APPENDIX

APPENDIX

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16734
Non-Argument Calendar

D.C. Docket No. 0:13-cr-60050-WJZ-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOCELYN FAURISMA,

Defendant-Appellant.

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

(March 28, 2018)

Before TJOFLAT, NEWSOM, and ANDERSON, Circuit Judges

PER CURIAM:

Jocelyn Faurisma seeks to appeal the denial of his 28 U.S.C. § 2255 claim that he is actually innocent of his conviction for carrying or brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c), because the

predicate offense of armed bank robbery does not qualify as a crime of violence after Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). After merits briefing, this Court determined that we could not hear Faurisma's appeal unless he obtained a certificate of appealability ("COA"). We entered a limited remand for the district court to determine whether to grant a COA. The district court has now denied a COA and this Court must determine whether to grant one.

"[A]n appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255" unless the appellant first obtains a COA. 28 U.S.C § 2253(c)(1)(B). In order to obtain a COA, a movant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000). Reasonable jurists would not debate the district court's denial of Faurisma's claim.

Faurisma was sentenced to a mandatory, consecutive 84-month term of imprisonment for brandishing a firearm during a crime of violence pursuant to 18 U.S.C. § 924(c)(1)(A)(ii). This section defines a crime of violence as a felony that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). This Court has referred to subsection (A) as the "use-of-force" clause and subsection (B) as the "risk-of-force" clause. Faurisma claims that he cannot be constitutionally sentenced under either clause. First, Faurisma claims that § 924(c)(3)(B) is unconstitutional after Johnson, in which the Supreme Court held that the residual clause in the ACCA (18 U.S.C. § 924(e)(2)(B)(ii)), is unconstitutionally vague. Id. at 2557–58, 2563. Faurisma then claims that his conviction for armed bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d), does not qualify as a crime of violence under § 924(c)(3)(A).

Faurisma's claims are contrary to this Circuit's binding precedent. This Court has held that armed bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d), is a crime of violence under § 924(c)(3)(A)'s use-of-force clause because it requires "the use, attempted use, or threatened use of physical force against the person or property of another." In re Hines, 824 F.3d 1334, 1337 (11th Cir. 2016) (quoting 18 U.S.C. § 924(c)(3)(A)). Thus, Faurisma's conviction is valid under § 924(c)(3)(A) regardless of whether § 924(c)(3)(B) is constitutional after Johnson.

Moreover, this Court recently held that "Johnson's void-for-vagueness ruling does not apply to or invalidate the 'risk-of-force' clause in § 924(c)(3)(B)." Ovalles v. United States, 861 F.3d 1257, 1265 (11th Cir. 2017). The Court

recognizes that the Supreme Court has heard oral argument in a case addressing whether language in 18 U.S.C. § 16(b), which is identical to language in § 924(c)(3)(B), is unconstitutionally vague. See Lynch v. Dimaya, 803 F.3d 1110 (9th Cir. 2015), cert. granted, 137 S. Ct. 31 (2016), Sessions v. Dimaya, No. 15-1498 (2017 Term). Nevertheless, "[u]nder the prior precedent rule, we are bound to follow a prior binding precedent 'unless and until it is overruled by this court en banc or by the Supreme Court.'" United States v. Vega-Castillo, 540 F.3d 1235, 1236 (11th Cir. 2008) (per curiam) (quoting United States v. Brown, 342 F.3d 1245, 1246 (11th Cir. 2003)); see also Ovalles, 861 F.3d at 1267 (discussing differences between § 16(b) and § 924(c)(3)(B)).

For all of these reasons, reasonable jurists would not find the district court's assessment of Faurisma's constitutional claims debatable. Faurisma's motion for COA is therefore DENIED. Accordingly, we DISMISS Faurisma's appeal.

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United States District Court

Southern District of Florida

FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

JOCELYN FAURISMA

JUDGMENT IN A CRIMINAL CASE

Case Number - 0:13-60050-CR-ZLOCH-1

USM Number: 02729-104

Counsel For Defendant: Daryl Wilcox, Esq.
Counsel For The United States: Francis Viamontes, Esq., AUSA
Court Reporter: Karl Shires

The defendant pleaded guilty to Counts 1, 2 and 3 of the Indictment.
The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 2113(a) and (d)	Armed bank robbery	February 20, 2013	1
18 U.S.C. § 924(c)(1)(A)(ii)	Possession and brandishing of a firearm in furtherance of a crime of violence	February 20, 2013	2
18 U.S.C. § 922(g)(1) and 924(e)	Felon in possession of a firearm	January 12, 2012	3

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

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

Date of Imposition of Sentence:
October 14, 2016

WILLIAM J. ZLOCH
United States District Judge

October 14, 2016

ALL PENDING MOTIONS ARE HEREBY DENIED AS MOOT.

DEFENDANT: JOCELYN FAURISMA
CASE NUMBER: 0:13-60050-CR-ZLOCH-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **156 months**. The term consists of **72 months** as to Counts 1 and 3 of the Indictment, to be served concurrently with each other, and **84 months** as to Count 2 of the Indictment, to be served consecutively to the terms imposed as to Counts 1 and 3.

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

The Court recommends the Federal facility at Coleman, Florida.

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: JOCELYN FAURISMA
CASE NUMBER: 0:13-60050-CR-ZLOCH-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This term consists of 3 years as to Counts 1, 2 and 3, all such terms to run concurrently. Within 72 hours of release, the defendant shall report in person to the probation office in the district where released.

While on supervised release, the defendant shall not commit any crimes, shall be prohibited from possessing a firearm or other dangerous devices, shall not possess a controlled substance, shall cooperate in the collection of DNA, and shall comply with the standard conditions of supervised release and with the special conditions listed 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 and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; 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: JOCELYN FAURISMA
CASE NUMBER: 0:13-60050-CR-ZLOCH-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.

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

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining written permission from the United States Probation Officer.

Permissible Search - The defendant shall submit to a search of his 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.

DEFENDANT: JOCELYN FAURISMA
CASE NUMBER: 0:13-60050-CR-ZLOCH-I

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
$300.00	$	$54.00

It is further ordered that the defendant shall pay restitution in the amount of **$54.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of his monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other anticipated or unexpected financial gains, assets or income of the defendant to satisfy the restitution obligations. The restitution shall be made payable to Clerk, United States Courts, and forwarded to:

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

The restitution will be forwarded by the Clerk of the Court to the victim in this case.

*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: JOCELYN FAURISMA
CASE NUMBER: 0:13-60050-CR-ZLOCH-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 **$300.00** due immediately.

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

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

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

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
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.

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.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-62520-CIV-ZLOCH
(13-60050-CR-ZLOCH)

JOCELYN FAURISMA,

Movant,

vs.

O R D E R

UNITED STATES OF AMERICA,

Respondent.
_____/

THIS MATTER is before the Court upon the Report of Magistrate Judge (DE 17) filed herein by United States Magistrate Judge Patrick A. White and Movant Jocelyn Faurisma's Motion To Vacate Sentence Pursuant to 28 U.S.C. § 2255 (DE 1). No objections to said Report have been filed.[1] The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

On July 12, 2013, Movant pled guilty to all counts of a three-count indictment, which charged him with (I) robbery of a federally insured bank, (II) carrying a firearm during and in relation to a crime of violence and possession of a firearm in furtherance of a crime of violence, and (III) possession of a firearm and ammunition by a convicted felon. At sentencing, the Court found that Movant qualified as an armed career criminal based on five prior convictions: burglary of a dwelling, aggravated assault, aggravated fleeing or eluding, and two convictions for possession of cannabis

[1] Movant filed a Response To Magistrate's Report (DE 21), in which he agrees with Magistrate's Judge White's conclusions and concedes that three of the claims raised in his initial Motion (DE 1) should be denied.

with intent to sell or deliver. The Court imposed a sentence of 216 months as to Counts I and III, and 84 months as to Count II, to be served consecutive.

The Armed Career Criminal Act (hereinafter "ACCA"), 18 U.S.C. § 924, sets a fifteen-year mandatory minimum sentence for persons convicted of being a felon in possession of a firearm who have three or more convictions for a "violent felony" or "serious drug offense." 18 U.S.C. § 924(e)(1).

Movant's two prior convictions for possession of cannabis with intent to sell or deliver do not qualify as serious drug offenses. Those convictions constitute third-degree felonies under Florida law, and are punishable by a maximum of five years imprisonment. See Fla. Stat. § 893.12(1)(a)2; Fla. Stat. § 775.082(3)(e). A "serious drug offense" under ACCA, however, must be punishable by "a maximum term of imprisonment of ten years or more. . . ." 18 U.S.C. § 924(e)(2)(A).

Further, Movant's conviction for aggravated fleeing and eluding is not a "violent felony" after the Supreme Court's decision in United States v. Johnson, 135 S. Ct. 2551 (2015). At the time of sentencing, the only category under which this conviction would have constituted a "violent felony" was ACCA's residual clause.[2] However, the Court in Johnson found ACCA's residual clause to be unconstitutionally vague. See Johnson, 135 S. Ct. at 2563. Johnson thus washed away any remaining support for

[2] A person is subject to the fifteen year mandatory minimum under ACCA's residual clause if he has three prior violent felony convictions for a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e).

Movant's ACCA enhancement.

Magistrate Judge White correctly observes that Movant's ACCA enhancement is no longer supported by law and therefore recommends that Movant's Motion (DE 1) be granted. The Court adopts the reasoning and conclusions of Magistrate Judge White's Report (DE 17).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. The Report of Magistrate Judge (DE 17) filed herein by United States Magistrate Judge Patrick A. White be and the same is hereby approved, adopted, and ratified by the Court;

2. Movant Jocelyn Faurisma's Motion To Vacate Sentence Pursuant to 28 U.S.C. § 2255 (DE 1) be and the same is hereby **GRANTED**; and

3. A hearing on modification of Movant Jocelyn Faurisma's sentence will be set by separate order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 28th day of July, 2016.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

The Honorable Patrick A. White
United States Magistrate Judge

All Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-60050-CR-ZLOCH
CASE NO. 15-62520-CIV-ZLOCH

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORDER DENYING CERTIFICATE OF APPEALABILITY

JOCELYN FAURISMA,

Defendant.
_____/

THIS MATTER is before the Court upon the Notice Of Appeal (DE 83) filed herein by Defendant and the Limited Remand of the United States Court of Appeals for the Eleventh Circuit (DE 89). The Court having carefully reviewed the entire court file herein and after due consideration, it is

ORDERED AND ADJUDGED that, having denied in part Jocelyn Faurisma's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1, Case No. 15-62520-CIV-ZLOCH), the Court finds that Jocelyn Faurisma has failed to demonstrate the deprivation of a Federal constitutional right. Accordingly, the issuance of a Certificate Of Appealability be and the same is hereby **DENIED** for the reasons set forth above.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of August, 2017.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:
All Counsel of Record

Clerk of the United States Court of Appeals
For the Eleventh Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-60050-CR-ZLOCH
CASE NO. 15-62520-CIV-ZLOCH

UNITED STATES OF AMERICA,

Plaintiff,

16-16734-CC

vs.

ORDER DENYING CERTIFICATE OF APPEALABILITY

JOCELYN FAURISMA,

Defendant.
_____/

THIS MATTER is before the Court upon the Notice Of Appeal (DE 83) filed herein by Defendant and the Limited Remand of the United States Court of Appeals for the Eleventh Circuit (DE 89). The Court having carefully reviewed the entire court file herein and after due consideration, it is

ORDERED AND ADJUDGED that, having denied in part Jocelyn Faurisma's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1, Case No. 15-62520-CIV-ZLOCH), the Court finds that Jocelyn Faurisma has failed to demonstrate the deprivation of a Federal constitutional right. Accordingly, the issuance of a Certificate Of Appealability be and the same is hereby **DENIED** for the reasons set forth above.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of August, 2017.

William J. Z

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:
All Counsel of Record

Clerk of the United States Court of Appeals
For the Eleventh Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CV-62520-ZLOCH
(13-CR-60050-ZLOCH)
MAGISTRATE JUDGE P. A. WHITE

JOCELYN FAURISMA, :

Movant, :

v. :

UNITED STATES OF AMERICA, :

Respondent. :

REPORT OF MAGISTRATE JUDGE

I. Introduction

This matter is before the Court on the Movant's *pro se* motion to vacate pursuant to 28 U.S.C. § 2255, attacking his sentence for armed bank robbery, possession of a firearm in furtherance of a crime of violence, and possession of a firearm by a felon pursuant to a guilty plea in case number 13-CR-60050-ZLOCH.

Before the Court for review are the amended motion to vacate (Cv-DE# 8), the Government's response (Cv-DE# 13), the Movant's reply (Cv-DE# 16), the Presentence Investigation Report ("PSI"), and all pertinent portions of the underlying criminal file.

II. Claims

Construing the *pro se* Movant's arguments liberally, he appears to raise the following claims in his amended Section 2255 motion:

1. Counsel was ineffective for failing to: file a motion to dismiss the indictment for lack of jurisdiction and because it failed to allege essential factual elements of the offense (FDIC insurance), and for failing to request a psychological evaluation of the Movant based on

mental illnesses that were noted during the change of plea hearing;

2. Counsel was ineffective for failing to adequately prepare for sentencing and challenge the Armed Career Criminal Act ("ACCA") enhancement, failing to challenge the application of United States Sentencing Guidelines 2K2.1(b)(4)(A), and failing to request a downward variance or departure due to the Movant's mental health condition;

3. Appellate counsel was ineffective for failing to argue that the Movant does not qualify for sentencing under the ACCA, for failing to raise Alleyne v. United States, 133 S.Ct. 2151 (2013), failing to move for rehearing *en banc* or file a petition for writ of certiorari, and for failing to consult with the Movant regarding the issues addressed in the appeal; and

4. The Movant is actually innocent of the armed career criminal enhancement pursuant to Johnson v. United States, 135 S.Ct. 2551 (2015).

III. Procedural History

The relevant procedural history of the underlying criminal case is as follows. The Movant was charged with: Count (1), robbery of a federally insured bank with a firearm; Count (2), carrying a firearm during and in relation to a crime of violence and possession of a firearm in furtherance of a crime of violence; and Count (3), possession of a firearm and ammunition by a convicted felon. (Cr-DE# 9).

The Movant entered an open guilty plea that was supported by a written factual proffer. (Cr-DE# 35); (Cr-DE# 55 at 2-3). The Movant testified at the plea hearing that he completed the ninth grade, has suffered from substance abuse, was treated for depression at Florida State Prison between 2002 and 2005, and takes prescription medication for depression. (Cr-DE# 55 at 5-6). He was not given his prescription medication the night before the hearing.

(Cr-DE# 55 at 7). The Court inquired as to the Movant's competency as follows:

> Q. Your prior drug use and the medication that you are taking, is that in any way affecting your ability to understand what is being discussed here in court?
> A. I can understand you very good, sir.
> Q. But my question is, your prior drug use and the medication that you are taking is that in any way affecting your ability to understand what is being discussed?
> A. No, sir.
> Q. Now, do you understand the purpose of this hearing?
> A. Yes, sir.
> Q. Do you understand that the purpose of this hearing is for you, if you wish to, because it is strictly your decision, but the purpose of this hearing is for you to enter pleas of guilty to the charges contained in counts one, two, and three of the indictment. Do you understand that?
> A. Yes, sir.
> Q. Is that what you wish to do?
> A. Yes, sir.
> THE COURT: Mr. Chambrot, are you satisfied as to your client's competency to enter a plea at this time?
> MR. CHAMBROT: I am, your honor.

(Cr-DE# 55 at 7-8).

The Movant went on to testify that he had read the indictment, that his lawyer explained the charges to him, that he discussed the Government's evidence and what he had done in the case with his lawyer, and that counsel discussed these issues with him fully and provided his advice and answered all the Movant's questions. The plea was supported by a written factual proffer. (Cr-DE# 55 at 8). He understood everything his lawyer has said to him about the entire case. (Cr-DE# 55 at 8). He has had enough time to discuss the case fully with counsel and he has been satisfied with counsel's representation throughout the entire matter. (Cr-DE# 55 at 9). The Court read each charge set forth in the indictment and

the Movant said he fully understood and had no questions. (Cr-DE# 55 at 9-12). The Movant also testified that he read the factual proffer, understood it fully, discussed it with counsel, and it is truthful and accurate. (Cr-DE# 55 at 13-15). The Movant testified that he understood the rights he was waiving and acknowledged the mandatory minimum and statutory maximum sentences that he could receive, as well as the advisory guidelines. (Cr-DE# 55 at 16, 18-21). He further testified that nobody had promised him anything or coerced him to plead guilty. (Cr-DE# 55 at 19-20). The Court again asked if the Movant understood everything, which he did, and had any questions, which he did not. (Cr-DE# 55 at 24). The Court then inquired as to whether counsel believed that the Movant understood the charges and his advice, and counsel answered affirmatively. (Cr-DE# 55 at 25). Counsel was satisfied as to the Movant's guilt regarding the charges after reviewing the discovery with the Movant and believed that pleading guilty was in the Movant's best interest. (Cr-DE# 55 at 25). The Movant pled guilty to all three charges. (Cr-DE# 55 at 25-26).

The Court accepted the guilty plea and found the Movant "alert and intelligent, that he understands the nature of the charges against him, appreciates the consequences of pleading guilty, understands the possible penalties, and fully understands his rights," and that the decision to plead guilty is knowing and voluntary and not the product of force, threats, promises or coercion. (Cr-DE# 55 at 25-26). Further, the factual proffer is sufficient to sustain the plea. (Cr-DE# 55 at 25).

The PSI calculated the base offense level as twenty-four because the offense involved unlawful possession of a firearm after at least two felony convictions for either a crime of violence or controlled substance offense pursuant to United States Guidelines

Section 2K2.1(a)(2) and 18 U.S.C. § 922(g)(1). (PSI ¶ 15). Two levels were added pursuant to Section 2K2.1(b)(4)(A) because the firearm was stolen. (PSI ¶ 16). This resulted in an adjusted offense level of twenty-six. (PSI ¶ 20). However, the offense level is thirty-seven because the Movant qualifies as an armed career criminal pursuant to Guidelines Section 4B1.4(b)(2), as well as a career offender pursuant to Guidelines Section 4B1.1(a) based on his prior convictions for a crime of violences (97-17506CF10A, 99-22983CF10A and 08-3771CF10A) and controlled substance offenses (07-23458CF10A and 10-2600CF10A). (PSI ¶ 21). Three levels were deducted for acceptance of responsibility, resulting in a total offense level of thirty-four. (PSI ¶¶ 22, 23, 24).

The criminal history section includes prior convictions for, *inter alia*: burglary of a dwelling (07-17506CF10A); aggravated assault (99-22983CF10A); possession of cannabis with intent to sell or deliver (07-23458CF10A and 10-2600CF10A); and aggravated fleeing or eluding (08-3771CF10A). (PSI ¶¶ 38, 40, 42, 43, 45). This totals seventeen criminal history points and a criminal history category of VI, and he also has a criminal history category of VI as a career offender and armed career criminal pursuant to Guidelines Section 4B1.1(b) and 4B1.4(c)(1). (PSI ¶ 48, 49).

The resulting guidelines range is: between 262 and 327 months' imprisonment for Counts (1) and (3) with a seven-year consecutive for Count (2) pursuant to 18 U.S.C. § 924(c); at least two and not more than five years of supervised release; between $17,500 and $175,000 in fines; and restitution. (PSI ¶¶ 93, 95, 99, 101).

Defense counsel filed objections to the PSI arguing, *inter alia*: the two-point increase for a stolen gun pursuant to 2K2.1(b)(4)(A) should be removed because the gun was not mentioned

in the factual proffer and the Movant did not accept that it was stolen; the Movant does not qualify as an armed career criminal pursuant to the Movant's *pro se* objections; and factors such as the Movant's health warrant a downward departure. (Cr-DE# 39).

The Movant argued in his *pro se* objections to the PSI with regards to Section 2K2.1(b)(4)(A), that "the probation officer is required to prove that, the defendant is the one that stole the firearm. The addition 2 points should be deducted, if the probation officer failed to prove that the defendant, is the one that stole the firearm per-se." (Cr-DE# 41 at 1). He argued with regards to the Armed Career Criminal Act that several of his convictions are not qualifying priors. Specifically, cases 07-23458CF10A and 10-2600CF10A are not "serious drug offenses" under the modified categorical approach because the charging document does not specify the amount of drugs involved. (Cr-DE# 41 at 2-3).

Counsel also filed a sentencing memorandum that sets forth the Movant's medical history including serious cardiovascular disease that required surgery on two occasions and severe depression for which he has been under psychiatric care and has been prescribed medication, and argues that the Court should vary downward from the advisory range based on the Defendant's extensive history of health problems. (Cr-DE# 40).

At the sentencing hearing, the Movant agreed that he reviewed the PSI with counsel and did not have any objections other than those that he and counsel had filed. (Cr-DE# 4). Counsel withdrew the objection with regards to the two-point increase for the stolen firearm. The Movant disagreed with the waiver but the Court overruled his objection:

> MR. CHAMBROT: As to paragraph 16, judge, there was a two point increase for the gun being stolen. Prior to this hearing, I met with the lead agent and he provided me the documentation showing that Mr. Faurisma [was] not the owner of this weapon. He also showed me a proper Broward County Police Sheriff's Office police report showing that the gun had been reported stolen.
>
> Just to clarify the record, this does not affect the sentencing guideline range which probation is calculating on. Nevertheless, I am withdrawing that objection since the gun was stolen.
>
> THE COURT: All right. Mr. Faurisma, do you agree with that?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: All right. Well, I am overruling your objection.

(Cr-DE# 56 at 5).

The Movant argued that his two prior drug offenses do not qualify as serious drug offenses because "possession with intent to sell or deliver cannabis carries a sentence of less than 10 years imprisonment, and those falls outside of the ACC Florida Statute 893.13182, and 893.031c, and 774.052." (Cr-DE# 45 at 8). The Government argued that the Movant does qualify as an armed career criminal because, even discounting the two drug offenses, he has three prior convictions for violent felonies, *i.e.*, burglary of a dwelling, aggravated assault, and fleeing and eluding. (Cr-DE# 45 at 11). The Court overruled the Movant's objection to his qualification as an armed career criminal or habitual offender. (Cr-DE# 45 at 11).

Counsel noted that he was objecting to the PSI's statement that there are no factors warranting a downward departure because the Movant's health should be considered (Cr-DE# 45 at 6), and argued that the Court should vary downward based, in part, on the Movant's mental and physical health:

> MR. CHAMBROT: ... Jocelyn suffers from a heart condition. He has two aortic operations to replace valves, the last one being in 2007. Despite the fact that he is a strapping looking young man he is ill. Again, he has a bad heart.
>
> His care while incarcerated at the Broward County Jail has not been stellar. He is not receiving the medication he needs. He also suffers from severe depression and a laundry list of other illnesses.

(Cr-DE# 56 at 14).

The Court granted the defense motion for a sentence outside the advisory range over the Government's objection to reflect the seriousness of the offense, afford adequate deterrence, and protect the public. See (SOR). It sentenced him to a total of 300 months' imprisonment (216 months as to Counts (1) and (3), concurrent, and eighty-four months as to Count (2), consecutive) followed by five years of supervised release. (Cr-DE# 43);

The Eleventh Circuit Court of Appeals affirmed on July 24, 2014, finding that the sentence was reasonable and supported by the Section 3553(a) factors and the record. United States v. Faurisma, 572 Fed. Appx. 952 (11th Cir. 2014). The Movant filed a *pro se* motion for rehearing and rehearing *en banc*, docketed on August 7, 2014, that was denied on September 15, 2014.

The Movant filed his original motion to vacate on November 28, 2015, and the amended motion on December 23, 2015.

IV. Statute of Limitations

The Government concedes the instant motion to vacate was timely filed. (Cv-DE# 12 at 2).

V. Standard of Review

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

To prevail on a claim of ineffective assistance of counsel, the Movant must establish: (1) deficient performance - that his counsel's representation fell below an objective standard of reasonableness; and (2) prejudice - but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000)(*en banc*).

In the context of a guilty plea, Strickland's prejudice inquiry "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). A movant must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id.

VI. Discussion

(1) Ineffective Trial Counsel: Motion to Dismiss

First, the Movant contends that trial counsel was ineffective for failing to: file a motion to dismiss the indictment for lack of jurisdiction and because it failed to allege essential factual elements of the offense (FDIC insurance), and for failing to request a psychological evaluation of the Movant based on mental illnesses that was noted during the change of plea hearing.

A defendant who pleads guilty "waives all non-jurisdictional challenges to the constitutionality of the conviction" and may only attack the knowing and voluntary nature of the plea. See Wilson v. United States, 962 F.2d 996 (11th Cir. 1992). To enter into a voluntary plea, the defendant must understand the law in relation to the facts. McCarthy v. United States, 394 U.S. 459 (1969). The court taking the plea must address the defendant personally in open court before accepting the plea "and determine the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)." Fed. R. Crim. P. 11(b)(1). The court must specifically address three "core principals" ensuring that a defendant "(1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea." United States v. Moriarty, 429 F.3d 1012 (11th Cir. 2005). To ensure compliance with the third core concern, Rule 11(b)(1) provides a list of rights and other relevant matters about which the court is required to inform the defendant prior to accepting the plea, including the right to plead not guilty and be represented by counsel. See id.; Fed. R. Crim. P. 11(b)(1). The defendant's declarations in open court during the plea colloquy carry "a strong presumption of verity" and cannot be overcome by conclusory or unsupported allegations. Blackledge v. Allison, 431 U.S. 63, 74 (1977); United States v.

Medlock, 12 F.3d 185, 187 (11th Cir. 1994).

The waiver extends to claims alleging ineffective assistance of counsel that do not implicate the validity of the plea itself. See Smith v. Estelle, 711 F.2d 677, 682 (5th Cir. 1983) ("Smith's guilty plea was voluntarily and knowingly made, [t]hus] he cannot now attack the ineffectiveness of his counsel in any respects other than as the alleged ineffectiveness bears upon counsel's faulty advice that coerced a guilty plea."); see also United States v. Glinsey, 209 F.3d 386, 392 (5th Cir. 2000) (voluntary guilty plea waives all nonjurisdictional defects in the proceedings against the defendant, including claims of ineffective assistance of counsel except insofar as the ineffectiveness is alleged to have rendered guilty plea involuntary); United States v. Bohn, 956 F.2d 208, 209 (9th Cir. 1992) (holding that pre-plea ineffective assistance of counsel claims are also waived by guilty plea).

To enter a voluntary plea, the defendant must understand the law in relation to the facts. McCarthy v. United States, 394 U.S. 459 (1969). The court taking the plea must address the defendant personally in open court before accepting the plea "and determine the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)." Fed. R. Crim. P. 11(b)(1). The court must specifically address three "core principals" ensuring that a defendant "(1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea." United States v. Moriarty, 429 F.3d 1012 (11th Cir. 2005). To ensure compliance with the third core concern, Rule 11(b)(1) provides a list of rights and other relevant matters about which the court is required to inform the defendant prior to accepting the plea, including the right to plead not guilty and be represented by counsel. See id.; Fed. R.

Crim. P. 11(b)(1). The defendant's declarations in open court during the plea colloquy carry "a strong presumption of verity" and cannot be overcome by conclusory or unsupported allegations. Blackledge, 431 U.S. at 74; Medlock, 12 F.3d at 187.

The Movant stated during the plea hearing that he understood the proceedings as well as the nature of the charges against him, appreciated the consequences of pleading guilty, understood the possible penalties, and full understood his rights, was pleading guilty because he was guilty based on the true and accurate written factual proffer, and that he was not entering his plea due to any promises or coercion. He advised the Court of his history of depression and present medications, and that he understood the proceedings. Counsel also advised the Court that the Movant appeared to understand everything throughout the course of the case and that he had no doubt as to the Movant's competency.

The Movant's present factual allegations that are contrary to his sworn statements during the plea colloquy should be rejected. This includes his guilt of the charged offenses and his understanding of the proceedings.[1] See Blackledge, 431 U.S. at 74; Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (movant is not entitled to habeas relief when the claims are merely conclusory allegations unsupported by specifics or on the face of the record are wholly incredible).

Further the Movant's knowing and voluntary guilty plea waived his claims that preceded the plea's entry that counsel was ineffective for failing to move to dismiss the indictment and

[1] The Movant does not appear to argue that his mental illness rendered his guilty plea involuntary. In any event, his own conduct at the change of plea hearing as well as counsel's view that he was competent to enter the plea refute any inference to the contrary.

investigate the Movant's competency.

For the foregoing reasons, this claim should be denied.

(2) Ineffective Trial Counsel: Sentencing

Next, the Movant contends that trial counsel was ineffective for failing to adequately prepare for sentencing by: (A) challenging the ACCA enhancement; (B) challenging application of the Section 2K2.1(b)(4)(A) stolen firearm enhancement by a preponderance of the evidence pursuant to Alleyne v. United States, 133 S.Ct. 2151 (2013); and (C) requesting a downward variance or departure due to the Movant's mental health condition.

(A) Counsel was not ineffective for failing to adequately prepare for sentencing by reviewing the Movant's State criminal history and application of the ACCA enhancement.

For the reasons set forth in Claim (4), *infra*, counsel was deficient for failing to challenge the Movant's prior convictions in case numbers 07-2348CF10A and 10-2600CF10A, for possession of cannabis with intent to deliver or distribute, because they are not "serious drug offenses" under ACCA.

Counsel was not, however, deficient for failing to challenge the Movant's prior convictions in case numbers 07-17506CF10A, 99-22983CF10A, and 08-3771CF10A, for burglary of a dwelling, aggravated assault, and aggravated fleeing or eluding. At the time the Movant was sentenced on September 24, 2013, each of these offenses was considered to be a "crime of violence" under ACCA. See United States v. Matthews, 466 F.3d 1271 (11th Cir. 2006) (Florida third-degree burglary is a crime of violence under ACCA's residual clause); Turner v. Warden, Coleman FCI (Medium), 709 F.3d

1328 (11th Cir. 2013) (Florida aggravated assault conviction is a crime of violence under ACCA's elements clause); United States v. Petite, 703 F.3d 1290, 1292 (11th Cir. 2013) (fleeing and eluding in violation of Florida Statutes Section 316.1935(2) is a crime of violence under ACCA's residual clause). Counsel cannot be deemed deficient for failing to predict that ACCA's residual clause would be invalidated by the United States Supreme Court more than a year after sentencing in Johnson. See generally Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994) ("We have held many times that reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.").

The Movant cannot demonstrate that he was prejudiced by counsel's failure to object to the cannabis distribution convictions because he still had three qualifying prior convictions for crimes of violence or serious drug offenses under the law in existence at the time of sentencing. See Matthews, 466 F.3d at 1271; Turner, 709 F.3d at 1328; Petite, 703 F.3d at 1292.

Therefore, even though counsel was deficient with regards to the Movant's cannabis priors, he was not prejudiced by counsel's failure to object, and this claim should be denied.

(B) Counsel was not ineffective for failing to challenge the application of United States Sentencing Guidelines 2K2.1(b)(4)(A) by a preponderance of the evidence standard pursuant to Alleyne.

As a preliminary matter, this claim should be rejected to the extent that it is refuted by the record. Defense counsel filed objections to the PSI arguing that Section 2K2.1(b)(4)(A) does not apply because the written factual proffer does not indicate that

the gun was stolen. However, counsel withdrew the objection at the sentencing hearing because the probation officer had produced documents demonstrating that the firearm was stolen and the Movant was not its owner. Counsel cannot be deemed deficient for withdrawing this meritless objection even though the Movant disagreed.

Further, counsel was not ineffective for failing to raise Alleyne. The United States Supreme Court held in Alleyne that "any fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury" and found beyond a reasonable doubt. 133 S.Ct. at 2155. The Supreme Court issued its opinion in Alleyne on June 17, 2013. Alleyne is an extension of Apprendi v. New Jersey, 530 U.S. 466 (2000). The Supreme Court resolved Alleyne on direct review, not collateral review, and did not declare that its new rule applies retroactively on collateral review. Apprendi and other cases based on Apprendi do not apply retroactively on collateral review. See Schriro v. Summerlin, 542 U.S. 348 (2004). The Eleventh Circuit Court of Appeals has found that Alleyne does not apply retroactively on collateral review. Jeanty v. Warden, FCI Miami, 2014 WL 3673382 (11th Cir. July 22, 2014).

Guidelines Section 2K2.1(b)(4)(A) addresses specific offense characteristics and provides that, if any firearm was stolen, the offense level is increased by two levels.

In the instant case, the Movant was facing zero to twenty-five years' imprisonment for armed bank robbery; seven years to life imprisonment for possessing and brandishing a firearm in furtherance of a crime of violence; and seven years to life imprisonment, consecutive, for possession of a firearm by a

convicted felon. See 18 U.S.C. § 2113(a), (d); 18 U.S.C. § 924(c)(1)(A)(ii); 18 U.S.C. § 922(g)(1). The stolen firearm enhancement in Section 2K2.1(b)(4)(A) only affected the Movant's guidelines range rather than his minimum mandatory or maximum sentence, and therefore, Alleyne is factually inapplicable. See United States v. Rivera, 558 Fed. Appx. 971 (11th Cir. 2014) (it was not error for the sentencing judge to make the required findings to apply the two-level sentencing enhancement for use of a computer or interactive computer service to entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor, pursuant to Guidelines Section 2G1.3(b)(3)).

Counsel was not ineffective for failing to raise a factually inapplicable argument at sentencing and this claim of ineffective assistance should be denied.

(C) Finally, the Movant contends that counsel was ineffective for failing to request a downward variance or departure due to the his mental health condition.

This claim is conclusively refuted by the record. Counsel filed objections to the PSI and a sentencing memorandum identifying the Movant's mental and physical health conditions and arguing that a downward variance should be granted. Counsel also argued at the sentencing hearing that the Court should grant a downward variance based on the foregoing, and the Court did decide to vary from the sentencing guidelines. The Movant fails to explain what more counsel should have done that probably would have resulted in a further reduction of his sentence. Therefore, this claim should be denied.

(3) Ineffective Appellate Counsel: Sentencing Challenges

The Movant contends that appellate counsel was ineffective for failing to: (A) argue that he does not qualify for sentencing under ACCA; (B) raise Alleyne; (C) move for rehearing *en banc* or file a petition for writ of certiorari; and (D) consult with the Movant regarding the issues to be addressed in the appeal.

(A) First, appellate counsel was not ineffective for failing to raise an unpreserved argument with regards to ACCA.

Where an issue is not preserved for appellate review, appellate counsel's failure to raise the issue is not constitutionally deficient as it is based on the reasonable conclusion that the appellate court will not hear the issue on its merits. Atkins v. Singletary, 965 F.2d 952, 957 (11th Cir. 1992). Had appellate counsel raised this unpreserved issue, it would have been reviewable for plain error. Under the plain error standard of review, there must be (1) an error, (2) that is plain, and (3) that affects substantial rights. United States v. Rodriquez, 398 F.3d 1291, 1298 (11th Cir. 2005). If these conditions are not met, the appellate court may notice an error only if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. In order for an error to be plain, it must be obvious or clear under current law. United States v. Hesser, 800 F.3d 1310, 1325 (11th Cir. 2015).

As set forth in Claim (2)(A), *supra*, the Movant's armed career criminal sentence was legal under then-existing law. Because there was no plain error, appellate counsel was not deficient for failing to raise this claim. See Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001) (counsel is not ineffective for failing to raise a non-meritorious appellate issue).

(B) Similarly, appellate counsel was not ineffective for failing to raise an unpreserved and meritless Alleyne issue. See Atkins, 965 F.2d at 957; Chandler, 240 F.3d at 917 Claim (2)(B), *supra*.

(C) Appellate counsel was not ineffective for failing to move for rehearing *en banc* or file a petition for writ of certiorari.

"[T]he right to appointed counsel extends to the first appeal of right, and no further." Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). A defendant is not deprived of effective assistance by his counsel's failure to file a timely application for a writ of certiorari from the highest state court. Wainwright v. Torna, 455 U.S. 586 (1982). No constitutional claim is presented by this alleged error. Hernandez v. Wainwright, 634 F.Supp. 241, 250 (S.D. Fla. 1986). Moreover, a petition for rehearing of an appeal is squarely a discretionary appeal and again is within the purview of the rule established in Torna. Hernandez, 634 F.Supp. at 250.

As a preliminary matter, the Movant's claim that counsel's deficiency deprived him of the opportunity to file a motion for rehearing *en banc* is belied by the record. He filed a *pro se* motion for rehearing *en banc* that the Eleventh Circuit denied.

Further, appellate counsel was not ineffective for failing to file either a motion for rehearing *en banc* or a petition for writ of certiorari because they are discretionary. Nor does the Movant allege how the outcome of the proceedings would have probably been different but for counsel's allegedly deficient performance. See Tejada, 941 F.2d at 1559.

(D) Finally, appellate counsel was not ineffective for failing

to consult with the Movant regarding the issues to be addressed on appeal.

"[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Jones v. Barnes, 463 U.S. 745 (1983)). An indigent defendant does not have a right to compel appointed appellate counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points. Jones, 463 U.S. at 751. Therefore, appellate counsel has no duty to raise every "colorable" claim suggested by a client. Jones, 463 U.S. at 753. When claiming that counsel's failure to raise a particular claim was ineffective, "it is difficult to demonstrate that counsel was incompetent." Smith, 528 U.S. at 288.

The Movant fails to identify any meritorious claims that he would have suggested had counsel consulted with him that probably would have resulted in a different outcome. See Tejada, 941 F.2d at 1559. Therefore, he has failed to demonstrate that appellate counsel provided deficient representation or that he was prejudiced in any way by counsel's allegedly deficient performance and this claim should be denied.

(4) ACCA Sentence

Finally, the Movant contends that he is actually innocent of the armed career criminal enhancement pursuant to Johnson v. United States, 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, 135 S.Ct. at 2563. In other words, Johnson "narrowed the class of people who are eligible for" an increased sentence under ACCA. In re Rivero, 2015 WL 4747749 at *2 (11th Cir. Aug. 12, 2015)(citing Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253, 1278 (11th Cir. 2013)).

The PSI identifies five prior convictions to support enhanced sentencing: burglary of a dwelling (07-17506CF10A); aggravated assault (99-22983CF10A); aggravated fleeing or eluding (08-3771CF10A); and possession of cannabis with intent to sell or deliver (07-23458CF10A and 10-2600CF10A).

The Government concedes that the Movant no longer qualifies for sentencing under ACCA because his prior convictions for possession of cannabis with intent to deliver or distribute in case numbers 07-23458CF10A and 10-2600CF10A are not "serious drug offenses," and that aggravated fleeing and eluding in case number 08-3771CF10A is no longer considered a "crime of violence" pursuant to Johnson. The undersigned agrees.

First, the two convictions for possession of cannabis with intent to deliver or distribute are not "serious drug offenses." The Eleventh Circuit has recognized a violation of Florida Statutes Section 893.13(1), is a serious drug offense. United States v. Smith, 775 F.3d 1262 (11th Cir. 2014). However, the Movant's convictions for violating Section 893.13(1)(a)2 are third-degree felonies punishable by a maximum of only five years' imprisonment. See § 775.082(3)(e), Fla. Stat. ACCA requires that the offense at issue be punishable by a maximum term of imprisonment of ten years or more to qualify as a serious drug offense. 18 U.S.C. § 924(2)(A)(ii). Because the marijuana distribution convictions in

case numbers 07-23458CF10A and 10-2600CF10A were only punishable by up to five years' imprisonment, they are not serious drug offenses under ACCA.

Second, aggravated fleeing and eluding is no longer considered a "crime of violence." Aggravated fleeing and eluding is not an enumerated offense and does not have as an element the use, attempted use, or threatened use of physical force. Because ACCA's residual clause has been invalidated by Johnson, this offense can no longer be considered a violent felony for purposes of enhanced sentencing. See United States v. Casamayor, 2016 WL 722892 at *5 (11th Cir. Feb. 24, 2016) (Florida fleeing-at-high-speed conviction is no longer a qualifying offense under ACCA's residual clause). Therefore, the conviction in case number 08-3771CF10A is no longer a "crime of violence" under ACCA.

This leaves the Movant with, at most, two qualifying prior convictions for crimes of violence or controlled substance offenses.[2] The Movant lacks the requisite three qualifying prior convictions for sentencing under ACCA and therefore, as the Respondent properly concedes, this claim should be GRANTED, the sentence vacated, a new PSI prepared, and a new sentencing hearing held.

VII. Evidentiary Hearing

Bare and conclusory allegations of ineffective assistance

[2] The remaining offenses are burglary of a dwelling in case number 07-17506CF10A and aggravated assault in case number 99-22983CF10A. The undersigned recently issued a Report in case number 16-CV-21426-ALTONAGA, recommending that the Court find that a Florida burglary conviction no longer be considered a qualifying prior conviction pursuant to Johnson, because Florida's burglary statute is indivisible. See (16-21426 DE# 13 at 28-38). The matter is set for hearing on June 10, 2016. It is unnecessary to reach the burglary issue in the instant case, however, because three qualifying prior convictions are required to support an ACCA sentence and the Movant only has two including the burlgary.

which contradict the record and are unsupported by affidavits or other evidence do not require a hearing. Chandler v. McDonough, 471 F.3d 1360 (11th Cir. 2006) (no hearing warranted in the absence of any specific factual proffer or evidentiary support); Peoples v. Campbell, 377 F.3d 1208 (11th Cir. 2004) (hearing is not required for frivolous claims, conclusory allegations unsupported by specifics, or contentions wholly unsupported by the record).

The Movant's Claims (1)-(3) are meritless and the Government has conceded that Claim (4) is meritorious and requires resentencing. Accordingly, no evidentiary hearing is warranted.

VIII. Certificate of Appealability

Section 2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability 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)." "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." 28 U.S.C. § 2255, Rule 11(a). A timely notice of appeal must be filed even if the court issues a certificate of appealability. 28 U.S.C. § 2255, Rule 11(b).

After review of the record, the undersigned finds no substantial showing of the denial of a constitutional right as to movant's claims. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (habeas petitioner must demonstrate reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues were adequate to deserve encouragement to proceed further). Therefore, it is recommended that the Court deny a certificate of

appealability in its final order. If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the District Judge in objections to this report.

IX. Conclusion

Based on the foregoing, it is recommended that Claim (4) be granted, that the sentence be vacated and that the Movant be resentenced, and that Claims (1)-(3) be denied and a certificate of appealability not be issued as to these claims, and that this case be closed.

Objections to this report, including any objection with regards to the recommendation regarding the certificate of appealability, may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 10th day of June, 2016.

UNITED STATES MAGISTRATE JUDGE

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