APPENDIX A

Order of the United States Court of Appeals
for the Sixth Circuit
Robert Eugene Secord v. United States of America,
No. 17-1477 (6th Cir., September 21, 2017)

No. 17-1477

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 21, 2017
DEBORAH S. HUNT, Clerk

ROBERT EUGENE SECORD,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
UNITED STATES OF AMERICA,)
)
Respondent-Appellee.)

Robert Eugene Secord, a federal prisoner proceeding through counsel, appeals the order of the district court denying his motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255. He applies for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

Pursuant to a plea agreement, Secord pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Secord's presentence report calculated a guidelines range of 324 to 405 months based on a total offense level of 36 and category VI criminal history score. The presentence report determined that Secord was subject to a 180-month mandatory minimum sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based on his prior convictions for first-degree home invasion in violation of Michigan Compiled Laws § 750.110a(2), unarmed robbery in violation of Michigan Compiled Laws § 750.530, second-degree home invasion in violation of Michigan Compiled Laws § 750.110a(3), and breaking and entering a building with intent in violation of Michigan Compiled Laws § 750.110. At sentencing, the district court granted the government's motion for a three-level downward departure based on substantial assistance, *see* USSG § 5K1.1, which

reduced the guidelines range to 235 to 293 months. The district court sentenced Secord to a term of imprisonment of 240 months, to be followed by a five-year term of supervised release. We granted Secord's motion for voluntary dismissal of his appeal. *United States v. Secord*, No. 12-2143 (6th Cir. Dec. 21, 2012) (order). The district court reduced Secord's sentence, first to 204 months and later to 144 months, based on motions the government filed under Federal Rule of Criminal Procedure 35(b) because of the substantial assistance Secord provided to the government.

In 2016, Secord, proceeding pro se, filed the current motion, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), several of his prior convictions counted as predicate offenses for his ACCA designation could no longer be counted as such. He also contended that his sentence was improperly enhanced under USSG § 3C1.2 for reckless endangerment. The district court appointed Secord counsel to assist with his *Johnson* claim. The court denied both claims on the merits while also concluding that both claims failed for independent procedural reasons. The court declined to issue a COA for any of the issues raised.

Secord now seeks a COA from this court on the issue of whether, in light of *Johnson*, his prior convictions, specifically his convictions for home invasion and unarmed robbery, still qualify as ACCA predicate offenses. He has effectively abandoned his sentencing-enhancement claim by failing to address it in his COA application. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

To obtain a COA from the denial on the merits of a motion to vacate, a petitioner must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate "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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Under the ACCA, a defendant who has three or more prior convictions for a "violent felony" or a "serious drug offense" qualifies as an armed career criminal and is subject to a

minimum term of fifteen years in prison. *See* 18 U.S.C. § 924(e)(1). An offense qualifies as a violent felony if it falls under one of the following three clauses in the ACCA: 1) the "elements" clause—"has as an element the use, attempted use, or threatened use of physical force against the person of another"; 2) the "enumerated offenses" clause—"is burglary, arson, or extortion, [or] involves [the] use of explosives"; or 3) the "residual" clause—"involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e). In *Johnson*, the Supreme Court held that the residual clause was unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563.

Reasonable jurists would not dispute the district court's denial of Secord's *Johnson* claim. The district court concluded that Secord's convictions were violent felonies even after *Johnson*. Specifically, the court found that Secord's prior convictions for first and second-degree home invasion qualified as generic burglary under the enumerated-offenses clause, and that his conviction for unarmed robbery qualified under the elements clause.

To determine whether a prior conviction qualifies as a violent felony, we start with the categorical approach, comparing "the elements of the crime of conviction with the elements of the 'generic' version of the listed offense—i.e., the offense as commonly understood." *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016). A prior crime "qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense." *Id.* Applying the categorical approach, we have found that the variants of home invasion under Michigan law qualify as generic burglary and, consequently, violent felonies for ACCA purposes. *See United States v. Quarles*, 850 F.3d 836, 837 (6th Cir. 2017) ("We affirm the district court's determination that Michigan's crime of third-degree home invasion is categorically equivalent to generic burglary."); *United States v. Gibbs*, 626 F.3d 344, 353 (6th Cir. 2010) ("[A] conviction for second-degree home invasion under Michigan law is the equivalent of the enumerated offense of burglary of a dwelling and therefore constitutes a 'crime of violence.'"); *United States v. Garcia-Serrano*, 107 F. App'x 495, 496 (6th Cir. 2004)

("Michigan's definition of home invasion-first degree includes all of the elements of burglary of a dwelling.").[1]

While acknowledging that we have found that home invasion under Michigan law equates to generic burglary, Secord contends that the district court's conclusion is still debatable among jurists of reason because there is a circuit split regarding language in Michigan's home invasion statute. While other courts may interpret the language of Michigan's home invasion statute differently, *Quarles* remains binding in this circuit. *See United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014). Secord's claim that his home invasion convictions are not violent felonies does not deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 327.

We have similarly found that unarmed robbery constitutes a crime of violence. In *United States v. Matthews*, _ F. App'x _, No. 15-2298, 2017 WL 1857265 (6th Cir. May 8, 2017), *petition for cert. filed*, (U.S. Sept. 7, 2017) (No. 17-5874), we determined that unarmed robbery under Michigan law is a crime of violence under the elements clause of the ACCA. [2] *Id.* at *5. Secord acknowledges *Matthews* as adverse authority but contends that reasonable jurists could still disagree about whether unarmed robbery constitutes a crime of violence given the dissenting opinion in *Matthews*. *See id.* at *5-7. Although *Matthews* is unpublished and has a dissent, Secord does not challenge the reasoning of the majority's opinion. The majority's opinion is also consistent with the conclusions of other circuits which have addressed this issue. *See United States v. Lamb*, 638 F. App'x 575, 577-78 (8th Cir. 2016), *vacated on other grounds*, *Lamb v. United States*, 137 S. Ct. 494 (2016); *United States v. Tirrell*, 120 F.3d 670, 680-81 (7th Cir. 1997). Secord's claim that his unarmed robbery offense is not a crime of violence does not deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 327.

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[1] These cases interpret the sentencing guidelines' definition of violent felony, but we have recognized that the guidelines' definition is "essentially the same" as the ACCA's definition. *Gibbs*, 626 F.3d at 352 n.6.

[2] The *Matthews* panel addressed the pre-2004 version of Michigan's unarmed robbery statute. *See Matthews*, 2017 WL 1857265, at *3 & n.1. Secord's unarmed robbery conviction is from 1996, and is therefore covered by *Matthews*.

Accordingly, Secord's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

Opinion and Order of the United States District Court
for the Western District of Michigan Southern Division
Robert Eugene Secord v. United States of America,
No. 1:16-cv-163 (March 27, 2017)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT EUGENE SECORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

CASE NO. 1:16-CV-163

HON. ROBERT J. JONKER

OPINION AND ORDER

Movant Secord moves to vacate his 144-month sentence for being a felon in possession of a firearm as an Armed Career Criminal. There is no merit to the Movant's position, and the motion is **DENIED**.

BACKGROUND

On August 3, 2011, a grand jury indicted Petitioner Secord on six counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and § 924(e), and six counts of possession of a stolen firearm in violation of 18 U.S.C. § 922(j) and § 924(a)(2). On January 11, 2012, based on a plea agreement, Secord pled guilty to the fourth count of felon in possession of a firearm as an Armed Career Criminal. The remaining counts were dismissed as part of the plea agreement.

The U.S. Probation Office prepared the final PSR in anticipation of sentencing. Under U.S.S.G. § 2K2.1, the guideline score for felon in possession came to 36, which was higher than the offense level of 30 Petitioner would have under the ACCA guideline, U.S.S.G. § 4B1.4. After a three-level reduction for acceptance of responsibility, the level of offense was 33. The criminal

history was VI because Petitioner had 26 criminal history points even without application of the Armed Career Criminal guideline. *See* U.S.S.G. 4B1.4(c)(2).[1]

The guidelines came to 324-405 months. At the sentencing hearing on August 21, 2012, the Court granted the government's motion for a three-level downward departure based on substantial assistance under U.S.S.G. § 5K1.1, which reduced the guideline range to 235-293 months. Ultimately, the Court imposed a guideline sentence of 240 months. Secord initially filed a notice of appeal, which he later voluntarily dismissed. In 2013 and 2014, the Court issued orders granting government motions to reduce the sentence, first to 204 months, then to 144 months, under Rule 35(b) because Secord continued to provide substantial assistance to the government.

Secord filed this Section 2255 motion on February 16, 2016. On April 12, 2016, the Court appointed defense counsel for Petitioner to assist with his *Johnson* claim.

LEGAL STANDARDS AND ANALYSIS

A federal prisoner may challenge his sentence by filing in the district court where he was sentenced a motion under 28 U.S.C. § 2255. A valid Section 2255 motion requires a petitioner to show that "the sentence was imposed in violation of the Constitution or laws of the United States, the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Section 2255 affords relief for a claimed constitutional error only when the error had a substantial

[1]Secord had four prior convictions that qualified as predicates at the time: (1) a December 12, 1996, conviction for first degree home invasion in violation of Mich. Comp. Laws § 750.110a(2); (2) a September 23, 1996, conviction for unarmed robbery in violation of Mich. Comp. Laws § 750.530; (3) a June 2, 2010, conviction for second degree home invasion in violation of Mich. Comp. Laws § 750.110a(3); and (4) a May 11, 2010, conviction for breaking and entering a building with intent in violation of Mich. Comp. Laws § 750.110.

and injurious effect or influence on the proceedings. *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999). Non-constitutional errors generally are outside the scope of Section 2255 relief, and they should afford collateral relief only when they create a "fundamental defect which inherently results in a complete miscarriage of justice, or, an error so egregious that it amounts to a violation of due process." *Id.* (internal quotation marks omitted). Generally, with the exception of claims of ineffective assistance of counsel, claims not first raised on direct appeal are procedurally defaulted and may not be raised on collateral review. *Massaro v. United States*, 538 U.S. 500, 503-04 (2003). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent." *Bousley v. United States*, 523 U.S. 614, 622 (1998) (internal citations and quotation marks omitted).

I. *Johnson* Claim

Petitioner claims his sentence should be vacated and he should be resentenced without the ACCA enhancement because the ACCA no longer applies after *Johnson*. The Court disagrees. *Johnson* invalidated only the residual clause of the ACCA, not the elements or enumerated offenses prongs of the ACCA. Here, two of Petitioner's predicates are Michigan home invasion offenses, all the variants of which the Sixth Circuit has held qualify as generic burglary, an enumerated offense. *See United States v. Quarles*, No. 16-1690, 2017 WL 942655, at *1 (March 10, 2017) ("We affirm the district court's determination that Michigan's crime of third-degree home invasion is categorically equivalent to generic burglary."); *United States v. Gibbs*, 626 F.3d 344, 353 (6th Cir. 2010) ("[A] conviction for second-degree home invasion under Michigan law is the equivalent of the enumerated offense of burglary of a dwelling and therefore constitutes a 'crime of violence'" for

Guidelines-calculation purposes") (citations omitted); *United States v. Howard*, 327 F. App'x 573, 575 (6th Cir. 2009) (holding that defendant's "supervised release violation for second degree home invasion was equivalent to a violation for burglary of a dwelling, a crime that falls squarely within the definition of a 'crime of violence' under § 4B1.2(a)(2) of the Sentencing Guidelines") (citation omitted); *United States v. Garcia-Serrano*, 107 F. App'x 495, 496 (6th Cir. 2004) ("Michigan's definition of home invasion-first degree includes all the elements of burglary of a dwelling," for purposes of applying the "crime of violence" enhancement in U.S.S.G. § 2L1.2); *United States v. Hart*, 104 F. App'x 469, 40 (6th Cir. 2004) ("[S]econd-degree home invasion [under Michigan law] plainly is a burglary").[2] Additionally, the offense of unarmed robbery qualifies as a predicate for reasons articulated by the Seventh and Eighth Circuits:[3] namely, unarmed robbery fits the "elements clause" of the ACCA because all variants of that crime involve the use or threatened use of physical force against another person. *See United States v. Lamb*, 638 F. App'x 575, 576-77 (8th Cir. 2016), *vacated on other grounds*, *Lamb v. United States*, __ U.S. __, 137 S. Ct. 494 (2016) (concluding that Michigan unarmed robbery is a violent felony under the elements clause); *United States v. Tirrell*, 120 F.3d 670, 680-81 (7th Cir. 1997) (citing *People v. Randolph*, 466 Mich. 532, 648 N.W.2d 164 (2002)) (holding that Michigan conviction for attempted unarmed robbery is a violent felony under

[2]Although most of these decisions address the generic offense of "burglary of a dwelling" in the Guidelines' "crime of violence" definition, the Guidelines' definition is "essentially the same" as the ACCA's "crime of violence" definition. *Gibbs*, 626 F.3d at 352 n.6; *see also United States v. Denson*, 728 F.3d 603, 607 (6th Cir. 2013) (holding that the analysis of whether an offense is a "crime of violence" or "violent felony" is the same under the ACCA and the Guidelines).

[3]The Sixth Circuit has not ruled either way. In *United States v. Freeman*, the Sixth Circuit explicitly "decline[d] to determine . . . whether [Michigan unarmed robbery] is a violent felony." No. 16-1004, 2017 WL 655775, at *2 (6th Cir. Feb. 17, 2017). The Court finds the rulings of two sister circuits persuasive.

§ 924(e)(2(B)(i) because "under Michigan law, the element of putting in fear means threatening the use of physical force against the person of another."). These predicates are sufficient to support Petitioner's ACCA conviction and sentence. *See* 18 U.S.C. § 924(e)(1) (requiring three prior convictions of either serious drug offenses or violent felonies to subject a defendant who violates 18 U.S.C. § 922(g) to the ACCA). Accordingly, *Johnson* does not require this Court to vacate Petitioner's sentence because the residual clause of the ACCA is not necessary to application of the Act in this case.[4]

II. Sentence Enhancement Claim

Petitioner's second claim alleges the Court improperly applied the two-level reckless endangerment enhancement. Specifically, Petitioner claims there was an insufficient "nexus" between his offense conduct and the enhancement. As an initial matter, guideline errors are not generally cognizable in a collateral attack. *See Grant v. United States*, 72 F.3d 503, 506 (6th Cir. 1996) ("[N]onconstitutional errors, such as mistakes in the application of the sentencing guidelines, will rarely, if ever, warrant relief . . . [on collateral review]."); *Besser v. United States*, No. 1:09-cv-948, 2013 WL 308951, at *30 (W.D. Mich. Jan. 25, 2013).

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[4]The Court notes that Petitioner's original motion did not raise a claim based on *Mathis v. United States*, 136 S. Ct. 2243 (2016). Nor could Petitioner have raised such a claim, because any such claim would be time-barred and defaulted. *Mathis* does not provide Secord with a gateway to a belated § 2255 motion because it did not announce a "new right." *See Mathis*, 136 S. Ct. at 2247, 2251 (holding that its decision merely reaffirms "25 years . . . [of] decisions" and that its "precedents . . . resolve[] this case."). Additionally, Secord failed to raise a *Mathis* claim in the district court or on appeal, and has made no attempt to meet the "cause and prejudice" or "actual innocence" showing to overcome his procedural default. But even aside from any procedural impediments, this Court finds that the statutory definitions of Petitioner's Michigan home invasion predicates and his unarmed robbery predicate fall comfortably within the relevant ACCA definitions. Indeed, the Sixth Circuit's decision in *Quarles*, No. 16-1690, 2017 WL 942655, is a post-*Mathis* decision finding third degree home invasion the equivalent of generic burglary. Accordingly, *Mathis* does not help Petitioner.

But even if Petitioner's claim was cognizable under Section 2255, the reckless endangerment enhancement was entirely proper in this case. As the Court noted at sentencing, Petitioner was a full-time professional engaged in the occupation of breaking into unoccupied homes, stealing valuables, and liquidating their value on the black market. (Case No. 1:11-cr-234, ECF No. 44, PageID.336-337). He routinely used the same operating procedure to conduct this ongoing crime spree. *Id.* Accordingly, all of Petitioner's break-ins and firearm thefts were relevant conduct to his count of conviction because they shared a common scheme and involved the same course of conduct. Petitioner's act of running over a police officer's foot and leading a dangerous car chase was an attempt to flee and escape the discovery and arrest for this same course of conduct. *Id.* Accordingly, those are valid facts to support the enhancement.

III. Timeliness, Waiver and Procedural Default

The Court has addressed and resolved the merits of Petitioner's claims, but this motion fails for independent procedural reasons too. First, Petitioner's *non-Johnson* claims are untimely because they were not filed within the statutory one-year limitations period. *See* 28 U.S.C. § 2255(f)(1). As noted earlier, Secord initially appealed the Court's judgment. Subsequently, however, he filed a motion for voluntary dismissal of that appeal, which this Court granted on December 21, 2012. Accordingly, the judgment became final on that date. *See United States v. Sylvester*, 258 F. App'x 411, 412 (3d Cir. 2007) (holding that a "[petitioner's] conviction bec[omes] final and the limitations period beg[ins] to run when his appeal [is] voluntarily dismissed"); *see also Futernick v. Sumpter Twp.*, 207 F.3d 305, 312 (6th Cir. 2000). As a result, Secord's February 16, 2016 § 2255 motion was not filed within one year of the date his judgment of conviction became final, as required under § 2255(f)(1). Nor does Secord allege any governmental impediment to a timely filing, *see* 28 U.S.C.

§ 2255(f)(2), or claim that his motion was based on newly discovered facts. *See* 28 U.S.C. § 2255(f)(4). Finally, Secord's non-*Johnson* claims are not based on a new, substantive right made retroactively applicable to cases like this case.

Second, Secord's plea agreement contained a provision wherein he "waive[d] the right to challenge . . . [his] sentence and the manner in which it was determined in any collateral attack, including . . . a motion brought under Title 28, United States Code, Section 2255." (Case No. 1:11-cr-234, ECF No. 20, PageID.49). The Sixth Circuit has held that a waiver provision in a plea agreement is valid and binding so long it is made knowingly and voluntarily. *United States v. Fleming*, 239 F.3d 761, 763-64 (6th Cir. 2001). A petitioner's "informed and voluntary waiver of the right to collaterally attack [his] sentence in a plea agreement bars" the right to appeal or otherwise collaterally attack the imposed sentence. *Watson v. United States*, 165 F.3d 486, 489 (6th Cir. 1999).

The scope of Secord's waiver encompasses all the claims he seeks to raise in this collateral attack, including the *Johnson* claims. Moreover, Secord does not challenge the validity of his waiver. Nor does the Court see any record basis for such a challenge. Petitioner signed the plea agreement containing the waiver, which stated that he had read the entire agreement and discussed it with his attorney (Case No. 1:11-cr-234, ECF No. 20, PageID.49). His signature indicates that he was aware of the waiver at the time he entered into the plea agreement. Accordingly, Secord's waiver of collateral attack in his plea agreement is enforceable and bars him from bringing his claims. *See In re Garner*, No. 16-1655, 2016 WL 6471761, at *1 (6th Cir. Nov. 2, 2016) (finding that the court "must deny [Petitioner's] motion [based on *Johnson*] for the same reason he lost his direct appeal

and his § 2255 action: [Petitioner] waived his right to challenge his sentence collaterally in his plea agreement.").

Favorable intervening changes in the law have no effect on whether Secord's waiver of collateral attack in his plea agreement is enforceable and bars him from bringing his claims. *See United States v. Bradley*, 400 F.3d 459, 463 (6th Cir. 2005) ("[A]bsent misrepresentations or other impermissible conduct by state agents, . . . a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.") (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970), and citing other cases). "[T]he possibility of changes in the law is simply one of the risks allocated by the parties' [plea] agreement." *United States v. Whitsell*, 481 F. App'x 241, 243 (6th Cir. 2012) (quoting *United States v. Haynes*, 412 F.3d 37, 39 (2d Cir. 2005)). *United States v. McBride*, 826 F.3d 293, 295 (6th Cir. 2016), is not to the contrary, as the defendant in that case did not sign a plea agreement waiving his appellate and collateral review rights as Petitioner did here. *See McBride*, 826 F.3d at 295.

The Court recognizes that the government has declined to rely on the Petitioner's waiver as to his *Johnson* claim. The government does rely on the waiver for other aspects of Petitioner's claims, thus recognizing its validity. The government's policy decision not to rely on a valid waiver does not prevent the Court from relying on it. Here, the Court finds the waiver valid and applicable, and adopts it as an alternate grounds for denying Petitioner's claim.

Third, Secord abandoned his appeal. Generally, with the exception of claims of ineffective assistance of counsel, claims not first raised on direct appeal are procedurally defaulted and may not be raised on collateral review. *Massaro*, 538 U.S. at 503-04. Nor does Secord allege any other

conceivable basis in this case to establish the cause and prejudice required to overcome procedural default. Upon filing, the only possible gateway Secord had to a belated § 2255 motion was the *Johnson* case. But that gateway is unavailable for any guideline issue, or any other issue apart from the ACCA residual clause itself. And as to that issue, Secord's claim is both waived under the plea agreement and unavailing on the merits.

CONCLUSION

Accordingly, the Motion of Secord to vacate is **DENIED**.

Before Petitioner may appeal the Court's dismissal of his petition, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(B); FED. R. APP. P. 22(b)(1). The Federal Rules of Appellate Procedure extend to district judges the authority to issue certificates of appealability. FED. R. APP. P. 22(b); *see also Castro v. United States*, 310 F.3d 900, 901–02 (6th Cir. 2002). Thus, the Court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); FED. R. APP. P. 22(b)(1); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make the required "substantial showing," the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Court does not believe that reasonable jurists would find the Court's assessment of the claim Petitioner raised debatable or wrong.

ACCORDINGLY, IT IS ORDERED:

1. Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence (Case No. 1:16-cv-163, ECF No. 1) is **DENIED**.

2. Petitioner's request for a Certificate of Appealability is **DENIED**.

Dated: March 27, 2017

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE