# APPENDIX

# A - 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 17-14291-E

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REINALDO SANTOS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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ORDER:

In 1994, a jury found Reinaldo Santos guilty of both being a felon in possession of a firearm and being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). According to the presentence investigation report ("PSI"), Santos's criminal history included a 1987 Florida conviction of aggravated battery, a 1987 Florida conviction of battery on a law enforcement officer, and a 1990 Florida conviction of aggravated assault on a police officer. The district court determined that those three convictions were for violent felonies and that Santos was an armed career criminal under the Armed Career Criminal

Act ("ACCA"), 18 U.S.C. § 924(e).[1] The district court imposed concurrent sentences of 360 months' imprisonment. We affirmed the sentences, but reversed the district court's restitution order. *See United States v. Santos*, 93 F.3d 761, 763-64 (11th Cir. 1996).

In 2002, the district court dismissed as time-barred Santos's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. Santos appealed, and we denied him a certificate of appealability ("COA").

In 2016, this Court authorized Santos to file a second or successive § 2255 motion to challenge his ACCA designation in light of *Johnson v. United States*. *See* 135 S. Ct. 2551, 2557-58, 2563 (2015) (holding that the residual clause of the definition of the phrase "violent felony" in the ACCA is unconstitutionally vague). Santos then filed a counseled § 2255 motion, arguing that none of his prior convictions were ACCA predicate convictions.

The government responded that Santos's convictions of aggravated battery and aggravated assault on a police officer categorically were convictions of violent felonies under the ACCA's elements clause. The government further responded that (1) Florida's battery statute was divisible and subject to the modified

[1] The conviction of aggravated battery arose from an incident that occurred in November 1986, while the conviction of battery on a law enforcement officer arose from an incident that occurred in February 1987. *See* 18 U.S.C. § 924(e)(1) (stating that the three ACCA predicate convictions must be for offenses that were "committed on occasions different from one another").

categorical approach; and (2) the undisputed statements in Santos's PSI revealed that he was convicted of battery on a law enforcement officer after he struck an officer, making the conviction one of a violent felony under the ACCA's elements clause.

Santos replied that Florida's battery statute was indivisible and punished conduct that did not constitute a violent felony. Alternatively, he asserted that a PSI was not an approved *Shepard* document that a court could consult when applying the modified categorical approach.[2]

A magistrate judge recommended that Santos's § 2255 motion be granted. The magistrate judge determined that Florida convictions of aggravated battery and aggravated assault on a police officer categorically were convictions of violent felonies under the ACCA's elements clause. However, the magistrate judge concluded that Santos's Florida conviction of battery on a law enforcement officer was not an ACCA predicate conviction because Florida's battery statute was indivisible and encompassed conduct that did not constitute a violent felony by punishing touching.

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[2] *See Shepard v. United States*, 544 U.S. 13, 26 (2005) (holding that the inquiry to determine whether prior convictions are ACCA predicate convictions "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information").

Both Santos and the government objected to the magistrate judge's report. The district court rejected the magistrate judge's recommendation, denied Santos's § 2255 motion, and denied him a COA. The district court determined that Florida convictions of aggravated battery and aggravated assault on a police officer categorically were convictions of violent felonies under the ACCA's elements clause. The district court concluded that, under controlling precedent, Florida's battery statute was divisible and subject to the modified categorical approach. The district court further concluded that undisputed statements in a PSI could be consulted when applying the modified categorical approach. The district court determined that the undisputed statements in Santos's PSI revealed that he was convicted of battery on a law enforcement officer after he struck an officer, making the conviction one of a violent felony under the ACCA's elements clause. Thus, the district court concluded that Santos had three ACCA predicate convictions and properly was sentenced under the ACCA.

Santos has appealed, and he now moves for a COA. In his counseled motion, he seeks a COA only on the issue of whether his conviction of battery on a law enforcement officer is an ACCA predicate conviction. He argues that it is debatable (1) whether Florida's battery statute is divisible, and (2) whether a court may rely on undisputed statements in a PSI when applying the modified categorical approach.

A COA is required to appeal a final order in a § 2255 proceeding. 28 U.S.C. § 2253(c)(1)(B). To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." *Id.* § 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" or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted).

A "prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Baston*, 818 F.3d 651, 662 (11th Cir. 2016) (quotation omitted), *cert. denied*, 137 S. Ct. 850 (2017). This "prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (clarifying that "published three-judge orders issued under [28 U.S.C.] § 2244(b) are binding precedent in [this] circuit"). "[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted).

The ACCA imposes a mandatory-minimum 15-year sentence on a defendant convicted of being a felon in possession of a firearm, if the defendant has 3 prior convictions of a combination of violent felonies and serious drug offenses. *See* 18 U.S.C. § 924(e)(1). A violent felony is a felony that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) is burglary, arson, or extortion or involves the use of explosives; or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B); *see also United States v. Esprit*, 841 F.3d 1235, 1237 (11th Cir. 2016) (stating that the three clauses of this definition are known as the elements clause, the enumerated-crimes clause, and the residual clause, respectively). The phrase "physical force," as used in the elements clause, means violent force, that is, force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Curtis Johnson*").

The residual clause is unconstitutionally vague because it creates uncertainty about how to estimate the risks that a crime poses and how much risk it takes for a crime to qualify as a violent felony. *Johnson*, 135 S. Ct. at 2557-58, 2563; *see also Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (ruling that *Johnson*'s holding is retroactively applicable to cases on collateral review). *Johnson*'s holding did "not call into question application of the [ACCA] to the four

enumerated offenses, or the remainder of the [ACCA's] definition of a violent felony." *Johnson*, 135 S. Ct. at 2563.

When determining whether a prior conviction is an ACCA predicate conviction, a court generally uses a categorical approach. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). The categorical approach involves looking to the elements that the statute of conviction requires to prove the offense, rather than to the facts of the offense in the particular case. *Id.* at 2283. If the statute criminalizes several acts, the court must assume that the prior conviction "rested upon nothing more than the least of the acts criminalized." *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014) (quotation omitted).

A court may use a modified categorical approach only if the statute of conviction is divisible in that it contains alternative elements of the offense. *Descamps*, 133 S. Ct. at 2281-82 (holding that a court may not use the modified categorical approach when the offense of conviction has a single, indivisible set of elements). A statute is indivisible if it lists various factual means of committing a single element, but does not list multiple elements disjunctively. *Mathis v. United States*, 136 S. Ct. 2243, 2251-54 (2016). "[T]he modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of

the defendant's prior conviction." *Descamps*, 133 S. Ct. at 2281. The court also "can rely on the facts set forth in the PSI if they are undisputed and thereby deemed admitted." *Rozier v. United States*, 701 F.3d 681, 686 (11th Cir. 2012); *see also United States v. Bennett*, 472 F.3d 825, 832-34 (11th Cir. 2006) (rejecting an argument that a PSI is not an approved document to consult when determining whether prior convictions are ACCA predicate convictions); *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) (stating that "[i]t is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes").

As an initial matter, Santos, in his counseled COA motion, does not seek COAs on the issues of whether his convictions of aggravated battery and aggravated assault on a police officer are ACCA predicate convictions. Binding Circuit precedent forecloses any argument that those convictions are not ACCA predicate convictions. *See In re Rogers*, 825 F.3d 1335, 1341 (11th Cir. 2016) (stating that the Florida offenses of aggravated battery and aggravated assault categorically are violent felonies under the ACCA's elements clause).

Under Florida law, a person commits battery when he (1) "[a]ctually and intentionally touches or strikes another person against the will of the other," or (2) "[i]ntentionally causes bodily harm to another person." Fla. Stat. Ann.

§ 784.03(1)(a); *see also id.* § 784.07(2)(b) (providing that battery on a law enforcement officer is a felony). "Because the elements of the offense [of Florida battery] are disjunctive, the prosecution can prove a battery in one of three ways." *Curtis Johnson*, 559 U.S. at 136. "It can prove that the defendant intentionally caused bodily harm, that he intentionally struck the victim, or that he merely actually and intentionally touched the victim." *Id.* at 136-37 (alterations and quotations omitted); *see also United States v. Braun*, 801 F.3d 1301, 1305 (11th Cir. 2015) (stating that Florida's battery statute is divisible and subject to the modified categorical approach). The "element of 'actually and intentionally touching' under Florida's battery law is satisfied by any intentional physical contact, no matter how slight," and does not satisfy the ACCA's elements clause. *Curtis Johnson*, 559 U.S. at 138-40 (emphasis and quotation omitted); *see also id.* at 137, 145 (setting aside a defendant's sentence under the ACCA when nothing in the record permitted the district court to conclude that his Florida battery conviction was not based on actual and intentional touching).

Santos argues that the "touches or strikes" portion of Florida's battery statute is a single, indivisible element that contains two factual means of committing battery. He asserts that, therefore, it is inappropriate to apply the modified categorical approach to determine whether his battery conviction resulted from touching or striking a law enforcement officer.

*Curtis Johnson* contradicts Santos's approach by stating that Florida battery can be proven in one of three ways because "the elements of the offense are disjunctive." *See id.* at 136-37. In *Descamps*, a majority of the Supreme Court rejected the dissent's assertion that the Florida battery statute at issue in *Curtis Johnson* may have contained alternative means, rather than alternative elements. *See Descamps*, 133 S. Ct. at 2285 n.2 (stating that the decision in *Curtis Johnson* "rested on the explicit premise" that the statute at issue covered several different crimes, rather than several different methods of committing one crime); *see also id.* at 2298 (Alito, J., dissenting) (asserting that it was "a distinct possibility" that a Florida battery conviction did "not require juror agreement as to whether a defendant firmly touched or lightly struck the victim," but that "[n]evertheless, in [*Curtis*] *Johnson*, we had no difficulty concluding that the modified categorical approach could be applied"). The Supreme Court stated in *Mathis* that its caselaw on the categorical and modified categorical approaches uses the word "elements" when the Court, in fact, has meant to say "elements." *See* 136 S. Ct. at 2254 (explaining that "a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same; and indeed, we have previously insisted on that point with reference to [the] ACCA's elements-only approach").

Florida's battery statute is divisible and subject to the modified categorical approach because it contains disjunctive elements. *Curtis Johnson*, 559 U.S. at 136-37; *Braun*, 801 F.3d at 1305. Although Santos argues to the contrary, the district court could rely on undisputed statements in the PSI when it applied the modified categorical approach to determine whether his conviction of battery on a law enforcement officer was an ACCA predicate conviction. *See Rozier*, 701 F.3d at 686; *Bennett*, 472 F.3d at 832-34.

According to Santos's PSI, the probable cause affidavit in his battery case stated that he "struck the officer in the face using a closed fist." Also according to the PSI, he pled *nolo contendere* and was convicted. Santos did not object to the accuracy of these statements at the time of sentencing, nor does contest their accuracy now. *See Wade*, 458 F.3d at 1277 (stating that "[i]t is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes"). The PSI reveals that Santos was convicted of battery on a law enforcement office by striking, which involves the use of physical force against the person of another. *See Curtis Johnson*, 559 U.S. at 140 (defining the phrase "physical force," as used in the elements clause, as violent force, that is, force capable of causing physical pain or injury to another person). Reasonable jurists would not debate whether his conviction of battery on a law enforcement officer is

an ACCA predicate conviction under the elements clause. *See* 18 U.S.C. § 924(e)(2)(B)(i).

Reasonable jurists would not debate that Santos has three ACCA predicate convictions and, therefore, properly was sentenced under the ACCA. His motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

# A - 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

93-8108

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | | |
| Plaintiff, | Case No. | CR-ROETTGER |
| v. | | 18 USC 922(g)(1)<br>18 USC 924(a)(2) |
| REINALDO SANTOS, | Magistrate Judge | |
| Defendant. | **INDICTMENT** | |

FILED BY _____ D.C.
93 NOV 23 AM 11:53

The Grand Jury charges that:

On or about November 17, 1993, at West Palm Beach, Palm Beach County, in the Southern District of Florida, the defendant,

REINALDO SANTOS,

having been convicted on or about July 19, 1990, in the Circuit Court, Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, in case number 89-11981, of a crime punishable by imprisonment for a term exceeding one year, that is, aggravated assault on a police officer, did knowingly possess a firearm in and affecting commerce, to wit: a Mossberg, 12 gauge shotgun,

serial number L314678; in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

A TRUE BILL

FOREPERSON

for KENDALL COFFEY
UNITED STATES ATTORNEY

HAL GOLDSMITH
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

93-8108
CR-ROETTGER

UNITED STATES OF AMERICA

CASE NO.: _____

VS.

REINALDO SANTOS

_____/

## CERTIFICATE OF TRIAL ATTORNEY

I do hereby certify:

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

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

3. This case will take 2-3 days for the parties to try.

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

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

5. Has this case been previously filed in this Court? NO ( Yes or No )
If yes, Judge: _____ Case No.: _____
(Attach copy of dispositive order)

6. This case originated in the U.S. Attorney's office prior to August 16, 1985 NO ( Yes or No )

HAL GOLDSMITH
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

**PENALTY SHEET**

Defendant Name: REINALDO SANTOS Case No.: 93-8108 CR-ROETTGER

Count #: 1

10 YEARS

Max. Penalty: $250,000.00

Count #:

Max. Penalty:

Count #:

Max. Penalty:

Count #:

Max. Penalty:

Count #:

Max. Penalty:

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

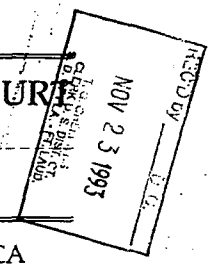
FORM DBD-34
JUN. 85

No. _____

# UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

NORTHERN Division




THE UNITED STATES OF AMERICA

*vs.*

REINALDO SANTOS

## INDICTMENT

18 USC 922(g)(1)
18 USC 924(a)(2)

*A true bill.*

*Foreman*

*Filed in open court this* _____ *day,*

*of* _____ *A.D. 19* _____

*Clerk*

*Bail, $* _____

# A - 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff, v. REINALDO SANTOS, PAUL BLACKSHERE, Defendants. | Case No. 93-8108-CR-ROETTGER(s)<br>18 USC 922(g)(1)<br>18 USC 924(a)(2)<br>18 USC 2<br>Magistrate Judge Snow<br>**SUPERSEDING INDICTMENT** |



The Grand Jury charges that:

COUNT I

On or about November 17, 1993, at West Palm Beach, Palm Beach County, in the Southern District of Florida, the defendants,

REINALDO SANTOS, and
PAUL BLACKSHERE,

each having previously been convicted of a crime punishable by imprisonment for a term in excess of one year, to wit: on or about July 19, 1990, in the Circuit Court, Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, in case number 89-11981, REINALDO SANTOS was convicted of a crime punishable by imprisonment for a term exceeding one year, that is, aggravated assault on a police officer; and on or about May 24, 1993, in the Circuit Court, Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, in case number 92-13783, PAUL BLACKSHERE was convicted of a crime punishable by imprisonment for a term

exceeding one year, that is, robbery; did knowingly possess a firearm in and affecting commerce, to wit: a Mossberg, 12 gauge shotgun, serial number L314678; in violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 2.

COUNT II

On or about November 17, 1993, at West Palm Beach, Palm Beach County, in the Southern District of Florida, the defendant,

REINALDO SANTOS,

having been convicted on or about July 19, 1990, in the Circuit Court, Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, in case number 89-11981, of a crime punishable by imprisonment for a term exceeding one year, that is, aggravated assault on a police officer, did knowingly possess ammunition in and affecting commerce, to wit: Remington Peters brand, 12 gauge shotgun shells; in violation of Title 18, United States Code, Sections 922(g)(1), and 924(a)(2).

COUNT III

On or about November 17, 1993, at West Palm Beach, Palm Beach County, in the Southern District of Florida, the defendant,

PAUL BLACKSHERE,

having been convicted on or about May 24, 1993, in the Circuit Court, Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, in case number 92-13783, of a crime punishable by imprisonment for a term exceeding one year, that is, robbery, did

knowingly possess ammunition in and affecting commerce, to wit: Federal brand, .45 caliber bullets; in violation of Title 18, United States Code, Sections 922(g)(1), and 924(a)(2).

A TRUE BILL

FOREPERSON

KENDALL COFFEY
UNITED STATES ATTORNEY

HAL GOLDSMITH
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

VS.

REINALDO SANTOS,
PAUL BLACKSHERE

CASE NO.: 93-8108-CR-ROETTGER(s)

## CERTIFICATE OF TRIAL ATTORNEY

I do hereby certify:

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

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

3. This case will take 3-4 days for the parties to try.

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

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

5. Has this case been previously filed in this Court? yes ( Yes or No )
If yes, Judge: ROETTGER Case No.: 93-8108-CR-ROETTGER
(Attach copy of dispositive order)

6. This case originated in the U.S. Attorney's office prior to August 16, 1985 NO ( Yes or No )

HAL GOLDSMITH
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

**PENALTY SHEET**

**Defendant Name:** REINALDO SANTOS **Case No.:** 93-8108-CR-ROETTGER

**Count #:** I FELON IN POSSESSION OF FIREARM

**Max. Penalty:** 10 years $250,000

**Count #:** II FELON IN POSSESSION OF AMMUNITION

**Max. Penalty:** 10 years $250,000

**Count #:**

**Max. Penalty:**

**Count #:**

**Max. Penalty:**

**Count #:**

**Max. Penalty:**

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

**PENALTY SHEET**

**Defendant Name:** PAUL BLACKSHERE **Case No.:** 93-8108-CR-ROETTGER

**Count #:** I FELON IN POSSESSION OF FIREARM

**Max. Penalty:** 10 years $250,000

**Count #:** III FELON IN POSSESSION OF AMMUNITION

**Max. Penalty:** 10 years $250,000

**Count #:**

**Max. Penalty:**

**Count #:**

**Max. Penalty:**

**Count #:**

**Max. Penalty:**

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

FORM DBD-34
JUN. 85

No. _____

# UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

NORTHERN Division

THE UNITED STATES OF AMERICA

vs.

REINALDO SANTOS,

PAUL BLACKSHERE

## INDICTMENT

18 USC 922(g)(1)
18 USC 924(a)(2)
18 USC 2

*A true bill.*

_____
*Foreman*

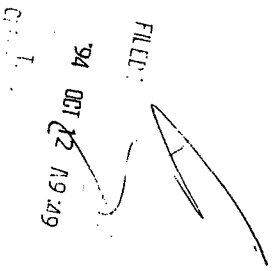
*Filed in open court this* _____ *day,*

*of* _____ *A.D. 19* _____

_____
*Clerk*

*Bail, $* _____

# A - 4



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Case No. 93-8108-CR-ROETTGER |
| v. | ) | |
| | ) | Magistrate Judge Snow |
| REINALDO SANTOS, | ) | |
| | ) | GOVERNMENT NOTICE OF INTENT |
| Defendant. | ) | TO RELY UPON 18 U.S.C. |
| | ) | §924(e) SENTENCE ENHANCEMENT |

THE UNITED STATES OF AMERICA, through its undersigned Assistant United States Attorney, files this notice of intent to rely upon the penalty enhancement contained in 18 U.S.C. §924(e)(1), the Armed Career Criminal Act. Be advised that the United States intends to rely upon the following prior convictions,[1] at sentencing, to seek the enhanced penalty:

1. Fifteenth Judicial Circuit of Florida: Convicted of Aggravated Assault on a Police Officer (Fla. Stat. §784.07(2)(c); §784.021) in Florida v. Santos, Case No. 89-11981 CF, on or about July 19, 1990.

2. Nineteenth Judicial Circuit of Florida: Convicted of Aggravated Battery (Fla. Stat. §784.045(1)(a)) and False Imprisonment (Fla. Stat. §787.02) in Florida v. Santos, Case No. 86-2824-CF, on or about March 13, 1987.

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[1] Copies of certified convictions of the listed offenses were attached to defendant Santos' copy of the Government's Response to the Standing Discovery Order, filed on December 8, 1993.

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3. Nineteenth Judicial Circuit of Florida: Convicted of Battery on Law Enforcement Officer in Florida v. Santos, Case No. 87-635-CF, on or about April 24, 1987.

Each of the above-listed prior convictions qualifies under 18 U.S.C. §924(e)(2) as a violent felony offense or serious drug offense for use in enhancing the defendant's sentence.

Respectfully submitted,

KENDALL COFFEY
UNITED STATES ATTORNEY

BY: _____
THOMAS A. O'MALLEY
ASSISTANT UNITED STATES ATTORNEY
Florida Bar No. 310964
701 Clematis Street, #100
West Palm Beach, FL 33401
(407) 820-8711

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered this 12th day of October, 1994, to: Robin Rosen, AFPD, 400 Australian Ave. N., Suite 300, West Palm Beach, FL 33401.

_____
THOMAS A. O'MALLEY
ASSISTANT UNITED STATES ATTORNEY

# A - 5

AO 245 S (Rev. 4/90) Sheet 1 - Judgment in a Cr[illegible] Case

FILED by D.C.
DEC 29 1994
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. FT. LAUD.

# United States District Court

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA

V.

REINALDO SANTOS
Marshal #40145-004

(Name of Defendant)

## JUDGMENT IN A CRIMINAL CASE
**(For Offenses Committed On or After November 1, 1987)**

Case Number: 93-8108-CR-ROETTGER

A.U.S.A.-O'Malley

Robin Rosen,Esq., F.P.D. 400 Australian Ave., North #300 West Palm Beach, FL 33401
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

XX was found guilty on count(s) 1 & 2 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 18;922(g)(1) | Possession of a firearm by a convicted felon | 11/17/93 | 1 |
| 18;922(g)(1) | Possession of ammunition by a convicted felon | | 2 |

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

XX☐ It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) 1 & 2, which shall be due ☒ immediately ☐ as follows.

IT IS FURTHER ORDERED that the defendant shall 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.

Defendant's Soc. Sec. No.: 267-73-2566

Defendant's Date of Birth: 3/5/68

Defendant's Mailing Address:

5227 Stacey St. Apt. E
West Palm Beach, FL 33401

Defendant's Residence Address:

December 22, 1994
Date of Imposition of Sentence

Signature of Judicial Officer

NORMAN C. ROETTGER
CHIEF UNITED STATES DISTRICT COURT JUDGE
Name & Title of Judicial Officer

23 Dec 1994
Date

1 of 10

Defendant: REINALDO SANTOS
Case Number: 93-8108-CR-ROETTGER

Judgment—Page 2 of 3

**IMPRISONMENT**

The defende t is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 360 Month as to Counts 1 & 2. Periods of confinement are to run concurrently with each other. Defendant to receive credit for time served.

☒ The court makes the following recommendations to the Bureau of Prisons: S.E. Region

☒ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district.
- ☐ at _____ a.m. p.m. on _____.
- ☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States marshal.
- ☐ as notified by the probation office.

**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 Marshal

★U.S GPO 1990-722-446-10286

Defendant: REINALDO SANTOS
Case Number: 94-8108-CR-ROETTGER



## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years as to each Count 1 & 2 to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

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

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

XXX ☐ The defendant shall not possess a firearm or destructive device.

Further Ordered that defendant shall submit to a reasonable search & seizure of person, auto, residence and boat when requested by the probation officer. Defendant shall make restitution in the amount of $2,000.00 to: Mr. Mohammed Khan, c/o Tina's Grocery, 511 25th Street, West Palm Beach, FL 33407 under the direction of the probation officer.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such 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 hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

# A - 6

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 16-12612-J

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IN RE: REINALDO SANTOS

Petitioner.

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Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

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Before: HULL, MARTIN and JULIE CARNES, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Reinaldo Santos has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if we certify that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the

application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In his application and attached legal memorandum, Santos indicates that he wishes to raise one claim in a second or successive § 2255 motion. Santos asserts that his claim relies upon a new rule of constitutional law. Specifically, he asserts that his sentence for possession of a firearm by a convicted felon, which was enhanced under the Armed Career Criminal Act ("ACCA"), must be set aside in light of *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), in which the Supreme Court held that the residual clause of the violent felony definition in the ACCA, 18 U.S.C. § 924(e), is unconstitutionally vague and that imposing an increased sentence under that provision violates due process. Santos further relies on *Welch v. United States*, 578 U.S. __, 136 S. Ct. 1257, __ L. Ed. 2d ___ (2016), in which the Supreme Court held that *Johnson* applies retroactively to cases on collateral review. Santos argues that, given the Supreme Court's holding in *Johnson*, his sentence was wrongfully enhanced under the residual clause and he no longer qualifies for ACCA status because he does not have the necessary number of predicate convictions. Santos contends that the scope of review at the successive application stage is "strictly circumscribed," that he is not required to prove that his prior offenses do not qualify as ACCA predicates, and that all he need do is make a *prima facie* showing that *Johnson* announced a new rule of constitutional law, made retroactive to cases on collateral rule. He argues that his prior offenses do not qualify as ACCA predicates under the remaining valid clauses of the violent felony definition. Santos contends that his prior

convictions for aggravated battery and false imprisonment did not occur on different occasions, and, thus, constitute one conviction for ACCA purposes. He further argues that his Florida convictions for battery on a law enforcement officer and aggravated assault on a law enforcement officer do not qualify as ACCA predicate convictions.

The ACCA defines violent felony as any crime punishable by a term of imprisonment 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). The first prong of this definition is sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes" and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

In *Johnson*, the Supreme Court held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. *Johnson*, 576 U.S. at ___, ___, 135 S. Ct. at 2557-58, 2563. The Supreme Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause and the enumerated crimes of the ACCA's definition of a violent felony. *Id.* at ___, 135 S. Ct. at 2563. In *Welch v. United States*, the Supreme Court held that *Johnson* announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review. *Welch*, 578 U.S. at ___, 136 S. Ct. at 1264-65.

Here, Santos has made a *prima facie* showing that he was sentenced as an armed career criminal based in part on the residual clause. Santos was convicted of one count of possession of a firearm by a convicted felon and one count of possession of ammunition by a convicted felon. The district court sentenced him under the ACCA to 360 months' imprisonment concurrent on both counts.

Santos clearly has two qualifying ACCA predicate offenses, aggravated assault and aggravated battery. *See* Fla. Stat. Ann. § 784.021 (defining aggravated assault); Fla. Stat. Ann. § 784.045 (defining aggravated battery); *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1337-38, 1341 (11th Cir. 2013), *abrogated in part on other grounds by United States v. Hill*, 799 F.3d 1318, 1321 n.1 (11th Cir. 2015), (holding that Florida aggravated assault and aggravated battery convictions qualified as violent felonies under the elements clause).

Santos's remaining prior convictions are Florida convictions for fleeing and eluding, escape, false imprisonment, battery on a law enforcement officer, resisting arrest without violence, and burglary of a conveyance. The record is unclear whether any of these convictions were counted, and if so, under what clause of the ACCA. *See Sykes v. United States*, 564 U.S. 1, 8, 131 S. Ct. 2267, 2273, 180 L. Ed. 2d 60 (2011) (stating that vehicle flight does not qualify for the ACCA under the elements or enumerated offenses clauses), *overruled on other grounds by Johnson*, 576 U.S. __, 135 S. Ct. 2551; *United States v. Proch,* 637 F.3d 1262, 1268-69 (11th Cir. 2011) (holding, prior to *Johnson,* that a Florida escape conviction qualified as an ACCA predicate under the residual clause); *United States v. Schneider*, 681 F.3d 1273, 1278-82 (11th Cir. 2012) (holding, prior to *Johnson,* that Florida false imprisonment qualified as an ACCA violent felony under the residual clause); *Johnson v. United States* ("*Johnson 2010*"), 559 U.S.

133, 135-45, 130 S. Ct. 1265, 1268-74, 176 L. Ed. 2d 1 (2010) (holding that Florida battery, which is identical to Florida battery on a law enforcement officer apart from the victim involved, does not qualify as a violent felony under the elements clause) *and Hill*, 799 F.3d at 1322 (noting that *Johnson* (2015) foreclosed the government from arguing that Florida battery on a law enforcement officer qualified as a violent felony under the residual clause); *see also* Fla. Stat. Ann. § 843.02 (defining the offense of Florida resisting arrest without violence as a misdemeanor). As such, Santos has made a *prima facie* showing that he has met the requirements of § 2255(h).

Finally, it is important to note that our threshold determination that an applicant has made a *prima facie* showing that he has met the statutory criteria of § 2255(h), thus warranting our authorization to file a second or successive § 2255 motion, does not conclusively resolve that issue. *See Jordan*, 485 F.3d at 1357 (involving the functionally equivalent § 2244(b)(2) successive application standard applicable to state prisoners). In *Jordan*, we emphasized that, once the prisoner files his authorized § 2255 motion in the district court, "the district court not only can, but must, determine for itself whether those requirements are met." *Id.* Notably, the statutory language of § 2244, which is cross referenced in § 2255(h), expressly provides that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." *Id.* (quoting 28 U.S.C. § 2244(b)(4)). We rejected the assertion that the district court owes "some deference to a court of appeals' prima facie finding that the requirements have been met." *Id.* at 1357. We explained that, after the district court looks at the § 2255(h) requirements *de novo*, "[o]ur first hard look at whether the § [2255(h)] requirements

actually have been met will come, if at all, on appeal from the district court's decision . . . ." *Id.* at 1358; *see also In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (reiterating that our threshold conclusion in granting a successive application that a *prima facie* showing has been made is necessarily a "limited determination," as the district court then must also decide "fresh" the issue of whether § 2255(h)'s criteria are met, and, if so, proceed to considering the merits of the § 2255 motion).

Accordingly, Santos has made a *prima facie* showing that he has raised a claim that meets the statutory criteria. Therefore, his application is GRANTED.

**APPLICATION GRANTED.**

MARTIN, Circuit Judge, concurring in judgment:

I agree with the majority that Reinaldo Santos is entitled to file a new § 2255 petition. However, unlike the majority, I would not assume that "Santos clearly has two qualifying ACCA predicate offenses, aggravated assault and aggravated battery." This question turns on what state law required at the time Mr. Santos was convicted. Because of evolving state court rulings, the same crimes may count as a "violent felony" if they were committed one year but not if they were committed the next. These questions are not easy to answer, and the District Court will be far better equipped to work through them than we are at this stage. But as the majority's order notes, nothing in the order binds the district court, which must decide every aspect of Mr. Santos's habeas petition de novo. This includes any determination about Mr. Santos's other convictions. Fortunately, Mr. Santos is represented by counsel who can assist him in making his case to the District Court.

# A - 7

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 16-CV-80990-ALTONAGA**
**(Underlying Case No. 93-8108-Cr-CMA)**

REINALDO SANTOS

Movant,

v.

UNITED STATES OF AMERICA,

Respondant.
_____/

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

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

1. On October 18, 1994, Mr. Santos was found guilty by a jury of Counts 1 and 2 of the underlying indictment. Count 1 charged Mr. Santos with possessing a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). Count 2 charged Mr. Santos with possessing ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

2. On October 12, 1994, the government filed a notice of its intent to rely on the enhancement found at 18 U.S.C. § 924(e). In its notice, the government listed the following convictions: aggravated battery and false imprisonment (Case No. 86-2824-CF); battery on a law enforcement officer (Case No. 87-635-CF); and aggravated assault on a police officer (Case No. 89-11981CFA02).

3. On December 29, 1994, the district court sentenced Mr. Santos pursuant to

the Armed Career Criminal Act (hereinafter referred to as the ACCA), sentencing him to 360 months in the Bureau of Prisons as to both counts of conviction.

3. Mr. Santos now requests relief in light of the Supreme Court's decision in *Johnson v. United States* 576 U.S. ___, 135 S.Ct 2551 (2015), which held that the ACCA's "residual clause" in § 924(e)(2)(B)(ii) is unconstitutionally vague.

4. Application of *Johnson* to this case demonstrates that Mr. Santos' sentence was imposed in violation of due process and in excess of the statutory maximum.

5. Accordingly, Mr. Santos is entitled to relief under § 2255.

## PROCEDURAL HISTORY

Mr. Santos was indicted for being a felon in possession of a firearm (Count 1) and ammunition (Count 2) in violation of 18 U.S.C. § 922(g)(1) [Case No. 93-08108-Cr-CMA]. Mr. Santos proceeded to trial and was convicted on both counts of the indictment on October 18, 1994. A presentence investigation report was disclosed. Probation advised Mr. Santos that he qualified for sentencing pursuant to the ACCA.[1] (PSI ¶ 30). The PSI further calculated Mr. Santos' guideline range at 262 - 327 months, with a mandatory minimum of 180 months as to each count. (PSI ¶¶s 67 - 68).

On December 22, 1994, the district court sentenced Mr. Santos to 360 months

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[1]While the PSI fails to specify which of Mr. Santos' convictions it was relying upon to classify him as an Armed Career Criminal, the government specifically listed in its notice of enhancement those convictions upon which it was relying to argue that Mr. Santos qualified for the enhanced ACCA sentence. Based upon the government's notice, it is now precluded from arguing that any of Mr. Santos' other convictions qualify him for the ACCA enhancement. *See United States v. Arroyo*, ___ F.3d ___, 2016 WL 80882 at *2 (11th Cir. Jan. 7, 2016) (precluding government from arguing different basis to support ACCA enhancement on remand).

as to each of Counts 1 and 2 after making a finding that he qualified as an Armed Career Criminal. Mr. Santos appealed his convictions, and his appeal was denied. (DE#110). Mr. Santos subsequently filed two petitions (01-08666-cv-NCR and 05-cv-80958-CMA), pursuant to 28 U.S.C. § 2255, challenging his sentence, each of which was denied. (DE#17 (01-08666-cv-NCR); DE#4 (05-cv-80958)). On June 9, 2016 the Eleventh Circuit granted Mr. Santos' application to file a successive petition.

## GROUNDS FOR RELIEF

Mr. Santos is no longer subject to the ACCA enhancement after *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551 (2015). None of the prior convictions relied upon by United States Probation (aggravated battery; escape; false imprisonment; battery on a law enforcement officer; aggravated assault on a police officer) qualify as either an enumerated offense, or has as an element the use of force.

### I. Mr. Santos' *Johnson* Claim is Cognizable Under § 2255

Section 2255(a) authorizes a federal prisoner claiming "that [his] sentence was imposed in violation of the Constitution . . . or that the sentence was in excess of the maximum authorized by law . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). In *Johnson*, the Supreme Court "h[e]ld that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." Because the district court enhanced Mr. Santos' sentence under the residual clause, his sentence violates due process under *Johnson*. Moreover, the statutory maximum sentence for being a felon in possession of a firearm and ammunition in

violation of 18 U.S.C. § 922(g)(1), is ordinarily ten years imprisonment.[2] However, under the ACCA, where the defendant "has three previous convictions . . . for a violent felony[3] or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years." *Id.* § 924(e)(1). Thus, this Court "can collaterally review a misapplication of the Armed Career Criminal Act because . . . that misapplication results in a sentence that exceeds the statutory maximum." *Spencer v. United States*, 773 F.3d 1132, 1143 (11th Cir. 2014) (en banc).

## II. *Johnson* Applies Retroactively to Cases on Collateral Review

The United States Supreme Court recently held that *Johnson* announced a new substantive rule of law which applies retroactively to cases which became final before the rule in *Johnson* was announced. *Welch v. United States*, 136 S.Ct. 1257 (2016). The Eleventh Circuit acknowledged the holding in *Welch* when it ruled one day later that "[T]he Supreme Court has held that the rule announced in *Johnson* is retroactive because it is a substantive rule of constitutional law." *In Re: Robinson*, 2016 WL

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[2]Simultaneous possession of firearm and ammunition is to be sentenced as a single offense. *See United States v. Hall*, 77 F.3d 398 (11th Cir. 1996), abrogated on other grounds by *Brown v. Warden, FCC Coleman-Low*, 2016 WL 1273019 (11th Cir. April 1, 2016).

[3]As relevant here, the term "violent felony' includes certain crimes that "(I) ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another ["elements clause"]; or (ii) is burglary, arson, or extortion, involves use of explosives ["enumerated offenses"], or otherwise involves conduct that presents a serious potential risk of physical injury to another ["residual clause"]." 18 U.S.C. § 924(e)(2)(B).

1583616 (11th Cir. April 19, 2016).

## III. Mr. Santos' Motion is Timely

As relevant here, § 2255 imposes a one-year statute of limitations that runs the later of: "(1) the date on which the judgement of conviction becomes final;" or "(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(1), (3).

Subsection (3) applies here. In declaring the ACCA's residual clause unconstitutionally vague, *Johnson* recognized a new right because that result was not "dictated by precedent" at the time Mr. Santos' convictions became final. *See* Welch, 136 S.Ct. at 1264. *Johnson* narrowed "the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. (Citations omitted)." *Id.* at 1264-65. Based on the plain wording of § 2255, Mr. Santos has one year from the date *Johnson* was decided–June 26, 2016–to seek relief. *See Dodd v. United States*, 545 U.S. 343, 360 (2005). Accordingly, this motion is timely under § 2255(f)(3).

## IV. In light of *Johnson*, Mr. Santos is Not an Armed Career Criminal

When Mr. Santos was sentenced, the district court applied the ACCA enhancement. As explained below, Mr. Santos is no longer an armed career criminal because his prior convictions for escape, aggravated assault on a law enforcement

officer, aggravated battery, battery on a law enforcement officer, and false imprisonment are no longer considered violent felonies.

> Mr. Santos is not challenging his aggravated battery conviction, the government therefore is precluded from relying upon his false imprisonment conviction in that there is no evidence that these offenses were committed on occasions different from each other

Under the ACCA, a defendant convicted under 18 U.S.C. § 922(g) is subject to § 924(e)(1)'s mandatory minimum sentence of 15 years if the defendant has "three previous convictions . . . for a violent felony . . . committed on occasions different from one another . . . " 18 U.S.C. § 924(e)(1). The three prior convictions must be "'for crimes that are temporally distinct.'" *United States v. Sneed*, 600 F.3d 1326 (11th Cir. 2010); *United States v. Sweeting*, 933 F.2d 962, 967 (11th Cir. 1991). The government must show "the three previous convictions arose out of a separate and distinct criminal episode." *United States v. Pope*, 132 F.3d 684, 689 (11th Cir. 1998). The Court can consult *Shepard*[4] documents in making the determination whether a defendant's prior convictions arose out of separate and distinct criminal episodes. *United States v. Sneed, supra.* A review of the *Shepard* documents[5] establishes that the offenses are temporally indistinguishable from one another, both involving the same victim during the same criminal episode, having been alleged in the same charging document as part

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[4]*Shepard v. United States*, 125 S.Ct. 1254 (2005).

[5]Composite Exhibit 1 consists of copies of the charging information and judgement in Case No. 86-2824-CF.

of the same criminal episode, therefore the government cannot rely upon the false imprisonment conviction as a separate ACCA predicate.

Mr. Santos' prior conviction for Florida battery on a law enforcement officer is not a violent felony

The Supreme Court has held that a conviction under Florida's battery law is not a "violent felony" under ACCA. *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265 (2010):

> The Florida felony offense of battery by "[a]ctually and intentionally touch[ing]" another person does not have "as an element the use . . . of physical force against the person of another," § 924(c)(2)(B)(i), and thus does not constitute a "violent felony" under § 924(e). *Id.* At 133.

The Supreme Court acknowledged that Florida's battery statute § 784.03(1)(a)[6] contains an element of "[a]ctually and intentionally touching" another person, and is satisfied by any intentional physical contact, no matter how slight. *Id.* at 133-34. This element of touching or striking constitutes an indivisible element pursuant to *United States v. Lockett*, 810 F.3d 1262 (2016), and that element, established by "touching" does not require the use of physical force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. at 134. Since the ACCA's elements clause requires that a violent felony have "as an element the use, attempted use, or threatened use of physical force against the person . . . of another," and the Florida battery statute can be committed without an element of force or violence, and can be

[6] Florida Statute § 784.03(1)(a) The offense of battery occurs when a person: Actually and intentionally touches or strikes another person against the will of the other; or Intentionally causes bodily harm to another person.

committed by mere touching, a conviction under Florida Statute § 784.07, for battery on a law enforcement officer falls outside the ACCA's definition of violent felony, and cannot be used as a predicate for the ACCA enhancement.

The Eleventh Circuit, in *United States v. Willliams*, 609 F.3d 1168 (2010), held that a Florida conviction for battery on a law enforcement officer did not constitute a violent felony. In *Williams*, the Eleventh Circuit applied the Supreme Court's analysis in *Johnson* (holding that a conviction under Florida's battery statute was not a violent felony under the ACCA), to determine that a Florida conviction for battery on a law enforcement officer was not a crime of violence under the sentencing guidelines career offender section:[7]

> We hold that, in light of the Supreme Court's ruling in *Johnson*, the fact of a conviction for felony battery on a law enforcement officer in Florida, standing alone, no longer satisfies the "crime of violence" enhancement criteria as defined under the "physical force" subdivision of section 4B1.2(a)(1) of the sentencing guidelines. Though the statutory context here varies somewhat from that present in *Johnson*, we have no reason to believe that the words present in the ACCA have a different meaning than the same words used in the sentencing guidelines. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)("This court has repeatedly read the definition of 'violent felony' under § 924(e) of the Armed Career Criminal Act as 'virtually identical' to the definition of 'crime of violence' under U.S.S.G. § 4B1.2.")

*United States v. Williams*, 609 F.3d 1168, 1169-70 (2010)..

In *United States v. Hill*, 799 F.3d 1318 (2015), the Eleventh Circuit reinforced

[7] In *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008), the Court held that the definition of violent felony under ACCA and the crime of violence under the career offender section of the sentencing guidelines is virtually identical.

its ruling that a Florida conviction for battery on a law enforcement officer is not a violent felony. In its discussion of the Supreme Court's ruling that the residual clause of the Armed Career Criminal Act is unconstitutional, *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551 (2015), the Court stated: "Consequently, *Johnson* forecloses the government's argument on appeal that Hill's prior Florida felony convictions for battery on a law enforcement officer and resisting an officer with violence are violent felonies under the ACCA's residual clause."

In *United States v. Braun*, 801 F.3d 1301 (11th Cir. 2015), the Eleventh Circuit viewed the crime of battery on a law enforcement officer as a divisible statute subject to analysis under the "modified categorical approach," which permits examination of *Shepard* documents to determine which version of the crime was committed. *Id.* at 1304-05; 1307-08. However, the Eleventh Circuit more recently published its opinion in *United States v. Lockett*, 810 F.3d 1262 (2016), which provides a detailed analysis and application of how to determine if a statute is divisible or indivisible, and whether the modified categorical approach applies. Mr. Santos asserts that pursuant to *Lockett*, the offense of battery on a law enforcement officer is indivisible because the element of "touching or striking" is an indivisible element, and a jury, pursuant to the Florida jury instruction 8.3[8] is not required to make a unanimous finding between the alternatives of "touching or striking."

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[8]Florida Jury Instruction 8.3 states: To prove the crime of battery, the state must prove the following elements beyond a reasonable doubt:

Give 1 or 2 as applicable:

[(Defendant) intentionally touched or struck (victim) against [his] [her] will.]

[(Defendant) intentionally caused bodily harm to (victim).]

The conclusions by the Supreme Court in *Johnson*, and by the Eleventh Circuit in *Williams, Hill,* and *Braun*, all provide authority for this Court to conclude that a Florida conviction for battery on a law enforcement officer is not a violent felony for purposes of ACCA.

Mr. Santos' conviction for Florida aggravated assault on a law enforcement officer is not a violent felony

The Florida statute prohibiting "aggravated assault on a law enforcement officer," Fla. Stat. § 784.07(2)(c), permits conviction with a *mens rea* of culpable negligence. As such, it encompasses conduct wider than the intentional conduct required under the ACCA's elements clause.

In *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377 (2004), the Supreme Court considered whether a Florida conviction for driving under the influence (DUI) with injuries qualified as a crime of violence for enhancement under 18 U.S.C. § 16. That section is identical to the wording of ACCA's elements clause. The Court found that the DUI statute did not constitute a violent felony because an individual could be convicted for negligent or accidental actions. The *Leocal* court held that "use . . . of physical force" requires "active employment." *Id.* at 9. The "use . . . of physical force against a person or property of another . . . suggests a higher degree of intent than negligent or accidental conduct." *Id.* at 9. Thus, for an offense to be considered a violent felony pursuant to ACCA's elements clause, it must have as an element the active and intentional employment of force.

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

Other circuits have set the same precedent and excluded crimes based on recklessness. *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *United States v. Torres-Villalobos*, 487 F.3d 607, 615-16 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121, 1127-32 (9th Cir. 2006) (en banc); *Garcia v. Gonzalez*, 455 F.3d 465, 468-69 (4th Cir. 2006); *Oyebanj v. Gonzalez*, 418 F.3d 260, 263-65 (3rd Cir. 2005); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2nd Cir. 2003); and *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001).

Whether a particular conviction constitutes a predicate for enhancement must be evaluated through a categorical approach. *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276, 2284-85 (2013). And in this case, Mr. Santos suggests that the pertinent statutory provision, i.e., "Assault" Fla. Stat. § 784.011, is an indivisible

statute, meaning that this Court may only look to the statutory definition of the offense and not to any "Shepard" documents to determine if it is a violent felony. *Id.* This Court must assume that the offense was committed by the least culpable, non-violent means. *Id.* In determining the elements of a state offense, this Court is bound by the particular state's courts' interpretation of the statute. *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 1269 (2010).

Mr. Santos was convicted of aggravated assault on a law enforcement officer in violation of Florida Statute § 784.07(2)(c). Section 784.07(2)(c) makes a simple assault (§ 784.011) an aggravated assault on a law enforcement officer if: "1) it is committed with a deadly weapon without the intent to kill; or 2) it is committed with an intent to commit a felony" and the victim was a law enforcement officer; the defendant knew the victim was a law enforcement officer; and at the time of the "assault" the victim was engaged in the lawful performance of his duties. Simple assault (which contains the operative intent element) under Fla. Stat. § 784.011 is defined as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Thus, aggravated assault on a law enforcement officer is simply an assault, aggravated or enhanced by the particular means or purpose and by the nature of the victim. Simple assault is a lesser included offense of aggravated assault on a law enforcement officer[9] and carries the same intent

[9]See Florida Standard Jury Instruction 8.12 for aggravated assault on a law enforcement officer.

element.

Interpreting the crime of aggravated assault, Florida courts have consistently held that the intent element may be satisfied by proof of culpable negligence. *LaValley v. State of Florida*, 633 So.2d 1126 (5th D.C.A. 1994); *Kelly v. State of Florida*, 552 So.2d 206 (5th D.C.A. 1989); *Green v. State of Florida*, 315 So.2d 499 (4th D.C.A. 1975); and *DuPree v. State of Florida*, 310 So.2d 396 (2nd D.C.A. 1975).

"Where, as here, there is no proof of an intentional assault on the victim, that proof may be supplied by proof of conduct equivalent to willful and reckless disregard for the safety of others." *Kelly*, 552 So.2d at 208. An aggravated assault defendant's "conduct must be equivalent to culpable negligence." *DuPree*, 310 So.2d at 398.

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

*Id.*

The Fifth Circuit has equated Florida "culpable negligence" with "recklessness." *United States v. Garcia-Perez*, 779 F.3d 278, 285 (5th Cir. 2015).

Mr. Santos has found no case in this Circuit, or any other, that has considered whether reckless or culpably negligent intent excludes Florida aggravated assault convictions from crimes of violence for § 4B1.2(a)(1) enhancement purposes.[10] There

[10]Mr. Santos acknowledges that the Eleventh Circuit has previously found that Florida aggravated assault qualifies as a crime of violence under the "elements clause" of ACCA. *Turner v. Warden*, 709 F.3d 1328 (11th Cir. 2013). However, that opinion

are, however, numerous cases from other circuits excluding similar culpable negligence or recklessness offenses as crime of violence predicates.

*United States v. McMurray*, 653 F.3d 357 (6th Cir. 2011) is such a case. There, the defendant objected to a crime of violence enhancement under § 924(e) based on a prior Tennessee conviction for aggravated assault (Tenn. Code Ann. § 39-13-101 and 102 (1991)). Tennessee defined "assault" as: "1) Intentionally, knowingly or recklessly causes bodily injury to another; 2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or 3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative." *Id.* *McMurrary* considered subsection (1), "Intentionally, knowingly or recklessly causes bodily injury." The court noted that Tennessee courts had extended the statute's application to such conduct as reckless driving resulting in injury. See *State v. Gillon*, 15 S.W. 3d 492, 496-97 (Tenn. Crim. App. 1997). Relying on *Leocal* and its earlier decision in *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006) (finding Tenn. vehicular assault while intoxicated is not a crime of violence), the Sixth Circuit held that Tennessee aggravated assault could not be a crime of violence under the § 924(e) elements clause because it allowed convictions based on no more than recklessness.

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failed to include any analysis of the intent component after *Leocal* and *Palomino-Garcia*. Had *Turner* raised the intent component and had the court considered *Leocal* and *Palomino-Garcia*, the decision would likely be different. Under those circumstances, this Court can follow the prior precedent and reach a conclusion contrary to *Turner*. See *Tucker v. Phyfer*, 819 F.2d 1030 (11th Cir. 1987)

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

Like *Leocal*, *Palomino-Garcia*, *McMurray*, and *Zuniga-Soto*, Mr. Santos was wrongfully enhanced for violation of a statute which permitted conviction with no more than the *mens rea* of recklessness. Under the required categorical approach to the Florida offense of aggravated assault on a law enforcement officer, that offense cannot constitute a violent felony under ACCA's element's clause.

Finally, this Court should be aware that the Supreme Court has granted certiorari in *Voisine v. United States*, Case No. 14-10154 (cert. granted October 30, 2015). The question presented in *Voisine* is whether "a misdemeanor crime with the *mens rea* of recklessness qualifies as a 'misdemeanor crime of violence' as defined by 18 U.S.C. § 921(a)(33)(A) and 922(g)." Those statutes, like ACCA's element's clause, reach those offenses that have, "as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A).

## CONCLUSION

Because Mr. Santos' prior convictions for battery on a law enforcement officer; and aggravated assault on a law enforcement officer no longer qualify post-*Johnson*; and the government cannot rely on the conviction for false imprisonment, he does not have the requisite three prior violent felonies necessary for the ACCA enhancement thus, Mr. Santos respectfully requests that this Court grant the instant § 2255 motion and re-sentence him without the Armed Career Criminal Act enhancement.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

s/*Robin C. Rosen-Evans*
Robin C. Rosen-Evans

# A - 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-80990-Civ-ALTONAGA
(93-08108-Cr-ALTONAGA)
MAGISTRATE JUDGE PATRICK A. WHITE

REINALDO SANTOS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

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

## I. Introduction

The movant, a federal prisoner, currently confined at the Coleman Medium Federal Correctional Institution, in Coleman, Florida, has filed this motion to vacate, after obtaining authorization from the Eleventh Circuit to file a second or successive Section 2255 motion to vacate, pursuant to 28 U.S.C. §2255.[1] See In re Reinaldo Santos, Eleventh Circuit Court of Appeals, Case No. 16-12612-J, Order entered June 9, 2016.

Petitioner is challenging the constitutionality of his enhanced sentence as an armed career criminal, entered following a jury trial in **case no. 93-08108-Cr-Altonaga.** Movant seeks relief in light of the Supreme Court's ruling in Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551 (2015) (hereinafter, "Samuel Johnson"), made retroactively applicable to cases on collateral

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

review by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257, ____, L.Ed.2d ___ (2016).

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

Presently before the court is the Eleventh Circuit's memorandum opinion granting permission to file this successive §2255 motion (Cv-DE#1), the Petitioner's motion (Cv DE# 7), the government's answer in opposition of the motion (Cv DE# 8), Petitioner's reply thereto (Cv DE# 9), Petitioner's notice of supplemental authority (Cv DE# 10, 11), Petitioner's motion for immediate release (Cv DE# 12), government's response in opposition to the motion for immediate release (Cv DE# 13), and Petitioner's reply thereto (Cv DE# 15, 16).

## II. Procedural History

Petitioner was indicted for being a felon in possession of a firearm (Count 1) and ammunition (Count 2) in violation of 18 U.S.C. §922(g)(1). (Cr DE# 7). Petitioner proceeded to trial and was convicted on both counts of the indictment on October 18, 1994. (Cr DE# 70).

On October 12, 1994, the government filed a notice of its intent to rely on the enhancement found at 18 U.S.C. §924(e). In its notice, the government listed the following convictions: aggravated battery and false imprisonment (Case No. 86-2824- CF); battery on a law enforcement officer (Case No. 87-635-CF); and aggravated assault on a police officer (Case No. 89-11981CFA02). (Cr DE# 68).

Prior to sentencing, a PSI was prepared, applying the 1994 Guidelines, which reveals as follows. The base offense level was set at 26 because the offense involved possession of a firearm and ammunition by a convicted felon and the Petitioner committed the instant offense subsequent to sustaining at least two prior felony convictions of either a crime of violence or a controlled substance offense, §2K2.1(a)(2). (PSI ¶24). Because the offense involved a stolen firearm, the offense level was increased by two levels, §2K2.1(b)(4)(A). (PSI ¶25).

The adjusted offense level of 28 was increased, pursuant to U.S.S.G. §4B1.4(a), to level 34, because of the movant's status as an armed career criminal under §924(e). (PSI ¶30). The PSI did not specifically identify the priors on which it relied. However, the PSI listed the following state court convictions: aggravated battery and false imprisonment in case no. 86-2824-CF (PSI ¶35), battery on a law enforcement officer in case no. 87-635-CF (PSI ¶37), and aggravated assault on a police officer in case no. 89-11981CFA02 (PSI ¶39). The PSI also included prior convictions for feeling and eluding in case no. 84-17440 (PSI ¶34), resisting arrest without violence in case no. 87-67-MM (PSI ¶36), escape in case no. 86-4039CF02 (PSI ¶38), and burglary of a conveyance in case no. 90-328-CF (PSI ¶40). Because th PSI did not include an adjustment for acceptance of responsibility, the total offense level was set at 34. (PSI ¶32).

The PSI next determined that the movant had a total of 21 criminal history points and because Petitioner was an armed career criminal, his criminal history category was set at VI. (PSI ¶46, 47). Statutorily, the movant faced a 15-year minimum term of imprisonment and a maximum term of life for violating 18 U.S.C. §924(e). (PSI ¶67). Based on a total offense level of 34 and a criminal history category VI, the guideline imprisonment range was

262 to 327 months. (PSI ¶68).

On December 22, 1994, Petitioner appeared for sentencing wherein the court found that he qualified as an armed career criminal and then sentenced him to 360 months' imprisonment as to Counts 1 and 2. (Cr DE#). The Clerk entered judgment on December 29, 1994. (Cr-DE#90).

Movant prosecuted a direct appeal. (Cr DE# 92). On **September 5, 1996,** the Eleventh Circuit Court of Appeals affirmed the movant's conviction in United States v. Santos, 93 F.3d 761 (11 Cir. 1996). (Cr DE# 110). Movant filed a petition for writ of certiorari, which the Supreme Court denied on April 14, 1997. See Santos v. United States, 520 U.S. 1170 (1997).

Thus, the judgment of conviction became final on **April 14, 1997**, when the Supreme Court denied the petition for writ of certiorari.[2] The movant had one year from the time his judgment became final, or no later than **April 14, 1998**,[3] within which to timely file his federal habeas petition, challenging the judgment of conviction. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6

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

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

(1986); see also, Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)).

Approximately three years after the statute of limitations expired, on **July 12, 2001**, Movant returned to this court filing his first §2255 motion, assigned **case no. 01-CV-08666-Roettger.** (01-cv-08666, DE#1). A Report recommended that the motion be denied as untimely. (01-cv-08666, DE# 10). The District Court issued an order adopting the report. (01-cv-08666, DE# 13). Petitioner appealed. (01-cv-08666, DE# 14). The Eleventh Circuit denied relief because Petitioner failed to make a substantial showing of the denial of a constitutional right. (01-cv-08666, DE# 17).

After another four years elapsed before, Movant returned to this court filing his second §2255 motion on **October 24, 2005**, assigned **case no. 05-CV-80958-Altonaga.** (05-cv-80958, DE#1). A Report recommended that the motion be denied for lack of jurisdiction as the petition was successive and Petitioner had not obtained permission from the Eleventh Circuit. (05-cv-80958, DE# 3). The District Court issued an order adopting the report. (05-cv-80958, DE# 4).

On **June 26, 2015,** the United States Supreme Court held that the ACCA's residual clause--defining a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another"--is unconstitutionally vague. Samuel Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551, 2563

(2015). The Supreme Court, however, expressly did not invalidate the ACCA's elements clause or the enumerated crimes clause. Id. ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony"). Then, on **April 18, 2016**, the Supreme Court held that Samuel Johnson announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257 (2016).

On **June 9, 2016**, the Eleventh Circuit granted movant's application for authorization to file a successive §2255 motion, finding the movant had made a *prima facie* showing under 28 U.S.C. §2255(h) that he was entitled to relief under Samuel Johnson. (Cv-DE#1). The application was transferred to this court, and opened by the Clerk as a §2255 motion to vacate. (Cv-DE#1). This court issued an order appointing the Federal Public Defender's office and setting a briefing schedule. (Cv-DE# 4). The parties have complied with the court's briefing schedule and the case is now ripe for review.

## III. Threshold Issues

### A. Timeliness

On **June 26, 2015**, the United States Supreme Court held that the ACCA's residual clause--defining a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another"--is unconstitutionally vague. Samuel Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551, 2563 (2015). The Supreme Court, however, expressly did not invalidate the ACCA's elements clause or the enumerated crimes clause. Id. ("Today's decision does not call into question application of the

Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony"). Then, on **April 18, 2016**, the Supreme Court held that Samuel Johnson announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257 (2016).

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

**B. Procedural Bar**

The government contends that, even if Samuel Johnson applies to 18 U.S.C. §924(c)(3)(B), Petitioner is procedurally barred from raising this argument because he never argued at sentencing or on direct appeal that the residual clause was unconstitutionally vague.(CR DE# 8:10-11).

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding; Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)(citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999).

Cause for not raising a claim can be shown when a claim "is so novel that its legal basis [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

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

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). That is precisely the circumstance here. Samuel Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. Furthermore, Petitioner can established actual prejudice because it appears that

Petitioner's ACCA enhancement is no longer valid in light of Samuel Johnson.

## IV. Standard of Review

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

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

If, as here, the Court of Appeals grants leave to file a successive §2255 motion, the trial court must review the record *de novo* to ascertain whether the movant meets the statutory criteria for relief under 28 U.S.C. §2255(h). See Jordan v. Sec'y Dep't of Corr's, 485 F.3d 1351, 1357-58 (11 Cir. 2007); Leone v. United States, __ F.Supp.2d ___, 2016 WL 4479390, *4 (S.D. Fla. Aug. 24, 2016)(stating a district court conducts *de novo* review after Court of Appeal grants leave to file a successive §2255 motion). Nothing in the Court of Appeals' ruling binds the district court. In re Chance, 831 F.3d at 1335, 1338 (11 Cir. 2016). Only if the district

court concludes that the applicant has established the statutory requirements for filing a second or successive motion will it "'proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise.'" Leone v. United States, ___ F.Supp.2d ___, 2016 WL 4479390, *4 (S.D. Fla. Aug. 24, 2016)(Lenard, J.) (quoting In re Moss, 703 F.3d ---, 1303 (11 Cir. 20--)

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

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

> [T]he district court cannot grant relief in a §2255 proceeding unless the movant meets hi burden that he is entitled to relief, and in this context the movant cannot meet that burden unless he proves that hew as sentenced using the residual clause and that the use of that clause made a difference in the sentence. If the district court cannot determine whether the residual clause was used in sentencing and affected the final sentence--if the court cannot determine one way or the other--the district court must deny the §2255 motion. It must do so because the movant will have failed to carry his burden of showing all that is

necessary to warrant §2255 relief.

Id. at 1273.

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

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

Where, as here, "an applicant is raising a true Johnson claim, such as here where the district court may have relied on the now-voided residual clause, it is unclear what effect, if any,

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

The Chance panel noted that, "[i]n applying the categorical approach, it would make no sense for a district court to have to ignore precedent such as Descamps v. United States, __ U.S. __, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), and Mathis v. United States, __ U.S. __, 136 S.Ct. 2243, __ L.Ed.2d __ (2016), which are the Supreme Court's binding interpretations of that approach." In re Chance, 2016 WL 4123844 at *4. By contrast, other Eleventh Circuit panels have opined that it is improper to consider Descamps because it is not retroactive for purposes of a second or successive §2255 motion and, therefore, Samuel Johnson cannot be used as a "portal" to raise a Descamps claim, whether "independent or otherwise." In re Hires, 825 F.3d 1297, 1303 (11th Cir. 2016) (denying a successiveness application because the movant's prior convictions qualified under ACCA's elements clause; noting that "Descamps does not qualify as a new rule of constitutional law for §2255(h)(2) purposes, and, thus, Descamps cannot serve as a basis, independent or otherwise, for authorizing a second or successive §2255 motion....").

The Chance panel further noted that both Chance and Moore are only *dicta* and that District Court's review is *de novo*. 2016 WL

4123844 at *5; see Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351 (11th Cir. 2007) (the district court is to decide the §2244(b)(1) & (2) issues fresh, or in the legal vernacular, *de novo*).

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

finds that he has established constitutional error.").

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

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

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

> a general verdict must be set aside if the jury was instructed that it could rely on any of two or more

> independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested.

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

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

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

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

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

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

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

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

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

## V. Discussion

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

As will be recalled, the Petitioner's ACCA enhancement was most likely based on aggravated battery and false imprisonment (Case No. 86-2824-CF); battery on a law enforcement officer (Case No. 87-635-CF); and aggravated assault on a police officer (Case No. 89-11981CFA02). (PSI ¶¶30,35,37,39). The PSI also included adult convictions for feeling and eluding in case no. 84-17440 (PSI ¶34), resisting arrest without violence in case no. 87-67-MM (PSI ¶36), escape in case no. 86-4039CF02 (PSI ¶38), and burglary of a

conveyance in case no. 90-328-CF (PSI ¶40).

The PSI next determined that the movant had a total of 21 criminal history points and because Petitioner was an armed career criminal, his criminal history category was set at VI. (PSI ¶46, 47). Because the movant was subject to an enhanced sentence under 18 U.S.C. §924(e), as an armed career criminal, his total offense level was increased to a level 34. (PSI ¶¶30,32). As an armed career criminal, the movant faced a statutory mandatory minimum of 15 years' imprisonment, and up to a term of life imprisonment. (PSI ¶67). Absent an ACCA enhancement, the maximum sentence for violation of §922(g) is ten years imprisonment. See 18 U.S.C. §922(g). Based on a total offense level of 34 and a criminal history category VI, the guideline imprisonment range was 262 to 327 months. (PSI ¶68).

On December 22, 1994, Petitioner appeared for sentencing wherein the court found that he qualified as an armed career criminal and then sentenced him to 360 months' imprisonment as to Counts 1 and 2. (Cr DE#110).

It is unclear from the record on which clause of the ACCA the court relied in sentencing the movant because the court did not explicitly or implicitly indicate at sentencing upon which clause it relied in applying the ACCA enhancement. The PSI is also silent on the issue, merely recognizing that the movant is an armed career criminal under the provisions of §924(e) (PSI ¶30). Since it is unclear from the record whether the court relied upon the residual clause, as opposed to the enumerated offenses clause of the ACCA, the movant has satisfied the first factor of the Chance test. Therefore, the court next turns to a determination of the second factor.

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

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

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

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

> ***potential risk of physical injury to another....***

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

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

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

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

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

In other words, when applying §924(e), courts should generally only look to the elements of the prior statute of conviction, or to the charging documents and jury instructions, but not the facts or conduct underlying a defendant's prior conviction. See Descamps v. United States, __ U.S. __, 133 S.Ct. 2283-85 (2013)(quoting Taylor v. United States, 495 U.S. 575, 600-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). Thus, courts should "look no further than the statute and judgment of conviction." United States v. Estrella, 758 F.3d 1239, 1244 (11th Cir. 2014)(citation omitted). In so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, ____ U.S. ___, 133 S.Ct. 1678, 1684 (2011)(quoting, Curtis Johnson v. United States, 559 U.S. 133, 137 (2010)) ("Curtis Johnson").

Absent an ACCA enhancement, the maximum sentence for violation §922(g) is ten years imprisonment. See 18 U.S.C. §924(a)(2). With the sole exception of convictions obtained in violation of the right to counsel, a defendant has no right to challenge the validity of previous state convictions in his federal sentencing proceeding when such convictions are used to enhance a sentence under the ACCA. Custis v. United States, 511 U.S. 485, 487 (1994).

After Samuel Johnson, for a prior conviction to qualify as a "violent felony," for purposes of the ACCA, the court must determine whether it falls under the elements clause because it "has as an element the use, attempted use, or threatened use of physical force against the person of another" or under the enumerated offenses clause because it is "burglary, arson, or extortion." 18 U.S.C. §924(e)(1). In that regard, the Supreme Court first instructs courts to "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime [burglary, arson, or extortion]--i.e., the offense as commonly understood." Descamps, 133 S.Ct. at 2281. If the elements of the state offense are either "the same as, or narrower than, those of the generic offense," then any conviction under the statute qualifies as a predicate offense for purposes of the ACCA enhancement. Descamps, supra; see also, United States v. Lockett, 810 F.3d 1262, 1266 (11th Cir. 2016). Likewise, under the categorical approach, if the prior conviction on its face requires proof, beyond a reasonable doubt and without exception, an element involving the use, attempted use, or threatened use of physical force against a person for every charge brought under that statute, then it too qualifies as a violent felony under the ACCA. Descamps, 133 S.Ct. at 2283-84. This is called the "categorical approach." Descamps, supra. But "if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in

its generic form." Descamps, 133 S.Ct. at 2283.

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

The Eleventh Circuit has recognized that, after Descamps, it can no longer assume that the modified categorical approach applies to all non-generic statutes. See Lockett, supra. (citing Howard, 742 F.3d at 1343). Rather, the Eleventh Circuit has recognized that "the modified categorical approach can be applied only when dealing with a **divisible** statute: a statute that 'sets out one or more elements of the offense in the alternative.'" Lockett, supra (citing Descamps, 133 S.Ct. at 2284) (emphasis added). The Court may refer to Shepard documents to determine under which version of the crime the defendant was convicted. These Shepard documents include, "the charging document, the plea agreement or transcript of colloquy between the judge and defendant, or ... some comparable

judicial record of this information." Shepard, 544 U.S. at 26, 125 S.Ct. at 1263.

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

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

Turning to the movant's prior convictions, to satisfy the second factor in Chance, it must be determined whether movant's convictions for battery on a law enforcement officer, aggravated assault on a police officer, aggravated battery, false imprisonment, escape, resisting arrest without violence, fleeing and eluding, and burglary of a conveyance are no longer qualifying predicate offenses for purposes of the ACCA enhancement. The court is mindful that it must only examine the elements of the offenses and not the movant's specific conduct in determining whether the prior convictions qualify as predicate offenses for purposes of the ACCA. See United States v. Chitwood, 676 F.3d 971, 976-77 (11 Cir. 2012)(describing the categorical approach).

**a. Battery on a law enforcement officer.** The parties have repeatedly disputed whether Petitioner's prior conviction for battery on a law enforcement officer qualifies as a violent felony for purposes of the ACCA enhancement. (Cv DE# 7, 8, 9, 10, 11, 12, 13, 15, 16).

The government argues that movant's Florida battery on a law enforcement officer constitutes a crime of violence for purposes of the ACCA enhancement. (Cv-DE#8:15). The government relies upon the movant's conviction for battery in case no. 89-11981CFA02, in violation of Fla.Stat. §784.03(1)(a) and 784.07.[4] The government maintains that the offense is a "violent felony" under the ACCA's elements clause because it has as an element the use, attempted use, or threatened use of physical force. (Cv-DE#8:30).

Both the government and the Petitioner rely upon the Supreme Court's decision in Curtis Johnson v. United States, 559 U.S. 133

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

(2010), which determined that, in order to satisfy the ACCA's elements/force clause, an offense must have as an element not merely the use of "physical force," but "violent force--that is, force capable of causing physical pain or injury to another person." Id. at 140. There, the Supreme Court considered whether Florida's simple battery statute, Fla.Stat. §784.03,[5] qualified as a violent felony under the elements/force clause of the ACCA. The Supreme Court in Curtis Johnson found that "the element of 'actually and intentionally touching' under Florida's battery law is satisfied by *any* intentional physical contact, no matter how slight. The most nominal contact, such as a tap on the shoulder without consent establishes a violation." Curtis Johnson, 559 U.S. at 138 (emphasis in original; citations, brackets, and ellipsis omitted).

Under Florida law, simple battery, as applied here, "occurs when a person actually and intentionally touches or strikes another person against the will of the other or intentionally causes bodily harm to another person." See C.A.C. v. State, 771 So.2d 1261, 1263 (Fla. 2 DCA 2000) (quoting Fla. Stat. §784.03(1)(a), Fla. Stat. (1999)). Specifically, at the time of his offense, the movant was charged with violating Fla.Stat. §784.03(1)(a)(b), which provides:

> (1) A person commits battery if he:
>
> (a) Actually and intentionally touches or strikes another person against the will of the other; or
>
> (b) Intentionally causes bodily harm to an individual.
>
> (2) Whoever commits battery shall be guilty

[5]In relevant part, simple battery under Florida law prohibits "(1) actually and intentionally touch[ing] or strik[ing] another person against the will of the other; or (2) intentionally causing bodily harm to another person." Fla.Stat. §784.03(1)(a).

> of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083, or §775.84.

See Fla. Stat. §784.03(1)(a)(b) (1987).

The movant argues correctly that the first element of felony battery is the same as that of the simple-battery offense the Curtis Johnson court found did not satisfy the elements/force clause, because it could be accomplished by mere touching, no matter how slight. (Cv-DE#9:2). The movant further argues that the Florida Standard Jury Instruction in Criminal Cases, No. 8.11, makes felony battery a single, indivisible statute. (Id.). Therefore, the modified categorical approach cannot be used to determine whether the offense qualifies as a crime of violence. (Id.).

At the time of the movant's battery conviction, Florida's felony battery statute simply required "actually or intentionally" "touching or striking another" or "causing injury to another," but not both. Prior to the recent 2015 Samuel Johnson decision, the Eleventh Circuit specifically held that Florida's felony battery statute has "a single, indivisible set of elements," and as such, a court is only allowed to apply the "categorical approach" in determining whether it qualifies as a predicate offense for purposes of an ACCA enhancement. See United States v. Eady, 591 Fed. Appx. 711, 720 (11th Cir. 2014), cert. den'd, 135 S. Ct. 1847 (2015).

As such, the court cannot "look at the time for which a defendant was initially charged," nor "look at any other Shepard-approved documents." Id. (citing Descamps v. United States, 133 S.Ct. 2276, 2282, 186 L.Ed.2d 438 (2013)). Consequently, the modified categorical approach cannot be utilized when, as here,

there is a single, indivisible set of elements. Eady, supra (citing Descamps, supra.). Rather, the court must look only to whether the state statute, defining the crime of conviction, categorically fits within the generic federal definition of a corresponding aggravated felony. Taylor v. United States, 495 U.S. 575, 599-600 (1990). In other words, the offense "must be viewed in the abstract to determine whether the state statute shares the nature of the federal offense that serves as a point of comparison." Moncrieffe v. Holder, ___ U.S. ___, 133 S.Ct. 1678, 1684 (2013).

Given the Eleventh Circuit's own determination that this statute is not divisible, the court cannot look to the modified categorical approach to determine whether the offense of conviction constitutes a violent felony for purposes of the ACCA. Instead, it must be determined categorically whether felony battery, a violation of Fla.Stat. §784.03(1), either fits the enumerated offenses or the elements offense for purposes of the ACCA. It is clear that to fall within the purview of the enumerated offense, the offense must be resonant with generic burglary, arson, or extortion, or involve the use of explosives. See 18 U.S.C. §924(e). Here, felony battery does not fall within any of the enumerated offenses listed within the ACCA.

Therefore, the determinative issue is whether it satisfies the elements/force clause, meaning that the conviction "has as an element the use, attempted use, or threatened use of physical force against the person of another." See 18 U.S.C. §924(e)(2)(B)(i). The question becomes whether the unlawful touching or striking of another person, against the will of the other, involves the use, attempted use, or threatened use of physical force against the person of another. In Curtis Johnson, the Supreme Court considered whether Florida simple battery involved the use, attempted use, or threatened use of physical force against another. Curtis Johnson,

559 U.S. at 136-37, 130 S.Ct. at 1268-69. The Court determined that since the defendant could have been convicted of merely unwanted touching, this did not involve "physical force." The Court reasoned that "the phrase 'physical force' means 'violent force.'" Id. at 140, 130 S.Ct. at 1271. The Supreme Court has made clear that "physical force" under the ACCA requires violent contact beyond a mere touching.

In this case, the unlawful touching or striking must have involved "violent force" not just force that resulted in great bodily harm, permanent disability or disfigurement. See Curtis Johnson, 599 U.S. at 136-37, 130 S.Ct. at 1268-69. For example, a comparison of aggravated battery, a second degree felony, more serious than the prior offense at issue here, to-wit, felony battery, a third degree felony, requires a showing that the defendant intentionally and knowingly causes great bodily harm, permanent disability or permanent disfigurement. Compare 784.045(1)(a) with 784.041(1). In other words, the only difference between felony battery and aggravated battery is that aggravated battery requires *mens rea*. See T.S. v. State, 965 So.2d 1288, 1290 (Fla. 2 DCA 2007). Consequently, the defendant charged with and convicted of felony battery need not have intended to cause bodily harm.

In Leocal v. Ashcroft, 543 U.S. 1 (2004), the Supreme Court held that the statutory phrase "use" of physical force against another required the "active employment of force, and therefore naturally suggests a higher degree of intent than negligent or merely accidental conduct." In Leocal, the Supreme Court concluded that a conviction for driving under the influence ("DUI") and causing serious bodily injury, was not a crime of violence under a materially-identical elements/force clause in 18 U.S.C. §16(a). Since Leocal, the Eleventh Circuit has determined that "even

offenses permitting the requisite physical injury to be caused by reckless conduct do not satisfy the elements/force clause." United States v. Palomino-Garcia, 606 F.3d 1317, 1334-36 (11th Cir. 2010).

Pre-Samuel Johnson, the Eleventh Circuit unequivocally held that felony battery, under Fla.Stat. §784.041(1), constituted a crime of violence for purposes of the ACCA. See United States v. Eugene, 423 Fed. Appx. 908, 911 (11th Cir. 2011)(holding that the statute requires the defendant to have "cause[d] great bodily harm, permanent disability, or permanent disfigurement."). The Eleventh Circuit concluded that it is impossible for a defendant to be convicted of felony battery in Florida without having used "physical force" as defined in Curtis Johnson. Id.; see also, United States v. Eady, 591 Fed. Appx. 711, 719 (11th Cir. 2014)(finding that, for purposes of the felony battery statute, a defendant cannot "hit another person and cause great bodily harm...without using the requisite level of violent force."); Dominguez v. State, 98 So.3d 198, 200 (Fla. 2 DCA 2012)(holding that Florida felony battery under §784.041 "cannot be committed without the use of force or violence"); Williams v. State, 9 So.3d 658, 660 (Fla. 4 DCA 2009)(holding that §784.041 "requires great bodily injury, permanent disability, or permanent disfigurement," and therefore "cannot be committed without the use of physical force or violence."). It is worth noting, however, that these convictions involved versions of the Florida statute in effect over a decade after the statute under which movant was charged and convicted.

The Florida Standard Jury Instruction for battery on a law enforcement officer provides, in relevant part, that for a jury to convict of the charged offense, beyond a reasonable doubt, the jury must find: (1) the defendant intentionally [touched/struck the victim against his/her will] [caused bodily injury to the victim];

(2) the victim was a [law enforcement officer] [firefighter] [emergency medical care provider] etc. ...; (3) the defendant knew victim was a [law enforcement officer] [firefighter] [emergency medical care provider] etc. ...; and (4) the victim was engaged in the lawful performance of his/her duties when the burglary was committed. Fla Std. Jury Instr. 8.11.

The Florida Supreme Court has held that the felony offense of battery on a law enforcement officer, a violation of Fla.Stat. §784.07(2)(b), "which requires the same conduct (directed against a law enforcement officer) as misdemeanor battery under §784.03(1)(a)" was not a forcible felony. Hearns v. Florida, 961 So.2d 211, 219 (Fla. 2007)(emphasis added). In so ruling, the Hearns court determined that since §784.03(1)(a) requires proof of only the slightest unwanted physical touch, "the use ... of physical force" was not an element of the offense. Id. at 219; see also, Curtis Johnson v. United States, 559 U.S. 133, 141-42 (2010).

The government argues that this court can rely on undisputed PSI facts to justify the ACCA enhancement would violate the Sixth Amendment. The Petitioner counters correctly that the PSI is not a Shepard-approved document. The PSI is not a "conclusive record [] made or used in adjudicating guilt," Shepard, 544 U.S. at 21, and it was not a part of the state criminal proceedings. Thus, unlike true Shepard documents, a federal PSI does not communicate the elements of the offense for which the defendant was convicted; rather, it communicates only extraneous factual information and impermissibly encourages speculation regarding "what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct." Descamps, 133 S.Ct. at 2288. Thus, even if there was no objection to the facts contained in the PSI, that has no constitutional significance. Instead, what matters is that the defendant did not invoke or waive his constitutional right to have

a jury find these facts beyond a reasonable doubt during the earlier criminal proceeding.

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

**b. Aggravated assault.** The government argues that movant's conviction for aggravated assault on a police officer in case no. 89-11981CFA02 qualifies as a crime of violence for purposes of the ACCA enhancement. (Cv DE# 8). Petitioner counters that aggravated assault is not a violent felony under the ACCA. (Cv DE# 7:10-15, 9:3-5).

At the time of the movant's conviction, Florida Standard Jury Instruction 8.2, provided that, in order to be found guilty of aggravated assault, the following elements were required: 1) the defendant intentionally and unlawfully threatened, either by word or act, to do violence to the victim; 2) at the time, the defendant appeared to have the ability to carry out the threat; 3) the act of the defendant created in the mind of the victim a well-founded fear that the violence was about to take place. See In re: Standard Jury Instructions in Criminal Cases, 131 So. 3d 755 (Fla. 1986) (aggravated assault instruction originally adopted in 1981) (*per curiam*) (emphasis added); see also Fla.Stat. §784.021.

While Samuel Johnson prohibits reliance on the ACCA's residual clause to establish that an offense is a violent felony, the offense of aggravated assault qualifies as a violent felony under the ACCA's elements clause, which requires that the offense have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." See 18 U.S.C. §924(e)(2)(B)(i); see also In re Hires, 825 F.3d 1297, 1301 (11th Cir. 2016) ("a Florida conviction for aggravated assault under §784.021 is categorically a violent felony under the ACCA's elements clause."). See also, Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-38 & n.6 (11th Cir. 2013), abrogated on other grounds by Johnson, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569; United States v. Thomas, 656 Fed.Appx. 951, 955-56 (11 Cir. 2016)(internal citations omitted) ("Thomas has two prior Florida convictions for resisting an officer with violence and a 1996 Florida conviction for aggravated assault with a deadly weapon, all three of which qualify as ACCA predicates post-Johnson. Thomas's three qualifying convictions are violent felonies per the ACCA's elements clause, which means Johnson does not affect Thomas's ACCA eligibility.")(emphasis added); United States v. Towns, 2016 WL 5017301, at *1 (11 Cir. Sept. 20, 2016).

Contrary, to the movant's argument, aggravated assault under Florida law constitutes a crime of violence for purposes of an ACCA enhancement.

**c. Aggravated battery** Petitioner states that his prior conviction for aggravated battery in case no. 86-2824-CF no longer qualifies as a crime of violence. (Cv DE# 7:5-6).

In Turner, 709 F.3d at 1337-38, the Eleventh Circuit held that Florida's aggravated battery offense categorically qualifies as a predicate offense under the ACCA's "elements" clause. Moreover, In

re Rogers, 825 F.3d 1335, 1341 (11th Cir. 2016), decided after Descamps, the Eleventh Circuit denied a motion for leave to file a second or successive motion to vacate pursuant to §2255 on the basis that Turner is "binding precedent [that] clearly classifies [aggravated battery] as elements clause offense." Furthermore, in the Eleventh Circuit order granting Petitioner permission to file a successive motion, the court noted:

> Santos clearly has two qualifying predicate offenses, aggravated assault and aggravated battery. See Fla. Stat. §784.021 (defining aggravated assault); Fla. Stat. §784.045 (defining aggravated battery); Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-38 (11th Cir. 2013), abrogated on other grounds by United States v. Hill, 799 F.3d 1318, 1321 n.1 (11th Cir. 2015) (holding that Florida aggravated assault and aggravated battery convictions qualified as violent felonies under the elements clause).

(Cv DE# 1:5).

In light of the foregoing, aggravated battery under Florida law constitutes a crime of violence for purposes of an ACCA enhancement.

**d. False imprisonment.** Petitioner states that his prior conviction for false imprisonment in case no. 86-2824-CF no longer qualifies as a crime of violence. (Cv DE# 7:5-6). He does not provide an extended argument in support of this statement. The government is silent regarding this issue.

The Eleventh Circuit recently held that "a conviction for false imprisonment under Florida Statute §787.02 does not categorically satisfy the ACCA's elements clause." United States v. Driver, 663 Fed. Appx. 915 (11th Cir. 2017). In 1986, section 787.02 defines false imprisonment to "mean[] forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining

another person without lawful authority and against her or his will." Fla. Stat. §787.02(1)(a) (1986). In United States v. Rosales-Bruno, 676 F.3d 1017, 1022 (11th Cir. 2012), the Eleventh Circuit held that the statute's "secretly confining" language made clear that §787.02 can be violated "without employing the type of 'physical force' contemplated" by the elements clause.

As a result, Petitioner's prior conviction for false imprisonment fails to constitute a crime of violence for purposes of an ACCA enhancement.

**e. Escape.** Petitioner states that his prior conviction for escape in case no. 86-4039CF02 no longer qualifies as a crime of violence. (Cv DE# 7:5-6). He does not provide an extended argument in support of this statement. The government is silent regarding this issue.

Fla. Stat. §944.40 (1986) provides that any confined prisoner "who escapes or attempts to escape from such confinement shall be guilty of a felony of the second degree." Escape no longer qualifies as a violent crime because it is not an enumerated offense, nor does it have "as an element the use, attempted use, or threatened use of physical force against the person of another." See Hernandez v. United States, 16-80662-Civ-COHN, 2016 WL 4132074 (S.D. Fla. May 31, 2016). As a result, Petitioner's prior conviction for escape fails to constitute a crime of violence for purposes of an ACCA enhancement.

**f. Resisting arrest without violence.** Petitioner states that his prior conviction for resisting arrest without violence in case no. 87-67-MM no longer qualifies as a crime of violence. (Cv DE# 7:5-6). He does not provide an extended argument in support of this statement. The government is silent regarding this issue.

Fla. Stat. 843.02 (1987) provides:

> Whoever shall obstruct or oppose any such officer, beverage enforcement agent, weight and safety officer of the Department of Transportation, member of the Florida Parole and Probation Commission or any administrative aide or supervisor employed by said commission, parole and probation supervisor or parole and probation officer employed by the Department of Corrections, personnel or representative of the Department of Law Enforcement, or legally authorized person in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

This statute, on its face, does not included "as an element the use, attempted use, or threatened use of physical force against the person of another." See 18 U.S.C. §924(e)(2)(B)(ii). Furthermore, it is not an enumerated offense. See 18 U.S.C. §924(e)(2)(B)(i). Therefore, Petitioner's prior conviction for resisting arrest without violence fails to constitute a crime of violence for purposes of an ACCA enhancement.

**g. Feeling and eluding.** Petitioner states that his prior conviction for feeling and eluding in case no. 84-17440 no longer qualifies as a crime of violence. (Cv DE# 7:5-6). He does not provide an extended argument in support of this statement. The government is silent regarding this issue.

The PSI listed the movant's prior Florida conviction for fleeing and eluding police, a violation of Fla. Stat. §316.1935. The Eleventh Circuit has recently determined that after Samuel Johnson, prior Florida convictions for "fleeing or attempting to elude may serve as predicate offenses under the ACCA only if they qualify as violent felonies under a different ACCA provision." See

United States v. Garner, __ F.3d ___, 2016 WL 641098, at *1-2 (11th Cir. 2016). Under Fla. Stat. §316.1935, fleeing and eluding police does not have "as an element the use, attempted use, or threatened use of physical force against the person of another," is not "burglary, arson, or extortion," and does not involve the "use of explosives." See 18 U.S.C. §924(e)(2)(B)(i)-(ii); see also United States v. Garner, supra. (quoting Sykes v. United States, 564 U.S. 1, 131 S.Ct. 2267, 2273, 180 L.Ed.2d 60 (2011) (concluding, under the categorical approach, that an Indiana conviction for "[r]esisting law enforcement through felonious vehicle flight" failed to qualify under either the ACCA's elements clause or enumerated offenses clause), overruled on other grounds by Samuel Johnson, 135 S.Ct. at 2551; United States v. Petite, 703 F.3d 1290, 1293 (11th Cir. 2013). Like the defendant in Garner, the movant's prior Florida conviction for fleeing or eluding no longer qualifies as a violent felony under the ACCA.

**h. Burglary of a conveyance.** Petitioner has a prior conviction for burglary of a conveyance in case no. 90-328-CF. Although not mentioned by the parties, this conviction also fails to qualify as a crime of violence. See Mathis v. United States, --S.Ct. --, 2016 WL 3434400, *3 (June 23, 2016); see also James v. United States, 550 U.S. 192, 212, 127 S. Ct. 1586, 1599, 167 L. Ed. 2d 532 (2007) overruled on other grounds by Samuel Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)("We agree that the inclusion of curtilage takes Florida's underlying offense of burglary outside the definition of 'generic burglary'").

**In conclusion**, for all of the foregoing reasons, the movant's prior convictions no longer qualify him for the ACCA sentencing enhancement. Although the aggravated assault on a police officer and aggravated battery convictions qualify, the movant does not have at least three prior felony convictions that do in fact

qualify as valid predicate offenses under the ACCA.

## VI. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing §2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255-Rule 11(b).

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

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a

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

## VII. Conclusion

Based on the foregoing, it is recommended that this §2255 motion to vacate, be GRANTED, solely to the extent that the movant's sentences be vacated, that his status as an armed career criminal be eliminated, and that a resentencing hearing be held after preparation by the probation officer of an updated PSI/memorandum. It is further recommended that no certificate of appealability issue herein, and that this case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report. However, if the parties choose to do so, they may notify the court of their intent to waive objections to this Report so that the movant may be released from custody as soon as practicable.

Signed this 9th day of May, 2017.

UNITED STATES MAGISTRATE JUDGE

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# A - 9

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 16-80990-CV-ALTONAGA/WHITE**
**(CASE NO. 93-08108-CR-ALTONAGA)**

**REINALDO SANTOS,**

**Movant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Respondent.**

_____/

**UNITED STATES'S OBJECTIONS TO REPORT AND RECOMMENDATION**

The United States of America, by and through the undersigned Assistant United States Attorney, hereby objects to Magistrate Judge White's Report and Recommendation ("R&R") (4CVDE 19).[1] Overall, the United States maintains that Santos still qualifies as an armed career criminal for the reasons outlined in our Responses to Santos's Motion to Vacate (4CVDE 8 at 12-19) and to his Motion for Summary Judgment and/or to be Released Immediately (4CVDE 13). While the R&R accurately finds that Santos's separate convictions for aggravated assault and aggravated battery continue to qualify as violent felonies under the Armed Career Criminal Act ("ACCA"), we object to the R&R's determination that Santos's battery on a law enforcement officer offense no longer qualifies as an ACCA violent felony.

The R&R's conclusion that Santos's battery on a law enforcement officer offense is not a

[1] Consistent with our prior filings, "4CVDE" refers to docket entries filed in *Reinaldo Santos v. United States*, Case No. 16-CV-80990-CMA (S.D. Fla. 2016).

violent felony depends upon three faulty logical underpinnings. The R&R erroneously determines that (1) Santos' claim is not procedurally defaulted, (2) Florida's offense of battery on a law enforcement officer is indivisible, and (3) courts may not rely on facts contained in the Presentence Investigation Report ("PSI") to which a defendant did not object at sentencing when evaluating whether an offense qualifies as a violent felony under the ACCA.

## I. Santos's Claim is Procedurally Barred.

First, the R&R's reading of and reliance upon *Reed v. Ross*, 468 U.S. 1, 17 (1984) to reject the procedural bar is oversimplified. No one disputes that Santos did not challenge his prior convictions as the basis for the ACCA enhancement at his sentencing hearing in 1994. He did not allege the ACCA was unconstitutionally vague, nor did he object to the PSI's narrative description of the facts of his convictions. He did not raise the issue in his direct appeal or first two motions to vacate. It was not until a habeas petition in 2010 that he first challenged his 1987 conviction for battery on a law enforcement officer. Santos's failure to raise this issue at his sentencing or on direct appeal results in it being procedurally barred. *See United States* v. *Frady*, 456 U.S. 152, 162, 167-168 (1982).

The R&R correctly observes that *Samuel Johnson v. United States*, 135 S.Ct. 2551, 2563 (2015) "explicitly overrule[d] well-settled precedent and g[a]ve[] retroactive application to that new rule after [Santos's] direct appeal" (4CVDE 19 at 8). But the R&R then concludes based upon *Ross* that "'by definition' a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal." 468 U.S. at 17. What the R&R overlooks, however, is that *James v. United States*, 550 U.S. 192 (2007), the precedent that *Samuel*

*Johnson* overturned, was not decided until years after Santos's sentencing. That timing matters because when Santos was sentenced and pursued his direct appeal, there was no Supreme Court precedent precluding an argument that the residual clause was unconstitutionally vague. Instead, Santos had available all of the tools necessary to construct the vagueness argument that, although rejected in *James*, ultimately carried the day in *Samuel Johnson*. Just as James presented the first vagueness challenge to the residual clause in 2007, Santos could have articulated the same argument over a decade earlier. Accordingly, the R&R's conclusion that the claim was not a "reasonably available to counsel at the time of the direct appeal" (4CVDE 19 at 8) is incorrect. Nothing prevented Santos from challenging the constitutionality of the ACCA at his sentencing and on his direct appeal. The argument was reasonably available to him, and his failure to raise the issue earlier means that the procedural bar should apply.[2]

## II. Florida's Battery on a Law Enforcement Officer is a Divisible Statute.

The R&R wrongly refuses to apply the modified categorical approach to evaluate whether a conviction for battery against a law enforcement officer qualifies as a violent felony (4CVDE 19 at 27). The sole basis for the decision is an unpublished opinion stating that "Because felony battery under § 784.041 has a single, indivisible set of elements, we apply only the categorical approach. . . ." *United States v. Eady*, 591 F. App'x 711, 720 (2014). But the reliance on *Eady* is misplaced. As we previously pointed out (4CVDE 13 at 2), the Eleventh Circuit later ruled in a published opinion that court should employ the modified categorical approach to evaluate Florida

[2] Despite the R&R's contrary determination (4CVDE 19 at 8-9), Santos cannot establish actual prejudice because his ACCA enhancement remains valid after *Samuel Johnson* for the reasons outlined below and discussed in more detail in our prior responses.

battery convictions. *United States v. Green*, 842 F.3d 1299, 1322 (11th Cir. 2016) (holding Florida battery convictions under § 784.041 or § 784.03 "could potentially qualify under the modified categorical approach"). The court explained, "Importantly, *Curtis Johnson* left open the possibility that, if *Shepard* documents are available, then we may be able to determine under which version of the statutory elements a defendant was convicted." *Id.* (citing *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010)).

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

As we have previously illustrated, applying the modified categorical approach to Santos's battery on a law enforcement officer offense illustrates that he violated the first or second of the disjunctive battery elements outlined in *Green* by either "intentionally causing bodily harm" or "intentionally str[iking] the victim" when he "struck the officer in the face using a closed fist [and then] kicked the officer in the groin area" (PSI ¶37). These undisputed facts from Santos's PSI

conclusively demonstrate that his offense was not a violation of the third disjunctive element for a mere actual and intentional touch.

**III. The Court May Rely on Undisputed Facts from the PSI.**

Finally, the R&R incorrectly concludes that courts cannot rely on undisputed facts from the PSI to determine whether an offense qualifies as a violent felony under the ACCA (4CVDE 19 at 31). Without citing any Eleventh Circuit case law addressing the issue, the R&R simply provides its own interpretation that "a federal PSI does not communicate the elements of the offense for which the defendant was convicted" and "what matters is that the defendant did not invoke or waive his constitutional right to have a jury find these facts beyond a reasonable doubt during the earlier criminal proceeding" (4CVDE 19 at 31-32). Yet the Eleventh Circuit has repeatedly held that courts can rely on undisputed statements in the PSI to determine the nature of a prior conviction.

As recently as last year, the Eleventh Circuit wrote, "In determining the nature of a defendant's prior convictions and whether to classify the defendant as an armed career criminal under the ACCA, the sentencing court may rely on *Shepard*-approved documents and any undisputed facts in the presentence investigation report." *In re Hires*, 825 F.3d 1297, 1302 (11th Cir. 2016) (citing *United States v. McCloud*, 818 F.3d 591, 595, 599 (11th Cir. 2016); *United States v. Bennett*, 472 F.3d 825, 832-34 (11th Cir. 2006); *United States v. Wade*, 458 F.3d 1273, 1277-78 (11th Cir. 2006)). Similarly, in 2012, the court noted, "[w]e have held that, when determining whether an offense is a violent felony (or crime of violence) under the modified categorical approach, a district court can rely on the facts set forth in the PSI if they are undisputed and thereby

deemed admitted." *Rozier v. United States*, 701 F.3d 681, 686 (11th Cir. 2012) (citing *Bennett*, 472 F.3d at 832-34 (holding that "the district court did not err in relying on the undisputed facts in Bennett's PSI to determine that his prior convictions were violent felonies under the ACCA"); *United States v. Beckles*, 565 F.3d 832, 843 (11th Cir. 2009) (explaining that "where an ambiguity exists and the underlying conviction may be examined," in addition to *Shepard* materials the district court "also may base its factual findings on undisputed statements found in the PSI, because they are factual findings to which the defendant has assented")).

With no attempt to distinguish this case law[3], the R&R inexplicably overlooks the well-established principle that sentencing courts may consider unobjected-to facts from the PSI when applying the modified categorical approach to decide whether a defendant's prior conviction qualifies as a violent felony under the ACCA. Ignoring that binding circuit law would be error. This Court should look to the undisuted facts of the PSI when applying the modified categorical approach. Doing so inevitably leads to the conclusion that Santos's battery on a law enforcement officer offense is a violent felony. Thus, he was properly sentenced as an armed career criminal, and his motion to vacate should be denied.

[3] The United States referenced these cases in its pleadings (4CVDE 8 at 18; 4CVDE 13 at 3).

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

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 22, 2017, I electronically filed the foregoing response with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served today on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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

# A - 10

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 16-CV-80990-ALTONAGA**
**(Underlying Case No. 93-CR-08108-ALTONAGA)**

REINALDO SANTOS,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

**MOVANT'S OBJECTIONS TO REPORT AND RECOMMENDATION**

Movant, Reinaldo Santos, through undersigned counsel, files the following objections to the Report and Recommendation issued on May 9, 2017. Specifically, Santos objects to the following:

At pps. 32 - 33, the Magistrate Judge concludes that Santos' conviction for Florida Aggravated Assault is a crime of violence for purposes of the ACCA enhancement. For the reasons stated below, Santos disagrees and objects to this finding.

At pps. 33 - 34, the Magistrate Judge concludes that Santos' conviction for Florida Aggravated Battery is a crime of violence for purposes of the ACCA enhancement. For the reasons stated below, Santos disagrees and objects to this finding.

**Aggravated Assault**: The Magistrate Judge erroneously concluded that Santos' conviction for Florida aggravated assault is a crime of violence under ACCA. *Turner v. Warden v. Coleman FCI (Medium)*, 709 F.3d 1328 (11th Cir. 2013), did not

consider state law that makes clear the offense of aggravated assault can be committed recklessly, and a crime which can be committed recklessly cannot be used as a crime of violence predicate for sentencing enhancement purposes. *See United States v. Palomino-Garcia*, 606 F.3d 1317 (11th Cir. 2010).

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

To the extent that the government may argue that the Florida battery statute is divisible, and thus amenable to the modified categorical approach, that argument is no longer viable in light of the Supreme Court's recent decision in *Mathis v. United States*, 136 S.Ct. 2243 (2016). There, the Court held that a statute is not divisible where, as here, it disjunctively list alternative means of satisfying element. *Id.* at 2249 (modified categorical approach applies only where statute "lists multiple elements disjunctively," but not where it "enumerates various factual means of committing a single element"). In so holding, *Mathis* confirmed the Eleventh Circuit's approach that, to determine whether something is a means or in elements, the court must look to state law. *Id.* at 2256 (instructing courts to apply "authoritative sources of state law"); *see United States v. Howard*, 742 F.3d 1342,

1346 (11th Cir. 2014). And, to do so, the court must look not only to the face of the statute and state court decisions, but to the jury instructions. *United States v. Lockett*, 810 F.3d 1262, 1268-69, 1271 (11th Cir. 2016).

Here, the Florida jury instructions for aggravated battery make clear that the "touching or striking" component under § 784.041 are simply alternative means of satisfying a single, indivisible element. Fla. Std. Jury Instr. In Crim. 8.4. Indeed, "touch" and "strike" are contained within a single elements. Thus, they are not alternative elements of the offense which the jury must find beyond a reasonable doubt. *See Lockett*, 810 F.3d at 1268-1269. Accordingly, under *Mathis*, the Florida battery statute is not only overbroad but indivisible. Any pre-*Mathis* authority to the contrary is no longer good law. Thus, the modified categorical approach does not apply, and aggravated battery can never qualify as a violent felony.

This conclusion is unaffected by the second element of the offense, which requires either: 1) the intentional infliction of great bodily harm, permanent disability, or permanent disfigurement; or 2) the use of a deadly weapon. Even if this element was divisible, the Court should not apply the modified categorical approach because each element is categorically overbroad. *See Howard*, 742 F.3d at 1346 ("Of course, courts are not compelled to apply the modified categorical approach for every divisible statute because with some of them none of the alternatives may match the elements of the generic crime. If that is the case, even though the statute is divisible, the court can and should skip over any Shepard documents and simply declare that the prior conviction is not a predicate offense

based on the statute itself.").

The fact that the defendant "intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement" does not satisfy the elements clause. Fla. Stat. § 784.045(1)(a)1. This is because the mere fact that the offense must result in bodily harm does not mean that the offense necessarily requires the use of violent, physical force within the meaning of *Curtis Johnson*. For example, the Fifth Circuit recently held that, notwithstanding the "causation of death" element of the Florida manslaughter statute, that offense did not satisfy the elements/force clause:

> Bolstering this conclusion, we have previously held that an "injury to a child" offense defined in terms of the causation of injury by intentional act did not contain a force elements. This was because if any set of facts with support a conviction without proof of that force component, then the component most decidedly is not an element of the crime. Intentional injury to a child could be committed by poison, for example, which would not be the use of physical force for these purposes. This holding logically extends to offenses defined in terms of the causation *of death*, such as the Florida statute at issue. We find that [Florida manslaughter] does not have an element of force.

*United States v. Garcia*, 779 F.3d 278, 283-84 (5th Cir. 2015) (emphasis in original; footnotes, brackets, and ellipses omitted). Thus, to the extent the government is arguing, and/or the Magistrate found that the "causation of great bodily harm" element means that aggravated necessarily requires the use of violent force, it is incorrect. Indeed, a person can knowingly cause great bodily harm to another with only *de minimis* touching– for instance, by softly applying a lotion, toxin, or acid to another's skin, knowing it will cause a severe allergic reaction. Likewise a person can knowingly cause great bodily harm by softly touching the sensitive or open

wound.

Likewise, a person can "use a deadly weapon" during a battery without the weapon ever actually touching the victim. Indeed, I conviction is permissible if the defendant simply holds the weapon while committing a simple battery. *See, i.e., Severance v. State*, 972 So.2d 931, 933-34 (Fla. 4th DCA 2007) (en banc) (clarifying that to "use a deadly weapon" for purposes of the aggravated battery statute "cover[s] all uses;" the Legislature "did not intend to limit the manner or method of use; therefore, it is unnecessary that the defendant use the weapon to commit the touching that constitutes the battery; it is sufficient if the defendant simply "hold[s] a deadly weapon without actually touching the victim with the weapon").

Furthermore, the term "deadly weapon" in Fla. Stat. § 784.045(1)(a)(2) is itself overbroad. According to Florida's standard instruction for "aggravated battery," "A weapon is a 'deadly weapon' if it is used or threatened to be used in a way likely to produce death or great bodily injury." Fla. Std. Jury Instr. In Criminal Cases No. 8.4; *see also id.* No. 3.3(b) ("A 'weapon' is legally defined to mean any object that could be used to cause death or inflict serious bodily injury."). That broad definition does not necessitate the use or threatened use of violent force in every case. A vial of poison, for example, would be a "deadly weapon" within that definition, and it can be easily administered to another without violent force. *See United States v. Garcia-Perez*, 779 F.3d 278, 284 (5th Cir. 2015) (recognizing that an offense requiring "[i]ntentional injury . . . Could be committed by poison, for example, which would not be 'use of physical force' for these purposes"). Other

courts have declared convictions overbroad and outside the elements clause for precisely this reason. *See, i.e., United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005); *United States v. Torres-Miguel*, 701 F.3d 165, 168-169 (4th Cir. 2012); *Matter of Guzman-Polanco*, 26 I & N Dec. 713, 717-718 (BIA Feb. 24, 2016). Accordingly, the statute is categorically overbroad and can never qualify as a violent felony.

The Magistrate Judge, and the government, rely primarily on *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2013). In that pre-*Descamps* case, the Court summarily concluded that aggravated battery qualified under the elements clause, because the facts of the underlying offense in that case involved "stabbing a man in the chest." That analysis, however, has clearly been abrogated by *Descamps* and *Mathis*. To be sure, the second element of aggravated battery is divisible in that it can involve either the intentional infliction of harm or the use of a deadly weapon. As a result, *Descamps* made clear, and *Mathis* confirmed, that the government may use the modified categorical approach for the limited purpose of determining which of those elements the defendant committed. (Here, even that is unnecessary, as explained above). Once that has been ascertained, the modified categorical approach has served its purpose: it has identified which of the elements the defendant committed. Critically, it may not be used to consider the underlying facts of the offense.

*Descamps* and *Mathis* made that point abundantly clear. *See Descamps*, 133 S.Ct. at 2284-85 (repeatedly explaining that the modified categorical approach is "a tool for implementing the categorical approach, to examine unlimited class of

documents to determine which of a statutes alternative elements formed the basis of the defendant's prior conviction;" it thus "retains the categorical approach's central feature: a focus on the elements, rather than the facts of a crime"); *Mathis*, 136 S.Ct. at 2253 (repeatedly explaining that the "ACCA . . . treats such facts as the relevant"). Because the Eleventh Circuit's decision in *Turner* improperly used the modified categorical approach to consider the underlying facts of the offense, rather than to determine which element the offense involved, that decision has been abrogated by Supreme Court precedent and is no longer good law. *See United States v. Howard*, 742 F.3d 1334, 1338, 1343-45 (11th Cir. 2014)(acknowledging that *Descamps* had unsettled the "settled law" of this Circuit, resulting in the abrogation of pre-*Descamps* prior circuit precedent).

In sum, aggravated battery under Fla. Stat. § 784.045(1)(a)2 is overbroad, in that it does not necessarily have as an element the use, attempted use, or threatened use of violence, physical force, as required by *Curtis Johnson*. Accordingly, it does not qualify as a crime of violence.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 23, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/*Robin C. Rosen-Evans*
Robin C. Rosen-Evans

# A - 11

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 16-80990-CIV-ALTONAGA/White**

**REINALDO SANTOS,**

Movant,

v.

**UNITED STATES OF AMERICA,**

Respondent.
_____/

**ORDER**

**THIS CAUSE** came before the Court upon Movant, Reinaldo Santos's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 and Memorandum of Law [ECF No. 7]. Respondent, the United States of America, filed a Response [ECF No. 8], to which Movant filed a Reply [ECF No. 9]. On May 9, 2017, Magistrate Judge Patrick A. White entered a Report of Magistrate Judge [ECF No. 19], recommending the Motion be granted. The Government timely filed Objections ("Government Objections") [ECF No. 20], to which Movant filed a Response ("Movant Response") [ECF No. 21]. Santos filed his own Objections ("Movant Objections") [ECF No. 22], to which the Government filed a Response ("Government Response") [ECF No 23]. Santos thereafter filed a Response to the Government's Response ("Movant Reply") [ECF No. 24].

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

Iowa 1999) (quoting 28 U.S.C. § 636(b)(1)). Since the parties filed timely objections, the Court reviews the record *de novo*.

## I. BACKGROUND

On December 28, 1993, Movant was indicted on charges of possession of a firearm (Count 1) and ammunition (Count 2) by a convicted felon in violation of 18 U.S.C. section 922(g)(1). (*See* Superseding Indictment [CR ECF No. 25][1] 1). Following trial, the jury found Movant guilty of both counts. (*See* Verdict [CR ECF No. 70]).

On October 12, 1994, the Government filed a Notice [CR ECF No. 68] of intent to rely upon the sentence enhancement found under the Armed Career Criminal Act, 18 U.S.C. section 924(e), which provides for enhanced sentencing where a criminal defendant violates 18 U.S.C. section 922(g) and has at least three prior convictions for a violent felony or a serious drug offense. (*See generally* Notice). As grounds for the enhancement, the Government listed the following prior convictions: (1) a 1990 conviction for Aggravated Assault on a Police Officer; (2) a 1987 conviction for Aggravated Battery and False Imprisonment; and (3) a 1987 conviction for Battery on a Law Enforcement Officer. (*See* Notice 1–2).

The Presentence Investigation Report ("PSI")[2] included a sentencing enhancement under the Armed Career Criminal Act, but did not identify the specific offenses supporting the ACCA enhancement. (*See* PSI ¶ 30). Nevertheless, the PSI listed several prior convictions, including the three convictions enumerated in the Notice, as well as: a 1987 conviction for Fleeing and

[1] References to docket entries in Movant's criminal case, Case No. 93-08108-CR-ALTONAGA, are denoted with "CR ECF No."

[2] The PSI is not on the public docket.

Eluding Police (*see id.* ¶ 34); a 1987 conviction for Resisting Arrest Without Violence (*see id.* ¶ 36); a 1987 conviction for Escape (*see id.* ¶ 38); and three 1990 convictions for Burglary of a Conveyance (*see id.* ¶¶ 40–42). Movant objected to the PSI listing "the extent and nature of the defendant's criminal history" as a factor that may warrant an upward departure (*id.* ¶ 82), because the serious nature of his criminal history was already "adequately considered by the Sentencing Commission in formulating the guidelines for a person who qualifies for sentencing under the Armed Career Criminal Act" (Supplemental Objection to Presentence Investigation Report [ECF No. 88] 1), and therefore an additional increase was not warranted.

Movant was sentenced to a 360-month term of imprisonment on Counts 1 and 2. (*See* Judgment [ECF No. 90] 2). The Eleventh Circuit affirmed his conviction and sentence on direct appeal. *See United States v. Santos*, 93 F.3d 761 (11th Cir. 1996). Movant filed a petition for writ of certiorari, which the Supreme Court denied on April 14, 1997. *See Santos v. United States*, 520 U.S. 1170 (1997).

Movant filed his first motion under 18 U.S.C. section 2255 on July 12, 2001, without raising any of the claims asserted in the present Motion. (*See Santos v. United States*, Case No. 01-cv-08666-NCR (S.D. Fla. 2001) ("*Santos I*"), Motion to Vacate Sentence [ECF No. 1], Memorandum of Law [ECF No. 6]). The motion was denied as untimely; the Eleventh Circuit then denied Movant's request for a certificate of appealability. (*See Santos I*, Order on Report and Recommendation [ECF No. 13], USCA Order [ECF No. 17]).

Movant filed a second motion under section 2255 on October 24, 2005, which again did not raise the claims asserted in the present motion. (*See Santos v. United States*, Case No. 05-cv-

80958-ALTONAGA (S.D. Fla. 2005) ("*Santos II*"), Title 28 U.S.C. § 2255 Motion [ECF No. 1]). The Magistrate Judge issued a Report recommending the motion be denied for lack of jurisdiction because it was successive and Movant had not obtained authorization from the Eleventh Circuit to file it. (*See Santos II*, Report re Dismissal [ECF No. 3]). The Court issued an Order adopting the report. (*See Santos II*, Order [ECF No. 4]).

On June 6, 2015, the United States Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), finding the so-called "residual clause" of the ACCA void for vagueness. *See id.* at 2557–60, 2563. On June 9, 2016, the Eleventh Circuit granted Movant's application for leave to file a successive motion under section 2255 in light of *Johnson*. (*See generally* USCA Order [ECF No. 1]). Santos now seeks to vacate his sentence under the ACCA. (*See generally* Mot.).

## II. ANALYSIS

### A. The ACCA and *Johnson*

The ACCA requires a 15-year mandatory minimum sentence for a defendant convicted of being a felon in possession of a firearm who also has three previous convictions for a "violent felony" or "serious drug offense." *See* 18 U.S.C. § 924(e)(1).

A "violent felony" is any crime punishable by more than a one-year term that: (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," *id.* § 924(e)(2)(B)(i); or (2) "is burglary, arson, or extortion, involves the use of explosives, or [(3)] otherwise involves conduct that presents a serious potential risk of physical injury to another," *id.* § 924(e)(2)(B)(ii) (alteration added). The first part of the violent felony

definition, contained in subsection (2)(B)(i), is known as the "elements clause," while the second and third parts in subsection (2)(B)(ii) are known as the "enumerated clause" and the "residual clause," respectively.

In *Johnson*, the Supreme Court struck down the residual clause as void for vagueness. *See* 135 S. Ct. at 2557–60, 2563. The Court explicitly stated its decision did "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," that is, the elements clause. *Id.* at 2563.

**B. Santos's Motion**

Santos can obtain relief on the Motion if: (1) it is unclear from the record which clause the Court relied on in applying the ACCA enhancement; and (2) Santos's prior convictions no longer qualify him for the ACCA sentencing enhancement after *Johnson*'s invalidation of the residual clause. *See Leonard v. United States*, No. 16-22612-CIV, 2016 WL 4576040, at *2 (S.D. Fla. Aug. 22, 2016) (citation omitted); *see also In re Chance*, 831 F.3d 1335, 1339–41 (11th Cir. 2016); *but see In re Moore*, 830 F.3d 1268, 1271–72 (11th Cir. 2016). As the record is not clear regarding whether Movant was sentenced under the ACCA's residual clause (*see* Report 18; *see also* PSI ¶ 30), the Court focuses on whether Movant has three prior convictions that still qualify as predicates under the elements or enumerated clauses.

As discussed, Movant's ACCA enhancement was based upon any three of the following Florida convictions: (1) a 1990 conviction for Aggravated Assault on a Police Officer; (2) a 1987 conviction for Aggravated Battery and False Imprisonment; (3) a 1987 conviction for Battery on a Law Enforcement Officer; (4) a 1987 conviction for Fleeing and Eluding; (5) a 1987

conviction for Resisting Arrest Without Violence; (6) a 1987 conviction for Escape; and (7) a 1990 conviction for Burglary of a Conveyance. (*See* PSI ¶¶ 34–42; Notice 1–2).

To determine whether an offense qualifies as a violent felony under the ACCA, courts apply the "categorical approach" or the "modified categorical approach" depending on the statute of conviction. *See, e.g.*, *Johnson*, 135 S. Ct. at 2557; *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013).

If the statute is indivisible — that is, if it lists only one set of elements for committing the offense — courts apply the categorical approach. *See Descamps*, 133 S. Ct. at 2283. Under the categorical approach, a court is limited to looking at the statute's definition, *i.e.*, the elements of a defendant's prior convictions and not the facts underlying the prior offenses. *See id.*; *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) ("[T]he underlying brute facts or means of commission . . . make[] no difference; even if [the defendant's] conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence." (citation and internal quotation marks omitted; alterations added)).

The modified categorical approach is reserved for analyzing ACCA enhancements under divisible statutes that provide multiple alternative elements capable of satisfying the offense. *See Descamps*, 133 S. Ct. at 2281. A court applying the modified categorical approach may consider a limited class of documents known as *Shepard*[3] documents to determine which of the possible elements of an alternatively worded statute was factually satisfied by a defendant's conduct. *See Descamps*, 133 S. Ct. at 2283–85.

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

The Court first considers the crimes of aggravated assault on a police officer; aggravated battery; and battery on a law enforcement officer to determine whether they qualify as violent felonies after *Johnson*.[4]

*Aggravated Assault on a Police Officer*. In 1990, Movant was convicted of one count of Aggravated Assault on a Police Officer. (*See* PSI ¶ 39[5]; Notice 1). The felony offense of aggravated assault on a law enforcement officer under Florida Statute section 784.07(2)(c) requires the same conduct as the felony of aggravated assault under section 784.021, with the added element the assault is directed against a law enforcement officer. Florida defines aggravated assault as an assault "(a) [w]ith a deadly weapon without intent to kill; or (b) [w]ith an intent to commit a felony." FLA. STAT. § 784.021(1) (alterations added). "An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." FLA. STAT. § 784.011(1).

The Eleventh Circuit has held aggravated assault categorically qualifies as a violent felony under the ACCA's elements clause. *See Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1338 (11th Cir. 2013) ("[A] conviction under section 784.021 will always include 'as an element the . . . threatened use of physical force against the person of another,' . . . and . . . thus qualifies as a violent felony for purposes of the ACCA." (first and third alterations added;

[4] As the Court finds all three convictions qualify as crimes of violence, it declines to examine whether the remaining prior convictions also qualify as crimes of violence or whether Santos's claim is procedurally barred.

[5] The PSI erroneously lists the conviction as occurring on "7/19/80." (PSI ¶ 39). The Court presumes this is a typographical error in light of the "9/5/89" arrest date (*id.*), and the July 19, 1990 conviction date listed on the Notice (*see* Notice 1).

footnote call number omitted) (quoting 18 U.S.C. § 924(e)(2)(B)(i))), *abrogated on other grounds by Johnson*, 135 S. Ct. 2551; *see also United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) (per curiam) (affirming *Turner* remains binding in this Circuit on this issue); *United States v. Hughes*, No. 16-12297, 2017 WL 2471207, at *1 (11th Cir. June 8, 2017) (per curiam) (same). Movant's argument "aggravated assault can be committed recklessly, and a crime which can be committed recklessly cannot be used as a crime of violence predicate for sentencing enhancement purposes" (Movant Objs. 2 (citing *United States v. Palomino-Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010))), was specifically rejected by the Eleventh Circuit in *Golden*. *See* 854 F.3d at 1257. While Movant informs the Court "a petition for writ of certiorari will be filed by *Golden* in June" (Movant Reply 1), this alone is not sufficient the Court to depart from Eleventh Circuit precedent.

Accordingly, Movant's 1990 conviction for aggravated assault on a law enforcement officer qualifies as a violent felony under the ACCA and constitutes one of three prior convictions sustaining the ACCA enhancement.

*Aggravated Battery.* In 1987, Movant was convicted of Aggravated Battery. (*See* PSI ¶ 35; Notice 1). In Florida, a person commits aggravated battery when he commits a battery: (1) which intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; (2) while using a deadly weapon; or (3) against a pregnant victim and the offender knew or should have known the victim was pregnant. *See* FLA STAT. § 784.045.

"[A] conviction under Florida's aggravated battery statute categorically qualifies under the elements clause." *In re Rogers*, 825 F.3d 1335, 1341 (11th Cir. 2016) (alteration added)

(citing *Turner*, 709 F.3d at 1341); *see also In re Hires*, 825 F.3d 1297, 1302 (11th Cir. 2016) ("Neither *Johnson* nor any other case suggests that . . . [Florida] armed robbery and aggravated battery offenses don't count as ACCA predicates under the 'elements clause.' Indeed our precedent says otherwise." (first alteration added; internal quotation marks omitted) (quoting *In re Robinson*, 822 F.3d 1196, 1197 (11th Cir. 2016))). Notably, the Eleventh Circuit instructed in the USCA Order that Santos's aggravated battery conviction was "clearly" a "qualifying predicate ACCA offense[]." (USCA Order 5 (alteration added) (citing *Turner*, 709 F.3d at 1337–38, 1341; other citations omitted)).

While Movant insists *Turner* is "no longer good law" (Movant Objs. 7), its holding aggravated battery constitutes a violent felony has not been abrogated by intervening Supreme Court decisions or overruled by the Eleventh Circuit en banc. Instead, *Turner's* conclusion aggravated battery qualifies under the elements clause has continued to be upheld as good law by the Eleventh Circuit. *See Rogers*, 825 F.3d at 1341; *Hires*, 825 F.3d at 1302; *Robinson*, 822 F.3d at 1197; *United States v. McKenzie*, No. 16-15936, 2017 WL 2492032, at *2 (11th Cir. June 9, 2017) (per curiam) (citation omitted); (*see also* USCA Order 5). In light of this precedent, the 1987 aggravated battery conviction qualifies as a violent felony under the ACCA and serves as the second of three prior convictions sustaining the ACCA enhancement.

*Battery on a Law Enforcement Officer.* Movant was convicted of battery on a law enforcement officer in 1987, in an action unrelated to his 1987 aggravated battery conviction. (*See* PSI ¶ 37; Notice 2). The felony offense of battery on a law enforcement officer under Florida Statute section 784.07(2)(b) requires the same conduct as misdemeanor battery under

Florida Statute section 784.03(1)(a), with the added element the battery must be directed against a law enforcement officer. A battery occurs when a person either: (1) "[a]ctually and intentionally touches or strikes another person against the will of the other," or (2) "[i]ntentionally causes bodily harm to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 136 (2010) (alterations in original) (quoting FLA. STAT. § 784.03(1)(a)). Thus, battery can occur in one of three ways — (1) if the defendant intentionally strikes the victim, (2) if the defendant actually and intentionally touches the victim, or (3) if the defendant intentionally causes bodily harm. *See id.* at 136–37; *United States v. Green*, 842 F.3d 1299, 1322 (11th Cir. 2016).

Relying on *Curtis Johnson*, the Report concludes battery on a law enforcement officer does not qualify as a violent felony under the ACCA. (*See* Report 32 (citing *Curtis Johnson*, 559 U.S. at 136–37) (other citations omitted)). But *Curtis Johnson* does not stand for the proposition a Florida battery conviction can never support an ACCA enhancement. Instead, recognizing the battery statute is divisible and contains disjunctive elements, the Supreme Court instructed courts to apply the modified categorical approach in deciding "which version of the offense [the defendant] was convicted of," to determine whether that offense qualifies as a violent felony. *Descamps*, 133 S. Ct. at 2284 (alteration added); *see Curtis Johnson*, 559 U.S. at 136; *Green*, 842 F.3d at 1322 (11th Cir. 2016) (noting "the Supreme Court has held that Florida battery under § 784.03 does not categorically satisfy the ACCA's elements clause because it can be accomplished by any intentional touching, 'no matter how slight'" (citing *Curtis Johnson*, 559 U.S. at 138)).

The Report mistakenly relies on *United States v. Eady*, 591 F. App'x 711, 720 (11th Cir. 2014), for the proposition Florida's battery statute is not divisible and "[c]onsequently the modified categorical approach cannot be utilized." (Report 27 (alteration added)). The Eleventh Circuit has since instructed in a published opinion "[t]he statutes for both battery under [section] 784.03 and battery under [section] 784.041 — which share the same first element — are divisible." *Green*, 842 F.3d at 1322 (alterations added). Accordingly, the modified categorical approach is appropriate here. *See id.* at 1323–24 (applying the modified categorical approach to determine whether violation of section 784.03 was a violent felony under the elements clause).

Under the modified categorical approach, the Court may consider *Shepard* documents including charging documents, plea agreements, and transcripts of plea colloquies to determine which statutory phrase describes Movant's conviction. *Curtis Johnson*, 559 U.S. at 144 (citations omitted). Undisputed statements in a presentence investigation report may also be considered. *See United States v. McCloud*, 818 F.3d 591, 595–96 (11th Cir. 2016) (per curiam) ("The district court may make findings of fact based on undisputed statements in the PSI, but may not rely on those portions to which the defendant objected with specificity and clarity, unless the Government establishes the disputed facts by a preponderance of the evidence." (citations and internal quotation marks omitted)). Santos did not specifically object to paragraph 37 of the PSI, which describes the conduct underlying his conviction for battery on a law enforcement officer. (*See generally* Supp. Obj. to PSI).[6]

[6] Santos's objection to the PSI involved its consideration of his prior criminal history in its section for "Factors That May Warrant a Departure" (PSI 20), when the serious nature of his criminal history was already "adequately considered by the Sentencing Commission in formulating the guidelines for a person who qualifies for sentencing under the Armed Career Criminal Act." (Supp. Obj. to PSI 1). The Court

The Court looks to the PSI to determine which version or versions of Florida battery Movant committed. In relevant part, the PSI indicates:

> Corrections Officers entered the second cell of cellblock three in order to break up an altercation between inmates Calvin Smith and Reinaldo Santos. Inmate Smith was taken from the cell by a corrections officer. As the officer was exiting the area, Santos struck the officer in the face using a closed fist. Santos then kicked the officer in the groin area.

(PSI ¶ 37).

The PSI demonstrates Movant's battery involved striking, not battery "by the merest touching." *Curtis Johnson*, 559 U.S. at 139; (*see also* PSI ¶ 37). Battery by striking has as an element the "use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Applying the modified categorical approach, the Eleventh Circuit has confirmed committing a battery by striking constitutes a violent felony. *See Green*, 842 F.3d at 1323–24 (noting a *Shepard* document indicated the defendant was "hitting" the victim, finding the defendant had committed a battery under Florida Statute section 784.03 by "striking," and concluding battery conviction was a violent felony under the ACCA's elements clause).

Thus, Movant's 1987 conviction for battery on a law enforcement officer constitutes his third predicate conviction for the ACCA enhancement. Together with the convictions for aggravated assault on a police officer and aggravated battery, these convictions are sufficient to sustain his ACCA enhancement. The Court need not address whether Movant's other prior convictions are also violent felonies or whether Movant procedurally defaulted his claim.

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does not construe this objection to cover the accuracy of the PSI's restatement of facts underlying his prior criminal convictions.

## III. CERTIFICATE OF APPEALABILITY

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

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

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

## IV. CONCLUSION

For the foregoing reasons, it is

**ORDERED AND ADJUDGED** that the Report **[ECF No. 19]** is **REJECTED** as follows:

1. Movant, Reinaldo Santos's Motion **[ECF No. 7]** is **DENIED**.
2. A certificate of appealability shall **NOT ISSUE**.
3. The Clerk of the Court shall **CLOSE** this case, and any pending motions are **DENIED as moot**.

**DONE AND ORDERED** in Miami, Florida, this 8th day of August, 2017.

Cecilia M. Altonaga

**CECILIA M. ALTONAGA**
**UNITED STATES DISTRICT JUDGE**

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