UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CIV-81366-HURLEY
(05-CR-80020-HURLEY)
MAGISTRATE JUDGE P.A. WHITE

NATHANIEL BEVERLY, :

Movant, :

v. : REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA, :

Respondent. :

_____

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence entered in Case No. 05-Cr-80020-HURLEY.

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

The Court has reviewed the motion [CV-DE#1], Movant's memorandum of law in support thereof [CV-DE#4], the government's response [CV-DE#13], Movant's pro se reply [CV-DE#14], Movant's counseled supplemental memorandum filed in further support of Movant's *pro se* motion [CV-DE#17], the government's supplemental response [CV-DE#19], Movant's counseled reply [CIV-DE#21], and all pertinent portions of the underlying criminal file.

Claims

Movant's general claim in this proceeding is that he no longer qualifies as an Armed Career Criminal in light of the United States Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015). More specifically, Movant contends that his prior convictions for burglary of a dwelling, robbery, possession of heroin with intent to sell, and manslaughter no longer qualify as ACCA predicate offenses.

Procedural History

The procedural history of Movant's underlying criminal case is not in dispute. On December 7, 2004, Movant was pulled over by state authorities for a traffic violation. (See PSI, ¶¶4-14). Movant admitted to driving with a suspended license, and fled to avoid arrest. (Id.). Movant was eventually apprehended at his house. (Id.). After being arrested, Movant apparently gave consent to search his residence, which produced firearms. (Id.). On March 14, 2005, Movant was then arrested by federal authorities on federal charges, and detained pending trial. (CR-DE#4-5, 16; PSI, p.2). Finally, on August 8, 2005, Movant was convicted of being a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 924(g)(1).

A PSI was prepared in anticipation of sentencing. Movant's base offense level was for his § 922(g) conviction because it was committed subsequent to Movant purportedly having sustained at least two felony convictions for a either a "crime of violence" or "controlled substance offense." (PSI, ¶18). Without this enhancement, Movant's base offense level would have been 20. 2K2.1(a)(4). However, Movant was considered to be an Armed Career Criminal, because he was subject to an enhanced sentence pursuant to § 924(e) of the ACCA. (Id. at ¶24). For the ACCA predicates, the PSI cited the following Florida convictions:

(1) a 1997 conviction for burglary of a dwelling (Dkt. No. 96007427CF);

(2) a 1978 conviction for robbery (Dkt. No. 77001937CF);

(3) a 1997 conviction for possession of heroin with intent to sell (Dkt. No. 97005898CF);

(4) a 1992 conviction for possession of cocaine with intent to sell (Dkt. 91012896CF); and

(5) a 1992 conviction for manslaughter (Dkt. No. 91012894CF).

(Id.). His offense level was thus enhanced to 33. (Id.). Movant also had a total of eleven criminal history points, resulting in a criminal history category of V. (Id. at ¶39). However, because Movant was considered an Armed Career Criminal, his criminal history category was enhanced to VI (Id.). Based on a total offense level of 33 and a criminal history category of VI, Movant's guideline imprisonment range was 210-262 months. (Id. at ¶62).

The district court adopted the PSI without change, imposed the mandatory minimum sentence required by § 924(e), and sentenced Movant to 210 months' imprisonment, to be followed by supervised release. (CR-DE#45; Court's Statement of Reasons). Thereafter, Movant unsuccessfully appealed to the Eleventh Circuit, and in January of 2007, the United States Court denied his petition for a writ of certiorari. (CR-DE#61, 64). On September 25, 2015, pursuant to the "prison mailbox rule," Movant filed the instant motion pursuant to 28 U.S.C. § 2255.[1]

[1]Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); see also Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)(setting forth the "prison mailbox rule").

Statute of Limitations

Pursuant to § 2255(f), a one-year period of limitation applies to motions under that section. The limitations period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2255(f).

In cases where the statute of limitations runs from the date on which the judgment of conviction becomes final and a criminal defendant pursues direct review to the United States Supreme Court, judgment becomes final when the Supreme Court affirms the conviction on the merits or denies the petition for certiorari. Gonzalez v. Thaler, ___ U.S. _____, 132 S.Ct. 641, 653 (2012). Here, Movant's judgment of conviction became final in January of 2007, when the Supreme Court denied certiorari. As such, under § 2255(f)(1), the statute of limitations expired in January of 2008.

However, in cases where the constitutional right asserted is a newly recognized right made retroactively applicable to cases on collateral review, the AEDPA's one-year limitations period runs from the date of that decision. See Dodd v. United States, 545 U.S. 353 (2005). Here, Movant claims that he is entitled to relief

under the Supreme Court's decision in Johnson, supra, which was decided on June 25, 2015. As such, § 2255 movants seeking relief under Johnson had until June 26, 2016 to file their claims. See In re Robinson, 822 F.3d 1196, 1198 (11th Cir. 2016)(*citing* Dodd, supra). Moreoever, it is undisputed that Movant filed the instant § 2255 motion well before the June 26, 2016 Johnson filing deadline. Indeed, the government concedes that, to the extent that Movant raises claims under Johnson, his motion is timely.

Finally, it bears noting that the period of limitation under § 2255(f) should be applied on a claim-by-claim basis. See Capozzi v. United States, 768 F.3d 32, 33 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 1476, 191 L. Ed. 2d 418 (2015) ("We now join all of the other circuits that have decided the question, and we hold that the period of limitation in 28 U.S.C. § 2255(f) should be applied on a claim-by-claim basis.")(citations omitted).

Standard of Review

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255. If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." Id. To obtain this relief on collateral review, however, a habeas petitioner must "clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)(rejecting the plain error standard as not sufficiently deferential to a final judgment).

Under §2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. §2255; see also Smith v. Singletary, 170 F.3d 1051, 1053 (11th Cir. 1999)("[a] habeas corpus petitioner is entitled to an evidentiary hearing on his claim 'if he alleges facts which, if proven, would entitle him to relief.'")(internal citations and quotations omitted)). However, the movant in a §2255 proceeding must allege reasonably specific, non-conclusory facts that, if true, would entitle him to relief. Aron v. United States, 291 F.3d 708, 715, n. 6 (11th Cir. 2002). Otherwise, no evidentiary hearing is warranted. Id, 291 F.3d at 714-715 (explaining that no evidentiary hearing is needed when claims are "affirmatively contradicted by the record" or "patently frivolous"); Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989)(noting that a hearing is not required on claims which are based upon unsupported generalizations or affirmatively contradicted by the record). Moreover, a court need not conduct an evidentiary hearing where the issues can be conclusively decided on the basis of the evidence already in the record, and where the petitioner's version of the facts have already been accepted as true. See, e.g., Chavez v. Sec'y Fla. Dep't of Corr., 647 F.3d 1057, 1070 (11th Cir. 2011); Turner v. Crosby, 339 F.3d 1247, 1274-75 (11th Cir. 2003); Smith, 170 F.3d at 1054; Schultz v. Wainwright, 701 F.2d 900, 901 (11th Cir. 1983); Roberts v. Marshall, 627 F.3d 768, 773 (9th Cir. 2010).

Discussion

Predicates at Issue

As set forth above, Movant's PSI listed the following convictions as ACCA predicate offenses: (1) a 1997 Florida conviction for burglary of a dwelling; (2) a 1978 Florida

conviction for robbery; (3) a 1997 Florida conviction for possession of heroin with intent to sell; (4) a 1992 Florida conviction for possession of cocaine with intent to sell; and (5) a 1992 Florida conviction for manslaughter.

Movant does not challenge his 1992 conviction for possession of cocaine with intent to sell as an ACCA predicate offense. The government, for its part, concedes that Movant's 1997 conviction for burglary of a dwelling and Movant's 1992 conviction for manslaughter no longer qualify.

It is well-settled that federal courts should not decide issues that are not before them. See, e.g., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 64 n.19, 109 S. Ct. 2782, 2802, 106 L. Ed. 2d 26 (1989). Therefore, it would be inappropriate for the court to set forth precisely how or why Movant's cocaine conviction still qualifies as an ACCA predicate, or how or why his burglary and manslaughter convictions do not. This is particularly true in light of the complexity of the issues relating to whether an alternatively phrased statute lists elements or means (and, as such, whether it is indivisible or divisible), and application of the categorical and modified categorical approaches. See, e.g., Almanza-Arenas v. Lynch, 815 F.3d 469, 483 (9th Cir. 2016) ("The bedeviling "modified categorical approach" will continue to spit out intra- and inter-circuit splits and confusion, which are inevitable when we have hundreds of federal judges reviewing thousands of criminal state laws . . . Almost every Term, the Supreme Court issues a "new" decision with slightly different language that forces federal judges, litigants, lawyers and probation officers to hit the reset button once again.") (Owens, Circuit Judge, joined by Tallman, Bybee, and Callahan, Circuit Judges, concurring).

The court notes, however, that it has considered the parties' arguments made in their respective filings, and has reviewed the

applicable binding authorities, as well as all pertinent portions of the underlying criminal file. And based on the foregoing, the Court finds the parties' respective concessions regarding Movant's prior convictions to be well-taken. See United States v. Darling, 619 F. App'x 877, 880 (11th Cir. 2015) ("The Supreme Court's recent decision in Johnson . . . has no bearing on Darling's sentence because he had more than three predicate convictions for "serious drug offenses" as defined in 18 U.S.C. § 924(e)(2)(A)(ii)"); Mathis, infra, (setting forth how federal courts are to determine whether an alternatively phrased statute lists alternative elements of a divisible statute, or merely lists alternative means of satisfying one element of an indivisible statute); Descamps, infra, (setting forth circumstances under which federal courts may use categorical and modified categorical approaches to determine if prior conviction qualifies as predicate under the ACCA); James v. United States, 550 U.S. 192, 212, 127 S. Ct. 1586, 1599, 167 L. Ed. 2d 532 (2007) *overruled on other grounds* by Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)("We agree that the inclusion of curtilage takes Florida's underlying offense of burglary outside the definition of 'generic burglary' . . ."); United States v. Garcia-Perez, 779 F.3d 278, 283 (5th Cir. 2015)("A Florida manslaughter conviction simply does not require proof of use of force.").

This case thus turns upon whether Movant's 1978 Florida robbery conviction his 1997 Florida conviction for possession of heroin with intent to sell qualify as ACCA predicate offenses, because without both of them Movant would not have the three requisite prior convictions qualifying him for the ACCA's sentencing enhancement.

Movant's Initial Burden

The government first argues that, because it cannot be determined from the record whether the district court relied on the residual clause in determining that Movant's prior convictions qualified him for the ACCA enhancement, his claim necessarily fails. Movant notes that the government does not cite any authority for this proposition, and similarly does not disclose the existence of any authority in this regard. However, in In re Moore, No. 16-13993-J, 2016 WL 4010433 (11th Cir. July 27, 2016), in the context of granting an application to file a second or successive § 2255 motion based on Johnson and discussing what the district court's task would be on *de novo* review, the Eleventh Circuit stated:

> In other words, the district court cannot grant relief in a § 2255 proceeding unless the movant meets his burden of showing that he is entitled to relief, and in this context the movant cannot meet that burden unless he proves that he was sentenced using the residual clause and that the use of that clause made a difference in the sentence. If the district court cannot determine whether the residual clause was used in sentencing and affected the final sentence---if the court cannot tell one way or the other---the district court must deny the § 2255 motion. It must do so because the movant will have failed to carry his burden of showing all that is necessary to warrant § 2255 relief.

2016 WL 4010433, at *4. This, however, is not the end of the matter. Rather, the Court must determine whether this language is binding upon the Court or, rather, mere dicta.

As the Eleventh Circuit has noted, "dicta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us.'" United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (citations omitted). The holding of a case is, conversely, "comprised both of the result of the case and 'those

portions of the opinion necessary to that result by which we are bound.'" Id. A dictum has been described as "'an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner.'" Evans v. Sec'y, Dept. of Corr., 703 F.3d 1316, 1335 (11th Cir. 2013), *quoting* P. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L.Rev. 1249, 1256 (2006). "'If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner.'" Id. Dictum has further been defined as "'a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding.'" Kaley, 579 F.3d at 1253 n.10, *citing* United States v. Crawley, 837 F.2d 291, 292 (7th Cir.1988).

Here, the Court's statement in Moore about what should occur in the event that Moore was not able to establish that the residual clause played a role in his sentencing was not necessary to the Eleventh Circuit's conclusion that he had made the requisite *prima facie* showing entitling him to file a second or successive motion under § 2255. As such, this language is mere dicta. See United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) ("As our cases frequently have observed, dicta is defined as those portions of an opinion that are not necessary to deciding the case then before us.") (quotation omitted; citing cases); see also In re Emelio Gomez, __ F.3d __, 2016 WL 3971720, at *3 (11th Cir. July 25, 2016) ("It is the job of the district court to decide every aspect of Gomez's motion 'fresh, or in the legal vernacular, de novo"), *citing* Jordan v. Sec'y Dep't of Corr., 485 F.3d 1351, 1358 (11th Cir. 2007); In re Jackson, __ F.3d __, 2016 WL 3457659, at *6 (11th Cir. June 24, 2016) ("Nothing about our ruling here binds the District Court, which must decide the . . . issue fresh, or in the

legal vernacular, de novo. And when we say every aspect, we mean every aspect.") (citation omitted); In re Rogers, __ F.3d __, 2016 WL 3362057, at *3 (11th Cir. June 17, 2016) ("nothing we pronounce in orders on applications to file successive § 2255 motions binds the district court"). The question thus becomes whether the Court should consider the language in Moore as persuasive authority. Respectfully, the Court concludes that it is not.

Review of applications for leave to file second or successive motions are supposed to be limited to whether the applicant has made a *prima facie* showing that the proposed motion will contain a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. 28 U.S.C. § 2244(b)(3)(D), 2255 (h). The form that prisoners are required to use when seeking leave to file a second or successive § 2255 motion gives them very little space to explain their claims. See In re McCall, No. 16-12972-J, 2016 WL 3382006, at *2 (11th Cir. June 17, 2016) (Martin, J., dissenting) (citation omitted). And the first page of this form warns: "DO NOT SUBMIT SEPARATE PETITIONS, MOTIONS, BRIEFS, ARGUMENTS, ETC." Id. Indeed, many of "these decisions were made without the briefing or argument from a lawyer, within a tight 30-day deadline and in a deluge of hundreds of applications." Id. The dangers of going beyond this threshold inquiry have been acknowledged by the Eleventh Circuit itself. See In re William Hunt, ___ F.3d ___, 2016 WL 3895246, at *7 (11th Cir. July 18, 2016) (Jill Pryor, J., concurring, joined by Wilson and Rosenbaum, JJ.) ("Since the Supreme Court decided in Johnson that this language is unconstitutionally vague, we have repeatedly misinterpreted and misap-plied that decision . . . . In throwing up these sorts of barriers [to successive § 2255 motions], this Court consistently got it wrong."). And nowhere are they more poignantly illustrated than in the case at bar. Specifically, since articulating the dicta in Moore, a different panel of the Eleventh Circuit has stated:

> Moore suggests that the district court must make the inmate prove whether or not [he] was sentenced under the residual clause. We think this is wrong, for two reasons. First, it implies that the district judge deciding Mr. Chance's upcoming § 2255 motion can ignore decisions from the Supreme Court that were rendered since that time in favor of a foray into a stale record. Assuming that Johnson does apply . . .then district courts must determine categorically---that is, by reference to the elements of the offense, and not the actual facts of [the defendant's] conduct---whether that offense qualifies as a crime of violence. . . . In applying the categorical approach, it would make no sense for a district court to have to ignore precedent such as Descamps v. United States, — U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), and Mathis v. United States, — U.S. — , 136 S.Ct. 2243, — L.Ed.2d — (2016), which are the Supreme Court's binding interpretations of that approach. And yet, the Moore panel suggested that the sentencing court must ignore that precedent unless the sentencing judge uttered the magic words 'residual clause' . . . Under the Moore panel's rule, however, a defendant could not benefit from that binding precedent except in the rare instances where the sentencing judge thought to make clear that she relied on the residual clause. That is not right.

In re Chance, No. 16-13918-J, 2016 WL 4123844, at *4 (11th Cir. Aug. 2, 2016). The Court finds the reasoning of Chance persuasive, as it does that of United States v. Ladwig, No. 2:03-CR-00232-RHW, - F.Supp.3d —, 2016 WL 3619640 (E.D. Wash. June 28, 2016), wherein the issue was squarely presented for resolution.

In Ladwig, the government advanced the same exact argument that it advances here; specifically, that "[the movant] could not affirmatively show that th[e] Court relied on the residual clause in finding that [movant]'s prior convictions qualified as violent felonies[.]".

With regard to this argument, the Ladwig court concluded that the movant is not required to show affirmatively that the sentencing court relied upon the residual clause to impose the enhancement. The court analogized the situation to the established rule that "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the

verdict may have rested exclusively on the insufficient ground." Id. at *3 (*quoting* Zant v. Stephens, 462 U.S. 862, 881 (1983)); see Parker v. Sec'y for Dep't of Corrs., 331 F.3d 764, 777 (11th Cir. 2003). The Court thus held that, "because of the unique nature of Johnson-based claims," the petitioner "ha[d] successfully demonstrated constitutional error simply by showing that the Court might have relied on an unconstitutional alternative when it found that [petitioner's] prior convictions for burglary and attempted rape were violent felonies." Id. at *3 (emphasis added).

Here, the record in Movant's case is similarly unclear as to which clause the district court relied upon. Thus, Movant has established constitutional error under Johnson, because it was possible that the enhancement rested on the residual clause. See Id. at *2-3.

Procedural Bar

As a general matter, a defendant must assert an available challenge to a conviction or sentence on direct appeal, or be barred from raising the challenge in a section 2255 proceeding. Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). However, both the Eleventh Circuit and other courts have recognized that "procedural default" is a non-jurisdictional affirmative defense that must be raised by the government in its Response to the Order to Show Cause (and similarly, by the state in its Answer to a § 2254 motion). Otherwise, the default defense is considered waived. Esslinger v. Davis, 44 F.3d 1515, 1524 n. 32 ("The state can waive a procedural bar to relief by explicitly waiving, or by merely failing to assert the bar in its answer to the habeas petition); Delap v. Dugger, 890 F.2d 285, 302 n. 20 (11th Cir. 1989) ("The state did not raise the issue of procedural default in its response to Delap's habeas petition, and thus has waived procedural default"); Barreto-Barreto v. United States, 551 F.3d 95, 98 (1st Cir. 2008) ("government waived the issue of procedural

default by not raising it in response to the § 2255 petitions"); Oakes v. United States, 400 F.3d 92, 96 (1st Cir. 2005) ("[P]rocedural default is an affirmative defense [which] the government may lose . . . by neglecting to raise it in a response to a habeas petition"); Dubria v. Smith, 224 F.3d 995, 1001 (9th Cir. 2000) (the state "waived its right to claim procedural default" by failing to raise that issue in its response to the habeas petition); Reese v. Nix, 942 F.2d 1276, 1280 (8th Cir. 1991) (same).

Here, in its Response to the Order to Show Cause, the government simply responded on the merits, and argued that Movant's Johnson claim was meritless because he purportedly still qualified as an Armed Career Criminal even after Johnson. At no time did the government suggest that Movant's failure to raise a vagueness challenge to his ACCA designation at sentencing or on appeal could possibly bar his right to relief at this time, if the Court disagreed with its contentions and found he no longer had 3 still-qualifying ACCA predicates after Johnson. It was only in its supplemental response that the government raised the procedural bar for the first time. As such, pursuant to the above authorities, the government has waived the procedural bar.

In response to the government's procedural default arguments, counsel for Movant also argues that the government should be deemed to have waived the procedural bar in this case, because Movant no longer qualifies for the ACCA enhancement in fact. Specifically, counsel for Movant notes that the government has waived the procedural bar in other cases where it conceded that the Movant no longer qualified for the ACCA enhancement, and that it is clear that here the government is not waiving the procedural bar because the government believes that Movant still qualifies. According to Movant, the Court should therefore deem that the government has waived the procedural bar because Movant is allegedly entitled to

relief on the merits in fact in this case, and then accept this legally implied concession. The Court finds this suggestion to be without merit.

Counsel for Movant essentially argues that the government is only raising the procedural bar only because it believes Movant should remain incarcerated and serve out his ACCA sentence. Counsel for Movant is right. This is what the government is doing. And the government has every right to do this. It is the government's prerogative to waive procedural bars in cases where the government concludes that it is in the interests of justice to do so:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). To penalize the government for waiving procedural bars in cases where the government concludes that the interests of justice warrant such waivers by implying them out of legal whole cloth in cases where the government has made a considered decision to oppose a particular motion on all legally meritorious grounds would have a chilling effect on the government's inclination to waive procedural bars in any case. This, in turn, would be to the detriment of all criminal defendants. The Court thus specifically declines to imply any such waiver, despite Movant's contention that he is entitled to relief on the merits.

Lest there be any confusion, the Court is concluding that the government has waived the procedural bar by not raising it in response to the order to show cause, but is not implying any waiver

based on the fact that the government has waived the procedural bar in other cases.

The ACCA

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

The ACCA defines "violent felony" as follows:

> any crime punishable by imprisonment for a term exceeding one year ... that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

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

Similarly, under the Federal Sentencing Guidelines, a "crime of violence" is defined as any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that---

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (2) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

In the context of the ACCA's definition of "violent felony," the phrase "physical force" in paragraph (i) "means *violent* force--that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010) ("Johnson I"). As the Supreme Court has noted, the term "violent felony" has been defined as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a deadly weapon, [and] calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." Id. (internal quotations and citations omitted); see also Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 383, 160 L. Ed. 2d 271 (2004) (stating that the statutory definition of "crime of violence" in 18 U.S.C. § 16, which is very similar to § 924(e)(2)(B)(i) in that it includes any felony offense which has as an element the use of physical force against the person of another, "suggests a category of violent, active crimes . . ."). As such, the Supreme Court has stated that the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" the phrase "use . . . of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9-10; see also United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force;" *citing* Leocal). While the meaning of "physical

force" under the ACCA is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the (statutory) elements of state crimes. Johnson I, 599 U.S. at 138. And a federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise. See Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir.1983).

The Categorical and Modified Categorical Approaches

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

The Supreme Court has also approved a variant of the categorical approach, labeled the "modified categorical approach," for use when a prior conviction is for violating a so-called "divisible statute." Id. That kind of statute sets out one or more elements of the offense in the alternative. Id. If one alternative matches an element in the generic offense, but another does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, known as Shepard

documents,[2] to determine which alternative formed the basis of the defendant's prior conviction. Id. The modified categorical approach then permits the court to "do what the he categorical approach demands: compare the elements of the crime of conviction . . . with the elements of the generic crime. Id.

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

In sum, when determining whether a prior conviction qualifies as an ACCA predicate "violent felony," the courts can only look to the elements of the statute of the prior conviction, whether assisted by Shepard documents or not, and not to the facts underlying the defendant's prior conviction. See Descamps, 133 S.Ct. 2283-85. And in so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, ___ U.S. ___, 133 S.Ct. 1678, 1684 (2011)(*quoting* Johnson I, 559 U.S. at 137).

Finally, in Mathis v. United States, – U.S. –, 136 S. Ct. 2243 (2016), the Court was most recently called upon to determine whether federal courts may use the modified categorical approach to determine if a past conviction is for an enumerated offense under the ACCA when a defendant is convicted under an indivisible statute that lists multiple, alternative means of satisfying one (or more)

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

of its elements. 136 S. Ct. at 2247-48. The Court declined to find any such exception and, in so doing, addressed how federal courts are to make the threshold determination of whether an alternatively-phrased statute sets forth alternative elements (in which case the statute would be divisible and the modified categorical approach would apply to determine which version of the statute the defendant was convicted of violating), or merely lists alternative means of satisfying one element of an indivisible statute (in which case the categorical approach would apply). Id. at 2256-57.

Movant's Florida Robbery Conviction

As set forth above, one of the ACCA predicate offenses in dispute is Movant's 1978 Florida robbery conviction in Dkt. No. 77001937CF. This conviction is from Palm Beach County (PSI, ¶29), which corresponds to Florida's Fourth District Court of Appeal.

In Florida, robbery is defined 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.

§ 812.13(1), Fla.Stat.[3]

In 1978, when Movant was convicted of robbery in Florida's Fifteenth Judicial Circuit, "Florida law clearly established that taking by stealth, as in pickpocketing where the victim is not aware of the theft, was merely larceny, not robbery." United

[3]§ 812.13(1) previously defined robbery as "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, by the use of force, violence, assault, or putting in fear." The latter portion of this definition was then amended and, as indicated, now provides "when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1). This amendment is not pertinent to the issues presented in Movant's case.

States v. Welch, 683 F.3d 1304, 1311 (11th Cir. 2012) (*citing* McCloud v. State, 335 So.2d 257, 258-59 (Fla. 1976)), *overruled on other grounds by* Welch v. United States, — U.S. ___, 136 S.Ct. 1257 (2016). As early as 1922, in Montsdoca v. State, 84 Fla. 82, 93 So. 157 (1922), the Florida Supreme Court stated that the distinction between robbery and larceny "was explained to be the addition to mere taking of a contemporaneous or precedent force, violence, or of an inducement of fear for one's physical safety." McCloud, 335 So. at 258. In Montsdoca, the Florida Supreme Court stated in relevant part that "[t]he degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance." 84 Fla. at 86-87

In 1976, the Florida Supreme Court again considered the issue of the requisite degree of force to convert a larceny into a robbery. In McCloud, supra, the defendant challenged the sufficiency of the evidence for his robbery conviction. 335 So.2d at 258-59. The Florida Supreme Court stated that "[a]ny degree of force suffices to convert larceny into robbery." 335 So.2d at 259.

Subsequent to McCloud, a split developed among the Florida appellate courts "on whether 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 (citations omitted). This split was resolved by the Florida Supreme Court's decision in Robinson v. State, 692 So.2d 883 (Fla. 1997).

In Robinson, the Florida Supreme Court had for review a decision from Florida's First District Court of Appeal, which certified conflicts with decisions of the Second and Third District Courts of Appeal "on the issue of whether the snatching of property by no more force than is necessary to remove the property from a person who does not resist amounts to robbery in Florida." 692 So.2d at 884. The Court held that a mere snatching could not

sustain a robbery conviction under Florida law, stating in relevant part:

> that 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. Rather, there must be resistance by the victim that is overcome by the physical force of the offender . . . The snatching or grabbing of property without such resistance by the victim amounts to theft rather than robbery.

Robinson, 692 So.2d at 886-87.

In Welch, supra, the defendant pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). 683 F.3d at 1307. Welch disputed his Armed Career Criminal designation, arguing that, at the time of his Florida robbery conviction, the degree of "force" required to violate the state statute was too slight to satisfy the federal statute. Id. at 1310. Specifically, Welch argued that Florida law at the time made mere "snatching" a robbery, and that mere snatching was not forceful enough to satisfy the federal statute under either the elements clause or the residual clause. Id.

Welch further argued that the Eleventh Circuit's decision in United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011), which had held that a 2001 Florida conviction for attempted robbery was a "crime of violence" within both the elements and residual clauses of the Guidelines, was not dispositive of whether his 1996 conviction under §812.13(1) was a violent felony, "because Lockley was convicted after Florida promulgated the 'sudden snatching' statute, so snatching from the person might [have] furnish[ed] the basis for [the 1996] robbery conviction here but not in Lockley." Welch, 683 F.3d at 1312. The Court acknowledged that, at the time of Welch's conviction, non-forceful snatching offenses were still being prosecuted as robberies under §812.13(1) in many Florida District Courts of Appeal – and importantly, in Florida's Fourth

District Court of Appeal, the jurisdiction where Welch was convicted. See Welch, 683 F.3d at 1311 and nn.28-38 (noting that, in 1996 when Welch was convicted, the state courts of appeal were divided on whether a snatching amounted to robbery, and that in Santiago v. State, 497 So.2d 975, 976 (Fla. 4th DCA 1986), Florida's Fourth District Court of Appeal had upheld a robbery conviction under § 812.13(1) for simply tearing a necklace off a victim's neck, explaining that evidence of force "be it ever so little" was sufficient).

In order to determine whether Welch was convicted of a "violent felony" within the meaning of the ACCA, the Court thus turned "to the version of state law that the defendant was actually convicted of violating." Id. at n.27 (*citing* McNeill v. United States, ––– U.S. ––––, 131 S.Ct. 2218, 2222, 180 L.Ed.2d 35 (2011). Only after Welch was convicted, the Court emphasized, was §813.131 enacted, establishing a separate crime of "robbery by sudden snatching." 683 F.3d at 1311. The Court assumed for purposes of its analysis that Welch pleaded guilty to robbery at a time when mere snatching sufficed. Id. (*citing* Silverberg, supra, for the proposition that "[a] federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise"). The Court acknowledged that Lockley was not dispositive, because it did not reach the question of whether robbery by sudden snatching qualified as a predicate "violent felony" under the ACCA. Id. at 1312. The Court further acknowledged that [a]rguably the elements clause would not apply to mere snatching, but the issue is not cut and dried." Id. at 1313. The could thus declined to decided whether snatching is sufficiently violent under the elements clause, because it concluded that it sufficed under the residual clause. Id.

Welch then filed an initial motion to vacate pursuant to § 2255 challenging, among other things, his sentence as an armed career criminal. See Welch v. United States, 0:13-cv-62770-KAM (S.D. Fla., 2013). Welch's case, of course, ultimately made it to the Supreme Court on the sole issue of whether Johnson was a substantive decision that was retroactive in cases on collateral review. Id. at 1261. The Supreme Court concluded that is was and, therefore, remanded the case for consideration of whether Welch's Florida robbery conviction qualifies as a "violent felony" under the elements clause of the ACCA. Id. at 1268. The Court noted that, on the present record in Welch's case, and in light of its holding that Johnson is retroactive in cases on collateral review, "reasonable jurists at least could find debatable whether Welch is entitled to relief." Id.

Welch remains pending before the Eleventh Circuit Court of Appeals, for resolution of whether Welch's pre-Robinson Florida Fourth DCA robbery conviction satisfies the ACCA's elements clause. See Docket in Case No. 14-15733. In addition, United States v. Seabrooks, Case No. 15-10380, which raises identical issues to those raised here and in Welch, is set for oral argument on September 15, 2016. This Court, however, cannot await final disposition of those matters. Specifically, as set forth above, it is undisputed that Movant has already served more than the 10-year statutory maximum sentence that would otherwise apply, if Movant does not still have the three requisite ACCA predicate "violent felonies."

As the Eleventh Circuit acknowledged in Welch, supra, in order to determine whether Movant was convicted of a "violent felony" within the meaning of the ACCA, the Court must turn "to the version of state law that [Movant] was actually convicted of violating." Welch 683 F.3d at 1311 (internal quotations and citations omitted). As the Eleventh Circuit further acknowledged in Welch, at the time

of Welch's robbery conviction, "the controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into robbery." Id. (*citing* McCloud).

Here, as set forth above, Movant's 1978 robbery conviction was Florida robbery conviction was from Florida's Fifteenth Judicial Circuit, which corresponds to Florida's Fourth District Court of Appeal which subsequently, in Santiago, supra, specifically cited McCloud and upheld a robbery conviction under § 812.13(1) for simply tearing a necklace off a victim's neck, explaining that evidence of force "be it ever so little" was sufficient. 497 So.2d at 976. It makes no difference that Santiago was decided after Movant was convicted. That is because McCloud had already been decided, and McCloud is the case that established that any degree of force could convert larceny into robbery. This Court, like the Eleventh Circuit in Welch, must therefore presume that Movant pleaded guilty in a Florida District where, at the time, mere snatching sufficed. See Moncrieffe, 133 S.Ct. 1684 (courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized.") (citation omitted).

Assuming that Movant thus pleaded guilty to robbery when mere snatching sufficed, the Court has little difficulty in concluding that this crime does not satisfy the ACCA's definition of a "violent felony." As set forth above, the degree of force required for a prior conviction to qualify as an ACCA predicate "violent felony" is "*violent* force--that is, force capable of causing physical pain or injury to another person." Johnson I, 130 S. Ct. at 1271. As further set forth above, the term "violent felony" has been defined as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a deadly weapon, [and] calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." Id. (internal quotations and citations omitted. Here, however, a

1978 robbery in the judicial circuit where Movant was convicted could have been accomplished by snatching; i.e., by "any degree of force," McCloud, 335 So.2d at 258-59.

The government argues that Lockley, supra, nevertheless controls Movant's 1980 robbery conviction, and that it makes no difference that in Lockley the Court addressed a 2001 Florida robbery conviction, because the text of the statute has remained unchanged. This ignores the fact that, as set forth above, at the time of Movant's conviction the "controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into robbery." Welch, 683 F.3d at 1311. Moreover, if Lockley were plainly dispositive of Welch's and Movant's identical pre-1997 Florida robbery challenge, there would have been no need for the Supreme Court to remand Welch's case to the Eleventh Circuit to resolve that issue in the first instance. Indeed, the Eleventh Circuit, in the context of granting an application to file a second or successive § 2255 motion in In re Jackson, supra, acknowledged that Lockely does not control Florida robbery convictions that could have been committed by sudden snatching. See 2016 WL 3457659 at *2.

The government also cites the Eleventh Circuit's unpublished decision in United States v. Wilson, — Fed. App'x —, 2016 WL 209901 for the proposition that "given that the robbery by snatching statute did not exist in 1997, if Mr. Wilson only committed a minimum-force "snatching" robbery (as described in the factual proffer) he could not have been convicted under Florida's general robbery statute." 20016 WL 209901 at *1. However, the Eleveth Circuit in Wilson on Florida's First District Court of Appeal's post-Robinson decision Messina v. State, 728 So.2d 818, 819 (Fla. 1st DCA 1999) (which, in turn, relied on Robinson, supra), for the proposition that "purse snatching is not a robbery if not a robbery if not force was used other than that necessary to take the

victim's purse." See Wilson, 20016 WL 209901 at *1. And that is because Mr. Wilson's robbery conviction was apparently from Florida's First DCA post-Robinson.

The government also asserts in conclusory fashion that "[a]s a judicial organ, the Florida Supreme Court had no authority to amend the Florida robbery statute, so Robinson's decision interpreting the robbery statute is properly understood to say what the law had always been, regardless of whether that decision was consistent with preexisting precedent or not." No one is suggesting that any Florida court (or any court for that matter) can "amend" a statute. What courts obviously do, rather, is interpret statutes. While the meaning of "physical force" under the ACCA is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the (statutory) elements of state crimes. Johnson I, 599 U.S. at 138. And here, as set forth above, at the time of Movant's conviction the "controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into robbery." See Welch, 683 F.3d at 1311.

Finally, the government cites United States v. Jenkins, — Fed.App'x —, 2016 WL 3101281, *6 (11th Cir., June 3, 2016)(unpublished), as authority for its position that Robinson is properly understood to say what the law had always been; i.e., that force to overcome the victim was always required.

In Jenkins, the defendant attempted to argue that is pre-October 1, 1999 Florida robbery conviction did not qualify as an ACCA predicate "violent felony" on the theory that, prior to the Florida legislature enacting § 812.131, a taking by sudden snatching was prosecuted under § 812.13(1). Id. In the course of rejecting Jenkins' claim, the Court stated that Robinson made clear that merely snatching property without using force to overcome the victim's resistance had never constituted a robbery under Florida's

ordinary robbery statute. Id. at *5-6 & n.6. After discussing Welch and Lockley, the Court then stated:

> Moreover, although Jenkins was arrested in 1995, he was not convicted until June 17, 1999, more than two years after Robinson was decided on April 24, 1997. In other words, if in fact Jenkins's 1995 conduct had been a mere snatching, by April 24, 1997, it would have been patently clear to state prosecutors in every judicial district in the state of Florida that a § 812.13(1) robbery charge based on such conduct could not be sustained. Thus, unlike the defendant in Welch, Jenkins could not have been convicted under § 812.13(1) for a taking by sudden snatching.

Id. at *6.

The Court finds Jenkins unpersuasive for several reasons. First, as set forth above, in determining whether a prior conviction qualifies as an ACCA predicate "violent felony," the Court turns "to the version of the state law that the defendant was actually convicted of violating," Welch, 683 F.3d at 1311 (internal quotations and citations omitted), and the Court is "bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements" of the crime. Johnson I, 599 U.S. at 138. Next, as also set forth above, in Welch the Eleventh Circuit expressly acknowledged that Welch was convicted "at a time when the controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into a robbery." Welch, 683 F.3d at 1131. Thus, Jenkins (an unpublished decision) appears to be in conflict with Welch (a published decision), which carefully considered what the state of Florida law was *vis-a-vis* the elements Florida robbery at the time that Welch was convicted. See Welch, 683 F.3d at 1311; see also Johnson I, 599 U.S. at 138 (federal courts are bound by state courts' interpretation of the elements of crimes). Moreover, Jenkins itself appears to be internally inconsistent, stating on the one hand that the Florida ordinary robbery statute has never included sudden snatching, and on the

other that "unlike the defendant in Welch, Jenkins could not have been convicted under § 812.13(1) for a taking by sudden snatching." 2016 WL 3101281 at *6 & n.6. And finally, the Court's statements in Jenkins regarding whether the Florida ordinary robbery statute has ever encompassed robbery by sudden snatching appear to be mere orbiter dicta. See United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) ("[D]icta is defined as those portions of an opinion that are not necessary to deciding the case then before us." The holding of a case is, conversely, "comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.") (internal quotations and citations omitted). In addition, the danger of relying on these non-precedential decisions is particularly evident here. Specifically, as set forth above, since making this statement in Jenkins, in In re Jackson, supra, the Court acknowledged that Lockely does not control Florida robbery convictions that could have been committed by sudden snatching. See 2016 WL 3457659 at *2

As the parties are aware, the Court has previously concluded that Florida robbery convictions from jurisdictions where, at the time, robbery could have been committed by "sudden snatching" do not qualify under the elements clause of the ACCA. The Court thus writes only briefly to specifically address the government's position that Robinson is properly understood to say what the law had always been; i.e., that force to overcome the victim was always required. To a certain extent, that may well be the case. It is certainly possible, particularly in light of Montsdoca, that the Florida Supreme Court never intended to allow people to be convicted of robbery based on a showing that the victim's property was taken by mere snatching, with "[a]ny degree of force." McCloud, 335 So.2d at 259. The problem is that that is what the Florida Supreme Court said in McCloud and that, as a result, people were in fact convicted in certain Florida jurisdictions for robbery

by sudden snatching for a period of time. So regardless of what the Florida Supreme Court intended when it stated in McCloud that any degree of force would suffice, the fact remains that McCloud changed the legal landscape in certain Florida jurisdictions until the Florida Supreme Court corrected it in Robinson.

The government argues that, regardless, Movant's 1978 Florida robbery conviction qualifies as an ACCA predicate offense because it was for armed robbery, as opposed to ordinary robbery. The government cites United States v. Dowd, 451 F.3d 1244 (11th Cir. 2006), United States v. Oner, 382 F. App'x 893 (11th Cir. 2010), and United States v. Johnson, 634 F. App'x 227 (11th Cir. 2015), for the proposition that Florida armed robbery is always a "violent felony" within the meaning of the ACCA's elements clause and that, therefore, nothing in Johnson, which merely invalidated the residual clause, affects the continuing viability of Florida armed robbery as an ACCA predicate offense. In support of its argument, the government appends a copy of the judgment at issue, which adjudicates Movant guilty of robbery "as charged in the information" (CIV-DE#13, Exh.7). The information, in turn, states that it is an information for "Robbery," states facts regarding how the robbery was committed, and further states that in the course of committing the robbery Movant was armed with a deadly weapon "contrary to Florida statute 812.13(2)(a)" (Id.).

The Florida robbery statute of which Movant was convicted, 812.13, provides in relevant part that:

> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony

> of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

In Dowd, supra, the Eleventh Circuit held that the defendant's 1974 Florida armed robbery conviction "undeniably is a conviction for a violent felony," and then cited without further discussion "See 18 U.S.C. § 924(e)(2)(B)(I)." 451 F.3d at 1255. In Oner, supra, the Eleventh Circuit considered the issue again, concluded that nothing in Johnson I[4] required it to revisit its holding in Dowd, and further stated that "[t]he carrying of a firearm or other deadly weapon during a robbery surely implicates violent force and of the most severe kind." 382 Fed. App'x at 896. And most recently, in Johnson, supra, the Eleventh Circuit rejected a void-for-vagueness challenge to the ACCA, citing Lockley, supra, and stating that "[e]ach of his predicates was an armed robbery, which had as an element 'the threatened use of force against the person of another.'" 634 Fed. App'x at 232.[5] The government argues Dowd is still binding precedent in the Eleventh Circuit for the proposition that even pre-Robinson Florida armed robbery convictions still qualify as ACCA violent felonies under the elements clause, as demonstrated by the fact that the Eleventh Circuit has denied applications for leave to file second or

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

[5]Although not cited by the government, the Court notes that in Yawn v. FCC Coleman-Medium Warden, 615 F. App'x 644, 645 (11th Cir. 2015), the Eleventh Circuit also stated "Yawn was convicted of armed robbery, Fla. Stat. § 812.13, which qualifies as a violent felony because it 'has as an element the use, attempted use, or threatened use of physical force against the person of another,' 18 U.S.C. § 924(e)(2)(B)(I)." 615 Fed. App'x at 645.

successive motions on this basis in In re Hires, __ F.3d __, 2016 WL 3342668 (11th Cir. June 15, 2016), In re Thomas, 823 F.3d 1345 (11th Cir. May 25, 2016), In re Robinson, 822 F.3d 1196 (11th Cir. April 19, 2016), In re Brunson, No. 16-14720-J; 16-13955-J (11th Cir. Aug. 3, 2016), and In re Smith, No. 16-14517-J (11th Cir. Aug. 1, 2016).

Movant, for his part, counters that the government has waived any argument that Movant was convicted of armed robbery and that, regardless, the government's argument that Movant was convicted of armed robbery is meritless. Movant further argues that Dowd has been abrogated by intervening Eleventh Circuit and Supreme Court precedents.

Movant first suggests that Movant was convicted of "ordinary, unarmed robbery," rather than "armed robbery," and that the PSI thus correctly listed this prior conviction as "Robbery," and not "armed robbery." This contention is without merit. Florida does not have multiple robbery statutes with different titles. Rather, as set forth above, Florida has one statute entitled "Robbery," which then classifies the offense differently for purposes of punishment, depending on whether the perpetrator was armed or not. Thus, the fact that the judgment, information and PSI simply state that Movant was charged with and convicted of "robbery" is not dispositive. What is dispositive is what subsection of the statute Movant was convicted of violating which, as set forth above, in this case was subsection (2)(a). As further set forth above, that subsection classifies a robbery in violation of subsection (1) as a first-degree felony, if in the course of the robbery the offender carried a firearm or other deadly weapon.

It is perfectly permissible for the court to look at the information to determine which subsection of the statute Movant was

convicted of violating under Taylor and its progeny.[6] What is not permitted, conversely, is for the Court to look to the information and the PSI to determine how Movant committed the robbery under 812.13(2)(a) in fact, that is by allegedly robbing the victim at gunpoint. See Descamps, 133 S. Ct. 2276, 2283-85 ("The key, we emphasized, is elements, not facts . . . The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime."); see also Mathis, 136 S. Ct. at 2247-48 (courts may not use modified categorical approach to determine how an offense was committed in fact when alternatively phrased statute lists multiple, alternative means of satisfying one (or more) of its elements).

With this said, the Court must comment briefly on its use of the modified categorical approach (i.e, looking to the information) to determine that Movant was in fact convicted of violating subsection (2)(a) of the Florida robbery (in other words, to determine that he was in fact convicted of what is commonly referred to as "armed" robbery, rather than what is commonly referred to as "ordinary" robbery). The use of the modified categorical approach is of course only authorized in order to determine what version of a divisible statute the defendant was convicted of violating, in order to then do what the categorical approach commands: to wit, look at the elements of the crime of conviction, and determine whether it qualifies as an ACCA "violent felony." See Descamps, 133 S. Ct. at 2281. Moreover, the Supreme Court in Mathis recently provided additional guidance regarding how federal courts are to make the threshold determination of whether

[6]In Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Supreme Court first set forth the above-referenced categorical and modified categorical approaches. See Descamps, 133 S.Ct. at 2283-84 (discussing Taylor). When employing the modified categorical approach, courts may look to Shepard documents, which include "the charging paper and jury instructions" used. Descamps, 133 S.Ct. at 2282–85 (discussing Taylor and Shepard).

an alternatively phrased statute sets forth alternative elements (in which case the statute would be divisible and the modified categorical approach would apply to determine which version of the statute the defendant was convicted of violating), or merely lists alternative means of satisfying one element of an indivisible statute (in which case the categorical approach would apply). 136 S.Ct at 2256-57. In so doing, the Court stated:

> . . . the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under Apprendi they must be elements . . . Conversely, if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's means of commission.

Id. at 2256 (citations omitted). As an example, the Court used a hypothetical adapted from two of its prior decisions:

> [S]uppose a statute requires use of a "deadly weapon" as an element of a crime and further provides that the use of a "knife, gun, bat, or similar weapon" would all qualify . . . Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors "conclude[d] that the defendant used a knife" while others "conclude[d] he used a gun," so long as all agreed that the defendant used a "deadly weapon."

Id. at 2249.

Here, as set forth above, the Florida robbery statute sets out the definition of robbery, and then classifies the crime based on whether a weapon was used and, in turn, what kind of weapon. At the time of Movant's conviction, the Florida standard robbery instruction advised juries that:

> The essential elements of this offense which must be proved beyond a reasonable doubt before there can be a conviction in this case are that:
>
> 1. The defendant did take from the person or immediate custody of (person alleged) the (money or property described in charge).
>
> 2. The property was taken against the will of (person alleged).
>
> 3. The taking was by means of force, violence or assault or by putting (person alleged) in fear.

Fla. Std. Instr. (Robbery. F.S. 812.13)(1978).[7] Today, those instructions go on to provide that:

> If you find the defendant guilty of the crime of robbery, you must further determine beyond a reasonable doubt if . . . the defendant carried some kind of weapon . . .
>
> If you find that the defendant carried a firearm in the course of committing the robbery, you should find [him] [her] guilty of robbery with a firearm . . .

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[7]Today, Florida's standard robbery instruction advises juries that:

> To prove the crime of Robbery, the State must prove the following four elements beyond a reasonable doubt:
>
> 1. (Defendant) took the (money or property described in charge) from the person or custody of (person alleged).
>
> 2. Force, violence, assault, or putting in fear was used in the course of the taking.
>
> 3. The property taken was of some value.
>
> 4. The taking was with the intent to permanently or temporarily [deprive (victim) of [his] [her] right to the property or any benefit from it] [[[appropriate the property of (victim) to [his] [her] own use or to the use of any person not entitled to it].

Fla. Std. Instr. (15.1 Robbery, § 812.13, Fla. Stat.)(2016). This variation makes no difference in the instant case since, as explained elsewhere in this report, the element of "force, violence, assault, or putting in fear" is overbroad because this element could be satisfied by any degree of force at the time Movant was convicted in Florida's Fourth DCA pursuant to McCloud.

> If you find that the defendant carried a (deadly weapon described in charge) in the course of committing the robbery and that the (deadly weapon described in charge) was a deadly weapon, you should find [him] [her] guilty of robbery with a deadly weapon . . .
>
> If you find that the defendant carried a weapon that was not a firearm or a deadly weapon . . . you should find [him] [[[her] guilty of robbery with a weapon . . .
> If you find that the defendant carried no firearm or weapon . . ., but did commit the robbery, you should find [him] [her] guilty only of robbery.

Fla. Std. Instr. (15.1 Robbery, § 812.13, Fla. Stat.)(2016). Thus, under Mathis, it is clear that Florida's robbery statute is divisible into 1) "armed" robbery with a firearm or deadly weapon under subsection (2)(a), 2) "armed" robbery with a weapon under subsection (2)(b), and "ordinary" robbery under subsection (2)(c). As such, it is appropriate to use the modified categorical approach to determine which version of the statute Movant was convicted of violating. See Descamps, 133 S. Ct. at 2281; Mathis, 136 S.Ct. At 2249, 2256 (citing as example a statute that requires use of a weapon as an element of the crime, and stating that if statutory alternatives carry alternative punishments they must be elements).

Movant argues that, because at the time of his conviction the Florida standard jury instructions for robbery did not submit the weapon enhancement to the jury, that Movant could not have been "convicted" of "armed" robbery. Rather, Movant argues, at that time subsection (2)(a) was not an element, it was simply a penalty enhancement provision. The Court is unpersuaded. The fact that Florida courts were not submitting the weapons enhancement to Florida juries at the time does not mean that the weapons enhancement was not an element of the crime. All it means is that this element was not being submitted to the jury in violation of

Apprendi, which is not surprising, since Apprendi had of course not been decided at the time.[8]

Movant also argues that, even if Movant could have been "convicted" of "armed" robbery, the government waived any possible argument in that regard at Movant's sentencing hearing. Specifically, Movant argues that the government referred to Movant's robbery conviction as being for "robbery" (as opposed to "armed robbery") at sentencing, and that the government stated that it had no objection to the historical accuracy of the convictions that were being used as the ACCA predicates as stated in the PSI. In support of its waiver argument, Movant relies upon the Eleventh Circuit's decisions in Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253 (11th Cir. 2013) and United States v. Canty, 570 F.3d 1251 (11th Cir. 2009) for the proposition that the government cannot rely on a different prior or on undisputed PSI facts for the first time on collateral review. The Court finds this similarly unpersuasive.

In Bryant, the Court rejected the government's suggestion that it use the defendant's prior burglary conviction to uphold an ACCA sentence that was specifically predicated upon a concealed-firearm conviction and two drug convictions listed in the indictment. 738 F.3d at 1279. The Court concluded that the concealed-firearm conviction did not qualify as an ACCA predicate, but noted that at no time during the hearing did the government object to the finding by the district court that those were the convictions that qualified the defendant for the enhancement, or suggest that the burglary conviction could also be used. Here, conversely, the government is relying on the same robbery conviction it relied upon as one of the ACCA predicate offenses at sentencing; that is, the

[8]In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the Supreme Court held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Florida robbery conviction in Dkt. #77001937CF listed in paragraphs 24 and 29 of the PSI. Movant's argument that the government is now trying to rely on a "different" conviction because it is now characterizing it as "armed" robbery as opposed to "ordinary" robbery is thus without merit.

Next, in Canty, the defendant at sentencing objected to the use of non-Shepard approved documents to make the determination of whether his various alleged ACCA predicate offenses were committed on occasions different from one another. On appeal, the government urged the Court to consider these facts in making its determination. The Court declined noting that, when the defendant objected at sentencing, the government expressly waived its reliance on the facts as set forth in the PSI, and instead submitted certified copies of various state convictions to support the ACCA enhancement. Here, however, Movant never objected to the use of any facts contained in the PSI at sentencing, and the government is not trying to rely on any such facts here.[9] Again, as stated above, here the government simply continues to rely on the same robbery conviction it relied on at sentencing, which is the one in the PSI. Indeed, as Movant himself ironically points out, the government never "objected" when the court indicated that the convictions listed in the PSI were the ones everyone agreed qualified Movant for the ACCA enhancement. Thus, even a cursory review of the circumstances of Canty reveals why it has no applicability in this case.

Movant next argues that Dowd has been abrogated by intervening Eleventh Circuit and Supreme Court precedent, and that even "armed" robbery under subsection (2)(a) is overbroad and thus does not satisfy the elements clause of the ACCA as a "violent felony." Counsel for Movant notes that the Eleventh Circuit has long

[9]Which, under the legions of caselaw regarding the categorical and modified categorical approaches, would of course be improper.

recognized that its "first duty" is always "to follow the dictates of the United States Supreme Court," and that it "must consider" whether intervening Supreme Court decisions have "effectively overruled" a prior precedent. United States v. Contreras, 667 F.2d 976, 979 (11th Cir. 1982). Counsel further asserts that, in similar circumstances, the Eleventh Circuit has easily declared prior precedents "effectively overruled," in reliance on Dawson v. Scott, 50 F.3d 884, 892 n. 20 (11th Cir. 1995), United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008), United States v. Howard, 742 F.3d 1334, 1337, 1343-1345 (11th Cir. 2014), and Scalia, Antonin, J., The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1177 (1989) (lower courts are not only bound by the narrow "holdings" of higher court decisions, but also by their "mode of analysis"). According to Movant, the Court in Dowd did not conduct the rigorous "mode of analysis" mandated by subsequent Supreme Court and Eleventh Circuit precedents in determining whether a particular offense qualifies as an ACCA predicate,[10] and that those cases make undeniably clear that proper application of the categorical approach requires federal court to consider a State's authoritative interpretation of the elements of its own statutes, something the Court in Dowd did not do. Specifically, Movant notes that the Dowd court failed to consider the Supreme Court of Florida's decision in State v. Baker, 452 So.2d 927, 929 (Fla. 1982), wherein the Court construed § 812.13(2)'s "carrying a weapon" requirement to simply require that the offender "possess" it. Movant further cites the Eleventh Circuit's post-Dowd decisions in United States v. Archer, 531 F.3d 1347, 1349 (11th Cir. 2008) and United States v. McGill, 618 F.3d 1273, 1279 (11th Cir. 2010), holding that merely carrying or possessing a firearm is

[10]Namely Moncrieffe, Descamps, Estrella, Howard, Lockett, and Mathis.

not an offense that "has as an element the use, attempted use, or threatened use" of violent force.

Despite its tempting appeal, there are numerous problems with Movant's suggestion that this Court need not follow Dowd. First, while it is true that Eleventh Circuit precedent can be effectively abrogated or overruled in certain circumstances, a prior panel's holding is binding "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or [the Eleventh Circuit] sitting *en banc.*" Archer, 531 F.3d at 1352. However, there is no authority for the proposition that, as Movant suggests, a prior decision of the Eleventh Circuit could be effectively abrogated or overruled by subsequent Eleventh Circuit decisions. Indeed, under the prior-panel-precedent rule dictates just the opposite. Id.

Next, while it may be true that Johnson I, Descamps and Mathis expanded upon or clarified how federal courts are to determine whether a prior conviction qualifies as an ACCA predicate, the categorical and modified categorical approaches existed long before Dowd was decided, see Taylor, supra, as did the rule that federal courts are bound to follow a State's authoritative interpretation of the elements of its own crimes. See Johnson I, 559 U.S. at 138, *citing* Johnson v. Fankell, 520 U.S. 911, 916, 117 S.Ct. 1880, 138 L.Ed.2d 108 (1997). The fact the the Dowd Court failed to conduct the analysis in accordance with the dictates of the law at the time does not mean that it has been abrogated or effectively overruled by Supreme Court precedents reiterating and clarifying the applicable standard. It just means that Dowd was wrongly decided. See Baker, 452 So.2d 927, 929 ("carrying a weapon" under § 812.13(2) simply requires that the offender "possess" the weapon); Archer, 531 F.3d at 1349 (carrying a concealed weapon); McGill, 618 F.3d at 1279 (possession of short-barreled shotgun); see also United States v. Parnell, 818 F.3d 974, 979-981 (9th Cir. 2016)

(holding that a conviction under the Massachuetts armed robbery statute was not a violent felony because it allowed for armed robberies by sudden snatching, and all that was required by Massachusetts law for an "armed robbery" conviction was the mere possession of a weapon, without using or even displaying it); United States v. Jones, ___ F.3d ___, 2016 WL 3923838 at **5-7 (2nd Cir. July 21, 2016)("forcible stealing" required under New York robbery statute did"not always involve 'force capable of causing physical pain or injury to another," and a robber's "use of less-than-violent force while carrying on his person but not using or threatening to use a deadly weapon his person but not using or threatening to use a deadly weapon," "cannot turn what is otherwise less than violent force into violent force"). But that of course does not give this Court the authority to disregard it.

Finally, while as previously indicated it is true that Eleventh Circuit precedent can be effectively abrogated or effectively overruled by the Supreme Court in certain circumstances, see Archer, 531 F.3d at 1352, Conteras, 667 F.2d at 979, that only means that the Eleventh Circuit may decline to follow the holding of a prior panel on that basis, which would ordinarily be required by the prior-panel-precedent rule. See Id. However, Movant does not cite any authority for the proposition that a district court can decline to follow binding Circuit precedent on this basis. Stated another way, it is for the Eleventh Circuit, not this Court, to decide whether its decision is Dowd has been effectively abrogated or overruled by intervening Supreme Court precedent, or to overrule Dowd by sitting *en banc*, in the event that it concludes that Dowd was wrongly decided.

The Court is cognizant that the Eleventh Circuit's continued reliance on Dowd to deny applications for leave to file second or

successive motions under § 2255[11] is particularly troublesome in light of the scope that such review is supposed to be limited to, as explained supra. The Court thus specifically does not find those decisions at all persuasive, particularly since they similarly fail to conduct the rigorous analysis required to determine whether an ACCA predicate qualifies[12] and, instead, merely summarily cite to Dowd. But that of course does not change the fact that Dowd is still binding, and that this Court is thus still bound to follow it.

It is important to note, however, that the Court's conclusion that Dowd is binding upon it only affects a limited class of defendants subjected to enhanced ACCA sentences based on prior Florida "armed" robbery convictions: to wit, those who were convicted in jurisdictions where, at the time, McCloud permitted that robberies by "sudden snatching" to be prosecuted under Florida's ordinary robbery statute, § 812.13. That is because, by its definitional terms, an "armed" robbery under Florida law necessarily includes a robbery which, in most cases, will qualify as an ACCA predicate pursuant to Lockley. See Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-38 & n.6 (11th Cir. 2013), *abrogated on other grounds by* Johnson, 576 U.S. — , 135 S.Ct. 2551, 192 L.Ed.2d 569 (because aggravated assault under Florida law by its definitional terms necessarily includes an assault, which is "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so" . . . [it] will always include "as an element the

[11]Specifically, in In re Hires, __ F.3d __, 2016 WL 3342668 (11th Cir. June 15, 2016), In re Thomas, 823 F.3d 1345 (11th Cir. May 25, 2016), In re Robinson, 822 F.3d 1196 (11th Cir. April 19, 2016), In re Brunson, No. 16-14720-J; 16-13955-J (11th Cir. Aug. 3, 2016), and In re Smith.

[12]Which, as set forth above, is arguably not even within the scope of its review in the context of an application for leave to file a second or successive motion under § 2255.

... threatened use of physical force against the person of another"). Thus, if the defendant was convicted of "armed" robbery at a time or in a jurisdiction where a robbery by sudden snatching would not have been sufficient to sustain a conviction under Florida's ordinary robbery statute, § 812.13, the conviction would still qualify as an ACCA predicate, regardless of Dowd. Stated another way, the conviction in such circumstances would qualify as an ACCA predicate violent felony because it was a Florida robbery, regardless of whether it was "armed" or not.

Movant's Conviction for Possession of Heroine with Intent to Sell

The second of the ACCA predicate offense in dispute is Movant's 1997 Florida conviction for possession of heroin with intent to sell (Dkt. No. 97005898CF). Specifically, Movant argues that the Supreme Court's decision in Carachuri-Rosendo v. Holder, 560 U.S. 563, 567, 130 S. Ct. 2577, 2581, 177 L. Ed. 2d 68 (2010) requires that the defendant must have actually faced a sentence of ten years or more for the drug offense at issue, that other circuits have applied this rule to convictions under structured sentencing schemes from North Carolina, Kansas, Oregon and New Mexico, and that the Fourth District in United States v. Newbold, 791 F.3d 455 (4th Cir. 2015) applied the reasoning in Carachuri-Rosendo and its own prior decision in Simmons v. United States, 649 F.3d 237 (4th Cir. 2011)(*en banc*) in the ACCA context, holding that the controlling inquiry under §924(e)(2)(A)(ii) after Carachuri-Rosendo is "the maximum penalty [the defendant] potentially faced." Finally, Movant notes that the Tenth Circuit has now ruled similarly in United States v. Romero-Leon, 622 Fed. Appx. 712 (10th Cir. 2015).

As set forth above, the ACCA provides for enhanced penalties if the offender has three or more prior convictions for a "serious

drug offense" or a "violent felony." A "serious drug offense" is defined in the ACCA as:

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. § 924(e)(2)(A). Nothing in Johnson calls into question predicating an ACCA enhancement upon a prior conviction for a "serious drug offense." United States v. Darling, 619 F. App'x 877, 880 (11th Cir. 2015) ("The Supreme Court's recent decision in Johnson . . . has no bearing on Darling's sentence because he had more than three predicate convictions for "serious drug offenses" as defined in 18 U.S.C. § 924(e)(2)(A)(ii)"); see also In re Rogers, No. 16-12626-J, 2016 WL 3362057, at *3 (11th Cir. June 17, 2016)(When . . . it is clear . . . that each predicate conviction qualified under the ACCA's elements or enumerated crimes clause, or as a serious drug offense . . . then [an application for authorization to file a second or successive § 2255 motion] does not 'contain' a Johnson claim."); In re Robinson, No. 16-11304-D, 2016 WL 1583616, at *1 (11th Cir. Apr. 19, 2016)("[T]he rule announced in Johnson does not benefit Robinson. Robinson's ACCA sentence was based on convictions for two serious drug offenses, as well as convictions for armed robbery and for aggravated battery with a firearm."). As stated above, however, Movant contends that it is Carachuri-Rosendo that controls disposition of this claim, not Johnson.

Movant's reliance on Carachuri-Rosendo for the proposition that his prior heroine conviction does not qualify as a "serious drug offense" because he was not "actually" exposed to maximum term of imprisonment of ten years or more is misplaced. While the Court agrees that Carachuri-Rosendo is generally applicable and persuasive outside of the immigration context for purposes of establishing whether a prior conviction qualifies as a "serious drug offense," Carachuri-Rosendo involved significantly different facts.

In 2004, Carachuri had received a 20–day sentence for possessing less than two ounces of marijuana in violation of Texas law. See Carachuri-Rosendo, 130 S. Ct. at 2583. In 2005, he received a 10–day sentence for possessing a Xanax tablet without a prescription, also in violation of Texas law. Id. at 2583. Although Texas law permitted an enhanced sentence for recidivist possession, Texas did not seek to use the 2004 conviction to enhance Carachuri's sentence for his 2005 conviction. Id. at 2583.

In contending that the 2005 Texas conviction nevertheless constituted a predicate "aggravated felony" conviction under the INA, the Government argued that if Carachuri had faced federal prosecution for the 2005 offense, he could have "received a 2–year sentence." Id. at 2582. This was so because federal law provides for a sentence of up to two years for drug possession, as long as the offender has a "prior conviction for any drug ... offense chargeable under the law of any State." 21 U.S.C. § 844(a). Given Carachuri's prior 2004 conviction, he hypothetically could have received a two-year federal sentence for his 2005 Xanax offense. In view of this hypothetical, the Government argued that Carachuri's 2005 conviction was for an aggravated felony that was "punishable" by imprisonment for more than one year, even though he actually received a sentence of only ten days' imprisonment. Id. at 2587. The Supreme Court rejected the government's suggestion that

Charchuri's prior conviction could be deemed a "serious drug offense" based on this hypothetical federal prosecution, as well as the government's contention that Carachuri could have theoretically been subjected to an enhanced sentence under the Texas recidivist statute.

Here, Movant contends that his presumptive guideline sentencing range under Florida law was not for a term of imprisonment exceeding ten years or more. However, it is undisputed that the felony drug offense of which Movant was convicted actually carried a maximum term of imprisonment of ten years or more. Thus, the maximum sentence for Movant's conviction for heroine with intent to sell what not hypothetical, as it was in Carachuri-Rosendo.

Movant argues that this Court should extend the reasoning of Carachuri-Rosendo to Movant's conviction in this case, as other Circuits have done, because Movant's presumptive guideline sentencing range for this conviction was not actually for a term of imprisonment of ten years or more. The problem with this, however, is that those decisions, for better or worse, were construing sentencing schemes from other States, not Florida. For example, in Simmons, supra, one of the cases upon which relies heavily, the Court explained that its conclusion there was based on the fact that the state sentencing scheme at issue in that case mandated specific sentences, "unlike the sort of 'guidelines systems' . . . in which a . . . judge may 'impose a sentence that exceeds the top' of the 'range' set forth in the [a]ct." Simmons, 649 F.3d at 244. In Florida, by contrast, departures from the guidelines have always been permitted. See McCarthy v. United States, 135 F.3d 754, at 756 (11th Cir. 1998)("McCarthy's argument that the quoted language refers to the high end of the Florida sentencing guidelines' presumptive range is flawed because the high end of the presumptive range is simply not the 'maximum.' The Florida sentencing

guidelines provide for upward departures above the presumptive sentence range," *citing* Miller v. Florida, 482 U.S. 423, 425-26, 107 S.Ct. 2446, 2449, 96 L.Ed.2d 351 (1987) (describing this aspect of the Florida sentencing guidelines)).

But even accepting as true Movant's allegation that the maximum sentence that the judge could have imposed for Movant's heroine conviction without complying with Florida's legal requirements for a departure was a maximum of 80.75 months, and further accepting that none of the necessary findings that would support a departure were made, that does not entitle to attack his felony conviction for possession of heroine with intent to sell in as an ACCA predicate in this proceeding. Indeed, the Fourth Circuit, upon which Movant so heavily relies, has properly acknowledged that Carachuri-Rosendo did not announce a new substantive rule of constitutional law retroactive on collateral review. See Simmons, 735 F.3d at 144 (citation omitted). As such, Movant cannot rely on it to challenge his 1997 heroine conviction in this proceeding.

That the rule of Carachuri-Rosendo is inapplicable on collateral review is evident from Movant's own cases. For example, Romero-Leon, supra, which held that a prior New Mexico conviction did not qualify as an ACCA "serious drug offense" where neither the government nor the judge considered an upward departure to the aggravated range and no upward departure was imposed, arose in the context of the defendant's appeal on direct review, as did all of the other cases Movant cites, with the notable exception of Newbold, supra. Newbold, in turn, considered the defendant's challenge to his a prior conviction as an ACCA predicate "serious drug offense" in the context of a § 2255 motion, apparently because the Fourth Circuit, although acknowledging that Carachuri-Rosendo did not establish a retroactively applicable new rule of constitutional law, concluded that its own decision in Simmons,

supra, construing a North Carolina statute with a mandatory sentencing scheme, did. Indeed, the Fourth Circuit itself has further acknowledged that the fact that it relied on Carachuri-Rosendo in reaching its decision in Simmons "does not mean that Carachuri itself announced a new rule of substantive criminal law, only that this Court applied Carachuri in such a way as to announce a new rule." Miller v. United States, 735 F.3d 141, 146 (4th Cir. 2013). Neither Movant nor the Fourth Circuit cite any authority for the proposition that a Circuit Court can establish a new substantive rule of criminal law retroactively applicable on collateral review, and the Court is aware of none. However, the Court need not reach this issue. That is because, even assuming that the Fourth Circuit's decision is proper in this regard, as set forth above, that decision is predicated upon the Fourth Circuit's conclusions regarding a North Carolina statute. It is thus limited as such, even in the Fourth Circuit.

Moreover, even assuming that Carachuri-Rosendo did announce a new rule retroactively applicable on collateral review (which for the reasons set forth above it does not), and even if the Fourth Circuit's decision in Simmons and Newbold were somehow applicable to the instant case (which for the reasons set forth above they are not), and such challenge to Movant's 1997 heroine conviction would be time-barred. Specifically, as set forth above, the period of limitation under § 2255(f) applies on a claim-by-claim basis. See Capozzi, 768 F.3d at 33. As further set forth above, in cases where the constitutional right asserted is a newly recognized right made retroactively applicable to cases on collateral review, the AEDPA's one-year limitations period runs from the date of that decision. See Dodd, supra. Carachuri-Rosendo was decided on June 14, 2010. Here, however, Movant's motion was not filed until On September 25, 2015, more than five years after Carachuri-Rosendo was decided. Moreover, § 2255(f)(3)'s limitations period can only

be triggered by decisions of the Supreme Court recognizing new rights made retroactively applicable to cases on collateral review by the Supreme Court, not by decisions of federal courts of appeal purportedly establishing new rights. And even if it was, the Fourth Circuit's decision in Simmons, supra, which is the one that established the purported new right that is inapplicable to this case for the reasons previously stated, was issued on August 17, 2011, more than four years before Movant filed the instant § 2255 motion. See Dodd, supra (one-year limitations period runs from date of decision, not from date made retroactively applicable on collateral review).

Finally, Movant argues that he is not raising a "stand-alone" claim under Carchuri-Rosendo, but that he raises this issue simply to demonstrate that the Johnson error that occurred by predicating Movant's ACCA enhancement on his Florida convictions for burglary, manslaughter and robbery was not harmless. The circular reasoning of this vague and conclusory assertion seems obvious. Movant presumably means that the Johnson error was not harmless because, according to Movant, his heroine conviction also no longer qualifies. This is nothing more than an attack on Movant's heroine conviction. Movant attempts to use the portal opened by Johnson, that permits collateral review of convictions that may no longer qualify as ACCA predicate "violent felonies," to obtain review of his unreviewable ACCA predicate "serious drug offense." Simply stated, Movant seeks to bootstrap another claim to his Johnson claim. Indeed, Movant himself asserts that it is under current law (i.e., not the law at the time of his sentencing) that his prior drug conviction allegedly does not quality. The Court cannot put the cart before the horse and conclude that, if Movant were sentenced today, his conviction 1997 heroine conviction would not qualify as a "serious drug offense," and then grant him habeas relief on that basis.

Certificate of Appealability

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

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

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

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

Conclusion

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

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

SIGNED this 26th day of August, 2016.

UNITED STATES MAGISTRATE JUDGE

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