APPENDIX

APPENDIX

A-1

CORRECTED

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14495-H

JIMMY LEE FRANKLIN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Appellant's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-20709-CR-ALTONAGA/TURNOFF

18 U.S.C. § 922(g)(1)
18 U.S.C. § 931
18 U.S.C. § 924(d)(1)
21 U.S.C. § 853

UNITED STATES OF AMERICA

vs.

JIMMY LEE FRANKLIN,

Defendant.
_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

On or about May 16, 2006, in Miami-Dade County, in the Southern District of Florida, the defendant,

JIMMY LEE FRANKLIN,

having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

It is further alleged that said firearm and ammunition is:

(a) One (1) Romarm 7.62 mm. semi-automatic rifle;

(b) Fourteen (14) rounds of 7.62 mm. ammunition;

(c) One (1) Smith & Wesson .38 caliber revolver; and

(d) Six (6) rounds of .38 caliber ammunition.

COUNT 2

On or about May 16, 2006, in Miami-Dade County, in the Southern District of Florida, the defendant,

JIMMY LEE FRANKLIN,

having been previously convicted of a felony that is a crime of violence, did knowingly possess body armor, sold and offered for sale in interstate and foreign commerce, in violation of Title 18, United States Code, Section 931.

FORFEITURE

The allegations in Count 1 of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeitures to the United States of America of property in which the defendant, **JIMMY LEE FRANKLIN,** has an interest pursuant to the provisions of Title 18, United States Code, Section 924(d)(1), and Title 28, United States Code, Section 2461(c).

1. Upon conviction of the violation alleged in Count 1 of this Indictment, the defendant, **JIMMY LEE FRANKLIN**, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d)(1), as made applicable hereto by Title 28, United States Code, Section 2461(c), any firearm and ammunition involved in or used in the commission of such violation.

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

(a) One (1) Romarm 7.62 mm. semi-automatic rifle;

(b) Fourteen (14) rounds of 7.62 mm. ammunition;

(c) One (1) Smith & Wesson .38 caliber revolver; and

(d) Six (6) rounds of .38 caliber ammunition.

All pursuant to Title 18, United States Code, Section 924(d)(1), as incorporated by Title 28, United States Code, Section 2461(c) and the procedures outlined in Title 21, United States Code, Section 853.

A TRUE BILL

FOREPERSON

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

GEORGE M. KARAVETSOS
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

JIMMY LEE FRANKLIN,

Defendant. /

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Indictment:

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

Court Division: (Select One)

X Miami ___ Key West
___ FTL ___ WPB ___ FTP

I do hereby certify that:

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

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

3. Interpreter: (Yes or No) No

   List language and/or dialect _____

4. This case will take 1 days for the parties to try.

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

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

6. Has this case been previously filed in this District Court? (Yes or No) No
   If yes:
   Judge: _____ Case No. _____
   (Attach copy of dispositive order)
   Has a complaint been filed in this matter? (Yes or No) No
   If yes:
   Magistrate Case No. _____
   Related Miscellaneous numbers: _____
   Defendant(s) in federal custody as of _____
   Defendant(s) in state custody as of _____
   Rule 20 from the _____ District of _____

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

7. Does this case originate from a matter pending in the U.S. Attorney's Office prior to April 1, 2003? ___ Yes X No

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

9. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ___ Yes X No

10. Does this case originate from a matter pending in the Narcotics Section (Miami) prior to May 18, 2003 ? X Yes ___ No

GEORGE M. KARAVETSOS
ASSISTANT UNITED STATES ATTORNEY
COURT NO. A5500533

REV.1/14/04

Penalty Sheet(s) attached

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PENALTY SHEET

Defendant's Name: JIMMY LEE FRANKLIN

Case No:

Count #: 1

Possession of a firearm and ammunition by a convicted felon.

Title 18, United States Code, Section 922(g)(1)

*** Max. Penalty:** Life imprisonment

Count #: 2

Possession of body armor by a convicted felon.

Title 18, United States Code, Section 931

***Max. Penalty:** Five years' imprisonment

Count #:

*** Max. Penalty:**

Count #:

***Max. Penalty:**

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

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United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

JIMMY LEE FRANKLIN

JUDGMENT IN A CRIMINAL CASE

Case Number: 06-20709-CR-ALTONAGA

USM Number: 78370-004

Counsel For Defendant: Michael D. Spivack, Esq.
and Anne M. Lyons, Esq.
Counsel For The United States: Sean P. Cronin, Esq.
Court Reporter: Barbara Medina

The defendant pled guilty to Count 1 of the Indictment.
The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)(1)	Possession of a Firearm and Ammunition by a Convicted Felon	May 16, 2006	1

The defendant is sentenced as provided in the following pages of this judgment.

Count 2 is dismissed on the motion of the United States.

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

Date of Imposition of Sentence:
October 16, 2007

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

October 16, 2007

DEFENDANT: JIMMY LEE FRANKLIN
CASE NUMBER: 06-20709-CR-ALTONAGA

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **180 months.**

The Court makes the following recommendations to the Bureau of Prisons:

The defendant be designated to a facility located in or near South Florida, and that he receive treatment for substance abuse.

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: JIMMY LEE FRANKLIN
CASE NUMBER: 06-20709-CR-ALTONAGA

SUPERVISED RELEASE

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: JIMMY LEE FRANKLIN
CASE NUMBER: 06-20709-CR-ALTONAGA

SPECIAL CONDITIONS OF SUPERVISION

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

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

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

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

DEFENDANT: JIMMY LEE FRANKLIN
CASE NUMBER: 06-20709-CR-ALTONAGA

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.00	**0**	**0**

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

DEFENDANT: JIMMY LEE FRANKLIN
CASE NUMBER: 06-20709-CR-ALTONAGA

SCHEDULE OF PAYMENTS

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

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

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

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

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

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

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

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

Forfeiture of the defendant's right, title, and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed order of forfeiture within three days of this proceeding.

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22192-CV-ALTONAGA
(06-20709-CR-ALTONAGA)

JIMMY LEE FRANKLIN
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

MOTION TO CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND MEMORANDUM OF LAW IN SUPPORT

Mr. Jimmy Lee Franklin, through undersigned counsel, respectfully moves this Court to correct his sentence, pursuant to 28 U.S.C. § 2255, and states:

1. On October 16th, 2007, Mr. Franklin was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1).
2. At sentencing, Mr. Franklin was subject to the Armed Career Criminal Act's ("ACCA") 15-year mandatory minimum sentence. 18 U.S.C. § 924(e).
3. Mr. Franklin now requests relief in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (June 26, 2015), which held that the ACCA's "residual clause" in § 924(e)(2)(B)(ii) is unconstitutionally vague.

4. Application of *Johnson* to this case shows that Mr. Franklin's sentence was imposed in excess of the statutory maximum.
5. Accordingly, Mr. Franklin is entitled to relief under § 2255.

PROCEDURAL HISTORY

On November 16th, 2006, the grand jury returned an indictment charging Mr. Franklin with Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. §§922(g)(1) and 924(e) (Count One); Possession of Body Armor by a Convicted Felon, in violation of 18 U.S.C. §931 (Count Two). (Cr-DE#1).

On August 1, 2007, pursuant to a negotiated plea agreement with the government, Mr. Franklin pleaded guilty to Count One of the indictment. (Cr-DE#45).

A Presentence Investigation Report ("PSI") was prepared in anticipation of sentencing, wherein the probation officer determined that an offense involving possession of a firearm and ammunition by a convicted felon, who committed the offense subsequent to sustaining at least one felony conviction of either a crime of violence or a controlled substance offense, had a base offense level of 20. (PSI¶19). Moreover, because one of the firearms was stolen, the offense level was increased by two levels. (PSI¶20). The adjusted offense level was set at 22. (PSI¶24). However, because the probation officer determined that Mr. Franklin qualified as an Armed Career Criminal, his offense level increased to a level 33. (PSI¶25).

The probation officer further determined Mr. Franklin had a subtotal of seven criminal history points. (PSI¶40). However, because Mr. Franklin committed the offense while serving a term of 12 months probation, 2 further criminal history points were added. (PSI¶41). This placed Mr. Franklin in a Criminal History Category of IV. Moreover, because the probation officer determined that Mr. Franklin was an Armed Career Criminal, his Criminal History Category was again calculated to be a category IV. (PSI¶42). Based on a Total Offense Level of 33 and a Criminal History Category of IV, the guideline imprisonment range was set between 188 to 235 months. (PSI¶88).

On October 16th, 2007, Mr. Franklin appeared for sentencing wherein he received a sentence of 180 months imprisonment as to Count One, to be followed by 5 years of supervised release and a special assessment of $100. (Cr-DE#54). The Clerk entered judgment on October 16th, 2007. (Cr-DE#55). Mr. Franklin filed a timely notice of appeal. (Cr-DE#56). On July 1st, 2008, the Eleventh Circuit, per curiam, affirmed Mr. Franklin's conviction. (Cr-DE#78). No petition for writ of certiorari was filed.

For purposes of the federal one-year limitations period, the judgment of conviction in the underlying criminal case became final on October 1, 2008, when time expired for filing a petition for writ of certiorari, ninety days following affirmance of Mr. Franklin's conviction on direct appeal.

Mr. Franklin filed his first motion to vacate within one year from the time the judgment became final. Mr. Franklin filed his first §2255 motion timely. (Cr-DE#79) (Cv-DE#1). The first motion to vacate was denied on June 11th, 2009. (Cv-DE#11). On May 17th, 2016, a petition was filed with the Eleventh Circuit Court of Appeals to allow the filing of a successive motion to vacate, set aside, or correct sentence. (Cr-DE#85). The petition was granted on June 15th, 2016. (Cr-DE#85).

GROUNDS FOR RELIEF

Mr. Franklin is no longer an armed career criminal. As an initial matter: Mr. Franklin s claim is cognizable on collateral review; *Johnson* applies retroactively to this case; and Mr. Franklin's claim is timely.

I. Mr. Franklin's Claim is Cognizable Under § 2255

Section 2255(a) authorizes a federal prisoner claiming "that [his] sentence was imposed in violation of the Constitution . . . or that the sentence was in excess of the maximum authorized by law . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). The statutory maximum sentence for being a felon in possession of a firearm, in violation of § 922(g)(1), is ordinarily ten years' imprisonment. 18 U.S.C. § 924(a)(2). However, under the ACCA, where the defendant "has three previous convictions . . . for a violent felony[1] or a serious drug offense, or both, committed on occasions different from

[1] As relevant here, the term "violent felony" includes certain crimes that "(i) ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another ["elements clause"]; or (ii) is burglary, arson, or extortion, involves use of explosives ["enumerated offenses"], or otherwise involves conduct that

one another, such person shall be fined under this title and imprisoned not less than fifteen years." *Id.* § 924(e)(1). Thus, this Court "can collaterally review a misapplication of the Armed Career Criminal Act because . . . that misapplication results in a sentence that exceeds the statutory maximum." *Spencer v. United States*, 773 F.3d 1132, 1143 (11th Cir. 2014) (en banc).

II. Mr. Franklin's Motion is Timely

As relevant here, § 2255 imposes a one-year statute of limitations that runs from "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." 28 U.S.C. § 2255(f)(3). That date runs from the date the Supreme Court recognizes the new right. *Dodd v. United States*, 545 U.S. 343, 360 (2005).

Mr. Franklin's motion is timely under § 2255(f)(3). In declaring the ACCA's residual clause unconstitutionally vague, *Johnson* recognized a new right because that result was not "dictated by precedent" at the time Jimmy Lee Franklin's conviction became final. *See Howard v. United States*, 374 F.3d 1068, 1073–74 (11th Cir. 2004). To the contrary, the Supreme Court itself, as well as the Eleventh Circuit, had repeatedly rejected vagueness challenges to the residual clause. *Sykes v. United States*, 564 U.S. 1 (2011); *James v. United States*, 550 U.S. 192, 210 n. 6 (2007); *United States v. Gandy*, 710 F.3d 1234, 1239 (11th Cir. 2013). And, as explained above, *Johnson* applies retroactively because it is a substantive rule.

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presents a serious potential risk of physical injury to another ["residual clause"]." 18 U.S.C. § 924(e)(2)(B).

Therefore, Mr. Franklin has one year from the date *Johnson* was decided—June 26, 2016—to seek relief. *See Dodd v. United States*, 545 U.S. 343, 360 (2005). Thus, this motion is timely under § 2255(f)(3).

III. *Johnson* Applies Retroactively to this Case

In *Welch v. United States*, the Supreme Court squarely held that "*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." 578 U.S. at __, 136 S. Ct. 1257, 1268 (2016); *see id.* at 1265 ("the rule announced in *Johnson* is substantive"); *Mays v. United States*, 817 F.3d 728, 736 (11th Cir. 2016) (concluding even before *Welch* that "*Johnson* is retroactive because it qualifies as a substantive rule . . . since it narrows the class of people that may be eligible for a heightened sentence under the ACCA."). Thus, there can be no dispute that *Johnson* applies retroactively to this case.

IV. The categorical and modified categorical approach

Before explaining why Mr. Franklin is no longer an armed career criminal, it is necessary to briefly set out the governing analytical framework. That framework, summarized below, was refined most recently in *Descamps v. United States*, 133 S. Ct. 2275 (2013), which is "the law of the land" and "must be . . . followed." *United States v. Howard*, 73 F.3d 1334, 1344 n.2 (11th Cir. 2014).

In determining whether a prior conviction qualifies as a "violent felony," sentencing courts must apply the "categorical approach." Under that approach, "courts may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Descamps*,

133 S. Ct. at 2283 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). In adopting this approach, the Court emphasized both Sixth Amendment concerns (explained below) and the need to avert "'the practical difficulties and potential unfairness of a [daunting] factual approach.'" *Id.* at 2287 (quoting *Taylor*, 495 U.S. at 601). As a result, courts "look no further than the statute and judgment of conviction." *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014) (citation omitted). And, in doing so, they "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2011) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

After *Johnson*, a conviction may qualify as a "violent felony" if it is one of the ACCA's enumerated offenses. In determining whether a prior conviction so qualifies, the court must ask whether "the relevant statute has the same elements as the 'generic' ACCA crime." *Descamps*, 133 S. Ct. at 2283. If so, "then the prior conviction can serve as an ACCA predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is necessarily guilty of all the generic crime's elements." *Id.* (citation and ellipses omitted). However, "if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Id.* "The key . . . is elements, not facts." *Id.*

A prior conviction may also qualify as a "violent felony" if it satisfies the ACCA's elements/force clause. The categorical approach applies equally in that context. Again looking no further than the statute and judgment of conviction, a conviction

will qualify as an ACCA predicate "only if the statute on its face requires the government to establish, beyond a reasonable doubt and without exception, an element involving the use, attempted use, or threatened use of physical force against a person for every charge brought under the statute." *Estrella*, 758 F.3d at 1244 (citation omitted). "Whether, in fact, the person suffering under this particular conviction actually used, attempted to use, or threatened to use physical force against a person is quite irrelevant. Instead, the categorical approach focuses on whether in every case a conviction under the statute *necessarily* involves proof of the element." *Id.* (citations omitted).

To implement the categorical approach, the Supreme Court has "recognized a narrow range of cases in which sentencing courts" may look beyond the statute and judgment of conviction and employ what it is referred to as the "modified categorical approach." *Descamps*, 133 S. Ct. at 2283–84. Those cases arise where the statute of conviction contains alternative elements, some constituting a violent felony and some not. In that scenario, "the statute is 'divisible,'" in that it "comprises multiple, alternative versions of the crime." *Id.* at 2284. As a result, "a later sentencing court cannot tell, without reviewing something more [than the statute and judgment of conviction], if the defendant's conviction" qualifies as violent felony. *Id.*

Two key points must be made about the modified categorical approach. First, *Descamps* made clear that "the modified categorical approach can be applied only when dealing with a divisible statute." *Howard*, 742 F.3d at 1344. Thus, where the statute of conviction "does not concern any list of alternative elements" that must be

found by a jury, there is no ambiguity requiring clarification, and therefore the "modified approach . . . has no role to play." *Descamps*, 133 S. Ct. at 2285–86; *see Estrella*, 758 F.3d at 1245–46; *Howard*, 742 F.3d at 1345–46. "[I]f the modified categorical approach is inapplicable," then the court must limit its review to the statute and judgment of conviction. *Howard*, 742 F.3d at 1345. And, even if a statute is divisible, the court need not employ the modified categorical approach if none of the alternatives would qualify. *Id.* at 1346–47.

Second, even where the modified categorical approach does apply, it does not permit courts to consider the defendant's underlying conduct. Rather, "the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. 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." *Descamps*, 133 S. Ct. at 2285. And, in order to ensure that the focus remains on the statutory elements rather than the defendant's underlying conduct, the court is restricted in what documents it may consider.

In *Shepard v. United States*, 544 U.S. 13, 15 (2005), the Supreme Court held that courts are "limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." What these *Shepard* documents have in common is that they are "conclusive records made or used in adjudicating guilt." *Id.* at 21; *see id.* at 23 ("confin[ing]" the class of permissible documents "to

records of the convicting court approaching the certainty of the record of conviction"). That accords with their function in the modified categorical approach—namely, to permit the court to identify the elements for which the defendant was convicted. *Descamps*, 133 S. Ct. at 2284.

Importantly, and as the Supreme Court explained in *Descamps*, that inexorable focus on the elements derives in large part from "the categorical approach's Sixth Amendment underpinnings." *Id.* at 2287–88. Other than the fact of a prior conviction, a jury must find beyond a reasonable doubt any fact that increases a defendant's sentence beyond the prescribed statutory maximum. *Id.* at 2288 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). The reason for the "prior conviction" exception is that, during the earlier criminal proceeding, the defendant either had a jury or waived his constitutional right to one. *See Apprendi*, 530 U.S. at 488.

As the Supreme Court made clear in *Descamps*, the use of *Shepard* documents "merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits." 133 S. Ct. at 2288. This is so because "the only facts the court can be sure the jury . . . found [beyond a reasonable doubt] are those constituting elements of the offense;" and, similarly, "when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements." *Id.* But where a court relies on non-*Shepard* documents to increase a defendant's sentence, it "extend[s] judicial fact finding" "beyond merely identifying a prior conviction," violating the Sixth Amendment. *Id.*

In sum, in determining whether a conviction qualifies as a violent felony, a court must generally consider only the statute and judgment of conviction. Only if the statute is divisible may the court consider *Shepard* documents, and it may do so only for the sole purpose of ascertaining the statutory elements for which the defendant was convicted. Once those elements are identified, the court must determine whether the least of the acts prohibited thereby constitutes a generic offense enumerated in the ACCA or necessarily requires the use, attempted use, or threatened use of violent, physical force against another. In no case may a court rely on non-*Shepard* documents or analyze whether the defendant's underlying conduct constituted a violent felony.

V. Mr. Franklin is No Longer an Armed Career Criminal

In this case, the record reflects that the court relied on the following convictions to enhance the applicant's sentence under the ACCA: (1)(a) a 1986 State of Florida conviction for Armed Robbery With a Firearm, (1)(b) for Attempted Armed Robbery, and (1)(c) for Aggravated Assault; (2) a 1986 State of Florida Conviction for Battery on a Law Enforcement Officer; and (3) a 1996 State of Florida Armed Robbery conviction. In light of *Johnson*, the applicant no longer has three qualifying "violent felonies" and is therefore no longer an armed career criminal, as explained below.

In regards to the 1986 State of Florida conviction for Armed Robbery With a Firearm, in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), this Court found a 2001 conviction for attempted robbery under Fla. Stat. §812.13(1) was a

"crime of violence" within both the elements and residual clauses of the Career Offender provision of the Guidelines. Notably, though, *Johnson* has since abrogated Lockley's residual clause holding, and *Moncrieffe* and *Descamps* have together abrogated its elements clause holding.

Lockley expressly acknowledged that §812.13(1) – by its terms – did not constitute an exact match to the elements clause because "putting in fear" did not "specifically require the use or threatened use of physical force against the person of another." 632 F.3d at 1245. Despite that, however, the Court found that a §812.13(1) conviction satisfied the elements clause, because in its view it was "inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force." *Id.* But that "inconceivability analysis" cannot be squared with the strict categorical analysis now dictated by *Moncrieffe* and *Descamps*. The elements clause assumptions in *Lockley* have been directly abrogated by these intervening Supreme Court precedents which now mandate an element-by-element comparison, and preclude enhancement whenever there is a "mismatch" in "elements."

Moreover, *Descamps* has exposed another flaw in Lockley's assumptions by making clear that the intent element in any §812.13 offense is categorically overbroad vis-a-vis an offense within the elements clause. According to the Supreme Court, the term "use" in the phrase "use, attempted use, or threatened use of physical force against the person of another" requires an "active employment" of force, which "most naturally" requires a high degree of intent. *Leocal v. Ashcroft*, 543 U.S. 1, 10

(2004). But notably, according to the Florida courts' own interpretation of a robbery by "putting in fear" – caselaw *Lockley* did not consider, but must be considered and deferred to after *Descamps* – a conviction under §812.13(1) for a robbery by "putting in fear" only requires proof that a "reasonable person" in the victim's position would be "put in fear" during "the course of the taking." The Florida courts do not require the State to prove the offender actually intended to put anyone in fear, or that the victim was actually put in fear. See *State v. Baldwin*, 709 So.2d 636 (Fla. 2nd DCA 1998); *Brown v. State*, 397 So.2d 1153 (Fla. 5th DCA 1981).

Finally, close examination of Florida's standard robbery instruction suggests that the crucial second element for conviction – that "force, violence, assault, or putting in fear was used in the course of the taking" – is indivisible under Descamps. By its terms, the instruction indicates there are only four true "elements" of a §812.13 robbery offense; that the second "element" ("[f]orce, violence, assault, or putting in fear was used in the course of the taking") is a list of "alternative means" of committing a single robbery offense; and that the jury need not agree unanimously on a "means." Each juror simply must find that either "force," or "violence," or "assault," or "putting in fear" "was used in the course of the taking." Therefore, according to *Descamps*, the second element of a §812.13 offense is indivisible.

And notably, it is clear from Florida case law that at least one additional means of committing robbery – by "use of force" – sweeps more broadly than the ACCA's elements clause, since the quantum of "force" required for conviction is not the *Johnson* level of "violent force." *See, e.g., Sanders v. State,* 769 So.2d 506 (Fla. 5th

DCA 2000) (affirming strong-arm robbery conviction under Fla. Stat. §812.13, and rejecting defendant's claim that he was only guilty of the newly-created "robbery by sudden snatching" crime under §812.131 because the State simply showed he had peeled back the victim's fingers before snatching money from out of his hand; explaining that the victim's "clutching of his bills in his fist as *Sanders* pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by *Sanders*;" confirming that no more resistance, or "force," than that was necessary for a conviction under §812.13(1)).

It is clear from *Sanders* that the quantum of "force" necessary to "overcome a victim's resistance" will vary depending upon the type and degree of resistance by the victim, and that if the victim's resistance is slight, the "force" necessary to overcome it – and seal a "strong-arm" robbery conviction in Florida – is likewise slight. Since the type of violent, pain-causing, injury-risking force required by *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) is not necessary in every §812.13(1) case, and a person may be found guilty of "strong-arm" robbery in Florida from using only de minimis force, the statute is categorically overbroad for this reason as well. And, post-*Descamps*, a conviction under a "categorically overbroad" statute cannot be an ACCA predicate. *See* 133 S.Ct. at 2285-2286, 2293.

In addition, in regards to the 1986 State of Florida conviction for Armed Robbery With a Firearm, Mr. Franklin was sentenced for "armed robbery" under Fla. Stat. §812.13(2)(1986) does not change the above analysis. As a threshold matter, it is clear from the standard robbery instruction at the time of Mr. Franklin's conviction,

that in 1986 Fla. Stat. §812.13(2)(a) and (b) were simply penalty enhancement provisions, not separate enhanced "offenses" with additional "elements." Notably – and differently than today – juries were not instructed in 1986 that they needed to find that the state proved any of the "aggravating circumstances" in the statute ("carrying," of some "weapon," "in the course of committing a robbery") beyond a reasonable doubt. Therefore, according to Descamps, the fact that Mr. Franklin's underlying robbery conviction under §812.13(1) was categorically overbroad, ends the ACCA elements clause inquiry. Mr. Franklin's ACCA sentence cannot be upheld based upon judicial findings as to facts on which he never had the protection of the Sixth Amendment. *Descamps,* 133 S.Ct. at 2289.

But notably, even if Mr. Franklin's state court judge or a jury had been required to find the "aggravating circumstances" in §§812.13(2)(1986) beyond a reasonable doubt, that would not change the result now dictated by *Descamps* in any manner, since each of the "aggravating circumstances" in §812.13(2)(1986) is itself categorically overbroad vis-a-vis the ACCA's element clause.

First, §812.13(2)(1986) permits a sentence enhancement for "armed robbery" simply for "carrying" a weapon, which does not necessitate either using it, brandishing it in a threatening manner, or even visibly displaying it. According to *State v. Baker*, 452 So.2d 927 (Fla. 1984), it simply requires "possessing" it. *See id.* at 929 ("The victim may never even be aware that a robber is armed, so long as the perpetrator has the weapon in his possession during the offense."). In *United States v. Archer*, 531 F.3d 1347 (2008), this Court expressly held that the mere act of "carry-

ing" a weapon, and specifically a firearm, "does not involve the use, attempted use, or threatened use of force, and so is not a crime of violence under [the elements clause." *Id.* at 1349 (emphasis added).

Second, the word "weapon" in §812.13(2)(b) [or "deadly weapon" in §812.13(2)(a)] is not only indeterminate but categorically overbroad vis-a-vis any offense within the elements clause. Poison, anthrax, and chemical weapons are "weapons" that may easily cause death without the "use" of any "physical force." Other courts, notably, have declared convictions overbroad and outside the elements clause for precisely this reason. See, e.g,, *United States v. Perez-Vargas,* 414 F.3d 1282 (10th Cir. 2005); *United States v. Torres-Miguel,* 701 F.3d 165, 168-169 (4th Cir. 2012); *Matter of Guzman-Polanco, 26 I & N Dec.* 713, 717-718 (BIA Feb. 24, 2016). And although the Florida legislature has expressly defined the term "weapon" in Fla. Stat. §790.001(13) to include a "chemical weapon," under Florida law, the list of "weapons" in §790.001(13) has never limited the universe of items that may qualify a Florida defendant for an "armed robbery" enhancement. Juries and courts have always been permitted to use the much broader, open-ended definition of "weapon" in the standard §812.13 instruction, pursuant to which "any object that could be used to cause death or inflict serious bodily injury" qualifies as a "weapon." Significantly, that definition creates an "objective test," pursuant to which any item could qualify as a "weapon," if it caused great bodily harm to the victim "during the course of the robbery," even if that was not the defendant's intent. See *Williams v. State,* 651

So.2d 1242, 1243 (Fla. 2nd DCA 1995)(under this "objective test," even coffee could trigger enhanced penalty for "armed robbery," if it caused great bodily harm).

Finally, the phrase "in the course of committing the robbery" in §§812.13(2)(1986), is itself broadly defined in a separate provision, §812.13(3)(a), which explains: "An act shall be deemed 'in the course of committing the robbery" if it occurs in an attempt to commit a robbery or in flight after the attempt or commission." Because of that expansive definition, Florida courts have upheld an enhanced penalty for "armed robbery" upon evidence that a defendant simply stole a gun after robbing a victim of money and other property, and fled with the gun as part of the "loot." *State v. Brown*, 496 So.2d 194 (Fla. 3rd DCA 1986) (defendant's conduct "fell within the unequivocal reach of the armed robbery provision," even if he did not "carry" the firearm during the "taking of the proceeds" from the cash register, because he then stole a gun from under the cash register, and fled the scene with it). Such conduct plainly involves no more than knowing, illegal "possession" of a firearm, which this Court has held is not a "violent felony" under the ACCA. *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010).

Although a panel of the Eleventh Court of Appeals noted in 2006 that it had "conclud[ed] without difficulty," that a Florida armed robbery conviction was "undeniably a conviction for a violent felony," *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), it offered nothing beyond "[s]ee 18 U.S.C. §924(e)(2)(B)(i)" to support that "undeniable" conclusion. There is no stated analysis in the opinion, and it is therefore unclear what the panel relied upon to reach that conclusion.

Moreover, *Dowd* was decided prior to *Archer* (in 2010); *Curtis Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson* I); *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012); *Moncrieffe* (in 2013); and *Descamps* (in 2013 as well). And the *Dowd* panel's presumption that a 1975 Florida "armed robbery" conviction was "undeniably" an offense within the ACCA's elements clause cannot be squared with the strict, element-by-element comparison now required by the categorical approach.

This Court has long recognized that its "first duty" is always "to follow the dictates of the United States Supreme Court," and 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). In similar circumstances, the Court has easily declared prior precedents "effectively overruled." *See Dawson v. Scott*, 50 F.3d 884, 892 n. 20 (11th Cir. 1995); *Archer*, 531 F.3d at 1352; *United States v. Howard*, 742 F.3d 1334, 1337, 1343-1345 (11th Cir. 2014); *see also* Scalia, Antonin, J., *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989) (lower courts are not only bound by the narrow "holdings" of higher court decisions, but also by their "mode of analysis"). Based upon the different "mode of analysis" now dictated by *Archer*, *Curtis Johnson*, *Welch*, *Moncrieffe*, and *Descamps, Dowd* has been effectively overruled at this time.

Although a panel of this Court recently found after reviewing a pro se inmate's application to file a second or successive §2255 motion in light of *Johnson*, that a Florida "armed robbery" conviction "appears to contain 'as an element the use, attempted use, or threatened use of physical force against the person of anoth-

er," and that "[n]either *Johnson* nor any other case" suggests that such a conviction did not count as an ACCA predicate," *In re Robinson*, ___ F.3d ___, 2016 WL 1583616 (11th Cir. April 19, 2016), none of the above-cited cases were cited by Mr. Robinson, nor did he make any of the above arguments in his pro se application. However, even assuming Mr. Robinson did not show a "reasonable likelihood" that his pro se challenge to a Florida armed robbery conviction had "possible merit," Mr. Franklin here has made a completely different, much stronger showing sufficient to "warrant fuller exploration by the district court. *Holladay*, 331 F.3d at 1173-74.

In regards to the related 1986 State of Florida Attempted Armed Robbery conviction, if a 1986 State of Florida conviction for Armed Robbery With a Firearm does not qualify, a 1986 State of Florida conviction for Attempted Armed Robbery can't qualify as a violent felony under the ACCA.

In regards to the related State of Florida conviction for Aggravated Assault, a conviction for "aggravated assault" under Fla. Stat. §784.021 is not a violent felony within the ACCA's elements clause because the Florida courts have held that a person may be convicted under §784.021 upon a mens rea of "culpable negligence," which is akin to recklessness. *See LaValley v. State*, 633 So.2d 1126 (Fla. 5th DCA 1995); *Kelly v. State*, 552 So.2d 206 (Fla. 5th DCA 1989); *Green v. State*, 315 So.2d 499 (4th DCA 1975); and *DuPree v. State*, 310 So.2d 396 (Fla. 2nd DCA 1975); *see generally United States v. Garcia-Perez*, 779 F.3d 278, 285 (5th Cir. 2015) (equating Florida's "culpable negligence" standard with "recklessness").

For an offense to be a violent felony within the ACCA's elements clause, however, it must have as an element the active and intentional employment of force, which requires more than negligence or recklessness. *See Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004) (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"); *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 and following *Leocal*).

Admittedly, in *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013) the Court held that an aggravated assault conviction under §784.021 qualified as a violent felony within the ACCA's elements clause since "by its definitional terms, the offense 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." *Id.* at 1338 (emphasis in original). Therefore, the Court reasoned, "a conviction under section 784.021 will always include 'as an element the . . . threatened use of physical force against the person of another." *Id.* at 1338 (emphasis in original). The reasoning in Turner, however, is inconsistent with the strict, element-by-element comparison now required by the categorical approach as clarified in *Descamps v. United States*, 133 S.Ct. 2276 (2013) and *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014).

In *Howard*, the Court confirmed that sentencing courts conducting divisibility analysis "are bound to follow any state court decisions that define or interpret the statute's substantive elements because state law is what the state supreme court says it is"). *Id.* at 1346. And in *Turner*, the Court did not consider how Florida courts interpreted the mens rea element in the underlying assault statute, §784.011.

Based upon the Florida cases cited above, it is clear that the aggravated assault statute has been interpreted by the Florida courts to require no more than "culpable negligence," which is recklessness. Therefore, there is no "match" between the mens rea element in §784.021 and an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" as interpreted in *Leocal* and *Palomino Garcia*. As such, a conviction under §784.02 is categorically overbroad and not a violent felony within the elements clause.

Since the elements clause analysis in *Turner* has been abrogated, it should not preclude relief at this time. See, e.g., *United States v. Howard*, 742 F.3d 1334, 1338 (11th Cir. 2014) (acknowledging that *Descamps* had unsettled the "settled law" of this Circuit, and required that the Court revisit its earlier decision in *United States v. Rainer*, 616 F.3d 1212, 1213 (11th Cir. 2010); holding that "two crucial aspects of our decision in *Rainer* are no longer tenable after *Descamps*").

In regards to the 1996 State of Florida Attempted Armed Robbery conviction, for the same reasons that the 1986 State of Florida conviction for Armed Robbery With a Firearm does not qualify, and the 1986 State of Florida conviction for Attempted

Armed Robbery doesn't qualify the 1996 conviction doesn't qualify as a violent felony under the ACCA.

CONCLUSION

Because Mr. Franklin no longer qualifies as an armed career criminal, he respectfully requests that this Court grant this § 2255 motion and re-sentence him without the Armed Career Criminal Act enhancement.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on June 24, 2016 , I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

By: *s/ Michael D. Spivack*
Michael D. Spivack

SERVICE LIST

JIMMY LEE FRANKLIN v. UNITED STATES OF AMERICA

Case No. 16-22192-CIV-ALTONAGA/WHITE
(06-20709-CR-ALTONAGA)

United States District Court, Southern District of Florida

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A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-22192-Civ-ALTONAGA
(06-20709-Cr-ALTONAGA)
MAGISTRATE JUDGE PATRICK A. WHITE

JIMMY LEE FRANKLIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE
FOLLOWING GRANT BY ELEVENTH CIRCUIT RE PERMISSION
TO FILE SUCCESSIVE MOTION TO VACATE

I. Introduction

The movant, a federal prisoner, currently confined at the Coleman Medium Federal Correctional Institution, in Coleman, Florida, has filed this motion to vacate (DE#1), after obtaining authorization from the Eleventh Circuit to file a second or successive Section 2255 motion to vacate, pursuant to 28 U.S.C. §2255.[1] See In re Jimmy Franklin, Eleventh Circuit Court of Appeals, Case No. 16-12528-J, Order entered June 14, 2016. Federal Public Defender Michael David Spivack appeared on behalf of the movant and filed an amended complaint. (Cv DE# 9).

Petitioner is challenging the constitutionality of his enhanced sentence as an armed career criminal, entered following a guilty plea in **case no. 06-20709-Cr-Altonaga**. Movant seeks relief in light of the Supreme Court's ruling in Johnson v. United States,

[1]The 11th Circuit's order and the movant's application are construed as a motion to vacate.

___ U.S. ____, 135 S.Ct. 2551 (2015), made retroactively applicable to cases on collateral review by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257, ____, L.Ed.2d ___ (2016).

This Cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B),(C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges, S.D. Fla. Admin. Order 2003-19; and, Rules 8 and 10 Governing §2255 Cases in the United States District Courts.

Presently before the court is the Eleventh Circuit's memorandum opinion granting permission to file this successive §2255 motion (Cv-DE#1), the Petitioner's amended complaint (Cv DE# 9), the government's response to the amended §2255 motion (Cv-DE#10), and the government's Notice of Supplemental Authority (Cv-DE#11).

II. Procedural History

On November 16th, 2006, the grand jury returned an indictment charging Petitioner with possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§922(g)(1), 924(e) (Count One), and with possession of body armor by a convicted felon, in violation of 18 U.S.C. §931 (Count Two). (Cr-DE#1). On August 1, 2007, pursuant to a negotiated plea agreement with the government, Mr. Franklin pleaded guilty to Count One of the indictment. (Cr-DE#45).

Prior to sentencing, a PSI was prepared which reveals as follows. The base offense level was set at 20 because the offense involved possession of a firearm and ammunition by a convicted felon and the Petitioner committed the instant offense subsequent to sustaining at least one felony conviction of either a crime of

violence or a controlled substance offense, §2K2.1(a)(4)(A); the Petitioner had been convicted of attempted armed robbery on February 6, 1997 in case no. F96-8085. (PSI ¶19). Because one of the firearms was stolen, the offense level was increased by two levels, §2K2.1(b)(4)(A). (PSI ¶20).

The adjusted offense level of 22 was increased, pursuant to U.S.S.G. §4B1.4(a), to level 33, because of the movant's status as an armed career criminal under §924(e). (PSI ¶25). The PSI relied on the following state court convictions: robbery with a firearm, attempted robbery with a firearm, and aggravated assault in case no. F86-6467; battery on a law enforcement officer in case no. F88-3007; and attempted armed robbery in case no. F96-8085. (PSI ¶¶25,31,32,38). Because th PSI did not include an adjustment for acceptance of responsibility, the total offense level was set at 33. (PSI ¶27).

The PSI next determined that the movant had a total of 9 criminal history points and because Petitioner was an armed career criminal, his criminal history category was set at IV. (PSI ¶40, 42). Statutorily, the movant faced a 15-year minimum term of imprisonment and a maximum term of life for violating 18 U.S.C. §924(e)(1). (PSI ¶87). Based on a total offense level of 33 and a criminal history category IV, the guideline imprisonment range was 188 to 235 months. (PSI ¶88).

On October 16th, 2007, Petitioner appeared for sentencing wherein he received a sentence of 180 months imprisonment as to Count One, to be followed by 5 years of supervised release and a special assessment of $100. (Cv DE# 10-1, Sentencing Hearing Transcript). The Clerk entered judgment on October 16th, 2007. (Cr-DE#55).

Movant prosecuted a direct appeal, challenging the sufficiency of the evidence to support his conviction. (Cr DE# 56). On **July 1, 2008**, the Eleventh Circuit Court of Appeals affirmed the movant's conviction in a written, but unpublished decision in United States v. Franklin, 384 Fed.Appx.701 (11th Cir. 2008). (Cr DE# 78). No petition for certiorari review was filed.

Thus, the judgment of conviction became final on **Monday, September 29, 2008**, when the 90-day period for seeking certiorari review with the U.S. Supreme Court expired.[2] The movant had one year from the time his judgment became final, or no later than **September 29, 2009**,[3] within which to timely file his federal habeas petition, challenging the judgment of conviction entered in case no. **06-20709-Cr-Altonaga**. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v.

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[2]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufman, 282 F.3d 1336 (11th Cir. 2002); Wainwright v. Sec'y Dep't of Corr's, 537 F.3d 1282, 1283 (11th Cir. 2007)(conviction final under AEDPA the day U.S. Supreme Court denies certiorari, and thus limitations period begins running the next day). Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry. The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir. 2003).

[3]See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)); see also, 28 U.S.C. §2255.

Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)).

Less than a year after the statute of limitations expired on **September 29, 2009,** Movant returned to this court on **January 2, 2009** filing his first §2255 motion, assigned **case no. 09-cv-20046-Altonaga.** (09-CV-20046, DE#1). A Report recommended that the motion be denied on the merits. (09-CV-20046, DE# 9). The District Court issued an order adopting the report. (09-CV-20046, DE# 11). Petitioner appealed. (09-CV-20046, DE# 13). The Eleventh Circuit denied relief because Petitioner failed to make a substantial showing of the denial of a constitutional right. (09-CV-20046, DE# 21).

On **June 26, 2015,** the United States Supreme Court held that the ACCA's residual clause--defining a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another"--is unconstitutionally vague. Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551, 2563 (2015). The Supreme Court, however, expressly did not invalidate the ACCA's elements clause or the enumerated crimes clause. Id. ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony"). Then, on **April 18, 2016,** after the Petitioner's original §2255 proceedings concluded, the Supreme Court announced that Johnson announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257 (2016).

On **June 16, 2016,** the Eleventh Circuit granted movant's application for authorization to file a successive §2255 motion, finding the movant had made a *prima facie* showing under 28 U.S.C. §2255(h) that he was entitled to relief under Johnson. (Cv-DE#1).

The application was transferred to this court, and opened by the Clerk as a §2255 motion to vacate. (Cv-DE#1). This court issued an order appointing the Federal Public Defender's office and setting a briefing schedule. (Cv-DE# 5). The parties have complied with the court's briefing schedule and the case is now ripe for review. (Cv DE# 7, 10, 11).

III. Standard of Review

Post-conviction relief is available to a federal prisoner under §2255 where "the sentence was imposed in violation of the Constitution or laws of the United States, or ... the court was without jurisdiction to impose such sentence, or ... the sentence was in excess of the maximum authorized by law." 28 U.S.C. §2255(a); see Hill v. United States, 368 U.S. 424, 426-27 (1962). A sentence is "otherwise subject to collateral attack" if there is an error constituting a "fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979); Hill v. United States, 368 U.S. at 428.

However, a federal prisoner who already filed a §2255 motion and received review of that motion is required to move the court of appeals for an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct sentence. See 28 U.S.C. §2255(h); 28 U.S.C. §2244(b)(3)(A).

If, as here, the Court of Appeals grants leave to file a successive §2255 motion, the trial court must review the record *de novo* to ascertain whether the movant meets the statutory criteria for relief under 28 U.S.C. §2255(h). See Jordan v. Sec'y Dep't of Corr's, 485 F.3d 1351, 1357-58 (11 Cir. 2007); Leone v. United States, __ F.Supp.2d ___, 2016 WL 4479390, *4 (S.D. Fla. Aug. 24,

2016)(stating a district court conducts *de novo* review after Court of Appeal grants leave to file a successive §2255 motion). Nothing in the Court of Appeals' ruling binds the district court. In re Chance, 831 F.3d at 1335, 1338 (11 Cir. 2016). Only if the district court concludes that the applicant has established the statutory requirements for filing a second or successive motion will it "'proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise.'" Leone v. United States, ___ F.Supp.2d ___, 2016 WL 4479390, *4 (S.D. Fla. Aug. 24, 2016)(Lenard, J.) (quoting In re Moss, 703 F.3d ---, 1303 (11 Cir. 20--)

Thus, pursuant to 28 U.S.C. §2244, the court must determine whether the movant has shown that his claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. §2244(b)(2)(A). If the movant has not made this showing, then the case must be dismissed. 28 U.S.C. §2244(b)(4).

The standard for conducting the foregoing review is far from settled with the Eleventh Circuit. In In re Moore, one panel granted a movant's §2255 application "because it [was] unclear whether the district court relied on the residual clause or other ACCA clauses in sentencing Moore, so Moore met his burden of making out a *prima facie* case that he is entitled to file a successive §2255 motion raising his Johnson claim." Id. at 1272. In dicta, the Moore panel further added:

> [T]he district court cannot grant relief in a §2255 proceeding unless the movant meets his burden 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 determine 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.

Id. at 1273.

Just six days after Moore, a different Eleventh Circuit panel called into doubt the Moore panel's reasoning. In re Chance 831 F.3d at 1339. In Chance, the Eleventh Circuit panel stated that the Moore court's suggestion that an inmate must affirmatively show that he was sentenced under the residual clause was "wrong, for two reasons." Id. at 1340. First, Moore incorrectly "implie[d] that the district judge deciding [a movant's] upcoming §2255 motion can ignore decisions of the Supreme Court that were rendered since that time in favor of a foray into a stale record." Id. Under Moore's approach, "unless the sentencing judge uttered the magic words 'residual clause' ... a defendant could not benefit from [the Supreme Court's] binding precedent." Id.

Second, the Chance court noted that a movant would face nearly impossible odds in proving whether the sentencing court relied on the residual clause "at his potentially decades-old sentencing." Id. "Nothing in the law require[d] a judge to specify which clause of §924(c)--the residual or elements clause--it relied upon in imposing a sentence." Id. Thus, the Chance court concluded that the Moore Court's approach was "unworkable." Id. To the Chance court, "it makes no difference whether the sentencing judge used the words 'residual clause' or 'elements clause' or 'some similar phrase,'" because "the required showing is simply that §924(c) may no longer authorize his sentence as that statute stands after Johnson--not proof of what the judge said or thought at a decades-old sentencing." Id.

Where, as here, "an applicant is raising a true Johnson claim, such as here where the district court may have relied on the now-voided residual clause, it is unclear what effect, if any, Descamps[v. United States, 133 S.Ct. 2276 (2013)] might have on the next step of the Johnson analysis [after successiveness permission is granted] as to whether a particular crime might still qualify under another ACCA clause." In re Adams, 825 F.3d 1283, 1286 (11th Cir. 2016) (distinguishing a Descamps "standalone claim" from a true Johnson claim that requires the Court to "look to the text of the relevant statutes, including the ACCA, to determine which, if any ACCA clauses [the movant's] prior convictions fall under" and "[i]n fulfilling this duty, we should look to guiding precedent, such as Descamps, to ensure we apply the correct meaning of the ACCA's words.").

The Chance panel noted that, "[i]n 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." In re Chance, 2016 WL 4123844 at *4. By contrast, other Eleventh Circuit panels have opined that it is improper to consider Descamps because it is not retroactive for purposes of a second or successive §2255 motion and, therefore, Johnson cannot be used as a "portal" to raise a Descamps claim, whether "independent or otherwise." In re Hires, 825 F.3d 1297, 1303 (11th Cir. 2016) (denying a successiveness application because the movant's prior convictions qualified under ACCA's elements clause; noting that "Descamps does not qualify as a new rule of constitutional law for §2255(h)(2) purposes, and, thus, Descamps cannot serve as a basis, independent or otherwise, for authorizing a second or successive §2255 motion....").

The Chance panel further noted that both Chance and Moore are only *dicta* and that District Court's review is *de novo*. 2016 WL 4123844 at *5; see Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351 (11th Cir. 2007) (the district court is to decide the §2244(b)(1) & (2) issues fresh, or in the legal vernacular, *de novo*).

After Moore and Chance, numerous district courts have grappled with the movant's burden of proof where the record was silent as to how the sentencing court applied the ACCA. The majority of these courts adopted Chance's reasoning, both with regards to the movant's burden of proof and the controlling law for analyzing a Johnson claim. See, e.g., United States v. Wolf, No. 04-cr-347-1, 2016 WL 6433151, at *2-4 (M.D. Pa. Oct. 31, 2016); United States v. Winston, NO. 01-cr-00079, 2016 WL 4940211, at *4-6 (W.D. Va. Sept. 16, 2016); Leonard v. United States, 16-22612, 2016 WL 4576040 at *2 (S.D. Fla. Aug. 22, 2016) (Altonaga, J.) (following the approach outlined in Chance to conclude that a movant "can sustain his Section 2255 Motion if: (1) it is unclear from the record which clause the sentencing court relief on in applying the ACCA enhancement; and (2) in light of Johnson, [his] prior convictions no longer qualify him for the ACCA sentencing enhancement" based on the present state of the law including Descamps and Mathis); Leone v. United States, __ F.Supp.3d __, 2016 WL 4479390 at *9 (S.D. Fla. Aug. 24, 2016) (Lenard, J.) (following the approach outlined in Moore to conclude that a movant whose "Johnson claim is inextricably intertwined with Descamps and Mathis" failed to satisfy §2255(h) because, "[o]ther than the new rule made retroactive by the Supreme Court (i.e., Johnson), the Court must apply the law as it existed at the time of sentencing to determine whether the Movant's sentence was enhanced under the ACCA's residual clause"); United States v. Ladwig, No. 03-Cr-232, 2016 WL 3619640, at *3 (E.D. Wash. June 28, 2016)("Because [the movant] has shown that the court might have relied upon the unconstitutional

residual clause in finding that his burglary and attempted rape convictions qualified as violent felonies, the court finds that he has established constitutional error.").

The undersigned recommends following the approach suggested by the Chance panel on both the Movant's burden of proof and the law that is applicable to the Johnson analysis. Thus, when it is unclear on which ACCA clause the sentencing judge rested a predicate conviction, the movant's burden is to show only that the sentencing judge may have used the residual clause. See Diaz v. United States, 2016 WL 4524785, at *5 (W.D. N.Y. Aug. 30, 2016); United States v. Navarro, 2016 WL 1253830, at *3 (E.D. Wash. Mar. 10, 2016). "Of course, ... this procedure ... invites the government to show (on the merits) that the predicate offense otherwise fits within the ACCA's force or enumerated clauses." United States v. Winston, NO. 01-cr-00079, 2016 WL 4940211, at *6 (W.D. Va. Sept. 16, 2016).

With regards to the burden of proof, it would also be unfair to require a §2255 movant to affirmatively prove that the sentencing court relied on ACCA's residual clause because "[n]othing in the law requires a judge to specify which clause of §924(c) - residual or elements clause - it relied upon in imposing a sentence." Chance, 2016 WL 4123844 at *4. Further, even if a sentencing judge mentions the residual or elements clause, "it would not prove that the sentencing judge 'sentenced [the defendant] using the residual clause.'" Id.

A compelling comparison can be drawn between claims of Johnson error and the error that results from a general verdict following unconstitutional jury instructions. See United States v. Winston, 2016 WL 4940211 (W.D. Va. Sept. 16, 2016). As the Supreme Court explained in that context:

> 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. The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested.

Zant v. Stephens, 462 U.S. 862, 881 (1983).

Under this theory, when it is unclear upon which ACCA clause the sentencing judge rested a predicate conviction, the movant's burden is to show only that the sentencing judge *may* have used the residual clause. See Winston, 2016 WL 4940211 at *6. This procedure is subject to harmless error analysis in that the Government may show on the merits that the predicate offense fits within ACCA's force or enumerated clauses. Id.

With regards to the law governing a Johnson claim, the current state of the law, including cases such as Descamps and Mathis, should be applied to determine whether relief is warranted. It is undisputed that cases like Descamps are not retroactively applicable on collateral review because they are not substantive or watershed rules of procedure. See King v. United States, 610 Fed. Appx. 825 (11th Cir. 2015).

Rather, Descamps "merely applied prior precedent to reaffirm that courts may not use the modified categorical approach to determine whether convictions under indivisible statutes are predicate ACCA violent felonies." Id. at 828. Settled rules, that is, rules dictated by precedent existing when a defendant's conviction became final, apply retroactively on collateral review. See Chaidez v. United States, __ U.S. __, 133 S.Ct. 1103, 1107 (2013) (unless a Teague exception applies, "[o]nly when [the

Supreme Court] appl[ies] a settled rule may a person avail herself of the decision on collateral review."). This is so because it is the Supreme Court's duty to "say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Rivers v. Road Express, Inc., 511 U.S. 298, 312-13 (1994).

When the Supreme Court construes a statute, "it is explaining its understanding of what the statute has meant continuously since the date when it became law." Id. at 313 n. 12. Since Descamps applies settled rules of law, "the Court may therefore consider [movant's] defensive arguments about why his ... convictions never properly qualified as ACCA predicates under the enumerated or elements clauses." Fugitt v. United States, 2016 WL 5373121 at *3 (W.D. Wash. Sept. 26, 2016).

Several district courts have applied the current state of the law, rather than the law at the time of sentencing, to determine whether Johnson claims are meritorious. See, e.g., United States v. Harris, 2016 WL 4539183 (M.D. Pa. Aug, 31, 2016) (in an initial §2255 motion, concluding that the movant can rely on current law to establish that his prior convictions do not qualify him for enhanced sentencing under the elements or enumerated offense clauses); Smith v. United States, 2015 WL 11117627 at *6 (E.D. Tenn. Nov. 24, 2016) (in an initial §2255 motion, applying Sixth Circuit case law from 2011, even though Defendant was sentenced in 2006, when assessing whether prior conviction fits within force clause). This approach has also been applied to successive §2255 motions. See United States v. Ladwig, __ F.Supp.3d __, 2016 WL 3619640 at *4-5 (E.D. Wash June 28, 2016) (explaining why, when

faced with Government's argument that other ACCA clauses supported enhancement, courts should apply current precedent to those clauses, even to successive petitions that raise Johnson challenges); see also United States v. Christian, 2016 WL 4933037 (9th Cir. Sept. 16, 2016) (reversing denial of successive §2255 motion because, applying Descamps, the movant did not have a sufficient number of violent felonies to sustain an ACCA sentencing enhancement).

Therefore, in the instant case, the Movant demonstrates he is entitled to relief, pursuant to §2255(h), if he shows that: (1) it is unclear from the record which clause the sentencing court relied on in applying the ACCA enhancement; and, (2) in light of Johnson, his prior convictions no longer qualify him for the ACCA sentencing enhancement, based on the present state of the law, including Descamps and Mathis. See Leonard, 2016 WL 4576040, at *2; see also Mack v. United States, 16-CV-23021-MARRA:DE#17 (adopting the reasoning set forth in Chance, granting the §2255 motion, and ordering movant's immediate release from custody).

IV. Discussion

Given the foregoing standards, it must first be determined whether the movant has demonstrated that the sentencing court *may* have relied on the ACCA's residual clause when imposing an armed career criminal enhancement at sentencing.

As will be recalled, the PSI listed the movant's prior adult criminal Florida convictions for robbery with a firearm, attempted robbery with a firearm, and aggravated assault in case no. F86-6467; battery on a law enforcement officer in case no. F88-3007; and attempted armed robbery in case no. F96-8085. (PSI ¶¶25,31,32,38).

Pursuant to U.S.S.G. §4B1.4, the PSI noted that the movant had a total of 7 criminal history points and a criminal history category IV. (PSI ¶40, 42). Because the movant was subject to an enhanced sentence under 18 U.S.C. §924(e), as an armed career criminal, his total offense level was increased to a level 33. (PSI ¶¶25,27). As an armed career criminal, the movant faced a statutory mandatory minimum of 15 years' imprisonment, and up to a term of life imprisonment. (PSI ¶87). Absent an ACCA enhancement, the maximum sentence for violation of §922(g) is ten years imprisonment. See 18 U.S.C. §922(g). With a total offense level 33, and a total criminal history category IV, movant's advisory guideline range was 188 months' imprisonment at the low end and 235 months' imprisonment at the high end. (PSI ¶88).

On October 16th, 2007, Petitioner appeared for sentencing wherein he received a sentence of 180 months imprisonment as to Count One, to be followed by 5 years of supervised release and a special assessment of $100. (Cv DE# 10-1, Sentencing Hearing Transcript).

It is unclear from the record on which clause of the ACCA the court relied in sentencing the movant because the court did not explicitly or implicitly indicate at sentencing upon which clause it relied in applying the ACCA enhancement. The PSI is also silent on the issue, merely recognizing that the movant is an armed career criminal under the provisions of §924(e) (PSI ¶25). Since it is unclear from the record whether the court relied upon the residual clause, as opposed to the enumerated offenses clause of the ACCA, the movant has satisfied the first factor of the Chance test. Therefore, the court next turns to a determination of the second factor.

The second inquiry requires a determination whether, in light

of Johnson, the movant's prior convictions no longer qualify him for the ACCA sentencing enhancement under an analysis based on the present state of the law. In other words, to support an ACCA enhanced sentence, movant must have three qualifying predicate offenses which constitute felony convictions for crimes of violence or serious drug offenses.

When applying §924(e), courts should generally only look to the facts of conviction and the elements of the prior statute of conviction, or to the charging documents and jury instructions, but not the facts of each of defendant's prior conduct. See Taylor v. United States, 495 U.S. 575, 600-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1999). With the sole exception of convictions obtained in violation of the right to counsel, a defendant has no right to challenge the validity of previous state convictions in his federal sentencing proceeding when such convictions are used to enhance a sentence under the ACCA. Custis v. United States, 511 U.S. 485, 487 (1994).

Turning to the Armed Career Criminal Act ("ACCA"), it provides an enhanced sentencing for individuals who violate §922(g) and have "three previous convictions for a violent felony, serious drug offense, or both, committed on occasions different from one another...." 18 U.S.C. §924(e)(1). Pertinent to this case, the ACCA defines "violent felonies" as any crime punishable by imprisonment for a term exceeding one year that:

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

18 U.S.C. §924(e)(2)(B) (emphasis added).

Subsection (e)(2)(B)(i) is known as the "elements clause," the first portion of subsection (e)(2)(B)(ii) is known as the "enumerated crimes clause," and the last portion of Section (B)(ii), in bold type above, is known as the "residual clause."

On June 26, 2015, the United States Supreme Court struck down the italicized clause, commonly known as the residual clause, as a violation of the Fifth Amendment's guarantee of due process. See Johnson, 576 U.S. ___, ____, 135 S.Ct. 2551, 2557 (2015). Specifically, the Supreme held that the ACCA's residual clause violated due process because it violated "[t]he prohibition of vagueness in criminal statutes." 135 S.Ct. at 2556-2557. The Supreme Court further explained that the vagueness doctrine "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences." Id. at 2557. The ACCA defines a crime and fixes a sentence. See 18 U.S.C. §924(e). In other words, Johnson "narrowed the class of people who are eligible for" an increased sentence under ACCA. In re Rivero, 797 F.3d 986 (11th Cir. 2015)(citing Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253, 1278 (11th Cir. 2013)).

However, the Supreme Court in Johnson did not invalidate ACCA's elements clause or enumerated crimes clause. Johnson, 135 S.Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). On April 18, 2016, the Supreme Court announced that Johnson is retroactively applicable to cases on collateral review. Welch v. United States, 136 S.Ct. 1257 (2016).

Turning to the movant's prior convictions, to satisfy the second factor, it must be determined whether movant's convictions for robbery a firearm, attempted robbery with a firearm, aggravated assault, battery on a law enforcement officer, and attempted armed robbery are no longer qualifying predicate offenses for purposes of the ACCA enhancement. The court is mindful that it must only examine the elements of the offenses and not the movant's specific conduct in determining whether the prior convictions qualify as predicate offenses for purposes of the ACCA. See United States v. Chitwood, 676 F.3d 971, 976-77 (11 Cir. 2012)(describing the categorical approach).

a. Battery on a law enforcement officer. The parties do not discuss whether the prior conviction for battery on a law enforcement officer qualifies as a violent felony for purposes of the ACCA enhancement.

A conviction for battery on a law enforcement officer **does not** qualify as a violent felony for purposes of the ACCA. See Johnson v. United States, 559 U.S. 133, 136-37, 130 S. Ct. 1265, 1269, 176 L. Ed. 2d 1 (2010) (battery on a law enforcement officer does not qualify) (citing State v. Hearns, 961 So.2d 211, 218 (Fla.2007) Rodriguez v. United States, No. 15-22901-CIV, 2016 WL 3653948, at *13 (S.D. Fla. June 23, 2016), report and recommendation adopted in part, No. 15-22901-CV, 2016 WL 3647628 (S.D. Fla. June 29, 2016); Harris v. United States, 2016 WL 1030815, at *3 (M.D. Fla. Mar. 15, 2016).

b. Armed Robbery. The parties dispute that the prior convictions for armed robbery and attempted armed robbery in case nos. F05-019246 and F96-8085 qualify as a crimes of violence for purposes of the ACCA enhancement.

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 a "violent felony" within the meaning of the ACCA's elements clause and, therefore, nothing in Samuel Johnson, which merely invalidated the residual clause, affects the continuing viability of Florida armed robbery as an ACCA predicate offense.

In Dowd, the Eleventh Circuit held that the defendant's 1974 Florida armed robbery conviction "undeniably is a conviction for a violent felony." 451 F.3d at 1255 (citing 18 U.S.C. § 924(e)(2)(B)(I)). In Oner, 382 Fed. App'x at 896, the Eleventh Circuit concluded that nothing in Johnson[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."

The Eleventh Circuit has repeatedly affirmed that armed robbery is a violent felony under the elements clause of the ACCA in the wake of Samuel Johnson. See In re Hires, 2016 WL 3342668, *4; In re Thomas, __ F.3d __, 2016 WL 3000325, *3 (11th Cir. May 25, 2016); In re Robinson, __ F.3d __, 2016 WL 1583616, *1 (11th Cir. April 19, 2016). More recently, in United States v. Fritts, 841 F.3d 937(11th Cir. November 8, 2016), the Eleventh Circuit held that all Florida robbery, regardless of the date of conviction, is a violent felony under the elements clause. Id. at 940 ("Our Dowd precedent and our conclusion here are also supported by our decisions holding that a Florida robbery conviction under § 812.13(1), even without a firearm, qualifies as a "crime of

[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," see Johnson v. United States, --U.S.--, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), as opposed its recent 2015 Samuel Johnson decision, which invalidated the residual clause.

violence" under the elements clause.").

A conviction for attempted armed robbery also qualifies. The language of the ACCA itself states that a violent felony is a crime that "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) (emphasis added). Thus, if an armed robbery satisfies the elements clause of the ACCA, then an attempt to commit that crime does as well. See United States v. Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011) (finding that attempted robbery satisfied the elements clause of the analogous "crime of violence" provision of the Sentencing Guidelines).

Contrary to the movant's argument, armed robbery and attempted armed robbery under Florida law constitute crimes of violence for purposes of an ACCA enhancement.

C. Aggravated assault. The government states that movant's conviction for aggravated assault in case no. F86-6467 qualifies as a crime of violence for purposes of the ACCA enhancement. (Cv DE# 10). Petitioner counters that aggravated assault is not a violent felony under the ACCA. (Cv DE# 9).

At the time of the movant's conviction, Florida Standard Jury Instruction 8.2, provided that, in order to be found guilty of aggravated assault, the following elements were required: 1) the defendant intentionally and unlawfully threatened, either by word or act, to do violence to the victim; 2) at the time, the defendant appeared to have the ability to carry out the threat; 3) the act of the defendant created in the mind of the victim a well-founded fear that the violence was about to take place. See In re: Standard Jury Instructions in Criminal Cases, 131 So. 3d 755 (Fla. 1986) (aggravated assault instruction originally adopted in 1981) (*per*

curiam) (emphasis added); see also Fla.Stat. §784.021.

While Johnson prohibits reliance on the ACCA's residual clause to establish that an offense is a violent felony, the offense of aggravated assault qualifies as a violent felony under the ACCA's elements clause, which requires that the offense have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." See 18 U.S.C. §924(e)(2)(B)(i); see also In re Hires, 825 F.3d 1297, 1301 (11th Cir. 2016) ("a Florida conviction for aggravated assault under §784.021 is categorically a violent felony under the ACCA's elements clause."). See also, 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; United States v. Thomas, 656 Fed.Appx. 951, 955-56 (11 Cir. 2016)(internal citations omitted) ("Thomas has two prior Florida convictions for resisting an officer with violence and a 1996 Florida conviction for aggravated assault with a deadly weapon, all three of which qualify as ACCA predicates post-Johnson. Thomas's three qualifying convictions are violent felonies per the ACCA's elements clause, which means Johnson does not affect Thomas's ACCA eligibility.")(emphasis added); United States v. Towns, 2016 WL 5017301, at *1 (11 Cir. Sept. 20, 2016). Contrary, to the movant's argument, aggravated assault under Florida law constitutes a crime of violence for purposes of an ACCA enhancement.

For all of the foregoing reasons, the movant has not demonstrated that, in light of Johnson, the movant's prior convictions no longer qualify him for the ACCA sentencing enhancement. Although the battery on a law enforcement officer conviction no longer qualifies, the movant has at least three prior felony convictions that do qualify as valid predicate offenses

under the ACCA: (1) armed robbery, (2) attempted armed robbery, and (3) aggravated assault.

V. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and 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)." See Rule 11(a), Rules Governing §2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255-Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001).

After review of the record in this case, the Court finds the

movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the Chief Judge in objections.

VI. Conclusion

Based on the foregoing, it is recommended that this motion to vacate be DENIED, that no certificate of appealability issue, and the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 5th day of May, 2017.

UNITED STATES MAGISTRATE JUDGE

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A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22192-CV-ALTONAGA
(06-20709-CR-ALTONAGA)

JIMMY LEE FRANKLIN
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

OBJECTIONS TO THE REPORT OF THE MAGISTARTE JUDGE

Client, Mr. Jimmy Lee Franklin, through undersigned counsel, respectfully files these objections to the Report of Magistrate Judge ("the Report"), [DE 12], filed in this matter. For the reasons stated below Mr. Franklin is not an Armed Career Criminal. Furthermore, even assuming that Mr. Franklin's analysis in regards to the individual charges is incorrect, and even assuming the Magistrate Judge's analysis in regards to the individual charges is correct, Mr. Franklin still does not qualify as an Armed Career Criminal because he does not have convictions from three separate events.

THE MAGISTRATE REPORT FAILS TO DISTINGUISH CONVICTIONS FROM SEPARATE CRIMINAL EVENTS

The Report takes the position that "the movant has at least three prior felony convictions that do qualify as valid predicate offenses under the A.C.C.A.: (i) armed robbery, (2) attempted armed robbery, and (3) aggravated assault." [DE 12:21-22].

However, the armed robbery conviction and the aggravated assault conviction both arose from the same criminal event. [DE 12:4]. Therefor they must be counted as one conviction, not two convictions. *See United States v. Sweeting*, 933 F.2d 962 (11th Cir. 1998). Thus, even assuming Mr. Franklin's positions are incorrect, in regards to whether the individual charges qualify or do not qualify as predicates, Mr. Franklin only has two separate qualifying events, not the necessary three. Mr. Franklin does not qualify as an Armed Career Criminal even under the position taken by the Magistrate Judge. Mr. Franklin is entitled to a new sentencing hearing.

MR. FRANKLIN IS NOT AN ARMED CAREER CRIMINAL

In this case, the record reflects that the court relied on the following convictions to enhance the applicant's sentence under the A.C.C.A.: (1)(a) a 1986 State of Florida conviction for Armed Robbery With a Firearm, (1)(b) for Attempted Armed Robbery, and (1)(c) for Aggravated Assault; (2) a 1986 State of Florida Conviction for Battery on a Law Enforcement Officer; and (3) a 1996 State of Florida Armed Robbery conviction. In light of *Johnson*, the applicant no longer has three qualifying "violent felonies" and is therefore no longer an armed career criminal, as explained below.

In regards to the 1986 State of Florida conviction for Armed Robbery With a Firearm, in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), this Court found a 2001 conviction for attempted robbery under Fla. Stat. § 812.13(1) was a "crime of violence" within both the elements and residual clauses of the Career Of-

fender provision of the Guidelines. Notably, though, *Johnson* has since abrogated Lockley's residual clause holding, and *Moncrieffe* and *Descamps* have together abrogated its elements clause holding.

Lockley expressly acknowledged that § 812.13(1) – by its terms – did not constitute an exact match to the elements clause because "putting in fear" did not "specifically require the use or threatened use of physical force against the person of another." 632 F.3d at 1245. Despite that, however, the Court found that a § 812.13(1) conviction satisfied the elements clause, because in its view it was "inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force." *Id.* But that "inconceivability analysis" cannot be squared with the strict categorical analysis now dictated by *Moncrieffe* and *Descamps*. The elements clause assumptions in *Lockley* have been directly abrogated by these intervening Supreme Court precedents which now mandate an element-by-element comparison, and preclude enhancement whenever there is a "mismatch" in "elements."

Moreover, *Descamps* has exposed another flaw in Lockley's assumptions by making clear that the intent element in any § 812.13 offense is categorically overbroad vis-a-vis an offense within the elements clause. According to the Supreme Court, the term "use" in the phrase "use, attempted use, or threatened use of physical force against the person of another" requires an "active employment" of force, which "most naturally" requires a high degree of intent. *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004). But notably, according to the Florida courts' own interpretation of a robbery

by "putting in fear" – caselaw *Lockley* did not consider, but must be considered and deferred to after *Descamps* – a conviction under § 812.13(1) for a robbery by "putting in fear" only requires proof that a "reasonable person" in the victim's position would be "put in fear" during "the course of the taking." The Florida courts do not require the State to prove the offender actually intended to put anyone in fear, or that the victim was actually put in fear. See *State v. Baldwin*, 709 So.2d 636 (Fla. 2nd DCA 1998); *Brown v. State*, 397 So.2d 1153 (Fla. 5th DCA 1981).

Finally, close examination of Florida's standard robbery instruction suggests that the crucial second element for conviction – that "force, violence, assault, or putting in fear was used in the course of the taking" – is indivisible under Descamps. By its terms, the instruction indicates there are only four true "elements" of a § 812.13 robbery offense; that the second "element" ("[f]orce, violence, assault, or putting in fear was used in the course of the taking") is a list of "alternative means" of committing a single robbery offense; and that the jury need not agree unanimously on a "means." Each juror simply must find that either "force," or "violence," or "assault," or "putting in fear" "was used in the course of the taking." Therefore, according to *Descamps*, the second element of a § 812.13 offense is indivisible.

And notably, it is clear from Florida case law that at least one additional means of committing robbery – by "use of force" – sweeps more broadly than the A.C.C.A.'s elements clause, since the quantum of "force" required for conviction is not the *Johnson* level of "violent force." *See, e.g., Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000) (affirming strong-arm robbery conviction under Fla. Stat. § 812.13, and

rejecting defendant's claim that he was only guilty of the newly-created "robbery by sudden snatching" crime under § 812.131 because the State simply showed he had peeled back the victim's fingers before snatching money from out of his hand; explaining that the victim's "clutching of his bills in his fist as *Sanders* pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by *Sanders*;" confirming that no more resistance, or "force," than that was necessary for a conviction under § 812.13(1)).

It is clear from *Sanders* that the quantum of "force" necessary to "overcome a victim's resistance" will vary depending upon the type and degree of resistance by the victim, and that if the victim's resistance is slight, the "force" necessary to overcome it – and seal a "strong-arm" robbery conviction in Florida – is likewise slight. Since the type of violent, pain-causing, injury-risking force required by *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) is not necessary in every § 812.13(1) case, and a person may be found guilty of "strong-arm" robbery in Florida from using only de minimis force, the statute is categorically overbroad for this reason as well. And, post-*Descamps*, a conviction under a "categorically overbroad" statute cannot be an A.C.C.A. predicate. *See* 133 S.Ct. at 2285-2286, 2293.

In addition, in regards to the 1986 State of Florida conviction for Armed Robbery With a Firearm, Mr. Franklin was sentenced for "armed robbery" under Fla. Stat. § 812.13(2)(1986) does not change the above analysis. As a threshold matter, it is clear from the standard robbery instruction at the time of Mr. Franklin's conviction, that in 1986 Fla. Stat. § 812.13(2)(a) and (b) were simply penalty enhancement pro-

visions, not separate enhanced "offenses" with additional "elements." Notably – and differently than today – juries were not instructed in 1986 that they needed to find that the state proved any of the "aggravating circumstances" in the statute ("carrying," of some "weapon," "in the course of committing a robbery") beyond a reasonable doubt. Therefore, according to Descamps, the fact that Mr. Franklin's underlying robbery conviction under §812.13(1) was categorically overbroad, ends the A.C.C.A. elements clause inquiry. Mr. Franklin's A.C.C.A. sentence cannot be upheld based upon judicial findings as to facts on which he never had the protection of the Sixth Amendment. *Descamps,* 133 S.Ct. at 2289.

But notably, even if Mr. Franklin's state court judge or a jury had been required to find the "aggravating circumstances" in § 812.13(2)(1986) beyond a reasonable doubt, that would not change the result now dictated by *Descamps* in any manner, since each of the "aggravating circumstances" in § 812.13(2)(1986) is itself categorically overbroad vis-a-vis the A.C.C.A.'s element clause.

First, § 812.13(2)(1986) permits a sentence enhancement for "armed robbery" simply for "carrying" a weapon, which does not necessitate either using it, brandishing it in a threatening manner, or even visibly displaying it. According to *State v. Baker*, 452 So.2d 927 (Fla. 1984), it simply requires "possessing" it. *See id.* at 929 ("The victim may never even be aware that a robber is armed, so long as the perpetrator has the weapon in his possession during the offense."). In *United States v. Archer*, 531 F.3d 1347 (2008), this Court expressly held that the mere act of "carrying" a weapon, and specifically a firearm, "does not involve the use, attempted use,

or threatened use of force, and so is not a crime of violence under [the elements clause." *Id.* at 1349 (emphasis added).

Second, the word "weapon" in § 812.13(2)(b) [or "deadly weapon" in § 812.13(2)(a)] is not only indeterminate but categorically overbroad vis-a-vis any offense within the elements clause. Poison, anthrax, and chemical weapons are "weapons" that may easily cause death without the "use" of any "physical force." Other courts, notably, have declared convictions overbroad and outside the elements clause for precisely this reason. See, e.g., *United States v. Perez-Vargas,* 414 F.3d 1282 (10th Cir. 2005); *United States v. Torres-Miguel*, 701 F.3d 165, 168-169 (4th Cir. 2012); *Matter of Guzman-Polanco, 26 I & N Dec.* 713, 717-718 (BIA Feb. 24, 2016). And although the Florida legislature has expressly defined the term "weapon" in Fla. Stat. § 790.001(13) to include a "chemical weapon," under Florida law, the list of "weapons" in § 790.001(13) has never limited the universe of items that may qualify a Florida defendant for an "armed robbery" enhancement. Juries and courts have always been permitted to use the much broader, open-ended definition of "weapon" in the standard § 812.13 instruction, pursuant to which "any object that could be used to cause death or inflict serious bodily injury" qualifies as a "weapon." Significantly, that definition creates an "objective test," pursuant to which any item could qualify as a "weapon," if it caused great bodily harm to the victim "during the course of the robbery," even if that was not the defendant's intent. See *Williams v. State*, 651 So.2d 1242, 1243 (Fla. 2nd DCA 1995)(under this "objective test," even-

coffee could trigger enhanced penalty for "armed robbery," if it caused great bodily harm).

Finally, the phrase "in the course of committing the robbery" in § 812.13(2)(1986), is itself broadly defined in a separate provision, § 812.13(3)(a), which explains: "An act shall be deemed 'in the course of committing the robbery" if it occurs in an attempt to commit a robbery or in flight after the attempt or commission." Because of that expansive definition, Florida courts have upheld an enhanced penalty for "armed robbery" upon evidence that a defendant simply stole a gun after robbing a victim of money and other property, and fled with the gun as part of the "loot." *State v. Brown*, 496 So.2d 194 (Fla. 3rd DCA 1986) (defendant's conduct "fell within the unequivocal reach of the armed robbery provision," even if he did not "carry" the firearm during the "taking of the proceeds" from the cash register, because he then stole a gun from under the cash register, and fled the scene with it). Such conduct plainly involves no more than knowing, illegal "possession" of a firearm, which this Court has held is not a "violent felony" under the A.C.C.A. *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010).

Although a panel of the Eleventh Court of Appeals noted in 2006 that it had "conclud[ed] without difficulty," that a Florida armed robbery conviction was "undeniably a conviction for a violent felony," *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), it offered nothing beyond "[s]ee 18 U.S.C. § 924(e)(2)(B)(i)" to support that "undeniable" conclusion. There is no stated analysis in the opinion, and it is therefore unclear what the panel relied upon to reach that conclusion.

Moreover, *Dowd* was decided prior to *Archer* (in 2010); *Curtis Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson* I); *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012); *Moncrieffe* (in 2013); and *Descamps* (in 2013 as well). And the *Dowd* panel's presumption that a 1975 Florida "armed robbery" conviction was "undeniably" an offense within the A.C.C.A.'s elements clause cannot be squared with the strict, element-by-element comparison now required by the categorical approach.

This Court has long recognized that its "first duty" is always "to follow the dictates of the United States Supreme Court," and 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). In similar circumstances, the Court has easily declared prior precedents "effectively overruled." *See Dawson v. Scott*, 50 F.3d 884, 892 n. 20 (11th Cir. 1995); *Archer*, 531 F.3d at 1352; *United States v. Howard*, 742 F.3d 1334, 1337, 1343-1345 (11th Cir. 2014); *see also Scalia, Antonin,* J., *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989) (lower courts are not only bound by the narrow "holdings" of higher court decisions, but also by their "mode of analysis"). Based upon the different "mode of analysis" now dictated by *Archer*, *Curtis Johnson*, *Welch*, *Moncrieffe*, and *Descamps, Dowd* has been effectively overruled at this time.

Although a panel of this Court recently found after reviewing a pro se inmate's application to file a second or successive § 2255 motion in light of *Johnson*, that a Florida "armed robbery" conviction "appears to contain 'as an element the use, attempted use, or threatened use of physical force against the person of anoth-

er," and that "[n]either *Johnson* nor any other case" suggests that such a conviction did not count as an A.C.C.A. predicate," *In re Robinson*, ___ F.3d ___, 2016 WL 1583616 (11th Cir. April 19, 2016), none of the above-cited cases were cited by Mr. Robinson, nor did he make any of the above arguments in his pro se application. However, even assuming Mr. Robinson did not show a "reasonable likelihood" that his pro se challenge to a Florida armed robbery conviction had "possible merit," Mr. Franklin here has made a completely different, much stronger showing sufficient to "warrant fuller exploration by the district court. *Holladay*, 331 F.3d at 1173-74.

In regards to the related 1986 State of Florida Attempted Armed Robbery conviction, if a 1986 State of Florida conviction for Armed Robbery With a Firearm does not qualify, a 1986 State of Florida conviction for Attempted Armed Robbery can't qualify as a violent felony under the A.C.C.A.

In regards to the related State of Florida conviction for Aggravated Assault, a conviction for "aggravated assault" under Fla. Stat. § 784.021 is not a violent felony within the A.C.C.A.'s elements clause because the Florida courts have held that a person may be convicted under § 784.021 upon a mens rea of "culpable negligence," which is akin to recklessness. *See LaValley v. State*, 633 So.2d 1126 (Fla. 5th DCA 1995); *Kelly v. State*, 552 So.2d 206 (Fla. 5th DCA 1989); *Green v. State*, 315 So.2d 499 (4th DCA 1975); and *DuPree v. State*, 310 So.2d 396 (Fla. 2nd DCA 1975); *see generally United States v. Garcia-Perez*, 779 F.3d 278, 285 (5th Cir. 2015) (equating Florida's "culpable negligence" standard with "recklessness").

For an offense to be a violent felony within the A.C.C.A.'s elements clause, however, it must have as an element the active and intentional employment of force, which requires more than negligence or recklessness. *See Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004) (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"); *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 and following *Leocal*).

Admittedly, in *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013) the Court held that an aggravated assault conviction under §784.021 qualified as a violent felony within the A.C.C.A.'s elements clause since "by its definitional terms, the offense 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." *Id.* at 1338 (emphasis in original). Therefore, the Court reasoned, "a conviction under section 784.021 will always include 'as an element the . . . threatened use of physical force against the person of another." *Id.* at 1338 (emphasis in original). The reasoning in *Turner*, however, is inconsistent with the strict, element-by-element comparison now required by the categorical approach as clarified in *Descamps v. United States*, 133 S.Ct. 2276 (2013) and *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014).

In *Howard*, the Court confirmed that sentencing courts conducting divisibility analysis "are bound to follow any state court decisions that define or interpret the statute's substantive elements because state law is what the state Supreme Court says it is"). *Id.* at 1346. And in *Turner*, the Court did not consider how Florida courts interpreted the mens rea element in the underlying assault statute, § 784.011.

Based upon the Florida cases cited above, it is clear that the aggravated assault statute has been interpreted by the Florida courts to require no more than "culpable negligence," which is recklessness. Therefore, there is no "match" between the mens rea element in §784.021 and an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" as interpreted in *Leocal* and *Palomino Garcia*. As such, a conviction under §784.02 is categorically overbroad and not a violent felony within the elements clause.

Since the elements clause analysis in *Turner* has been abrogated, it should not preclude relief at this time. See, e.g., *United States v. Howard*, 742 F.3d 1334, 1338 (11th Cir. 2014) (acknowledging that *Descamps* had unsettled the "settled law" of this Circuit, and required that the Court revisit its earlier decision in *United States v. Rainer*, 616 F.3d 1212, 1213 (11th Cir. 2010); holding that "two crucial aspects of our decision in *Rainer* are no longer tenable after *Descamps*").

In regards to the 1996 State of Florida Attempted Armed Robbery conviction, for the same reasons that the 1986 State of Florida conviction for Armed Robbery With a Firearm does not qualify, and the 1986 State of Florida conviction for Attempted

Armed Robbery doesn't qualify the 1996 conviction doesn't qualify as a violent felony under the A.C.C.A.

CONCLUSION

Because Mr. Franklin no longer qualifies as an armed career criminal, he respectfully requests that this Court grant this § 2255 motion and re-sentence him without the Armed Career Criminal Act enhancement.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on May 16, 2017. I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

By: *s/ Michael D. Spivack*
Michael D. Spivack

A-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 16-22192-CIV-ALTONAGA
(06-20709-CR-ALTONAGA)

JIMMY LEE FRANKLIN,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

GOVERNMENT'S OBJECTIONS TO THE REPORT AND RECOMMENDATIONS

The United States of America, by and through the undersigned Assistant United States Attorney, hereby files these objection to the Report and Recommendations of the Magistrate Judge (DE 12). While the Magistrate Judge correctly found that the second or successive Section 2255 Motion filed by Jimmy Lee Franklin (hereinafter "Movant") should be denied, the government objects to the findings that (1) Movant satisfied his burden to proceed on his claim and (2) Movant's conviction for battery on a law enforcement officer is not a qualifying felony under the elements clause of the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e).

INTRODUCTION

In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), the Supreme Court held that the so-called residual clause of the ACCA is unconstitutionally vague. Movant argues that, as a result, he no longer has three qualifying predicate violent felonies under the ACCA. The Eleventh Circuit has issued two published opinions containing dicta regarding the findings that this Court must make in reviewing a successive Section 2255 claim invoking *Johnson*. *Compare In re Moore*, 830 F.3d 1268, 1271-73 (11th Cir. 2016) (it is for the "district court in the first instance" to determine whether "at the time" of the movant's "sentencing hearing" the district court relied

on the residual clause or other ACCA clauses not implicated by *Johnson,* and if the record is unclear, the court must deny the Section 2255 motion because the defendant has not met his burden of proof) *with In re Chance,* 831 F.3d 1335, 1339-40 (11th Cir. 2016) (disagreeing with *Moore* and opining that an inmate need only show that under current Supreme Court precedent his conviction [or sentence] does not meet one of the definitions that survived *Johnson*).

In his Report and Recommendations, the Magistrate Judge acknowledged that the law surrounding the Supreme Court's holding in *Johnson* is in a state of flux as it applies to second or successive claims filed pursuant to 28 U.S.C. § 2255. The Report and Recommendations cited the *Moore* and *Chance* decisions, noting that the two cases took opposing stands on a movant's burden of proof and the state of the law to be applied. Courts within this District have come down on different sides of the *Moore/Chance* divide. For example, in *Leonard v. United States*, 2016 WL 4576040, *2 (S.D. Fla. Aug. 22, 2016) (Altonaga, D.J.), the court followed *Chance* and concluded that a movant "'can sustain his section 2255 Motion if: (1) it is unclear from the record which clause the sentencing court relied on in applying the ACCA enhancement; and (2) in light of *Johnson*, [his] prior convictions no longer qualify him for the ACCA sentencing enhancement' based on the present state of the law including *Descamp* and *Mathis.*" On the other hand, in *Leone v. United States*, 203 F Supp.3d 1167, 1173-79 (S.D. Fla. Aug. 24, 2016) (Lenard, D.J.), the court followed *Moore* and concluded that a movant whose "*Johnson* claim is inextricably interwined with *Descamps* and *Mathis*" did not satisfy Section 2255(h) because, "[o]ther than the new rule made retroactive by the Supreme Court (i.e., *Johnson*), the Court must apply the law as it existed at the time of sentencing to determine whether the Movant's sentence was enhanced under the ACCA's residual clause."

The Report and Recommendations followed the *Chance* approach and ultimately concluded (1) that Movant satisfied the first factor of the *Chance* test because it is unclear if this Court relied on the residual clause when it enhanced Movant's sentence under the ACCA; but (2) that under the present state of the law Movant has three prior qualifying convictions under the ACCA (DE 12).

The analytical framework set forth by the panel in *Moore* applies well-established precedent to clear congressional limits on the scope of Section 2255(h)(2), and the government respectfully submits that the Magistrate Judge erred in rejecting *Moore* and analyzing this case under the framework of *Chance*.

OBJECTIONS

1. Movant has not satisfied his burden to proceed on his claims.

The government objects to the Report and Recommendations' finding that Movant was not required to satisfy his burden of proof to show that he was sentenced under the residual clause in order to be entitled to relief under *Johnson*. The Magistrate Judge stated that it would be "unfair to require a § 2255 movant to affirmatively prove that the sentencing court relied on ACCA's residual clause because '[n]othing in the law requires a judge to specify which clause of § 924(c) – residual or elements – it relied upon in imposing a sentence'" (DE 12:11) (*quoting Chance*, 831 F.3d at 1340). In rejecting the reasoning of *Moore*, the Magistrate Judge instead relied on *Chance* and *United States v. Winston*, 207 F.Supp.3d 669 (W.D.Va. 2016),[1] which rejected the requirement that a movant establish that he was actually sentenced under the residual clause.

[1] *Winston* was recently vacated and remanded, although the Fourth Circuit Court of Appeals agreed with the district court's burden of proof analysis. *See United States v. Winston*, 850 F.3d

However, as noted by the solid wall of precedent cited in *Moore*, it is well established that a movant in a Section 2255 proceeding has the burden of proving his entitlement to relief on his claim. *Moore*, 830 F.3d at 1272 (collecting cases); *see also Rivers v. United States*, 777 F.3d 1306, 1316 (11th Cir. 2015); *LeCroy v. United States*, 739 F.3d 1297, 1321 (11th Cir. 2014). A prisoner seeking to file a Section 2255 motion based on the new constitutional rule in *Johnson* can only establish that his due process rights were violated if he can show that his ACCA sentence was based on the residual clause. If the movant cannot show that his ACCA sentence was based on the residual clause, then there was no constitutional error encompassed by *Johnson*. While an initial Section 2255 motion is not jurisdictionally limited to a claim based on a new constitutional rule, made retroactive on collateral review by the Supreme Court, as is a successive motion under Section 2255(h)(2), only a constitutional claim based on *Johnson* is timely under 28 U.S.C. § 2255(f)(3). *See Zack v. Tucker*, 704 F.3d 917, 925-26 (11th Cir. 2013) (the statute of limitations under Section 2255(f) applies on a claim-by-claim basis).[2]

In *Moore,* the Eleventh Circuit explicitly directed that if the record is silent or unclear as to whether the Court actually relied on the residual clause when imposing the ACCA sentence, then the District Court cannot grant relief because the movant has not met his burden of showing actual entitlement to relief on his *Johnson* claim. 830 F.3d at 1273. The analytical framework

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677, 682 (4th Cir. 2017).

[2] *Johnson* announced a new constitutional rule that applies retroactively to cases on collateral review, *Welch v. United States*, 136 S. Ct. 1257 (2016). Neither *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013) nor *Mathis v. United States*, 136 S. Ct. 2243 (2016) announced "new" rights although they apply retroactively to cases on collateral review. *See Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016) (holding that *Descamps* applies retroactively on collateral review but did not announce a new rule for purposes of Section 2255(f)(3)).

set forth in *Moore* applies well-established precedent regarding the movant's burden of proof in a Section 2255 proceeding to the clear jurisdictional limitations on the scope of Section 2255(h)(2). *See Ziglar v. United States*, 201 F.Sup.3d 1315, 1322-32 (M.D. Ala. 2016) (applying *Moore* and finding Section 2255(h)(2) criteria for *Johnson* claim was not met because record was unclear and at the time of sentencing the Court could have relied on the residual clause or the enumerated crimes clause in finding that convictions under Alabama's burglary statute qualified as violent felonies under the ACCA, and movant could not use *Johnson* as a portal to rely on *Descamps*). *See also King v. United S*tates, 202 F.Supp.3d 1346 (S.D. Fla. 2016) (where movant failed to demonstrate that he was sentenced under the residual clause, the court was without jurisdiction to consider his second or successive motion).

In the *Johnson* setting, the factual component of the District Court's analysis requires the Court to decide whether a prisoner's ACCA-enhanced sentence in fact depended on the residual clause voided by *Johnson*, and not the elements or enumerated-crimes clauses, left undisturbed by *Johnson*, regardless of whether *Descamps* or *Mathis* renders those convictions non-qualifying. That is because *Johnson* and *Descamps/Mathis* stand on different legal footing. *Chance* overlooked that critical distinction when opining that all a defendant is required to show is "that his sentence is now unlawful" based on current precedent. 831 F.3d at 1341.

The *Chance* Court also mischaracterized *Moore* as saying that a movant could only show that his sentence had been based on the residual clause if "the sentencing judge uttered the magic words 'residual clause.'" *Id.* at 1340. When making the factual determination as to whether the sentencing court relied on the residual clause, a court should consider any relevant record materials (*i.e.*, the presentence investigation report (PSI), any objections or addenda thereto, as well as the

sentencing transcript) and any controlling precedent holding that a particular offense satisfied a particular definitional clause in the ACCA at the time of a movant's sentencing. *See Moore*, 830 F.3d at 1271 (it is for the "district court in the first instance" to determine whether "at the time" of the movant's "sentencing hearing" the district court relied on the residual clause or other ACCA clauses not implicated by *Johnson*).

In this case, the Magistrate Judge found that it was unclear whether the Court had relied on the residual clause. The United States agrees with that factual finding but objects to the Magistrate Judge's finding that Movant's burden of proof is to show only that the Court *may* have used the residual clause and that Movant has established constitutional error under *Johnson* (DE 14:12). In reaching this conclusion, the Magistrate Judge, relying on *United States v. Winston*, 207 F.Supp.3d 669 (W.D. Va. 2016), analogized an unclear sentencing record as to the basis for the ACCA sentence to a general verdict that may have rested on an invalid legal theory. However, there is a fundamental difference between a general verdict that may have rested on a legally insufficient ground and an ACCA sentence that may have rested on the unconstitutional residual clause. As a general rule, constitutional error occurs when a district court submits a charge to the jury on multiple independent grounds, one of the grounds is legally flawed, and it is impossible to tell whether the jury relied on the flawed theory. *See Skilling v. United States*, 561 U.S. 358, 414 (2010); *Yates v. United States*, 354 U.S. 298, 312 (1957). "While the Due Process Clause indeed requires proof beyond a reasonable doubt of every fact necessary to constitute the crime," the ACCA "does not create a separate offense but is merely a sentence enhancement provision." *United States v. McGatha*, 891 F.3d 1520, 1526-27 (11th Cir. 1990). Because the predicate felony convictions necessary for a sentencing enhancement under § 924(e) are not "elements of the

offense" that must be charged in an indictment and "proved beyond a reasonable doubt at the trial," Movant's sentence under Section 924(e) does not "run afoul of the Due Process Clause" unless the Sentencing Court actually relied on the residual clause that the Supreme Court held in *Johnson* was unconstitutionally vague.

The United States urges the Court to reject the Report and Recommendations' application of the *Chance* approach and follow the approach set forth in *Moore.*

2. Movant's conviction for battery on a law enforcement officer is a qualifying violent felony under the elements clause of the ACCA.

In the Report and Recommendations, the Magistrate Judge correctly concluded that Movant's convictions for armed robbery, attempted armed robbery, and aggravated assault are all valid predicate offenses under the elements clause of the ACCA. Those conclusions are dictated by binding Eleventh Circuit precedent. *See United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) (Florida robbery satisfies elements clause); *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016) (*Lockley* applies to pre-1999 robbery convictions); *In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016) ("a Florida conviction for aggravated assault under § 784.021 is categorically a violent felony under the ACCA's elements clause"). However, the Magistrate Judge incorrectly held that Movant's conviction for battery on a law enforcement officer qualifies as a violent felony. Before reaching this conclusion, the Report and Recommendations incorrectly noted that "the parties do not discuss whether the prior conviction for batter on a law enforcement officer" is a valid predicate offense (DE 18:24). While it is true that Movant never argued that this conviction is no longer a valid qualifying offense in the wake of *Johnson*, the government, nonetheless, argued why that conviction satisfies the elements clause of the ACCA (DE 10:8-11).

The correctness of the government's position was confirmed by *United States v. Green*, 842 F.3d 1299 (11th Cir. 2016). In *Green,* the Eleventh Circuit held, in accordance with *Curtis Johnson v. United States*, 559 U.S. 133, 136-37 (2010), that battery under Fla.St. § 784.03 is divisible in three ways: (1) intentionally causing bodily harm, (2) intentionally striking, and (3) actually and intentionally touching the victim. *Green.* 842 F.3d at 1322. Thus, the modified categorical approach applies, and the Court can look to Shepard documents to determine under which of these three elements the defendant was convicted. When engaging in this modified categorical approach, the Court is permitted to rely on undisputed facts in the PSI, which are deemed admitted by a defendant. *See Hires*, 825 F.3d at 1302; *Rozier v. United States*, 701 F.3d 681, 686 (11th Cir. 2012); *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) (explaining that the "failure to object to a district court's factual findings [as to the nature of the prior offense] precludes the argument that there was error in them"). Movant did not object to the following statement in the PSI describing the events surrounding his conviction for battery on a law enforcement officer:

> On January 27, 1987, a Dade Correctional Officer (CO) was strip searching the defendant after a contact visit. The CO found a bag of suspect marijuana on the floor of the search area. The CO picked up the suspect marijuana and attempted to hand it to another CO, who was inside the control booth. The defendant grabbed the CO's hand in an attempt to retrieve the marijuana. The defendant became angry and broke the glass of the control booth on the sixth floor of the Dade County Jail. The defendant was subdued by other COs and was taken to the first floor holding cell. (PSI ¶ 32).

Relying on these undisputed facts, the District Court for the Middle District of Florida has already concluded that Movant's conviction for battery on a law enforcement officer is a violent felony under the elements clause of the ACCA:

> These facts do not demonstrate the "slight" touching that the [*Curtis*] *Johnson* Court found did not qualify as a crime of violence. Instead, the PSI indicates that Petitioner was involved in a physical altercation with multiple corrections officers which included breaking the glass of a control booth in which one of the officers had been standing. Accordingly, the Court concludes that the evidence of record demonstrates that Petitioner's conviction for battery on a law enforcement officer was a crime of violence pursuant to 18 U.S.C. § 924(e)(2)(B)(i).

Jimmy Lee Franklin v. Warden, FCC Coleman-Medium, Case Number 11-CV-00043-SPC-TBS (Docket Entry 13). This Court should reach the same conclusion.

CONCLUSION

While the Court should adopt the ultimate finding of the Report and Recommendations that the Section 2255 Motion should be denied, it should reject its conclusions that Movant satisfied his burden of proof to proceed on his claim and that his conviction for battery on a law enforcement officer is not a valid predicate offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 19, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Sean Paul Cronin
Sean Paul Cronin
Assistant United States Attorney

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22192-CIV-ALTONAGA/White

JIMMY LEE FRANKLIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court upon Movant, Jimmy Lee Franklin's amended Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 [ECF No. 9], filed on June 24, 2016. Respondent, the United States of America, filed an Answer and Memorandum of Law in Opposition [ECF No. 10] on July 5, 2016 and a Notice of Supplemental Authority [ECF No. 11] on July 29, 2016. Magistrate Judge Patrick A. White entered a Report of Magistrate Judge [ECF No. 12], recommending the Motion be denied. Franklin timely filed Objections to the Report [ECF No. 13] on May 16, 2017. The Government filed its own Objections ("Government Objections") [ECF No. 14] as well as a Response to Movant's Objections [ECF No. 16]. The Court has reviewed the parties' written submissions, the record, and applicable law.

When a magistrate judge's "disposition" is properly objected to, district courts must review the disposition *de novo*. FED. R. CIV. P. 72(b)(3). Although Rule 72 is silent on the standard of review, the United States Supreme Court has determined Congress's intent was to require *de novo* review only when objections are properly filed, not when neither party objects. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985); *Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1169 (N.D. Iowa 1999) (quoting 28 U.S.C. § 636(b)(1)). Since the parties filed timely objections, the Court

reviews the record *de novo*.

I. BACKGROUND

On August 1, 2007, Franklin plead guilty to, and was adjudicated guilty of, one count of possession of a firearm and ammunition by a convicted felon under 18 U.S.C. sections 922(g)(1) and 924(e). (*See* Plea Agreement [CR ECF No. 47][1] ¶ 1; Minute Entry for August 1, 2007 Change of Plea Hearing [CR ECF No. 45]).

The Presentence Investigation Report ("PSI")[2] advised Movant qualified as an armed career criminal under the Armed Career Criminal Act, 18 U.S.C. section 924(e), which provides for enhanced sentencing where a criminal defendant violates 18 U.S.C. section 922(g) and has at least three prior convictions for a violent felony or a serious drug offense. *See* 18 U.S.C. § 924(e); (*see also* PSI ¶ 25). The PSI indicated Movant was subject to the ACCA enhancement because of convictions for violent felonies associated with three separate Florida cases:

1. the "**1986 Case**," in which Movant was convicted of: (1) robbery with a firearm; (2) attempted robbery with a firearm; and (3) aggravated assault;
2. the "**1987 Case**,"[3] in which Movant was convicted of battery on a law enforcement officer; and
3. the "**1996 Case**," in which Movant was convicted of two counts of attempted armed robbery.

(*See id.* ¶¶ 25, 31, 32, 38). The PSI did not specify which offenses from each case supported the ACCA enhancement.

Neither the Government nor Movant filed objections to the PSI. (*See* Addendum to the Presentence Report). Movant was sentenced to a 180-month term of imprisonment, the

[1] References to docket entries in Movant's criminal case, Case No. 06-20709-CR-ALTONAGA, are denoted with "CR ECF No."

[2] The PSI and its Addendum are not on the public docket.

[3] The Government notes a typo in the PSI resulted in the incorrect notation of this case as being from 1988. (*See* Gov't's Resp. to Movant Objs. 1 n.1).

minimum statutory term under the ACCA. (*See* PSI ¶ 87; Judgment in a Criminal Case [CR ECF No. 55] 2).

Movant filed his first motion to vacate his sentence under 28 U.S.C. section 2255 — which was ultimately denied — on January 8, 2009. On January 31, 2011, Movant filed a *pro se* petition for habeas corpus under 18 U.S.C. section 1241 in the Middle District of Florida, challenging his conviction for battery on a law enforcement officer in light of recent Supreme Court and Eleventh Circuit case law, including *Curtis Johnson v. United States*, 559 U.S. 133 (2010). (*See* Answer 3). That petition, too, was denied. (*See id.*, Ex. B, Order ("Middle District Order") [ECF No. 10-2]).

On May 17, 2016, Movant filed an application for leave to file a second or successive motion under 28 U.S.C. section 2255 in light of the United States Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). (*See* Answer 5). The Eleventh Circuit Court of Appeals granted Franklin's application on June 14, 2016. (*See generally* USCA Order [ECF No. 1]).

In *Johnson*, the United States Supreme Court considered the legality of a conviction under the so-called "residual clause" of the ACCA. The ACCA requires a 15-year mandatory minimum sentence for a defendant convicted of being a felon in possession of a firearm who also has three previous convictions for a "violent felony" or "serious drug offense." *See* 18 U.S.C. § 924(e)(1).

A "violent felony" is any crime punishable by more than a one-year term that: (1) "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); or (2) "is burglary, arson, or extortion, involves the use of explosives, or [(3)] otherwise involves conduct that presents a serious potential risk of physical

injury to another," *id.* § 924(e)(2)(B)(ii) (alteration added). The first part of the violent felony definition, contained in subsection (2)(B)(i), is known as the "elements clause," while the second and third parts in subsection (2)(B)(ii) are known as the "enumerated clause" and the "residual clause," respectively. In *Johnson*, the Supreme Court struck down the residual clause as void for vagueness. *See* 135 S. Ct. at 2557–60, 2563.

After *Johnson*'s invalidation of the residual clause, Franklin filed the present Motion arguing he no longer qualifies as an armed career criminal under the ACCA since he does not have three qualifying convictions for violent felonies under the ACCA's elements or enumerated clauses. (*See* Mot. 11–22).

II. ANALYSIS

Franklin can proceed on the Motion if: (1) it is unclear from the record which clause the Court relied on in applying the ACCA enhancement; and (2) Franklin's prior convictions no longer qualify him for the ACCA sentencing enhancement after *Johnson*. *See Leonard v. United States*, No. 16-22612-CIV, 2016 WL 4576040, at *2 (S.D. Fla. Aug. 22, 2016) (citation omitted); *see also In re Chance*, 831 F.3d 1335, 1339–41 (11th Cir. 2016); *but see In re Moore*, 830 F.3d 1268, 1271–72 (11th Cir. 2016). As the record is not clear regarding whether Movant was sentenced under the ACCA's residual clause as opposed to the elements or enumerated clause (*see* Report 14–15; *see also* PSI ¶ 25), the Court focuses on whether Movant has three prior convictions that still qualify as violent felonies after *Johnson*.

As discussed, Movant's ACCA enhancement was based upon three prior Florida cases: (1) the 1986 Case involving convictions for robbery with a firearm, attempted robbery with a firearm, and aggravated assault; (2) the 1987 Case involving a conviction for battery on a law

enforcement officer; and (3) the 1996 Case involving two convictions for attempted armed robbery.[4]

To determine whether an offense qualifies as a violent felony under the ACCA, courts apply the "categorical approach" or the "modified categorical approach" depending on the statute of conviction. *See, e.g.*, *Johnson*, 135 S. Ct. at 2557; *see also Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) ("The categorical approach is the framework the Court has applied in deciding whether an offense qualifies as a violent felony under the Armed Career Criminal Act.").

If the statute is indivisible — that is, if it lists only one set of elements for committing the offense — courts apply the categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). Under the categorical approach, a court is limited to looking at the statute's definition, *i.e.*, the elements of a defendant's prior convictions and not the facts underlying the prior offenses. *See id.*; *Mathis v. United States*, 136 S. Ct. 2243, 2246 ("[T]he underlying brute facts or means of commission . . . make[] no difference; even if [the defendant's] conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence." (citation and internal quotation marks omitted; alterations added)).

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[4] At the outset, the Court acknowledges Movant's argument he does not have three separate convictions for sentencing purposes from the 1986 Case or two separate convictions from the 1996 Case. (*See* Movant Objs. 1–2; Gov't Resp. to Movant Objs. 1–2). The ACCA permits an enhancement for three previous convictions for a violent felony "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Movant maintains the armed robbery, attempted armed robbery, and aggravated assault in the 1986 Case "arose from the same criminal event" and so "must be counted as one conviction." (Movant Objs. 2 (citing *United States v. Sweeting*, 933 F.2d 962, 967 (11th Cir. 1991))). The Government concedes the PSI indicates these three crimes "took place simultaneously" and therefore were not committed on different occasions for ACCA enhancement purposes. (Gov't Resp. to Movant Objs. 2). Similarly, Movant's two attempted armed robbery convictions from the 1996 Case are considered one conviction for purposes of the ACCA enhancement. (*See id.*). As a result, in order for Movant's sentence to stand, each of the three Florida cases must contain at least one conviction for a violent felony.

The modified categorical approach is reserved for analyzing ACCA enhancements under divisible statutes, which provide multiple alternative elements capable of satisfying the offense. *See Descamps*, 133 S. Ct. at 2281. A court applying the modified categorical approach may consider a limited class of documents known as *Shepard*[5] documents to determine which of the possible elements of an alternatively worded statute were factually satisfied by a defendant's conduct. *See id.* at 2283–84.

The Court considers the 1986, 1987, and 1996 Cases to determine whether each involved a conviction that still qualifies as a violent felony after *Johnson*.

Armed Robbery. Movant was convicted of one count of armed robbery in the 1986 Case. Florida defines "robbery" as "the taking of money or other property which may be the subject of a larceny from the person or custody of another . . . when in the course of the taking there is the use of force, violence, assault, or putting in fear." FLA. STAT. § 812.13(1) (alteration added). Armed robbery occurs "[i]f in the course of committing the robbery the offender carried a firearm or other deadly weapon." *Id.* § 812.13(2)(a) (alteration added).

Since the filing of the Motion, the Eleventh Circuit has held a conviction for armed robbery categorically qualifies as a violent felony under the ACCA's elements clause. *See United States v. Fritts*, 841 F.3d 937, 943–44 (11th Cir. 2016). *Fritts* explained the Eleventh Circuit's prior precedents in *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006), and *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), already indicated Florida armed robbery and Florida robbery, even without a firearm, both qualify as violent felonies. *See Fritts*, 841 F.3d at 939–42. Movant argues *Dowd* and *Lockley* "cannot be squared with the strict categorical analysis now dictated" by subsequent Supreme Court precedent. (Movant Objs. 3). But *Fritts*

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

ensures their holdings remain good law even after the Supreme Court's subsequent refining of the categorical approach. *See* 841 F.3d at 940–42.

Accordingly, Movant's 1986 conviction for armed robbery qualifies as a violent felony under the ACCA and constitutes his first of three prior convictions sustaining the ACCA enhancement.[6]

Attempted Armed Robbery. Movant was convicted of two counts of attempted armed robbery in the 1996 Case.[7] The ACCA's elements clause encapsulates violent felonies that have as an element "the use, *attempted use*, or threatened use of physical force." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Armed robbery categorically qualifies as a violent felony; by extension, attempted armed robbery qualifies also. (*See* Report 20 (citing *Lockley*, 632 F.3d at 1245) (explaining *Lockley* found attempted robbery satisfied the elements clause of the "crime of violence" provision in the Sentencing Guidelines)). Thus, Movant's 1996 convictions for attempted armed robbery stand as the second prior conviction supporting his ACCA enhancement.

Battery on a Law Enforcement Officer. Movant was convicted of battery on a law enforcement officer in the 1987 Case. Movant previously challenged the battery's status as a violent felony in a 28 U.S.C. section 2241 petition which was denied by the Middle District of Florida (*see* Government's Answer, Ex. B, Order in *Franklin v. Warden, FCC Coleman – Medium*, Case No. 5:11-cv-43-OC-38TBS ("Middle District Order") [ECF No. 10-2]); however,

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[6] As stated, since Movant's 1986 convictions for attempted armed robbery and aggravated assault were not "committed on occasions different from" the 1986 armed robbery, 18 U.S.C. § 924(e)(1), the Court does not address those offenses. Because these three convictions were part of the same criminal episode, they constitute one prior conviction for the purposes of the ACCA enhancement.

[7] As with the 1986 Case, the two attempted armed robbery convictions in the 1996 Case were part of the same criminal event and can only count as one conviction for the ACCA enhancement. Movant was also convicted of one count of attempted armed robbery in the 1986 Case.

the present Motion does not at all discuss whether the offense is a violent felony, instead focusing on armed robbery, attempted armed robbery, and aggravated assault (*see generally* Mot.). For its part, the Government maintains battery on a law enforcement officer qualifies as a violent felony. (*See* Gov't's Answer 8–11; Gov't Objs. 7–9).

The felony offense of battery on a law enforcement officer under Florida Statutes section 784.07(2)(b) requires the same conduct as misdemeanor battery under Florida Statutes section 784.03(1)(a), with the added element the battery is directed against a law enforcement officer. A battery occurs when a person either: (1) "[a]ctually and intentionally touches or strikes another person against the will of the other," or (2) "[i]ntentionally causes bodily harm to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 136 (2010) (alterations in original) (quoting FLA. STAT. § 784.03(1)(a)).

Relying on *Curtis Johnson*, the Report summarily concludes battery on a law enforcement officer does not qualify as a violent felony under the ACCA. (*See* Report 18 (citing *Curtis Johnson*, 559 U.S. at 136–37) (other citations omitted)). But *Curtis Johnson* does not preclude use of a Florida battery conviction to support an ACCA enhancement if violent force was actually used in committing the battery. Instead, recognizing the battery statute is divisible and contains disjunctive elements, the Supreme Court determined courts should apply the modified categorical approach to decide "which version of the offense [the] defendant was convicted of." *Descamps*, 133 S. Ct. at 2284 (alteration added); *see Curtis Johnson*, 559 U.S. at 136.

Under the modified categorical approach, the Court may consider *Shepard* documents including charging documents, plea agreements, and transcripts of plea colloquies to determine which statutory phrase describes Movant's conviction. *Curtis Johnson*, 559 U.S. at 144

(citations omitted). Undisputed statements in a presentence investigation report may also be considered. *United States v. McCloud*, 818 F.3d 591, 595–96 (11th Cir. 2016) (citations omitted).

Movant did not object to the PSI and its summary of the battery offense. (*See* Gov't Objs. 9–10 (citing Middle District Order)). He has not argued his battery conviction no longer qualifies as a violent felony after *Johnson*. (*See* Gov't Resp. to Movant Objs. 2). Accordingly, Movant's conviction for battery on a law enforcement officer constitutes a third prior conviction for a violent felony, which, together with the convictions for armed robbery and attempted armed robbery, sustain his ACCA enhancement.

III. CERTIFICATE OF APPEALABILITY

A certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (alteration added). The Supreme Court has described the limited circumstances when a certificate of appealability should properly issue after the district court denies a habeas petition:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The [Movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000) (alteration added). Movant does not satisfy his burden, and the Court will not issue a certificate of appealability

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Report **[ECF No. 12]** is **ACCEPTED AND ADOPTED** as follows:

1. Movant, Jimmy Lee Franklin's Motion **[ECF No. 9]** is **DISMISSED**.

2. A certificate of appealability shall **NOT ISSUE**.

3. The Clerk of the Court is directed to **CLOSE** this case, and all pending motions are **DENIED as moot**.

DONE AND ORDERED in Miami, Florida, this 17th day of July, 2017.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Patrick A. White;
counsel of record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JIMMY LEE FRANKLIN,
Defendant,

vs. Case No. 16-cv-22192-CMA

UNITED STATES OF AMERICA,
Respondent.

MOTION TO ALTER OR AMEND JUDGMENT
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 59(e)

NOW COME the defendant, Jimmy Lee Franklin, (hereinafter referred to a Defendant), proceeding pro se, and moves this Honorable Court for a Motion to Alter or Amend Judgment dismissing his motion to vacate pursuant to 28 U.S.C. §2255. The ground for the Fed. R. Civ. P. 59(e) motion was manifest error. The court's reliance on the Presentence Report as a Shepard document was a manifest error and thus, grounds for granting the defendant's motion to alter or amend a judgment dismissing his motion to vacate under 28 U.S.C. §2255.

This Court issued a Memorandum and Order dismissing the defendant's Motion to Vacate on July 17, 2017. Jimmy Lee Franklinv. United States, Case No. 1:16-cv-22192-CMA (July 17, 2017)(Altonaga,

C.M.). For reasons which need not be discussed in any great detail, this Court erroneously relied on the Presentence Report in reaching its conclusions, and dismissing the Motion to Vacate. The defendant now file this Motion to Alter or Amend Judgment citing this Court's error.

On June 24, 2016, the defendant filed a §2255 motion challenging the constitutionality of his enhanced sentence as a Armed Career Criminal, following a guilty plea in case no. 06-20709-Cr-Altonaga/16-22192-CIV-Altonaga. The defendant sorted relief in light of the Supreme Court's ruling in **Johnson v. United States**, __ U.S. __, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), made retroactively applicable to cases on collateral review by **Welch v. United States**, 578 U.S. __, 136 S.Ct. 1257, __, 194 L.Ed.2d 387 (2016).

On July 5, 2016, the Government filed a Answer and Memorandum of Law in Opposition. On June 16, 2017, the Magistrate Judge Patrick A. White entered a Report recommending the Motion to Vacate be denied. However, the magistrate found that under controlling law the **Battery on a Law Enforcement Office** did not qualify as a crime of violence. The defendant timely Objected to the Report recommending that his motion be denied. The Government filed its response. [ECF No. 14, 16].

On July 17, 2017, this court issued an Order dismissing the defendant's §2255. In reaching its conclusion, the district court stated that "Movant did not object to the PSI and its summary of the battery offense. He has not argued his battery conviction no

longer qualifies as a violent felony after Johnson. Accordingly, Movant's conviction for battery on a law enforcement officer constitutes a third prior conviction for a violent felony which, together with the convictions for armed robbery and attempted armed robbery, sustain his ACCA enhancement. District Court's Order at 9. This finding constituted a manifest error of the law.

Battery on a Law Enforcement Officer

In 1996, the defendant was convicted of Battery of a Law Enforcement Officer ("BOLEO") in violation of Fla.Stat. §§784.03(1)(a) and 784.07. A person commits battery if he "(1) Actually and Intentionally touches or strikes another person against the will of the other; or (2) Intentionally causes bodily harm to an individual." §784.03(1)(a)(1984). When the battery is committed on a law enforcement officer, it becomes a felony of the third degree. §784.07(2)(b). Defendant's battery conviction was for "touching or striking" the officer.

In **Mathis**, the Supreme Court distinguished between statutes "that list multiple elements disjunctively" and those that "enumerate various factual means of committing a single element." Mathis, 136 S.Ct. at 2249. "The Court held that the modified categorical approach does not apply 'when a statute happens to list possible alternative means of commission.' United States v. Esprit, 841 F.3d 1235, 1239-40 (11th Cir. 2016)(quoting Mathis, 136 S.Ct. at 2257). Defendant states that subparagraph 1 of §784.03(1)(a) -touching or striking- is one element with two alternate means. In the instant case, the district court relied on the modified

categorical approach and thus looked to Shepard documents to determine which version- touching or striking -defendant was convicted of.

In the present case, there was no evidence that the government submitted any documents about the defendant's conviction for battery on a law enforcement officer to which the district court could rely on to deny the defendant the relief requested. Instead, the district court relied on the undisputed statements set forth in the presentence investigation report describing the crime, which indicate the crime involved more than touching. Howvever, in **United States v. Braun**, the Eleventh Circuit held that the district court may not rely on unobjected-to facts from a **prior** PSR to enhance a defendant's sentence under the ACCA in a subsequent proceeding. **801 F.3d 1301, 1306 (11th Cir. 2015)**("Under **Shepard** and **Descamps**, a sentencing court may not rely on a Presentence Report from an unrelated proceeding in place of a **Shepard Document.**"). The defendant see no reason why the principle articulated therein should not apply to his case, where the district court relied on his Presentence Report, which was unrelated to the present proceeding, to find that the defendant Battery on a Law Enforcement Officer constitutes as a violent felony. (District Court Order at p.9).

Based on **Shepard** and **Descamps**, the district court committed a manifest error because undisputed statements describing the nature of the defendant's prior conviction could not be used when

reviewing a **Johnson** claims under the modified categorical approach. Ignoring any facts contained in the PSR describing the nature of the defendant's 1996 conviction for batter of a law enforcement officer, there is no evidence to show that the defendant did anything more than touch the officer.

The district Court also find **United States v. McCloud**, 818 F.3d 591 (11th Cir. 2016) as controlling this case. There, the Eleventh Circuit, on **direct appeal** and **under plain error review**, found that the district court did not err in relying on undisputed facts in the PSI as a Shepard document when conducting a modified categorical approach. However, the circumstances in the present case are distinguishable. Unlike the district court in **McCloud**, in reviewing a Johnson claims, a court must determine whether, in light of a retroactive, substantive change in the law, a defendant has at least three qualifying predicate offenses under the ACCA. The undisputed statements describing the factual circumstances of a prior conviction may not have made any difference in a defendant's case when the defendant was originally sentence, but now mean the difference between a **10-year** and **15-year** sentence. Additionally, in reviewing whether defendant had three qualifying conviction without the residual clause under §2255, a district court does not conduct a plain error review. Thus, United States v. McCloud is not binding in this case.

Even with the benefit of Shepard documents and the PSR, this Court can only conclude the defendant was convicted of touching the officer. See **Moncrifeffe v. Holder**, 133 S.Ct. 1678, 1687, 185 L.Ed.2d 727 (2013)("Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must

presume that the conviction rested upon noting more than the least of the acts criminalized."). Therefore, as in Curtis Johnson, defendant's "conviction was a predicate conviction for a violent felony under the ACCA only if actually and intentionally touching another person constitutes the use of physical force within the meaning of §924(e)(2)(B)(i) [the element clause]." 599 U.S. at 137 (reviewing conviction for Florida battery, in violation of §784.03(1)(a), (2)(4).

Curtis Johnson defined "the phrase 'physical force' to mean violent force-that is, force capable of causing physical pain or injury to another person," Id. at 140. Thus, defendant's conviction failed to constitute a violent felony because "the element of 'actually and intentionally touching' under Florida's battery law is satisfied by any intentional physical contact, 'no matter how slight." Id. at 138(quoting State v. Hearms, 961 So.2d 211, 218(Fla. 2007)). See also Braun, 801 F.3d at 1307 (conviction for BOLEO, in violation of Fla.Stat. §784.03(2)(b), was not a violent felony where "shepard documents only allowed the court to conclude that the defendant actually and intentionally touched a law enforcement officer against his will"). Thus, defendant's 1996 conviction for Battery of a Law Enforcement Officer ("BOLEO"), pursuant to Fla.Stat. §§ 784.03(1)(a) and 784.07(2)(b), is not a violent felony under the elements clause of the ACCA.

Federal Rule of Civil Procedure 59(e)

Federal Rule of Civil Procedure 59 is made applicable t 28 U.S.C. §2255. Federal Rule 59(e) provides that motions to alter or

amend must be filed within twenty-eight days after the entry of the judgment. Because this Court issued its Order on July 17, 2017, the defendant's Motion to Amend or Alter Judgment was timely filed.

Rule 59 motions should only be granted for "newly-discovered evidence or manifest errors of law or fact." In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999). A manifest error is one that "is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." Black's Law Dictionary p. 582 (8th ed. 2004). This Court's reliance on the Presentence Report as its reason for denying the defendant the relief requested was a manifest error.

"A motion for relief under Rule 59 enables a district court to address oversights, and the court appreciates the opportunity to do so." Magnum Opus Techs., Inc. v. United States, 94 Fed. Cl. 553, 554-55(2010).

This Court, in reaching its conclusion in the July 17, 2017, Order, erroneously relied on the Presentence Report. This reliance was a manifest error on the part of this Court. Accordingly, the defendant's Motion to Alter or Amend should be GRANTED.

CONCLUSION

Without the BOLEO conviction, the defendant no longer has the three predicate convictions for violent felony necessary to uphold his ACCA enhanced sentence. This remains true even if defendant's 1986 and 1988 Florida robbery conviction qualifies as a violent felony. Accordingly, defendant ask that the Court to reconsider its Order dated July 17, 2017, dismissing his §2255 and find that

defendant is not an armed career criminal and GRANT his Motion to Correct Sentence.

Respectfully submitted,

/s/ Jimmy Franklin

Jimmy Lee Franklin

CERTIFICATE OF SERVICE

I, Jimmy Franklin, hereby certify that on this 7 day of August, I mailed a true and correct copy of the foregoing with First Class Prepaid Postage to the following address:

Sean Paul Cronin
Assistant United States Attorney
Court No. A5500940
99 N.E. 4th street, Suite 400
Miami, FL. 33132

I declare under the penalty of perjury, 28 U.S.C. §1746, that all of the statements made in this "Certificate of Service" are true and correct.

RESPECTFULLY SUBMITTED.

/s/ Jimmy Franklin

Name: Jimmy Lee Franklin

Register No.: 78370-004

Federal Correctional Institution

P.O. Box 779800

Miami, Florida 33177

Jimmy Franklin #78370-004
Federal Correctional Institution
Miami Low
P.O Box 779800
Miami Fla 33177

USMS INSPECTED
By _____

8/7/17

INITIALS _____

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Wilkie D. Ferguson Jr
United States Courthouse
Clerk of the Court
400 North Miami Ave Room #8
Miami Fla 33128

A-10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22192-CIV-ALTONAGA/White

JIMMY LEE FRANKLIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court upon Movant, Jimmy Lee Franklin's Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e) ("Motion") [ECF No. 19], filed August 8, 2017. The Court has carefully considered the Motion. The parties are directed to the Court's July 17 Order [ECF No. 17] accepting and adopting the Report of Magistrate Judge [ECF No. 12] for a recitation of the facts.

Federal Rule of Civil Procedure 59(e) allows a party the ability to seek post-trial relief in the form of a motion to alter or amend judgment. *See* FED. R. CIV. P. 59(e). "The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law and fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (alteration in original) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)). A party may not use Rule 59 to relitigate old matters or present arguments and evidence that could have been presented prior to the entry of judgment. *See id.* at 1343 (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)). "[T]he decision to alter or amend a judgment is committed to the sound discretion of the district court." *Mitra v. Glob. Fin. Corp.*, No. 08-80914-CIV, 2009 WL

2423104, at *1 (S.D. Fla. Aug. 6, 2009) (alteration added) (citing *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992)).

During its application of the modified categorical approach in the July 17 Order, the Court considered the unobjected-to summary of Movant's 1987 battery on a law enforcement officer offense, as stated in the PSI, to determine whether the offense qualified as a prior conviction for a violent felony so as to sustain an enhancement under the Armed Career Criminal Act. (*See* Order 7–9). Movant asserts the Court's "reliance on the Presentence Report as a *Shepard* document was a manifest error and thus, grounds for granting" his Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Habeas Motion") [ECF No. 9]. (Mot. 1). Alternatively, Movant appears to suggest a proper application of the modified categorical approach, including consideration of the PSI, would indicate the battery on a law enforcement officer was not a violent felony. (*See id.* 5–7).

This is the first time Movant has made any argument regarding his battery-on-a-law-enforcement-officer conviction. He did not raise the claim the battery conviction is not a violent felony in his Application for Leave to File a Second or Successive Motion. (*See* Application [ECF No. 1] 6–36). The amended Habeas Motion and Movant's Objections [ECF No. 16] do not analyze whether battery on a law enforcement officer is a violent felony — despite the Government's discussion of the subject (*see* Answer [ECF No. 10] 8–11). The Court examined the conviction to address the Government's Objections [ECF No. 14] to the Report's finding battery on a law enforcement officer categorically does not qualify as a violent felony. (*See id.* 7–9).

There is no error with regard to the Court's use of the PSI because the Court properly relied on the PSI prepared for the Movant's sentence at issue in this habeas proceeding, not the PSI of an unrelated case. *See United States v. Ramirez-Flores*, 743 F.3d 816, 823 (11th Cir. 2014) (citation omitted) (considering undisputed facts in a presentence report in using modified

categorical approach); *cf. United States v. Braun*, 801 F.3d 1301, 1305–06 (11th Cir. 2015) (holding a sentencing court may not rely on a presentence report from an unrelated proceeding and the district court erred in relying on the PSI prepared for a prior conviction for felony possession of a firearm). Movant alternatively asks the Court to consider legal arguments that were not raised in his original Application and the Habeas Motion (*see* Mot. 5–7), but Rule 59(e) forecloses presentation of arguments that were available to Movant before the judgment, *see Arthur*, 500 F.3d at 1343 (citation omitted).

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 19]** is **DENIED**. The language in the Court's July 17 Order [ECF No. 17] is revised to state the Habeas Motion **[ECF No. 9]** is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 11th day of August, 2017.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Jimmy Lee Franklin, *pro se*;
Magistrate Judge Patrick A. White;
counsel of record