

No. _____

IN THE
Supreme Court of the United States

FRANK GUBANIC,
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. Gubanic a certificate of appealability (“COA”) on whether he 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 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).¹

Additionally, Mr. Gubanic 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 set forth 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.

¹ This Court is currently considering whether Florida robbery is a “violent felony” under the ACCA’s elements clause 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, Frank Gubanic, 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

Frank Gubanic respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Gubanic's application for a COA in Appeal No. 17-14430 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Gubanic's case under 18 U.S.C. § 3231. The district court denied Mr. Gubanic's 28 U.S.C. § 2255 motion on August 4, 2017, and Mr. Gubanic filed a timely notice of appeal. *See* Appendix B. Mr. Gubanic subsequently filed a COA application in the Eleventh Circuit, which was denied on January 30, 2018. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves the 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. Gubanic’s 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 when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Fla. Stat. § 812.13(1) (1988).

At the time of Mr. Gubanic’s resisting-with-violence conviction, the Florida statute for 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 (1990).

STATEMENT OF THE CASE

Mr. Gubanic pled guilty to possessing ammunition as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), and on July 14, 2009, the district court sentenced him under the Armed Career Criminal Act (ACCA) to 184 months' imprisonment, followed by 48 months' supervised release. At the time of sentencing, the PSR, which was adopted without change by the district court, stated that Mr. Gubanic had the following four qualifying ACCA predicate convictions, all Florida offenses:

PSR Paragraph	Description	Date of Conviction
¶ 38	Robbery	March 28, 1988
¶ 39	Battery on a Law Enforcement Officer (Count One) Resisting with Violence (Count Two) ²	May 7, 1990
¶ 42	Trafficking in Cocaine (Count One) Sale of Cocaine (Count Two) ³	October 28, 1993
¶ 43	Battery on a Probation Officer ⁴	October 28, 1993

Mr. Gubanic did not appeal his conviction or sentence, and on June 11, 2010, he filed his first § 2255 motion, alleging several grounds for relief, including several claims relating to his right to be resentenced without the ACCA enhancement. The government responded that Mr. Gubanic had procedurally defaulted his ACCA claims and that the four predicate offenses relied

² These two offenses qualify as a single ACCA predicate offense because they occurred on the same occasion.

³ In the district court, Mr. Gubanic argued that the government was precluded from arguing these two offenses qualify as more than one ACCA predicate offense based on both the law of the case doctrine and judicial estoppel. However, the district court rejected that argument, finding those doctrines did not apply and that the two offenses qualify as separate ACCA predicate offenses. This Court need not decide whether the district court erred in its ruling since even if they independently qualify as separate predicate offenses, Mr. Gubanic still does not have three ACCA predicate offenses.

⁴ Below, the government declined to argue that Mr. Gubanic's battery convictions qualified as "violent felon[ies]."

on at sentencing still qualified as ACCA predicate offenses. The district court denied the motion and declined to issue a COA.

On May 18, 2016, Mr. Gubanic filed an application with this Court, seeking authorization to file a second or successive § 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).⁵ On June 15, 2016, the Eleventh Circuit granted Mr. Gubanic authorization to file a second or successive § 2255 motion, finding that he made a *prima facie* showing that his proposed § 2255 motion contains a new rule of constitutional law that has been made retroactive by this Court.

Mr. Gubanic filed his second § 2255 motion in the district court on June 17, 2016, raising only one claim — that his sentence was above the statutory maximum in light of *Samuel Johnson*. On September 2, 2016, the district court granted Mr. Gubanic’s unopposed motion to stay the proceedings until the Eleventh Circuit decided *United States v. Fritts*, Case No. 15-15699, as *Fritts* was going to decide whether, given *Samuel Johnson*, a Florida conviction for armed robbery qualifies as an ACCA predicate offense. Subsequently, after the Eleventh Circuit decided *Fritts* and held that a Florida conviction for armed robbery qualifies as an ACCA predicate offense, 841 F.3d 937 (11th Cir. 2016), the district court lifted the stay, allowed Mr. Gubanic to adopt the arguments in Mr. Fritts’ briefs, and permitted Mr. Gubanic to file a memorandum in support of his § 2255 motion.

In his memorandum, Mr. Gubanic argued, among other things, that his convictions for robbery and resisting with violence do not qualify as “violent felon[ies].” *See id.* The government responded that Mr. Gubanic’s claim: (1) failed to satisfy § 2255(h)(2)’s gatekeeping

⁵ *Samuel Johnson* held that the ACCA’s residual clause is unconstitutionally vague. 135 S. Ct. at 2557. In *Welch v. United States*, this Court held that *Samuel Johnson* applies retroactively on collateral review. 136 S. Ct. 1257 (2016).

requirement; (2) is procedurally defaulted; and (3) fails on the merits. As for its merits argument, the government argued that Mr. Gubanic's convictions for resisting with violence and robbery qualified as "violent felon[ies]." *Id.* at 20–22. Mr. Gubanic replied, maintaining that he had, at most, one ACCA predicate offense—his 1993 conviction for sale of cocaine.

On August 4, 2017, the district court denied Mr. Gubanic's motion on the merits.⁶ The district court held that Mr. Gubanic's robbery conviction qualified under *Fritts*, and that his two 1993 drug convictions occurred on separate occasions. *Id.* So in the district court's view, Mr. Gubanic continued to qualify as an armed career criminal. Because the court found Mr. Gubanic continued to qualify based on these three offenses, it did not opine on whether it believed his conviction for resisting with violence still qualifies as a "violent felony." The district court also denied Mr. Gubanic a COA.

On January 30, the Eleventh Circuit also denied Mr. Gubanic a COA. Like the district court, the Eleventh Circuit found Mr. Gubanic still qualifies as an armed career criminal based on his two 1993 drug convictions and his robbery conviction. And although there is a circuit split on whether a Florida robbery conviction qualifies as a "violent felony," the law in the Eleventh

⁶ Because the district court denied Mr. Gubanic's motion on the merits, it declined to address the government's arguments that Mr. Gubanic's claim did not meet the requirements of § 2255(h)(2) and was procedurally defaulted. In Mr. Gubanic's view, the district court's decision to decline addressing these issues was implicit rejection of the government's arguments. *See Beeman v. United States*, 871 F.3d 1215, 1225 (11th Cir. 2017) (Williams, J., dissenting). Because neither the district court nor the Eleventh Circuit passed on these issues, Mr. Gubanic will not address them here and relies on the arguments he raised in the lower court. However, he would simply note that reasonable jurists can, and do, debate these procedural issues as well. *See United States v. Snyder*, 871 F.3d 1122, 1126–28 (10th Cir. 2017) (holding that a movant's *Johnson* claim was not reasonably available to him at the time of his direct appeal, and so the claim was not procedurally defaulted); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) ("We therefore hold that, when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim "relies on" the constitutional rule announced in [*Samuel Johnson*]).").

Circuit is that reasonable jurists cannot debate an issue foreclosed by binding circuit precedent. *See* Appendix A at 4 (citing *Hamilton v. Sec’y Fla. Dep’t of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015)). The Eleventh Circuit thus found that reasonable jurists would not debate whether the district court correctly denied his § 2255 motion.⁷

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

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, 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 felon[ies]” 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.”).

⁷ Like the district court, the Eleventh Circuit did not pass on whether Mr. Gubanic’s Florida conviction for resisting with violence qualifies as a “violent felony.”

According to *Fritts*, it was irrelevant that *Fritts*' own conviction predated *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 clarified 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 confirms that a defendant may be convicted of robbery even if he uses only a minimal amount of force. A conviction may be imposed if a defendant: (1) peels back someone's fingers;⁸ (2) struggles to escape someone's grasp;⁹ (3)

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

⁹ See *Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) (discussing *Colby v. State*, 46 Fla. 112, 114 (Fla. 1903), and stating, "[a]lthough the crime in *Colby* was held to be larceny, it would be robbery under the current version of the robbery statute because the perpetrator used force to escape the victim's grasp."). Indeed, Florida courts have made clear that if a pickpocket "jostles the owner, or if the owner, catching the pickpocket in the act, struggles to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting W. LaFave, A. Scott, Jr., *Criminal Law* § 8.11(d), at 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000).

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

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

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

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

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

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

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

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

resistance is not necessarily violent force.” *Id.* at 901 (citing *Montsdoca*, 93 So. at 159 (“The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim’s resistance.”))).

As is clear from *Geozos*, the Ninth and Eleventh Circuits’ decisions directly conflict about an important and recurring question of federal law: whether the minimal force 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. Thus, the disagreement between the Ninth and Eleventh Circuits, as well as this Court’s decision to hear *Stokeling*, show that at a minimum, reasonable jurists can (and do) debate this issue. Mr. Gubanic therefore urges this Court to hold this case pending *Stokeling*.

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. Much like the analysis above, the question here is whether § 843.01 categorically requires “violent force” or “strong physical force” as an element of conviction. It does not. The lead case is *I.N. Johnson v. State*, 50 So. 529 (Fla. 1909), where the defendant was charged with the offense of “knowingly and willfully resisting, obstructing or opposing the execution of legal process, by offering or doing violence” to an officer.

Id. at 529.¹⁶ The charging document alleged “a knowing and willful resistance . . . by gripping the hand of the officer and forcibly preventing him from opening the door of the room . . . thereby obstructing the officer in entering the room to make the arrest.” *Id.* at 529-30. The Florida Supreme Court found that this allegation met the “violence” element of the statute:

The allegation that the defendant gripped the hand of the officer, and forcibly prevented him from opening the door for the purpose of 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

¹⁶ 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 1087.¹⁷ The *Flores-Cordero* court noted a decision of the Arizona court of appeals that held a defendant’s “struggle to keep from being handcuffed” and “kick[ing] the officers trying to control her” constituted conduct within the scope of the resisting arrest statute “because some physical force was used.” 723 F.3d at 1087-88 (citing *State v. Lee*, 176 P.3d 712 (Ariz. Ct. App. 2008)). Thus, the Ninth Circuit determined, “[u]nder prevailing Arizona law, the use of minimal force is sufficient to constitute ‘resisting arrest.’” *Id.* Because the state appellate court did not require that defendant’s conduct – “instigating a scuffle with officers” – necessarily involve force capable of inflicting pain or causing injury as contemplated by *Curtis Johnson*, the Arizona conviction for resisting arrest was not categorically a crime of violence within the meaning of federal law. *Id.* at 1088.

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

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

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

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

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

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

and United States Supreme Court case law, is compelling, and Mr. Gubanic 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 Eleventh Circuit’s Rule that a COA may not be Granted Where Binding Circuit Precedent Forecloses a Claim Erroneously Applies the COA Standard Set Forth 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. Gubanic’s case using the proper terms—that reasonable jurists would not debate whether Mr. Gubanic 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 a Florida conviction for robbery qualifies as a “violent felony” under the ACCA’s elements clause. *See Buck*, 137 S. Ct. at 773; Appendix A. The Eleventh Circuit’s rule places burdens movants too heavily 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 other circuit courts have arrived at different conclusions on these issues.

Because the Eleventh Circuit’s rule essentially requires a merits determination, and precludes issuing COAs where reasonable jurists debate whether a movant is entitled to relief, Mr. Gubanic respectfully requests that if this petition is not held pending *Stokeling*, it be granted to

review the Eleventh Circuit's erroneous application of the COA standard.

CONCLUSION

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

Respectfully submitted,

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14430-K

FRANK GUBANIC,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Frank Gubanic is a federal prisoner serving a sentence of 184 months' imprisonment for possessing ammunition as a convicted felon, 18 U.S.C. §§ 922(g)(1), 924(e). At sentencing, the court found that he qualified as an armed career criminal, based on the following predicate Florida convictions: (1) robbery; (2) battery on an officer and resisting arrest with violence; (3) trafficking in cocaine and sale of cocaine; and (4) battery on a probation officer.

Gubanic filed an initial 28 U.S.C. § 2255 motion to vacate, which was denied by the district court. In 2016, he applied to this Court for leave to file a second or successive § 2255 motion to vacate, arguing that he was sentenced under the Armed Career Criminal Act's ("ACCA") residual clause, which the Supreme Court had declared unconstitutionally vague in

Johnson v. United States, 135 S. Ct. 2551 (2015). This Court granted him leave to file a successive § 2255 motion.

Gubanic subsequently filed the instant counseled § 2255 motion, arguing that four of his predicate offenses—robbery, battery on an officer, resisting with violence, and battery on a probation officer—no longer qualified as predicate offenses under the ACCA, in light of *Johnson*. Thus, he argued, he had, at most, only one predicate offense—trafficking in cocaine and sale of cocaine—which he argued counted as one conviction because the government previously had asserted, in its response brief in Gubanic’s initial § 2255 proceeding, that the offenses occurred on the same date.

The district court denied Gubanic’s motion, finding that three of his prior convictions continued to qualify as ACCA predicates—the robbery conviction qualified under the elements clause, and the drug convictions counted as two separate serious drug offenses—so Gubanic could not show that his ACCA sentence was based on the now-unconstitutional residual clause. As to the robbery conviction, the district court found that Gubanic’s claim was foreclosed by binding Circuit precedent. *See United States v. Fritts*, 841 F. 3d 937, 943-44 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2264 (June 19, 2017). As to the drug convictions, it noted that Gubanic did not dispute that they occurred on separate dates. In the same order, it denied a certificate of appealability (“COA”) and leave to proceed *in forma pauperis* (“IFP”) on appeal.

In his counseled motion for a COA before this Court, Gubanic abandons his challenge to his two separate drug convictions, and argues only that his robbery and resisting-arrest-with-violence convictions do not qualify as predicate offenses under the ACCA’s elements clause. Thus, Gubanic argues, he does not have the necessary three predicate offenses.

In order to obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To merit a COA, the movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000) (quotations omitted).

The ACCA provides that a defendant who violates 18 U.S.C. § 922(g) and has three prior convictions for a violent felony or serious drug offense is subject to a fifteen-year statutory minimum sentence. *See* § 924(e)(1). It defines the term “violent felony,” for purposes of the mandatory minimum sentencing enhancement, 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 Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague. 135 S. Ct. at 2557-58, 2563.

In *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), this Court held that a 1974 conviction for Florida armed robbery was “undeniably a conviction for a violent felony” under the ACCA’s elements clause. Further, in *Fritts*, this Court since concluded that, under *Dowd* alone, a Florida armed-robbery conviction qualifies as an ACCA violent felony under the elements clause. 841 F.3d 937, 939-40 (11th Cir. 2016). This Court further determined that the Florida Supreme Court has made clear that the Florida robbery statute never included taking by mere snatching, without force. *Id.* at 940-45.

For these reasons, Gubanic's claim regarding his robbery conviction is foreclosed by binding Circuit precedent, *see Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), and such conviction qualifies as a violent felony under the ACCA's elements clause. As he abandoned his challenge to his two separate serious drug offenses, he thus continues to have at least three predicate offenses under the ACCA, such that reasonable jurists would not find debatable whether the district court correctly denied his § 2255 motion. Thus, because Gubanic has not made the requisite showing under *Slack*, 529 U.S. at 484, his motion for a COA is DENIED. His motion for leave to proceed IFP is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

Appendix B

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

FRANK GUBANIC,

Petitioner,

v.

CASE NO: 8:16-cv-1626-T-30TGW

Crim. Case No: 8:08-cr-499-T-30TGW

UNITED STATES OF AMERICA,

Respondent.

_____ /

ORDER

This matter is before the Court on Petitioner’s Motion under 28 U.S.C. § 2255 to vacate his conviction. Petitioner was sentenced as an armed career criminal based on his predicate convictions. Petitioner now argues that his sentence was unconstitutional because the district court enhanced his sentence under the now-voided residual clause of the Armed Career Criminal Act (the “ACCA”). The Government argues that this claim does not satisfy the statutory criteria of § 2255(h), was procedurally defaulted, and is meritless. The Court concludes that Petitioner’s Motion must be dismissed because Petitioner cannot clearly demonstrate that the Court relied on the residual clause while sentencing him as an armed career criminal.

BACKGROUND

Petitioner was indicted in March 2009 by a grand jury for possession of ammunition after having been convicted of a felony (count one), and for possession with an intent to distribute methamphetamine within 1,000 feet of a school (count two). Petitioner entered

into a plea agreement with the Government on March 17, 2009, and pled guilty to one count of possession of ammunition by a convicted felon. The second count was dismissed. The Court entered judgment against Petitioner and sentenced him to 184 months' imprisonment. The Court's sentence was imposed after consideration of the presentence report ("PSR"), which recommended that Petitioner be sentenced as an armed career criminal under 18 U.S.C. § 924(e). Because Petitioner's prior convictions are relevant to these enhancements, the Court will set them out here in full:

Case No.	Offense	Date of Offense
CRC 88-00168CFANO-C	Robbery	January 6, 1988
CRC 90-00714CFANO-C	Battery on a Law Enforcement Officer	January 11, 1990
	Resisting with Violence	
CRC 92-04751CFANO-C	Trafficking in Cocaine	March 25, 1992
	Sale of Cocaine	March 13, 1992
CRC 92-19842CFANO-C	Battery on a Probation Officer	December 3, 1992

The PSR provides that these convictions were relied on as the qualifying predicate to enhance Petitioner's sentence. Petitioner did not object to the PSR, and did not appeal.

On June 11, 2010, Petitioner filed his first § 2255 motion which included a number of claims relating to his right to be resentenced without the ACCA enhancement which was denied.

On May 18, 2016, within a year of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Petitioner filed an application with the Eleventh Circuit seeking authorization to file a successive § 2255 motion. This was granted on June 15, 2016, based on his *prima facie* showing that his proposed motion contained a new rule of constitutional law now made retroactive by the Supreme Court.

Petitioner's Motion argues that his armed career criminal sentence is unconstitutional because his convictions for robbery, battery on a law enforcement officer, battery on a probation officer, and resisting with violence no longer qualify as violent felonies. Petitioner also argues that the offenses of trafficking in cocaine and sale of cocaine are regarded as a single predicate offense. So Petitioner argues he does not have three predicate qualifying felonies that occurred on separate occasions to qualify for an armed career criminal sentence.

DISCUSSION

Petitioner's Motion must be dismissed because the Court concludes three of the prior convictions on which the Court relied categorically qualify as ACCA predicates. So Petitioner cannot make a *prima facie* showing that his armed career criminal sentence relied on the now-voided residual clause.

I. Standard of Review

To warrant the filing of a second or successive § 2255 motion, a petitioner must make a *prima facie* showing to the circuit court that he has satisfied the requirements of § 2255(h). Section 2255(h) provides:

A second or successive motion must be certified as provided in § 2244 by a panel of the appropriate court of appeals to contain—

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

For a *Johnson* claim, this requires a petitioner to make a *prima facie* showing that his armed career criminal sentence may have relied on the ACCA's now invalid violent felony residual clause. *In re Moore*, 830 F.3d 1268 (11th Cir. 2016). In other words, § 2255(h) is not satisfied if:

(1) the sentencing court record demonstrates that the sentencing court specifically identified three prior convictions as qualifying ACCA predicates under the elements or enumerated crimes clauses, or based on the “serious drug offense” provision of the ACCA; and/or (2) under binding precedent, it is clear that the prior convictions the sentencing court identified categorically qualify as ACCA predicates under the elements or enumerated crimes clauses or, alternatively, the ACCA's “serious drug offenses” provision.

In re Rogers, 825 F.3d 1335, 1338 (11th Cir. 2016). This threshold determination, though, is not binding on the district court, which must analyze anew whether § 2255(h) is satisfied. *In re Moore*, 830 F.3d at 1271.

II. Analysis

Petitioner argues he was denied due process because the district court wrongfully enhanced his sentence under the residual clause of the ACCA to a mandatory minimum 15-year sentence. But the Court concludes Petitioner's motion should be dismissed because his prior convictions for robbery and two serious drug offenses alone qualify as

the necessary predicate convictions to be sentenced under the ACCA, so he cannot successfully satisfy § 2255(h).

III. Whether Petitioner’s predicate robbery conviction qualifies as a “violent felony” under the ACCA elements clause.

Petitioner’s robbery conviction qualifies as a violent felony under the holding in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016). The Eleventh Circuit Court decided in *Fritts* that a Florida armed robbery conviction under § 812.13, Florida Statutes, categorically qualified as a violent felony under the ACCA’s elements clause. *Id.* at 944. Petitioner adopts the argument the Eleventh Circuit rejected in *Fritts*, so Petitioner’s argument is foreclosed. The Court concludes that Petitioner has no *Johnson* claim as to his robbery conviction even though he believes the Eleventh Circuit Court erred in *Fritts*.

IV. Whether Petitioner’s serious drug convictions occurred on the same occasion, qualifying them as a single offense.

The ACCA requires the 15-year minimum sentence only if the three predicate convictions result from crimes “committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). *See Patterson v. United States*, 423 Fed. Appx. 921, 924 (11th Cir. 2011) (holding that as long as “predicate crimes were successive rather than simultaneous, they constitute separate criminal episodes for purposes of the ACCA.”). Petitioner argues that his convictions for trafficking in cocaine and sale of cocaine should be regarded as a single offense. But Petitioner does not dispute that both crimes are serious drug offenses. And Petitioner does not dispute that they occurred on separate occasions, since the

trafficking offense occurred on March 25, 1993 and the sale offense occurred on March 13, 1993. (CV Doc 12-1 at 23). Instead Petitioner argues the Court cannot consider them as separate offenses because of the law of the case doctrine and judicial estoppel. As the Court explains below, Petitioner's arguments are meritless.

A. Whether under the law of the case doctrine Petitioner's trafficking conviction qualifies as a separate offense.

The law of the case doctrine's purpose is "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *United States v. Bobo*, 419 F.3d 1264, 1267 (11th Cir.2005); *United States v. Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997) (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478, at 788(1981)). So a "decision on an issue must be followed in all subsequent trial court proceedings unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the decision is clearly erroneous and, if implemented, would work a manifest injustice." *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir.1985).

Petitioner argues the Government's response to the first § 2255 motion stated his prior drug offenses counted as a single predicate conviction under the ACCA, so they are now precluded from arguing his serious drug convictions are separate offenses. (Case 8:10-cv-01356-T-30-TGW, Doc. 6 at 9). Though the Government did assert the drug offenses "qualify as only one predicate conviction," Petitioner is mistaken that the law of the case doctrine applies because this was not an issue on which the Court ruled. (Case

8:10-cv-01356-JSM-TGW Doc. 6 at 9). Rather, the Court denied his prior § 2255 motion concluding that the requirements were unsatisfied and that he had the necessary qualifying predicate offenses under the ACCA. (CR Doc. 61). Because the Court did not determine which predicate offenses applied or how they were applied, the Court concludes the law of the case doctrine does not apply.

B. Whether judicial estoppel prevents Petitioner's trafficking conviction from qualifying as a separate offense.

The Court concludes that the doctrine of judicial estoppel also does not apply. Judicial estoppel bars a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. *New Hampshire v. Maine*, 532 U.S. 742 (2001). There are several factors that typically inform the decision of when to apply the doctrine of judicial estoppel: (1) whether the party's later position is "clearly inconsistent" with its earlier position, (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 750-51.

When applying these factors to Petitioner's case, the Court concludes that judicial estoppel does not apply. Though the Government's position is now inconsistent, it did not succeed in persuading the Court to accept their original position in the prior case. The

Court did not even rule on this issue. (CV Doc. 12 at 22). (Case 8:10-cv-01356-JSM-TGW Doc. 6 at 9). The Government's argument does not impose an *unfair* detriment on Petitioner because the drug offenses actually occurred on separate occasions. And because the Government did not benefit from their previous argument, they do not now receive an unfair advantage by arguing the drug offenses occurred on separate occasions.

CONCLUSION

This Court concludes that Petitioner's failed to make a *prima facie* showing under the new substantive rule in *Johnson*. Petitioner's convictions of robbery, trafficking in cocaine, and sale of cocaine are enough to qualify as the necessary predicate offenses for an ACCA enhancement.

It is therefore ORDERED AND ADJUDGED that:

1. Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. §2255 is DENIED.
2. The Clerk is to enter judgment for Respondent, United States of America, terminate any pending motions, and close this case.

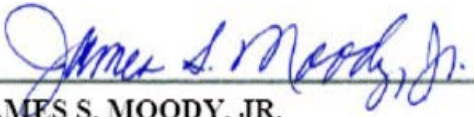
CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus 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, 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 on this 4th day of August, 2017.



JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record