NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

EDWARD LEE LEWIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX A

TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN D. BYRNE
ASSISTANT FEDERAL PUBLIC DEFENDER
Office of the Federal Public Defender, Southern District of West Virginia
Room 3400, Robert C. Byrd Federal Courthouse
300 Virginia Street East
Charleston, West Virginia 25301
Telephone: 304/347-3350
Counsel for Petitioner

CHRISTIAN M. CAPECE
FEDERAL PUBLIC DEFENDER

2018 WL 4090862
Only the Westlaw citation is currently available.
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1.
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Edward Lee LEWIS, Defendant - Appellant.

No. 18-4149
|
Submitted: August 24, 2018
|
Decided: August 28, 2018

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Joseph R. Goodwin, District Judge. (2:02-cr-00042-1)

Attorneys and Law Firms

Christina M. Capece, Federal Public Defender, Jonathan D. Byrne, Research & Writing Specialist, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. Michael B. Stuart, United States Attorney, J. Matthew Davis, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

Before WILKINSON and DUNCAN, Circuit Judges, and SHEDD, Senior Circuit Judge.

Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

*1 Edward Lee Lewis was charged with violating several conditions of his supervised release. At a hearing at which Lewis admitted the violations, the district court revoked release and sentenced him to 18 months in prison. Lewis appeals.

"We will affirm a revocation sentence if it is within the statutory maximum and is not 'plainly unreasonable.' " *United States v. Webb*, 738 F.3d 638, 640 (4th Cir. 2013) (quoting *United States v. Crudup*, 461 F.3d 433, 438 (4th Cir. 2006)). The record establishes that Lewis was sentenced within the statutory maximum term of two years, *see* 18 U.S.C. §§ 924(a)(2), 3559(a)(3), 3583(e)(3) (2012). The remaining question is whether the sentence is plainly unreasonable.

"When reviewing whether a revocation sentence is plainly unreasonable, we must first determine whether it is unreasonable at all." *United States v. Thompson*, 595 F.3d 544, 546 (4th Cir. 2010). Only if we find a sentence to be unreasonable will we consider whether it is "plainly" so. *United States v. Crudup*, 461 F.3d at 440.

A revocation sentence is procedurally reasonable if the district court considered the Chapter Seven policy statement range and the applicable 18 U.S.C. § 3553(a) (2012) sentencing factors. *Id.* A revocation sentence is substantively reasonable if the court stated a proper basis for concluding that the defendant should receive the sentence imposed, up to the statutory maximum. *Id.* "A court need not be as detailed or specific when imposing a revocation sentence as it must be when imposing a post-conviction sentence, but it still must provide a statement of reasons for the sentence imposed." *United States v. Thompson*, 595 F.3d at 547 (internal quotation marks omitted).

We conclude that Lewis' sentence is procedurally and substantively reasonable. The district court considered relevant § 3553(a) factors, and the court was aware of Lewis' policy statement range of 5-11 months. Further, the court provided a sufficiently individualized assessment in fashioning the revocation sentence. In this regard, the court was particularly concerned that Lewis had demonstrated that he was not amenable to either supervision or drug treatment. The court was similarly concerned that the offenses of conviction were not minor crimes. We reject Lewis' claims that the court should have considered that he over-served his original sentence, imposed in 2002, because he was erroneously determined to be an armed career criminal. Case law and Guidelines commentary counsel that supervised release and incarceration serve different ends and that detention ordered upon revocation of release may not be decreased by time served in official detention other than time spent in detention for the release violation. *See United States v. Johnson*, 529 U.S. 53, 54-56, 120 S.Ct. 1114, 146 L.Ed.2d 39 (2000); U.S. Sentencing Guidelines Manual § 7B1.3(e), p.s., cmt. n.3 (2017).

We therefore affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

*2 *AFFIRMED*

All Citations

--- Fed.Appx. ----, 2018 WL 4090862 (Mem)

End of Document

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

EDWARD LEE LEWIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX B

TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN D. BYRNE
ASSISTANT FEDERAL PUBLIC DEFENDER
Office of the Federal Public Defender, Southern District of West Virginia
Room 3400, Robert C. Byrd Federal Courthouse
300 Virginia Street East
Charleston, West Virginia 25301
Telephone: 304/347-3350
Counsel for Petitioner

CHRISTIAN M. CAPECE
FEDERAL PUBLIC DEFENDER

your headache is impairing in any way your ability to understand these proceedings?

THE DEFENDANT: No, I understand completely.

THE COURT: It's the judgment of the Court that the defendant be committed to the custody of the Federal Bureau of Prisons for a term of 18 months. I will not impose supervised release. Mr. Lewis, you have a right to appeal the Court's sentence. If you want to do that, you must file a written notice of appeal within 14 days of the entry of the order of sentence and conviction in your case. If you fail to do that, you won't be able to appeal. Do you understand?

THE DEFENDANT: I understand.

THE COURT: If you do file the notice and I find you don't have the money to procure documents or hire lawyers, those costs will be borne by the United States. Do you understand?

THE DEFENDANT: I understand.

THE COURT: You are not and have proved not to be amenable to drug treatment, outpatient or inpatient, or amenable to supervision. The probation staff and the Court acceded to your requests and tried to work with you to see that you get the treatment you need, but it just doesn't seem to work. I don't believe that the threats you made in your original case are minor crimes. I don't believe being

a felon in possession of a firearm is a minor crime. This supervised release is a part of the statutory punishment. I understand what point you've preserved below and I think it's entirely appropriate that you preserve that argument; nevertheless, I think you should go back to prison, serve your time, and as the people refer in a colloquial manner, you will be off paper.

Anything further to come before the Court?

MR. DAVIS: No, Your Honor.

MR. CAPECE: Your Honor, I just want to, for the record, object to the sentence imposed. Thank you.

THE COURT: Certainly. You do know that's unnecessary?

MR. CAPECE: Your Honor, this is a complicated case and I just want to be sure that it's on the record.

THE COURT: Okay. Next time remember I told you it was unnecessary.

MR. CAPECE: Thank you, Your Honor.

THE COURT: All right.

(Proceedings concluded at 10:25 a.m., March 8, 2018.)

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

EDWARD LEE LEWIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX C

TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN D. BYRNE
ASSISTANT FEDERAL PUBLIC DEFENDER
Office of the Federal Public Defender, Southern District of West Virginia
Room 3400, Robert C. Byrd Federal Courthouse
300 Virginia Street East
Charleston, West Virginia 25301
Telephone: 304/347-3350
Counsel for Petitioner

CHRISTIAN M. CAPECE
FEDERAL PUBLIC DEFENDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CRIMINAL ACTION NO. 2:02-cr-00042

EDWARD LEE LEWIS,

Defendant.

REVOCATION OF SUPERVISED RELEASE AND JUDGMENT ORDER

On March 8, 2018, the defendant, Edward Lee Lewis, appeared in person and by counsel, Christian M. Capece, FPD, for a hearing on the *Petition for Warrant or Summons for Offender Under Supervision* submitted by the defendant's supervising probation officer. The United States was represented at the hearing by James Matthew Davis, AUSA. United States Probation Officer Patrick Fidler was also present at the hearing.

On November 7, 2002, the defendant was sentenced to a term of imprisonment of 192 months to be followed by a 3 year term of supervised release. The defendant began serving the term of supervised release on October 21, 2016. On March 9, 2017 the *Petition for Warrant or Summons for Offender Under Supervision* was filed charging the defendant with violating certain conditions of supervised release. On August 15, 2017, the court held the matter in abeyance in order for the defendant to receive drug treatment at Recovery Point in Huntington. On August 31, 2017 the court ordered that the defendant by released on September 8, 2017 to begin his term of drug treatment. The defendant was transported directly to Recovery Point in Huntington, West Virginia by MTM, Inc. The defendant was to participate in the program for no less than nine

months. On September 26, 2017 an *Amendment to the Petition* was filed charging the defendant with violating certain conditions of supervised release.

At the hearing, the court found that the defendant had received written notice of the alleged violations as contained in the *Petition*, and that the evidence against the defendant had been disclosed. The court further found that the defendant appeared, was given the opportunity to present evidence, and was represented in the proceeding by counsel.

The court then found, by a preponderance of the evidence, that the defendant violated certain conditions of supervised release as contained in the *Petition*. Specifically, the court found that the defendant violated standard condition number six that he shall notify the probation officer at least ten days prior to any change in residence or employment; special condition that he shall spend a period of six months at Dismas Charities, in St. Albans, West Virginia and abide by all rules and regulations of the facility; and that he shall participate in and successfully complete the treatment program at Recovery Point in Huntington, West Virginia and that he shall follow the rules and regulations of the program, and shall participate in the program for no less than nine months. In making these findings, the court relied upon the information contained in the *Petition*, the evidence presented at the hearing, and the defendant's own admission.

Having found the defendant to be in violation of the conditions of supervised release, the court **REVOKED** the defendant's supervised release and entered judgment as follows:

It is the **JUDGMENT** of the court that the defendant be committed to the custody of the Federal Bureau of Prisons for a term of **18 MONTHS**. No additional term of supervised release imposed.

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

The court **DIRECTS** the Clerk to send a copy of this Order to the defendant and counsel,

the United States Attorney, the United States Probation Office, and the United States Marshal.

ENTER: March 8, 2018

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

EDWARD LEE LEWIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX D

TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN D. BYRNE
ASSISTANT FEDERAL PUBLIC DEFENDER
Office of the Federal Public Defender, Southern District of West Virginia
Room 3400, Robert C. Byrd Federal Courthouse
300 Virginia Street East
Charleston, West Virginia 25301
Telephone: 304/347-3350
Counsel for Petitioner

CHRISTIAN M. CAPECE
FEDERAL PUBLIC DEFENDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

EDWARD LEE LEWIS,

Petitioner,

v. CIVIL ACTION NO. 2:16-cv-05565
(Criminal Action No. 2:02-cr-00042)

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

Pending before the court is Edward Lee Lewis's Motion to Correct Sentence Under 28 U.S.C. § 2255 [ECF No. 252]. This matter is referred to the Honorable Dwane L. Tinsley, United States Magistrate Judge, for submission of proposed findings and a recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). For reasons appearing to the court, it is hereby **ORDERED** that the referral of this matter to the Magistrate Judge is **WITHDRAWN.**

I. Procedural History and Positions of the Parties

On August 16, 2002, following a jury trial, Mr. Lewis was convicted of four counts of mailing threatening communications in violation of 18 U.S.C. § 876; one count of mailing threatening communications to the President in violation of 18 U.S.C. § 871; and one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Mr. Lewis had previously been convicted in the

Circuit Court of Putnam County, West Virginia of three counts of daytime burglary in violation of W. Va. Code § 61-31-11.

At sentencing, which occurred on November 7, 2002, this court found that Mr. Lewis's three prior daytime burglary convictions were "violent felonies" as defined by 18 U.S.C. § 924(e)(2)(B).[1] As a result of these prior convictions, Mr. Lewis was classified as an armed career criminal under 18 U.S.C. § 924(e) (the "Armed Career Criminal Act" or "ACCA"). The ACCA provides for a sentencing enhancement for a felon possessing a firearm or ammunition when the defendant has three prior convictions for violent felonies and/or serious drug offenses. With this enhancement, Mr. Lewis was subject to a mandatory minimum sentence of fifteen years of imprisonment.[2] Mr. Lewis was sentenced to serve 192 months in prison, followed by a three-year term of supervised release. J., No. 2:02-cr-42 [ECF No. 88]. Mr. Lewis's sentence was affirmed on appeal. *United States v. Lewis*, 75 F. App'x 164 (4th Cir. 2003).

---

[1] 18 U.S.C. § 924(e)(2)(B) defines a "violent felony" as "a crime punishable . . . by imprisonment for a term exceeding one year . . . that

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

18 U.S.C. § 924(e)(2)(B) (emphasis added). The emphasized portion of this definition is known as the Act's "residual clause."

[2] Without the ACCA enhancement, Mr. Lewis would have been subject to a maximum ten-year term of imprisonment.

On September 16, 2004, Mr. Lewis, proceeding *pro se*, filed a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. Mot. Vacate, No. 2:02-cr-42 [ECF No. 126]. This motion was denied on November 30, 2005. Mem. Op. & Order, No. 2:02-cr-00042 [ECF No. 146].[3] Mr. Lewis was denied a certificate of appealability, and his appeal of the decision denying his § 2255 motion was dismissed on August 25, 2006. *United States v. Lewis*, No. 05-7936, 2006 WL 2467337 (4th Cir. Aug. 25, 2006). Mr. Lewis subsequently filed a number of other motions that are not relevant to the instant matter.

On June 26, 2015, the Supreme Court decided *United States v. Johnson*, 135 S. Ct. 2551, 2557 (2015), holding that the residual clause[4] of the ACCA is unconstitutionally vague and further holding that the imposition of an increased sentence thereunder violates due process. As noted by the United States, the Supreme Court specifically excluded the remainder of the ACCA from its holding in *Johnson*. The Court stated, "[t]oday's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." *Id.* at 2563. Thus, a prior conviction may still qualify as a violent felony if it meets the element of force criterium contained in §924(e)(2)(B)(i) ("the force clause") or is one of the enumerated offenses contained in § 924(e)(2)(B)(ii) ("the

[3] Mr. Lewis unsuccessfully challenged his designation as an armed career criminal in both his direct appeal and his first § 2255 motion.

[4] *See supra* note 1.

enumerated offense clause"), namely burglary, arson, extortion, or a crime involving explosives.

On April 18, 2016, the Supreme Court decided *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), in which the Court determined that *Johnson* was a substantive, rather than a procedural, decision because it affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied. Therefore, the Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Id.*

On May 6, 2016, attorney W. Michael Frazier was appointed to represent Mr. Lewis for the purpose of determining whether he qualifies for federal habeas relief under § 2255 in light of *Johnson*. Order [ECF No. 246]. On June 21, 2016, Mr. Lewis was authorized by the United States Court of Appeals for the Fourth Circuit to file a second § 2255 motion asserting a *Johnson* claim. Notice [ECF No. 250]; Order [ECF No. 251]. That same date, the court docketed the instant Motion to Correct Sentence [ECF No. 252], and subsequently permitted Mr. Lewis to file a Supplemental Brief addressing his *Johnson* claim, which was filed on August 11, 2016. Suppl. Br. [ECF No. 258]. Mr. Lewis's brief asserts that, after *Johnson*, his prior daytime burglary offenses no longer qualify as "violent felonies" under the ACCA.

On September 12, 2016, the United States ("the Government") filed a Response to Mr. Lewis's § 2255 motion and Supplemental Brief. Answer to Def.'s Suppl. Br. [ECF No. 268]. The Government's Response asserts that, in order to prevail on his

second § 2255 motion, Mr. Lewis has the burden of proving by a preponderance of the evidence that his claim for relief is based upon a new rule of constitutional law and, thus, "is unlawful on one of the specified grounds." *Id.* at 4 (quoting *United States v. Pettiford*, 612 F.3d 270, 277 (4th Cir. 2010)).

The Government's Response further contends that because "the defendant's challenge is nominally based on *Johnson*, he must prove that he was sentenced under the residual clause of the ACCA and that the use of that clause made a difference in sentencing." *Id.* at 4. Relying upon authority from the Seventh and Eleventh Circuits, the Government asserts that, unless it is clear from the record that the District Court specifically found Mr. Lewis's prior crimes to be "violent felonies" under the residual clause, his convictions remain unaffected by *Johnson* and his § 2255 motion must be denied. *Id.* at 4–5 (citing *Stanley v. United States*, No. 15-3728, 2016 WL 3514185, at *3 (7th Cir. June 27, 2016); *In re Moore*, No. 16-13993-J & 16-14361-J, 2016 WL 4010433, at *3–4 (11th Cir. July 27, 2016)). The Government further contends that Mr. Lewis cannot meet this burden because the record fails to indicate the basis for the finding that Mr. Lewis's three prior daytime burglary convictions were convictions for "violent felonies." *Id.* at 6–10.

On September 14, 2016, Mr. Lewis filed Movant's Response to Government's Argument, in which he concedes that he has to prove that he is entitled to the relief he seeks, but further contends that "it would be a rare case where a district judge

expressly states 'I hereby sentence you under the residual clause.'" Movant's Resp. to Gov't's Arg. 1 ("Reply") [ECF No. 269]. The Reply further states:

> We have no direct evidence of how the judge arrived at his enhancement, as the judge merely recited statutory terms. But to qualify Movant for an ACCA sentence, the judge had to use one of three avenues; the force clause, the enumerated offense clause, or the residual clause. He could not have used the force clause, because his prior felonies do not qualify under that, as discussed in the initial brief. He could not have used the enumerated offense clause as West Virginia burglary is broader than the "generic" definition, and thus would not qualify. So the only way the judge could have arrived at the ACCA enhancement is via the residual clause, which *Johnson* invalidated.
>
> * * *
>
> Movant believes it is obvious his argument is based on a "new rule . . . that was unavailable to him at trial or on direct appeal." The recent case of *United States v. Desmond Ra'Keesh White*, ___ F.3d ___, 2016 WL 4717943 (4th Cir. Sept. 9, 2016) effectively closed this argument for the Government. "It would have been futile for [Mr. Lewis] to argue that those [burglary] convictions did not qualify as ACCA violent felonies because they fell under the residual clause." [*Id.*] at Page 16. That is the case here precisely. Movant could not have argued the residual clause was vague, because the Supreme Court had previously said it was not. *Sykes v. United States*, 564 U.S. 1 (2014). *Johnson* expressly overruled *Sykes*.

Id. at 2–3.

On September 22, 2016, Mr. Lewis filed a Notice of Additional Authority [ECF No. 270], providing notice of a decision by a district judge in the United States District Court for the Western District of Virginia. The decision diverged from the reasoning of the Eleventh Circuit's decision in *Moore* (relied upon by the Government) and held

that a movant in a second § 2255 proceeding need only show that the district court "may" have used the residual clause in finding a crime to be a "violent felony" in order to be able to pursue relief under *Johnson*. *See United States v. Winston*, 207 F. Supp. 3d 669, 675 (W.D. Va. 2016). The United States Court of Appeals for the Fourth Circuit affirmed this portion of the holding, although it vacated the decision on other grounds. *See United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). The Fourth Circuit's decision will be discussed below.

II. Discussion

A. As a threshold matter, the record need not conclusively prove that the District Court relied upon the residual clause in finding the previous offenses to be "violent felonies."

Following the Supreme Court's retroactive decision in *Johnson*, the residual clause can no longer be used to qualify a prior crime as a "violent felony." Furthermore, in light of the Fourth Circuit's recent decision in *United States v. Winston*, the court is not persuaded by the Government's argument that Mr. Lewis must prove that the sentencing court found his prior convictions to be violent felonies based upon the residual clause in order to obtain relief under *Johnson*.

In *Winston*, the petitioner challenged the classification of a Virginia common law robbery conviction as a "violent felony" for an ACCA enhancement after *Johnson*. *United States v. Winston*, 850 F.3d at 679. The Government asserted that Winston was procedurally barred from seeking relief because the record did not establish that the sentencing court relied on the residual clause to conclude that the Virginia

common law robbery conviction qualified as a violent felony under the ACCA. However, the Fourth Circuit found:

> Although the record does not establish that the residual clause served as the basis for concluding that Winston's prior convictions for rape and robbery qualified as violent felonies, "[n]othing in the law requires a [court] to specify which clause . . . it relied upon in imposing a sentence." *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016). We will not penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony. Thus, imposing the burden on movants urged by the government in the present case would result in "selective application" of the new rule of constitutional law announced in [*Johnson*], violating "the principle of treating similarly situated defendants the same." *Id.* at 1341 (quoting *Teague v. Lane*, 489 U.S. at 304, 109 S. Ct. at 1060).
>
> We therefore hold that when an inmate's sentence may have been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in [*Johnson*], the inmate has shown that he "relies on" a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A). This is true regardless of any non-essential conclusions a court may or may not have articulated on the record in determining the defendant's sentence. *Chance*, 831 F.3d at 1340.

Winston, 850 F.3d at 682 (emphasis added).

Therefore, I **FIND** that Mr. Lewis's second § 2255 motion relies on a new rule of constitutional law and is subject to review. The proper inquiry now is to determine whether his prior convictions can be considered to be violent felonies under the remaining clauses contained in the ACCA.

B. Mr. Lewis's prior burglary convictions are not violent felonies.

At the time of Mr. Lewis's daytime burglary convictions, the relevant West Virginia statute defined burglary as follows:

> If any person shall, in the night time, break and enter, or enter without breaking, or shall, in the daytime, break and enter, the dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a crime therein, he shall be deemed guilty of burglary.

W. Va. Code § 61-3-11(a). The statute further defines "dwelling" as including "a mobile home, house trailer, modular home, factory-built home or self-propelled motor home, used as a dwelling regularly or only from time to time, or any other automotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from time to time." W. Va. Code § 61-3-11(c).

The ACCA contains four enumerated offenses that are deemed to be "violent felonies." Those offenses are "burglary, arson, or extortion, [or crimes] involv[ing] the use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii). However, as noted by Mr. Lewis, the ACCA, in its current form, does not define these offenses. Suppl. Br. 3.

In *Taylor v. United States*, 495 U.S. 575, 599 (1990), the Supreme Court announced the following definition of "generic" burglary for use in the application of the ACCA: "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." The *Taylor* Court noted that some states "define burglary more broadly, *e.g.*, by eliminating the requirement that the entry be

unlawful, or by including places, such as automobiles and vending machines, other than buildings" and that such offenses do not constitute "generic" burglary. *Id.* at 599. Mr. Lewis contends that, before *Johnson*, burglary offenses outside the scope of the generic definition could be considered "violent felonies" under the residual clause. However, after *Johnson*, they cannot. Suppl. Br. 4.

In *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016), the Supreme Court found Iowa's burglary statute to encompass conduct outside the generic burglary definition because it criminalized entries into a greater variety of locations than the structures defined by *Taylor*. On September 9, 2016, the Fourth Circuit, following suit with *Mathis*, held that West Virginia's burglary statute is broader than the generic definition set forth in *Taylor*. *United States v. Desmond Ra'Keesh White*, 836 F.3d 437, 446 (4th Cir. 2016). Therefore, convictions for burglary under West Virginia law do not qualify as enumerated offenses under the ACCA's definition of a "violent felony." *Id.*

Based upon the decisions in *Mathis* and *White,* I **FIND** that Mr. Lewis's West Virginia daytime burglary convictions do not qualify as generic burglaries for the purpose of the ACCA. I likewise **FIND** that such offenses do not have "as an element the use, attempted use, or threatened use of physical force against the person of another." Therefore, I further **FIND** that, in light of *Johnson*, Mr. Lewis's prior West Virginia daytime burglary convictions no longer qualify as "violent felonies" under the ACCA, and that Mr. Lewis's sentence thereunder is unlawful.

III. Conclusion

For all the foregoing reasons, it is hereby **ORDERED** that Mr. Lewis's Motion to Correct Sentence [ECF No. 252] is **GRANTED**. Mr. Lewis has completed his term of imprisonment and was serving his term of supervised release. However, Mr. Lewis has violated the terms of his supervised release, and, on September 26, 2017, a warrant was issued for his arrest. Accordingly, at this time, the only relief that this court can grant Mr. Lewis is to modify his class of felony and his criminal history category, which may affect any potential revocation sentence. Therefore, it is hereby **ORDERED** that Mr. Lewis's class of felony for the instant offense is modified from a Class A felony to a Class C felony, and his criminal history category applicable to his original sentencing is reduced to category III.[5]

The clerk is **DIRECTED** to forward copies of this Memorandum Opinion and Order to Movant, all counsel of record, the United States Probation Office, and the United States Marshals Service.

ENTER: October 24, 2017

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

[5] Because the ACCA does not apply to Mr. Lewis's conduct (1) the maximum sentence and, therefore, the class of felony is reduced; (2) Sentencing Guideline § 4B1.3(c)(3) is no longer applicable for purposes of increasing Mr. Lewis's criminal history category. *See* 18 U.S.C. §§ 924(e)(2)(B), 3559(a)(3); U.S. Sentencing Guidelines Manual § 4B1.4(c)(3) (U.S. Sentencing Comm'n 2016). Mr. Lewis's original sentence also included three years of supervised release. This portion of the sentence remains lawful despite the change in his felony classification. *See* 18 U.S.C. § 3583(b)(2).

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

EDWARD LEE LEWIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX E

TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN D. BYRNE
ASSISTANT FEDERAL PUBLIC DEFENDER
Office of the Federal Public Defender, Southern District of West Virginia
Room 3400, Robert C. Byrd Federal Courthouse
300 Virginia Street East
Charleston, West Virginia 25301
Telephone: 304/347-3350
Counsel for Petitioner

CHRISTIAN M. CAPECE
FEDERAL PUBLIC DEFENDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

UNITED STATES OF AMERICA

v. **Criminal No. 2:02-cr-00042**

EDWARD LEE LEWIS

MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER DENIAL OF
CJA COUNSEL'S MOTION TO RESENTENCE

Comes now appointed supervised release counsel for the defendant, Edward Lee Lewis ("Lewis"), Federal Public Defender Christian M. Capece, and provides this memorandum in support of his motion reconsider this Court's Order denying the motion to resentence filed by Lewis's CJA Counsel, Michael Frazier ("CJA Counsel"). Dkt. Nos. 301, 303. Lewis should be resentenced because this Court has determined that his current sentence was imposed in violation of the Constitution. That resentencing may have an impact on Lewis's pending supervised release proceeding.

Interest of Undersigned Counsel

On May 6, 2016, this Court appointed CJA Counsel to represent Lewis in connection with any proceedings arising from the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Dkt. No. 246. CJA Counsel filed the appropriate petition with the Court of Appeals, and then in this Court, arguing that Lewis's sentence violated the Constitution. Dkt. Nos. 251, 252, 258, 269, 270. While that motion was pending, Lewis was released from prison and, on March 9, 2017,

charged with violating the conditions of his supervised release. Dkt. No. 276. Undersigned counsel was appointed to represent Lewis in the supervised release proceeding. Dkt. No. 285.

Undersigned counsel does not agree that CJA Counsel "exceeded his mandate," as the Government puts it, by filing the motion to resentence. Dkt. No. 302 at 3. The motion is a part of CJA Counsel's duty to litigate Lewis's *Johnson* claim to the fullest extent possible. Nonetheless, undersigned counsel recognizes the intertwined nature of his representation of Lewis and CJA Counsel's and provides this memorandum and the accompanying motion to reconsider in order that that relevant issues receive a full airing.

Relevant Factual Background

On November 12, 2002, this Court sentenced Lewis to 192 months in prison, followed by a term of supervised release. Dkt. No. 88. On June 21, 2016, Lewis filed a Motion to Correct Sentence Under 28 U.S.C. § 2255 after receiving permission from the Court of Appeals to do so. Dkt. No. 252. Lewis argued that his sentence was unconstitutional because it was based on the conclusion that he had three prior convictions for "violent felonies" and was therefore eligible for an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). *Id* at 2. As relief, Lewis requested that "this Court grant his § 2255 motion, and vacate his § 924(e) conviction and sentence." *Id.* In a supplemental brief filed with this Court Lewis argued that "he should be resentenced in a manner affording him due process of law." Dkt. No. 258 at 7.

While that motion was pending, and before Lewis was released from custody, on October 5, 2016, Lewis agreed to a modification of his terms of supervised release to require that he spend six months at Dismas Charities, a halfway house. Dkt. No. 272. Lewis began his six month term at Dismas on October 21, 2016. Lewis and his Probation Officer also agreed to further modify his conditions of supervised release to allow him to enroll in drug treatment. Dkt. No. 274.

A petition seeking the revocation of Lewis's term of supervised release was filed on March 9, 2017, alleging that Lewis left Dismas without permission and without telling his Probation Officer. Dkt. No. 276. Upon Lewis's motion, this Court agreed to hold the petition in abeyance until Lewis successfully completed drug treatment. Dkt. No. 293. On September 26, 2017, an amendment to the petition was filed, alleging that Lewis was discharged from drug treatment after not returning to the program as scheduled. This Court issued a warrant for Lewis's arrest as a result. Dkt. No. 297. That warrant is outstanding.

On October 24, 2017, following the issuance of the warrant, this Court entered a memorandum opinion and order addressing Lewis's § 2255 motion. Dkt. No. 299. This Court recognized that if the ACCA enhancement did not apply, Lewis "would have been subject to a maximum ten-year term of imprisonment," rather than the 192-month sentence imposed. *Id.* at 2. This Court then went on to find that Lewis's motion relied on a new rule of constitutional law and allowed for a review of his sentence. *Id.* at 8. Lewis's prior convictions were all for West Virginia burglary, which this Court recognized no longer qualified as a violent felony under ACCA after

Johnson. *Id.* at 10, citing *United States v. White*, 836 F.3d 437 (4th Cir. 2016). As a result, this Court concluded, Lewis's "sentence thereunder is unlawful." *Id.* This Court then "granted" Lewis's motion, but concluded that, because he had served his entire sentence, "the only relief that this court can grant . . . is to modify his class of felony and his criminal history category, which may affect any potential revocation sentence." *Id.* at 11.

On October 26, 2017, CJA Counsel filed a motion for resentencing, noting that his "unlawful" sentence resulted in him serving many more years in prison that he otherwise should. Dkt. No. 301. This Court denied the motion in a brief Order on November 7, 2017. Dkt. No. 303.

This Court has held that Lewis's sentence is "unlawful." It must be vacated and he must be resentenced

The relief Lewis requested in his § 2255 proceeding is clear. In the § 2255 motion submitted to the Court of Appeals with the petition to file a second or successive motion he asked that "this Court grant his § 2255 motion, and vacate his § 924(e) conviction and sentence." Dkt. No. 525 at 2. Then, in a supplemental brief filed with this Court Lewis requested that he "be resentenced in a manner affording him due process of law." Dkt. No. 258 at 7. That is what § 2255 requires.

Relief under § 2255 is available to a defendant who can show that, among other things, his sentence was "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). If the reviewing court finds that, among other things, that "the sentence imposed was not authorized by law . . . or that there has

been such a denial or infringement of the constitutional rights of the prisoner," then "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(b)(emphasis added). Thus, when this Court correctly concluded that Lewis's sentence was "unlawful" it was required to vacate his sentence. *See United States v. Pettiford*, 612 F.3d 270, 277 (4th Cir. 2010)("if the prisoner's sentence is found unlawful on one of those grounds, the district court should grant the prisoner an 'appropriate' remedy"); *United States v. Hillary*, 106 F.3d 1170, 1172 (4th Cir. 1997)(most "appropriate" remedy in § 2255 proceeding is to "put § 2255 defendants in the same boat as direct appellants, i.e., to permit resentencing"). Because this Court found Lewis's sentence was imposed in violation of the Constitution, § 2255 requires that his sentence be vacated.

The Government's focus on supervised release presupposes that a valid term of supervised release will remain in effect

The Government's position that what Lewis is really asking for is an early termination of his term of supervised release is based on a flawed presumption – that there must be a valid term of supervised release that Lewis is now serving. However, once a sentence is vacated the term of supervised release that was imposed as part of it is also vacated. Only if this Court, at a resentencing hearing, imposed a new term of supervised release that was legally in effect when Lewis's alleged violations took place, could there be a supervised release term to terminate. *See, e.g., United States v. Merlino*, 785 F.3d 79 (3d Cir. 2015)(no jurisdiction to revoke term of supervised

release that terminated prior to filing of petition to revoke); *United States v. Janvier*, 599 F.3d 264 (2d Cir. 2010)(same).

Lewis was sentenced on six separate offenses – being a felon in possession of a firearm (Count Six), mailing threatening communications to the President (Count Five) and mailing threatening communications (Counts One through Four). The original ACCA determination required a sentence of at least 180 months on Count Six. This Court imposed a sentence of 192 months, but the judgment does not set forth any allocation of that sentence amongst the various counts. Dkt. No. 88 at 3. That sentence was within the then mandatory Guideline range, which was driven by Lewis's ACCA designation. PSR at 13-14, 19.

If Lewis was resentenced today, he would likely receive a much lower sentence. Although a 192-month sentence would be within the cumulative statutory maximum for his offenses (even without the ACCA designation), it would require a significant variance or departure to reach that level. At his original sentencing, without the ACCA designation, Lewis would have faced a mandatory Guideline range of 70 to 87 months in prison.[1] At a resentencing under the current version of the Guidelines Lewis's advisory Guideline range would be only 51 to 63 months in prison.[2] By either standard, a 192-month sentence would be a significant departure (2.21 times greater

[1] Each of Lewis's threat counts would produce a final offense level of 16 or 17, with the felon in possession count producing a final offense level of 20. After applying the grouping rules of U.S.S.G. § 3D1.4, Lewis's final offense level would be 25 and his Criminal History Category III. PSR at 11-14.
[2] Each of Lewis's threat counts would still produce a final offense level of 16 or 17, with the felon in possession count now producing a final offense level of 16. After applying the grouping rules of U.S.S.G. § 3D1.4, Lewis's final offense level would be 22 and his Criminal History Category III.

than top of the original Guideline range) or variance (3.05 times greater than the top of the current advisory Guideline range) and would not be justified under the factors set forth in 18 U.S.C. § 3553(a). Lewis has served much more time than he should receive for the convictions he sustained.

In addition, none of the offenses for which Lewis was convicted require the imposition of a term of supervised release. 18 U.S.C. § 3583(a)("court . . . ***may*** include . . . a term of supervised release" unless otherwise required by statute of conviction). Given the amount of additional time Lewis has served in prison as a result of the original ACCA designation, this Court should decide that no term of supervised release should be imposed and release Lewis completely. The District Court in the District of Columbia did just that in very similar circumstances.

In *United States v. Taylor*, Criminal No. 03-10 (CKK)(D. D.C.), the defendant was convicted of being a felon in possession of a firearm and sentenced under ACCA in 2003. After *Johnson*, the defendant filed a § 2255 motion challenging his sentence. *Id.* at Dkt. No. 52 at 2-5. While his motion was pending the defendant was released after serving his term of imprisonment and was shortly thereafter arrested on local charges in the District of Columbia, charges which also produced an alleged violation of his supervised release condition. *Id.* Dkt No. 60 at 2, 10, 11-12; Minute Entry October 17, 2017. The district court eventually concluded that the defendant "has only two, not three, qualifying convictions and, as such, is entitled to be resentenced." *Id.* at Dkt. No. 52 at 30. At resentencing, the district court granted the defendant's request to impose a new sentence without any term of supervised release, in

recognition of the years he spent incarcerated pursuant to an unlawful sentence. *Id.* at Dkt. No. 60 at 11-12. As a result, the pending supervised release violation was "withdrawn based on the fact that the Defendant is no longer going to be on supervised release." *Id* at Minute Entry October 17, 2017.

United States v. Johnson, 529 U.S. 53 (2000), which this Court cited in its Order denying the motion for resentencing, does not require the denial of the motion to resentence. Johnson was convicted on multiple counts, including two counts of using a firearm in connection with a drug trafficking crime under 18 U.S.C. § 924(c), and received a sentence of 171 months in prison. Subsequent changes to case law rendered the two § 924(c) convictions unlawful and they were reversed. Johnson had already served more than 51 months, the sentence imposed for the other counts. He argued that his term of supervised release began to run when should have been released had he been properly sentenced. As a result, he should only have six months (of an imposed three-year term) of supervised release left to serve. *Id.* at 55-56. The Supreme Court rejected that argument and concluded that a term of supervised release begins when a person is actually released from custody and the statutory scheme "does not reduce the length of a supervised release term by reason of excess time served in prison." *Id.* at 60

Lewis does not argue otherwise and is not seeking a reduction in a currently imposed term of supervised release. Rather, he argues that this Court, pursuant to § 2255(a), must vacate the original sentence imposed – including the term of

supervised release – and resentence him and that such resentencing should not include any period of supervised release. Nothing in *Johnson* precludes that relief.

Conclusion

For the reasons set forth above, this Court should follow the example of the court in *Taylor* by vacating Lewis's sentence, resentencing him to an appropriate sentence under § 3553(a), a sentence which should not include any further period of supervised release. Because Lewis would no longer be on supervised release, the pending petition to revoke should be withdrawn or dismissed.

Respectfully submitted this 8th day of November, 2017.

EDWARD LEE LEWIS

By Counsel

CHRISTIAN M. CAPECE
FEDERAL PUBLIC DEFENDER

s/ Christian M. Capece
Christian M. Capece, Bar No. 10717
Attorney for Defendant
United States Courthouse
300 Virginia Street, East, Room 3400
Charleston, WV 25301
Telephone: (304) 347-3350
Facsimile: (304) 347-3356
E-mail: christian_capece@fd.org

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

EDWARD LEE LEWIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX F

TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN D. BYRNE
ASSISTANT FEDERAL PUBLIC DEFENDER
Office of the Federal Public Defender, Southern District of West Virginia
Room 3400, Robert C. Byrd Federal Courthouse
300 Virginia Street East
Charleston, West Virginia 25301
Telephone: 304/347-3350
Counsel for Petitioner

CHRISTIAN M. CAPECE
FEDERAL PUBLIC DEFENDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CIVIL ACTION NO. 2:16-cv-05565
CRIMINAL ACTION NO. 2:02-cr-00042

EDWARD LEE LEWIS,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending before the court is the defendant's Motion to Reconsider Denial of CJA Counsel's Motion to Resentence [ECF No. 304]. The United States submitted a Response [ECF No. 306]. For the reasons stated herein, the Motion to Reconsider is **DENIED**.

I. Procedural Background

On August 16, 2002, a jury found Edward Lee Lewis guilty of four counts of mailing threatening communications in violation of 18 U.S.C. § 876; one count of mailing threatening communications to the President of the United States in violation of 18 U.S.C. § 871; and one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

On November 12, 2002, the court sentenced Mr. Lewis for these convictions. Based on the three convictions for "violent felonies" in Mr. Lewis's criminal history,[1] he was classified as an armed career criminal under 18 U.S.C. § 924(e), the Armed Career Criminal Act (the "ACCA"). Thus, Mr. Lewis was subject to a mandatory minimum sentence of 180 months' imprisonment, and a maximum of life, for his conviction under 18 U.S.C. § 922(g)(1). *See* 18 U.S.C. § 924(e)(1). Accordingly, this conviction was classified as a Class A felony, *see* 18 U.S.C. § 3559(a)(1), and Mr. Lewis was subject to a sentence of up to five years' supervised release, *see* § 3583(b)(1). Ultimately, this court sentenced Mr. Lewis to 192 months' incarceration, followed by three years' supervised release. J. [ECF No. 88]. This sentence was affirmed on appeal. *United States v. Lewis*, 75 F. App'x 164 (4th Cir. 2003).

Following the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Welch v. United States*, 136 S. Ct. 1257 (2016), the court issued a Memorandum Opinion and Order finding that Mr. Lewis's classification as an Armed Career Criminal was no longer lawful,[2] and thus his sentence of 192 months' imprisonment was unlawful. *See* Mem. Op. & Order [ECF No. 299]. However, by this time, Mr. Lewis had already served his term of imprisonment and been released from prison. The court found that Mr. Lewis's sentence of supervised release remained

[1] Mr. Lewis had previously been convicted in the Circuit Court of Putnam County, West Virginia of three counts of daytime burglary in violation of W. Va. Code § 61-31-11. These were classified as violent felonies under 18 U.S.C. § 924(e)(2)(B)(ii).

[2] His three prior state burglary charges could no longer lawfully be considered "violent felonies" under the ACCA. *See* Memorandum Op. & Order 7–10 [ECF No. 299].

lawful and declined to alter it. *See id.* at 11, n.5. The court adjusted Mr. Lewis's criminal history category and class of felony for the benefit of their impact on any future proceedings. *See id.* at 11.

Following the entry of the court's Order, Mr. Lewis's CJA counsel filed a Motion to Resentence asking the court to resentence Mr. Lewis to no supervised release to compensate Mr. Lewis for the excess time he spent in prison. Mot. Resentence [ECF No. 301]. The court denied this motion, citing the Supreme Court's decision in *Johnson v. United States*, which plainly states that "[t]he objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release." 529 U.S. at 59; Order [ECF No. 303].

Subsequently, the federal public defender, appointed to represent Mr. Lewis in his pending revocation proceeding for violation of the terms of his supervised release, filed this motion [ECF No. 304], asserting that the court is required to vacate Mr. Lewis's sentence and resentence him. The court assumes that the client, who was a fugitive at the time of filing, authorized his counsel to bring this motion.

II. Discussion

The defendant argues that the court must vacate the original judgment in its entirety and conduct a de novo resentencing for the defendant. However, the language of § 2255 and the case law interpreting it is clear: "A district court need not actually vacate the original sentence if the judgment has the 'practical effect' of vacating the original sentence." *United States v. Davis*, No. 17-4011, 2017 WL 3867817, at *2 (4th

Cir. Sept. 5, 2017) (quoting *United States v. Hadden*, 475 F.3d 652, 661 n.9 (4th Cir. 2007). Furthermore, the court is only required to take *one* of "four distinct courses in remedying a successful § 2255 petitioner's unlawful sentence: (1) 'discharge the prisoner,' (2) 'grant [the prisoner] a new trial,' (3) 'resentence [the prisoner],' or 'correct the [prisoner's] sentence." *Hadden*, 475 F.3d at 667. This language "confers a 'broad and flexible' power to the district courts 'to fashion an appropriate remedy.'" *United States v. Hillary*, 106 F.3d 1170, 1171 (4th Cir. 1997) (quoting *United States v. Garcia*, 956 F.2d 41, 45 (4th Cir. 1992)). Thus, despite the defendant's argument to the contrary, the court is not required to resentence the defendant.

Given the specific facts and the posture of this case, I find that the appropriate means by which to grant relief to Mr. Lewis is for the court to *correct* Mr. Lewis's sentence. Mr. Lewis has, unfortunately, already served the entire period of imprisonment on his original unlawful sentence. It is clear that this period of incarceration was greater than any sentence that would now be imposed by the court. Therefore, it is unnecessary to conduct a de novo resentencing to determine a numerical sentence of imprisonment, and it is appropriate to correct the defendant's sentence by amending the term of imprisonment to "time served."

The defendant also asks the court to impose no term of supervised release, as none was originally *required* and "[g]iven the amount of additional time Lewis has served in prison" as a result of the unlawful term of imprisonment. Mem. Support Mot. Recon. 7 [ECF No. 305]. The court finds such reasoning unpersuasive. As

articulated by the Supreme Court, "[t]he objectives of supervised release would be unfulfilled if excess prison time were to offset supervised release." *Johnson*, 529 U.S. at 59. The court is well aware that it has discretion to amend Mr. Lewis's sentence of supervised release. However, it has chosen not to do so. "Congress intended supervised release to assist individuals in their transition to community life." *Id.* Considering the difficulty Mr. Lewis has had in his transition, it is clear that the court made the right decision.

III. Conclusion

Accordingly, the court **ORDERS** that the defendant's original term of imprisonment is amended to a term of **"time served."** The term of supervised release will remain as is—three years under the same conditions previously ordered. The defendant's motion [ECF No. 304] is **DENIED**.

The court **DIRECTS** the Clerk to send a copy of this Order to the defendant and counsel, the United States Attorney, the United States Probation Office, and the United States Marshal.

ENTER: January 22, 2018

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE