral review. Jeanty v. Warden, FCI Miami, 757 F.3d 1283, 1285 (11th Cir. 2014) (per curiam); accord King v. United States, 610 Fed. Appx. 825, 828 (11th Cir.) (affirming district court's finding that § 2255 motion was timed-barred where Alleyne is not retroactive and collateral review), cert. denied, 136 S.Ct. 349 (2015).

In Descamps, the Supreme Court addressed whether a prior conviction under the California burglary statute qualified as a "violent felony" under the residual clause of the Armed Career Criminal Act. The Supreme Court clarified that the modified categorical approach could not be applied to indivisible statutes that criminalize a broader range of conduct than the ACCA. Descamps, 133 S.Ct. at 2293. Notably, Descamps did not announce a "new" constitutional rule and is not applicable on collateral

review. Abney v. Warden, 621 Fed. Appx. 580, 584 (11th Cir. 2015) (affirming decision to dismiss § 2241 petition); King, 610 Fed. Appx. 828-29 (finding Descamps does not apply on collateral review and motion was not timely under § 2255(f)(3)).

Missouri v. Frye also did not announce a new rule of constitutional law. In Re Perez, 682 F.3d 930, 934-934 (11th Cir. 2012) (per curiam). Finally, Windsor, in which the Supreme Court found the Defense of Marriage Act unconstitutional, is wholly inapplicable to Petitioner's case. As Petitioner claims do not involve a right newly recognized by the Supreme Court and made retroactive on collateral review, he cannot avail himself of a delayed start to the one-year limitation under § 2255(f)(3).

Petitioner also contends that these claims are timely pursuant to § 2255(f)(4). That section provides that the limitations period runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4).

First, a § 2255 motion based on counsel's failure to file a requested direct appeal could be considered timely under § 2255(f)(4) if the movant files within one year of the date "when the facts *could have been discovered* through the exercise of due diligence, not when they were *actually* discovered." Aron v. United States, 291 F.3d 708, 711 (11th Cir.2002). With regard to his claim of ineffective assistance of counsel in failing to file an

appeal, Petitioner does not even argue that he filed his § 2255 motion within one year of actually discovering his attorney did not file a direct appeal. In fact, Petitioner never states that he was ever unaware of his attorney's failure to file an appeal let alone that he was unaware of that fact for years. To the contrary, Petitioner states that when he requested his attorney file an appeal "counsel did state that the Petitioner had waived all of his rights away and had nothing to appeal because he had pled guilty." (Cv-D-2, p. 24.) He further contends that his counsel actually refused to file an appeal. (Id.) According to Petitioner, after his repeated requests at sentencing for his counsel to file an appeal, Petitioner tried to contact counsel by telephone but counsel would not answer his calls. (Cv-D-2, p. 23.) He actually admits that "based on his counsel's misguidance and ill-advice, [Petitioner] never appealed his issues that he wanted the appeal court to hear...." (Cv-D-2, p. 5.)

Thus, it appears from Petitioner's own statements that he was actually aware on the date of his sentencing in March 2007, or shortly thereafter, that his counsel did not intend to file an appeal. As such, his § 2255 motion filed eight years later is untimely.

Even assuming Petitioner was not actually aware in the spring of 2007 that his attorney failed to file an appeal, he raises no legitimate reason consistent with due diligence as to why he could

not have learned of the failure to file an appeal earlier. A notice of appeal is public information that Petitioner could have found on the docket or by simply calling and inquiring of the District Court Clerk's Office or the Court of Appeals. Petitioner, however, fails to present any evidence that he attempted to contact either the Clerk's Office to request the case number or status of his appeal or the Court of Appeals regarding the status of his appeal. Petitioner fails to present any evidence of any effort he made to determine whether an appeal had been filed during the eight year period between Petitioner's sentencing and the filing of his motion. The Court therefore finds Petitioner fails to demonstrate due diligence.

Petitioner does not assert that he is entitled to equitable tolling. "Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with due diligence." Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999) (per curiam). A prisoner has not shown reasonable diligence and therefore is not entitled to equitable tolling where the petitioner fails to show he made any attempt to contact the court to learn about the resolution of his case or anyone else to complain that his counsel was not responding to him. San Martin v. McNeil, 633 F.3d 1257, 1270 (11th Cir. 2011). Equitable tolling is not appropriate in this instance as Petitioner has failed to meet his burden of demonstrating both

diligence and the existence of extraordinary circumstances beyond his control which made it impossible for him to timely file his motion relating to his attorney's failure to file an appeal.

Finally, Petitioner provides no explanation how his claims of an involuntary plea and ineffective assistance relating to his guilty plea are timely under § 2255(f)(4). He asserts no facts as to when he allegedly learned that he would not have faced a mandatory life sentence had he proceeded to trial. Nor has he alleged any facts demonstrating due diligence on his behalf in attempting to discern the information.

The fact that Petitioner never faced a mandatory life sentence certainly could have been discovered with the exercise of due diligence years many before Petitioner filed his § 2255 motion.[9] Under the circumstances, neither § 2255(f)(4) nor equitable tolling is applicable to Petitioner's involuntary plea and related ineffective assistance claims under the circumstances. These

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[9] The information was discoverable with due diligence before Petitioner even entered his guilty plea. The Government's June 17, 2006 Information and Notice of Prior Conviction advised Petitioner that he faced a mandatory term of imprisonment of 20 years as to Counts One and Two and a maximum of life imprisonment. (Cr-D-29.) In the October 11, 2006 Notice, the Government advised Petitioner that the maximum term of imprisonment as to each Count was life, but that there was a mandatory minimum sentence of 20 years as to Counts One and Two, a minimum sentence of five years as to Count three, and a mandatory minimum sentence of 15 years as to Count Six. (Cr-D-67.) Magistrate Judge Pizzo similarly advised Petitioner at his guilty plea of the minimum and maximum penalties associated. (Cr-D-190, p. 6-7.)

claims are therefore untimely under § 2255(f)(1).

IT IS ORDERED that:

(1) Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Cv-D-1; Cr-D-155) is DENIED in part and DISMISSED as untimely in part.

(2) Petitioner's Request to Supplement According to Civil Procedure Rule 15(a) in the Interest of Justice (Cv-D-12) is GRANTED in part and DENIED in part. The Court has considered the merits of Petitioner's supplemental arguments but finds that he is not entitled to relief.

(3) The Clerk is directed to CLOSE the civil case.

CERTIFICATE OF APPEALABILITY AND

LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability. A prisoner seeking a motion to vacate has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). Id. "A [COA] may issue … only if the applicant has made a substantial showing of the denial of a constitutional right." Id. at § 2253(c)(2). To make such a showing, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong,"

Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983)). Petitioner has not made the requisite showing in these circumstances. Finally, because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal in forma pauperis.

DONE AND ORDERED at Tampa, Florida this 10th day of February, 2016.

WILLIAM J. CASTAGNA
SENIOR UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11082-A

ERNEST KING,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Ernest King is a federal prisoner serving a total sentence of 300 months' imprisonment after pleading guilty to conspiracy to possess with the intent to distribute five kilograms or more of cocaine (Count 1), possession of cocaine with intent to distribute (Count 2), knowingly carrying a firearm during and in relation to a drug-trafficking crime (Count 3), and possession of a firearm by a convicted felon (Count 6). In August 2015, King filed a *pro se* 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, raising various challenges to his convictions and sentence. Among these claims, King asserted that his sentence on Count 6 under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), was invalid in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of the violent-felony definition in the ACCA was unconstitutionally vague. In relevant part, King contended that his prior

Florida robbery and armed-robbery convictions no longer qualified as violent felonies in light of *Johnson*, rendering him ineligible for an ACCA enhanced sentence.

The district court denied in part and dismissed in part King's § 2255 motion. Regarding King's *Johnson* claim, the court concluded that King was properly classified as an armed career criminal in part because his 1991 Florida conviction for robbery and 1996 Florida conviction for armed robbery constituted violent felonies under the elements clause of the ACCA. King, through counsel, now moves this Court for a certificate of appealability ("COA") on his *Johnson* claim. King has also filed a motion for leave to proceed *in forma pauperis* ("IFP") on appeal.

In order to obtain a COA, a § 2255 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).

Here, reasonable jurists could debate whether King's pre-1997 Florida robbery and armed-robbery convictions qualify as predicate offenses under the ACCA's elements clause. *See Slack*, 529 U.S. at 484. Accordingly, King has made the requisite showing of the denial of a constitutional right, and this Court now GRANTS his motion for a COA on the following issue:

> Whether King was erroneously sentenced above the statutory maximum as an armed career criminal on Count 6, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Furthermore, because King's appeal of this claim is not frivolous, and he has provided an affidavit indicating that he is indigent, his motion for leave to proceed IFP is also GRANTED.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

Appendix C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11082-AA

ERNEST KING,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

A petition for initial hearing en banc having been filed and circulated to the en banc court, and no member of this Court in active service having requested a poll on whether this case should be heard initially by the Court sitting en banc, IT IS ORDERED that the Petition for Initial Hearing En Banc is DENIED. This case will still proceed and be submitted as a regular appeal.

Frank M. Hull

UNITED STATES CIRCUIT JUDGE

Appendix D

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11082
Non-Argument Calendar

D.C. Docket Nos. 8:15-cv-02018-SCB-MAP; 8:06-cr-00110-SCB-MAP-3

ERNEST KING,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(January 25, 2018)

Before JULIE CARNES, FAY, and HULL, Circuit Judges.

PER CURIAM:

Ernest King, a federal prisoner serving a total sentence of 300 months' imprisonment, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence, arguing in relevant part that he no longer qualifies for an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924(e), following the Supreme Court's decision in Samuel Johnson v. United States, __ U.S. __, 135 S. Ct. 2551 (2015), because his pre-1997 Florida robbery and armed robbery convictions are not "violent felonies" under the ACCA's elements clause.

Under the ACCA, a defendant convicted of violating 18 U.S.C. § 922(g) is subject to a mandatory minimum sentence of 15 years (180 months) if he has three prior convictions for a "violent felony" or "serious drug offense." 18 U.S.C. § 924(e)(1). A "violent felony" is 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 is referred to as the "elements clause," while the second prong contains the "enumerated crimes" and the "residual clause." United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012). In Samuel Johnson, the Supreme Court struck down the ACCA's residual clause as

unconstitutionally vague, but did not call into question the validity of the ACCA's enumerated crimes or elements clause. Samuel Johnson, 135 S. Ct. at 2563. Under the elements clause, "the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." Curtis Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271 (2010).

Florida law defines robbery, in relevant part, as "the taking of money or other property . . . from the person or custody of another, . . . when in the course of the taking there is the use of force, violence, assault, or putting in fear," and provides increased penalties for armed robbery. Fla. Stat. § 812.13(1)-(2). Prior to 1997, Florida's intermediate appellate courts were divided as to whether a sudden snatching amounted to robbery under § 812.13(1). See United States v. Welch, 683 F.3d 1304, 1311 & n.29 (11th Cir. 2012) (citing cases). In 1997, the Florida Supreme Court resolved this division, making clear the robbery statute had never included theft by mere snatching and had always required that the perpetrator employ force (1) greater than that necessary to simply remove the property from the victim and (2) sufficient to overcome the victim's resistance. See Robinson v. State, 692 So. 2d 883, 886-87 (Fla. 1997). Additionally, for purposes of robbery by putting in fear, "'[t]he fear contemplated . . . is the fear of death or great bodily harm'" under Florida law. United States v. Lockley, 632 F.3d 1238, 1242 (11th

Cir. 2011) (quoting Magnotti v. State, 842 So. 2d 963, 965 (Fla. 4th Dist. Ct. App. 2003) (alteration in original)).

On appeal, King argues that Florida robbery, whether committed before or after 1997, can never qualify as a violent felony under the ACCA's elements clause because the least of the acts criminalized by the Florida statute does not require the use, attempted use, or threatened use of violent force. Among other things, King contends that: (1) prior to 1997, Florida robbery included robbery by sudden snatching, which does not require violent force; (2) both before and after 1997, Florida courts have held that any degree of force, however slight, converts a theft offense into a robbery so long as the force used is sufficient to overcome the victim's resistance; and (3) robbery by putting in fear does not require either that the defendant intentionally put the victim in fear or that the defendant threaten the use of physical force.

King's arguments are unavailing. In United States v. Fritts, 841 F.3d 937 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017), the defendant raised, and we rejected, these very same arguments. Consistent with our prior precedent, we held that Florida robbery, whether committed before or after 1997, categorically qualifies as a violent felony under the ACCA's elements clause. Id. at 939-44. First, relying in part on our prior decision in Lockley, we explained that even the least of the acts criminalized by the Florida robbery statute—robbery by putting in

fear—categorically qualified as a violent felony under the elements clause because "the fear contemplated by the statute is the fear of death or great bodily harm." Fritts, 841 F.3d at 941 (internal quotation marks omitted). We determined that any act which causes the victim to fear death or great bodily harm would necessarily involve the use or threatened use of physical force against the victim. Id. Likewise, each of the other means of committing Florida robbery—use of force, violence, and assault—by definition "specifically require[s] the use or threatened use of physical force against the person of another." Id. (internal quotation marks omitted).

In Fritts, we further explained that the Florida Supreme Court's decision in Robinson and the earlier Florida cases on which Robinson relied demonstrated that the Florida robbery statute had never encompassed robbery by sudden snatching and had always required the use or threatened use of sufficient physical force to overcome the victim's resistance. Id. at 942-43; see also Robinson, 692 So. 2d at 886-87 (stating: "[I]n order for the snatching of property from another to amount to robbery, the perpetrator must employ more than the force necessary to remove the property from the person. Rather, there must be resistance by the victim that is overcome by the physical force of the offender."). Thus, unlike the simple battery statute at issue in Curtis Johnson, which could be violated by mere touching, slight force was insufficient to sustain a Florida robbery conviction. Fritts, 841 F.3d at

942-43. Indeed, we noted that, as early as 1922, the Florida Supreme Court had held: "'There can be no robbery without violence, and there can be no larceny with it. It is violence that makes robbery an offense of greater atrocity than larceny.'" Id. at 943 (quoting Montsdoca v. State, 93 So. 157, 159 (Fla. 1922)).

Consequently, given Lockley and Fritts, King's challenge to his ACCA sentence fails, and the district court did not err in denying his § 2255 motion. See United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) ("Under [the prior panel precedent] rule, a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc.").

Accordingly, we affirm the district court's order dismissing King's § 2255 motion.

AFFIRMED.