No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

ARMANDO RIVERA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Armando Rivera, Jr., pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. §3006A. Therefore, in reliance upon RULE 39.1 and §3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. §1746.

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

West Palm Beach, Florida
October 12, 2017

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DECLARATION VERIFYING TIMELY FILING

Petitioner, Armando Rivera, Jr., through undersigned counsel and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. §1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was sent via Federal Express for next day delivery, addressed to the Clerk of the Supreme Court of the United States, on the 12th day of October 2017 which is timely pursuant to the rules of this Court.

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CERTIFICATE OF SERVICE

I certify that on this 12th day of October 2017, in accordance with SUP. CT. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed *In Forma Pauperis*, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by U.S. mail upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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West Palm Beach, Florida
October 12, 2017

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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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QUESTION PRESENTED FOR REVIEW

Whether reasonable jurists could debate whether Mr. Rivera was denied his due process rights under the Fifth Amendment to the United States Constitution when he was sentenced as an armed career criminal to a 188-month term of imprisonment pursuant to 18 U.S.C. §924(e) for possessing a gun after three Florida state armed robbery convictions, where such offenses are not violent felonies after *Johnson v. United States,* 576 U.S. ___, 135 S. Ct. 2551 (2015)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Armando Rivera, Jr. respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the denial of his motion for certificate of appealability by the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-13189 in that Court on September 1, 2017.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit denying petitioner's motion for a certificate of appealability is contained in Appendix A-1. The decision of the United States District Court for the Southern District of Florida denying petitioner's 28 U.S.C. §2255 motion to vacate sentence and denying a certificate of appealability is contained in Appendix A-2. The report and recommendation of the magistrate judge recommending denial of petitioner's §2255 motion is contained in Appendix A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. §2255. The decision of the court of appeals was entered on September 1, 2017. This petition is timely filed pursuant to Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

The Fifth Amendment to the Constitution provides in pertinent part:

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

U.S. Const. Amend. V.

28 U.S.C. §2255(a):

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. §2253(c):

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

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

(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.

(3) A certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

18 U.S.C. §924(e) - ACCA

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years.

(e)(2) As used in this subsection --

> (B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, . . . that --
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another.

Fla. Stat. §812.13 Robbery

(1) "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.

(2)(a) 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 or as provided . . .

STATEMENT OF THE CASE

Mr. Rivera was charged with two counts of possession of a gun by a convicted felon and two counts of possession of ammunition by a convicted felon, all in violation of 18 U.S.C. §§922(g)(1) and 924(e). *See United States v. Armando Rivera, Jr.*, Case No. 05-14007-Cr-Martinez, DE 1 (S. D. Fla). He pled guilty to all four counts of the indictment; there was no plea agreement. (DE 27). However, at the plea hearing, Mr. Rivera was advised that if he was determined to be an armed career criminal, he faced a mandatory minimum 15 year to life sentence. (DE 38:8).

A presentence investigation report (PSI) was prepared. While the guideline for a gun offense is found in U.S.S.G. §2K2.1, the probation officer classified Mr. Rivera as an armed career criminal because he was "subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e)," and used U.S.S.G. §4B1.4. The following convictions were listed as predicate offenses: (1) a February 7, 1990 armed burglary, armed robbery, false imprisonment and aggravated assault; (2) a February 7, 1990 armed robbery; and (3) a January 25, 1993 armed robbery. Because Mr. Rivera used or possessed the guns in connection with a controlled substance offense, his armed career criminal offense level was 34.

Three levels were deducted for pleading guilty, resulting in a total offense level of 31. Mr. Rivera's criminal history category was IV, but as an armed career criminal who possessed both firearms in connection with a controlled substance offense, his criminal history category was increased to VI, pursuant to U.S.S.G. §4B1.4(c)(2). Mr. Rivera's advisory guideline range was 188 to 235 months, with a

minimum term of imprisonment of 180 months.

At his December 6, 2005 sentencing, the district court determined that Mr. Rivera qualified for an enhanced sentence under 18 U.S.C. §924(e), then imposed a sentence of 188 months. (DE 31). Mr. Rivera appealed his sentence, and his sentence was affirmed on appeal. *See United States v. Armando Rivera, Jr.,* No. 05-16989 (11th Cir. July 18, 2006).

On September 7, 2006, Mr. Rivera filed a Motion to Vacate Sentence under 28 U.S.C. §2255. (DE 44; DE 45). That motion was denied by the district court on November 6, 2008. *See* 06-14233-Civ-Martinez. (S. D. Fla).

On April 18, 2016, the Supreme Court decided *Welch v. United States,* 578 U.S. ___, 136 S. Ct. 1257 (2016), which held that *Johnson* applies retroactively. On May 13, 2016, Mr. Rivera filed a petition in this Court seeking permission to file a successive §2255 petition. Permission was granted on June 7, 2016. *See Armando Rivera, Jr. v. United States,* No. 16-12584.

On June 24, 2016, Mr. Rivera filed a motion in the district court based on *Johnson. See Armando Rivera, Jr. v. United States,* 16-14205-Civ-Martinez, DE 1 (S. D. Fla). In that motion, he argued that because his armed robbery convictions were no longer considered "violent felonies," he did not have the three predicates required for the ACCA enhancement. The government maintained that Mr. Rivera's armed robbery convictions remained violent felonies under *United States v. Lockley,* 632 F.3d 1238 (11th Cir. 2011). (DE 11).

On April 20, 2017, the magistrate judge entered a Report and Recommendation, recommending that Mr. Rivera's §2255 motion be denied. (A-3). In that Report, the magistrate judge found that Florida armed robbery is a violent felony under the elements clause, regardless of the date of conviction, specifically citing *United States v. Dowd,* 451 F.3d 1244 (11th Cir. 2006), and *United States v. Fritts,* 841 F.3d 937 (11th Cir. 2016).

On June 27, 2017, the district court entered an Order adopting the Report and Recommendation and denying Mr. Rivera's motion to vacate. (A-2). In that Order, the court ruled that having "reviewed the entire file and record" and having "made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present," Mr. Rivera's motion to vacate should be denied. In the same Order, the court denied a certificate of appealability.

On July 13, 2017, Mr. Rivera filed a notice of appeal from the denial of his §2255 motion. (DE 24). On July 17, 2017, he filed a Motion for Certificate of Appealability in the Eleventh Circuit. That motion was denied on September 1, 2017. (A-1). In the order denying the motion for certificate of appealability, the Court ruled that to merit a COA, Mr. Rivera 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, citing 28 U.S.C. §2253(c)(2) and *Slack v. McDaniel,* 529 U.S. 473, 478 (2000). According to the Court, Mr. Rivera "failed to satisfy the first prong of *Slack*'s test." (A-1).

REASON FOR GRANTING THE WRIT

"[R]easonable jurists could at least debate whether Mr. Rivera is entitled to relief" on his ACCA claim following *Johnson v. United States,* 576 U.S. ___, 135 S. Ct. 2551 (2015). *See Welch v. United States,* 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016). This is because it is at least debatable whether his conviction for armed robbery remains a "violent felony" under the elements clause of §924(e).

Legal Standard

A certificate of appealability (COA) is required to appeal the denial of a 28 U.S.C. §2255 motion to vacate sentence. A COA must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. §2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983)).

As this Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell,* 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, 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." *Id.* at 338. Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

This Court recently applied this standard in *Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759, 773 (2017), where it reversed the denial of a COA, holding that the COA inquiry "is not coextensive with a merits analysis." At the COA stage, the *only* question is whether the applicant has shown that the claim is fairly debatable. If it is fairly debatable – in other circuits or in the Supreme Court – binding precedent is not a proper consideration for the denial of a COA.

Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257 (2016), also arose from the denial of a COA. *Id.* at 1263-1264. In that case, the Court broadly held that *Johnson* announced a substantive rule that applied retroactively to cases on collateral review. *Id.* at 1268. But in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." *Id.* at 1264, 1268. In that case, the parties disputed whether Welch's robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving

that question. *See id.* at 1263-1264, 1268. Accordingly, this Court held that a COA should issue.

For the reasons stated below, reasonable jurists could debate whether Mr. Rivera's sentence was properly enhanced by ACCA. This is so because as the Court recognized in *Welch,* it is at least debatable whether a Florida conviction for robbery qualifies as a violent felony under ACCA's elements clause. Therefore, reasonable jurists could debate whether the sentence violated the Due Process Clause. Accordingly, the United States Court of Appeals for the Eleventh Circuit erred when it denied Mr. Rivera a certificate of appealability, and his petition for writ of certiorari should be granted.

Reasonable Jurists Could Debate Whether a Florida State Robbery Conviction has "As an Element" the Use, Attempted Use, or Threatened Use of Physical Force Against the Person of Another.

In finding that Mr. Rivera's Florida armed robbery convictions satisfy the ACCA elements clause, the magistrate judge cited *United States v. Fritts,* 841 F.3d 937 (11th Cir. 2016) (holding that all Florida robbery convictions under §812.13, regardless of date, require resistance and thus qualify as violent felonies under ACCA). The existence of precedent does not mean that reasonable jurists could not debate the issue. *See, e.g., Lambright v. Stewart,* 220 F.3d 1022, 1026 (9th Cir. 2000) ("Under *Slack,* it is thus clear that we should not deny a petitioner an opportunity to persuade us through full briefing and argument to reconsider circuit law that apparently forecloses relief"); *United States v. Gomez-Sotelo,* 18 F. App'x

690, 692 (10th Cir. 2001) (granting COA where there was "a split among the circuits," even though the "issue has been settled in this circuit and not overturned by the Supreme Court"). Indeed, members of the Eleventh Circuit *have* in fact debated – even after *Fritts* – whether a Florida robbery conviction satisfies the elements clause. *See King v. United States,* No. 16-11082 at 2 (11th Cir. Nov. 9, 2016) (granting COA post-*Fritts* as to whether King's pre-1997 Florida robbery and armed robbery convictions qualify as predicate offenses under ACCA's elements clause).

Importantly, the Fourth Circuit has twice rejected the argument that a robbery offense that can be committed by the use of force sufficient to overcome the victim's resistance, no matter how slight, qualifies as a violent felony under ACCA's elements clause. In *United States v. Garner,* 823 F.3d 793 (4th Cir. 2016), the Fourth Circuit recognized that only minimal force is required to commit robbery against a victim's resistance under a similarly-construed North Carolina statute. Because North Carolina courts had upheld convictions for robbery by force where the defendant simply pushed the victim's hand off a carton of cigarettes before stealing it, or where the defendant pushed the shoulder of a store clerk, causing her to fall while he took possession of an item in the store, the minimum conduct necessary "does not necessarily include the use, attempted use, or threatened use of" violent force required by the ACCA elements clause. *Id.* at 803-804.

Fritts reached the contrary conclusion, by ignoring the Florida courts' construction of §812.13(1) and the minimal conduct sufficient for a "forceful" taking

under that provision. *See, e.g.*, *Sanders v. State*, 769 So.2d 506, 507-508 (Fla. 5th DCA 2000) (affirming a strong arm robbery conviction where the defendant merely peeled back the victim's fingers before snatching money from his hand); *Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993) (finding force sufficient to tear a scab off victim's finger was enough to sustain conviction for robbery); *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001) (upholding conviction for robbery by force based upon testimony of the victim "that her assailant 'bumped' her from behind with his shoulder and probably would have caused her to fall to the ground but for the fact that she was in between rows of cars when the robbery occurred" and did not fall); and *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011) (rejecting defendant's argument that actual "violence" was necessary for a strong arm robbery conviction in Florida, and that his act of "engaging in a tug-of-war over the victim's purse" could not constitute robbery because it "was not done with violence or the threat of violence"; holding that it was sufficient that there was "the use of force to overcome the victim's resistance"). Contrary to *Fritts,* then, these Florida decisions confirm that "overcoming resistance" for a robbery conviction in Florida, as for a robbery conviction in North Carolina, does *not* necessitate *violent* force.

Similarly, in *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the Fourth Circuit held that a conviction for Virginia common law robbery – an offense which may be committed by either *"violence or intimidation"* – likewise failed to qualify as a violent felony within the ACCA's elements clause since in Virginia, robbery can be committed by slight, non-violent force. *Id.* at 684-685 (noting that

according to Virginia case law, "anything which calls out resistance is sufficient"; "such resistance by the victim does not necessarily reflect use of 'violent force'"; holding that the "minimum conduct necessary to sustain a conviction for Virginia common law robbery does not necessarily include 'violent force'"). Because a Virginia court had sustained a conviction for robbery by force where the extent of the victim's resistance was limited to the fact that she was "forc[ed] to turn around and face" the defendant, who had simply tapped her on the shoulder, "jerked" her around by pulling on her shoulder, then grabbed her purse and ran, the Fourth Circuit squarely rejected the proposition that any force sufficient to overcome resistance necessarily satisfied the elements clause. *Id.* at 685.

And the Sixth Circuit has just aligned itself with the Fourth, holding that the Ohio statutory robbery offense does not qualify as an ACCA violent felony, given Ohio appellate decisions confirming that a robbery by "use of force" under the statute can be accomplished by the minimal amount of force necessary to snatch a purse involuntarily from an individual, or simply "bumping into an individual," which is demonstrably "lower than the type of force required by [*Curtis*] *Johnson*." *United States v. Yates,* 866 F.3d 723, 728-732 (6th Cir. 2017).

Also, in *United States v. Bell,* 840 F.3d 963, 966 (8th Cir. 2016), the Eighth Circuit held that a Missouri conviction for second degree robbery failed to qualify under ACCA's elements clause because a defendant can be convicted of that offense "when he has physical contact with the victim but does not necessarily cause physical pain or injury." *But see United States v. Harris,* 844 F.3d 1260, 1266-1268

(10th Cir. 2017) (acknowledging that Colorado statutory robbery is an ACCA violent felony due to Colorado Supreme Court's statement that "there can be no robbery without violence, and there can be no larceny with it").

Still, beyond the conflict with the Fourth, Sixth, and Eighth circuits on the resistance/quantum of force issue, *Fritts* also conflicts with the Ninth Circuit on the *mens rea* necessary for an offense within the elements clause. *See United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015). Applying the Court's reasoning in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that the term "use" in the similarly-worded 18 U.S.C. §16(a) "most naturally suggests a higher degree of intent than negligent or merely accidental conduct," *id.* at 9, the Ninth Circuit concluded in *Dixon* that a California conviction for robbery committed by "force" does not qualify as a "violent felony" under the ACCA elements clause since the California Supreme Court had determined that a conviction may result from a defendant's *unintentional* use of force, and therefore, merely negligent conduct. *See Dixon*, 805 F.3d at 1197.

Florida decisions such as *State v. Baldwin*, 709 So.2d 636 (Fla. 2nd DCA 1998), have made clear that a robbery by "putting in fear" under §812.13(1) does not require intentionally or actually threatening conduct. *See id.* at 637-638 ("We note that the test does not require conduct that is, itself, threatening or forceful. Rather, a jury may conclude that, in context, the conduct would induce fear in the mind of a reasonable person notwithstanding that the conduct is not expressly threatening"). Because a defendant need not intend to place a victim in fear to commit a Florida robbery, the offense – like a California robbery – does not categorically have as an

element the threatened "use" of physical force, as that term was interpreted by this Court in *Leocal* and the Ninth Circuit in *Dixon*.

Even the bare holding of *Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), followed in *Fritts* and by the Magistrate Judge at A-3, that a Florida "armed robbery" conviction under Fla. Stat. §812.13 is "undeniably" a "violent felony" within the ACCA's elements clause, is debatable by reasonable jurists. At least two other circuits have reasoned differently and reached directly conflicting results on similar issues. Although the Eleventh Circuit has declined to consider the Florida Supreme Court's decision in *State v. Baker*, 452 So.2d 927 (Fla. 1984), which confirms that the term "carrying" in Fla. Stat. §812.13(2) simply requires that the offender possess a weapon – not that the victim see it, be threatened with it, or even know of its existence—*see id.* at 929, the Ninth and D.C. Circuits have both found the distinction between "possessing" and "using" a weapon dispositive of whether an armed robbery conviction qualifies as a "violent felony" within the elements clause. *See United States v. Parnell*, 818 F.3d 974, 978-981 (9th Cir. 2016) (holding after considering Massachusetts case law that a conviction under the Massachusetts armed robbery statute was not a violent felony because the underlying offense permitted conviction upon the use of "any force, however slight," and all that was required by the Massachusetts courts for an "armed robbery" conviction was the mere possession of a weapon without using or even displaying it, which "does not bring Massachusetts' armed robbery statute within ACCA's force clause"); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016) (reaching the opposite

conclusion after reviewing the Maryland armed robbery statute, since the Maryland statute – unlike the Massachusetts armed robbery statute in *Parnell* – required "the *use* of a dangerous or deadly weapon").

Moreover, in *United States v. Stokeling,* 684 F. App'x 870 (11th Cir. 2017), while concurring in the majority's decision to uphold the defendant's prior robbery conviction under §812.13 as a "violent felony" under ACCA because "our Circuit precedent dictates that," Judge Martin stated simply that she "believe[s] that *Fritts* was wrongly decided." She opined:

> The *Fritts* panel did not engage in the categorical analysis the Supreme Court instructed us to use when deciding whether a person's prior conviction requires a longer sentence under ACCA. When it turned its back on the required categorical approach, the *Fritts* panel failed to give proper deference to *McCloud v. State,* 335 So.2d 257 (Fla. 1976), the controlling Florida Supreme Court case interpreting §812.13 from 1976 to 1997. In *McCloud,* Florida's highest court held that taking by *"any degree of force"* was sufficient to justify a robbery conviction. The result of the mistakes in *Fritts* is that people like Mr. Fritts will serve longer prison sentences that are not authorized by law.

Id. at 872. Judge Martin recognized that Stokeling was "not one of those people" since he was convicted after the Florida Supreme Court decided *Robinson v. State,* 692 So.2d 883 (Fla. 1997), which abrogated *McCloud*'s "any degree of force" holding. However, Mr. Rivera *is* one of "those people."

Finally and most recently, in *United States v. Geozos,* 870 F.3d 890 (9th Cir. 2017), the Ninth Circuit considered both robbery and armed robbery convictions under the exact statute at issue here – Fla. Stat. §812.13 – and held neither

categorically qualified as an ACCA violent felony since §812.13 – both by its text and as interpreted by the Florida courts – did *not* require the use of "violent force" within the meaning of the ACCA and *Curtis Johnson*, because "one can violate §812.13(1) without using violent force." 870 F.3d at 900. The Ninth Circuit found significant that the terms "force" and "violence" were used separately in the statute, suggesting "that not all 'force' that is covered by the statute is 'violent force.'" *Id.* It recognized that its conclusion that a Florida robbery offense was not categorically an ACCA "violent felony" put it "at odds" with the Eleventh Circuit, but determined that the Eleventh Circuit's decisions in *United States v. Lockley,* 632 F.3d 1238 (11th Cir. 2011) and *United States v. Fritts,* 841 F.3d 937 (11th Cir. 2016) were unpersuasive because they overlooked that crucial point – that violent force is unnecessary to "overcome resistance" in Florida. *Geozos,* 870 F.3d at 901.

Given the Ninth Circuit's criticism of the Eleventh Circuit in *Geozos,* it is undisputable that reasonable jurists not only can debate – but have expressly debated – the correctness of the conclusion in *Lockley* and *Fritts* that a Florida *unarmed* robbery conviction qualifies as an ACCA violent felony. Moreover, the Ninth Circuit found that an offender may be sentenced for *armed* robbery under Fla. Stat. §812.13(2)(a) for merely carrying a concealed firearm or other deadly weapon during the robbery, even if it is never displayed to the victim and the victim remains unaware of its presence. *Geozos,* 870 F.3d at 900. As such, reasonable jurists have now debated whether the armed nature of a Florida robbery conviction

is sufficient to qualify the offense as an ACCA violent felony.

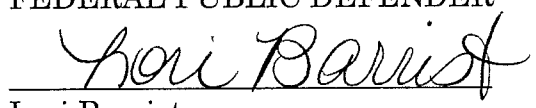
In sum, reasonable jurists could at least debate, and members of the Eleventh Circuit, as well as other circuits, have in fact debated, whether a Florida state armed robbery conviction satisfies ACCA's elements clause. For all these reasons, the Eleventh Circuit erred when it failed to grant a certificate of appealability on the following question:

Whether reasonable jurists could debate whether Mr. Rivera was denied his due process rights under the Fifth Amendment to the United States Constitution when he was sentenced as an armed career criminal to a 188-month term of imprisonment pursuant to 18 U.S.C. §924(e) for possessing a gun after three Florida state armed robbery convictions, where such offenses are not violent felonies after *Johnson v. United States,* 576 U.S. ___, 135 S. Ct. 2551 (2015)?

CONCLUSION

Based upon the foregoing petition, this Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER



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APPENDIX

APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13189-D

ARMANDO RIVERA, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Armando Rivera, Jr., moves for a certificate of appealability ("COA"), in order to appeal the denial of his counseled 28 U.S.C. § 2255 motion to correct sentence. To merit a COA, Rivera 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* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Rivera has failed to satisfy the first prong of *Slack*'s test, his motion for a COA is DENIED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Ft. Pierce Division
Case Number: 16-14205-CIV-MARTINEZ-WHITE
(Case Number: 05-14007-CR-MARTINEZ)

ARMANDO RIVERA, JR.,
Movant,
vs.

UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE WHITE'S REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, for a Report and Recommendation on Movant's counseled motion to vacate, filed pursuant to 28 U.S.C. § 2255 [ECF No. 9]. Magistrate Judge White filed a Report and Recommendation [ECF No. 19], recommending that the motion to vacate be denied, no certificate of appealability issue, and the case be closed. The Court has reviewed the entire file and record and has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present. After careful consideration, it is hereby:

ADJUDGED that United States Magistrate Judge White's Report and Recommendation [ECF No. 19] is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ADJUDGED that Movant's motion to vacate, filed pursuant to 28 U.S.C. § 2255 [ECF No. 9], is **DENIED**. A certificate of appealability is **DENIED**. This case is **CLOSED,** and all pending motions are **DENIED** as **MOOT.**

DONE AND ORDERED in Chambers at Miami, Florida, this 27 day of June, 2017.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge White
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CIV-14205-MARTINEZ
(05-CR-14007-MARTINEZ)
MAGISTRATE JUDGE P.A. WHITE

ARMANDO RIVERA, JR.,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT OF MAGISTRATE JUDGE

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence entered in Case No. 05-CR-14007-MARTINEZ.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the order granting Movant leave to file a second or successive motion (CV-DE#1), Movant's amended motion and memorandum of law in support thereof (CV-DE#9), the government's response (CV-DE#11), Movant's reply (CV-DE#16), the parties' respective notices of supplemental authority (CV-DE#17, 18), and all pertinent portions of the underlying criminal file.

Claims

Movant's sole claim in this proceeding is that he no longer qualifies as an Armed Career Criminal after the Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015).

Procedural History[1]

Movant was charged with four counts of illegal possession of either a firearm or ammunition, in violation of 18 U.S.C. § 922(g)(1). On October 11, 2005, Movant entered a plea of guilty to the indictment, without a written plea agreement At the change-of-plea hearing, Movant was advised that, if he was found to be an armed career criminal within the meaning of 18 U.S.C. § 924(e)(1), the Armed Career Criminal Act (ACCA), he faced a mandatory minimum sentence of 15 years' imprisonment and a maximum sentence of life as to all four counts of the indictment.

A pre-sentence investigation report (PSI) was prepared in anticipation of sentencing. Movant's base offense level was set at 24, pursuant to USSG § 2K2.1(a)(2), which provided that an offense involving possession of a firearm by a convicted felon who committed the offense subsequent to sustaining two felony convictions of either a crime of violence or a controlled substance offense had a base offense level of 24. Movant was deemed to satisfy the criteria for the enhanced base offense level based on a February 7, 1990 convictions for armed burglary, armed robbery, false imprisonment, and aggravated assault in Polk County Case No. CF89-3750A1, and a June 25, 1993 conviction for armed robbery in Polk County Case No. CF 92-3462A1. Two points were added because the firearms involved in the offense were stolen, and another four points were added because Movant had possessed the firearms and ammunition in connection with other felony offenses, to-wit, the sale of cocaine, marijuana, oxycodone, and methamphetamine within 1,000 feet of a school, resulting in an adjusted offense level of 30. However, Movant's offense level was increased to 34 because he qualified as an armed career criminal. As the predicate offenses

[1]The relevant procedural history of Movant's underlying criminal case is not in dispute. A detailed recitation thereof, with citations to the record, can be found in the parties' filings.

qualifying Movant for the armed career criminal designation, the PSI listed the following convictions: following convictions were listed as predicate offenses: (1) February 7, 1990 armed burglary, armed robbery, false imprisonment and aggravated assault (Dkt.#89-3750); (2) February 7, 1990 armed robbery (Dkt.#89-3802); and (3) January 25, 1993 armed robbery (Dkt.#92-3462). Three points were then deducted for timely acceptance of responsibility, resulting in a total offense level of 31.

Movant also had a total of nine criminal history points, yielding a criminal history category of IV. However, because Movant was considered an armed career criminal, his criminal history category was enhanced to VI. Based on an total offense level of 31 and a criminal history category of VI, Movant's guideline range was 188-235 months' imprisonment. The probation officer noted, however, that because Movant had an undischarged term of imprisonment on the state drug case that arose out of the same relevant conduct as the federal charges, an adjustment to his guideline range was warranted pursuant to § 5G1.3(b)(1) and (2). The probation officer further noted that Movant was subject to mandatory minimum terms of 15 years' imprisonment on each count, pursuant to 18 U.S.C. § 924(e)(1).

Movant filed objections to the PSI. In pertinent part, Movant argued that pursuant to Rivera argued that, pursuant to Apprendi,[2] Blakely,[3] Booker,[4] and Shepard,[5] the district court could not enhance his sentence based on prior convictions that were neither alleged in the indictment nor admitted by him at his change-of-plea hearing. Movant contended that the district court was therefore

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[2]Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000).

[3]Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004).

[4]United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005).

[5]Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254 (2005).

capped by the statutory maximum sentence provided for in 18 U.S.C. § 924(a)(2) (ten years). Movant acknowledged, however, that controlling precedent was adverse to his position. In addition, Movant did not lodge a factual challenge to any of the convictions set forth in the PSI or contend that any of his prior convictions were not "violent felony" offenses, as that term is used in 18 U.S.C. § 924(e)(1).

At the sentencing hearing, Movant sought a ruling for purposes of preserving the issue for appeal regarding his contention that he could not be classified as an armed career criminal in light of the fact that the indictment did not allege the prior convictions and he had not admitted to them at the change-of-plea hearing. The court overruled Movant's objection, and thereafter sentenced him to concurrent terms of 188 months' imprisonment as all four counts, with a 13-month adjustment pursuant to USSG § 5G1.3(b), for a net sentence of 175 months' imprisonment.

Movant filed a timely notice of appeal. On appeal, he claimed that the district court had erred in imposing the mandatory minimum fifteen year sentence pursuant to the ACCA based on prior convictions that were neither charged in the indictment nor admitted by the defendant at his plea. On July 18, 2006, Movant's sentence was affirmed on direct appeal. United States v. Rivera, 189 F. App'x 933(11th Cir. 2006).

On September 7, 2006, Movant filed a Motion to Vacate pursuant to § 2255. In that proceeding, Movant did not object to or contest any of his qualifying ACCA predicate convictions. On August 15, 2007, the court entered the Amended Order Adopting Magistrate's Report and Recommendation, wherein the court denied Movant's motion. Movant filed a Notice of Appeal and Motion for Certificate of Appealability, which was denied. Then, on March 27, 2008, the Eleventh Circuit Court of Appeals denied Movant's Motion for

Certificate of Appealability, and on May 5, 2008, the Court of Appeals denied Movant's Motion for Reconsideration.

On August 11, 2008, Movant filed a motion pursuant to Fed. R. Crim. P. 60(b)(3). Specifically, Movant claimed that the United States had failed to provide him with the discovery. On November 6, 2008, the court denied Movant's motion. Movant appealed, and his appeal was subsequently dismissed.

On June 7, 2016, the United States Court of Appeals for the Eleventh Circuit granted Movant leave to file a successive motion to correct his sentence under 28 U.S.C. § 2255. Thereafter, the undersigned appointed counsel and set a briefing schedule. The government conceded that the instant motion is timely because it was filed within one year of Johnson. See Dodd v. United States, 545 U.S. 353 (2005).

Procedural Bar

This Court acknowledges that threshold issues should ordinarily be resolved first. However, judicial economy sometimes dictates reaching the merits, if the threshold issues are complicated and the case is otherwise easily resolvable against the defendant on the merits. See, Barrett v. Acevedo, 169 F.3d 1155, 1162 (8 Cir. 1999)(stating that judicial economy sometimes dictates reaching the merits, if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 528 U.S. 846 (1999); see, also, Lambrix v. Singletary, 520 U.S. 518, 525 (1997); Chambers v. Bowersox, 157 F.3d 560, 564 n. 4 (8 Cir. 1998)(stating that "[t]he simplest way to decide a case is often the best.").

Here, the parties have significant disputes regarding whether Movant has met (or even has) the initial burden of establishing that the was sentenced pursuant to the residual clause of the ACCA, whether Movant has procedurally defaulted on his Johnson claim by

not specifically couching his challenge to his armed career criminal designation in terms of a vagueness challenge to the ACCA's residual clause and, if so, whether the alleged error is jurisdictional and thus cannot be defaulted as a matter of law, or whether Movant can make a showing of cause and prejudice or actual innocence to overcome the procedural bar. However, it is clear from the record and applicable law that Movant is not entitled to relief on the merits of his claim. Judicial economy thus dictates that his claim should be resolved on the merits. Indeed, the Court's conclusion that Movant's claim fails on the merits also resolves Movant's procedural defense that his challenge is jurisdictional and thus cannot be defaulted, as well as Movant's procedural defense that he can establish cause and prejudice and that he is actually innocent. Stated another way, because the Court's conclusion, as set forth below, is that Movant still qualifies as an armed career criminal after Johnson, Movant cannot establish that the trial court exceeded its jurisdiction by sentencing Movant to a term of imprisonment in excess of the statutory maximum, nor can he establish that he will be prejudiced by the failure to consider his claim on the merits, or that he is actually innocent of his statutorily-enhanced sentence.

Discussion

In general, the applicable maximum statutory penalty for being a felon in possession of a firearm and ammunition is 10 years' imprisonment. 18 U.S.C. § 924(a)(2). However, if the offender has three or more prior convictions for a "serious drug offense" or a "violent felony," the ACCA increases his or her prison term to a minimum of 15 years and a maximum of life. 18 U.S.C. § 924(e)(1).

The ACCA defines "violent felony" as follows:

> any crime punishable by imprisonment for a term exceeding one year ... that—

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

§ 924(e)(2)(B). Paragraph (i) of this definition is commonly referred to as the "elements clause." That portion of paragraph (ii) that lists several felonies by name is commonly referred to as the "enumerated offenses clause." And the closing phrase of paragraph (ii) italicized above that begins "or otherwise involves conduct that . . . ," which has come to be known as the Act's residual clause, was of course held to be unconstitutionally vague in Johnson.

In the context of the ACCA's definition of "violent felony," the phrase "physical force" in paragraph (i) "means *violent* force--that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010) ("Johnson I"). As the Supreme Court has noted, the term "violent felony" has been defined as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a deadly weapon, [and] calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." Id. (internal quotations and citations omitted); see also Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 383, 160 L. Ed. 2d 271 (2004) (stating that the statutory definition of "crime of violence" in 18 U.S.C. § 16, which is very similar to § 924(e)(2)(B)(i) in that it includes any felony offense which has as an element the use of physical force against the person of another, "suggests a category of violent, active crimes . . ."). As such, the Supreme Court has stated that the term "use" in the

similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" the phrase "use . . . of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9-10; see also United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force;" *citing* Leocal). While the meaning of "physical force" under the ACCA is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the (statutory) elements of state crimes. Johnson I, 599 U.S. at 138. And a federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise. See Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir.1983).

To determine whether a past conviction is for a crime listed under the enumerated offenses clause is "violent felony" under the ACCA, "courts use what has become known as the 'categorical approach': They compare the elements of the statute forming the basis of the defendant's conviction with the elements of the "generic" crime---*i.e.*, the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." Descamps v. United States, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013); see also United States v. Estrella, 758 F.3d 1239 (11th Cir. 2014). To determine whether an offense "categorically" qualifies as a "crime of violence" under the "elements" or "use-of-force" clause, then, the court would have to determine if the crime of conviction has an element of "force

capable of causing physical pain or injury to another person" as contemplated by Johnson I and its progeny. See Johnson, 559 U.S. at 140; Leocal, 543 U.S. at 11.

The Supreme Court has approved a variant of the categorical approach, labeled the "modified categorical approach," for use when a prior conviction is for violating a so-called "divisible statute." Id. That kind of statute sets out one or more elements of the offense in the alternative. Id. If one alternative matches an element in the generic offense, but another does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, known as Shepard documents,[6] to determine which alternative formed the basis of the defendant's prior conviction. Id. The modified categorical approach then permits the court to "do what the he categorical approach demands: compare the elements of the crime of conviction . . . with the elements of the generic crime. Id.

The modified categorical approach does not apply, however, when the crime of which the defendant was convicted has a single, indivisible set of elements. Id. at 2282. And when a defendant was convicted of a so-called "'indivisible' statute' - *i.e.*, one not containing alternative elements— that criminalizes a broader swath of conduct than the relevant generic offense," that conviction cannot serve as a qualifying ACCA predicate offense. Id. at 2281-82.

In sum, when determining whether a prior conviction qualifies as an ACCA predicate "violent felony," the courts can only look to the elements of the statute of the prior conviction, whether assisted by Shepard documents or not, and not to the facts

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[6]In Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court held that a sentencing court could examine only a limited category of documents when employing the modified categorical approach in determining whether a prior guilty plea was for a particular offense, and thus a violent felony under ACCA. See id. at 16, 125 S.Ct. 1254.

underlying the defendant's prior conviction. See Descamps, 133 S.Ct. 2283-85. And in so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, ___ U.S. ___, 133 S.Ct. 1678, 1684 (2011)(*quoting* Johnson I, 559 U.S. at 137).

Finally, in Mathis v. United States, — U.S. —, 136 S. Ct. 2243 (2016), the Court was most recently called upon to determine whether federal courts may use the modified categorical approach to determine if a past conviction is for an enumerated offense under the ACCA when a defendant is convicted under an indivisible statute that lists multiple, alternative means of satisfying one (or more) of its elements. 136 S. Ct. at 2247-48. The Court declined to find any such exception and, in so doing, addressed how federal courts are to make the threshold determination of whether an alternatively-phrased statute sets forth alternative elements (in which case the statute would be divisible and the modified categorical approach would apply to determine which version of the statute the defendant was convicted of violating), or merely lists alternative means of satisfying one element of an indivisible statute (in which case the categorical approach would apply). Id. at 2256-57.

Here, the parties agree that Movant's entitlement to relief in this case turns entirely on whether his three prior Florida convictions for armed robbery still qualify as ACCA predicate offenses after Johnson. The government cites United States v. Dowd, 451 F.3d 1244 (11th Cir. 2006), United States v. Oner, 382 F. App'x 893 (11th Cir. 2010), and United States v. Johnson, 634 F. App'x 227 (11th Cir. 2015), for the proposition that Florida armed robbery has always a "violent felony" within the meaning of the ACCA's elements clause and that, therefore, nothing in Johnson, which merely invalidated the residual clause, affects the continuing viability of Florida armed robbery as an ACCA predicate

offense. In Dowd, supra, the Eleventh Circuit held that the defendant's 1974 Florida armed robbery conviction "undeniably is a conviction for a violent felony," and then cited without further discussion "See 18 U.S.C. § 924(e)(2)(B)(I)." 451 F.3d at 1255. In Oner, supra, the Eleventh Circuit considered the issue again, concluded that nothing in Johnson I[7] required it to revisit its holding in Dowd, and further stated that "[t]he carrying of a firearm or other deadly weapon during a robbery surely implicates violent force and of the most severe kind." 382 Fed. App'x at 896. And most recently, in Johnson, supra, the Eleventh Circuit rejected a void-for-vagueness challenge to the ACCA, *citing* Lockley, supra, and stating that "[e]ach of his predicates was an armed robbery, which had as an element 'the threatened use of force against the person of another.'" 634 Fed. App'x at 232.[8] The government argues Dowd is still binding precedent in the Eleventh Circuit for the proposition that Florida armed robbery convictions still qualify as ACCA violent felonies under the elements clause, as demonstrated by the fact that the Eleventh Circuit has denied applications for leave to file second or successive motions on this basis in decisions such as In re Hires, __ F.3d __, 2016 WL 3342668 (11th Cir. June 15, 2016), In re Thomas, 823 F.3d 1345 (11th Cir. May 25, 2016), In re Robinson, 822 F.3d 1196 (11th Cir. April 19, 2016), In

[7]That is, the Supreme Court's 2010 Johnson case which dealt with the issue of the degree of force required for an ACCA "violent felony," as opposed its recent 2015 Johnson decision, which invalidated the residual clause.

[8]Although not cited by the government, the Court notes that in Yawn v. FCC Coleman-Medium Warden, 615 F. App'x 644, 645 (11th Cir. 2015), the Eleventh Circuit also stated "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)." 615 Fed. App'x at 645.

re Brunson, No. 16-14720-J; 16-13955-J (11th Cir. Aug. 3, 2016), and In re Smith, No. 16-14517-J (11th Cir. Aug. 1, 2016).[9]

Movant, for his part, argues that Dowd has been abrogated by intervening Eleventh Circuit and Supreme Court precedent, and that Florida robbery is overbroad and thus does not satisfy the elements clause of the ACCA as a "violent felony." It is true that the Eleventh Circuit has long recognized that its "first duty" is always "to follow the dictates of the United States Supreme Court," and that it "must consider" whether intervening Supreme Court decisions have "effectively overruled" a prior precedent. United States v. Contreras, 667 F.2d 976, 979 (11th Cir. 1982); see also Scalia, Antonin, J., The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1177 (1989) (lower courts are not only bound by the narrow "holdings" of higher court decisions, but also by their "mode of analysis"). According to Movant, the Court in Dowd did not conduct the rigorous mode of analysis mandated by subsequent Supreme Court and Eleventh Circuit precedents in determining whether a particular offense qualifies as an ACCA predicate, and that those cases make undeniably clear that proper application of the categorical approach requires federal court to consider a State's authoritative interpretation of the elements of its own statutes, something the Court in Dowd did not do. Movant further argues that the various cases decided in the context of applications for leave to file second or successive petitions similarly failed to conduct the requisite analysis, or to consider whether Dowd has been abrogated.

Despite its tempting appeal, there are numerous problems with Movant's suggestion that this Court need not follow Dowd. First,

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[9]Although not cited by the government, the Court notes that in Yawn v. FCC Coleman-Medium Warden, 615 F. App'x 644, 645 (11th Cir. 2015), the Eleventh Circuit also stated "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)." 615 Fed. App'x at 645.

while it is true that Eleventh Circuit precedent can be effectively abrogated or overruled in certain circumstances, a prior panel's holding is binding "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or [the Eleventh Circuit] sitting *en banc.*" Archer, 531 F.3d at 1352. However, there is no authority for the proposition that, as Movant suggests, a prior decision of the Eleventh Circuit could be effectively abrogated or overruled by subsequent Eleventh Circuit decisions. Indeed, under the prior-panel-precedent rule dictates just the opposite. Id.

Next, while it may be true that Johnson I, Descamps and Mathis expanded upon or clarified how federal courts are to determine whether a prior conviction qualifies as an ACCA predicate, the categorical and modified categorical approaches existed long before Dowd was decided, see Taylor, supra, as did the rule that federal courts are bound to follow a State's authoritative interpretation of the elements of its own crimes. See Johnson I, 559 U.S. at 138, *citing* Johnson v. Fankell, 520 U.S. 911, 916, 117 S.Ct. 1880, 138 L.Ed.2d 108 (1997). The fact the the Dowd Court failed to conduct the analysis in accordance with the dictates of the law at the time does not mean that it has been abrogated or effectively overruled by Supreme Court precedents reiterating and clarifying the applicable standard. It just arguably means that Dowd was wrongly decided. See State v. Baker, 452 So.2d 927, 929 (Fla. 1982) ("carrying a weapon" under § 812.13(2) simply requires that the offender "possess" the weapon.

Finally, while as previously indicated it is true that Eleventh Circuit precedent can be effectively abrogated or effectively overruled by the Supreme Court in certain circumstances, see Archer, 531 F.3d at 1352, Conteras, 667 F.2d at 979, that only means that the Eleventh Circuit may decline to follow the holding of a prior panel on that basis, which would

ordinarily be required by the prior-panel-precedent rule. See Id. However, Movant does not cite any authority for the proposition that a district court can decline to follow binding Circuit precedent on this basis. Stated another way, it is for the Eleventh Circuit, not this Court, to decide whether its decision is Dowd has been effectively abrogated or overruled by intervening Supreme Court precedent, or to overrule Dowd by sitting *en banc*, in the event that it concludes that Dowd was wrongly decided.

Counsel for Movant also devotes significant portions of her brief to argument regarding why even ordinary robbery convictions are problematic under Florida law. As the parties are aware, the undersigned has previously recommended that relief be granted to certain § 2255 Movants with certain Florida robbery convictions as their predicate offenses, on the basis of an anomaly that existed under Florida law for a period of time. The problem, of course, is that the Eleventh Circuit Court of Appeals has since laid that issue to rest. Specifically, as the government notes in its Notice of Supplemental Authority, in United States v. Fritts, 841 F.3d 937(11th Cir. November 8, 2016), the Eleventh Circuit held that all Florida robbery, regardless of the date of conviction, is a violent felony under the elements clause. Id. at 940 ("Our Dowd precedent and our conclusion here are also supported by our decisions holding that a Florida robbery conviction under § 812.13(1), even without a firearm, qualifies as a "crime of violence" under the elements clause."). In sum, the Eleventh Circuit has now explicitly held in a comprehensive decision that surveyed the applicable law that all Florida robbery, regardless of the date of conviction, is a violent felony under the elements clause.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and that if a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where a §2255 movant's constitutional claims have been adjudicated and denied on the merits by the district court, the movant must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a §2255 movant's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the movant can demonstrate both "(1) 'that jurists of reason would find it debatable whether the [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is

more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Movant is not entitled to relief on the merits, the court considers whether Movant is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find the court's treatment of any of Movant's claims debatable and that none of the issues are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is not warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84.

Conclusion

Based upon the foregoing, it is recommended that the motion to vacate be DENIED, and that no certificate of appealability be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections with regard to the denial of a certificate of appealability.

SIGNED this 20th day of April, 2017.

UNITED STATES MAGISTRATE JUDGE

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