APPENDIX

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14417-F

MAURICE DORVILUS,

Petitioner-Appellant,

versus

UNITED STATES,

Respondent-Appellee.

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

ORDER:

Maurice Dorvilus is a federal prisoner serving a sentence of 204 months' imprisonment for being a felon in possession of a firearm. At sentencing, the court found that he qualified as an armed career criminal, based on five predicate offenses, including a 1989 Florida robbery conviction. Dorvilus appealed, and this Court affirmed his convictions and sentence. In his instant amended 28 U.S.C. § 2255 motion, Dorvilus argued that three of his five predicate offenses, including the 1989 Florida robbery conviction, no longer qualified as predicate offenses under the Armed Career Criminal Act ("ACCA"), in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and, thus, his enhanced sentence under the ACCA was unlawful.

The magistrate judge issued a report and recommendation ("R&R"), recommending that the § 2255 motion be denied, finding that Dorvilus' claim was procedurally barred, and he could not overcome the exceptions to the bar. The magistrate judge found that this Court, in *United*

States v. Lockley, 632 F. 3d 1238 (11th Cir. 2001), already had determined that a Florida robbery conviction qualified as a violent felony, and, in three cases post-*Johnson*, had determined that it continued to qualify as such under the ACCA's elements clause. Thus, Dorvilus continued to have three predicate offenses under the ACCA's elements clause, and his ACCA enhancement was lawful. Over Dorvilus' objections, the district court adopted the R&R and denied the motion. Dorvilus appealed, and has moved this Court for a certificate of appealability ("COA"), arguing that circuits are split as to whether a movant must prove that he was sentenced under the residual clause, rather than the elements clause, to obtain *Johnson* relief, and whether an offense is a violent felony, if the offense has been interpreted by state courts to require only slight force.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, the movant must show that reasonable jurists would find debatable both: (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000) (quotations omitted). Moreover, "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted).

In *Lockley*, this Court addressed whether a 2001 Florida attempted-robbery conviction qualified as a crime of violence under the elements clause of the career-offender provision of the Sentencing Guidelines. 632 F.3d 1238 (11th Cir. 2011); *see also United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010) (providing that "[c]onsidering whether a crime is a "violent felony" under the ACCA is similar to considering whether a conviction qualifies as a "crime of violence" under U.S.S.G. § 4B1.2(a) because the definitions for both terms are virtually identical." (quotations omitted)). This Court determined that Lockley's 2001 Florida

attempted-robbery conviction categorically constituted a crime of violence under the elements clause of the career-offender Guideline. *Lockley*, 632 F.3d at 1244-45.

Post-*Johnson*, in *United States v. Seabrooks*, 839 F. 3d 1326 (11th Cir. 2016), *cert. denied*, 137 S.Ct. 2265 (June 19, 2017), this Court relied on *Lockley* to determine that a 1997 Florida robbery conviction constituted a violent felony under the ACCA. 839 F.3d at 1340-41; *id.* at 1346 (Baldock, J., concurring); *id.* at 1350, 1352 (Martin, J., concurring). In *United States v. Fritts*, 841 F.3d 937, 939-40 (11th Cir. 2016), *cert. denied*, 137 S.Ct. 2264 (June 19, 2017), this Court concluded that Florida armed robbery conviction qualifies as an ACCA violent felony under the elements clause. This Court further determined that *Lockley* had not been abrogated, and that it, as well as *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997), and other Florida Supreme Court law, supported the qualification of Florida robbery as a violent felony under the ACCA's elements clause, because the Florida Supreme Court made clear that the robbery statute never included taking by mere snatching without force. *Fritts*, 841 F.3d at 940-45.

Moreover, this Court already has found unpersuasive Dorvilus' argument that, because his robbery conviction occurred prior to Florida's enactment of the sudden snatching statute, *Lockley* is inapplicable. In *Seabrooks*, this Court determined that *Lockley* was not based on an artificial time divide before and after enactment of the sudden snatching statute, but, rather, was based on the elements of the robbery statute, specifically "force, violence, assault, or putting in fear," that had "not changed from the 1970's to the present." 839 F. 3d at 1343.

Based on the above, Dorvilus' claim is foreclosed by binding Circuit precedent, *see Hamilton*, 793 F.3d at 1266, and, thus, Dorvilus has failed to make the requisite showing and his motion for a certificate of appealability is DENIED. *See Slack*, 529 U.S. at 484.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

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CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 16-22251-CIV-GRAHAM/WHITE
(08-20400-CR-GRAHAM)

MAURICE DORVILUS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court originally on Movant's corrected motion to correct sentence pursuant to Title 28 U.S.C. § 2255 challenging the constitutionality of his enhanced sentence as an armed career criminal in case no. 08-20400-CR-Graham. [D.E. 6]. The matter is now before the Court on the Magistrate Judge's Report and Recommendation [D.E. 14], and the Movant's and Government's respective objections to the Magistrate Judge's Report and Recommendation. [D.E. 15 and 16].

I. Background

THIS MATTER was initiated when Movant Maurice Dorvilus, through counsel, filed a motion attacking his enhanced sentence following a jury-trial conviction of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). [D.E. 6]. Movant was subject to a 15-year mandatory minimum sentence under the Armed Career Criminal Act ("ACCA")

because it was determined by the pre-sentence investigation ("PSI") that Movant committed the firearm possession offense subsequent to at least three prior felony convictions of either a crime of violence or a controlled substance offense. [PSI ¶18].

In his motion, Movant relies on Samuel Johnson v. United States, 135 S.Ct. 2551 (2015) to collaterally attack his 18 U.S.C. § 924(e)(1) enhanced sentence. In Samuel Johnson, the Supreme Court held that the ACCA's "residual clause" in 18 U.S.C. § 924(e)(2)(B)(ii) is unconstitutionally vague. Movant argues that, as a result of Samuel Johnson, he is no longer an Armed Career Criminal because his convictions for Florida robbery in violation of Fla. Stat. § 812.13(1), Georgia robbery in violation of O.C.G.A. § 16-8-40, and Florida burglary in violation of Fla. Stat. § 810.02(1)(a) no longer qualify as predicate "crimes of violence".

The matter was assigned to the Honorable United States Magistrate Judge Patrick A. White. [D.E. 11]. Magistrate Judge White issued a Report and Recommendation recommending that Movant's motion be denied on its merits, and no certificate of appealability be issued. [D.E. 14]. Specifically, the Magistrate Judge found, and the Court agrees, that Movant's prior convictions for O.C.G.A. § 16-8-40 Georgia robbery and Fla. Stat. § 810.02(1)(a) Florida burglary do not constitute as predicate offenses under the ACCA. [D.E. 14 at 26-27]. According to the Report and Recommendation, however, Movant still has three prior felony convictions, Fla.

Stat. § 893.135(1)(b)(1) cocaine trafficking, Fla. Stat. § 810.02(1)(a) Florida robbery, and Fla. Stat. § 784.03(1)(a)(b) resisting an officer with violence, which qualify as predicate offenses under the ACCA. Id. at 25-28. Therefore, the Report and Recommendation concludes that Movant has no basis for relief following Samuel Johnson. Id. at 29.

II. Parties' Objections

a. Movant's Objections

The parties filed timely objections to the Magistrate's Report. [D.E. 13 and 14]. Movant objects to the Report and Recommendation on its finding that the Florida robbery conviction qualifies as a crime of violence under ACCA standards.

i. First Objection

First, Movant argues that the Report erred in relying on United States v. Fritts, 2016 WL 65995533 (11th Cir. Nov. 8, 2016) as binding precedent in its finding that Florida law robbery qualifies as a "crime of violence" under the ACCA's elements clause post-Samuel Johnson. [D.E. 14 at 25]. Specifically, Movant contends that Fritts is not precedential because "it was a Second DCA Florida robbery case which is factually and legally distinct and different from a Third DCA Florida robbery case." [D.E. 15 at 2]. Additionally, Movant claims a writ of certiorari will be sought in Fritts.

However, Fritts and Movant were both convicted under the same

Florida robbery statute, Fla. Stat. § 812.13(1), and cases from the Eleventh Circuit Court of Appeals ("11th Circuit") are binding precedent on this Court. Although a petition of certiorari has been filed, Fritts has not been abrogated and still remains good law under the prior panel precedent rule. See United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008)("Under [the prior panel precedent] rule, a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.").

Additionally, the Report and Recommendation does not rely solely on Fritts in its determination. Magistrate Judge White also cites to United States v. Conde, 2017 WL 1485021 (11th Cir. April 26, 2017), in which the 11th Circuit held that "Florida robbery has always required the 'substantial degree of force' required by the ACCA's elements clause." Id. at *2. This binding precedent also supports Magistrate Judge White's recommendation that Florida robbery is a "crime of violence". After considering the context, reasoning, and decision in Fritts, the Court finds Movant's first objection without merit.

ii. Second Objection

Next, Movant contends that his 1989 Florida robbery no longer qualifies as a "crime of violence". In support of his argument, Movant relies on the 11th Circuit's "least culpable act" rule,

applied in McCloud v. State, 335 S.2d 257 (Fla. 1976) and validated by the Supreme Court in Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013). Movant suggests that under the least culpable act rule, his conviction of robbery "did not have as an element violent, physical force" [D.E. 15 at 5] because not every charge brought under the Florida robbery statute involves "the use, attempted use, or threatened use of physical force" as required pursuant to the elements clause of the ACCA. See [D.E. 15 at 5]; United States v. Estrella, 758 F.3d 1239, 144-45 (11th Cir. 2015). Movant argues that the least culpable conduct under the statute is "putting in fear," and it does not require "the use, attempted use, or threatened use of physical force" in *every case*. [D.E. 15 at 5-7] (emphasis added).

However, a recent 11th Circuit case addressed this issue, "[a]nalyzing the least culpable of the acts in § 812.13(1), we stressed that 'putting in fear' involves an act causing the victim to fear death or great bodily harm and stated that we can 'conceive of no means by which a defendant could cause such fear absent a threat to the victim's person'" United States v. Anthony Bernard Williams, 2017 WL 2712964 at *2 (11th Cir. June 23, 2017)(quoting United States v. Lockley, 632 F.3d 1238, 1246 (11th Cir. 2011). Movant attempts to undermine the 11th Circuit's analysis in Lockley, in that "putting in fear" would not survive the categorical approach in Descamps v. United States, 133 S. Ct. 2276 (2013), which uses an element-by-element comparison to determine whether a prior offense

is a violent felony under ACCA. Id. at 2281.

Further, Movant claims that Lockley's elements clause holding has been abrogated by Moncrieffe v. Holder, 133 S.Ct. 1678, Descamps, and Mathis v. United States, 136 S.Ct. 2243. [D.E. 6-7]. However, Movant is incorrect in this claim; Lockley has not been abrogated and remains good law. See Williams, 2017 WL 2712964 at *2. Therefore, the Court is bound by the recent 11th Circuit decisions which have specifically held robbery to be a "crime of violence" under ACCA's elements clause.

iii. Third Objection

Movant's final objection is that the Court should still hold that his sentence was erroneously enhanced because Florida case law post Robinson v. State, 692 So.2d 883 (1997) suggests that *violent* force is not categorically necessary to overcome "resistance", to suffice as Florida robbery. [D.E. 15 at 8](emphasis added). To support his argument, Movant cites Sanders v. State, 769 So.2d 506 (Fla. 5th CA 2000) and Benitez-Saldana v. State, 67 So.3d 320 (2nd DCA 2011), however, neither of these cases are binding on the Court. Furthermore, "the Robinson court had made clear that the § 812.13 robbery statute had never included a theft or taking by mere snatching because snatching was theft only and did not involve the force needed to sustain a robbery conviction under § 812.13(1)." Conde, 2017 WL 1485021 at *2 (citing Fritts, 841 F.3d at 942-43). It is clear the Florida robbery statute has always contemplated that

some type of "substantial degree of force" is required to pass the threshold of mere theft and that degree of force meets the standard under the ACCA's elements clause. Id.

After considering the context, reasoning, and decisions in Lockley, Conde, Fritts, and upon de novo review of the record, the Court finds Movant's objection without merit.

b. Government's Objection

The Government raises no objection to the Report's conclusion that Movant still qualifies as an armed career criminal. [D.E. 16 at 1] However, the Government objects to the Report's determination that Movant's Florida battery on a law enforcement officer conviction, in violation of Fla. Stat. § 784.03(1)(a)(b), no longer qualifies as an ACCA violent felony. Id. Specifically, the Government contends that the "Magistrate Court wrongly decline[d] to apply the modified categorical approach" in its determination. [D.E. 16 at 2-3].

In the Report, Magistrate Judge White refers to Curtis Johnson v. United States, 559 U.S. 133 (2010), which held that battery on a law enforcement officer is not included in the enumerated clause of the ACCA and does not satisfy the "physical force or violence" requirement of the elements clause. Id. at 136-37. However, the Government is correct in pointing out that a recent 11th Circuit case ruled that a "battery conviction under § 784.03 could potentially qualify under the modified categorical approach.

Importantly, Curtis Johnson left open the possibility that, if Shepard documents are available, then we may be able to determine under which version of the statutory elements a defendant was convicted." United States v. Green, 842 F.3d 1299, 1322 (11th Cir. 2016)(citing Curtis Johnson, 559 U.S. 136-37).

The elements of Fla. Stat. § 784.03(1)(a)(b) are disjunctive therefore, the battery can be proved in one of three ways, "that the defendant '[i]ntentionally caus[ed] bodily harm,' that he 'intentionally str[uck]' the victim, or that he merely '[a]ctually and intentionally touche[d]' the victim." Curtis Johnson, 559 U.S. at 136-37. Since the elements are divisible, Shepard documents could be used to determine if Movant was convicted under the "actually and intentionally touched" element, which would not constitute a violent felony because it could be "satisfied by *any* intentional physical contact, 'no matter how slight'" Id. at 138 (quoting State v. Hearns, 961 So.2d 211, 218 (Fla. 2007). On the other hand, if Movant was convicted under the "striking" element, his conviction would constitute a violent felony under the ACCA elements clause. Green, 842 F.3d at 1322.

Shepard-approved documents include the charging document, written plea agreement, transcript of plea colloquy, and/or undisputed factual findings by the court, such as the PSI. United States v. McCloud, 818 F.3d 591, 595 (11th. Cir. 2016). Referring to the PSI, Movant was sentenced under the "striking" element of the

battery statute because Movant "kicked and punched at the officer" while officers attempted to arrest Movant. [PSI ¶55]. As such, Movant's battery on a law enforcement officer conviction qualifies as a violent felony under the modified categorical approach.

For the reasons stated above, the Court **DENIES** Movant's motion to correct sentence pursuant to Title 28 U.S.C. § 2255 challenging the constitutionality of his enhanced sentence as an armed career criminal in case no. 08-20400-CR-Graham. [D.E. 6]. Because reasonable jurists would not debate that the Motion fails to present a valid claim of the denial of a constitutional right, or that the Motion should have been resolved in a different manner, the Court **DECLINES** to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(3).

III. Conclusion

THE COURT has conducted an independent review of the record and is otherwise fully advised in the premises. Accordingly, for the aforementioned reasons, it is

ORDERED AND ADJUDGED that United States Magistrate Judge Whites's Report [D.E. 14] is hereby **RATIFIED, AFFIRMED and APPROVED in part** to the extent that the Court sustains the Government's objection. It is further

ORDERED AND ADJUDGED that Movant's Corrected Motion to Correct Sentence pursuant to 28 U.S.C. § 2255 [D.E. 6] is **DENIED.** It is further

ORDERED AND ADJUDGED that no certificate of appealability shall issue in this matter. It is further

ORDERED AND ADJUDGED that this case is **CLOSED** and all pending Motions are **DENIED** as Moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of August, 2017.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22251-CV-GAYLES/WHITE
(CASE NO. 08-20400-CR-GRAHAM)

MAURICE DORVILUS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

UNITED STATES'S OBJECTIONS TO REPORT AND RECOMMENDATION

The United States of America, by and through the undersigned Assistant United States Attorney, hereby respectfully submits the following objections to Magistrate Judge White's Report and Recommendation ("R&R") (DE 14).[1] For the reasons set forth below, the United States objects to the R&R's determination that Dorvilus's battery on a law enforcement officer offense no longer qualifies as an ACCA violent felony. However, the United States agrees with the Report and Recommendation's conclusion that Dorvilus still qualifies as an armed career criminal. Specifically, Dorvilus's convictions for cocaine trafficking, Florida robbery, and resisting an officer with violence continue to qualify as violent felonies under the Armed Career Criminal Act ("ACCA").

As to the battery on a law enforcement statute, the Magistrate Court wrongly declines to

[1] Consistent with our prior filings, "DE" refers to docket entries filed in the instant case, *Dorvilus v. United States,* Case No. 16-cv-22251-GAYLES, while documents filed in Movant's criminal case, *United States v. Dorvilus*, Case No. 08-cr-20400-GRAHAM, are referred to herein as "CRDE" followed by the appropriate docket entry number.

apply the modified categorical approach to evaluate whether a conviction for battery against a law enforcement officer qualifies as a violent felony (DE 1 at 28). The Eleventh Circuit ruled in a published opinion that courts should employ the modified categorical approach to evaluate Florida battery convictions. *United States v. Green*, 842 F.3d 1299, 1322 (11th Cir. 2016) (holding Florida battery convictions under § 784.041 or § 784.03 "could potentially qualify under the modified categorical approach"). The court explained, "Importantly, *Curtis Johnson* left open the possibility that, if *Shepard* documents are available, then we may be able to determine under which version of the statutory elements a defendant was convicted." *Id.* (citing *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010)).

The Eleventh Circuit unequivocally held that "[t]he statutes for both battery under § 784.03 and § 784.041 – which share the same first element – are divisible." *Green*, 842 F.2d at 1322. The court expounded, "The Supreme Court has explained that § 784.03 is 'disjunctive, [and] the prosecution can prove a battery in one of three ways . . . [that he] '[i]ntentionally cause[ed] bodily harm,' that he 'intentionally str[uck]' the victim, or that he merely '[a]ctually and intentionally touche[d] the victim." *Id.* (citing *Curtis Johnson*, 559 U.S. at 136-37). Because *Green* is binding Eleventh Circuit law, this Court is obligated to apply the modified categorical approach to its consideration of the offense of battery on a law enforcement officer, which incorporates § 784.03, and simply adds an additional element regarding the victim's status pursuant to § 784.07.

Applying the modified categorical approach to Dorvilus's battery on a law enforcement officer offense illustrates that he violated the first or second of the disjunctive battery elements outlined in *Green* by either "intentionally causing bodily harm" or "intentionally str[iking] the victim" when he "kicked and punched at the officers" (PSI ¶ 55). These undisputed facts from

Dorvilus's PSI conclusively demonstrate that his offense was not a violation of the third disjunctive element for a mere actual and intentional touch. *In re Hires*, 825 F.3d 1297, 1302 (11th Cir. 2016) ("In determining the nature of a defendant's prior convictions and whether to classify the defendant as an armed career criminal under the ACCA, the sentencing court may rely on *Shepard*-approved documents and any undisputed facts in the presentence investigation report.") (citing *United States v. McCloud*, 818 F.3d 591, 595, 599 (11th Cir. 2016); *United States v. Bennett*, 472 F.3d 825, 832-34 (11th Cir. 2006); *United States v. Wade*, 458 F.3d 1273, 1277-78 (11th Cir. 2006)). Accordingly, Dorvilus's battery on a law enforcement officer conviction qualifies as a violent felony.

WHEREFORE, the United States respectfully requests that this Court decline to adopt the R&R and deny Dorvilus's motion to vacate.

Respectfully submitted,

BENJAMIN G. GREENBERG
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 25, 2017, I electronically filed the foregoing response with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served today on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

s/ Brandy Brentari Galler
BRANDY BRENTARI GALLER
ASSISTANT UNITED STATES ATTORNEY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 16-CV-22251-DLG/PAW
(Underlying Case No. 08-20400-Cr-Graham)

MAURICE DORVILUS
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

MR. DORVILUS' OBJECTIONS TO THE MAGISTRATE'S REPORT & RECOMMENDATION [DE 14]

Maurice Dorvilus, through undersigned counsel, respectfully files his objections to the R&R [DE 14] in which the Magistrate Court recommends his § 2255 be denied, no certificate of appealability issue, and the case be closed. In support thereof, he states:

I. THE § 2255 SHOULD NOT BE DENIED BECAUSE THE 1989 FLORIDA ROBBERY CONVICTION DOES NOT QUALIFY AS A CRIME OF VIOLENCE.

The predicate conviction at issue is a 1989 Florida robbery conviction that was within the jurisdiction of Florida's Third DCA. For the all the reasons set forth in his § 2255 [DE 6], as well as his Reply [DE 10], Mr. Dorvilus objects to the R&R's conclusion that his 1989 Florida robbery conviction qualifies as a predicate conviction under the Armed Career Criminal Act (ACCA).

A. *Fritts* does not control the outcome of Mr. Dorvilus's case as it was a Second DCA Florida robbery case which is factually and legally distinct and different from a Third DCA Florida robbery case.

As a threshold matter of law, the Eleventh Circuit has been clear that the holding of a case can extend no further than the facts and circumstances there before the Court. *United States v. Birge*, 830 F.3d 1229, 1233 (11th Cir. 2016) (Carnes, C.J.) ("[W]e have explained time and time again: [A] decision can hold nothing beyond the facts of that case;'" "All statements that go beyond the facts of the case . . . are dicta. And dicta is not binding on anyone for any purpose") (citation omitted). In *United States v. Fritts*, ___ F.3d ___, 2016 WL 65995533 (11th Cir. Nov. 8, 2016), the 1989 robbery conviction at issue occurred in Pinellas County, which is within Florida's **Second DCA**. *See* Initial Brief in *United States v. Fritts*, 2016 WL 1376197 at *2 (March 14, 2016). As such, the *Fritts* panel could not have "held" anything beyond that a 1989 Florida robbery conviction within the Second DCA required proof that the defendant used sufficient force to overcome victim resistance; was not for mere snatching; and "violent force" was an element.

Notably, as the government itself pointed out in its Answer Brief in *Fritts*, that conclusion was consistent with Second DCA law at the time of Fritts's conviction. *See* Answer Br. in *United States v. Fritts*, 2016 WL 2347280 at **36-37 (citing *Adams v. State*, 295 So.2d 114, 116 (Fla. 2nd DCA 1974) as "approving a jury instruction stating that pocket picking or purse snatching is not a robbery if no more force or violence is used than is necessary to remove the item from a non-resisting person;" noting that the government was "unable to identify a single decision of the

Second District Court of Appeal from 1963 to 1997 that would support the[] proposition" that a robbery conviction was permissible "upon proof of only the slightest of force").

Mr. Dorvilus preserves his argument that *Fritts* does not apply to his case, much less control the outcome. Assuming *arguendo* this Court applies *Fritts* Mr. Dorvilus preserves his arguments below that the *Fritts* was wrongly decided and a writ of certiorari will be sought.

B. Mr. Dorvilus's 1989 Florida Robbery no longer qualifies as a crime of violence.

In 1999, the Florida legislature enacted a separate "robbery by sudden snatching" statute, Fla. Stat. §812.131. Before that time, as the Eleventh Circuit correctly recognized in *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012) (Welch's direct appeal case), non-forceful snatching offenses were being prosecuted under §812.13(1) in many Florida DCAs. *See Welch*, 683 F.3d at 1311 and nn.28-38 (noting with significance that in 1996 when Welch was convicted, "the state courts of appeal were divided on whether a snatching, as of a purse, or cash from a person's hand, or jewelry on the person's body, amounted to robbery"). In *Welch*, the Eleventh Circuit recognized that the Legislature's enactment of the sudden snatching statute, "appear[ed] to have been a legislative response to the 1997 Florida Supreme Court decision [*Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997)]," "holding that 'there must be resistance by the victim that is overcome by the physical force of the offender' to establish robbery, so that the intermediate appellate decisions holding mere snatching to be sufficient were put in doubt." *Welch*, 683 F.3d at 1311.

The Eleventh Circuit correctly recognized in *Welch* that, before *Robinson*, the "latest authoritative pronouncement" as to the elements of robbery under §812.13(1) was in *McCloud v. State*, 335 So.2d 257 (Fla. 1976). And in *McCloud*, the Florida Supreme Court expressly held that "***any degree of force suffices***" for robbery, including the minimal amount of force necessary to "extract" property from a victim's "grasp," so long as the taking is not by "stealth." *McCloud*, 335 So.2d 258-259 (explaining that what distinguished robbery from larceny is the victim's awareness of the taking) (emphasis added).

In light of *McCloud*, the Eleventh Circuit, applying the "least culpable act" rule—which has since been expressly validated by the Supreme Court in *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013)—assumed that the defendant's pre-*Robinson* robbery convictions for were sudden snatching only. While the Eleventh Circuit in *Welch* did not follow its own "least culpable conduct" analysis to its logical conclusion, it *did* agree with Welch that at least "[a]rguably the elements clause would not apply to mere snatching." 683 F.3d at 1312-1313. Although it was unnecessary to definitively resolve that issue in *Welch* (because even a non-forceful snatching crime satisfied the residual clause), Magistrate Judge White has correctly recognized in *Jones* that the government has since conceded in other cases in this district that a robbery by sudden snatching under Fla. Stat. §812.131 no longer qualifies as an ACCA predicate after *Johnson*. *Melvin Jones v. United States*, Case No. 15-81380-Civ-Hurley/White, DE35 at 17 (S.D. Fla. June 23, 2016) (referring to *Edlord Dieujuste v. United States*, Case No. 15-80618-Civ-Ryskamp/White)).

Although Mr. Dorvilus, unlike Welch, was convicted after the new snatching statute was enacted, the Court still must assume, under the least culpable act rule, that his conviction did not have as an element violent, physical force. This is so because binding Eleventh Circuit precedent makes clear that, after *Descamps*, "every charge" brought under the statute must necessarily satisfy the elements clause in order to qualify under that clause. *United States v. Estrella*, 758 F.3d 1239, 1244-45 (11th Cir. 2015) (stating that categorical approach's "analysis permits application of the . . . enhancement 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") (emphasis added; citations omitted); *id.* at 1245 ("the categorical approach focuses on whether in *every case* a conviction under the statute *necessarily* involves proof of the element") (first emphasis added; citation omitted). And that is not true here because, even after *Robinson*, violent, physical force was not required to commit robbery.

Furthermore, the Eleventh Circuit's decision in *Lockett* and the Supreme Court's decision in *Mathis* have now left no possible doubt that the second "element" of any Florida robbery conviction – that "force, violence, assault, or putting in fear was used in the course of the taking" — is a single indivisible element. "Force" and "putting in fear" are *not* alternative "elements" under the statute; they are alternative "means" of satisfying the second element of the offense. *See* Fla. Std. Jury Instr. in Crim. Cases No. 15.1. And since the least culpable conduct under the Florida

caselaw – namely, "force" – plainly does not require "violent force" in every case, then, under the "categorical approach" as clarified in *Descamps* and *Mathis*: (1) the elements of a § 812.13(1) conviction and the ACCA's elements clause do *not* "match;" (2) the Florida robbery statute sweeps more broadly than the elements clause in at least this respect; and (3) §812.13(1) is "indivisible," the "modified categorical approach" will never be permissible, "*Shepard* documents" will have no use or relevance, every §812.13(1) conviction will be "categorically overbroad," and a "categorically overbroad" conviction cannot be an ACCA predicate. *See* 133 S.Ct. at 2285-2286, 2293.

It is undeniable from the pre-*Robinson* caselaw surveyed in *Welch*, the post-*Robinson* decisions in *Sanders* and *Benitez-Saldana*, the Florida legislature's use of the different terms "force" *and* "violence" within §812.13(1), and "Florida's 'elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage,'" *United States v. Shannon*, 631 F.3d 1187, 1189 (11th Cir. 2011)(citing *Mendenhall v. State*, 48 So.3d 740, 749 (Fla. 2010)), that a robbery "by force" in Florida has *never* required the use of the *Johnson* level of "*violent* force" for conviction.

To be sure, in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), the Eleventh Circuit 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*, *Descamps*, and *Mathis* 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 *Lockley* 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*, *Descamps*, and *Mathis*. 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 an enhancement whenever there is a "mismatch" in "elements."

In addition, as mentioned above, the crucial second element for conviction – that "force, violence, assault, or putting in fear was used in the course of the taking" – is plainly indivisible following *Mathis*. 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 *Mathis*, the second element of a §812.13 offense is indivisible.

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. 2d DCA 1998); *Brown v. State*, 397 So.2d 1153 (Fla. 5th DCA 1981).

C. The Court can and should still hold that Mr. Dorvilus's sentence was erroneously enhanced as an ACCA since the post-*Robinson* Florida caselaw confirms that *violent* force is not categorically necessary to overcome "resistance."

Florida caselaw, post-*Robinson*, confirms that Florida robbery is still categorically overbroad because violent force is not categorically necessary to overcome a victim's resistance. Undoubtedly, the Florida Supreme Court in *Robinson* agreed with the Third DCA in *S.W.*, and clarified for the other DCAs that had ruled differ-

ently after *McCloud* that there needed to be at least some victim resistance for a prosecution for robbery, and that a "snatching or grabbing of property without such resistance by the victim amounts to theft rather than robbery." 692 So.2d at 887. However, the Florida Supreme Court's holding in *McCloud* that "any degree of force" sufficed for robbery (*i.e.*, violent force was not required), remained the law in Florida even post-*Robinson*. Indeed, that particular statement of law was consistent with the Florida Supreme Court's earlier holding in *Montsdoca v. State*, 93 So. 157 (Fla. 1922), that the "degree of force used" in a robbery "is immaterial." *Id.* at 159. The government, tellingly, ignores that holding of *Montsdoca* in discussing that case in its brief.

However, *even if* the Court were to find that some modicum of resistance has always been an element of a Florida robbery conviction since the 1922 decision in *Montsdoca*, and that *Robinson* simply clarified that a mere snatching has never sufficed for robbery in Florida, the Court can and should still affirm the district court – albeit on a different ground. Specifically, as Mr. Dorvilus argued below, the *Curtis Johnson* level of "*violent* force" is not required to overcome victim resistance in Florida. The post-*Robinson* Florida caselaw confirms that the degree of force necessary will always be a function of the degree of resistance. And, as indicated by the decision in *Sanders v. State*, 769 So.2d 506 (Fla. 5thCA 2000), if the victim's resistance is slight, the "force" necessary to overcome it is likewise slight. *See id.* (affirming strongarm 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 where 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 strongarm robbery conviction under § 812.13(1)).

As such, even ***if*** victim resistance *were* a necessary element of all of Mr. Dorvilus's robbery convictions—a point which Mr. Dorvilus does not concede—the Court should hold that "violent force" was *not*. *Sanders* confirms that the quantum of force "legally" necessary to seal a § 812.13(1) conviction in Florida remains extremely slight – and far less than the *Curtis Johnson* level of "violent force" – to this day. *See also Benitez-Saldana v. State*, 67 So.3d 320, 323 (a. 2nd DCA 2011) (rejecting defendant's argument that actual "violence" was necessary for a strongarm robbery conviction in Florida, and that his act of "engaging in a tug-of-war over the victim's purse" could not constitute robbery because it "was not done with violence or the threat of violence;" holding that it was sufficient that there was "the use of force to overcome the victim's resistance"). These post-*Robinson* decisions confirm that *violent* force could *not* have been a "necessary element" of Mr. Dorvilus's robbery convictions – even if force "against resistance" were an element of the offense in 1987—which Mr. Dorvilus does not concede.

It is undeniable from the pre-*Robinson* caselaw surveyed in *Welch*, the post-*Robinson* decisions in *Sanders* and *Benitez-Saldana*, the Florida legislature's use of

the different terms "force" *and* "violence" within § 812.13(1), and "Florida's 'elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage,'" *United States v. Shannon*, 631 F.3d 1187, 1189 (11th r. 2011) (citing *Mendenhall v. State*, 48 So.3d 740, 74(Fla. 2010)), that a robbery "by force" in Florida has *never* required the use of the *Curtis Johnson* level of "*violent* force" for conviction.

And as a matter of law, that is case-dispositive in the aftermath of *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016) and *Mathis v. United States*, 136 S.Ct. 2243 (2016), which have left no possible doubt that the second "element" of a Florida robbery conviction – that "force, violence, assault, or putting in fear was used in the course of the taking" – is indivisible. Notably, Florida's standard jury instructions for robbery have never required that the jury unanimously agree as to these means. And given that, it is irrelevant under current law whether, as the Court held in *Lockley*, a robbery by "putting in fear" continues to meets the ACCA's elements clause. For indeed, *Mathis* has confirmed that "putting in fear" is simply one "means" – and not the least culpable means – of committing the clearly-indivisible robbery offense under § 812.13 (1).

In short, both prior to and after *Robinson*, the least culpable means of committing a robbery in Florida was a robbery by "force," for which "any degree of force" has always sufficed, and "*violent* force" has never been required for conviction. Therefore, however the Court chooses to analyze this case, its conclusion should be

the same: Mr. Dorvilus's Florida robbery convictions were categorically overbroad vis-a-vis an offense that has "as an element" "the us attempted use, or threatened use of violent force against the person of another." Since the Supreme Court was clear in *Descamps* that a categorically overbroad conviction is never a proper ACCA predicate, 133 S.Ct. at 2285-2286, 2293, the decision of the district court should be affirmed.

II. A CERTIFICATE OF APPEALABILITY SHOULD ISSUE.

A. Legal Standard for a COA

A certificate of appealability ("COA") must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. §2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] 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.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

As the Supreme Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, af-

ter the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. *See also Buck v. Davis*, ___ U.S. ___, 2017 WL 685534, *11-12 (U.S. Feb. 22, 2017).

Under this "debatable among reasonable jurists" standard, the fact that there is a split among various courts on the question satisfies the standard for obtaining a COA. *See Lambright v. Stewart*, 220 F.3d 1022, 1028-29 (9th Cir. 2000). Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001); *see also Welch v. United States*, 136 S. Ct. 1257, 1263-1264, 1268 (2016) (Court of Appeals erred by denying a COA, because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence").

B. Reasonable jurists could debate whether Mr. Dorvilus has three qualifying ACCA predicates.

The Western District of New York analyzed the Florida Robbery Statute and found that it no longer qualifies as a "violent felony" predicate for purposes of the ACCA. It is significant that another federal district court, sitting in the Western District of New York, analyzing a Florida robbery conviction from 2000—11 years after the Florida robbery conviction at issue in this case—determined that it was not a "crime of violence." In *Antonio Demaris Lee v. United States*, Civil Case No. 6:16-cv-6009-MAT & Criminal Case No. 6:08-cr-6167, 2016 WL 1464118, at *5-7 (W.D.N.Y. Apr. 12, 2016), the Court granted the movant's § 2255, finding that his

conviction in 2000 for Florida robbery "cannot be a predicate 'violent felony' under the ACCA." *Id.* at *7. Its mode of analysis and reasoning, mirrored that of the district court in the instant case and that which is mandated by the Supreme Court:

> "[F]orce" sufficient to form an ACCA predicate "violent felony" must be "*violent* force—that is, force capable of causing physical pain or injury to another person. The Florida robbery statute simply states that "the use of force, violence, assault, or putting in fear" must be used in the "course of the taking," but it does not specify against whom or against what the force, violence, assault, or putting in fear is directed. Nor does "putting in fear," for instance, necessarily require the use of "physical" "force capable of causing physical pain or injury to another person." Likewise, the fact that the defendant "carried a firearm or other deadly weapon" does not equate to the use of "physical" "force capable of causing physical pain or injury to another person." The Court therefore concludes that Florida's robbery statute is not a categorical match for the ACCA definition of "physical force."
>
> Because Florida's robbery under Fla. Stat. § 812.13(1) and (2)(a) is not a categorical match for "physical force" under *Johnson*, and because the status is indivisible, Movant's Florida conviction for robbery cannot be a predicate "violent felony" under the ACCA.

Antonio Demaris Lee, 2016 WL 1464118, at *5-7 (emphasis in original; citations omitted).

Thus, where there exists a debate among reasonable jurists, a COA should issue to allow Mr. Dorvilus the opportunity to fully brief this important legal matter for review.

III. CONCLUSION

WHEREFORE, the movant Maurice Dorvilus respectfully requests this Court GRANT his objections to the R&R and GRANT his § 2255; alternatively, he respectfully requests this Court GRANT his request for a Certificate of Appealability.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on **May 24, 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 or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/ Sowmya Bharathi*

A - 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-CV-22251-GAYLES
(08-CR-20400-GAYLES)
MAGISTRATE JUDGE PATRICK A. WHITE

MAURICE DORVILUS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE RECOMMENDING MOTION TO VACATE BE GRANTED IN LIGHT OF JOHNSON V. UNITED STATES

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, 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. See In re Maurice Dorvilus, Eleventh Circuit Court of Appeals, Case No. 16-12684-J, Order entered June 16, 2016.(Cv DE# 1).

Petitioner is challenging the constitutionality of his enhanced sentence as an armed career criminal, entered following a jury trial in **case no. 08-CR-20400-Gayles**. Movant seeks relief in light of the Supreme Court's ruling in Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551 (2015) (hereinafter, "Samuel Johnson"), 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# 5, 6), the government's answer in opposition to the complaint (Cv DE# 8), Petitioner's reply thereto (Cv DE# 10, 12), and Petitioner's notice of supplemental authority. (Cv DE# 13).

II. Procedural History

Petitioner was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1). (Cr DE# 9). The indictment also alleged that he was subject to the ACCA's enhanced penalty, citing 18 U.S.C. §924(e)(1). (Id.). On August 13, 2008, Petitioner was convicted after a jury trial. (Cv DE# 63).

Prior to sentencing, a PSI was prepared, applying the 2008 Guidelines, which reveals as follows. The base offense level was set at 24 because the offense involved possession of a firearm and the Petitioner committed the instant offense subsequent to sustaining at least two prior felony convictions of either a crime of violence or a controlled substance offense, §2K2.1(a)(2). (PSI ¶12).

The adjusted offense level of 24 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 ¶18). The PSI

identified the prior offenses on which it relied. (PSI ¶18). Specifically, the following state court convictions: robbery in case no. F89-14196 (PSI ¶24), cocaine trafficking in case no. F92-42114A (PSI ¶35), robbery in Georgia state court case no. 98-FE-104-F (PSI ¶51), burglary of a structure in case no. 98-21816CF (PSI ¶53), resisting arrest with violence, and battery on a law enforcement officer in case no. F00-37541 (PSI ¶55). The total offense level was set at 33. (PSI ¶20).

The PSI next determined that the movant had a total of 10 criminal history points and because Petitioner was an armed career criminal, his criminal history category was set at IV. (PSI ¶57). 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). (PSI ¶94). Based on a total offense level of 33 and a criminal history category IV, the guideline imprisonment range was 188 to 235 months. (PSI ¶95).

On January 6, 2009, Petitioner appeared for sentencing wherein the court found that he qualified as an armed career criminal and then sentenced him to 204 months' imprisonment. (Cr DE# 92, Sentencing Hearing Transcript). The Clerk entered judgment on **January 6, 2009**. (Cr-DE# 84).

Movant prosecuted a direct appeal. On December 17, 2009, the Eleventh Circuit affirmed the convictions and sentences in a written but unpublished opinion. United States v. Dorvilus, 357 Fed. Appx 239 (11th Cir. 2009). Certiorari review was denied on April 19, 2010. Dorvilus v. United States, 559 U.S. 1084 (2010).

Thus, the judgment of conviction became final on **April 19,**

2010, when the U.S. Supreme Court denied certiorari review.[1] The movant had one year from the time his judgment became final, or no later than **April 19, 2011**,[2] within which to timely file his federal habeas petition, challenging the judgment of conviction. 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. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)).

Less than a year after the statute of limitations expired, Movant returned to this court on **March 15, 2011** filing his first §2255 motion, assigned case no. 11-cv-21122-Gayles. (11-cv-21122, DE#1). A Report recommended that the motion be denied on the merits. (11-cv-21122, DE# 14). The District Court issued an order adopting the report. (11-cv-21122, DE# 19). Petitioner appealed. (11-cv-21122, DE# 21). The Eleventh Circuit denied Petitioner's

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[1]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).

[2]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.

motion for a certificate of appealability because Dorvilus failed to make a substantial showing of the denial of a constitutional right as to any of his claims. (11-cv-21122, DE# 28). Petitioner filed a petition for writ of certiorari in the Supreme Court, which was denied. (11-cv-21122, DE# 29).

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. Samuel 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**, the Supreme Court held that Samuel 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 Samuel 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# 7). The parties have complied with the court's briefing schedule and the case is now ripe for review.

III. Threshold Issues

A. Timeliness

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. Samuel 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,** the Supreme Court held that Samuel 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).

The parties agree that the petition is timely as it was filed within one year of the Supreme Court's issuance of Samuel Johnson on June 26, 2015.

B. Procedural Bar

The government contends that, even if Samuel Johnson applies to 18 U.S.C. §924(c)(3)(B), Petitioner is procedurally barred from raising this argument because he never argued at sentencing or on direct appeal that the residual clause was unconstitutionally vague.(CR DE# 8:7-8).

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding; Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It

is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)(citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can be shown when a claim "is so novel that its legal basis [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96; see also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Id. at 496; see also Bousley, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992)("the miscarriage of justice exception is concerned with actual as compared to legal innocence").

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). That is precisely the circumstance here. Samuel Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. However, no actual prejudice would result from finding a procedural default here because, as set forth below, regardless of whether Samuel Johnson applies, Petitioner's ACCA enhancement remains valid. Accordingly, Movant cannot establish cause-and-prejudice to overcome the procedural bar.

IV. 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 hi burden that he is entitled to relief, and in this context the movant cannot meet that burden unless he proves that hew as 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 Samuel 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, Samuel 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 Samuel 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 Samuel 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 Samuel 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 Samuel 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 Samuel 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 Samuel 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).

V. 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 Petitioner's ACCA enhancement (PSI ¶18) was based on robbery in case no. F89-14196 (PSI ¶24), cocaine trafficking in case no. F92-42114A (PSI ¶35), robbery in Georgia state court case no. 98-FE-104-F (PSI ¶51), burglary of a structure in case no. 98-21816CF (PSI ¶53), resisting arrest with violence, and battery on a law enforcement officer in case no. F00-37541 (PSI ¶55).

The PSI next determined that the movant had a total of 10 criminal history points and because Petitioner was an armed career criminal, his criminal history category was set at IV. (PSI ¶57). 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). (PSI ¶94). Absent an ACCA enhancement, the maximum sentence for violation of §922(g) is ten years' imprisonment. See 18 U.S.C. §922(g). Based on a total offense level of 33 and a criminal history category IV, the guideline imprisonment range was 188 to 235 months. (PSI ¶95).

On January 6, 2009, Petitioner appeared for sentencing wherein the court found that he qualified as an armed career criminal and then sentenced him to 204 months' imprisonment. (Cr DE# 92, 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 ¶18). 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 Samuel 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 Samuel Johnson, 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, Samuel 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 Samuel Johnson did not invalidate ACCA's elements clause or enumerated crimes clause. Samuel 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 Samuel Johnson is retroactively applicable to cases on collateral review. Welch v. United States, 136 S.Ct. 1257 (2016).

Generally, any fact that increases either the statutory maximum or statutory minimum sentence is an element of the crime, that must be submitted to a jury and proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000); Alleyne v. United States, 570 U.S. ___, ___, 133 S.Ct. 2151, 2163-64 (2013). However, there is one exception to the rule--the fact of a prior conviction may be found by the sentencing judge, even if it increases the statutory maximum sentence for the offense. Descamps, 133 S.Ct. at 2289. The Supreme Court has explained that the reason for the exception is that the defendant either had a jury trial that led to the conviction, or waived the right when pleading guilty. See Descamps, at 2288. Thus, when determining whether a prior conviction qualifies as a violent felony under the ACCA, courts may only look to the elements of the crime, not the underlying facts of the conduct that led to the conviction. Id. Additionally, district courts may make findings regarding the nature of a prior conviction for ACCA purposes. United States v. Day, 465 F.3d 1262, 1264-65 (11th Cir. 2006)(*per curiam*).

In other words, when applying §924(e), courts should generally only look to the elements of the prior statute of conviction, or to the charging documents and jury instructions, but not the facts or conduct underlying a defendant's prior conviction. See Descamps v. United States, __ U.S. __, 133 S.Ct. 2283-85 (2013)(quoting Taylor

v. United States, 495 U.S. 575, 600-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). Thus, courts should "look no further than the statute and judgment of conviction." United States v. Estrella, 758 F.3d 1239, 1244 (11th Cir. 2014)(citation omitted). In so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, ____ U.S. ___, 133 S.Ct. 1678, 1684 (2011)(quoting, Curtis Johnson v. United States, 559 U.S. 133, 137 (2010)) ("Curtis Johnson").

Absent an ACCA enhancement, the maximum sentence for violation §922(g) is ten years imprisonment. See 18 U.S.C. §924(a)(2). 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).

After Samuel Johnson, for a prior conviction to qualify as a "violent felony," for purposes of the ACCA, the court must determine whether it falls under the elements clause because it "has as an element the use, attempted use, or threatened use of physical force against the person of another" or under the enumerated offenses clause because it is "burglary, arson, or extortion." 18 U.S.C. §924(e)(1). In that regard, the Supreme Court first instructs courts to "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime [burglary, arson, or extortion]--i.e., the offense as commonly understood." Descamps, 133 S.Ct. at 2281. If the elements of the state offense are either "the same as, or narrower than, those of the generic offense," then any conviction under the statute qualifies as a predicate offense for purposes of the ACCA enhancement. Descamps, supra; see also, United States v. Lockett, 810 F.3d 1262, 1266 (11th Cir. 2016). Likewise, under the

categorical approach, if the prior conviction on its face requires proof, 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 that statute, then it too qualifies as a violent felony under the ACCA. Descamps, 133 S.Ct. at 2283-84. This is called the "categorical approach." Descamps, supra. But "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." Descamps, 133 S.Ct. at 2283.

For the limited purpose of helping to implement the categorical approach, the Supreme Court has also recognized a "narrow range of cases" in which courts can utilize what is called the "modified categorical approach." Descamps. at 2284 (quotation omitted). The modified categorical approach allows courts to review certain documents from the state proceedings, known as "Shepard documents," to determine if the state court convicted the defendant of the generic offense. Id. at 2283-84 (quotation omitted); see also, Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). Even though the modified categorical approach lets courts briefly look at the facts, it "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's." Descamps, 133 S.Ct. at 2285. Thus, the inquiry ""is always about what elements the defendant was convicted of, not the facts that led to that conviction." United States v. Lockett, 810 F.3d at 1266 (citing Descamps, 133 S.Ct. at 2285).

The Eleventh Circuit has recognized that, after Descamps, it can no longer assume that the modified categorical approach applies to all non-generic statutes. See Lockett, supra. (citing Howard,

742 F.3d at 1343). Rather, the Eleventh Circuit has recognized that "the modified categorical approach can be applied only when dealing with a **divisible** statute: a statute that 'sets out one or more elements of the offense in the alternative.'" Lockett, supra (citing Descamps, 133 S.Ct. at 2284)(emphasis added). The Court may refer to Shepard documents to determine under which version of the crime the defendant was convicted. These Shepard documents include, "the charging document, the plea agreement or transcript of colloquy between the judge and defendant, or ... some comparable judicial record of this information." Shepard, 544 U.S. at 26, 125 S.Ct. at 1263.

However, if a statute "lists multiple, alternative elements, and so effectively creates different crimes," after looking only at the Shepard documents, if the court cannot ascertain under which crime a defendant was convicted, then no conviction under the statute can be assumed to be generic. Lockett, supra. In other words, the modified categorical approach only applies "to explicitly divisible statutes" because the "ACCA's test and history" show that "Congress made a deliberate decision to treat every conviction of a crime in the same manner; and, that cannot work if a "statute sweeps more broadly than the generic crime." Lockett, supra at 1266 (quoting Descamps, 133 S.Ct. at 2283, 2287, 2290). If the statute "does not concern any list of alternative elements," then the "modified approach ... has no role to play," and is thus not applicable. Descamps, 133 S.Ct. 2285-86; Howard, 742 F.3d at 1345-46. Where the modified categorical approach cannot be utilized, the court should limit its review only to the statute and judgment of conviction. Howard, 742 F.3d at 1345. In either case, however, courts are not permitted to consider a defendant's underlying conduct, or the facts forming the basis for the conviction. Descamps, 133 S.Ct. at 2285.

Simply put, Descamps instructs courts on how to determine if a statute is divisible. In essence, the Supreme Court explains that if a statute "lists multiple, alternative elements, it effectively creates several different crimes," and as a result it is divisible. Descamps, 133 S.Ct. at 2285 (quotation and alternation omitted). However, if the prior offense of conviction does not require the jury or factfinder to actually find all of the elements of the generic, enumerated offense, then the statute is not divisible. Descamps at 2290, 2293.

Turning to the movant's prior convictions, to satisfy the second factor in Chance, it must be determined whether movant's convictions for robbery, cocaine trafficking, burglary of Structure, battery on a law enforcement officer, and resisting arrest with violence 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. Robbery. The parties dispute whether Petitioner's prior conviction for robbery in case no. F89-14196 and robbery in Georgia state court case no. 98-FE-104-F qualify as a violent felony for purposes of the ACCA enhancement. (Cv DE# 5:15-22; Cv DE#8:9-12; Cv DE#10:7-20).

1998 Florida Robbery Conviction

Petitioner was convicted of robbery in case no. F89-14196, in violation of Fla.Stat. §812.13(1).

Prior to the issuance of Samuel Johnson the Eleventh Circuit had found that a Florida robbery conviction qualified as a violent felony under the sentencing guidelines. See United States v. Lockley, 632 F3d 1238 (11th Cir. 2001). In three decisions issued after Samuel Johnson, the Eleventh Circuit addressed the question of whether robbery under Florida law is categorically a violent felony under the ACCA. See United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016); United States v. Fritts, 841 F.3d 937 (11th Cir. 2016); and United States v. Conde, 2017WL1485021 (11th Cir. April 26, 2017). In Seabrook, the three judge panel all agreed that Lockley was controlling in its determination of whether a robbery under Florida law was a crime of violence under the ACCA elements clause. Seabrooks, 839 F.3d at 1346 (Judge Martin, concurring) ("[T]his panel opinion stands only for the proposition that our Circuit precedent in [Lockely] requires Mr. Seabrooks's 1997 Florida convictions for armed robbery to be counted in support of his [ACCA] sentence."). In Fritts, 841 F.3d at 941, the court reiterated that under Florida law "robbery is categorically a crime of violence under the elements of even the least culpable of these acts criminalized by Florida Statutes §812.13(1)." In Conde, in rejecting the argument that a Florida robbery conviction under Fla. Stat. §812.13 entered prior to the Florida Supreme Court's opinion in Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997) did not constitute a crime of violence, the Eleventh Circuit held that "Florida robbery has *always* required the 'substantial degree of force' required by the ACCA's elements clause." Conde, 2017 WL 1485021 at *2 (citing Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271 (2010)) (emphasis added).

In light of this binding precedent, the movant's prior Florida conviction for robbery is a violent felony under the elements clause of the ACCA.

1998 Georgia Robbery Conviction

In Georgia, robbery can be committed in one three of ways: by use of force; by intimidation, threat or coercion, or placing a person in fear of immediate bodily injury; or by "sudden snatching." See O.C.G.A. §16-8-40. Where the defendant commits robbery by sudden snatching, the statute does not require the use of violent physical force, see Johnson v. United States, 559 U.S. 133, 138 (2010), but can be committed where, for example, the victim merely observes the defendant commit larceny, see, e.g., Sweet v. State, 304 Ga. App. 474, 476-77 (2010); King v. State, 214 Ga. App. 311 (1994). As a result, Georgia robbery does not categorically qualify as a violent felony following Samuel Johnson.

In light of the foregoing, the movant's prior Georgia conviction for robbery is not a violent felony under the ACCA.

b. Cocaine trafficking. The parties do not discuss whether Petitioner's prior conviction for cocaine trafficking in case no. F92-42114A qualifies as a predicate offense for purposes of the ACCA enhancement.

In United States v. James, 430 F.3d 1150, 1154 (11th Cir. 2005), the Eleventh Circuit explained, as follows:

> Florida ... has a three-tiered scheme for punishing drug-related offenses. Under Florida law, those three tiers are the following: (1) possession of any amount of a controlled substance, Fla.Stat. §893.13(6)(a); (2) possession with intent to distribute a controlled substance, §893.13(1)(a); and (3) trafficking in cocaine by possession of 28 grams or more of the drug, §893.135(1)(b). Under this third tier, trafficking in cocaine is further delineated according to the amount of drugs that the defendant possessed, and the sentence imposed increases accordingly.

Although in James the Eleventh Circuit only mentioned trafficking by possession, Florida's "trafficking in cocaine" statute can also be violated by selling, purchasing, manufacturing, delivering, or importing 28 grams or more of cocaine. See Fla. Stat. §893.135(1)(b)1; Id. at 1154. The Eleventh Circuit further emphasized that "drug trafficking is a more serious offense, and is punished more harshly, than either simple possession or possession with intent to distribute." Id. at 1155. In other words, Florida's three-tiered scheme structures drug offenses in ascending order of severity.

In light of the forgoing, Petitioner's conviction for trafficking in cocaine constitutes a serious drug offense for purposes of the enhanced sentence as an armed career criminal. See United States v. Home, 206 Fed.Appx. 942, 944 n.3 (11th Cir. 2006) (sale or delivery of cocaine is a serious drug offense for purposes of enhanced sentence as an armed career criminal); United States v. Johnson, 515 Fed.Appx. 844, 847 (11th Cir.2013) (delivery of a controlled substance qualifies as a serious drug offense under the ACCA).

c. Burglary of structure. Petitioner argues that his prior conviction for burglary of a structure in case no. 98-21816CF no longer qualifies as a predicate offenses for purposes of the ACCA enhancement. (Cv DE# 5:16-21). The government concedes that Petitioner's prior conviction for burglary is not crime of violence under the ACCA. (Cv DE# 8:12-13).

The parties correctly agree that the Florida burglary conviction fails to qualify as a crime of violence. See Mathis v. United States, -- S.Ct. --, 2016 WL 3434400, *3 (June 23, 2016); see also James v. United States, 550 U.S. 192, 212, 127 S. Ct. 1586, 1599, 167 L. Ed. 2d 532 (2007) overruled on other grounds by

Samuel Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)("We agree that the inclusion of curtilage takes Florida's underlying offense of burglary outside the definition of 'generic burglary'").

d. Battery on a law enforcement officer. The parties do not mention whether Petitioner's prior conviction for battery on a law enforcement officer qualifies as a violent felony for purposes of the ACCA enhancement. Petitioner was convicted of battery on a law enforcement officer in case no. F00-37541, in violation of Fla.Stat. §784.03(1)(a)(b).[3]

Petitioner's conviction for battery on a law enforcement officer no longer qualifies as a predicate offense 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).

e. Resisting arrest with violence. The parties do not dispute whether the Petitioner's prior conviction for resisting arrest with violence in case no. F00-37541 qualifies as a crime of violence.

The Eleventh Circuit has held that a defendant's prior conviction for the Florida felony of resisting arrest with violence is a violent felony under the elements clause of the ACCA. See

[3]Under Florida law, a battery occurs when a person either "[a]ctually and intentionally touches or strikes another person against [his] will," or "[i]ntentionally causes bodily harm to another person." See Johnson v. United States, 559 U.S. 133, 133 (2010)(quoting Fla. Stat. §784.03(1)(a)).

United States v. Romo-Villalobos, 674 F.3d 1246, 1251 (11th Cir. 2012); United States v. Hill, ___ F.3d ____, 2015 WL 5023791 (11th Cir. 2015) (affirming Romo-Villalobos in that "resisting an officer with violence categorically qualifies as a violent felony under the elements clause of the ACCA."); see also, United States v. Telusme, 655 Fed. Appx. 743, 746 (11th Cir. July 8, 2016)(unpublished); United States v. Antunes-Rivera, 659 Fed.Appx. 538, 540, (11th Cir. Aug. 10, 2016)(unpublished).

In light of the foregoing, resisting arrest with violence under Florida law constitutes a crime of violence for purposes of an ACCA enhancement.

In conclusion, the movant has not demonstrated that, in light of Samuel Johnson, the movant's prior convictions no longer qualify him for the ACCA sentencing enhancement. The movant's prior convictions for burglary of a structure, Georgia robbery, and battery on a law enforcement officer do not constitute predicate offenses for purposes of the ACCA. However, the movant has three prior felony convictions that do qualify as valid predicate offenses under the ACCA-cocaine trafficking, Florida robbery, and resisting an officer with violence. As a result, he is not entitled to relief.

VI. 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.

VII. 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 11th day of May, 2017.

UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 16-CV-22251-DLG/PAW
(Underlying Case No. 08-20400-Cr-Graham)

MAURICE DORVILUS
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

CORRECTED[1] MOTION TO CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND MEMORANDUM OF LAW IN SUPPORT

Maurice Dorvilus, through undersigned counsel, respectfully moves this Court to correct his sentence, pursuant to 28 U.S.C. § 2255, and states:

1. On August 13, 2008, Mr. Dorvilus was convicted after jury trial of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1).
2. At sentencing, Mr. Dorvilus was sentenced subject to the Armed Career Criminal Act's ("ACCA") 15-year mandatory minimum sentence. 18 U.S.C. § 924(e).

[1] This corrected motion is filed to include reference to the Supreme Court's decision today in *Mathis v. United States*, ___ S.Ct. ___, 2016 WL 3434400 (June 23, 2016) (No. 15-6092) (reaffirming that "application of the ACCA involves, and involves only, comparing elements;" even a statute like Iowa's that itemizes "various places" in which a burglary could occur as "disjunctive factual scenarios rather than separate elements, so that a jury need not make any specific finding" in that regard, is indivisible under *Descamps*; and a statute that is non-generic, overbroad, and indivisible is never an ACCA predicate); *see infra,* pp. 21-22.

3. Mr. Dorvilus now requests relief in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. __, 135 S.Ct. 2551, 2015 WL 2473450 (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. Dorvilus's sentence was imposed in violation of due process and in excess of the statutory maximum.
5. Accordingly, Mr. Dorvilus is entitled to relief under § 2255.

PROCEDURAL HISTORY

Mr. Dorvilus was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). [Case No. 08-cr-20400-Graham, D.E. 9]. The indictment also alleged that he was subject to the ACCA's enhanced penalty. [*See id.* (citing 18 U.S.C. § 924(e)(1)]. On August 13, 2008, Mr. Dorvilus was convicted after a jury trial. [*Id.* at D.E. 63.]

On November 3, 2008, the presentence investigation ("PSI") report was disclosed. Probation advised it was relying on five convictions to enhance him under the ACCA. [PSI ¶ 18]. Those paragraphs are summarized from the PSI as follows:

> ¶ 24 **Robbery** (Miami, FL) – Case # F89-14196 – 8/22/89: Pled nolo contender, 4 years Florida state prison as Youthful Offender & 2 years community control, with 148 days credit, concurrent with F89-11554B; 8/5/91: Community control revoked
>
> ¶ 35 Count 1: Cocaine Trafficking; Count 2: Possession of Drug Paraphernalia (Miami, FL) – Case # F92-42114A – 6/21/93: Guilty on both counts, 6.5 months credit time served, 1 year probation

¶ 51 **Robbery** (Dublin, GA) – Case # 98-FE-104-F – 5/11/98: Pled guilty, 4 years probation, 4 months credit time served, $1,500 restitution

¶ 53 **Burglary** of a Structure (Melbourne, FL) – Case # 98-21816CF – 9/9/02: Pled guilty, 39.15 months Florida state prison, with 208 days credit time served, $20,227.49 restitution

¶ 55 Count 1: Battery on Police; Count 2: Resisting Arrest with Violence; Count 3: Possession of Unlawful Driver's License; Count 4: Obstructing Justice; Count 5: Habitual Traffic Offender (Hialeah, FL) – Case # F00-37541 – 7/9/01: Pled guilty to all counts, 2 years community control; 10/4/02: Counts 1-3, & 5, community control revoked, 366 days county jail, with 77 days credit time served, concurrent with 98-21816CF; Count 4, suspended entry of sentence.

On January 6, 2009, Mr. Dorvilus was sentenced. *See* Sentencing Transcript [D.E. 92]. The sentencing court determined he was an ACCA and that his guideline range was 188-235 months. [D.E. 92. pp. 9-10.] Mr. Dorvilus was sentenced to 204 months followed by 5 years of supervised release. [D.E. 84.] The judgment was docketed [D.E. 84], and Mr. Dorvilus timely filed his notice of appeal [D.E. 85.]

On January 20, 2010, the mandate from the United States Court of Appeals for the Eleventh Circuit issued, affirming the judgment of the district court. [D.E. 100.] Mr. Dorvilus timely filed a writ of certiorari to the United States Supreme Court, which was denied on May 5, 2010. [D.E. 102.]

Mr. Dorvilus filed his first motion to vacate under 28 U.S.C. § 2255 on March 31, 2011. [D.E. 103.] That motion was denied on January 26, 2012. [D.E. 104.]

Mr. Dorvilus filed his Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence with the Eleventh Circuit on May

17, 2016, based on the Supreme Court's decision in *Johnson v. United States*, 576 U.S. __, 135 S.Ct. 2551, 2015 WL 2473450 (June 26, 2015). *In re: Maurice Dorvilus,* Court of Appeals Dkt. 16-12684 (11th Cir. May 17, 2016). Mr. Dorvilus alleged that after *Johnson,* he is no longer subject to the ACCA's 15-year minimum mandatory because he does not have the requisite three predicate convictions. Specifically, he alleged that the following convictions can no longer be predicate convictions under the ACCA: 1989 Florida robbery (PSI ¶ 24); 1998 Georgia robbery (PSI ¶ 51); and 1998 Florida burglary (PSI ¶ 53). Because those three convictions no longer qualify as ACCA predicates, Mr. Dorvilus argued he is not an ACCA.

On June 16, 2016, the Eleventh Circuit granted Mr. Dorvilus authorization to file a second § 2255 petition. *See In re: Maurice Dorvilus,* Court of Appeals Dkt. 16-12684 (11th Cir. June 16, 2016).

GROUNDS FOR RELIEF

Mr. Dorvilus is no longer subject to the ACCA enhancement after *Johnson v. United States*, 576 U.S. __, 135 S.Ct. 2551, 2015 WL 2473450 (June 26, 2015). Mr. Dorvilus had five identified qualifying priors. (PSI ¶ 18.) Now, three of those five convictions no longer qualify as "violent felonies" for ACCA purposes: 1989 Florida robbery (PSI ¶ 24); 1998 Georgia robbery (PSI ¶ 51); and 1998 Florida burglary (PSI ¶ 53). Without those convictions as predicates, Mr. Dorvilus only has two remaining possible predicate offenses and, therefore, is not an ACCA.

I. Mr. Dorvilus'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[2] or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years." *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. Dorvilus'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

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

runs from the date the Supreme Court recognizes the new right. *Dodd v. United States*, 545 U.S. 343, 360 (2005).

Mr. Dorvilus'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 Mr. Dorvilus'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.

Therefore, Mr. Dorvilus 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. Dorvilus 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 factfinding" "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. Dorvilus is No Longer an Armed Career Criminal

When Mr. Dorvilus was sentenced, the Court applied the ACCA enhancement, relying on the five prior convictions. (PSI ¶ 18.) As explained below, Mr. Dorvilus is no longer an ACCA because his priors for 1989 Florida robbery (PSI ¶ 24), 1998 Georgia robbery (PSI ¶ 51), and 1998 Florida burglary (PSI ¶ 53) no longer count as "violent felonies."

Because Mr. Dorvilus no longer has three qualifying predicate convictions, he is therefore no longer an armed career criminal.

A. 1989 Florida Robbery

According to *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), a pre-1999 conviction for "strong-arm robbery" under Fla. Stat. §812.13(1) must be analyzed as a "robbery by sudden snatching," an offense for which "any degree of force" sufficed. In *Welch*, the Eleventh Circuit distinguished *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) where it had found a 2001 conviction for attempted robbery was a "crime of violence" within both the elements and residual clauses of the Guidelines. Welch argued, and the Court agreed, that *Lockley* was not dispositive of whether his 1996 conviction under §812.13(1) was a violent felony, "because Lockley was convicted after Florida promulgated the 'sudden snatching' statute, *so snatching from the person might [have] furnish[ed] the basis for [the 1996] robbery conviction here but not in Lockley*." *Welch*, 683 F.3d at 1312 (emphasis added).

Although the language of §812.13(1) has never changed, what *did* change – quite significantly in 1999 (*after* both Welch and Mr. Dorvilus were convicted) – was

Florida's statutory scheme for robberies. In 1999, the Florida legislature enacted a separate "robbery by sudden snatching" statute, Fla. Stat. §812.131. But as of 1996 (before the enactment of that statute), the Court recognized in *Welch*, non-forceful snatching offenses were still being prosecuted as "strong-arm" robberies under §812.13(1) in Florida. *See Welch*, 683 F.3d at 1311 and nn.28-38. Only *after* Welch was convicted, the Eleventh Circuit underscored, was §813.131 enacted, establishing a separate crime of "'robbery by sudden snatching,' in between larceny and robbery." 683 F.3d at 1311.

The Eleventh Circuit recognized in *Welch* that the enactment of §812.131 "appear[ed] to have been a legislative response" to the Florida Supreme Court's decision in *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997), which clarified that "there must be resistance by the victim that is overcome by the physical force of the offender" to establish robbery, "so that the intermediate appellate decisions holding mere snatching to be sufficient were put in doubt." *Welch*, 683 F.3d at 1311. Nonetheless, the *Welch* Court found *Robinson*'s clarification of the law irrelevant to whether the defendant's 1996 Florida robbery conviction qualified as an ACCA predicate, since "[i]n 'determining whether a defendant was convicted of a 'violent felony,'" the Court must apply "the version of the state law that the defendant was actually convicted of violating." *Welch*, 683 F.3d at 1311 (citing *McNeill v. United States*, 563 U.S. 816, 131 S.Ct. 2218, 2222 (2011)).

As the Eleventh Circuit recognized in *Welch*, as of 1996 – and therefore, in 1989 when Mr. Dorvilus was convicted as well – the "latest authoritative pro-

nouncement" as to the elements of robbery under §812.13(1) was in *McCloud v. State*, 335 So.2d 257 (Fla. 1976). And in *McCloud*, the Florida Supreme Court expressly held that "any degree of force suffices" for robbery, including the minimal amount of force necessary to "extract" property from a victim's "grasp," so long as the taking is not by "stealth." *McCloud*, 335 So.2d 258-259 (what distinguished robbery from larceny is the victim's awareness of the taking).

Like Welch, Mr. Dorvilus pled guilty to robbery under §812.13 "at a time when mere snatching" with "any degree of force" sufficed for conviction under then-controlling Florida Supreme Court law. *Welch,* 683 F.3d at 1311-1312. Accordingly, for the same reason the Eleventh Circuit assumed for its "violent felony" analysis that Welch's 1996 robbery conviction under §812.13(1) was for "robbery by sudden snatching," this Court should so assume for Mr. Dorvilus's conviction here as well. The correctness of *Welch*'s "least culpable conduct" analysis, notably, has since been validated by the Supreme Court in *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013).

Admittedly, in *Welch* the Eleventh Circuit did not follow its own "least culpable conduct" analysis to its logical conclusion under the ACCA's elements clause. However, it did agree with Welch that at least *"[a]rguably the elements clause would not apply to mere snatching."* *Id.* at 1312-1313 (emphasis added). Although the Court believed that question was "not cut and dried" at that time, it found it unnecessary to resolve definitively in 2012 since then-controlling precedent compelled

a finding that even a non-forceful snatching was a "violent felony" within the residual clause. *Id.*

Now that the residual clause has been excised from the ACCA, however, and the Supreme Court has remanded in Welch's own §2255 case to definitively decide the elements clause question left open in 2012, *see Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257, 1268 (April 18, 2016)(remanding to the Eleventh Circuit in recognition of the fact that "reasonable jurists could at least debate whether Welch is entitled to relief" after the voiding of the ACCA's residual clause), this Court will have to use the categorical approach as clarified by the Supreme Court in *Moncrieffe* and *Descamps* to itself resolve whether a pre-1999 robbery conviction qualifies as a "violent felony" within the ACCA's elements clause. And *Moncrieffe* and *Descamps* confirm that because – as the Eleventh Circuit recognized in *Welch* – according to the Florida Supreme Court the "least culpable conduct" under Florida's robbery statute at the time of Mr. Dorvilus's conviction was a taking by "any degree of force," Mr. Dorvilus's robbery conviction is categorically overbroad vis-à-vis an offense within the ACCA's elements clause. Accordingly, it is no longer a countable ACCA predicate.

B. 1998 Georgia Robbery

In Georgia, robbery can be committed in one three of ways: by use of force; by intimidation, threat or coercion, or placing a person in fear of immediate bodily injury; or by "sudden snatching." O.C.G.A. § 16-8-40. Where the defendant commits robbery by sudden snatching, the statute does not require the use of violent, physi-

cal force, *see Johnson v. United States*, 559 U.S. 133, 138 (2010), but can be committed where, for example, the victim merely observes the defendant commit larceny. *See, e.g., Sweet v. State*, 697 S.E.2d 246, 248-49 (Ga. Ct. App. 2010); *King v. State*, 447 S.E.2d 645, 647 (Ga. Ct. App. 1994). The government has conceded that point post-*Johnson*. *See United States v. Robinson*, No. 14-cr-6, D.E. 129 at 13 (W.D. Va. Aug. 12, 2015). Accordingly, Georgia robbery does not categorically qualify as a violent felony.

C. 1998 Florida Burglary

In 1998 when Mr. Dorvilus was convicted of his burglary offense, the Florida burglary statute provided that "'burglary' means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein ...." Fla. Stat. § 810.02(1)(a). Critically, the Florida legislature has long defined both the term "structure" for purposes of the burglary statute to *always* include the "curtilage" of the building. *See* Fla. Stat. § 810.011(1) ("'Structure' means a building of any kind, either temporary or permanent, which has a roof over it, *together with the curtilage thereof.*") (emphasis added).

In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court construed the "burglary" offense enumerated in the ACCA to refer to "generic" burglary, which it defined as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598. After *Taylor*, both the Supreme Court and the Eleventh Circuit recognized that Florida burglary "does not meet the definition of burglary under ACCA that this Court set forth in *Taylor*," be-

cause Florida uniquely defines the term "structure" to include the curtilage. *James v. United States*, 550 U.S. 192, 197, 212 (2007) ("[T]he inclusion of curtilage takes Florida's underlying offense of burglary outside the definition of 'generic burglary'"); *see, e.g., Williams v. Warden, Fed. Bureau of Prisons*, 713 F.3d 1332, 1345 (11th Cir. 2013) ("Since Fla. Stat. § 810.02 defines [structure] to include *both* the structure and its surrounding curtilage, *Taylor* rendered it impossible to hold that § 810.02 was categorically a violent felony under the ACCA's enumerated felonies clause.").

Nonetheless, prior to the sentencing in this case, the Eleventh Circuit held that the ACCA's residual clause provided an alternative path to the enhancement for Florida burglaries. *See United States v. Matthews*, 466 F.3d 1271, 1275 (11th Cir. 2006) ("even if Matthews's third degree burglary convictions are not for 'generic burglary,' they are convictions for violent crimes under the ACCA because they saisfy th[e] alternative definition" in the residual clause). And notably, that remained the law in this Circuit until *Johnson*. *See United States v. Kirk*, 767 F.3d 1136, 1139-1141 & n.1 (11th Cir. 2014) (noting that "Kirk and the government agree that Florida's definition of burglary is broader than generic burglary and that the enumerated offenses clause does not apply to Kirk's case," but following *Matthews* to hold that Florida 2nd degree burglary convictions were nonetheless "violent felonies" within the ACCA's residual clause), *certiorari granted, vacated, and remanded for reconsideration in light of Johnso*n, 135 S.Ct. 2941 (2015).

Now that *Johnson* has effectively excised the residual clause from the ACCA, thus abrogating *Matthews* and *Kirk*, the only possible way for Mr. Dorvilus's Florida

burglary conviction to qualify as an ACCA predicate would be under the ACCA's enumerated offenses clause. And for the following reasons, the Florida burglary statute is not only non-generic and overbroad, but also indivisible according to *Descamps* because the definition of "structure" in § 810.011(1) is itself non-generic, overbroad, and indivisible. Therefore, under current law, no Florida burglary of a "structure" conviction ever qualifies as the enumerated offense of "burglary" in the ACCA.

The Eleventh Circuit was clear in *Howard* that even if a statute is technically "divisible" in the sense that there are different manners of violating the statute, if "*none* of the alternatives" match the elements of the generic crime, "the court can and should skip over any *Shepard* documents and simply declare that the prior conviction is not a predicate offense based on the statute itself." 742 F.3d at 1346. That is the case here. Just as the burglary of a conveyance is never generic burglary, the burglary of a "structure" under Florida law is also never generic burglary. This is so because, by definition, a "structure" in Florida *always* includes not simply a building, but a "building .... ***together with the curtilage thereof***" – which is an indivisible, overbroad definition. The words "together with" and "thereof" are meaningful – not superfluous in that definition. "Thereof" plainly refers back to the term "building" in § 810.011. "The curtilage thereof" makes *no* sense on its own. Section 810.011 notably does *not* define a "structure" as a "building" OR "the curtilage thereof." To the contrary, the crucial term "together with" tethers the "building" to "the curtilage thereof" to create a single, indivisible "structure" element. And for

that reason, the modified categorical approach has "no role to play" here. *Descamps*, 133 S.Ct. at 2285.

In *Howard*, the Eleventh Circuit explained that sentencing courts conducting divisibility analysis "should usually be able to determine whether a statute is divisible by simply reading its text and asking if its elements or means are 'drafted in the alternative.'" 742 F.3d at 1346 (citing *Descamps*, 133 S.Ct. 2285 n.2). However, they 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.* (emphasis added). And notably, in *Baker v. State*, 636 So.2d 1342 (Fla. 1994), the Florida Supreme Court definitively construed Fla. Stat. § 810.02, and confirmed that the terms "building" and "curtilage" are *not* alternatives, but rather are part of a single indivisible definition of "structure" in the statute since there is no separate crime denominated "burglary of a curtilage." *See id.* at 1344 ("*There is no crime denominated burglary of a curtilage;* the curtilage is not a separate location wherein a burglary can occur. Rather it is an integral part of the structure or dwelling that it surrounds. Entry onto the curtilage is, for the purposes of the burglary statute, entry into the structure or dwelling.")(emphasis added).[3]

---

[3] Consistent with *Baker*, Florida's standard jury instructions defines "structure" to *always* include the curtilage. *See, e.g.*, Fla. Std. Jury Instr. in Crim. Cases 13.1 (defining "structure" to "mean[ ] any building of any kind, either temporary or permanent, that has a roof over it, *and the enclosed space of ground and outbuildings immediately surrounding that structure*") (emphasis added). The only "alternatives" that the jury must find beyond a reasonable doubt in this instruction – a building vs. a conveyance – are bracketed. And since the italicized phrase above is not bracketed, it plainly is *not* a statutory alternative to "building."

Because this Court is bound by the Florida Supreme Court's interpretation of its own burglary statute, *see Howard*, 742 F.3d at 1346, that plain-language definitive interpretation renders the burglary statute not only overbroad but "indivisible." And under *Descamps* and *Howard*, that renders every "burglary of a structure" conviction under § 810.02 categorically overbroad; such a conviction is never countable as the enumerated crime of "burglary" in the ACCA; and the modified categorical approach simply does not apply. *Descamps*, 133 S. Ct. at 2293; *Howard*, 742 F.3d at 1346.

Notably, every judge and magistrate judge in this district to have considered the issue has consistently found after *Descamps* that Florida's similar definition of "dwelling" is indeed, indivisible on its face, categorically overbroad, and that a Florida burglary conviction does not qualify as either the enumerated "violent felony" in the ACCA, or the enumerated "crime of violence" in the Guidelines. *See, e.g.,*

- *United States v. Cardoso*, Case No. 13-CR-60103-Cohn, DE44 at 10 (S.D. Fla. May 8, 2014) (concluding that "Florida's burglary statute is non-generic and indivisible" because it "defines dwelling to include any building . . . together with the curtilage thereof. The inclusion of the word 'curtilage' in the definition of burglary makes Florida's burglary [of a] dwelling Statute broader than the generic burglary of a dwelling Statute. The Statute is indivisible because the definition of dwelling also includes the curtilage therefore. Accordingly, there is no legal basis for the Court to utilize the modified categorical approach.");

- *United States v. Dixon*, Case No. 13-CR-20370-Altonaga, DE45 at 8-9 (S.D. Fla. July 3, 2014) (expressly agreeing with the defense that "the definition of dwelling in the Florida statute is categorically overbroad and indeed it is indivisible, just with a plain reading of the statutory language, curtilage, therefore, plainly has to refer back to a building or conveyance. It makes no sense on its own");

- *Wheeler v. United States*, Case No. 14-cv-80782-Middlebrooks/Brannon, DE26, DE27 (S.D. Fla. Aug. 11, 2015) (order granting §2255 motion based on *Johnson*, and adopting Magistrate's Report and Recommending finding it "undisputed that Wheeler's prior three burglary convictions did not fall under the 'use of force' or the 'enumerated offense' clauses");

- *Bush v. United States*, Case No. 15-cv-81271-Dimitrouleas, DE16 at 2 (S.D. Fla. Nov. 5, 2015) (order granting §2255 motion based on *Johnson*, finding "that Burglary in Florida is not a divisible crime," and that the defendant therefore "does not qualify as an ACCA offender");

- *Harrell v. United States*, Case No. 14-cv-61396-Zloch/Hunt, DE28 at 2, DE25 at 6-7 (S.D. Fla. Mar. 1, 2016) ("As a result of *Descamps*, convictions pursuant to Florida's burglary of a dwelling crime may not be used to support a sentence enhancement under the enumerated-offense clause of §924(e);" adopting the Supplemental Report and Recommendation, concluding that "section 810.02, Florida statutes, is indivisible, and that the modified categorical approach, post-*Descamps* cannot be applied in this case");

- *Villa v. United States*, Case No. 15-22898-Civ Seitz/White, DE17 at 21-32(S.D.Fla. June 14, 2016) (Report and Recommendation agreeing with, and following, all of the above rulings; recommending that § 2255 relief be granted because the Florida burglary conviction no longer qualified as a predicate to support the ACCA enhancement; specifically finding that the movant is correct that "Florida's burglary statute is, in fact, indivisible;" that the government was incorrect in arguing to the contrary; citing *Baker* as confirming the indivisibility of the Florida burglary statute; and concluding that "review of *Shepard* approved documents is not authorized" and after *Descamps* "the inquiry is over"); and

- *United States v. Antron Rogers*, Case No. 16-20999-Civ-Huck/White, DE13 (S.D.Fla. June 17, 2016) (same).

And now, the Supreme Court itself has confirmed by its decision in *Mathis v. United States*, ___ S.Ct. ___, 2016 WL 3434400 (June 23, 2016) (No. 15-6092) that the conclusions of these judges and magistrate judges were prescient and indisputably correct. *See id.* (reaffirming that "application of the ACCA involves, and involves only, comparing elements;" even a statute like Iowa's that itemizes "various places" in which a burglary could occur as "disjunctive factual scenarios rather than

separate elements, so that a jury need not make any specific finding" in that regard, is indivisible under *Descamps*; and a statute that is non-generic, overbroad, and indivisible is never an ACCA predicate).

Accordingly, this Court should hold – consistent with the other judges on this Court to have considered this issue post-*Descamps*, and as now confirmed by the Supreme Court in *Mathis* – that the Florida burglary statute is non-generic, overbroad, and indivisible. As a result, a conviction under the statute can never qualify as a violent felony under the ACCA's enumerated-offense clause. And as in *Descamps*, "[t]he modified approach . . . has no role to play in this case." 133 S.Ct. at 2285. Under the categorical approach, the Court should simply declare here – as the Supreme Court just declared in *Mathis* – that "the inquiry is over," *id.*, and that a Florida burglary conviction no longer qualifies as ACCA predicate after *Johnson*.

* * *

In sum, this Court should hold – consistent with the other judges on this Court to have considered this issue post-*Descamps* – that the Florida burglary statute is overbroad and indivisible. As a result, a conviction under the statute can never qualify as a violent felony under the ACCA's enumerated-offense clause. And as in *Descamps*, "[t]he modified approach . . . has no role to play in this case." 133 S.Ct. at 2285. Under the categorical approach, the Court should simply declare that "the inquiry is over," *id.*, and that Mr. Dorvilus's burglary conviction no longer qualifies as ACCA predicate after *Johnson*.

CONCLUSION

Because Mr. Dorvilus 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,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY certify that on **June 23, 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 or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/ Sowmya Bharathi*

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United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

MAURICE DORVILUS

JUDGMENT IN A CRIMINAL CASE

Case Number: 08-20400-CR-GRAHAM

USM Number: 80450-004

Counsel For Defendant: Sowmya Bharathi, AFPD
Counsel For The United States: Kelly S. Karase, AUSA
Court Reporter: Carleen Horenkamp

The defendant was found guilty on Count One 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) and 924(e)	Possession of a Firearm by a Convicted	April 22, 2008	1

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

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

Date of Imposition of Sentence:
December 16, 2008

DONALD L. GRAHAM
United States District Judge

January ~~December~~ 5, 2008

DEFENDANT: MAURICE DORVILUS
CASE NUMBER: 08-20400-CR-GRAHAM

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **204 Months**. The defendant shall receive credit for time served as applicable by statute.

The Court makes the following recommendation(s) to the Bureau of Prisons: that the defendant be designated to a facility close to Miami, Florida consistent with his security rating. Additionally, the Court recommends that the defendant participate in the 500 Hour RDAP Program administered by the Bureau of Prisons.

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: MAURICE DORVILUS
CASE NUMBER: 08-20400-CR-GRAHAM

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (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: MAURICE DORVILUS
CASE NUMBER: 08-20400-CR-GRAHAM

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 participate in an approved treatment program for anger control/domestic violence. 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.

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

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 obtain prior written approval from the Court before entering into any self-employment.

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: MAURICE DORVILUS
CASE NUMBER: 08-20400-CR-GRAHAM

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		

*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: MAURICE DORVILUS
CASE NUMBER: 08-20400-CR-GRAHAM

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 is payable immediately to the CLERK, UNITED STATES COURTS and is to be addressed to:

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

The 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,

One (1) Glock, Model 27, .40 caliber handgun; and eight (8) rounds of Smith & Wesson .40 caliber ammunition

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

08-20400-CR-GRAHAM/TORRES

CASE NO._____

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(e)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

MAURICE DORVILUS,

Defendant.
_____/

INDICTMENT

The Grand Jury charges that:

On or about April 22, 2008, in Miami-Dade County, in the Southern District of Florida, the defendant,

MAURICE DORVILUS,

having previously been 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).

FORFEITURE

1. The allegations in this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of property in which the defendant, **MAURICE DORVILUS**, has an interest.

2. Upon conviction of the violation of Title 18, United States Code, Section

922(g)(1), as alleged in this Indictment, the defendant, **MAURICE DORVILUS**, shall forfeit to the United States any firearm and ammunition involved or used in the commission of such violation.

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

(a) one (1) Glock, Model 27, .40 caliber handgun; and

(b) eight (8) rounds of Smith & Wesson .40 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 set forth in Title 21, United States Code, Section 853.

A TRUE BILL

FOREPERSON

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

KELLY S. KARASE
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

MAURICE DORVILUS,

Defendant.
_____/

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

X Miami ___ Key West
___ FTL ___ WPB ___ FTP

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

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 2 days for the parties to try.

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

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

6. Has this case been previously filed in this District Court? (Yes or No) No
If yes:
Judge: _____ Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) Yes
If yes:
Magistrate Case No. 08-2516-CMM
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of 04/22/2008
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 Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ___ Yes X No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? ___ Yes X No

Kelly S. Karase

KELLY S. KARASE
ASSISTANT UNITED STATES ATTORNEY
Court No. A5501183

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendants' Name: **MAURICE DORVILUS** **Case No:**_____

Count #: 1

Felon in possession of a firearm

Title 18, United States Code, Sections 922(g)(1) and 924(e)

***Max. Penalty:** Not less than 15 years' imprisonment

Counts #:

*** Max. Penalty:**

Counts #:

*** Max. Penalty:**

Counts #:

*** 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.**