No. _____

IN THE
Supreme Court of the United States

ROBERT LESTER JAMES,

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

The broad question presented by this case is whether the Eleventh Circuit Court of Appeals erroneously denied Mr. James a certificate of appealability ("COA") on the issue of whether he was sentenced above the statutory maximum for his offense of conviction. More specifically, the narrow question presented is whether reasonable jurists can, at a minimum, debate the issue of whether a Florida conviction for robbery qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).

Since this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*), striking down the ACCA's residual clause as unconstitutionally vague, several circuit courts of appeals have published decisions on whether various state robbery statutes qualify as "violent felon[ies]" under the ACCA's elements clause. As a result of the differing conclusions these courts have reached, a direct conflict has emerged about the degree of force necessary for a robbery offense to qualify as a "violent felony."

In Florida, a robbery occurs where an individual commits a taking using only the amount of force necessary to overcome a victim's resistance. Thus, if a victim's resistance is minimal, then the force needed to overcome that resistance need only be minimal. Two terms ago, in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), this Court left open the question of whether a Florida conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause. Since then, the issue has placed the Eleventh and Ninth Circuit at odds. *Compare United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), *with United States v. Geozos*, --- F.3d ---, No. 17-35018, 2017 WL 3712155 (9th Cir. Aug. 29, 2017). Given the split that has emerged, Mr. James submits that at a minimum, he should have been granted a COA on the issue, because reasonable jurists can (and do) debate this issue.

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

LIST OF PARTIES

Petitioner, Robert Lester James, 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

Robert Lester James respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. James' application for a COA in Appeal No. 17-11090 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. James' case under 18 U.S.C. § 3231. The district court denied Mr. James' § 2255 motion on December 15, 2016. Mr. James subsequently filed a notice of appeal and application for a COA in the Eleventh Circuit, which was denied on July 5, 2017. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves the application of the ACCA, 18 U.S.C. § 924(e). The ACCA's 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 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).

The Florida robbery statute in effect at the time of Mr. James' convictions provides, 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 by force, violence, assault, or putting in fear.
>
> If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . .

Fla. Stat. § 812.13 (1979).[1]

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[1] Effective October 1, 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.

STATEMENT OF THE CASE

Mr. James was convicted of possession of a firearm by a convicted felon, and on September 25, 2007, he was sentenced under the Armed Career Criminal Act (ACCA) to 180 months' imprisonment. At the time of sentencing, Mr. James had five Florida convictions that qualified as ACCA predicate offenses—breaking and entering with intent to commit grand larceny, attempted robbery, armed robbery, robbery, and aggravated battery. Mr. James did not appeal.

On January 18, 2008, Mr. James moved to vacate his sentence under 28 U.S.C. § 2255, however the motion was dismissed because Mr. James waived the right to collaterally attack his sentence in his plea agreement. Both the district court and the Eleventh Circuit denied Mr. James a COA.

On June 15, 2016, after receiving permission from the Eleventh Circuit, Mr. James filed a second or successive § 2255 motion in the district court arguing, among other things, that his ACCA sentence was unconstitutional in light of *Johnson II.*

Because Mr. James' right to relief turned on whether his Florida convictions for robbery qualify as "violent felonies" under the ACCA's elements clause, he filed an unopposed motion to stay his § 2255 proceedings pending the Eleventh Circuit's decision in *United States v. Fritts*, appeal number 15-15699. The district court granted the motion.

On November 8, 2016, the Eleventh Circuit issued its decision in *Fritts*, holding that Florida robbery categorically qualifies as a "violent felony." 841 F.3d 937 (11th Cir. 2016).

In light of the decision in *Fritts*, Mr. James filed an unopposed motion to lift the stay in his case and adopt the arguments set forth in the appellant's briefs in *Fritts*. Also, for the purpose of

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

further review, Mr. James maintained that *Fritts* was wrongly decided, and that his robbery offenses do not qualify as "violent felonies." Therefore, he requested a COA on the issue of whether he was unconstitutionally sentenced above the statutory maximum in light of *Johnson II*.[2] On December 15, 2016, the district court lifted the stay, allowed him to adopt the arguments set forth in *Fritts*, denied the § 2255 motion based on *Fritts*, and denied a COA. On March 7, 2017, Mr. James filed a timely notice of appeal.

On March 24, 2017, Mr. James filed an application for a COA with the Eleventh Circuit, requesting a COA on the issue of whether he was erroneously sentenced above the statutory maximum for his conviction. In his application, he recognized that the Eleventh Circuit's binding precedent precluded a finding that his robbery conviction was not a "violent felony," but maintained that the court's precedent was incorrect and reasonable jurists could still debate the issue. Mr. James also noted that since *Fritts* was rendered, both circuit and district judges in the Eleventh Circuit had granted COAs on the issue. Regarding the merits of the issue, Mr. James explained, among other things, that under Florida law, a robbery committed "by force" requires minimal force and therefore cannot qualify as a "violent felony" under the ACCA's elements clause.

On July 5, 2017, the Eleventh Circuit denied Mr. James' application for a COA. The Court, citing *Hamilton v. Sec'y Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), stated that a COA may not issue where a claim is foreclosed by binding circuit precedent "because reasonable jurists will follow controlling law." Thus, because *Fritts* was binding precedent, the Court denied Mr. James a COA.

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[2] Although Mr. James also maintained that his convictions for breaking and entering and aggravated battery do not qualify as ACCA predicate offenses, the issue of whether his robbery convictions qualify as ACCA predicate offenses is dispositive of his *Johnson II* claim.

REASONS FOR GRANTING THE WRIT

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

Under Florida's robbery statute, a robbery occurs where a taking is accomplished using enough force to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Thus, if a victim's resistance is minimal, the force needed to overcome that resistance is similarly minimal. Indeed, a review of Florida case law clarifies that a defendant may convicted of robbery even if he uses only a *de minimis* amount of force. A conviction may be imposed if a defendant: (1) bumps someone from behind;[3] (2) engages in a tug-of-war over a purse;[4] (3) pushes someone;[5] (4) shakes someone;[6] (5) struggles to escape someone's grasp;[7] (6) peels back

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

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

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

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

[7] *Colby v. State*, 46 Fla. 112, 114 (Fla. 1903). In *Colby*, the defendant was caught during an attempted pickpocketing. *Id.* The victim grabbed the defendant's arm, and the defendant struggled to escape. *Id.* Under the robbery statute in effect at the time, the Florida Supreme Court held it was not a robbery because the force was used to escape, rather than secure the money. *Id.* However, the Florida Supreme Court has made clear that this conduct would have qualified as a robbery under the current robbery statute, which is at issue in this case. *See Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) ("Although the crime in *Colby* was held to be larceny, it would be robbery under the current version of the robbery statute because the perpetrator used force to escape the victim's grasp."). Indeed, Florida courts have made clear that if a pickpocket "jostles the owner, or if the owner, catching the pickpocket in the act, struggles to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting W. LaFave, A. Scott, Jr., *Criminal Law* § 8.11(d), at 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000).

someone's fingers;[8] or (7) pulls a scab off someone's finger.[9] Indeed, under Florida law, a robbery conviction may be upheld based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986).[10]

The Ninth Circuit recently recognized this in *Geozos*, where it held that a Florida conviction for robbery, regardless of whether it is armed or unarmed, fails to qualify as a "violent felony" under the elements clause. 2017 WL 3712155 at *6–*8.[11] In so holding, the Ninth Circuit relied on Florida caselaw which clarified that an individual may violate Florida's robbery statute without using violent force, such as engaging "in a non-violent tug-of-war" over a purse. *Id.* (citing *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011)). And while both the Ninth and Eleventh Circuits have recognized the Florida robbery statute requires an individual use enough force to overcome a victim's resistance, the Ninth Circuit, in coming to a decision that it recognized was at "odds" with this Eleventh Circuit's holding in *Fritts*, stated that it believed

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

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

[10] 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.

[11] The *Geozos* Court correctly stated that whether a robbery was armed or unarmed made no difference because an individual may be convicted of armed robbery for "merely carrying a firearm" during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. 2017 WL 3712155 at *6–*8; *see State v. Baker*, 452 So. 2d 927, 929 (Fla. 1984); *State v. Burris*, 875 So. 2d 408, 413 (Fla. 2004); *Williams v. State*, 560 So. 2d 311, 314 (Fla. 1st DCA 1990); *see also Parnell v. United States*, 818 F.3d 974, 978–81 (9th Cir. 2016) (holding that a Massachusetts conviction for *armed* robbery, which requires only the possession of a firearm (without using or even displaying it), does not qualify as a "violent felony" under the ACCA's elements clause). Thus, it is of no moment that one of Mr. James' convictions was for *armed* robbery.

the Eleventh Circuit "overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." *Id.*

Florida is not alone in its use of a resistance-based standard. In fact, most states permit robbery convictions where the degree of force used is sufficient to overcome a victim's resistance. Indeed, at least fifteen states use some variation of this standard in the text of their statutes,[12] and several others have adopted it through case law.[13] Since this Court struck down the ACCA residual clause in *Johnson II*, several circuits have had to reevaluate whether these robbery statutes and others still qualify as "violent felon[ies]" under the ACCA's elements clause.[14] These courts have reached differing conclusions, and as a result, significant tension has arisen regarding the degree of force a state robbery statute must require to categorically satisfy the "physical force" prong of the elements clause. *See Johnson I*, 559 U.S. at 140 (defining "physical force" as "*violent* force . . . force capable of causing physical pain or injury to another person.") (emphasis in original). The Fourth Circuit's decisions in *United States v. Gardner*, 823 F.3d 793 (4th Cir.

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

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

[14] *See United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016); *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016); *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016); *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016); *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017); *United States v. Doctor*, 843 F.3d 306 (4th Cir. 2016); *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016); *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015).

2016), and *United States v. Winston*, 850 F.3d 677, 683–86 (4th Cir. 2017), are instructive in this regard.

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

In *Gardner*, the Fourth Circuit held that the offense of common law robbery in North Carolina does not qualify as a "violent felony" under the elements clause because it does not categorically require the use of "physical force." 823 F.3d at 803–04. A North Carolina common law robbery may be committed by force so long as the force is "is sufficient to compel a victim to part with his property." *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). "This definition," the Fourth Circuit stated, "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.* (emphasis in original). The Fourth Circuit then discussed two North Carolina state cases that supported that conclusion. *Id.* (discussing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008), and *State v. Eldridge*, 677 S.E.2d 14 (N.C. Ct. App. 2009)). Based on these decisions, the Fourth Circuit concluded that "the minimum conduct necessary to sustain a conviction for North Carolina

common law robbery" does not necessarily require "physical force," and therefore the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*

Like the Virginia offense described in *Winston* and the North Carolina offense addressed in *Gardner*, a Florida robbery may be committed by force sufficient to overcome a victim's resistance. As the Fourth Circuit recognized, this definition implicitly suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery. And, as explained above, Florida case law confirms this point.

Given the circuit split between the Ninth and Eleventh Circuits, and the tension among the other circuits, reasonable jurists can (and do) debate whether Mr. James' convictions for armed robbery qualify as "violent felon[ies]" after *Johnson II*. This case presents an ideal vehicle for the Court to resolve the circuit split discussed herein and reinforce what it said in *Johnson I* — that "physical force" requires "a substantial degree of force." 559 U.S. at 140. At a minimum, it requires more than the *de minimis* force required for a robbery conviction under Florida law.

The issue presented by this petition was fully preserved below and is dispositive — if Mr. James' prior robbery convictions do not qualify as "violent felon[ies]" under the ACCA's elements clause, then Mr. James is ineligible for enhanced sentencing under the ACCA and his 180-month sentence is above the statutory maximum for his offense.

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

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). "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 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*, 793 F.3d 1261 ("[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 Court phrased its decision in Mr. James' case using the proper terms—that reasonable jurists would not debate whether Mr. James is entitled to relief—but reached its conclusion by essentially deciding the case on the merits, that he would be unsuccessful on appeal because *Fritts* is binding circuit precedent. *Buck*, 137 S. Ct. at 773. The Eleventh Circuit's rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,"

> it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

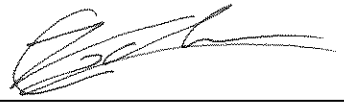
Indeed, as this Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch*, 136 S. Ct. at 1264. Here, we know that is not the case, particularly because the Circuits are at odds about whether a Florida conviction for armed robbery qualifies as a "violent felony" under the elements clause. Because the Eleventh Circuit's rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled to relief, Mr. James respectfully requests that this Court grant this petition to review the Eleventh Circuit's erroneous application of the COA standard.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender



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Appendix A

Decision Below

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11090-K

ROBERT LESTER JAMES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Mr. Robert James is a federal prisoner serving a 180-month sentence for possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). According to the presentence investigation report ("PSI") and the sentencing transcript, Mr. James was sentenced as an armed career criminal, based on his Florida convictions for: (1) attempted robbery, in 1976; (2) armed robbery, in 1979; (3) robbery, in 1979; and (4) aggravated battery, in 1988. Mr. James was convicted and sentenced in 2007, and he did not directly appeal.

In 2008, Mr. James filed his original motion to vacate under 28 U.S.C. § 2255, which the district court dismissed with prejudice. In May 2016, Mr. James filed an application for a second or successive motion to vacate, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), his sentence was unconstitutionally enhanced under the Armed Career Criminal Act ("ACCA"), § 924(e).

This Court determined that Mr. James made a *prima facie* showing that he fell within the scope of the new rule announced in *Johnson*. Specifically, this Court determined that two of Mr. James's four prior convictions—his 1979 Florida robbery conviction and his 1976 Florida attempted robbery conviction—were not clearly violent felonies without the application of the residual clause because this Court had not yet determined whether a pre-1996 Florida robbery conviction was a predicate offense under the elements clause of ACCA. Accordingly, this Court granted Mr. James's application.

Mr. James then filed the instant counseled motion to vacate, under 28 U.S.C. § 2255, arguing that his sentence as an armed career criminal was unconstitutional, as it was enhanced under the residual clause of ACCA. Mr. James then moved to stay his § 2255 proceedings, pending this Court's decision in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016) (holding that armed robbery qualified as a prior conviction under the elements clause of ACCA), *cert. denied* 2017 WL 554569 (U.S. June 19, 2017). The district court granted the motion to stay.

Thereafter, Mr. James moved to lift the stay, as this Court had decided *Fritts*. Mr. James noted that this Court's decision in *Fritts* required the district court to deny his § 2255 motion. However, to preserve the argument that his convictions did not qualify as predicate offenses under ACCA, Mr. James asked to adopt the arguments set forth by Mr. Fritts. He further moved for a certificate of appealability ("COA"), noting that this Court had issued at least one COA on whether pre-1997 robbery qualified as a violent felony after *Fritts* was decided.

Mr. James attached a copy of Mr. Fritts's appellate briefs. Mr. Fritts argued that his 1989 Florida robbery convictions did not qualify as predicate offenses under ACCA. He asserted that armed robbery occurred when a robber carried a firearm, irrespective of whether the victim was aware of the weapon. Mr. Fritts argued that, because the record was silent on how the taking

occurred, this Court needed to consider his offense under the least culpable form of either robbery by "force" or robbery by "putting in fear," which were not predicate offenses under the elements clause of ACCA. Specifically, he argued that, prior to 1997, robbery by force did not constitute a violent felony because the degree of force used was immaterial, and the crime could be committed with only minimal force. Furthermore, Mr. Fritts argued, robbery could be committed by using a substance to render the victim unconscious. Additionally, he argued that robbery by "putting in fear" did not qualify as a violent felony because it did not require the defendant to intentionally put the victim in fear or threaten to use physical force.

The district court permitted Mr. James to adopt the arguments made by Mr. Fritts. However, the district court determined that *Fritts* resolved the issue of whether Mr. James was an armed career criminal. Accordingly, it denied Mr. James's § 2255 motion to vacate, and denied a COA.

Mr. James now moves, through counsel, for a COA on appeal. Mr. James recognizes that this Court's binding precedent forecloses his argument that his robbery convictions do not qualify as predicate offenses under ACCA, but maintains that this Court's precedent was incorrectly decided. He asserts that this Court and a district court have issued COAs on this issue and notes that the Fourth Circuit is also addressing whether Florida robbery qualifies as a predicate offense.

Mr. James argues that the Florida robbery statute is indivisible and, therefore, this Court needs to presume that his conviction rested on the least culpable conduct. He argues that the least culpable conduct was either robbery by "force" or by "putting in fear," and neither qualifies as a violent felony under ACCA's elements clause. Specifically, he asserts that the force needed to commit robbery prior to 1997 was minimal, and could occur through snatching. He argues

that this Court's determination that Florida robbery always required force sufficient to overcome resistance did not settle the issue, as Florida courts may have been misapplying the law when Mr. James was convicted because the controlling law permitted any degree of force to show robbery. He also argues that robbery could occur if a person administered a substance to a victim in order to commit the crime. Furthermore, he argues, the only force needed was the force necessary to overcome resistance, which could be slight. He argues that this Court's precedent is in conflict with the Fourth Circuit, as that court determined that the elements clause of ACCA was not implicated when a robbery statute could be violated with only minimal force.

Mr. James further argues that robbery by "putting in fear" did not qualify as a violent felony because it did not require the defendant to intentionally place the victim in fear or threaten to use force. He contends that this Court's decision in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), conflicts with *Leocal v. Ashcroft*, 543 U.S. 1 (2004), where the Supreme Court held that the word "use" required an "active employment" of force, in 18 U.S.C. § 16(a). Specifically, he argues that, under the reasoning used in *Leocal*, because the Florida robbery statute does not require a degree of intent to place someone in fear, it does not qualify as a violent felony under the elements clause of ACCA. He asserts that the Ninth Circuit's decision in *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015), shows that, if a robbery offense can be committed unintentionally, it does not qualify as a violent felony. Finally, he argues that the least culpable conduct necessary to put someone in fear does not require threatened physical force.

DISCUSSION:

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). The movant satisfies this requirement by

demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). Moreover, "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted), *cert. denied*, 136 S. Ct. 1661 (2016). Finally, when reviewing a district court's denial of a § 2255 motion, this Court reviews "findings of fact for clear error and questions of law *de novo*." *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009).

ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

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

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes" and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012). The Supreme Court in *Johnson* held that the residual clause of ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. *Johnson*, 135 S. Ct. at 2557-58, 2563. Thereafter, the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264-65, 1268 (2016).

Mr. James qualified as an armed career criminal based on his Florida convictions for: (1) attempted robbery, in 1976; (2) armed robbery in 1979; (3) robbery in 1979; and (4) aggravated battery, in 1988. A conviction under Florida's aggravated battery statute categorically qualifies under the elements clause. *See Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2016), *abrogated on other grounds by Johnson*, 135 S. Ct. 2551.

Reasonable jurists would not debate whether Mr. James's pre-1997 Florida robbery convictions qualify under the elements clause. This Court held, in a pre-*Descamps*[1] case, that a Florida conviction for armed robbery is "undeniably" a violent felony under ACCA's elements clause. *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006). In *Lockley*, this Court determined that a 2001 Florida attempted-robbery conviction qualified as a crime of violence under the elements clause of the career-offender provision of the Sentencing Guidelines. 632 F.3d at 1240, 1244-45; *see also United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010) (providing that "[c]onsidering whether a crime is a "violent felony" under ACCA is similar to considering whether a conviction qualifies as a "crime of violence" under U.S.S.G. § 4B1.2(a) because the definitions for both terms are virtually identical." (quotations omitted)).

More recently, in *United States v. Seabrooks*, a panel of this Court held that a defendant's August 1997 Florida armed-robbery conviction qualified under ACCA's elements clause, but the panel did not reach a consensus about whether a pre-1997 conviction could qualify as a predicate offense. *See United States v. Seabrooks*, 839 F.3d 1326, 1340-41 (11th Cir. 2016) *cert. denied*, (U.S. June 19, 2017) (No. 16-8072). Shortly after *Seabrooks*, this Court held that pre-1997 Florida robbery convictions categorically qualify as predicate offenses under ACCA's elements

[1] *Descamps v. United States*, 133 S. Ct. 2276 (2013).

clause. *Fritts*, 841 F.3d at 939-40. In determining that pre-1997 Florida robbery qualified under the elements clause, this Court reasoned that Florida robbery "never included a theft or taking by mere snatching because snatching is theft only and does not involve the degree of physical force needed to sustain a robbery conviction." *Id.* at 942. Furthermore, this Court re-affirmed its decisions in *Lockley* and *Dowd*. *Id.* at 942-43. Therefore, under this Court's binding precedent, Mr. James's Florida robbery convictions qualify as predicate offenses under ACCA.

Finally, although Mr. James makes numerous arguments challenging this Court's decision in *Fritts*, *Fritts* is binding precedent in this Court until it is overruled by this Court sitting *en banc* or by a decision of the U.S. Supreme Court. *See United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008) (explaining the prior precedent rule). Thus, Mr. James's claim that his Florida robbery convictions do not qualify as predicate offenses under ACCA is foreclosed by binding circuit precedent. *See Fritts*, 841 F.3d at 939-40. Therefore, Mr. James has at least three qualifying predicate offenses under ACCA post-*Johnson*. Consequently, Mr. James cannot make a substantial showing of the denial of a constitutional right, and his motion for a COA is DENIED. *See* 28 U.S.C. § 2253(c)(2); *Hamilton*, 793 F.3d at 1266.

UNITED STATES CIRCUIT JUDGE