APPENDIX

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11494-C

JAUMON R. LEWIS,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

ORDER:

Jaumon R. Lewis moves for a certificate of appealability (COA) in order to appeal the denial of his 28 U.S.C. § 2255 motion. This motion is before the Court after the United States Supreme Court vacated our previous denial of Lewis's motion for a COA on April 17, 2017. Lewis seeks a COA to challenge whether his conviction for felony battery under Florida law qualifies as a "crime of violence" for purposes of a sentencing enhancement under the Armed Career Criminal Act, § 2L1.2 of the United States Sentencing Guidelines. The Supreme Court vacated our

previous denial of Lewis's motion because, at that time, that same issue was before this Court en banc in *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc).

On August 25, 2017, this Court issued its decision in *Vail-Bailon*. We held "that Florida battery does categorically qualify as a crime of violence under § 2L1.2 of the [Sentencing] Guidelines." *Id.* at 1295. Thus, the issue Lewis raises as the basis for granting him a COA is now settled in this Circuit.[1] Lewis has therefore failed to make the requisite showing needed to justify the grant of a COA. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000).

Appellant's motion for a COA is accordingly DENIED.

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

[1] The second issue raised by Lewis in his motion for a COA—whether his conviction for aggravated assault with a firearm under Florida law qualifies as a crime of violence under the ACCA—also fails to meet the *Slack* standard.

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Supreme Court of the United States

No. 16-7535

JAUMON R. LEWIS,

Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the above court is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of the position asserted by the Acting Solicitor General in his memorandum for the United States filed March 15, 2017.

April 17, 2017

Justice Gorsuch took no part in the consideration or decision of this motion and this petition.

A True Copy SCOTT S. HARRIS
Test
Clerk of the Supreme Court of the United States
By:

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11494-C

JAUMON R. LEWIS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: TJOFLAT and WILSON, Circuit Judges.

BY THE COURT:

Jaumon R. Lewis has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's August 25, 2016, order denying a certificate of appealability and *in forma pauperis* status. Upon review, Lewis's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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NO. 16-11494

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAUMON LEWIS,
Movant/appellant,

v.

UNITED STATES OF AMERICA,
Respondent/appellee.

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

MOTION FOR RECONSIDERATION OF DENIAL OF CERTIFICATE OF APPEALABILITY BY THE APPELLANT JAUMON LEWIS

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THIS CASE IS ENTITLED TO PREFERENCE
(28 U.S.C. § 2255 APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Jaumon Lewis v. United States of America,
Case No. 16-11494

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Caruso, Michael, Federal Public Defender

Ferrer, Aimee, Assistant Federal Public Defender

Ferrer, Wifredo, United States Attorney

Goodman, Honorable Jonathan G. Jr., United States Magistrate Judge

Lewis, Jaumon, Movant/Appellant

Lunkenheimer, Kurt, Assistant United States Attorney

Patel, Kashyap, Esquire

Seitz, Honorable Patricia A., United States District Judge

Smachetti, Emily, Assistant United States Attorney, Appellate Division

United States of America, Plaintiff/Appellee

White, Honorable Patrick A., United States Magistrate Judge

MOTION FOR RECONSIDERATION OF DENIAL OF MOTION FOR CERTIFICATE OF APPEALABILITY

Comes now Movant/Appellant, Jaumon Lewis, by and through undersigned counsel, and respectfully request that this Court reconsider its denial of his motion for a certificate of appealability and grant him a certificate of appealability on the following question:

> Whether the district court erred in denying Mr. Lewis's claim that he was wrongly sentenced as an Armed Career Criminal given that, after *Johnson*, he no longer has three qualifying predicate offenses for purposes of the Armed Career Criminal Enhancement

In support of this request, Mr. Lewis states as follows:

PROCEDURAL HISTORY

On September 9, 2011, Mr. Lewis was charged in a one-count indictment with having previously been convicted of a felony offense and being in knowing possession of a firearm on or about March 5, 2010 in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e). Crim. DE 7.[1] On October 17, 2011, the government superseded the indictment and added three additional counts: count 2

[1] In this document, "Crim. DE" refers to documents in his underlying criminal case, S.D. Florida Case No. 11-20631-PAS, "Civ. DE" refers to documents in Mr. Lewis's section 2255 proceedings, S.D.Florida Case No. 15-23059-PAS

charged Mr. Lewis with knowingly and intentionally possessing a controlled substance in violation of 21 U.S.C. § 841(a)(1), which substance was identified as a detectable amount of cocaine base; count 3 charged Mr. Lewis knowingly possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A)(i) and count 4 charged Mr. Lewis with having previously been convicted of a felony offense and being in knowing possession of a firearm on or about August 30, 2011 in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. 924(e)(1).

On December 8, 2011, Mr. Lewis pled guilty to the Count 1 of the superseding indictment pursuant to a plea agreement. Crim. DE 24, 26, 27. In the agreement, the government agreed to seek dismissal of Count 4 of the Superseding Indictment unconditionally after sentence, and further agreed to seek dismissal of Counts 2 and 3 of the Superseding Indictment if the defendant is found to have three prior convictions for violent felonies or serious drug offenses. Crim. DE 26.

The defendant and the government further agreed that Mr. Lewis had prior convictions for the following felonies: (a) armed robbery with a firearm or deadly weapon in violation of Florida Statute 812.13(2)(A), (b) aggravated assault with a firearm in violation of Florida Statute 784.021(a), (c) felony battery in violation of Florida Statute 784.041, and (d) fleeing/attempting to elude a police officer in a motor vehicle in violation of Florida Statute 316.1935(2). Crim. DE 26.

The Pre-Sentence Investigation was disclosed and classified Mr. Lewis as being subject to the enhanced penalties of the Armed Career Criminal Act without specifying which prior convictions were qualifying convictions. PSI, ¶22. On February 24, 2012, Mr. Lewis was sentenced to 180 months in prison with the judgement finding that he was subject to the Armed Career Criminal penalty enhancement of 18 U.S.C. § 924(e)(1). Crim. DE 30.

In August 2015, Mr. Lewis filed his first habeas petition *pro se* pursuant to 18 U.S.C. § 2255 challenging his Armed Career Criminal sentencing enhancement based on the United States Supreme Court decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the ACCA's residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) is unconstitutionally vague. Civ. DE 1. The magistrate judge initially recommended denying the petition as untimely because it had not been filed within a year of Mr. Lewis's conviction becoming final and cited an Eleventh Circuit case finding that second or successive habeas petition could not be filed within a year of *Johnson*. Civ. DE 6. Mr. Lewis filed objections to that finding in the report and recommendation, which were sustained by the district court, noting that Mr. Lewis's petition was not a second or successive habeas petition and referring the petition back to the magistrate judge for a supplemental report. Civ DE 7. The magistrate issued a supplemental report still recommending that Mr. Lewis's first habeas petition was

time-barred because *Johnson* had not been made retroactive and also recommending that on the merits of the petition, Mr. Lewis was not entitled to relief because three of Mr. Lewis's prior convictions satisfy the ACCA's definition of violent felony. Civ DE 9.

Mr. Lewis again filed objections to the magistrate judge's findings that his petition was time barred and further objected to the finding on the merits specifically the recommendation that two of his convictions - aggravated assault with a firearm and felony battery - qualify as violent felonies for the ACCA. Civ DE 10, 14. The government filed a response to Mr. Lewis's objections, agreeing with his objection to the report's finding of untimeliness and opposing Mr. Lewis's arguments that his priors no longer qualified as predicate violent felonies. Civ DE 13. The district court entered an order on the petition, overruling the magistrate judge's finding that Mr. Lewis's petition was time barred, but adopting the denial of relief on the merits. Civ DE 15. The district court also denied a certificate of appealability. *Id.* Mr. Lewis filed a timely notice of appeal. Civ. DE 17.

Mr. Lewis, through counsel, then filed a timely motion for a certificate of appealability with this Court. On August 25, 2016, one judge of this Court denied Mr. Lewis a certificate of appealability. Mr. Lewis now respectfully asks this Court to reconsider that denial.

ARGUMENT AND CITATION OF AUTHORITY

A certificate of appealability (COA) is required to appeal the denial of a motion to vacate sentence under 18 U.S.C. § 2255. A COA may issue only upon a "substantial showing of the denial of a constitutional right." 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, 120 S. Ct. 1595, 1603-04 (2000) (internal quotation marks omitted). *See also Henry v. Dep't of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999).

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, 123 S. Ct. 1029, 1039 (2003). Noting that 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, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*, 537 U.S. at 338, 123

S. Ct at 1040.

When a single judge order denies a certificate of appealability, a motion for reconsideration of that order is reviewed under the same standard as the original motion, that is, whether jurist of reason could debate the claim. *See Griffin v. Sec'y Fla. Dep't Corr.*, 787 F. 3d 1086, 1088-89 (11th Cir. 2015).

For the reasons stated below, the district court's ruling denying relief on Mr. Lewis's section 2255 petition may or may not have been correct, but it was surely debatable among reasonable jurists, particularly in light of the fact that one of his prior convictions was for Florida felony battery. A district court judge in the Southern District of Florida has recently ruled that after *Johnson*, Florida felony battery can no longer be considered a predicate crime of violence for the Armed Career Criminal enhancement Mr. Lewis was subjected to. *United States v. Titato Clarke*, Case No. Case No. 14-20759-Cr-COOKE (S.D. Fla) (at June 22, 2016 resentencing after 11th Circuit vacated ACCA sentence and remanded to conduct new sentencing in light of *Johnson*, district court agreed felony battery was not a violent felony within the elements clause). Moreover, this Court heard oral argument on precisely the same issue in *United States v. Eddy Vail-Balon*, Case No. 15-10351, on May 17, 2016. No opinion yet has issued in *Vail-Bailon*. Thus, it seems that reasonable jurists can and do disagree about whether Florida felony battery qualifies as a crime of violence.

If Mr. Lewis's conviction for Florida felony battery is no longer a crime of violence for purposes of the ACCA enhancement,[2] Mr. Lewis's will be actually innocent of being an armed career criminal and his 180 month will be in excess of the 120 month statutory maximum otherwise applicable. In light of the fact that reasonable jurists do appear to disagree about whether a conviction for Florida felony battery would qualify as an ACCA predicate offense, Mr. Lewis respectfully requests that this Court grant him a certificate of appealability

I. Reasonable jurists could debate whether Mr. Lewis was wrongly sentenced as an armed career criminal in light of the intervening change in the law found in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Mr. Lewis had prior convictions for the following felonies: (1) armed robbery with a firearm or deadly weapon in violation of Florida Statute 812.13(2)(A), (2) aggravated assault with a firearm in violation of Florida Statute 784.021(a), (3) felony battery in violation of Florida Statute 784.041, and (4) fleeing/attempting to elude a police officer in a motor vehicle in violation of Florida Statute 316.1935(2). Crim. DE

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[2] Mr. Lewis had, at the time, four qualifying prior convictions. One of those, his prior conviction for fleeing and eluding, is indisputably not a crime of violence after *Johnson's* invalidation of the residual clause. Mr. Lewis is challenging his three remaining convictions, which are for felony battery, armed robbery and aggravated assault. If any one of those is no longer a crime of violence, as Mr. Lewis contends, then he is no longer an armed career criminal.

26. The government conceded that his fleeing/attempting to elude prior conviction no longer qualified as a violent felony. Civ. DE 13 at 8. Mr. Lewis is moving for a certificate of appealability because there are cognizable legal arguments that each of the three remaining prior convictions should not qualify as a predicate offense, and that "reasonable" jurists could disagree on the merits of those arguments. Because reasonable jurists could disagree, a certificate of appealability should issue.

A. Reasonable jurists could debate whether Florida's felony battery statute is a violent felony.

In denying the habeas petition, the district court judge found that a conviction under Florida Statute section 784.021(1)(a) for felony battery was a violent felony. Civ. DE 15 at 6-7. The district court relied upon the unpublished decision in *United States v. Eugene*, 423 F. App'x 908, 911 (11th Cir. 2011). There is no published case from this Circuit addressing the issue and the reasoning in *Eugene*, which pre-dates *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, __ S. Ct. __, 2016 WL 3434400 (June 23, 2016), is unpersuasive. It states, again in only one sentence of reasoning, that "it is impossible for one to be convicted of felony battery in Florida without having used 'physical force' as defined in *Johnson*." *United States v. Eugene*, 423 Fed. App'x 908, 911 (11th Cir. 2011). But that is patently not true: there are numerous ways for an individual to unintentionally cause

great bodily harm by only a non-violent touching. For example, one can unintentionally cause someone to fall down a slight of stairs (or, worse, fall off a cliff) by surprisingly tapping them on the shoulder. One can unintentionally cause great bodily harm in the form of an allergic reaction by applying lotion to someone's skin. And one can unintentionally cause great bodily harm by touching someone on a concealed wound or exacerbate a pre-existing medical condition with only a slight touching (*i.e.*, the so-called "eggshell" victim). The hypotheticals are innumerable.

The U.S. Supreme Court has held, and there is no dispute, that the Florida simple battery statute in Fla. Stat. § 784.03 is not a crime of violence, because it can be violated by "actually and intentionally touching." Because the offense can be satisfied by *any* intentional physical contact, no matter how slight, it does not require the use of violent, physical force required to satisfy the elements clause. *Johnson v. United States*, 559 U.S. 133, 138 (2010) (citing *State v. Hearns*, 961 So.2d 211, 218 (Fla. 2007)).

The fact that the felony battery statute has an additional causation of bodily harm requirement, does not change the fact that it can be accomplished by a mere unwanted touching. The Florida jury instructions for felony battery make clear that the "touching or striking" component under § 784.041(1)(a) are simply alternative

means of satisfying a single, indivisible element. Fla. Std. Jury Instr. in Crim. 8.5. Indeed, "touch" and "strike" are contained within a single element. Thus, they are not alternative elements of the offense which the jury must find beyond a reasonable doubt. *See Lockett*, 810 F.3d at 1268-1269. In light of the above, the government has now expressly "concede[d] that . . . battery on a law enforcement officer [a derivative of simply battery] is no longer considered a violent felony under the ACCA." *Turner v. United States*, No. 16-cv-61285, D.E. 8 at 2 (S.D. Fla. July 7, 2016).

That conclusion is unaffected by the fact that the Florida felony battery statute also requires that the defendant "[c]ause[ ] great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1)(b). This is so because the mere fact that the offense must result in great bodily harm does not mean that the offense necessarily requires the use of violent, physical force within the meaning of *Curtis Johnson*. For example, the Fifth Circuit recently held that, notwithstanding the "causation of death" element of the Florida manslaughter statute, that offense did not satisfy the elements/force clause:

> Bolstering this conclusion, we have previously held that an "injury to a child" offense defined in terms of the causation of injury by intentional act did not contain a force element. This was because if any set of facts would support a conviction without proof of that force component, then the component most decidedly is not an element of

> the crime. Intentional injury to a child could be committed by poison, for example, which would not be use of physical force for these purposes. This holding logically extends to offenses defined in terms of the causation of *death*, such as the Florida statute at issue. We find that [Florida manslaughter] does not have an element of force.

United States v. Garcia-Perez, 779 F.3d 278, 283–84 (5th Cir. 2015) (emphasis in original; footnotes, brackets, and ellipses omitted). Thus, to the extent the unpublished decision in *Eugene* found that the "causation of great bodily harm" element means that felony battery necessarily requires the use of violent force, it is incorrect.

In addition, the "causation of great bodily harm" element for felony battery lacks any *mens rea* requirement: the injury caused by the touching or striking may be unintentional and unknowing. This is made clear by comparing felony battery, which is a third-degree felony, to aggravated battery, which is a second-degree felony. Aggravated battery occurs when, in the course of committing a battery, a person "*intentionally or knowingly* causes great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.045(1)(a) (emphasis added). The only difference between felony battery and aggravated battery is that the latter requires *mens rea*. *See T.S. v. State*, 965 So.2d 1288, 1290 (Fla. 2d DCA 2007) (explaining

that aggravated battery is simply "felony battery with the added element of intentionally or knowingly causing the great bodily harm, etc.").

The lack of any *mens rea* requirement for the "great bodily harm" element precludes that element from transforming felony battery into a violent felony. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court held that a conviction for driving under the influence ("DUI") *and causing serious bodily injury* was not a "crime of violence" under the materially-identical elements clause in 18 U.S.C. § 16(a). The Court reasoned that the statutory phrase "use" of physical force against another required the "active employment" of force, and therefore "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 9; *see id.* at 11 ("requiring a higher *mens rea* than . . . merely accidental or negligent conduct"). Because the defendant's conviction did "not require any mental state with respect to the use of force against another person, thus reaching individuals who were negligent or less," the Court held that it did not qualify under the elements clause. *Id.* at 13.

Here, Florida law is clear that, in order to commit felony battery, the defendant need not have any *mens rea* at all with regard to causing the bodily harm. Thus, while the touching or striking must be intentional, the defendant need not intend for

that battery to cause the bodily harm. *See, e.g.*, *T.S.*, 965 So.2d at 1290 (reducing defendant's conviction for aggravated battery to felony battery where the causation of injury was not intentional, but rather was the result of "a quick, almost reflexive response to having tea thrown in his face"). Accordingly, the "great bodily harm" element of the felony battery statute does not bring the offense within the scope of elements clause, as interpreted by *Leocal*.

At least one judge in this district has recently accepted the arguments above and held that felony battery no longer qualifies as a violent felony. *United States v. Clarke*, No. 14-cr-20759-MGC (S.D. Fla. June 22, 2016) and there is currently a case pending on this issue with this Court which had oral argument on May 17, 2016 - *United States v. Vail-Bailon*, Case No. 15-10351 (issue presented: whether "felony battery" in violation of Fla. Stat. §784.041 was a "crime of violence" as defined in U.S.S.G. §2L1.2). The issue of whether or not felony battery qualifies as a predicate violent felony for purposes of the armed career criminal is not settled law in this Circuit, reasonable jurists can disagree about it and therefore, Mr. Lewis should receive a certificate of appealability and be able to proceed with his appeal of the district court's finding.

B. Reasonable jurists could debate whether a violation of Florida Statute § 784.021 is a "violent felony" in light of the Supreme Court's decision in *Johnson v. United States*, 559 U.S.___, 133, 130 S.Ct. 1265 (2010) because it can be committed recklessly.

Mr. Lewis should also be able to proceed on his challenge to whether his prior conviction for aggravated assault with a firearm in violation of Fla. Stat. § 784.021 was properly considered to qualify as a violent felony under the elements clause. The Florida statute prohibiting "aggravated assault," Fla. Stat. § 784.021 has been interpreted by the Florida courts to permit conviction with a *mens rea* of culpable negligence. And under controlling Supreme Court and Circuit precedent that *mens rea* is insufficient for an offense within the elements clause.

In *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377 (2004), the Supreme Court considered whether a Florida conviction for driving under the influence (DUI) with injuries qualified as a crime of violence for enhancement under 18 U.S.C. § 16. That section is almost identical to the pertinent wording of § 4B1.2(a)(1). The Court found that the DUI statute did not constitute a violent felony because an individual could be convicted for negligent or accidental actions. The *Leocal* court held that "use . . . of physical force" requires "active employment." *Id.* at 9. The "use . . . of physical force against a person or property of another . . . suggests a higher degree of

intent than negligent or accidental conduct." *Id.* at 9. Thus, for an offense to be considered a crime of violence pursuant to § 4B1.2(a)(1)'s definition it must have as an element an active and intentional employment of force to trigger the elements clause.

In *United States v. Palomino-Garcia*, 606 F.3d 1317 (11th Cir. 2010) this Court extended the holding in *Leocal* to exclude crimes based on a *mens rea* of recklessness from qualifying as predicates for enhancement under U.S.S.G. § 2L1.2. The conviction in question in *Palomino-Garcia* was an Arizona conviction for aggravated assault. Arizona defined "assault" as intentionally, knowingly or recklessly causing any physical injury to another person." Ariz. Stat. § 13-1203(A)(1). Arizona defined recklessness as a conscious disregard of a substantial and unjustifiable risk. Ariz. Stat. § 13-105(c). *See also In Re William G.*, 963 P.2d 287, 292 (1997) ("recklessness requires an awareness and conscious disregard of the risk").

Other circuits have similar precedent and likewise have excluded crimes based on recklessness. *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *United States v. Torres-Villalobos*, 487 F.3d 607, 615-16 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121, 1127-32 (9th Cir. 2006) (*en banc*); *Garcia v. Gonzalez*, 455 F.3d 465, 468-

69 (4th Cir. 2006); *Oyebanj v. Gonzalez*, 418 F.3d 260, 263-65 (3rd Cir. 2005); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2nd Cir. 2003); and *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001).

Whether a particular conviction constitutes a predicate for enhancement must be evaluated through a categorical approach. *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276, 2284-85 (2013). And in this case, Mr. Golden suggests that the pertinent statutory provision, i.e., "Assault" Fla. Stat. § 784.011, is an indivisible statute, meaning that the Court may only look to the statutory definition of the offense and not to any "*Shepard*" documents to determine if it is a crime of violence. *Id.* This Court must assume that the offense was committed by the least culpable, non-violent means. *Id.* In determining the elements of a state offense, this Court is bound by the particular state's courts' interpretation of the statute. *Johnson v. United States*, 559 U.S.___, 133, 130 S.Ct. 1265, 1269 (2010).

Mr. Lewis was convicted of aggravated assault in violation of Florida Statute § 784.021. Section 784.021 makes a simple assault (§ 784.011) an aggravated assault if: "1) it is committed with a deadly weapon without the intent to kill; or 2) it is committed with an intent to commit a felony." Lastly, simple assault (which contains the operative intent element) under Fla. Stat. § 784.011 is defined as "an intentional,

unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Thus, aggravated assault is simply an assault, aggravated or enhanced by the particular means or purpose and by the nature of the victim. Simple assault is a lesser included offense of aggravated assault and carries the same intent element.

Interpreting Fla. Stat. § 784.021 (aggravated assault), Florida courts have consistently held that the intent element may be satisfied by proof of culpable negligence. *LaValley v. State*, 633 So.2d 1126, 1127 (Fla. 5th DCA 1994); *Kelly v. State*, 552 So.2d 206, 208 (Fla. 5th DCA 1989) ("Where, as here, there is no proof of an intentional assault on the victim, that proof may be supplied by proof of conduct equivalent to willful and reckless disregard for the safety of others."); *Green v. State*, 315 So.2d 499, 500 (Fla. 4th DCA 1975) (reversing conviction for aggravated assault because proof of intent was lacking, but explaining that "intent" in an aggravated assault case can be supplied by proof of conduct equivalent to culpable negligence since such an offense is a lesser included offense of manslaughter by culpable negligence); and *DuPree v. State*, 310 So.2d 396, 398 (Fla. 2nd DCA 1975)(holding in a manslaughter case that to sustain DuPree's conviction for the lesser included

offense of aggravated assault, his conduct must have been equivalent to culpable negligence).

In *Dupree*, the court explained that

> Culpable negligence means conduct of a gross and flagrant character, evincing reckless disregard of human life or the safety of persons exposed to its dangerous effects; or that entire want of care which would raise the presumption of indifference to consequences; or such wantonness or recklessness or grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others, which is equivalent to an intentional violation of them.

Id. It is clear from *Dupree* and the other above-cited Florida aggravated assault cases that the Florida Statute encompasses conduct which is broader than the type of intentional conduct required for the enhancement found at §4B1.2(a)(1). Accordingly, Mr. Lewis's aggravated assault conviction should not have been used to enhance his sentence.

The district court in denying the petition and certificate of appealability relied upon *United States v. Tinker*, 618 Fed. Appx. 635 (11th Cir. 2015), however, in that case, the defendant explicitly did not challenge or argue that his prior conviction was not a violent felony. Mr. Lewis acknowledges that this Court has previously found

that Florida aggravated assault qualifies as a crime of violence under the "elements clause" of § 924(e). *Turner v. Warden*, 709 F.3d 1328 (11th Cir. 2013). However, *Turner* is distinguishable from the argument that would be advanced by Mr. Lewis because these cases did not analyze the culpable negligence component of the Florida aggravated assault statute or its relationship to manslaughter. The panel in *Turner* did not consider the opinion in *Palomino-Garcia*, or the controlling Supreme Court decision in *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed2d 271 (2004). *Leocal* held that 18 U.S.C. § 16's use of force elements clause required active employment which suggests a higher degree of intent than negligent or merely accidental conduct. Had *Turner* raised the intent component and had the Court considered *Leocal* and *Palomino-Garcia*, the decision may have been different. Under those circumstances, the rule in this Circuit is that the Court should follow the prior precedent–*Palomino-Garcia* and *Leocal* which would lead to a ruling contrary to *Turner*. *See Tucker v. Phyfer*, 819 F.2d 1030, 1035, at n.7 (11th Cir. 1987) (panel may contradict prior panel decision if prior panel clearly failed to consider controlling precedent); *United States v. Hornaday*, 392 F.3d 1306, 1316 (11th Cir. 2004) (to the extent there is a conflict between two circuit precedents, the earlier precedent controls).

Although Mr. Lewis has found no case in this Circuit, or any other, that has explicitly considered whether reckless or culpably negligent intent excludes Florida aggravated assault convictions from being counted as violent felonies for enhancement purposes, numerous cases from other circuits exclude similar culpable negligence or recklessness offenses as crime of violence predicates.

The Fifth Circuit, notably has explicitly equated Florida "culpable negligence" with "recklessness." *United States v. Garcia-Perez*, 779 F.3d 278, 285 (5th Cir. 2015). Another example can be found in *United States v. McMurray*, 653 F.3d 357 (6th Cir. 2011) where the defendant objected to a crime of violence enhancement under § 924(e) based on a prior Tennessee conviction for aggravated assault (Tenn. Code Ann. § 39-13-101 and 102 (1991)). Tennessee defined "assault" as: "1) Intentionally, knowingly or recklessly causes bodily injury to another; 2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or 3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative." *Id.* *McMurray* considered subsection (1), "Intentionally, knowingly or recklessly causes bodily injury." The court noted that Tennessee courts had extended the statute's application to such conduct as reckless driving resulting in injury. See *State v. Gillon*, 15 S.W. 3d 492, 496-97 (Tenn. Crim. App. 1997). Relying on *Leocal* and an

earlier decision in *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006) (finding Tenn. vehicular assault while intoxicated is not a crime of violence), the Sixth Circuit held that Tennessee aggravated assault could not be a crime of violence under the § 924(e) elements clause because a person can be convicted of aggravated assault in Tennessee based on no more than recklessness.

Likewise, the Tenth Circuit held that the Texas offense of assault on a public servant (Tex. Pen. Code § 22.01(b)(1)) was not a crime of violence in the context of U.S.S.G. § 2L1.2 because it included crimes with a *mens rea* of reckless intent. *United States v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008). The underlying simple assault provision (Tex. Pen. Code § 22.01(a)(1)) made it an offense to "intentionally, knowingly or recklessly cause bodily injury another." As such, it could not constitute a crime of violence predicate under a categorical approach. See also *Kabenga v. Holder*, 2015 WL 728205 (S.D. N.Y. 2/19/15) (finding same Texas aggravated assault statute not a crime of violence due to recklessness *mens rea*).

Like *Leocal*, *Palomino-Garcia*, *McMurray*, and *Zuniga-Soto*, Mr. Lewis was wrongfully enhanced for violation of a statute which permitted conviction with no more than the *mens rea* of recklessness. Under the required categorical approach to

the Florida offense of aggravated assault, that offense cannot constitute a violent felony as defined in the ACCA.

In sum, Mr. Lewis has a cognizable legal argument that reasonable jurists could differ on and that the district court erred in denying his petition and requests that a certificate of appealability issue so that he may advance these arguments.

RELIEF REQUESTED

WHEREFORE, the Movant/Appellant Jaumon Lewis respectfully moves this Court to grant him a certificate of appealability on the following questions:

> Whether the district court erred in denying Mr. Lewis's claim that he was wrongly sentenced as an armed career criminal?

Respectfully submitted,
MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

BY: *s/ Aimee Ferrer*

Aimee Ferrer
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CERTIFICATE OF COMPLIANCE

I CERTIFY that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7). According to the WordPerfect program on which it is written, this motion contains 5,336 words.

s/Aimee Ferrer

Aimee Ferrer

Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served via CM/ECF this 10th day of May 2016, upon Emily M. Smachetti, Assistant United States Attorney, Chief, Appellate Division, United States Attorney's Office, 99 N.E. 4th Street, Miami, Florida 33132-2111.

s/Aimee Ferrer

Aimee Ferrer

Assistant Federal Public Defender

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11494-C

JAUMON R. LEWIS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Jaumon R. Lewis moves for a certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2255 motion. Because Lewis has failed to make the requisite showing, his motion for a certificate of appealability is DENIED. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000). His motion for *in forma pauperis* status is DENIED AS MOOT.

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-23059-CIV-SEITZ/WHITE

JAUMON R. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING RECOMMENDATION ON THE MERITS ONLY, OVERRULING IN PART PETITIONER'S OBJECTIONS, AND DENYING CERTIFICATE OF APPEALABILITY

THIS MATTER is before the Court on Petitioner Lewis's Objections [DE 10] to Magistrate Judge White's Report and Recommendations [DE 9]. In his 28 U.S.C. § 2255 petition [DE 1], Petitioner challenges his fifteen-year enhanced sentence under 18 U.S.C. § 924(e) of the Armed Career Criminal Act ("ACCA") based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson*"), which held that the ACCA's residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) is unconstitutionally vague. The Report recommends dismissing the petition for two reasons: (1) it is untimely because the Supreme Court has not made *Johnson* retroactive on collateral review; and (2) it is without merit because three of Petitioner's prior convictions satisfy the ACCA's "elements clause," § 924(e)(2)(B)(i), which survived *Johnson*.

The Court has reviewed, *de novo*, the record, the Report, Petitioner's Objections [DE 10; *see also* DE 14], and the Government's Response [DE 13] and finds that the Report's factual findings are not clearly erroneous and its legal conclusions on the *merits* are consistent with the proper application of the law to those facts. However, the Court must sustain Petitioner and the Government's objection to the Report's conclusion that the petition was untimely under *Johnson* and 28 U.S.C. § 2255(f)(3). The Report relied on *In re Rivero*, 797 F.3d 986 (11th Cir. 2015), which

involved a successive petition subject to § 2255(h)(2)'s requirement that the Supreme Court make new rules retroactive. Because this is Petitioner's first petition and any court can make a new rule retroactive under § 2255(f)(3), the Court cannot adopt this section of the Report.

In his Objections on the merits, Petitioner disputes that two of his convictions — aggravated assault with a firearm and felony battery — satisfy the elements clause. He contends that these offenses do not categorically require physical force as elements and that the record is unclear as to the statutory basis underlying his assault conviction. Given his admission to the fact of both his assault and battery convictions and that each requires physical force as an element — threatening to do violence and causing significant physical harm, respectively — his Objections are overruled.

Background

In 2011, Petitioner pled guilty to being a felon in possession of a firearm. In his signed Plea Agreement [Case No. 11-cr-20631, DE 26], Petitioner conceded the following three prior convictions:

> (1) Armed robbery with a firearm or deadly weapon, in violation of Florida Statutes 812.13(2)(A) and 775.087, Miami-Dade County, Florida Case Number F03-012116;
> (2) Aggravated assault with a firearm, in violation of Florida Statutes 784.021(1)(a) and 775.087, Miami-Dade County, Florida Case Number 99-2878;
> (3) Felony battery, in violation of Florida Statue 784.041, Miami-Dade County, Florida Case Number 03-012114 . . . .[1]

Petitioner was sentenced to 180 months' imprisonment under the ACCA and did not appeal. His one-year collateral review deadline was March 12, 2013. Petitioner filed this habeas petition challenging his ACCA sentence enhancement in August 2015, two months after *Johnson* issued.

***The Petition is Timely under* Johnson**

Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a petitioner may file a habeas petition within one year of "the date on which the right asserted was initially recognized by

[1] Petitioner also admitted to a fourth conviction for fleeing a police officer in a motor vehicle. The Report, the Government, and Petitioner correctly concur that offense no longer counts as a violent felony after *Johnson*.

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). Petitioner claims that his lapsed collateral review clock restarted with *Johnson*. Interpreting *In re Rivero*, 797 F.3d 986 (11th Cir. 2015), the Report concluded that the petition was not timely, because the Supreme Court has not yet made *Johnson*'s new substantive rule retroactive on collateral review.

Both Petitioner and the Government disagree. Their position is that *In re Rivero* limited its non-retroactivity analysis to successive, not initial, habeas petitions. *See id.* at 991 ("If Rivero . . . were seeking a first collateral review of his sentence, the new substantive rule from *Johnson* would apply retroactively."). The Government argues that the hurdles differ under 28 U.S.C. § 2255(h)(2) and § 2255(f)(3). Whereas § 2255(h)(2) specifies that the Supreme Court itself must make a new rule retroactively applicable to successive petitions like Rivero's, a new rule may apply to belated initial petitions under § 2255(f)(3) as long as *any court* makes it retroactive, *see Dodd v. United States*, 365 F.3d 1273, 1278 (11th Cir. 2004), *aff'd on other grounds*, 545 U.S. 353 (2005).

The parties' interpretation is persuasive. In *In re Rivero*, the Eleventh Circuit recognized that *Johnson* announced a new substantive rule of constitutional law and that such rules generally apply retroactively. 797 F.3d at 988-89. In holding that *Johnson* nonetheless did not permit successive petitions, the focus of the Court's analysis was whether the Supreme Court itself had made the rule retroactive as required by § 2255(h)(2), concluding it had not. *Id.* at 989-90; *see also In re Franks*, No. 15-15456-G, 2016 WL 80551, at *2-3 (11th Cir. Jan. 6, 2016) (same). Unlike in *In re Rivero*, this is Petitioner's first petition; therefore, § 2255(h)(2) does not apply. Given that any court can make new substantive rules apply retroactively under § 2255(f)(3); that *In re Rivero* recognized *Johnson* announced such a rule; and that Petitioner filed his petition within a year of *Johnson*, the Court sustains Petitioner and the Government's objection and finds that the petition is timely.

The Petition Must Be Denied on the Merits

Although the Supreme Court in *Johnson* invalidated the ACCA's residual clause, its elements

clause survived and states in relevant part that a violent felony means a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). The Report recommended denying the petition on the merits, because three of Petitioner's prior convictions — (1) armed burglary, (2) aggravated assault with a firearm, and (3) felony battery — fall under the elements clause. Although Petitioner does not challenge the Report's finding as to armed burglary, he objects that his convictions for aggravated assault and for felony battery no longer qualify after *Johnson*.

I. Aggravated Assault Conviction.

As to his aggravated assault with a firearm conviction, Petitioner raises two objections. First, citing *United States v. Day*, 465 F.3d 1262, 1264-65 (11th Cir. 2006), he argues that "the state court record does not indicate under which of [784.021(1)'s] two subsection [sic] Movant was convicted." [DE 10, p. 4.] In his view, the Court must thus apply a "modified categorical approach" to determine the subsection underlying his conviction or "look for a physical force element" in each. *Id.* Second, he contends the district court must have "used the residual clause in applying the ACCA enhancement" based on his assault conviction because it does not have physical force as an element. [DE 10, p. 5.] Neither objection has merit.

As to his first objection, Florida Statute 784.021(1) specifically proscribes "an assault: (a) [w]ith a deadly weapon without intent to kill; or (b) [w]ith an intent to commit a felony." Florida law defines "assault" as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Fla. Stat. § 784.011(1). The Eleventh Circuit has held that the statutory definition of the "assault" element alone categorically qualifies aggravated assault as a violent felony under the elements clause. *United States v. Johnson*, 515 F. App'x 844, 848 (11th Cir. 2013). Even if clarification as to the subsection of his conviction were needed, Petitioner's signed Plea Agreement states he was convicted under § 784.021(1)(a). *Cf.*

United States v. Yancy, 725 F.3d 596, 601 (6th Cir. 2013) ("[W]hen a defendant knowingly admits the facts necessary for a sentence enhancement in the context of a plea . . . no *Apprendi* problem arises."). Petitioner does not challenge his admission to the fact of his prior conviction under § 784.021(1)(a); thus, his citation to *Day* is inapposite. 465 F.3d at 1265-66 (holding that the district court correctly applied a modified categorical approach to a divisible statute to determine the *nature* of the conviction but erred in relying on a state criminal information that charged a different crime with a different factual predicate than the crime of conviction).

Petitioner's second objection is also misguided. Regardless of whether a district court relies on the ACCA's residual clause to enhance a sentence, there is no prejudicial error if the predicate offense also qualifies as a violent felony under the elements clause. *See United States v. Jean*, No. 15-11978, 2016 WL 143361, at *3 (11th Cir. Jan. 13, 2016) (holding on direct appeal that the district court's use of the residual clause was harmless error where defendant's prior conviction also qualified under the elements clause).[2] As discussed, Petitioner's conviction categorically qualifies under the elements clause; thus, the Court does not reach a "modified categorical" analysis. On page 5 of his Objections [DE 10], Petitioner appears to disagree, citing *Johnson v. United States*, 559 U.S. 133, 140 (2010) and emphasizing that physical force means "*violent* force — that is, force capable of causing physical pain or injury to another." However, Florida Statutes § 784.011(1) and § 784.021(1)(a) require just that: an intentional threat to do *violence* to another, with a deadly weapon. Thus, Petitioner's conviction satisfies the elements clause. *See United States v. Tinker*, No. 15-10642, 2015 WL 4430678, at *2 (11th Cir. July 21, 2015) (noting that a Florida conviction for aggravated assault with a firearm qualifies under the elements clause) *cert. denied*, No. 15-6555, 2015 WL 6111470 (U.S. Nov. 16, 2015).

[2] Petitioner's reference to the residual clause in the Sentencing Guidelines is irrelevant. Although that clause is virtually identical to the ACCA's residual clause, the Eleventh Circuit has held that the vagueness doctrine "does not apply to advisory guidelines" and thus that *Johnson* did not invalidate the Guidelines' residual clause. *United States v. Matchett*, 802 F.3d 1185, 1194-95 (11th Cir. 2015).

II. Felony Battery Conviction.

As to his felony battery conviction, Petitioner raises two belated objections.[3] First, he argues that felony battery is not a violent felony because harm is not a necessary part of each element and "the statute does not categorically or invariably require significant force or violence." At the time of his offense, Florida Statute § 784.041 provided that a person is guilty of felony battery if he "(a) actually and intentionally touches or strikes another person against the will of the other; and (b) causes great bodily harm, permanent disability, or permanent disfigurement." Petitioner stresses that the first element contains the same "actually and intentionally touching" language as simple battery, which has been held to be insufficient to satisfy the "physical force" required under the elements clause. *Johnson*, 559 U.S. at 139-40. He further objects that no one established he was convicted of "striking" the victim and that the Report failed to specifically find that he caused any significant harm. Second, he claims the Report should have established that his crime fell within both the ACCA's elements clause and enumerated clause, § 924(e)(2)(B)(ii) (listing certain categories of offenses, including burglary, arson, or extortion).

Petitioner's first argument misreads the felony battery statute. Unlike simple battery, both contact with the victim *and* harm must be established for a felony battery conviction. By its terms, the elements clause requires only that a crime have physical force as "an element," not in each element. Petitioner's focus on whether the first element involves the requisite physical force is thus a nonstarter. The second element necessarily requires causing some form of significant physical harm to another, meaning that no one can be convicted of felony battery *unless* he used violent physical force. *See United States v. Eugene*, 423 F. App'x 908, 911 (11th Cir. 2011) (holding that felony battery is a violent felony under a provision of the Sentencing Guidelines virtually identical to the ACCA's elements clause). No specific finding as to the type of harm caused is necessary. *See id.*

[3] Petitioner did not raise specific objections to classifying his battery conviction under the elements clause until his second set of Objections [DE 14], which he filed two months after the Report issued.

Petitioner's second objection also fails. Because his conviction satisfies the elements clause, it qualifies as a violent felony. There is no requirement that a prior conviction fit both subsections of § 924(e)(2)(B). For the foregoing reasons, all of Petitioner's Objections to the Report's analysis on the merits are overruled.

No Evidentiary Hearing is Warranted

A court need not hold an evidentiary hearing if the "files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). The Report recommended that any request for an evidentiary hearing be denied, because Petitioner's claims are meritless and wholly unsupported by the record. Although Petitioner recognizes that the facts underlying his prior convictions are irrelevant, Petitioner argues that a hearing is required to determine the "violation nature" of his predicate offenses and whether the sentencing judge applied the ACCA's residual clause or elements clause. However, the inquiry turns on whether his prior convictions categorically fall within the elements clause, and three do. *See Jean*, 2016 WL 143361, at *3. As set out in the Report and herein, Petitioner is entitled to no relief, and his request for a hearing is thus denied.

No Certificate of Appealability Will Issue

Additionally, the Court will deny issuance of a certificate of appealability. In order to obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is satisfied if a petitioner demonstrates "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Jones v. Sec'y, Dep't of Corr.*, 607 F.3d 1346, 1349 (11th Cir. 2010) (quotation omitted). Petitioner has not met this standard; accordingly, a certificate of appealability is denied. Therefore, it is

ORDERED THAT

(1) The Court **ADOPTS ONLY THE REPORT'S FACTUAL FINDINGS AND RECOMMENDATION TO DENY THE PETITION ON THE MERITS** [DE 9, pp. 3-4; 21-29].[4]

(2) Petitioner's Objections [DE 10, 14] are **SUSTAINED IN PART** as to the timeliness of his petition **AND OVERRULED IN PART** as to the merits.

(3) Petitioner's request for an evidentiary hearing is **DENIED**.

(4) Pursuant to Rule 11 of the Rules Governing Section 2255 Cases, a certificate of appealability is **DENIED**.

(5) Petitioner's habeas petition under 28 U.S.C. § 2255 [DE 1] is **DENIED**.

(6) All pending motions not ruled upon are **DENIED AS MOOT**.

(7) This **CASE is CLOSED**.

DONE AND ORDERED in Miami, Florida, this 11th day of March, 2016.

PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record
Pro Se Petitioner
Magistrate Judge Patrick White

[4] The Court does not adopt the Report's citation to *State v. Shorette*, 404 So. 2d 816 (Fla. 2d DCA 1981) on page 25, because it is no longer good law.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-23059-Civ-SEITZ
(11-20631-Cr-SEITZ)
MAGISTRATE JUDGE P.A. WHITE

JAUMON R. LEWIS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

SUPPLEMENTAL REPORT OF MAGISTRATE JUDGE

I. INTRODUCTION

Jaumon R. Lewis, a federal prisoner, currently confined at the Federal Correctional Complex in Coleman, Florida, has filed a pro se motion to vacate, pursuant to 28 U.S.C. §2255, challenging the constitutionality of sentence as an armed career criminal, based the retroactive application of the Supreme Court's recent decision in Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015).

This Cause has been re-referred to the Undersigned for further Report and Recommendation 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 Section 2255 Cases in the United States District Courts. No order to show cause has been issued because, on the face of the petition, it is evident the petitioner is entitled to no relief. See Rule 4(b),[1] Rules

[1]Rule 4(b) of the Rules Governing Section 2255 Proceedings, provides, in pertinent part, that "[I]f it plainly appears from the motion and any attached exhibits, and the record of prior proceeding that the movant party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party...."

Governing Section 2255 Proceedings.

A Report was initially entered recommending that the movant's motion be dismissed as time-barred, noting that Johnson, supra, was not retroactively applicable to cases on collateral review. After objections were filed thereto, the district court entered an order sustaining movant's objection solely to the extent that movant was not foreclosed by this Circuit's decision in In Re Rivero, 2015 WL 4747749 at *1 (11th Cir. 2015), regarding the applicability of Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015) to his case, because the Eleventh Circuit's In Re Rivero decision "expressly limited its non-retroactivity analysis to successive petitions, not initial habeas petitions." (Cv-DE#8:2).

The Court has re-reviewed the movant's motion (Cv-DE#1), and all pertinent portions of the underlying criminal file, case no. 12-80211-Cr-Hurley, including the plea agreement and factual proffer statement (Cr-DE#375), and the Presentence Investigation Report ("PSI").[2]

II. CLAIMS

This court, recognizing that movant is *pro se*, afforded him liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). Movant raises **two** grounds for relief, asserting that, in light of the Supreme Court's decision in Johnson, his enhanced sentence as an armed career criminal is unlawful, and he is therefore entitled to vacatur of his sentence and a resentencing hearing without the enhancement.

[2]The undersigned takes judicial notice of its own records as contained on CM/ECF in those proceedings. See Fed.R.Evid. 201.

III. PROCEDURAL HISTORY

Initially, movant was charged with and pleaded guilty to being a felon in possession of a firearm. (Cr-DE#s17,26-27,30). Pursuant to the executed written plea agreement, movant agreed and stipulated that he had prior felony convictions in: (1) Miami-Dade County Circuit Court, case no. F03-012116, for armed robbery with a firearm or deadly weapon, in violation of Fla.Stat. §812.13(2)(A); (2) Miami-Dade County Circuit Court, case no. 99-2878, for aggravated assault with a firearm, in violation of Fla.Stat. §784.021(1)(a) and §775.087; (3) Miami-Dade County Circuit Court, case no. 03-012114, for felony battery, in violation of Fla.Stat. §784.041; and, (4) Miami-Dade County Circuit Court, case no. F03-012112 for fleeing/attempting to elude a police officer in a motor vehicle, in violation of Fla.Stat. 316.1935(2). (Cr-DE#26:1-2). After his plea was accepted, movant was adjudicated guilty and sentenced as an armed career criminal to a term of 180 months imprisonment, following by 5 years supervised release. (Cr-DE#30). The judgment was entered on the docket on **February 27, 2012**. (Id.). No direct appeal was prosecuted.

Thus, the Judgment became final on **Monday, March 12, 2012,** fourteen days after the entry of the judgment, when time expired for filing a notice of appeal.[3] Thus, the movant had one year from

[3]Where, as here, a defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a direct appeal expires. Adams v. United States, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999). On December 1, 2009, the time for filing a direct appeal was increased from 10 to 14 days days after the judgment or order being appealed is entered. Fed.R.App.P. 4(b)(1)(A)(i). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). Moreover, now every day, including intermediate Saturdays, Sundays, and legal holidays are included in the computation. See Fed.R.App.P. 26(a)(1). Here, movant was sentenced after the effective date of the amendment, thus he had fourteen days, including Saturdays and Sundays, within which to file his notice of appeal. See Fed.R.App.P. 26(a)(1)(B).

the time his conviction became final, or no later than **March 12, 2013**[4] within which to timely file this federal habeas petition. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, 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)). Applying the anniversary method to this case means petitioner's limitations period expired on **March 12, 2013.**

There were no further filings in the underlying criminal case by the movant until he returned to this court, filing the instant §2255 motion to vacate. (Cv-DE#1). Absent evidence to the contrary, in accordance with the mailbox rule, the motion is deemed filed on the date the movant signed it, **August 6, 2015.**[5] (DE#1).

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[4]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.

[5]Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing. Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

IV. STANDARD OF REVIEW

A. GENERALLY

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255. In determining whether to vacate a movant's sentence, a district court must first determine whether a movant's claim is cognizable under Section 2255. See Lynn v. United States, 365 F.3d 1225, 1232-33 (11th Cir. 2004)(stating that a determination of whether a claimed error is cognizable in a Section 2255 proceeding is a "threshold inquiry"), cert. den'd, 543 U.S. 891, 125 S. Ct. 167, 160 L. Ed. 2d 154 (2004). It is well-established that a Section 2255 motion may not be a substitute for a direct appeal. Id. at 1232 (*citing* United States v. Frady, 456 U.S. 152, 165, 102 S. Ct. 1584, 1593, 71 L.Ed.2d 816 (1982)).

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable. First, a district court must find that "a defendant assert[ed] all available claims on direct appeal." Id. (citing Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994). Second, a district court must consider whether the type of relief the movant seeks is appropriate under Section 2255. This is because "[r]elief under 28 U.S.C. §2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." Id. at

1232-33 (quoting Richards v. United States, 83 F.2d 965, 966 (11th Cir. 1988)(internal quotations omitted)).

If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. §2255. To obtain this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." Frady, 456 U.S. at 166, 102 S.Ct. at 1584 (rejecting the plain error standard as not sufficiently deferential to a final judgment).

Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). See also Aron v. United States, 291 F.3d 708, 715 (11th Cir. 2002)(explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous"). As indicated by the discussion below, the motion and the files and records of the case conclusively show that movant is entitled to no relief, therefore, no evidentiary hearing is warranted.

B. TIMELINESS

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA")

created a limitation for a motion to vacate. Pursuant to 28 U.S.C. §2255(f), as amended April 24, 1996, a one year period of limitations applies to a motion under the section. The one year period runs from the latest of:

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

See 28 U.S.C. §2255(f); see also, Pruitt v. United States, 274 F.3d 1315, 1317 (11th Cir. 2001); see also, Bousley v. United States, 523 U.S. 614 (1998)(new substantive not constitutional rule applies retroactively on collateral review, finding that the issue there was the product of statutory interpretation and not constitutional determinations that place particular conduct covered by a statute beyond the State's power to punish). The burden of demonstrating that the AEDPA's one-year limitation period was sufficiently tolled, whether statutorily or equitably, rests with the movant. See e.g., Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); Gaston v.

Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).

V. DISCUSSION

A. TIMELINESS

As will be recalled, movant's convictions became final on **March 12, 2012**, when the 14-day direct appeal expired. The instant motion was filed on **August 6, 2015**, over **3 years** after movant's conviction became final, and long after the one-year federal limitations expired. Consequently, movant is not entitled to statutory tolling of the limitations period.

1. Section 2255(f)(1). Under §2255(f)(1), when a defendant does not prosecute a direct appeal, the judgment of conviction becomes final when the time for seeking such review with the appellate court expires. See Murphy v. United States, 634 F.3d 1303, 1307 (11th Cir. 2011). As will be recalled, the movant's conviction became final on **March 12, 2012**, when time expired for filing a direct appeal, 14 days after the judgment was entered on the docket. The movant had one year from the time his conviction became final within which to timely file this initial collateral proceeding. The §2255 motion was not filed until **August 6, 2015.** Therefore, movant cannot rely on §2255(f)(1) to establish the timeliness of this motion since over **3 years** elapsed from the time the conviction became final until he filed this first §2255 motion.

2. Section 2255(f)(2) and (3). For purposes of timeliness, however, the inquiry is not at an end. Pursuant to §2255(f)(2), the

limitations period commences from the date on which the impediment created by the government is removed if such impediment prevented movant from timely filing the motion. Movant somehow believes that the impediment to relief was created by the government because no binding precedent existed which would enable him to collaterally attack his sentence. However, the movant is mistaken. The government did not create the impediment.

Rather, in legal effect, construing his arguments liberally, movant argues that his §2255 motion is timely because he raises a right to relief based on the Supreme Court's recent decision in Johnson v. United States ___ U.S. ____, 135 S.Ct. 2551, ___ L.Ed.2d ___ (2015), which was decided on **June 26, 2015**. Movant claims that, in light of Johnson, his prior convictions could not serve as the necessary predicate offenses to establish his eligibility to be sentenced as an armed career criminal under 18 U.S.C. §924(e).

In other words, pursuant to §2255(f)(3), movant claims the motion is timely because it was instituted less than one year from the issuance of the Supreme Court's decision in Johnson. However, under §2255(f)(3), a movant has one year from "the date 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 on collateral review." The Supreme Court, however, did not expressly address the retroactivity of Johnson or its availability as a basis for collateral relief. Consequently, since Johnson did not announce a right that was "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," movant cannot rely on §2255(f)(3) to establish the timeliness of this motion.

This is so because a "new rule of constitutional law," applies

retroactively to §2255 cases on collateral review when the criminal judgment under attack has become final before the rule was announced, but only to the extent that rule falls within one of two narrow exceptions. See In re Rivero, 797 F.3d 986, 988 (11th Cir. 2015)(citing Teague v. Lane, 489 U.S. 288, 308, 109 S.Ct. 1060, 1074, 103 L.Ed.2d 334 (1989)(plurality opinion)). Thus, for the new law to be retroactive, requires a showing of (1) "new substantive rules," or (2) the retroactive application of "a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." In re Rivero, 797 F.3d at 988 (citing Schriro v. Summerlin, 542 U.S. 348, 351-52, 121 S.Ct. 2519, 2522-2523, 159 L.Ed.2d 442 (2004)(emphasis omitted)).

Under the first exception, a new substantive rule "limits the application" on collateral review to those instances where the rules "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." In re Rivero, 797 F.3d at 988 (citing Schriro v. Summerlin, 542 U.S. at 352; see also Teague, 489 U.S. 311). New substantive rules of law are to be retroactively applied on collateral review. Bousley v. United States, 523 U.S. 614, 620-21, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)(finding that Bailey v. United States, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), created a rule of substantive law that therefore applied retroactively to cases on collateral review); see also Davis v. United States, 417 U.S. 333, 346-47, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974) (holding that a defendant may assert in a §2255 proceeding a claim based on an intervening substantive change in the interpretation of a federal criminal statute). The second exception, however, "limits the application of new procedural constitutional rules on collateral review of

criminal convictions to those rules 'without which the likelihood of an accurate conviction is seriously diminished.'" In re Rivero, supra (citing Teague, 489 U.S. at 313).

The Eleventh Circuit's In Re Rivero decision held that Johnson announced "a new substantive rule of constitutional law," rather than a new procedural rule, because it narrowed the scope of §924(e) by interpreting the term "violent felony" for purposes of the ACCA. See In re Rivero, 797 F.3d at 989 (citing Bryant v. Warden, FCC Coleman-Medium, 739 F.3d 1253, 1278 (11th Cir. 2013). The Eleventh Circuit recognized, however, that the Supreme Court "is the only entity that can 'ma[k]e' a new rule retroactive." In Re Rivero, supra (citing Tyler v. Cain, 533 U.S. 656, 663 (2001)(citations omitted)). The Eleventh Circuit found that when the Supreme Court makes a rule "retroactive for collateral review," it does so "unequivocally, in the form of a holding." Id. (citing In re Anderson, 396 F.3d 1336, 1339 (11th Cir. 2005)). Thus, the Eleventh Circuit concluded correctly that the Supreme Court did not expressly hold that Johnson was retroactively applicable, and further found it did not meet the criteria used by the Supreme Court to determine whether "the retroactivity exception for new substantive rule applies." Id.

Movant suggests that he is entitled to consideration of the merits of this §2255 motion because the Eleventh Circuit determined that Johnson is a Supreme Court decision, made retroactively applicable to cases on collateral review. Specifically, he relies upon the Eleventh Circuit's finding In Re Rivero that "[I]f Rivero-like the petitioner in Bousley-were seeking a first collateral review of his sentence, the new substantive rule from Johnson would apply retroactively." In re Rivero, 797 F.3d at 991. Movant misses the mark. Section 2255(f)(3) clearly states that, for purposes of

an initial §2255 motion, the right asserted has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. The Supreme Court has not done so in Johnson.

While it is true that Bousley involved a first attack on collateral review, what is equally important to note, however, is that the Eleventh Circuit went on to explain that even Bousley did not "necessarily dictate" that Johnson apply retroactively to cases on collateral review. In re Rivero, 797F.3d at 992. The movant cannot utilize the discovery of the Johnson decision to circumvent the one-year federal limitations period. See In re Rivero, ___ F.3d ___, 2015 WL 4747749 (11th Cir. Aug. 12, 2015) (Recognizing that its sister circuit in Price v. United States, No. 15-2427 (7th Cir. Aug. 4, 2015) found Johnson retroactive, but disagreeing with that court, stating that "[W]e can "escap[e] th[at] logical conclusion" because Congress could impose the punishment in Johnson if Congress did so with specific, not vague, language.); see also, Garcia v. United States, 2015 WL 4886085, *4 (S.D.Fla. Aug. 14, 2015); Haugabook v. United States, 2015 WL 4605750 (M.D. Fla. July 30, 2015)(finding §2255 not timely and Johnson not retroactive); See Weeks v. United States, 382 Fed.Appx. 845, 848 (11th Cir. 2010)(citation omitted)(noting §2255(f)(3) provides that the one year limitations period begins on the date the Supreme Court decides a case which initially recognized the right being asserted). Therefore, movant cannot circumvent the untimeliness of the instant §2255 as a result of Johnson, and he is thus not entitled to application of §2255(f)(2) and §2255(f)(3).

To the contrary, movant's is mistaken that the Eleventh Circuit's In Re Rivero decision explicitly found Johnson retroactively applicable to cases on initial collateral review. As

stated previously, the Eleventh Circuit determined that "[T]he new rule announced in Johnson neither prohibits Congress from punishing a criminal who has a prior conviction for attempted burglary nor prohibits Congress from increasing that criminal's sentence because of his prior conviction." In Re Rivero, 797 F.3d at 990. Thus, the Eleventh Circuit disagreed with the Seventh Circuit's finding that Johnson was retroactively applicable to cases on collateral review rejecting the finding that a defendant sentenced under the residual clause of 924(e) bore a significant risk of facing a punishment that the law cannot impose upon him/her. In Re Rivero, 797 F.3d at 990-91 (rejecting the Seventh Circuit's decision in Price v. United States, 795 F.3d 731 (7th Cir. Aug. 4, 2015). Although In Re Rivero expressly limited its non-retroactivity analysis to successive §2255 motions, neither does In Re Rivero explicitly hold that the rule would apply retroactively for a first collateral attack. Thus, the movant cannot utilize Johnson to circumvent the one-year limitations period. He is thus not entitled to statutory tolling under §2255(f)(2) or (3).

3. §2255(f)(4) Due Diligence. Although Movant's section 2255 motion is also untimely under §2255(f)(1)-(3), the timeliness issue is still not at an end. In certain instances, the limitation period may run from the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. See 28 U.S.C. §2255(f)(4); Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000). See also Shannon v. Newland, 410 F.3d 1083, 1089 (9th Cir. 2005)(holding that an unrelated state court decision which established an abstract proposition of law helpful to petitioner's habeas claim did not constitute a "factual predicate" for purposes of triggering one-year period of limitations).

In other words, the discovery of a new legal theory does not constitute a discoverable "fact" for purposes of §2255(f)(4). See Barreto-Barreto v. United States, 551 F.3d 98, 99 n.4 (1 Cir. 2008)(finding that discovery of new legal theory does not constitute discoverable "fact" for purposes of §2255(f)(4)); Owens v. Boyd, 235 F.3d at 359. In this case, the factual predicate for the movant's claims could have been discovered by movant well within the one-year federal limitations period. In fact, movant agreed as part of the negotiated plea agreement that he had three prior felony convictions. See Cr-DE#26). Although the written plea agreement did not specify whether those predicate offenses would support the armed career criminal enhancement, at that time, movant was not disputing the validity of those felony convictions. He does not allege, much less has he demonstrated here, that his written plea agreement or that his change of plea proceeding was the product of undue influence, coercion, or otherwise not knowing and voluntary.

Here, movant offers nothing to suggest that the factual predicates were not discoverable until the Johnson decision. He states, however, in support of due diligence that relief was not available until "now" when the Johnson decision was issued. (Cv-DE#1:7). The movant is mistaken in this regard. He could well have challenged his enhanced sentence based on his prior felony convictions early on, but chose not to do so.

As cause for failing to pursue the issue diligently on direct appeal, movant states in his form motion, albeit in conclusory fashion, that he instructed counsel to file a direct appeal. (Cv-DE#1:4). He further states that, in response thereto, he was informed by counsel that he could not appeal his guilty plea or the sentence imposed. (Id.). Even if the court were to assume, without

deciding, that counsel's advice in this regard was error, movant did nothing to ascertain the status of the filing of his requested direct appeal. He has not alleged what actions, if any, he understood to verify the status of his appeal. Further, he provides no objective evidence in this habeas proceeding, in the form of prison mail and phone logs, to demonstrate that he attempted to write and/or call counsel or the courts regarding the purported pending direct appeal.

Even if movant is attempting to overcome the time-bar by relying on §2255(f)(4), a claim that an attorney failed to file a notice of appeal as directed is timely if filed within one year of discovering, though the exercise of due diligence, that counsel did not file the requested appeal. See Long v. United States, 626 F.3d 1167, 1169 (11th Cir. 2010), *citing*, Aron v. United States, 291 F.3d 708, 711 (11th Cir. 2002). The one-year limitation period of §2255(4) begins to run when the facts could have been discovered through the exercise of due diligence, not when they were actually discovered. Aron, 291 F.3d at 711. The beginning of the one-year period is, therefore, triggered by a date that is not necessarily related to a movant's actual efforts or actual discovery of the relevant facts. Id.

If the court finds that a movant exercised due diligence, then the one-year limitation period would begin to run on the date the movant actually discovered the relevant facts, because the dates of actual and possible discovery would be identical. Id. However, if the court finds that the movant did not exercise due diligence, the statute does not preclude the possibility that the movant's motion could still be timely under §2255(4). If the court finds that the movant did not exercise due diligence then the court is required to speculate about the date on which the facts could have been

discovered with the exercise of due diligence. Id. at 711 n.1. See also Dauphin v. United States, 604 Fed.Appx. 814, 817-818 (11th Cir. Mar. 16, 2015) (unpublished); Anjulo-Lopez v. United States, 541 F.3d 814, 817-18 (8th Cir. 2008)(noting that the relevant inquiry is "when a duly diligent person in petitioner's circumstances would have discovered that no appeal had been filed" (internal quotation marks omitted)). Due diligence "does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts." Aron, 291 F.3d at 712. The due diligence inquiry is an individualized inquiry that "must take into account the conditions of confinement and the reality of the prison system." Id. (citation omitted).

Based upon the principles set forth in Aron, this Court must begin the timeliness inquiry under §2255(4) by determining whether movant exercised due diligence because, as previously noted. Then, if the court finds movant did so, the limitation period would not begin to run before the date he actually discovered the facts supporting the claim. The due diligence standard requires that movant show that he made "reasonable efforts" to determine whether an appeal had been filed. Aron, 291 F.3d at 712. Here, movant has not demonstrated that he exercised due diligence. He has failed to include any details whatever regarding what, if any, steps he took to determine whether trial counsel filed a notice of appeal. He acknowledges he waived the right to appeal the sentence imposed as part of his knowing and voluntary guilty plea. However, he suggests, albeit in a vague, conclusory manner, that he wanted to file an appeal in order to benefit from the recent Johnson.

Movant has not indicated that he ever contacted counsel after sentencing or at any time during the ensuing years after his conviction became final to inquire as to the status of an appeal.

Movant has not demonstrated that he called or wrote this court requiring the status of an appeal, something he could also have done. Further he has not alleged that any person on his behalf made any attempts whatsoever to ascertain the status of an appeal. The gist of his arguments at this late stage appear to coincide with the fact that he seeks to perfect a seriously out of time appeal in order to attempt to benefit from a review of his enhanced sentence in light of the recent Johnson decision dealing with the residual clause of the Armed Career Criminal Act.[6]

Movant's lack of diligence for over three years is fatal to support equitable or statutory tolling of the limitations period. See, e.g., Camacho-Duke v. United States, 2012 WL 6115660, *2 n.4 (M.D. Fla. 2012)(concluding that petitioner had not shown due diligence in supposed efforts to determine whether appeal had been filed and noting that he "easily could have requested a copy of his criminal docket"); United States v. Larry, 2010 WL 5651470, *3 (N.D. Fla. 2010)("With one letter or telephone call to the Clerk of this Court or to the presiding district judge, Defendant could have secured a copy of the docket sheet in this case and immediately known that a notice of appeal had not been filed. The Court, therefore, concludes that Defendant's failure to make any attempt to contact the Court evinces a lack of due diligence.").

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[6]The movant is cautioned that he may not raise for the first time in objections to the undersigned's Report any new arguments regarding the timeliness issue. Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009)(citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009). To the extent the movant attempts to do so, the court should exercise its discretion and decline to consider the argument. See Daniel, supra; See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). This is so because "[P]arties must take before the magistrate, 'not only their best shot but all of the shots.'" See Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)(gouting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

Since Movant has provided no support whatever to substantiate any argument that he was acting diligently to determine the status of any appeal, his assertion is not only incredible, but wholly conclusory. See generally United States v. Jones, 614 F.2d 80, 81-82 (5th Cir. 1980)(district court justified in dismissing section 2255 movant's claims when movant presented only conclusory allegations to support claims).[7] See also Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991)(recognizing that a petitioner is not entitled to habeas relief "when his claims are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible'" (citation omitted)).

To the extent movant believes he is entitled to an evidentiary hearing to explore the issue of equitable tolling, such an argument also fails. However, given movant's complete failure to allege, let alone demonstrate due diligence, this Court must consider when movant could have discovered that no notice of appeal had been filed on his behalf and whether that date is within one year of the filing of the instant motion to vacate.

Here, at the latest, the appropriate beginning date in this case is **March 12, 2012**, fourteen days after the Judgment had been entered on this Court's docket. There are no allegations whatever in the record that movant was prevented or incapable of discovering with reasonable diligence that counsel had not filed a notice of direct appeal by **March 12, 2012**, the expiration date for the filing of a notice appeal. While the transcript of the sentence proceeding is not part of the record, movant was most probably advised by this

[7]It is noted that the Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981)(en banc).

Court during sentencing that he had the right to take a direct appeal from his sentence. Regardless, even if this Court were to find that some later date would be reasonable, this motion to vacate would be untimely filed in that **August 2015**, is simply too late. See e.g., United States v. Thomas, 2007 WL 624538, *5 (N.D. Fla. 2007)(concluding that sixty-two days was sufficient time for reasonably diligent prisoner to determine whether his attorney had filed a notice of appeal).

4. Equitable Tolling. Next, the United States Supreme Court has also held that the one-year limitations period is subject to equitable tolling in appropriate cases. See Holland v. Florida, 560 U.S. ___, 130 S.Ct. 2549 (2010); see also, Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir. 2009)(citations omitted); Jones v. United States, 304 F.3d 1035, 1039 (11th Cir. 2002)(citations omitted). The burden is on the petitioner to demonstrate that he is entitled to the extraordinary relief of equitable tolling, meaning that the movant must show that he has exercised reasonable diligence and that extraordinary circumstances prevented him from timely filing this motion to vacate. Holland, 130 S.Ct. at 2562. See also Hunter v. Ferrell, 587 F.3d at 1308 (citations omitted); see also, Outler v. United States, 485 F.3d 1273, 1280 (11th Cir. 2007); Wade v. Battle, 379 F.3d 1254, 1264-65 (11th Cir. 2004).

Here, movant has made no showing of extraordinary circumstances or diligence on his part to file his §2255 motion prior to the expiration of the one year AEDPA deadline. Because the record is devoid of evidence to satisfy either prong of the equitable tolling test, the undersigned cannot find that movant's untimely filing of this §2255 motion is not rescued by principles of equitable tolling. In conclusion, this is simply not one of those rare cases in which principles of equitable tolling can save

the movant from the one-year limitations period.

If movant suggests that equitable tolling is warranted because he was previously unable to file his motion due to the fact that his claims were foreclosed by Eleventh Circuit precedent, such an argument is also unavailing. This too does not excuse the delay in failing to present the issue on direct appeal or in a timely post-conviction proceeding. Even if he may have subjectively believed that he could not properly file a §2255 motion earlier, his attempts to excuse the untimeliness by arguing his unfamiliarity with the legal process or ignorance of the law, or the mistaken belief he could not raise the issue earlier do not support the grant of equitable tolling.[8] See Johnson v. United States, 544 U.S. 295, 311, 125 S.Ct. 1571, 1582 (2005)(stating that "the Court has never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness."). See also Rivers v. United States, 416 F.3d at 1323 (holding that while movant's lack of education may have delayed his efforts to vacate his state conviction, his procedural ignorance is not an excuse for prolonged inattention when promptness is required); Carrasco v. United States, 2011 WL 1743318, *2-3 (W.D.Tex. 2011)(finding that movant's claim that he just learned of Padilla decision did not warrant equitable tolling, although movant was incarcerated and was proceeding without counsel, because ignorance of the law does not excuse failure to timely file §2255 motion).

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[8]As correctly maintained by Movant, pro se filings are subject to less stringent pleading requirements, Estelle v. Gamble, 429 U.S. 97, 106 (1976), and should be liberally construed with a measure of tolerance. See Haines v. Kerner, 404 U.S. 519 (1972). See also Gomez-Diaz v. United States, 433 F.3d 788, 791 (11th Cir. 2005); Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991). However, contrary to Movant's apparent belief, the policy of liberal construction for pro se litigants' pleadings does not extend to a "liberal construction" of the one-year limitations period.

Consequently, a petitioner's belated realization of the purported legal significance of the facts does not delay commencement of the limitations period. As indicated above, movant appears to be improperly confusing his knowledge of the factual predicate of his claims with the time permitted for gathering evidence and/or additional legal support for his claims. See Flanagan v. Johnson, 154 F.3d 196, 198-99 (5th Cir. 1998). See also Worthen v. Kaiser, 952 F.2d 1266, 1268-68 (10th Cir. 1992)(holding that habeas petitioner's failure to discover the legal significance of the operative facts does not constitute cause). Finally, movant has not demonstrated that any unconstitutional government action prevented him from timely filing the instant §2255. See 28 U.S.C. §2255(f)(2).

Thus, movant has failed to show that he is entitled to be excused from the applicable limitations period for any or all the reasons provided. Movant did not file his §2255 motion until more than a year after the statute of limitations had expired. Nothing other than movant's own lack of due diligence is responsible for the untimeliness of the filing of the instant motion to vacate. Therefore, this motion is subject to dismissal as time-barred.

B. MERITS

Regardless, on the merits, the movant is also not entitled to relief. As will be demonstrated below, movant had at least three prior violent felony offenses which properly qualify under the elements clause of §924(e) to support movant's enhanced sentence as an armed career criminal. Under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e), and its corresponding sentence guideline, U.S.S.G. §4B1.4, a defendant convicted of violating 18 U.S.C. §922(g), is subject to a mandatory minimum 15-year term of

imprisonment if he has three prior violent felony or serious drug offense convictions. See 18 U.S.C. §924(e)(1).

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, the fact of a prior conviction is not an element of the crime and does not need to be alleged in the Indictment or proven beyond a reasonable doubt. Almendarez-Torres v. United States, 523 U.S. 224, 243-44, 247 (1998); United States v. Harris, 741 F.3d 1245, 1250 (11th Cir. 2014). Additionally, district courts may make findings regarding the violation nature of a prior conviction for ACCA purposes. United States v. Day, 465 F.3d 1262, 1264-65 (11th Cir. 2006)(*per curiam*).

Absent an ACCA enhancement, the maximum sentence for violation §922(g) is ten years imprisonment. See 18 U.S.C. §924(a)(2). 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 conduct. See Taylor v. United States, 495 U.S. 575, 600-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). 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 sentence under the ACCA. Custis v. United States, 511 U.S. 485, 487 (1994).

The ACCA defines a "violent felony" as any crime punishable by a term of imprisonment exceeding one year that: "(i) has 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. §922(e)(2)(B)(emphasis added). In Johnson, the Supreme Court struck down the italicized clause, commonly known as the residual clause, as a violation of the Fifth Amendment's guarantee of due process. See Johnson, 576 U.S. ___, ___, 135 S.Ct. 2551, 2557 (2015). Specifically, the Supreme Court held that the residual clause of the ACCA "violate[d] the Constitution's guarantee of due process," 135 S.Ct. at 2563, because it violated "[t]he prohibition of vagueness in criminal statutes," *id.* at 2556-57. 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).

However, the Johnson court did "not call into question application of the Act to the four enumerated offenses, or the remainder of the [ACCA's] definitions of a violent felony." Johnson, __ U.S. ___, 135 S.Ct. 2551, 2563 (2015). Section 924(e)(2)(B)(i), often referred to as the elements clause, defines a violent felony as a crime that is punishable by more than one year in prison that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. §924(e)(2)(B)(i). See also United States v. Petite, 703 F.3d 1290, 1293 (11th Cir. 2013).

To determine whether an offense is a violent felony under the ACCA, the Eleventh Circuit instructs that under a "categorical approach," courts look at "the fact of conviction and the statutory definition of the prior offense." See Petite, 703 F.3d at 1294

(internal quotation marks omitted). The phrase "physical force," in the context of the statutory definition of "violent felony" means "force capable of causing physical pain or injury to another person." Johnson, 559 U.S. at 140, 130 S.Ct. at 1271. While the meaning of "physical force" is a question of federal law, federal courts are bound by a state supreme court's interpretation of state law, including its determination of the underlying state offense. See Id. at 138, 130 S.Ct. at 1269. "[A]bsent a decision from the state supreme court on an issue of state law, we are bound to follow decision of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently." McMahan v. Toto, 311 F.3d 1077, 1080 (11th Cir. 2002).

As applied here, movant suggests his prior offenses were considered under the residual clause of §924(e), which was found unconstitutional in Johnson. However, even if so, movant is not entitled to the relief requested because at least three of his prior convictions qualify as predicate offenses under the elements clause, 18 U.S.C. §9222(e)(2)(B)(i), because each had as an element the use, attempted use, or threatened use of physical force against the person of another. That provision of the statute was not found unconstitutional in Johnson.

Specifically, in Miami-Dade County Circuit Court, case no. F03-012114, movant was convicted of **felony battery** and sentenced to a term of 5 years imprisonment on October 18, 2004. (PSI ¶28). Following his violation of community control, he was sentenced to a term of 7 years imprisonment. (Id.). This offense, under Florida law, has as an element, the use or attempted use of physical force against the person of another. In fact, to be convicted of felony battery under Florida law, a defendant must "(a) Actually and

intentionally touches or strikes another person against the will of the other; and (b) Causes great bodily harm, permanent disability, or permanent disfigurement." Fla.Stat. §784.041(1). As such, the prior conviction qualifies as a predicate offense for purposes of the ACCA. See United States v. Bullard, 2014 WL 4681728 (N.D. Fla. 2014)(citing United States v. Eugene, 423 Fed.Appx. 908, 911 (11th Cir. 2011); see also, United States v. Eady, 591 Fed.Appx. 711 (11th Cir. 2014). Under the categorical approach, the felony battery conviction can be used to qualify as a predicate offense for purposes of his enhanced ACCA sentence.

Next, in Miami-Dade County, Circuit Court, case no. F99-2878, movant was convicted of **aggravated assault with a firearm** and sentenced to a term of 5 years imprisonment, following a violation of community control. (PSI ¶26). After the Supreme Court's decision in Johnson, the Eleventh Circuit has held that such a prior conviction qualifies as a violent felony under the "elements" clause in §924(e)(2)(B)(1), rather than the "residual" clause in §924(e)(2)(B)(ii). See United States v. Tinker, 2015 WL 4430678 (11th Cir. July 21, 2015)(unpublished). In any event, under Florida law, aggravated assault with a firearm has as an element the use or attempted use of physical force against the person of another. An "aggravated assault" is an assault with a deadly weapon without a premeditated design to kill the person assaulted. See Fla.Stat. §784.021. While Florida's aggravated assault statute does not require as an element of the crime that the accused had to intend to do physical harm to the victim; but rather, it does require that the intent to make a threat to do violence. Cambell v. State, 37 So.3d 948 (2010); see also, U.S. v. El-Amin, 343 Fed.Appx. 488 (11th Cir. 2009)(unpublished); State v. Shorette, 404 So.2d 816 (1981)(finding conviction of aggravated assault requires proof of a specific intent to do violence to person of another); see also,

United States v. Wilson, 2015 WL 5003655 (N.D. Fla. Aug. 21, 2015)(unpublished).

Finally, in Miami-Dade County Circuit Court, case no. F03-12116, movant was sentenced for **armed robbery with a deadly weapon** to a term of 7 years imprisonment, following the violation of his community control. (PSI ¶29). Armed robbery with a Under Florida statute, §812.13 makes it unlawful for an individual to take "money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." By its terms, the elements of armed robbery qualifies under §924(e)(2)(B)(i) for purposes of the ACCA because it has the threatened use of force or violence against the person of another. Thus, the residual clause under Johnson is not applicable here, and this prior conviction was properly considered as one of the three qualifying armed career criminal predicate offenses to support movant's enhanced sentence.

Further, the Eleventh Circuit has repeatedly held that the nature of a prior conviction for purposes of the ACCA may be decided by district courts. See United States v. Jones, 608 Fed.Appx. 822, 828-829 (11th Cir. 2015)(citing, United States v. Greer, 440 F.3d 1267, 1273-75 (11th Cir. 2006); United States v. Weeks, 711 F.3d 1255, 1259 (11th Cir.), cert. den'd, ___ U.S. ____, 134 S.Ct. 311, 187 L.Ed.2d 220 (2013)). Here, the facts contained in the PSI are undisputed, but even if disputed, they are deemed admitted for purposes of this federal habeas petition. See Id. (citing, United States v. Bennett, 472 F.3d 825, 834 (11th Cir. 2006) ("[T]he district court did not err in relying on the undisputed facts in Bennett's PSI to determine that his prior

convictions were violent felonies under the ACCA and, therefore, that he was an armed career criminal."); United States v. Shelton, 400 F.3d 1325, 1330 (11th Cir.2005) (finding no error where a defendant's sentence was enhanced based on facts in the PSI to which the defendant did not object at sentencing)).

Under the totality of the circumstances present here, the movant's sentence was not improperly based on the residual clause of §924(e) and therefore unlawful in light of Johnson. Consequently, this motion is not only time-barred, but movant is not entitled to relief on the merits. For the foregoing reasons, the movant's classification as an armed career criminal is not affected by Johnson.

VI. EVIDENTIARY HEARING

To the extent movant requests an evidentiary hearing on this matter, the request must be denied. To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, show both extraordinary circumstances and reasonable diligence entitling a petitioner to enough equitable tolling to prevent his motion to vacate or habeas petition from being time-barred. See generally Chavez v. Sec'y Fla. Dep't of Corr's, 647 F.3d 1057, 1060-61 (11th Cir. 2011)(holding that an evidentiary hearing on the issue of equitable tolling of the limitations period was not warranted in a §2254 proceeding and further finding that none of the allegations in the habeas petition about what postconviction counsel did and failed to do came close to the serious attorney misconduct that was present in Holland, instead, were at most allegations of garden variety negligence or neglect). If so, he gets an evidentiary hearing and the chance to prove that those factual allegations are true. Id. As noted by the

Eleventh Circuit, "[t]he allegations must be factual and specific, not conclusory. Conclusory allegations are simply not enough to warrant a hearing." Id. at 1061. Based upon the reasons stated above, this is not one of those cases where an evidentiary hearing is warranted on the limitations issue or otherwise.

VII. 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 Section 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 district judge in objections.

VIII. CONCLUSION

For all of the foregoing reasons, is therefore recommended that this motion to vacate be dismissed as time-barred; and, in the alternative, that it be denied, since movant's sentence is unaffected by the Supreme Court's Johnson decision. It is further recommended 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 30th day of September, 2015.

UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-23059-Civ-SEITZ
(11-20631-Cr-SEITZ)
MAGISTRATE JUDGE P.A. WHITE

JAUMON R. LEWIS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF
MAGISTRATE JUDGE

I. Introduction

Jaumon R. Lewis, a federal prisoner, currently confined at the Federal Correctional Complex in Coleman, Florida, has filed a pro se motion to vacate, pursuant to 28 U.S.C. §2255, challenging the constitutionality of sentence based the retroactive application of the Supreme Court's recent decision in Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015).

In Johnson, the Supreme Court held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." Johnson, ___ U.S. at ____, 135 S.Ct. at 2563. In other words, Johnson "narrowed the class of people who are eligible for" an increased sentence under the Armed Career Criminal Act. In re Rivero, __ F.3d ___, 2015 WL 4747749 at *2 (11th Cir. Aug. 12, 2015)(citing Bryant, 738 F.3d at 1278).

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 Section 2255 Cases in the United States District Courts. No order to show cause has been issued because, on the face of the petition, it is evident the petitioner is entitled to no relief. See Rule 4(b),[1] Rules Governing Section 2255 Proceedings.

The Court has reviewed the movant's motion (Cv-DE#1), and all pertinent portions of the underlying criminal file, case no. 11-20631-Cr-Seitz, including his plea agreement, and stipulated factual proffer, entered and made part of the Rule 11 change of plea proceeding.[2]

II. Claim

This court, recognizing that movant is *pro se*, afforded him liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). Movant seeks vacatur of his sentence for felon in possession of a firearm based on the recent Supreme Court decision in Johnson, stating that his enhanced sentence is now unlawful, warranting vacatur of the judgment and a resentencing hearing.

III. Procedural History

Initially movant was charged with and pleaded guilty to being a felon in possession of a firearm. (Cr-DE#s17,26-27,30). Pursuant to the executed written plea agreement, movant agreed and

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[1]Rule 4(b) of the Rules Governing Section 2255 Proceedings, provides, in pertinent part, that "[I]f it plainly appears from the motion and any attached exhibits, and the record of prior proceeding that the movant party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party...."

[2]The undersigned takes judicial notice of its own records as contained on CM/ECF in those proceedings. See Fed.R.Evid. 201.

stipulated that he had the following prior felony convictions: (1) Miami-Dade County Circuit Court, case no. F03-012116, for armed robbery with a firearm or deadly weapon, in violation of Fla.Stat. §812.13(2)(A); (2) Miami-Dade County Circuit Court, case no. 99-2878, for aggravated assault with a firearm, in violation of Fla.Stat. §784.021(1)(a) and §775.087; (3) Miami-Dade County Circuit Court, case no. 03-012114, for felony battery, in violation of Fla.Stat. §784.041; and, (4) Miami-Dade County Circuit Court, case no. F03-012112 for fleeing/attempting to elude a police officer in a motor vehicle, in violation of Fla.Stat. 316.1935(2). (Cr-DE#26:1-2). After his plea was accepted, movant was adjudicated guilty and sentenced to a term of 180 months imprisonment, following by 5 years supervised release. (Cr-DE#30). The judgment was entered on the docket on **February 27, 2012**. (Id.). No direct appeal was prosecuted.

Thus, the Judgment became final on **Monday, March 12, 2013**, fourteen days after the entry of the judgment, when time expired for filing a notice of appeal.[3] Thus, the movant had one year from the time his conviction became final, or no later than **March 12, 2014**[4] within which to timely file this federal habeas petition. See

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[3]Where, as here, a defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a direct appeal expires. Adams v. United States, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999). On December 1, 2009, the time for filing a direct appeal was increased from 10 to 14 days days after the judgment or order being appealed is entered. Fed.R.App.P. 4(b)(1)(A)(i). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). Moreover, now every day, including intermediate Saturdays, Sundays, and legal holidays are included in the computation. See Fed.R.App.P. 26(a)(1). However, since movant was sentenced prior to the effective date of the amendment, he had ten business days, excluding intermediate Saturdays and Sundays, within which to file his notice of appeal. See Fed.R.App.P. 26(a)(1)(B).

[4]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

Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, 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)). Applying the anniversary method to this case means petitioner's limitations period expired on **March 12, 2014.**

There were no further filings in the underlying criminal case by the movant until he returned to this court, filing the instant §2255 motion to vacate. (Cv-DE#1). Absent evidence to the contrary, in accordance with the mailbox rule, the motion is deemed filed on the date the movant signed it, **August 6, 2015.**[5] (DE#1).

IV. Standard of Review

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal

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(7th Cir. 2000)); see also, 28 U.S.C. §2255.

[5]Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing. Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255. In determining whether to vacate a movant's sentence, a district court must first determine whether a movant's claim is cognizable under Section 2255. See Lynn v. United States, 365 F.3d 1225, 1232-33 (11th Cir. 2004)(stating that a determination of whether a claimed error is cognizable in a Section 2255 proceeding is a "threshold inquiry"), cert. den'd, 543 U.S. 891, 125 S. Ct. 167, 160 L. Ed. 2d 154 (2004). It is well-established that a Section 2255 motion may not be a substitute for a direct appeal. Id. at 1232 (*citing* United States v. Frady, 456 U.S. 152, 165, 102 S. Ct. 1584, 1593, 71 L.Ed.2d 816 (1982)).

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable. First, a district court must find that "a defendant assert[ed] all available claims on direct appeal." Id. (citing Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994). Second, a district court must consider whether the type of relief the movant seeks is appropriate under Section 2255. This is because "[r]elief under 28 U.S.C. §2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." Id. at 1232-33 (quoting Richards v. United States, 83 F.2d 965, 966 (11th Cir. 1988)(internal quotations omitted)).

If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. §2255. To obtain

this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." Frady, 456 U.S. at 166, 102 S.Ct. at 1584 (rejecting the plain error standard as not sufficiently deferential to a final judgment).

Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). See also Aron v. United States, 291 F.3d 708, 715 (11th Cir. 2002)(explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous"). As indicated by the discussion below, the motion and the files and records of the case conclusively show that movant is entitled to no relief, therefore, no evidentiary hearing is warranted.

V. Discussion-Timeliness

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") created a limitation for a motion to vacate. Pursuant to 28 U.S.C. §2255(f), as amended April 24, 1996, a one year period of limitations applies to a motion under the section. The one year period runs from the latest of:

> (1) The date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking

such review;

(2) The date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant is prevented from filing by such governmental action;

(3) The date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) The date on which the facts supporting the claim or claims could have been discovered through the exercise of due diligence.

See 28 U.S.C. §2255(f); see also, Pruitt v. United States, 274 F.3d 1315, 1317 (11th Cir. 2001). The burden of demonstrating that the AEDPA's one-year limitation period was sufficiently tolled, whether statutorily or equitably, rests with the movant. See e.g., Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).

As will be recalled, movant's convictions became final on **March 12, 2013**, fourteen days after the entry of the judgment, when time expired for filing a notice of appeal. For purposes of the AEDPA's one-year federal limitations period, the movant was required to file this motion to vacate within one year from the time the judgment became final, or no later than **March 12, 2014**. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, 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)).

Pursuant to the mailbox rule, movant's motion was not filed until **August 6, 2015**, over **one year** after movant's conviction became final, and long after the one-year federal limitations expired. Consequently, movant is not entitled to statutory tolling of the limitations period.

Movant suggests that he is entitled to consideration of the merits of this §2255 motion because Johnson is a Supreme Court decision, made retroactively applicable to cases on collateral review. The Eleventh Circuit Court of Appeals has recently determined that Johnson does not apply retroactively to cases on collateral review. In re Rivero, ___ F.3d ___, 2015 WL 4747749 (11th Cir. Aug. 12, 2015) (Recognizing that its sister circuit in Price v. United States, No. 15-2427 (7th Cir. Aug. 4, 2015) found Johnson retroactive, but disagreeing with that court, stating that "[W]e can "escap[e] th[at] logical conclusion" because Congress could impose the punishment in Johnson if Congress did so with specific, not vague, language.); see also, Garcia v. United States, 2015 WL 4886085, *4 (S.D.Fla. Aug. 14, 2015); Haugabook v. United States, 2015 WL 4605750 (M.D. Fla. July 30, 2015)(finding §2255 not timely and Johnson not retroactive).

Thus, movant has failed to demonstrate that his challenge to his conviction and sentence premised on the recently announced Johnson decision has been made retroactively applicable to cases on

collateral review. See Weeks v. United States, 382 Fed.Appx. 845, 848 (11th Cir. 2010)(citation omitted)(noting §2255(f)(3) provides that the one year limitations period begins on the date the Supreme Court decides a case which initially recognized the right being asserted).

Although Movant's section 2255 motion is clearly untimely under §2255(f)(1) and (3), this does not, however, end the inquiry here. In certain instances, the limitation period may run from the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. §2255(f)(4). Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000). See also Shannon v. Newland, 410 F.3d 1083, 1089 (9th Cir. 2005)(holding that an unrelated state court decision which established an abstract proposition of law helpful to petitioner's habeas claim did not constitute a "factual predicate" for purposes of triggering one-year period of limitations). In other words, the discovery of a new legal theory does not constitute a discoverable "fact" for purposes of §2255(f)(4). See Barreto-Barreto, 551 F.3d at 99 n.4 (finding that discovery of new legal theory does not constitute discoverable "fact" for purposes of §2255(f)(4)); Owens v. Boyd, 235 F.3d at 359. In this case, the factual predicate for the claim could have been discovered by movant well within the one-year federal limitations period, and in fact, as early on as the time of sentencing. Here, movant offers nothing to suggest that the factual predicate was not discoverable until the Johnson decision.

Next, the United States Supreme Court has also held that the one-year limitations period is subject to equitable tolling in appropriate cases. See Holland v. Florida, 560 U.S. ___, 130 S.Ct. 2549 (2010); see also, Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th

Cir. 2009)(citations omitted); Jones v. United States, 304 F.3d 1035, 1039 (11th Cir. 2002)(citations omitted). The burden is on the petitioner to demonstrate that he is entitled to the extraordinary relief of equitable tolling, meaning that the movant must show that he has exercised reasonable diligence and that extraordinary circumstances prevented him from timely filing this motion to vacate. Holland, 130 S.Ct. at 2562. See also Hunter v. Ferrell, 587 F.3d at 1308 (citations omitted); see also, Outler v. United States, 485 F.3d 1273, 1280 (11th Cir. 2007); Wade v. Battle, 379 F.3d 1254, 1264-65 (11th Cir. 2004). Here, movant has made no showing of extraordinary circumstances or diligence on his part to file his §2255 motion prior to the expiration of the one year AEDPA deadline. Because the record is devoid of evidence to satisfy either prong of the equitable tolling test, the undersigned cannot find that movant's untimely filing of this petition is not rescued by principles of equitable tolling. In conclusion, this is simply not one of those rare cases in which principles of equitable tolling can save the movant from the one-year limitations period.

Petitioner suggests that equitable tolling is warranted because he was previously unable to file his motion due to the fact that his claims were foreclosed by Eleventh Circuit precedent. This too does not excuse the delay in failing to present the issue on direct appeal or in a post-conviction proceeding. Even if he may have subjectively believed that he could not properly file a §2255 motion earlier, his attempts to excuse the untimeliness by arguing his unfamiliarity with the legal process or ignorance of the law, or the mistaken belief he could not raise the issue earlier do not support the grant of equitable tolling.[6] See Johnson v. United

[6]As correctly maintained by Movant, pro se filings are subject to less stringent pleading requirements, Estelle v. Gamble, 429 U.S. 97, 106 (1976), and should be liberally construed with a measure of tolerance. See Haines v. Kerner, 404 U.S. 519 (1972). See also Gomez-Diaz v. United States, 433 F.3d 788, 791

States, 544 U.S. 295, 311, 125 S.Ct. 1571, 1582 (2005)(stating that "the Court has never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness."). See also Rivers v. United States, 416 F.3d at 1323 (holding that while movant's lack of education may have delayed his efforts to vacate his state conviction, his procedural ignorance is not an excuse for prolonged inattention when promptness is required); Carrasco v. United States, 2011 WL 1743318, *2-3 (W.D.Tex. 2011)(finding that movant's claim that he just learned of Padilla decision did not warrant equitable tolling, although movant was incarcerated and was proceeding without counsel, because ignorance of the law does not excuse failure to timely file §2255 motion).

Consequently, a petitioner's belated realization of the purported legal significance of the facts does not delay commencement of the limitations period. As indicated above, movant appears to be improperly confusing his knowledge of the factual predicate of his claims with the time permitted for gathering evidence and/or additional legal support for his claims. See Flanagan v. Johnson, 154 F.3d 196, 198-99 (5th Cir. 1998). See also Worthen v. Kaiser, 952 F.2d 1266, 1268-68 (10th Cir. 1992)(holding that habeas petitioner's failure to discover the legal significance of the operative facts does not constitute cause). Finally, movant has not demonstrated that any unconstitutional government action prevented him from timely filing the instant §2255. See 28 U.S.C. §2255(f)(2).

Thus, movant has failed to show that he is entitled to be

(11th Cir. 2005); Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991). However, contrary to Movant's apparent belief, the policy of liberal construction for pro se litigants' pleadings does not extend to a "liberal construction" of the one-year limitations period.

excused from the applicable limitations period for any or all the reasons provided. Movant did not file his §2255 motion until more than a year after the statute of limitations had expired. Nothing other than movant's own lack of due diligence is responsible for the untimeliness of the filing of the instant motion to vacate. Therefore, this motion is subject to dismissal as time-barred.

VI. Evidentiary Hearing

To the extent movant requests an evidentiary hearing on this matter, the request must be denied. To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, show both extraordinary circumstances and reasonable diligence entitling a petitioner to enough equitable tolling to prevent his motion to vacate or habeas petition from being time-barred. See generally Chavez v. Sec'y Fla. Dep't of Corr's, 647 F.3d 1057, 1060-61 (11th Cir. 2011)(holding that an evidentiary hearing on the issue of equitable tolling of the limitations period was not warranted in a §2254 proceeding and further finding that none of the allegations in the habeas petition about what postconviction counsel did and failed to do came close to the serious attorney misconduct that was present in Holland, instead, were at most allegations of garden variety negligence or neglect). If so, he gets an evidentiary hearing and the chance to prove that those factual allegations are true. Id. As noted by the Eleventh Circuit, "[t]he allegations must be factual and specific, not conclusory. Conclusory allegations are simply not enough to warrant a hearing." Id. at 1061. Based upon the reasons stated above, this is not one of those cases where an evidentiary hearing is warranted on the limitations issue or otherwise.

VII. 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 Section 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 district judge in objections.

VIII. Conclusion

For all of the foregoing reasons, is therefore recommended that this motion to vacate be dismissed as time-barred, 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 20th day of August, 2015.

UNITED STATES MAGISTRATE JUDGE

cc: Jaumon R. Lewis, Pro Se
95468-004
Federal Correctional Institution - Coleman (Med.)
Inmate Mail/Parcels
Post Office Box 1032
Coleman, FL 33521

Noticing 2255 U.S. Attorney
Email: usafls-2255@usdoj.gov

A - 9

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

JAUMON R. LEWIS

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:11-20631-CR-SEITZ-1

USM Number: 95468-004

Counsel For Defendant: Aimee Ferrer
Counsel For The United States: Kurt Lunkenheimer
Court Reporter: David Ehrlich

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

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. §§ 922(g)(1) and 924(e)(1)	Felon in possession of a firearm	3/5/10	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.

Counts 2-4 are dismissed on the motion of the United States.

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

Date of Imposition of Sentence:
2/24/2012

PATRICIA A. SEITZ
United States District Judge

February 24, 2012

DEFENDANT: JAUMON R. LEWIS
CASE NUMBER: 1:11-20631-CR-SEITZ-1

IMPRISONMENT

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

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

Defendant should be placed in a facility as close to Miami, FL as possible.

If the BOP determines that Defendant is eligible, he should participate in the 500 hour drug treatment program.

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: JAUMON R. LEWIS
CASE NUMBER: 1:11-20631-CR-SEITZ-1

SUPERVISED RELEASE

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

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: JAUMON R. LEWIS
CASE NUMBER: 1:11-20631-CR-SEITZ-1

SPECIAL CONDITIONS OF SUPERVISION

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

Anger Control/Domestic Violence Treatment - 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.

Community Service - The defendant shall perform **250 hours** of community service as monitored by the U.S. Probation Officer.
Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - 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 Court will consider a motion for early termination of supervised release after 3 years, provided the defendant has completed more than the required 250 hours of community service and performed all terms and conditions in an exemplary fashion.

DEFENDANT: JAUMON R. LEWIS
CASE NUMBER: 1:11-20631-CR-SEITZ-1

CRIMINAL MONETARY PENALTIES

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

Total Assessment	Total Fine	Total Restitution
$100.00	$	$

*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: JAUMON R. LEWIS
CASE NUMBER: 1:11-20631-CR-SEITZ-1

SCHEDULE OF PAYMENTS

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

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

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

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

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

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

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

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

Set forth in the Preliminary Order of Forfeiture entered 1/11/12 [DE 29].

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

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