APPENDIX

APPENDIX

APPENDIX A-1

698 Fed.Appx. 577 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Kelvin PACE, Defendant-Appellee.
Kelvin Pace, Petitioner-Appellee,
v.
United States of America, Respondent-Appellant.

No. 16-16427, No. 16-16429
|
Non-Argument Calendar
|
(September 29, 2017)

Appeals from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:03-cr-20102-CMA-1, D.C. Docket Nos. 1:16-cv-21794-CMA, 1:03-cr-20102-CMA-1

Attorneys and Law Firms

Jane Mackenzie Duane, Wifredo A. Ferrer, Nicole D. Mariani, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, Charles E. Duross, U.S. Department of Justice, Criminal Division, Washington, DC, for Plaintiff-Appellant

Brenda Greenberg Bryn, Federal Public Defender's Office, Fort Lauderdale, FL, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Defendant-Appellee

Before TJOFLAT, WILLIAM PRYOR and BLACK, Circuit Judges.

Opinion

PER CURIAM:

The Government appeals the district court's grant of **Kelvin Pace's** motion to vacate sentence, 28 U.S.C. § 2255. Pace had been sentenced to 235 months' imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The Government asserts the district court erred by concluding Pace lacked a sufficient number of predicate "violent felonies" in light of *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). After review, [1] we reverse and remand to the district court.

1 In a 28 U.S.C. § 2255 proceeding we review a district court's findings of fact for clear error, and its legal conclusions *de novo*. *Garcia v. United States*, 278 F.3d 1210, 1212 (11th Cir. 2002).

Pace contends the cases cited by the Government are unpersuasive. We do not agree. Following close review, we conclude our binding precedent counsels in favor of reversal and remand because, in light of his convictions for Florida robbery pursuant to Florida Statute § 812.13, Pace has a sufficient number of predicate "violent felonies" to support an armed career criminal designation under the ACCA. *See United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016); *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011); *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006). The district court's amended judgment is **VACATED**. The district court's order granting Pace's motion to vacate sentence is **REVERSED**. We **REMAND** to the district court for reinstatement of its original judgment and further action consistent with this opinion.

All Citations

698 Fed.Appx. 577 (Mem)

End of Document

APPENDIX A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-20102-CR-MARTINEZ (s)
18 U.S.C. § 922(g)
18 U.S.C. § 924(e)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

KELVIN LEON PACE,

Defendant.
_____/

SUPERSEDING INDICTMENT

The Grand Jury charges that:

On or about January 21, 2003, in Miami-Dade County, in the Southern District of Florida, the defendant,

KELVIN LEON PACE,

having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess firearms and ammunition in and affecting interstate and foreign commerce, that is, an F.I.E. Derringer, .38 caliber ~~revolver~~ Gun CRCD, a Ruger 9 mm semi-automatic pistol, and six rounds of ammunition; in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

FIREARMS CRIMINAL FORFEITURE

1. The allegations of the criminal conduct in this Superseding Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeitures to the United States of America of property in which the defendant has an interest pursuant to the provisions of

Title 28, United States Code, Section 2461, Title 18, United States Code, Section 924(d)(1), and the procedures outlined at Title 21, United States Code, Section 853.

2. Upon conviction of any violation of Title 18, United States Code, Section 922(g)(1), the defendant shall forfeit to the United States any firearm and ammunition involved in or used in the commission of said violation.

3. The property subject to forfeiture, includes, but is not limited to:

(a) an F.I.E. Derringer, .38 caliber ~~revolver~~ GUN TEK OD

(b) a Ruger 9 mm semi-automatic pistol; and

(c) six rounds of ammunition.

All pursuant to Title 28, United States Code, Section 2461, Title 18, United States Code, Section 924(d)(1), and Title 21, United States Code, Section 853.

A TRUE BILL

Charles R. Scott III
FOREPERSON

/s/ Kent S. Nolte
MARCOS DANIEL JIMENEZ
UNITED STATES ATTORNEY

CHARLES E. DUROSS
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v.

KELVIN LEON PACE

CASE NO. 03-20102-CR-MARTINEZ(s)

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

X Miami ___ Key West
___ FTL ___ WPB ___ FTP

New Defendant(s) Yes ___ No X
Number of New Defendants ___
Total number of counts 1

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
List language and/or dialect English

4. This case will take 2 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	X	Petty	
II	6 to 10 days		Minor	
III	11 to 20 days		Misdem.	
IV	21 to 60 days		Felony	X
V	61 days and over			

6. Has this case been previously filed in this District Court? (Yes or No) YES
If yes:
Judge: MARTINEZ Case No. 03-20102-CR-MARTINEZ
(Attach copy of dispositive order)

Has a complaint been filed in this matter? (Yes or No) Yes
If yes:
Magistrate Case No. 03-2080-Bandstra
Related Miscellaneous numbers:
Defendant(s) in federal custody as of January 21, 2003
Defendant(s) in state custody as of
Rule 20 from the District of

Is this a potential death penalty case? (Yes or No) NO

7. Does this case originate from a matter pending in the U. S. Attorney's Office prior to April 1, 1999? ___ Yes X No If yes, was it pending in the Central Region? ___ Yes ___ No

8. Did this case originate in the Narcotics Section, Miami? ___ Yes X No

CHARLES E. DUROSS
ASSISTANT UNITED STATES ATTORNEY
COURT NUMBER A5500618

*Penalty Sheet(s) attached

REV.6/27/00

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PENALTY SHEET

Defendant's Name: **KELVIN LEON PACE** Case No.:_____

Count #: **1**

18 U.S.C. §§ 922(g)(1) and 924(e)/possession of firearm by convicted felon

*Max Penalty: **life imprisonment**

Count #:

*Max. Penalty:

Count #:

*Max. Penalty:

Count #:

*Max. Penalty:

Count #:

*Max. Penalty:

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

REV. 12/12/96

APPENDIX A-3

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

vs.

KELVON LEON PACE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: ~~02~~ 03 20102-CR-ALTONAGA

Counsel For Defendant: Scott W. Sakin, Esq.
Counsel For The United States: Charles E. Duross, Esq.
Court Reporter: Barbara Medina

The defendant pleaded guilty to Count(s) 1 of the Indictment.
ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 U.S.C. § 922(g)(1) and § 924(e)	Felon in Possession of a Firearm	January 21, 2003	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 263-47-7985
Defendant's Date of Birth: September 24, 1968
Deft's U.S. Marshal No.: 69396-004

Defendant's Mailing Address:
1130 N.W. 62 Street, Apartment #3
Miami, Florida 33147

Defendant's Residence Address:
1130 N.W. 62 Street, Apartment #3
Miami, Florida 33147

Date of Imposition of Sentence:
February 18, 2004

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

February 18, 2004

103

DEFENDANT: KELVON LEON PACE
CASE NUMBER: 02-20102-CR-ALTONAGA

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **235 months**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: KELVON LEON PACE
CASE NUMBER: 02-20102-CR-ALTONAGA

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: KELVON LEON PACE
CASE NUMBER: 02-20102-CR-ALTONAGA

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall participate in an approved treatment program for mental health/substance abuse, as directed by the U.S. Probation Office, and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment, if deemed necessary. The defendant will contribute to the costs of services rendered (co-payment) in an amount determined by the U.S. Probation Officer, based on ability to pay, or availability of third party payment.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days, unless excused by the U.S. Probation Officer. Further, the defendant shall provide documentation, including but not limited to, pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and any other documents requested by the U.S. Probation Office.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: KELVON LEON PACE
CASE NUMBER: 02-20102-CR-ALTONAGA

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.00	**$8,750.00**	**0**

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: KELVON LEON PACE
CASE NUMBER: 02-20102-CR-ALTONAGA

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Lump sum payment of **$100.00** due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The defendant shall forfeit the defendant's interest in the following property to the United States:

The defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX A-4

UNITED STATES COURT OF APPEALS

16-cv-21794-CMA

APPLICATION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY

Name KELVIN LEON PACE Prisoner Number #69396-004

Institution FCI Jesup, Ga. 2680 U.S. Highway 301 South

Street Address U.S. Highway 301 South

City Jesup State Ga. Zip Code 31599

INSTRUCTIONS--READ CAREFULLY

(1) This application must be legibly handwritten or typewritten and signed by the applicant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.

(2) All questions must be answered concisely in the proper space on the form.

(3) The Judicial Conference of the United States has adopted the 8½ x 11 inch paper size for use throughout the federal judiciary and directed the elimination of the use of legal size paper. All pleadings must be on 8½ x 11 inch paper, otherwise we cannot accept them.

(4) All applicants seeking leave to file a second or successive petition are required to use this form, except in capital cases. In capital cases only, the use of this form is optional.

(5) Additional pages are not permitted except with respect to additional grounds for relief and facts which you rely upon to support those grounds. DO NOT SUBMIT SEPARATE PETITIONS, MOTIONS, BRIEFS, ARGUMENTS, ETC., EXCEPT IN CAPITAL CASES.

(6) In accordance with the "Antiterrorism and Effective Death Penalty Act of 1996," as codified at 28 U.S.C. § 2255, effective April 24, 1996, before leave to file a second or successive motion can be granted by the United States Court of Appeals, it is the applicant's burden to make a prima facie showing that he satisfies either of the two conditions stated below.

> A second or successive motion must be certified as provided in [28 U.S.C.] section 2255 by a panel of the appropriate court of appeals to contain—
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> >
> > (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(7) When this application is fully completed, the original and three copies must be mailed to:

> Clerk of Court
> United States Court of Appeals for the

APPLICATION

1. (a) State and division of the United States District Court which entered the judgment of conviction under attack Southern District Of Florida

(b) Case number 03-20102-CR-Altonaga

2. Date of judgment of conviction 01/23/2004

3. Length of sentence 235 months Sentencing Judge Cecilia M. Altonage

4. Nature of offense or offenses for which you were convicted: Possession of Possession of Ammunition and a firearm by a convicted felon, 18 U.S.C. §922(g)(1), and 924(e), a Class A felony

5. Related to this conviction and sentence, have you ever filed a motion to vacate in any federal court?

Yes (x) No ( ) If "yes", how many times? one (if more than one, complete 6 and 7 below as necessary)

(a) Name of court Southern District Of Flroida

(b) Case number 05-23021-Civ-Altonaga

(c) Nature of proceeding Ineffective Assistance of Counsel

(d) Grounds raised (list all grounds; use extra pages if necessary)

Ineffective Assistance of Counsel in Violation of my Constitutional right

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No (x)

(f) Result

(g) Date of result

6. As to any second federal motion, give the same information:

(a) Name of court

(b) Case number

(c) Nature of proceeding

(d) Grounds raised (list all grounds; use extra pages if necessary)_____

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No ( )

(f) Result _____

(g) Date of result _____

7. As to any third federal motion, give the same information:

(a) Name of court _____

(b) Case number _____

(c) Nature of proceeding _____

(d) Grounds raised (list all grounds; use extra pages if necessary)_____

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No ( )

(f) Result _____

(g) Date of result _____

8. Did you appeal the result of any action taken on your federal motion? (Use extra pages to reflect additional petitions if necessary)

(1) First motion No (x) Yes ( ) Appeal No. _____

(2) Second motion No ( ) Yes ( ) Appeal No. _____

(3) Third motion No ( ) Yes ( ) Appeal No. _____

9. If you did not appeal from the adverse action on any motion, explain briefly why you did not: Time-barred AEDPA-limitation Period

10. State concisely every ground on which you now claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

A. Ground one: APPPLICANT PACE IS ACTUALLY INNOCENT OF THE ARM CAREER OFFENDER ENHANCEMENT THAT EXCESS THE STATUTORY

Supporting FACTS (tell your story briefly without citing cases or law):

MAXIMUM OF 10 YEARS, PACE'S THREE PRIOR CONVICTION USE TO ARM CAREER HIM, BURGLARY, A ATTEMPT ROBERRY, AND A ROBBERY, NO LONGER A VIOLENT FELONY, IN LIGHT OF JOHNSON V. UNITED STATES, U.S. 135 S.Ct. 2551, 2557 (2015). THE SUPREME COURT RECENTLY DECLARED "RESIDUAL CLAUSE" UNCONSTITUTIONAL VAGUE.

Was this claim raised in a prior motion? Yes (X) No ( )

Does this claim rely on a "new rule of law?" Yes (X) No ( )

If "yes," state the new rule of law (give case name and citation):

Does this claim rely on "newly discovered evidence?" Yes ( ) No ( )

If "yes," briefly state the newly discovered evidence, and why it was not previously available to you

B. Ground two:

Supporting FACTS (tell your story briefly without citing cases or law):

Was this claim raised in a prior motion? Yes ( ) No ( )

Does this claim rely on a "new rule of law?" Yes ( ) No ( )
If "yes," state the new rule of law (give case name and citation):

_____

_____

Does this claim rely on "newly discovered evidence?" Yes ( ) No ( )
If "yes," briefly state the newly discovered evidence, and why it was not previously available to you _____

_____

_____

_____

_____

_____

_____

_____

[Additional grounds may be asserted on additional pages if necessary]

11. Do you have any motion or appeal now pending in any court as to the judgment now under attack? Yes ( ) No (X)
If "yes," name of court _____ Case number _____

Wherefore, applicant prays that the United States Court of Appeals for the . Circuit grant an Order Authorizing the District Court to Consider Applicant's Second or Successive Motion to Vacate under 28 U.S.C. § 2255.

Kelvin L. Pace
Applicant's Signature

I declare under Penalty of Perjury that my answers to all the questions in this Application are true and correct.

Executed on 4/19/16
[date]

Kelvin L. Pace
Applicant's Signature

PROOF OF SERVICE

Applicant must send a copy of this application and all attachments to the United States Attorney's office in the district in which you were convicted.

I certify that on 4/19/16 [date], I mailed a copy of this Application* and all attachments to _____

at the following address:

U.S. Attorney office
401 N. Miami
Federal Courthouse
Miami, FL 33314

Kelvin L. Pace
Applicant's Signature

* Pursuant to Fed.R.App.P. 25(a), "Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day of filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."

APPENDIX A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-21794-CIV-ALTONAGA/White

KELVIN LEON PACE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court upon Movant, Kelvin Leon Pace's ("Movant['s]") Motion . . . ("Motion") [ECF No. 1], filed April 25, 2016, seeking to vacate his sentence under 28 U.S.C. section 2255. The Clerk referred the case to Magistrate Judge Patrick A. White under Administrative Order 2003-19 for a report and recommendation on any dispositive matters. (*See* [ECF No. 4]). On August 30, 2016, Judge White entered his Report of Magistrate Judge ("Report") [ECF No. 21], recommending the Court deny the Motion and not issue a certificate of appealability. (*See generally id.*). Movant filed timely Objections . . . ("Objections") [ECF No. 23] on September 7, 2016. The Court has carefully reviewed the Motion, Report, Objections, the record, and applicable law.

I. BACKGROUND

On December 4, 2003, a jury convicted Movant of knowingly possessing a firearm and ammunition, in and affecting interstate commerce, in violation of 18 U.S.C. sections 922(g)(1) and 924(e). (*See United States v. Pace*, Case No. 03-CR-20102-ALTONAGA (S.D. Fla. 2003) ("*Pace I*") Jury Verdict [ECF No. 91]; *see also id.* Superseding Indictment [ECF No. 19]). Section 922(g)(1) criminalizes possession of a firearm by a felon. *See* 18 U.S.C. § 922(g)(1) ("It

shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [to] possess . . . any firearm or ammunition . . . ." (alterations added)). Section 924(e) — the Armed Career Criminal Act ("ACCA") — requires an increased sentence for a defendant who violates section 922(g)(1) and has three prior convictions for violent felonies or serious drug offenses. *See* 18 U.S.C. § 924(e)(1) ("[A] person who violates section 922(g) . . . and has three previous convictions . . . for a violent felony or a serious drug offense . . . shall be . . . imprisoned not less than fifteen years . . . ." (alterations added)). At a February 18, 2004 sentencing hearing, the Court found the ACCA applied to Movant and sentenced him to 235 months in prison. (*See Pace I*, Transcript of Sentencing Proceedings . . . ("Sentencing Proceedings") [ECF No. 114] 13:2–21).

The Presentence Investigation Report ("PSI") identified three convictions qualifying Movant as an armed career criminal under the ACCA (*see* PSI ¶ 22): (1) F8424300 — 1985 Florida robbery and burglary of an occupied conveyance with assault convictions (*see id.* ¶ 26); (2) F8424301 — 1985 Florida attempted robbery, robbery, and burglary of an occupied conveyance with an assault convictions (*see id.* ¶ 27); and (3) F8838955 — 1989 Florida robbery and burglary of an occupied conveyance with an assault or battery convictions (*see id.* ¶ 29). Movant committed the first two crimes when he was 16 and the third when he was 20, but he was processed as an adult for all three. (*See id.* ¶¶ 26, 27, 29).

Although unnecessary for the present analysis — because, as explained below, the Court may not consider the facts underlying the prior convictions — Movant's predicate convictions involve the following: (1) on October 3, 1984, Movant grabbed a woman's necklace from around her neck while the victim was sitting in her car at a fast-food drive thru (*see id.* ¶ 26); (2) also on October 3, 1984, Movant reached inside a woman's car while it was stopped at a red light and

pulled the woman's handbag from her lap (*see id.* ¶ 27); (3) on November 9, 1988, Movant attempted to steal a woman's purse and punched her in the mouth (*see id.* ¶ 29).

II. LEGAL STANDARDS

A. Review of Magistrate Judge's Order

When a magistrate judge's "disposition" has been properly objected to, district courts must review the disposition *de novo*. FED. R. CIV. P. 72(b)(3). "[T]he plain language of the statute governing review [of the report] provides only for *de novo* review of 'those portions of the report . . . to which objection is made.'" *Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1169 (N.D. Iowa 1999) (alterations added) (quoting 28 U.S.C. § 636(b)(1)). Although Rule 72 is silent on the standard of review, the U.S. Supreme Court has determined Congress's intent was to require *de novo* review only where objections were properly filed, not when neither party objects. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985). Since Movant filed timely objections (*see* Objections), the Court reviews the record *de novo*.

B. Felon in Possession of a Firearm

"The ordinary maximum sentence for being 'a felon in possession of a firearm' is ten years['] imprisonment." *United States v. Welch*, 683 F.3d 1304, 1310 (11th Cir. 2012) (alteration added) (citing 18 U.S.C. §§ 922(g)(1), 924(a)(2)). "But if a felon in possession has three previous convictions for violent felonies or serious drug offenses, then the Armed Career Criminal Act requires a minimum sentence of fifteen years['] imprisonment." *Id.* (alteration added) (citing 18 U.S.C. § 924(e)).

C. *Johnson* and the Armed Career Criminal Act

The Supreme Court in *Johnson v. United States* held imposing an increased sentence under the ACCA residual clause violates due process. *See* 135 S. Ct. 2551, 2563 (2015). The ACCA defines "violent felony" as:

> 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 [elements clause]; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives [enumerated clause], or otherwise involves conduct that presents a serious potential risk of physical injury to another [residual clause].

18 U.S.C. § 924(e)(2)(B) (alterations added); *see also Welch*, 136 S. Ct. at 1261.

The Supreme Court held the residual clause unconstitutional under the void-for-vagueness doctrine, which prohibits the government from imposing sanctions "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556 (citation omitted). The Court explained the residual clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony. . . . [T]hese uncertainties produce more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2554 (alterations added). The Court further stated the decision did "not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony[,]" *id.* at 2563 (alteration added), but instead was limited to the residual clause, *see id.* In *Welch*, the Supreme Court held *Johnson* applied retroactively on collateral review. *See* 136 S. Ct. at 1268.

D. The Categorical and Modified Categorical Approach

The Supreme Court has repeatedly instructed courts to apply the categorical approach in determining whether a crime qualifies as a violent felony under the ACCA. *See, e.g.*, *Johnson*,

135 S. Ct. at 2557; *see also Welch*, 136 S. Ct. at 1262 ("The categorical approach is the framework the Court has applied in deciding whether an offense qualifies as a violent felony under the Armed Career Criminal Act."). Under the categorical approach, a court is limited to looking at "how the law defines the offense and not in terms of how an individual offender might have committed [the offense] on a particular occasion." *Johnson*, 135 S. Ct. at 2557 (alteration added). That is, a court may only look at how the law defines a defendant's prior offenses and cannot look at the particular facts underlying those prior offenses. *See Descamps v. United States*, 133 S. Ct. 2276, 2280 (2013) (The "ACCA's language shows that Congress intended sentencing courts 'to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.'" (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990))).

In applying this approach, courts "look no further than the statute and judgment of conviction," *United States v. Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010), and must assume "the conviction rested upon nothing more than the least of the acts criminalized," *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014) (quoting *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013)). The categorical approach applies to statutes that are indivisible — that is, where the "statute defines only a single crime with a single set of elements." *Mathis v. United States*, 136 S. Ct. 2243, 2245 (2016).

If the statute is divisible — because it "lists multiple crimes by listing multiple, alternative elements," *id.* — courts are permitted to "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Descamps*, 133 S. Ct. at 2281. Afterward, the court must apply the categorical approach and compare the elements of the crime with the elements of an ACCA

crime of violence. *See id.* If the divisible statute's elements are broader than a generic ACCA crime, the "prior convictions cannot give rise to ACCA's sentence enhancement." *Mathis*, 136 S. Ct. at 2246. For example, a burglary statute criminalizing unlawful entry into a "building, structure [or] land, water, or air vehicle" is broader than a generic burglary crime that only requires unlawful entry into a "building or other structure." *Id.* (citations omitted; alteration in original).

In *Mathis*, the Supreme Court held it made no difference whether the facts underlying the defendant's conduct fell within the generic burglary offense because Iowa's burglary statute was broader than the generic burglary offense — requiring entry into a building or other structure — given Iowa's statute listed entry into a land, water, or air vehicle. *See id.* It did not matter the defendant in *Mathis* actually burgled structures, rather than vehicles, because courts cannot look at the facts of the offense but only at the elements of the statute; and the elements of Iowa's burglary statute were broader than the generic elements of burglary. *See id.* at 2250.

E. Florida Robbery Pre-2000

Before 2000 in Florida, there was no intermediary statute between robbery and larceny, criminalizing robbery-by-sudden-snatching. Florida's robbery statute, Florida Statutes section 812.13, defines robbery as:

> [T]he 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.

FLA. STAT. § 812.13 (alteration added). Although the definition of robbery has not changed, the Florida courts' interpretation of section 812.13 and Florida's statutory scheme for robberies changed in 1997 and 1999, respectively.

Because there was no separate statute for robbery-by-sudden-snatching before 2000, "a defendant could commit robbery . . . either by use of force or by 'sudden snatching,' which Florida courts construed as not requiring force." *In re Jackson*, No. 16-13536-J, 2016 WL 3457659, at *2 (11th Cir. June 24, 2016) (alteration added) (citing *Welch*, 683 F.3d at 1311 n. 29). At the time, there was a divide in Florida "on whether a snatching, as of a purse, or cash from a person's hand, or jewelry on the person's body, amounted to robbery." *Welch*, 683 F.3d at 1311.

To resolve this ambiguity and inconsistent application of section 812.13, the Florida Supreme Court held in *Robinson v. State*, 692 So. 2d 883 (Fla. 1997): "in order for the snatching of property from another to amount to robbery, the perpetrator must employ more than the force necessary to remove the property from the person. . . . [T]here must be resistance by the victim that is overcome by the physical force of the offender." *Id.* at 886 (alterations added). *Robinson* court clarified robbery-by-snatching could no longer be prosecuted under section 812.13, *see id.* 886–87, and it "put in doubt" the "intermediate appellate decisions holding mere snatching to be sufficient" under section 812.13, *Welch*, 683 F.3d at 1311.

In October 1999, after *Robinson*, Florida's legislature created a statute criminalizing robbery-by-sudden-snatching, section 812.131, thereby placing robbery-by-sudden-snatching into its own category separate from robbery under section 812.13. *See id.* "This statute appears to have been a legislative response to [*Robinson*] holding that 'there must be resistance by the victim that is overcome by the physical force of the offender' to establish robbery." *Id.* (alteration added) (quoting *Robinson*, 692 So. at 886). Therefore, any defendant convicted under section 812.13 before 2000 could have potentially been convicted of robbery-by-sudden-

snatching which does not require force. *See id.* After 2000, section 812.13 comprised only forceful acts. *See id.*

III. ANALYSIS

Movant argues in light of *Johnson*, his Florida robbery, attempted robbery, and burglary convictions no longer qualify as violent felonies under the ACCA; thus, he is not subject to the enhanced 15-year sentence and should be immediately released because he has served more than the 10-year statutory maximum penalty under 18 U.S.C. § 922(g)(1). (*See* Movant's Reply . . . ("Reply") [ECF No. 15] 1, 7). The Government, relying on *United States v. Jenkins*, No. 15-14809, 2016 WL 3101281 (11th Cir. June 3, 2016), *Robinson*, 692 So. 2d at 883, and *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), asserts Movant's Florida robbery convictions remain crimes of violence under the ACCA after *Johnson*. (*See* Response . . . ("Response") [ECF No. 18] 9–12). The Government also argues Movant must prove he was sentenced under the residual clause[1] (*see id.* 7), and Movant procedurally defaulted[2] and cannot establish cause and prejudice for his procedural default (*see id.* 7–9).

---

[1] At sentencing, the Court did not pronounce whether Movant was sentenced under the residual, enumerated, or elements clause of the ACCA. It is not necessary to determine whether Movant was sentenced under the residual clause because his Florida robbery convictions do not qualify as crimes of violence under the ACCA elements clause. Additionally, as explained below, Movant's Florida burglary convictions do not qualify as crimes of violence under the enumerated clause. In any event, the Court has already rejected the Government's argument a movant has the burden of proving he was sentenced under the residual clause. *See Leonard v. United States*, No. 16-CIV-22612-CMA, 2016 WL 4576040, at *2 (S.D. Fla. Aug. 22, 2016) ("[T]he Court declines to impose upon [the movant] the high burden of proving the Court relied upon the ACCA residual clause as opposed to the enumerated or elements clauses at sentencing." (alterations added)).

[2] Movant has shown cause and prejudice because his requested relief rests on a new constitutional principle, established in *Johnson*, that was not previously recognized, and Movant would be prejudiced if he is no longer an armed career criminal and does not qualify for the ACCA enhanced sentence. *See Reed v. Ross*, 468 U.S. 1, 16 (1984) ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim . . . ." (alterations added)). Thus, because Movant appropriately relies upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[,]" 28 U.S.C. § 2255(h)(2) (alteration added), the Court addresses the merits of the Motion.

A. Florida Robbery and Attempted Robbery Convictions

"[N]o current binding precedent makes undeniably clear that, absent the residual clause, [pre-2000 Florida] robbery conviction[s]" qualify as "violent felonies" under the ACCA. *In re Jackson*, 2016 WL 3457659, at *2 (alterations added; internal quotation marks omitted) (quoting *In re Rogers*, No. 16-12626-J, 2016 WL 3362057, at *2 (11th Cir. June 17, 2016)). As such, the Eleventh Circuit has granted various section 2255 applicants convicted of pre-2000 Florida robbery leave to file second section 2255 motions. *See, e.g.*, *In re Jackson*, 2016 WL 3457659 (granting the movant's application for leave to file a second section 2255 motion because a 1975 Florida robbery conviction may no longer qualify as a violent felony under the ACCA).

Here, the Eleventh Circuit granted Movant's application to file a second section 2255 motion recognizing his two 1985 Florida robbery convictions may not be ACCA violent felonies after *Johnson*. (*See In re Pace*, Case No. 16-11898-A [ECF No. 2] 3–5). In the order, the court noted it remains an "open question" in the Eleventh Circuit whether pre-1997 or pre-1999 Florida robbery satisfies the elements clause of the ACCA. (*See id.* 5). Upon review of the available case law, the Court finds Movant's pre-2000 Florida robbery convictions do not qualify as violent felonies under the ACCA.

Because *Johnson* invalidated the ACCA residual clause, Movant's robbery convictions must qualify as violent felonies under the enumerated or elements clause of the ACCA for his sentence enhancement to stand. *See Johnson*, 135 S. Ct. at 2557. Robbery is not one of the ACCA enumerated offenses (*see* § 924(e)(2)(B) (listing the enumerated offenses as "burglary, arson, . . . extortion, [or] involves use of explosives" (alterations added)); thus, the robbery conviction fails under the enumerated clause. The enumerated clause defines a crime of violence

as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.*

In Florida, robbery is the taking of property which may be the subject of larceny from another, with the intent to either permanently or temporarily deprive the person or the owner of the property; in the course of the taking force, violence, assault, or putting in fear must take place. *See* FLA. STAT. § 812.13 (alteration added). Section 812.13 plainly requires the person to use "force, violence, assault" or otherwise place the victim "in fear." *See id.* But the Court cannot rely solely on the plain language of the statute because the Florida Supreme Court and Eleventh Circuit have recognized that before 1997, mere snatching, which does not require force, was prosecuted under section 812.13, and it was not until 2000 that the Florida legislature created a robbery-by-sudden-snatching statute. *See Welch*, 683 F.3d at 1311. Simply looking at section 812.13 is insufficient to determine whether pre-2000 section 812.13 offenses qualify as ACCA crimes of violence because individuals who committed robbery-by-sudden-snatching could have been prosecuted under section 812.13 before 2000. *See id.*

The Court assumes Movant's pre-2000 robbery convictions were for robbery-by-sudden-snatching for two reasons. First, in *Welch*, the Eleventh Circuit assumed the movant's 1996 robbery conviction was for robbery-by-sudden-snatching because the movant "pleaded guilty before [*Robinson*] and the new [snatching] statute . . . and at a time when the controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into a robbery." *See id.* at 1311–12 (alterations added; footnotes omitted). Second, Supreme Court precedent requires the Court apply the categorical approach in determining whether Movant's predicate crimes qualify as violent felonies under the ACCA. *See Johnson*, 135 S. Ct. at 2557; *see also In re Rogers*, 2016 WL 3362057, at *2 ("[C]ourts must apply *Descamps* and other binding Supreme

Court precedent in determining whether a prior conviction would still support an enhanced ACCA sentence." (alteration added)).

Florida's robbery statute is an indivisible statute defining the single crime of robbery. *See* FLA. STAT. § 812.13. As such, the categorical approach applies, and the Court can only look to the statute and the case law interpreting the statute. *See Garcia*, 606 F.3d at 1336. At the time of Movant's Florida robbery convictions, the robbery statute encompassed robbery-by-sudden-snatching. *See Welch*, 683 F.3d at 1311–12.

Even if the modified categorical approach applied — because the robbery statute encompassed two crimes, robbery and robbery-by-sudden-snatching — the Court must assume "the conviction rested upon nothing more than the least of the acts criminalized," *Howard*, 742 F.3d at 1345, in this case, robbery-by-sudden-snatching. Again, it does not matter if Movant actually "used, attempted to use, or threatened to use physical force;" the categorical approach focuses on whether the statute necessarily involved proof of use, attempted, or threatened force, *see United States v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014); and snatching does not, *see Welch*, 683 F.3d at 1311–12.

In *Welch*, the Eleventh Circuit held the movant's 1996 robbery conviction qualified as a crime of violence under the residual clause and did "not decide whether snatching is sufficiently violent under the elements clause." *Id.* at 1313. The court recognized "[a]rguably the elements clause would not apply to mere snatching, but the issue is not cut and dried." *Id.* (alteration added). Since the residual clause was held unconstitutional, the Eleventh Circuit has yet to decide whether snatching qualifies as a violent felony under the elements clause. *See In re Jackson*, 2016 WL 3457659, at *2.

Robbery-by-sudden-snatching requires only a taking of money or property — a showing of force or resistance by the victim is not necessary. *See* FLA. STAT. § 812.131 ("Robbery by sudden snatching means the taking of money or other property from the victim's person. . . . In order to satisfy this definition, it is *not necessary* to show that: (a) The offender used any amount of force beyond that effort necessary to obtain possession of the . . . property; or (b) There was any resistance offered by the victim to the offender or that there was injury to the victim's person." (alterations and emphasis added)). Although the robbery-by-sudden-snatching statute was enacted in 1999,[3] before then, robbery-by-sudden-snatching fell within the robbery statute. Because the Court assumes Movant's robbery convictions were for robbery-by-sudden-snatching, it applies the robbery-by-sudden-snatching definition.

The Court declines to adopt the Report's recommendation the Court should assume Movant was convicted of robbery and not robbery-by-sudden-snatching. The Report states at the time of "Movant's 1984 and 1988 robbery convictions, 'the controlling Florida Supreme Court authority held that "any degree of force" would convert larceny into robbery.'" (Report 14 (quoting *Welch*, 683 F.3d at 1311)). It then concludes the Court should adopt instead the interpretation of section 812.13 in Florida's Third District Court of Appeal. (*See id.*). The Report explains at the time of Movant's Florida robbery convictions, the Third District "required more than 'any degree of force' to sustain a conviction for robbery," (*id.* (citation omitted)), and thus "snatching did not suffice to support a robbery conviction" (*id.* 15). The Report cites *S.W. v. State*, 513 So. 2d 1088 (Fla. 3d DCA 1987), and *Mims v. State*, 342 So. 2d 116 (Fla. 3d DCA 1977), for this proposition.

The Report further advises the Court adopt the Third District's interpretation of section 812.13 because "[a] federal court applying state law is bound to adhere to the state's intermediate

[3] The statute went into effect in October 1999. *See* FLA. STAT. § 812.131.

appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." (*Id.* (alteration in original) (quoting *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir.1983))). The Report concludes Florida's robbery statute satisfies the elements clause of the ACCA, and thus Movant's robbery convictions remain predicate violent felonies under the ACCA.

Movant objects to these conclusions, arguing the Third District had not definitively held mere snatching did not constitute robbery at the time of his robbery convictions. (*See* Objections 2). The Court agrees with Movant. In *Mims*, the Third District did not consider the Florida Supreme Court's decision in *McCloud v. State*, 335 So.2d 257 (Fla. 1976), that "[a]ny degree of force suffices to convert larceny into a robbery." 335 So.2d at 258 (alteration added). It was not until *S.W.* — in 1987, after Movant's 1985 Florida robbery convictions — the Third District considered *McCloud* and distinguished it. *See S.W.*, 513 So. 2d at 1092. But even then, the Third District court acknowledged "[a]lthough *the issue is not free from doubt*, it seems reasonably clear that a stealthy taking or sudden snatching of property from the person of another does not ordinarily constitute sufficient 'force [or] violence' to satisfy this element." *Id.* at 1090 (first alteration and emphasis added; second alteration in original).

Thus, at the time of Movant's 1985 robbery convictions it was not clear in the Third District, let alone in Florida, that snatching could not be prosecuted under robbery. As such, the Court declines to assume Movant was convicted of robbery and not robbery-by-sudden-snatching. Moreover, adopting the Report's recommendations would lead to inconsistent application of *Johnson* and the ACCA throughout Florida depending on the district in which a movant was sentenced. Before 2000, Florida only had one robbery statute, section 812.13, and the Florida Supreme Court did not definitively interpret it until *Robinson*, in 1997, when it

specified snatching could not be prosecuted under the robbery statute. Adopting the Florida appellate courts' varying interpretations of section 812.13 would lead to inconsistent results.

The Court declines to adopt the Report's approach and instead interprets section 812.13 in light of the Florida Supreme Court's decision in *Robinson* and the U.S. Supreme Court's holding courts must apply the categorical approach and assume a movant's conviction rests on nothing more than the least of the acts criminalized. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1684. Before 2000, the least culpable conduct prosecuted under section 812.13 was robbery-by-sudden-snatching.

Robbery-by-sudden-snatching does not require the use of threatened physical force, only that the offender takes some property. *See* FLA. STAT. § 812.131. The ACCA enumerated clause requires at a minimum "threatened use of physical force." *See* 18 U.S.C. § 924(e)(2)(B). Thus, robbery-by-sudden-snatching is broader than the ACCA elements offense given the elements clause requires force, *see id.*, and snatching does not require force, *see* FLA. STAT. § 812.131. When a statute "sweeps more broadly than [a] generic [ACCA] crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Descamps*, 133 S. Ct. at 2283 (alterations added). Consequently, even if Movant's predicate crimes were for robbery and not robbery-by-sudden-snatching, the Court cannot consider the facts of the predicate offenses, only the statute under which he was convicted. *See id.* "The key . . . is elements, not facts." *Id.* (alteration added). At the time of Movant's robbery convictions, the statute did not require force.

In *Descamps*, the Supreme Court held the Ninth Circuit erred in invoking the modified categorical approach to look at the facts of the appellant's conviction to determine whether the appellant committed burglary or a generic unlawful entry. *See id.* at 2280–81. Following

Supreme Court precedent, the Court does not look at the facts underlying Movant's prior convictions to determine whether he committed robbery or snatching. The Court assumes he committed snatching, which is much broader than the generic ACCA elements clause; thus, Movant's ACCA sentence enhancement cannot stand.

The Government relies on *Jenkins* and *Lockley* to support its argument Movant's Florida robbery convictions are crimes of violence. (*See* Resp. 11–12). These two cases are distinguishable on various grounds.

Lockley held a 2001 Florida attempted robbery in violation of section 812.13 constituted a crime of violence under the United States Sentencing Guidelines ("USSG"). *See id.* at 1246. *Lockley* "construed Florida's robbery scheme post-2000" and "does not squarely govern here." *In re Lee*, Case No. 16-13561-J at 4; *see also In re Jackson*, 2016 WL 3457659, at *2 ("[*Lockley*] construed a very different statutory scheme" (alteration added)).

Even if *Lockley* applied to pre-2000 Florida robbery, the Court declines to extend its holding here because *Lockley* analyzed whether the appellant qualified for a sentence enhancement under the USSG, not the ACCA. *See Lockley*, 632 F.3d at 1246. Although the language of the USSG and ACCA is nearly identical, the Eleventh Circuit has declined to extend the reasoning and holding in *Johnson* to the USSG. *See United States v. Matchett*, 802 F.3d 1185, 1194 (11th Cir. 2015) (the appellant argued because the definitions of violent felony under the USSG and the ACCA are "nearly identical" the court should apply the reasoning in *Johnson* to the USSG; the court declined to adopt the appellant's argument and determined the reasoning in *Johnson* did not apply to the USSG). Similarly, the Court will not apply the reasoning in *Lockley* — reached in the context of the USSG — to the ACCA.

Jenkins is not applicable either. As a preliminary matter, *Jenkins* is not binding on the Court, only persuasive. *See James v. McDaniel*, No. CV 16-51-KD-M, 2016 WL 1573457, at *3 n.3 (S.D. Ala. Apr. 19, 2016) ("[N]on-published opinions are persuasive rather than controlling authority." (alteration added)).

In *Jenkins*, the Eleventh Circuit determined Florida's robbery statute had never included a taking-by-sudden-snatching and stated *Robinson* confirmed section 812.13 had never encompassed snatching, only robbery requiring physical force. *See Jenkins*, 2016 WL 3101281, at *5 ("[Section] 812.13(1) has never included a taking by sudden snatching, as the Florida Supreme Court explained in *Robinson* . . . ." (alterations added)). The Court disagrees.

Robinson recognized appellate courts interpreted section 812.13 differently and some Florida courts determined snatching, "even without resistance by or injury to the victim, was sufficient to satisfy Florida's force element." 692 So. 2d at 885; *see also id.* at 885–86 ("[I]n *Andre v. State*, 431 So. 2d 1042 (Fla. 5th DCA 1983) . . . the court held . . . any degree of force, including that used to snatch money from a person's hand, was force sufficient to satisfy the force element of robbery." (alterations added)). *Jenkins* interpreted *Robinson* as "reaffirm[ing] and clarify[ing] what had already been the law in Florida since at least the *McCloud* decision in 1977 — that merely snatching property without using force to overcome the victim's resistance did not constitute a robbery under § 812.13(1)." 2016 WL 3101281, at *5 (alterations added). But the fact *Robinson* had to clarify snatching did not constitute robbery demonstrates precisely the point — before *Robinson*, some Florida courts interpreted snatching to fall within the robbery statute.

Even the Eleventh Circuit has disagreed with *Jenkins* in other opinions. In two non-published orders on second section 2255 motions, the Eleventh Circuit has recognized pre-2000

Florida robberies may not qualify as crimes of violence under the ACCA. *See In re Jackson*, 2016 WL 3457659, at *2; *see also In re Lee*, Case No. 16-13561-J 3–5. Additionally, in *Welch*, a published opinion, the Eleventh Circuit recognized before *Robinson* and the enactment of section 812.131, snatching sufficed under section 812.13. *See Welch*, 683 F.3d at 1311. The *Jenkins* court found *Welch* "unpersuasive" based on its interpretation of *Robinson*. *See Jenkins*, 2016 WL 3101281, at *6 ("*Welch* is unpersuasive in light of the Florida Supreme Court's reasoning in *Robinson*, which makes it clear that a § 812.13(1) robbery has 'consistently' required more force than a sudden snatching."). But the Court interprets *Robinson* differently than the *Jenkins* court.

In any event, the *Jenkins* court concluded the appellant had been convicted in 1999, after *Robinson*, so the appellant's case was distinguishable from *Welch* because the appellant was sentenced after *Robinson* established snatching could not be prosecuted under section 812.13, whereas the appellant in *Welch* was convicted before *Robinson*. This portion of the opinion makes *Jenkins* inconsistent because the court first states Florida robbery never encompassed snatching but concluded the appellant was sentenced after *Robinson*, seemingly recognizing if the appellant had been sentenced before *Robinson*, he may have been convicted "for a taking by sudden snatching." *See id.* at *6.

One last distinguishing feature of *Jenkins* is the decision was in the context of challenging a sentence under the USSG, not the ACCA, and thus the court did not apply the categorical approach as required by binding Supreme Court precedent in the context of the ACCA. *See generally Jenkins*, 2016 WL 3101281; *see also Johnson*, 135 S. Ct. at 2557. If the court had applied the categorical or modified categorical approach, it would have had to assume

anyone convicted under section 812.13 before 2000, or at a minimum 1997, could have been convicted for mere snatching.

In sum, Movant's Florida robbery convictions are not violent felonies after the Supreme Court invalidated the ACCA residual clause. *See Johnson*, 135 S. Ct. at 2563. Snatching is not sufficiently violent to satisfy the elements clause of the ACCA. Because the Court assumes, as required by Supreme Court precedent, Movant's pre-2000 Florida robbery convictions were for snatching — under both the categorical and modified categorical approach — the convictions are not violent felonies under the ACCA.

B. Burglary Convictions

The Government addressed Movant's burglary convictions in a footnote because it decided to focus on the "robbery convictions since those . . . clearly qualify under the elements clause of § 924(e)(2)(B)(i)." (Resp. 6 n. 4 (alteration added)). The Government contends Movant's burglary of a conveyance convictions qualify as violent felonies because Florida Statute section 810.02 requires proof of the elements of an assault, which requires violence. (*See id.*). However, the Government also acknowledged the U.S. Supreme Court's decision in *Mathis* "will guide the analysis of whether the Florida burglary statute is divisible and may affect the viability of the government's position in this matter." (*Id.*). Movant's response was submitted after the Supreme Court decided *Mathis* and states "post-*Mathis*, the government has correctly conceded in this district that even Florida burglaries of 'dwellings' are no longer ACCA predicates." (Reply 15 (citations omitted)).

The Court agrees in light of *Mathis*, Movant's burglary of a conveyance convictions do not qualify as crimes of violence. As explained, in *Mathis* the Supreme Court applied the categorical approach and held the movant's Iowa burglary convictions were not violent felonies

under the ACCA because Iowa's burglary statute was broader than a generic burglary offense. *Mathis*, 136 S. Ct. at 2246 (2016). A generic burglary offense only requires entry into a "building or other structure," whereas Iowa's burglary statute criminalized unlawful entry into a "building, structure [or] land, water, or air vehicle." *Id.* (citations omitted; alteration in original).

Similarly, Florida's burglary statute is broader than a generic burglary offense because it includes entry into a conveyance. *See* FLA. STAT. § 810.02; *see also Milliner v. United States*, No. 8:11-CR-381-T-30-MAP, 2016 WL 4247906, at *1 (M.D. Fla. Aug. 11, 2016) ("The Supreme Court's recent decision in *Mathis* . . . clarified that a Florida burglary conviction is not considered an ACCA predicate offense under the ACCA's enumerated-offenses clause." (alteration added)). Furthermore, the Government has conceded in this District Florida burglary no longer qualifies as an ACCA predicate offense. *See, e.g.*, *Leonard*, 2016 WL 4576040, at *2 ("The Government concedes [the movant's Florida burglary] convictions no longer qualify as violent crimes." (alteration added)); *see also Kelly v. United States*, No. 16-cv-21910 (S.D. Fla. June 28, 2015), United States' Response . . . [ECF No. 15] 3 ("The United States concedes that [the movant's] prior conviction for Florida burglary does not qualify as a violent felony under the ACCA." (alteration added)). Thus, Movant's burglary convictions do no qualify as predicate offenses under the ACCA.

IV. CONCLUSION

Because Movant's Florida robbery and burglary convictions do not qualify as violent felonies under the ACCA, Movant no longer has three predicate offenses qualifying him for an enhanced sentence as an armed career criminal. Movant has served in excess of the statutory maximum of 10 years under section 922(g)(1). It is therefore

ORDERED AND ADJUDGED as follows:

1. The Report [**ECF No. 21**] is **REJECTED**.
2. The Objections [**ECF No. 23**] are **SUSTAINED**.
3. The Motion **[ECF No. 1]** is **GRANTED**.
4. Movant's sentence is hereby vacated, and his classification as an armed career criminal is eliminated.
5. An amended judgment reflecting a corrected sentence of 120 months as to Movant's possession of a firearm by a convicted felon conviction, with credit for time served, followed by a period of three (3) years supervised release, will be entered in the corresponding criminal case.
6. In light of this Order and corresponding amended judgment, the Bureau of Prisons and the United States Marshal's Service **SHALL EXPEDITE** any required processing due to Movant's eligibility for immediate release.
7. The Clerk of the Court is directed to **CLOSE** this case, and any pending motions are **DENIED as moot**.

DONE AND ORDERED in Miami, Florida, this 23rd day of September, 2016.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

APPENDIX A-6

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

KELVIN LEON PACE

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number - 1:03-20102-CR-ALTONAGA-1

USM Number: 69396-004

Counsel For Defendant: Brenda Greenberg Bryn and
Scott W. Sakin, Esq.
Counsel For The United States: Charles E. Duross, Esq.
Court Reporter: Barbara Medina

Date of Original Judgment (or Date of Last Amended Judgment): February 18, 2004
Reason for Amendment: 28 U.S.C. § 2255

The defendant was found guilty of Count 1 of the Superseding Indictment.
The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)	Felon in Possession of a Firearm	January 21, 2003	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
February 18, 2004

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

September 23, 2016

DEFENDANT: KELVIN LEON PACE
CASE NUMBER: 1:03-20102-CR-ALTONAGA-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **120 months**, with credit for time served. The Bureau of Prisons and the United States Marshal's Service **SHALL EXPEDITE** any required processing due to Defendant's eligibility for immediate release.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: KELVIN LEON PACE
CASE NUMBER: 1:03-20102-CR-ALTONAGA-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: KELVIN LEON PACE
CASE NUMBER: 1:03-20102-CR-ALTONAGA-1

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Mental Health and Substance Abuse Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program and an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: KELVIN LEON PACE
CASE NUMBER: 1:03-20102-CR-ALTONAGA-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$100.00	$8,750.00	0

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: KELVIN LEON PACE
CASE NUMBER: 1:03-20102-CR-ALTONAGA-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$8,850.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The defendant shall forfeit the defendant's interest in the following property to the United States:

The defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.