No.

IN THE

Supreme Court of the United States

EDWARD TYRONE REEVES,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

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

CERTIFICATE OF SERVICE

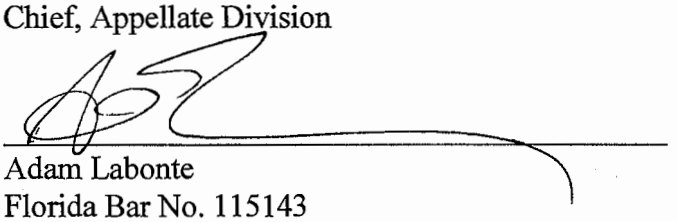
I HEREBY CERTIFY, pursuant to Supreme Court Rule 29.5(b), that on this 3rd day of October, 2017, true copies of the Petition for Writ of Certiorari and the Motion for Leave to Proceed *In Forma Pauperis* were mailed in an envelope to the Clerk, United States Supreme Court, One First Street, N.E., Washington, D.C. 20543; to the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

All parties required to be served have been served.

EXECUTED this 3rd day of October 2017.

Donna Lee Elm
Federal Defender

Rosemary Cakmis
Assistant Federal Defender
Chief, Appellate Division



Adam Labonte
Florida Bar No. 115143
Research and Writing Attorney
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-Mail: Adam_Labonte@fd.org
Counsel of Record for Petitioner

No.

IN THE

Supreme Court of the United States

EDWARD TYRONE REEVES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Edward Tyrone Reeves, asks leave to file the enclosed Petition for Writ of Certiorari to the Supreme Court of the United States without prepayment of costs and to proceed *In Forma Pauperis* in accordance with Supreme Court Rule 39, and Title 18, U.S.C. 3006A(d)(6). The filing of this petition is a continuation of the representation of the defendant under a Criminal Justice Act appointment of the Office of the Federal Public Defender for the Middle District of Florida, by the United States District Court. In accordance with 3006A(d)(6), no affidavit as required by Supreme Court Rule 39 need be filed.

WHEREFORE, Petitioner, Edward Tyrone Reeves, prays for leave to proceed *In Forma Pauperis*.

Respectfully submitted this 3rd day of October 2017.

Donna Lee Elm
Federal Defender

Rosemary Cakmis
Assistant Federal Defender
Chief, Appellate Division

Adam Labonte
Florida Bar No. 115143
Research and Writing Attorney
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-Mail: Adam_Labonte@fd.org
Counsel of Record for Petitioner

No. _____

IN THE
Supreme Court of the United States

EDWARD TYRONE REEVES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

Donna Lee Elm
Federal Defender

Adam Labonte, Counsel of Record
Research and Writing Attorney
Fla. Bar No. 115143
Federal Defender's Office
400 North Tampa St., Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-Mail: Adam_Labonte@fd.org

QUESTIONS PRESENTED FOR REVIEW

This case presents an important issue concerning the proper application 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) (*Samuel Johnson*), striking down the ACCA's residual clause as unconstitutionally vague, several circuit courts of appeals have reconsidered and issued published decisions on whether various state robbery convictions – previously counted as "violent felonies" under the ACCA's residual clause using a simple "risk" analysis – remain "violent felonies" under the ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i), because they have "the use, attempted use, or threatened use" of violent force "as an element." 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). This petition addresses that question. Specifically, the question presented is whether any conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause where, as in Florida and several other states, the offense may be committed by using a *de minimis* amount of force.

Additionally, this case presents the issue of whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent, even where a

judge on the panel issuing the binding precedent subsequently states the panel's decision may be erroneous, misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and more recently in *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a certificate of appealability (COA).

This Court's resolution of these issues 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) (*Curtis Johnson*). It is respectfully submitted that this petition presents an ideal vehicle to clarify the scope of the ACCA's elements clause. Additionally, this case would allow resolution of the Eleventh Circuit's erroneous application of the COA standard rule, which essentially requires a merits determination and precludes the issuance of COAs, even where reasonable jurists debate whether a movant is entitled to relief.

LIST OF PARTIES

Petitioner, Edward Tyrone Reeves, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - cont'd

Cases **Page(s)**

TABLE OF AUTHORITIES - cont'd

Cases **Page(s)**

Statutes

TABLE OF AUTHORITIES - cont'd

TABLE OF AUTHORITIES - cont'd

PETITION FOR A WRIT OF CERTIORARI

Edward Tyrone Reeves respectfully petitions this Court for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his motion for a certificate of appealability (COA) on the issue of whether his ACCA sentence, based in part on Florida convictions for unarmed robbery and robbery with a firearm or deadly weapon, is unconstitutional in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Reeves' motion for a COA in Appeal No. 17-11133 is included in the Appendix at A.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Reeves' criminal case pursuant to 18 U.S.C. § 3231 and jurisdiction over his civil case proceeding pursuant to 28 U.S.C. § 2255. The district court dismissed Mr. Reeves' § 2255 motion on January 10, 2017. Mr. Reeves subsequently filed a notice of appeal on March 9, 2017, and a motion for COA in the Eleventh Circuit on March 24, 2017, that was denied on July 6, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely pursuant to Supreme Court Rule 13.1.

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 Florida robbery statutes in effect at the time of Mr. Reeves' convictions provided, in pertinent part:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . .

Fla. Stat. § 812.13 (1992).[1]

---

[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.

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

STATEMENT OF THE CASE

Mr. Edward Tyrone Reeves was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The presentence investigation report (PSR) recommended sentencing Mr. Reeves as an armed career criminal based, in part, on his prior 1987 Florida conviction for unarmed robbery and prior 1992 conviction for robbery with a firearm or deadly weapon. As an armed career criminal, Mr. Reeves' enhanced offense level and enhanced criminal history category provided an advisory guideline sentencing range of 180 months' imprisonment and a mandatory minimum term of 15 years' imprisonment. Without the ACCA enhancement, Mr. Reeves' advisory guideline sentencing range would have been 46 to 57 months' imprisonment, and the statutory maximum would have been 10 years' imprisonment. On January 14, 2014, the district court granted the government's motion for downward departure of Mr. Reeves' sentence based upon substantial assistance, which allowed the district court to sentence Mr. Reeves below the 15-year mandatory minimum sentence, and sentenced Mr. Reeves to 72 months' imprisonment. Mr. Reeves did not appeal.

On June 23, 2016, Mr. Reeves moved to vacate his sentence under 28 U.S.C. § 2255, arguing that his ACCA sentence was unconstitutional based on *Samuel Johnson*, 135 S. Ct. 2551. On January 10, 2017, the district court denied the § 2255 motion and denied a COA. On March 9, 2017, Mr. Reeves filed a timely notice of appeal, and on March 24, 2017, he sought a COA in the Eleventh Circuit. On July 6, 2017, the Eleventh Circuit denied Mr. Reeves' motion for a COA, stating that Mr. Reeves had failed to make the requisite showing to merit a certificate of appealability. *See* Appendix A.

REASONS FOR GRANTING THE WRIT

A. There is a Split between the Ninth and Eleventh Circuits Regarding Whether a Florida Conviction for Robbery Qualifies as a "Violent Felony" under the ACCA's Elements Clause.

Under Florida's robbery statute, a robbery occurs where a taking is accomplished using enough force to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Thus, if a victim's resistance is minimal, the force needed to overcome that resistance is similarly minimal. Indeed, a review of Florida case law clarifies that a defendant may be convicted of robbery even if he uses only a *de minimis* amount of force. A conviction may be imposed if a defendant: (1) bumps someone from behind;[2] (2) engages in a tug-of-war over a purse;[3] (3) pushes someone;[4] (4) shakes someone;[5] (5) struggles to escape someone's grasp;[6] (6) peels back someone's fingers;[7] or (7) pulls a scab off someone's finger.[8] Indeed, under

---

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

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

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

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

[6] *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*, 692 So. 2d at 887 n.10 ("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).

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

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).[9]

The question of whether a state robbery conviction necessarily has violent force "as an element" was not a pressing question for this Court when the ACCA's residual clause remained in existence. Many circuits, including the Eleventh, had easily concluded that the residual clause extended to categorically non-violent crimes due to the mere "risk" of physical injury during a robbery, or in its aftermath. In line with that, the Eleventh Circuit had held in *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), that even a robbery by "sudden snatching," a crime which – by definition – requires no more force than that necessary to snatch money or an item from the victim's hand, and neither victim resistance or injury, was nonetheless a "violent felony" and proper ACCA predicate within the residual clause because "[s]udden snatching ordinarily involves substantial risk of physical injury to the victim." *Id.* at 1313. "The victim's natural reaction is likely to be to try to hold on to his or her money or property, leading in many cases to serious injury," the Eleventh Circuit reasoned, and "[i]n that respect, the crime is much like burglary, where if the victim perceives what is going on, a violent encounter is reasonably likely to ensue." *Id.*

However, once this Court eliminated the residual clause as the easiest route to an ACCA enhancement in *Samuel Johnson*, 135 S. Ct. 2551, lower courts have had to reconsider whether state robbery crimes – long counted as "violent felonies" within the residual clause, or within the

---

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

[9] 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.

elements clause before this Court clarified the meaning of "physical force" in *Johnson v. United States*, 559 U.S. 133 (2010) (*Curtis Johnson*), or the categorical approach in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016) – would qualify as "violent felonies" under these intervening precedents.

Some circuit courts have risen to that task. They have carefully re-examined their elements clause precedents rendered prior to these decisions. And notably, strictly applying the dictates of the now-clarified categorical approach, conducting the now-mandated threshold "divisibility" inquiry, *Mathis*, 136 S. Ct. at 2256, seeking out the state courts' interpretation of the elements of their robbery statutes as mandated by *Curtis Johnson*, 559 U.S. at 138, and *Mathis*, 136 S. Ct. at 2256, and determining the minimum conduct necessary for conviction as required by *Moncrieffe*, 133 S. Ct. at 1680. The Fourth Circuit has concluded that a state conviction for robbery "by violence" does not have "violent force" as an element. *See United States v. Gardner*, 823 F.3d 793, 803 (4th Cir. 2016) (North Carolina common law robbery is not an ACCA "violent felony" because *de minimis* contact is sufficient for a robbery "by violence"). And the Ninth Circuit has concluded that even an armed robbery conviction does not have "violent force" as an element. *United States v. Parnell*, 818 F.3d 974, 978-81 (9th Cir. 2016) (Massachusetts armed robbery is not an ACCA "violent felony" because the statute simply requires possessing, rather than using, a weapon).

While admittedly, other courts that have reached different conclusions, their differing conclusions are generally attributable to the different wording of the state robbery statutes there at issue, or authoritative interpretations of the statutory language by the respective state supreme courts. *Gardner*, 823 F.3d at 804; *see, e.g.*, *United States v. Harris*, 844 F.3d 1260 (10th Cir.

2017) (Colorado robbery is an ACCA "violent felony" because the Colorado Supreme Court has confirmed that the "violent" taking expressly required by the statute requires actual violence); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016) (Maryland armed robbery is a "violent felony" since, unlike the Massachusetts statute construed in *Parnell*, Maryland requires *use* – not simply possessing – of a deadly weapon).

However, the recent Eleventh Circuit's holdings in *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016) and *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), that Florida armed robbery convictions categorically qualify as "violent felonies" have been based upon prior circuit precedent of *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), which held that a robbery by "putting in fear" is categorically a "violent felony" within the elements clause, and *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), which held that a 1974 Florida conviction for armed robbery was a "undeniably" a conviction for a violent felony under the elements clause. However, the Eleventh Circuit's reliance on *Lockley* and *Dowd* ignores the irreconcilable conflict of those opinions' holdings with this Court's intervening precedents in *Moncrieffe*, *Descamps*, and *Mathis*. *See, e.g.*, *Seabrooks*, 839 F.3d at 1348 (Martin, J., concurring in judgment) ("But in light of the clarifications given to us by the Supreme Court about what steps we must take when applying the categorical approach, *Dowd* is no longer good law.").

The Ninth Circuit recently recognized this conflict in *United States v. 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. -- F.3d ---, No. 17-35018, 2017 WL

3712155 at *6–*8 (9th Cir. Aug. 29, 2017).[10] In so holding, the Ninth Circuit relied on Florida caselaw which clarified that an individual may violate Florida's robbery statute without using violent force, such as engaging "in a non-violent tug-of-war" over a purse. *Id.* (citing *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011)).

And while both the Ninth and Eleventh Circuits have recognized the Florida robbery statute requires an individual use enough force to overcome a victim's resistance, the Ninth Circuit, in coming to a decision that it recognized was at "odds" with this Eleventh Circuit's holding in *Fritts*, stated that it believed the Eleventh Circuit "overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." *Id.* (emphasis in original)

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,[11] and several others have adopted it through case law.[12] Since this Court struck down

---

[10] 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 Baker*, 452 So. 2d at 929; *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*, 818 F.3d at 978–81 (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. Reeves' convictions was for robbery with a firearm or dangerous weapon.

[11] *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).

the ACCA residual clause in *Samuel Johnson*, several circuits have had to reevaluate whether these robbery statutes and others still qualify as "violent felon[ies]" under the ACCA's elements clause.[13] 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 Curtis Johnson* , 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 *Gardner*, 823 F.3d at 793, 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

---

[12] *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).

[13] *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).

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.

Furthermore, the Eleventh Circuit refuses to consider either the specific language used in Fla. Stat. 812.13(2) which dictates enhanced penalties if the offender "carried" a weapon during a robbery, or controlling Florida caselaw clarifying that the term "carrying" as used in that

enhancement provision simply requires the offender *possess* a weapon; the victim need not be threatened with it, or ever be aware of its existence. *See State v. Baker*, 452 So.2d 927, 929 (Fla. 1984) ("The victim may never even be aware that a robber is armed, so long as the perpetrator has the weapon in his possession during the offense"). While the Florida Supreme Court's decision in *Baker* demonstrably has made no difference to the Eleventh Circuit, at least two other circuits have found the distinction between "possessing" and "using" a weapon dispositive of whether an armed robbery conviction qualifies as a "violent felony." Indeed, the *Geozos* Court held that "the 'armed' nature of each of Defendant's convictions does not make the conviction one for a violent felony" as a defendant could be convicted of violating Florida's robbery statute for merely carrying a firearm or dangerous weapon during the course of a robbery even if that firearm was not displayed or the victim aware of its presence. 2017 WL 3712155 at *7 (citing *Baker*, 452 So.2d at 929).

Given the circuit split between the Ninth and Eleventh Circuits, and the tension among the other circuits, this case presents an ideal vehicle for the Court to resolve these inconsistencies and reinforce what it said in *Curtis Johnson* — 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.

Neither justice, nor sentencing, should vary by locale. Unless this Court intervenes Eleventh Circuit defendants will continue to be sentenced more harshly, and inequitably, under the currently insurmountable "precedents" of *Dowd*, *Lockley*, *Seabrooks*, and *Fritts*.

B. 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, 773–74 (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 side steps [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 v. Sec'y Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) ("[R]easonable jurists will follow controlling law."); *see also Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). To be sure, the Court phrased its decision in Mr. Reeves' case using the proper terms—that reasonable jurists would not debate whether Mr. Reeves is entitled to relief—but reached its conclusion by essentially deciding the case on the merits, that he would be unsuccessful on appeal because *Hines* and *Sams* are 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 a member of the Eleventh Circuit has written that the issue is debatable. *In re Jones*, No. 16-14106, Order at 13 (11th Cir. June 27, 2016) (Martin, J. concurring); *In re Moore*, No. 16-14214, Order at 4–9 (11th Cir. July 27, 2016) (Martin, J., concurring). 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. Reeves respectfully requests that this Court grant this petition to review the Eleventh Circuit's erroneous application of the COA standard.

CONCLUSION

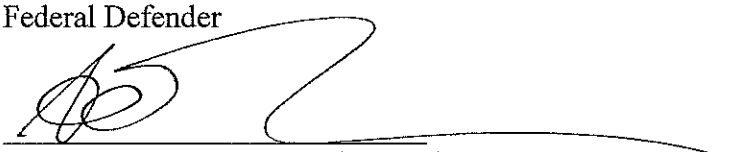
If Edward Tyrone Reeves' prior robbery convictions do not qualify as "violent felonies" under the ACCA's elements clause for any of the reasons raised herein, he was ineligible for enhanced sentencing under the ACCA. And notably, the questions raised by Mr. Reeves will have far-reaching impact not only for other Eleventh Circuit defendants, but also for defendants

throughout the country given the similarities between the Florida robbery statute and the robbery statutes of other states. Furthermore, this case addresses the Eleventh Circuit's erroneous application of the COA standard, which adopts a rule that a COA be adjudicated on the merits.

This is an excellent case for certiorari for these reasons. If granted a COA, Mr. Reeves can seek to appeal en banc in the Eleventh Circuit Court of Appeals pursuant to Fed. R. App. P. 35. The Court should grant the writ of certiorari in this case.

Respectfully submitted,

Donna Lee Elm
Federal Defender



Adam Labonte, Counsel of Record
Research and Writing Attorney
Fla. Bar No. 115143
Federal Defender's Office
400 North Tampa St., Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-Mail: Adam_Labonte@fd.org
Counsel of Record for Petitioner

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11133-F

EDWARD TYRONE REEVES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Mr. Edward Tyrone Reeves is a federal prisoner serving a 72-month sentence for possession of a firearm by a convicted felon, under 18 U.S.C. §§ 922(g) and 924(e).[1] He seeks a certificate of appealability ("COA"), to appeal the denial of his 28 U.S.C. § 2255 motion to vacate his sentence.

According to his presentence investigation report ("PSI"), and the sentencing hearing, Mr. Reeves qualified as an armed career criminal based on his prior Florida convictions for: (1) burglary and unarmed robbery, in 1986;[2] (2) resisting an officer with violence in 1990; and

---

[1] Although Mr. Reeves qualified as an armed career criminal under § 924(e), he received a departure from an otherwise mandatory 180-month sentence because he cooperated with the government, as defined under U.S.S.G. § 5K1.1.

[2] Mr. Reeves was 16 when he was convicted and sentenced for this offense. However, he was convicted as an adult.

(3) burglary and robbery with a firearm or deadly weapon, in 1992. Mr. Reeves did not appeal his federal conviction and sentence.

In June 2016, Mr. Reeves filed the instant counseled motion to vacate under 28 U.S.C. § 2255, arguing that the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague and, therefore, his sentence was unconstitutional because it was enhanced under the residual clause. Thereafter, Mr. Reeves filed an unopposed motion to stay his § 2255 proceeding, pending this Court's decision in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), *cert. denied* 2017 WL 554569 (U.S. June 19, 2017), asserting that, among other arguments, he was challenging his 1986 Florida conviction for unarmed robbery and his 1992 conviction for robbery with a firearm or deadly weapon, which were used to enhance his sentence under ACCA. The district court granted the motion to stay.

Thereafter, Mr. Reeves moved to lift the stay, as this Court had decided whether Florida robbery qualified as an ACCA predicate offense in *Fritts*. Mr. Reeves acknowledged that *Fritts* foreclosed his argument, but asserted that he wanted to preserve the issue of whether Florida robbery was a violent felony under ACCA. Therefore, Mr. Reeves asked to adopt the arguments set forth by Mr. Fritts, in pages 10-13 and 17-23 of Mr. Fritts's initial brief and pages 18-26 of Mr. Fritts's reply brief. He further moved for a 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. Reeves attached a copy of Mr. Fritts's appellate briefs. In relevant part, 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. He 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. Furthermore, Mr. Fritts argued, robbery by forced never qualified as a violent felony under ACCA because it 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 lifted the stay, and ordered the government to respond. The government responded, noting that, as Mr. Reeves recognized in his motion to lift the stay, his § 2255 motion must be denied under this Court's current precedent. Thereafter, the district court determined that Reeve qualified as an armed career criminal based on his prior offenses for: (1) burglary and unarmed robbery; (2) resisting an officer with violence; and (3) burglary and robbery with a firearm or deadly weapon. Therefore, in light of this Court's decision in *Fritts*, the district court denied Mr. Reeves's motion to vacate and, in the same order, denied a COA.

Mr. Reeves now moves, through counsel, for a COA on appeal. In his motion, Mr. Reeves recognizes that this Court's binding precedent forecloses his argument that his robbery convictions do not qualify as predicate offenses under ACCA, but argues that this Court's precedent was incorrectly decided. He asserts that this Court and a district court have issued COAs on this issue.

Mr. Reeves 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 was minimal, and robbery could occur by knocking a victim out with a

substance. Additionally, Mr. Reeves 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 acknowledges that, in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), this Court held that it was inconceivable that robbery did not require the use or threatened use of force, but argues that this part of *Lockley* did not survive *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), because those cases require a strict elements-based assessment of what the state must prove under state law.

Mr. Reeves also argues that robbery by putting in fear does not qualify as a violent felony under the elements clause because it does not require that the defendant intentionally put a victim in fear. He asserts that this Court's decision in *Lockley* 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) (which provides a definition for a crime of violence). 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 have an element of use, attempted use, or threatened use of force, which is necessary to qualify as a violent felony under the elements clause of ACCA. 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. Reeves qualified as an armed career criminal based on his Florida convictions for: (1) burglary and unarmed robbery in 1987; (2) resisting and officer with violence, in 1990; and

(3) burglary and robbery with a firearm or deadly weapon, in 1992.[3] As an initial matter, resisting arrest with violence qualifies under the elements clause of ACCA. *United States v. Hill*, 799 F.3d 1318, 1322-23 (11th Cir. 2015).

Additionally, reasonable jurists would not debate whether Reeve's Florida robbery convictions qualify under the elements clause. 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 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*. *Id.* at 942-43. Therefore, under this Court's binding precedent, Mr. Reeves's Florida robbery convictions qualify as predicate offenses under ACCA.[4]

---

[3] In 1986 Mr. Reeves was convicted of two offenses: burglary, involving assaulting or carrying a deadly weapon, and unarmed robbery. Likewise, in 1992, Mr. Reeves was convicted of two offenses: burglary, with assault or carrying a weapon, and robbery with a firearm or deadly weapon.

[4] Although not addressed by the district court or argued by Mr. Reeves in his motion for a COA, his Florida burglary offenses would not qualify as predicate convictions under ACCA. *See United States v. Esprit*, 841 F.3d 1235, 1240-41 (11th Cir. 2016). However, no COA is warranted on this basis because the sentencing hearing relied on both Reeve's burglary offenses and his robbery offenses, and his robbery offenses qualify as predicate convictions under ACCA, as discussed above.

Finally, although Mr. Reeves 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. Reeves'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. Reeves has at least three qualifying predicate offenses under ACCA post-*Johnson*. Consequently, Mr. Reeves cannot make a substantial showing of the denial of a constitutional right, and no COA is warranted. *See* 28 U.S.C. § 2253(c)(2); *Hamilton*, 793 F.3d at 1266.

Therefore, Mr. Reeves's motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD TYRONE REEVES,

Petitioner,

v. CASE NO. 3:16-cv-795-J-25PDB
3:12-cr-145-J-25PDB

UNITED STATES OF AMERICA,

Respondent.

ORDER

Before the Court is the Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Dkt. 1). From the record, the Court finds the following:

I. BACKGROUND

On January 14, 2014, Petitioner was sentenced under the Armed Career Criminal Act ("ACCA") to a term of 72 months' imprisonment, to be followed by two (2) years supervised release. Petitioner did not appeal. On June 23, 2016, Petitioner filed the instant counseled § 2255 motion challenging his sentence as an armed career criminal in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015),[1] where the Supreme Court addressed the statutory sentencing enhancement contained in § 924(e) and the definition of "violent felony" found in § 924(e)(2)(B)(ii), and held that the

---

[1] *Johnson* was made retroactively applicable to cases on collateral review by *Welch v. United States*, 136 S.Ct. 1257 (2016).

residual clause of the ACCA is unconstitutionally vague. On July 25, 2016, this matter was stayed upon motion of the Petitioner pending the Eleventh Circuit Court of Appeal's decision in *United States v. Derwin Darryl Fritts*, Appeal No. 15-15699-CC, where the issue of whether a Florida conviction for armed robbery qualifies as a "violent felony" after *Johnson* was before the Eleventh Circuit. Dkts. 5, 6. On December 7, 2016, Petitioner filed an Unopposed Motion to Lift Stay and Adopt and Preserve Arguments. Dkt. 7. The motion was granted, and the Government was directed to respond to the § 2255 motion. Dkt. 8. On January 3, 2017, the Government filed a "Response to Court's Order Lifting Stay." Dkt. 9.

II. DISCUSSION

The Pre-Sentence Investigation Report (PSR) identified the following Florida convictions to support Petitioner's sentence under the ACCA:

(1) Burglary (Assaults or Carries Weapon) and Unarmed Robbery, Duval County Circuit Court, Case No. 1986-CF-11183;

(2) Resisting an Officer with Violence, Duval County Circuit Court, Case No. 1990-CF-14677;

(3) Burglary (Assaults or Carries a Weapon) and Robbery with a Firearm or Deadly Weapon, Duval County Circuit Court, Case No. 1992-CF-1944.

PSR at ¶ 24. By his § 2255 motion, Petitioner seeks to challenge the use of his 1986 conviction for unarmed robbery and his 1992 conviction for robbery with a firearm or deadly weapon as ACCA predicate offenses. Motion to Stay, Dkt. 5 at ¶ 2.

In light of the Eleventh Circuit's decision in *Fritts*, holding that Florida robbery categorically qualifies as a "violent felony" under the ACCA's elements clause,

Petitioner's § 2255 motion is due to be denied. *See United States v. Fritts*, 841 F.3d 937, 944 (Nov. 8, 2016).

III. CONCLUSION

Accordingly, it is **ORDERED**:

1. That the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Dkt. 1) is **DENIED** and this case is **DISMISSED with prejudice**.

2. The Clerk is directed to enter judgment accordingly and to close this case. A copy of this Order shall be filed in the underlying criminal case, Case No. 3:12-cr-145-J-25PDB.

3. Petitioner is not entitled to a Certificate of Appealability.

DONE AND ORDERED at Jacksonville, Florida this 10th day of January, 2017.

HENRY LEE ADAMS, JR.
United States District Judge

Copies to:
Adam Labonte, Federal Defender Attorney
Ashley Washington, Assistant U.S. Attorney
Case No. 3:12-cr-145-J-25PDB