No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTRON EDWARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12957
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-22585-RNS,
1:14-cr-20130-RNS-1

ANTRON DEMOND EDWARDS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(August 2, 2018)

Before WILSON, WILLIAM PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

Antron Demond Edwards appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence. On appeal, Edwards argues that his sentence

was unconstitutionally enhanced under the Armed Career Criminal Act (ACCA) in light of *Johnson v. United States*, 576 U.S. ___,135 S. Ct. 2551 (2015), which held that the ACCA's residual clause was void for vagueness. After careful review of the parties' briefs and the record, we affirm.

I.

We review the legal conclusions in the denial of a motion to vacate under 28 U.S.C. § 2255 de novo and the findings of fact for clear error. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014). We may affirm on any ground supported by the record, regardless of the ground stated by the district court. *Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017).[1]

II.

Under the ACCA, a defendant faces a 15-year mandatory minimum sentence if he is convicted of being a felon in possession of a firearm or ammunition following three prior felony convictions for a "violent felony" or a "serious drug offense," or a combination of both. 18 U.S.C. § 924(e)(1). The term "violent felony" includes "any crime punishable by imprisonment for a term exceeding one year" that: "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause), or "is burglary, arson, or

[1] The mandate in *Beeman* has not yet issued, but it is still the law of this circuit. *See Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) (per curiam); 11th Cir. R. 36 I.O.P. 2 ("Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result.").

extortion, [or] involves use of explosives" (the enumerated-offenses clause). *Id.* at § 924(e)(2)(B). Before *Johnson*, "violent felony" also included an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). *Id.*; *Johnson*, 576 U.S. at ___, 135 S. Ct. at 2563.

We held in *Beeman* that to prove a *Johnson* claim, a movant must establish that his sentence enhancement turned on the validity of the residual clause, such that he would not have been sentenced as an armed career criminal absent the existence of the residual clause. *Beeman*, 871 F.3d at 1221. We explained that a movant meets his burden only if (1) the sentencing court relied solely on the residual clause to qualify a prior conviction as a violent felony, as opposed to also or solely relying on either the enumerated-offenses clause or elements clause, and (2) there were not at least three other prior convictions that could have qualified under either of those two clauses as a violent felony or a serious drug offense. *Id.* We further held that, to carry his burden of proof, a § 2255 movant asserting a *Johnson* claim must show that—more likely than not—it was the sentencing court's use of the residual clause that led to its enhancement of his sentence. *Id.* at 1221–22.

III.

The district court did not apply the proper standards when assessing Edwards's *Johnson* claim because it did not have the benefit of our ruling in

Beeman.[2] Nevertheless, the *Beeman* issue has been fully briefed on appeal and neither party requests a remand for reconsideration of Edwards's § 2255 motion in light of *Beeman*. Under *Beeman*, Edwards cannot carry his burden of proving that he was sentenced under the ACCA's residual clause because nothing in the record shows that the sentencing court relied on the residual clause in concluding that his Florida arson conviction qualified as an ACCA predicate and Edwards has cited no precedent from the time of sentencing showing that Florida arson qualified only under the residual clause.

AFFIRMED.

[2] Because the government therefore had no opportunity to raise the *Beeman* issue in the district court, we can consider it in on appeal. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331–32 (11th Cir. 2004) (explaining that one exception to the general rule that we will not consider arguments in the first instance occurs if the argument could not have been raised in the district court).

United States District Court
for the
Southern District of Florida

Antron Demond Edwards, Movant	)	
	)	
v.	)	Civil Action No. 16–22585-Civ-Scola
	)	
United States of America, Respondent.	)	
	)	

Order on Report and Recommendation

This case was referred to United States Magistrate Judge Alicia M. Otazo-Reyes for a ruling on all pre-trial, nondispositive matters and for a report and recommendation on any dispositive matters, consistent with 28 U.S.C. § 636 and Local Magistrate Judge Rule 1. After holding a hearing, Judge Otazo-Reyes issued a report, recommending that Petitioner Antron Demond Edwards's motion to vacate his sentence be granted. (Rep. & Rec., ECF No. 19, 1.) The Government filed objections to one of the sections of Judge Otazo-Reyes's report. (Gov.'s Obj. to Sec. 6, ECF No. 21, 1.) Edwards, represented by counsel, neither objected to the report nor responded to the Government's objections. After a de novo review, the Court **accepts in part and rejects in part** the magistrate judge's report and recommendation and **denies** Edwards's motion (**ECF No. 1**).

1. Background

Edwards was charged, in 2014, with three counts related to an armed robbery of a McDonald's restaurant committed in December 2013. He pleaded guilty to one of the counts: possession of ammunition by a convicted felon. The Government dismissed the remaining counts of Hobbs Act robbery and the use of a firearm during the commission of a crime. Under the Armed Career Criminal Act, the Court found Edwards to be subject to a fifteen-year minimum mandatory sentence and sentenced him to 180 months, followed by five years of supervised released. In doing so, the Court relied on the following prior convictions in applying the ACCA to Edwards's sentence: burglary; fleeing and eluding through a high-speed chase; first degree arson; possession with intent to sell or deliver cocaine (two separate convictions: a 1998 case and a 2005 case); and burglary of an unoccupied structure. (Mot. to Vacate, ECF No. 1, 10; Presentence Inv. Rep. ¶ 17, ECF No. 31 in *United States v. Edwards*, Case No. 1:14-cr-20130-RNS (S.D. Fla. 2014).)

On June 24, 2016, Edwards filed the instant motion to vacate, contending that his fifteen-year minimum-mandatory sentence has been rendered illegal by the United States Supreme Court's ruling that the ACCA's residual clause is unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015).

2. Legal Framework

Under the ACCA, a defendant found guilty of possession of ammunition by a convicted felon and who has three previous convictions for a violent felony or a serious drug offense must be imprisoned for at least fifteen years. 18 U.S.C. § 924(e)(1). "Violent felony," in turn, is defined 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 referred to as the "elements clause"; the second prong contains the "enumerated-crimes clause" and the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

On June 26, 2015, the United States Supreme Court held in *Johnson* that the residual clause, referring to a felony that "presents a serious potential risk of physical injury to another," 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*, 135 S. Ct. at 2557–58, 2563. The *Johnson* Court specifically did not call into question the application of either the elements clause or the enumerated crimes clause. *Id.* at 2563. Ten months later the Supreme Court held, in *Welch v. United States*, that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. 136 S. Ct. 1257, 1264–65 (2016).

The Government concedes that, after *Johnson*, Edwards's two burglary convictions and his conviction for fleeing and eluding do not qualify as predicate convictions under the ACCA. Edwards, moreover, acknowledges that his two drug convictions do qualify as predicate convictions. The Government also agrees that Edwards's arson conviction does not satisfy the ACCA's elements clause. Thus the sole dispute between the parties is whether Edwards's arson conviction falls within the enumerated crimes clause thereby

constituting the third predicate prior conviction required for imposition of the ACCA's fifteen-year minimum-mandatory sentence.

3. Discussion

Edwards has not objected to Judge Otazo-Reyes's report and recommendation; and the Government does not object to the majority of it. Despite the absence of objections to most of the report, the Court nonetheless has reviewed the entirety of Judge Otazo-Reyes's report de novo. After doing so, the Court adopts those unobjected to portions of Judge Otazo-Reyes's findings and conclusions that set forth the analysis that should be applied to evaluating whether Florida arson is the same as arson as listed in the enumerated-crimes clause of the ACCA as described above.

To summarize, and as set forth by Judge Otazo-Reyes, in making its evaluation, the Court must determine whether the elements of Edwards's prior arson conviction "are the same as, or narrower than, those of the generic offense" such that the prior crime qualifies as an ACCA predicate. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). "But if the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA [enumerated crime]—even if the defendant's actual conduct (*i.e.,* the facts of the crime) fits within the generic offense's boundaries." *Id.*

The Florida arson statute provides that:

> (1) Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged:
>
> (a) Any dwelling, whether occupied or not, or its contents;
>
> (b) Any structure, or contents thereof, where persons are normally present . . . ; or
>
> (c) Any other structure that he or she knew or had reasonable grounds to believe was occupied by a human being,
>
> is guilty of arson in the first degree, which constitutes a felony of the first degree.

Fla. Stat. § 806.01.

The Eleventh Circuit has not opined on the definition of contemporary, generic arson. To that end, neither party objects to Judge Otazo-Reyes's adoption of the Fifth Circuit's determination that the generic definition of arson "involves a 'willful and malicious burning of property.'" (Rep. & Rec. at 5 (quoting *United States v. Velez-Alderete*, 569 F.3d 541, 546 (5th Cir. 2009).) This generally comports with the determinations of the Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits which "have all concluded that the

modern generic definition of arson is the intentional (or willful) and/or malicious burning of property." *United States v. Delgado-Montoya*, 663 F. App'x 719, 724 (10th Cir. 2016) (citing *United States v. Gatson*, 776 F.3d 405, 410 (6th Cir. 2015); *United States v. Misleveck*, 735 F.3d 983, 988 (7th Cir. 2013); *United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009); *Velez–Alderete*, 569 F.3d at 546 (per curiam); *United States v. Craig*, 236 Fed. App'x. 863, 865 (4th Cir. 2007) (per curiam) (unpublished); *United States v. Hathaway*, 949 F.2d 609, 610 (2d Cir. 1991) (per curiam)).

In comparing Florida arson with generic arson, it is readily apparent, as Judge Otazo-Reyes notes, that Florida arson covers more conduct than generic arson. Specifically, Florida arson can be committed either "willfully or unlawfully" *or* "while in the commission of any felony." By contrast, generic arson may only be predicated on "the intentional (or willful) and/or malicious burning of property." *Delgado-Montoya*, 663 F. App'x at 724. However, as Judge Otazo-Reyes concludes, the Florida statute is divisible and Edwards was convicted only for committing arson "willfully and unlawfully" rather than "while in the commission of a felony." (Rep. & Rec. at 7.) Neither party objects to Judge Otazo-Reyes's application of this "modified categorical approach," *Mathis*, 136 S. Ct. at 2249, in assessing the comparison of the Florida statute to generic arson. (Rep. & Rec. at 6.) This Court adopts this framework.

Where the Court parts ways with the report and recommendation, however, is the actual application of this framework to comparing Florida arson with contemporary, generic arson. In her evaluation of the two arsons, Judge Otazo-Reyes narrows the analysis down to determining whether Florida arson's "willful and unlawful" "matches" generic arson's "willful and malicious." (*Id.* at 7.) In concluding that the two phrases "do not match," Judge Otazo-Reyes relies on Florida's Fourth District Court of Appeal's opinion in *Lofton v. State*, 416 So. 2d 522, 523 (Fla. 4th DCA 1982). In that opinion the Florida appellate court explained the evolution of Florida's arson statute which, prior to 1979, prohibited "willful and malicious," as opposed to "willful and unlawful," burning. This change in the statute was implemented, according to the *Lofton* court, to address the difficulty in obtaining arson convictions due to "the problems inherent in proving malice." *Id.* Under Florida law, "malice" in this context was equated with a "defendant's evil intent." *Id.* By substituting the word "unlawfully" for the word "maliciously," said the court, the statute obviated the need for the prosecutor to "prove an evil intent on the part of the perpetrator." *Id.* Instead, under the revised statute, "[i]t need only be shown that the willful act was done without a legitimate, lawful purpose." *Id.* Based on this opinion, the magistrate judge concludes that the "willful and unlawful"

elements of Florida arson do not match the "willful and malicious" elements of generic arson. The Court has reservations about this analysis.

To begin with, *Lofton's* definition of malice as "evil intent" does not comport with how "maliciously" has been defined in the context of generic arson. In the generic arson context, "maliciously" has been defined as "that state of mind which actuates conduct injurious to others without lawful reason, cause or excuse." *United States v. Doe*, 136 F.3d 631, 635 (9th Cir. 1998) (quoting and citing state court cases); *see also* 5 Am. Jur. 2d *Arson and Related Offenses* § 7 (2017) ("'Malicious,' as in the requirement of a malicious burning as used in defining arson, is quite different from its literal meaning. It need not take the form of revenge or ill will, and is done with a design to do an intentional wrongful act toward another . . . without any legal justification, excuse or claim of right"). The Court thus finds that the amendment of Florida's statute was a reflection not of Florida's intention to broaden Florida arson beyond generic arson but, instead, to bring Florida arson in line with generic arson in light of Florida's restrictive definition of malice.

The Court finds Florida arson substantially corresponds to generic arson even though there is not a word-for-word match of the listed elements. *See Taylor v. United States*, 495 U.S. 575, 602 (1990) (requiring a substantial correspondence between the generic offense and the state offense and noting that "exact formulations vary"). The question of what Congress "had in mind" when it added "arson" to the ACCA is to be answered by reference to how "the term is now used in the criminal codes of most States." *Id.* at 598. Additionally, 18 U.S.C. § 844(i), enacted just four years before arson was added to the ACCA, "is powerful evidence" of what Congress regards as arson. *Misleveck*, 735 F.3d at 986. The federal arson statutes apply to a person who acts "maliciously," which includes acting "intentionally or with willful disregard of the likelihood that damage or injury would result," *United States v. Morrison*, 218 F. App'x 933, 941 (11th Cir. 2007), and which is also defined as "that state of mind which actuates conduct injurious to others without lawful reason, cause, or excuse," *Doe*, 136 F.3d at 635. The Court concludes, then, that Florida's requirement of acting "willfully and unlawfully" does not encompasses anything broader than generic arson. *See United States v. Bedonie*, 913 F.2d 782, 791 (10th Cir. 1990) (finding no plain error where jury instructions used the words "unlawfully" and "intentionally" instead of the precise words "willfully" and "maliciously" and noting this discrepancy amounts merely "to a difference between synonyms"); *see also Whaley*, 552 F.3d at 907 (perceiving "little difference," in the arson context, among the words "intentionally," "willfully," "maliciously," "wantonly," and "knowingly").

4. Conclusion

The Court finds that the report and recommendation places too much emphasis on the mismatch of the word "unlawfully" in the state-arson context and the word "maliciously" in the generic-arson context. Instead, the Court finds substantial correspondence between the Florida arson statute, under which Edwards was convicted in 1998, and the contemporary, generic arson encompassed in the enumerated-crimes clause of the ACCA. The Court therefore **rejects** section 6 of the report and recommendation (Rep. & Rec. at 7–8), particularly the magistrate judge's recommendation that Edwards's motion be granted, but **adopts** the remainder. The Court thus **denies** Edwards's motion to vacate his sentence (**ECF No. 1**).

The Clerk is directed to **close** this case and any pending motions are **denied as moot**.

Done and ordered, in chambers at Miami, Florida, on April 28, 2017.

Robert N. Scola, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-22585-CIV-SCOLA/OTAZO-REYES
(NO. 14-20130-CR-SCOLA)

ANTRON EDWARDS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Movant Antron Edwards ("Edwards" or "Movant") Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 ("Section 2255") (hereafter, "Motion to Vacate") [D.E. 1]. This matter was referred to the undersigned by the Honorable Robert N. Scola, Jr., United States District Judge, pursuant to 28 U.S.C. § 636 and Local Magistrate Judge Rule 1 [D.E. 5]. The undersigned held a hearing on this matter on October 18, 2016. For the reasons stated below, the undersigned respectfully recommends that the Motion to Vacate be GRANTED.

PROCEDURAL BACKGROUND

On March 4, 2014, Edwards was charged by way of indictment in Case No. 14-20130-CR-SCOLA (hereafter, "Case 14-20130") of the following crimes allegedly committed on December 11, 2013:

Count 1: Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a).

Count 2: Using and carrying a firearm during and in relation to a crime of violence, namely, Hobbs Act Robbery, in violation of 18 U.S.C. § 924(c)(1)(A).

Count 3: Possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e).

See Indictment [Case 14-20130, D.E. 1]. On August 14, 2014, Edwards pled guilty to Count 3 only [Case 14-20130, D.E. 27]. Pursuant to a plea agreement, the government agreed to dismiss Counts 1 and 2 of the indictment at the time of sentencing [Case 14-20130, D.E. 25]. On November 13, 2014, Edwards was sentenced to a term of 180 months, followed by five years of supervised release. See Judgment [Case No. 14-20130, D.E. 36]. Edwards was subject to a 15-year minimum mandatory sentence pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). See Motion to Vacate [D.E. 1 at 1]. The Court relied upon the following prior convictions for application of the ACCA to Edwards' sentence: burglary; fleeing and eluding high speed chase; arson first degree; possession with intent to sell or deliver cocaine; burglary of an unoccupied structure; and cocaine/sell/man/del/poss with intent. See Response to Motion to Vacate [D.E. 9 at 2].

On June 24, 2016, Edwards filed the instant Motion to Vacate [D.E. 1]; see also [Case 14-20130, D.E. 37]. Edwards contends that his 15-year minimum mandatory sentence pursuant to the ACCA has been rendered illegal by the United States Supreme Court's ruling that the ACCA's "residual clause" is unconstitutionally vague. See Johnson v. United States, 135 S. Ct. 2551 (2015).

APPLICABLE LAW

The ACCA provides that any person who violates 18 U.S.C. § 922(g)—possession of a firearm or ammunition by a convicted felon—and has three previous convictions for a violent felony or a serious drug offense, shall be imprisoned for at least 15 years. 18 U.S.C. § 924(e)(l). The ACCA defines the term "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 the "elements clause;" and the second prong contains the "enumerated crimes clause" and the "residual clause." United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012).

On June 26, 2015, the Supreme Court held in Johnson 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, 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 clause of the ACCA's definition of a violent felony. Id. at 2563. On April 18, 2016, the Supreme Court held in Welch v. United States, 136 S. Ct. 1257 (2016), that Johnson announced a new, substantive rule that applies retroactively to cases on collateral review. Id. at 1264-65.

The government has conceded that, after Johnson, Edwards' two burglary convictions and the conviction for fleeing and eluding high speed chase do not qualify as predicate convictions under the ACCA; and that the arson conviction does not satisfy the ACCA's elements clause. See Response to Motion to Vacate [D.E. 9 at 2, 7]. Further, Edwards acknowledges that his two drug convictions do qualify as predicate convictions under the ACCA. See Reply in Support of Motion to Vacate [D.E. 13 at 2]. Therefore, the sole dispute between the parties is whether the arson conviction falls within the enumerated crimes clause of the ACCA, thereby constituting the third predicate prior conviction required for imposition of the ACCA's 15-year minimum mandatory sentence. Id. at 3.

DISCUSSION

1. Analytical framework

The "ACCA defines the term 'violent felony' to include any felony, whether state or federal, that 'is burglary, arson, or extortion.'" Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). "In listing those crimes, we have held, Congress referred only to their usual or (in our terminology) generic versions—not to all variants of the offenses." Id. (citing Taylor v. United States, 495 U.S. 575, 598 (1990)). "To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary [or other enumerated crime], while ignoring the particular facts of the case." Id. "A crime counts as 'burglary' [or 'arson' or 'extortion'] under the [ACCA] if its *elements* are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA 'burglary' [or 'arson' or 'extortion']—even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries." Id.

2. The Florida arson statute

The Florida arson statute provides that:

> (1) Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged:
>
> (a) Any dwelling, whether occupied or not, or its contents;
>
> (b) Any structure, or contents thereof, where persons are normally present, such as: jails, prisons, or detention centers; hospitals, nursing homes, or other health care facilities; department stores, office buildings, business establishments, churches, or educational institutions during normal hours of occupancy; or other similar structures; or

> (c) Any other structure that he or she knew or had reasonable grounds to believe was occupied by a human being,
>
> is guilty of arson in the first degree, which constitutes a felony of the first degree.

Fla. Stat. § 806.01.

3. Generic arson

Although the Eleventh Circuit has not opined on the definition of generic arson, the Fifth Circuit has found that "courts considering whether arson is a crime of violence agree that the generic, contemporary definition of arson involves a 'willful and malicious burning of property.'" United States v. Velez-Alderete, 569 F.3d 541, 546 (5th Cir. 2009) (quoting United States v. Velasquez-Reyes, 427 F.3d 1227, 1230 (9th Cir. 2005) (quoting United States v. Hathaway, 949 F.2d 609, 610 (2d Cir. 1991))). The Fifth Circuit also relied on

> *United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009) ("[W]e conclude that the generic offense of arson, for purposes of the sentence enhancement in [the Armed Career Criminal Act], has as elements the malicious burning of real or personal property of another."); *United States v. Craig*, 236 F. App'x 863, 865 (4th Cir. 2007) (holding that "the burning of personal property with intent to defraud . . . substantially corresponds to the generic definition of arson for the purposes of [the Armed Career Criminal Act]"); and *United States v. Miller*, 246 F. App'x 369, 372 (6th Cir. 2007) (stating that "[t]he widely accepted 'generic' definition of arson thus includes the knowing burning of personal property without consent or with unlawful intent" in holding that Tennessee's arson statute constitutes a violent felony under the Armed Career Criminal Act).

Id. The Fifth Circuit concluded, "We join our sister Courts of Appeals in holding that the generic, contemporary definition of arson involves a willful and malicious burning of property." Id.

4. Comparison of Florida arson with generic arson

Applying the Mathis analytical framework, it is clear that the Florida arson statute covers more conduct than generic arson as defined by the Fifth Circuit. Specifically, Florida arson can be committed "willfully and unlawfully" or "while in the commission of any felony," while

generic arson may only be predicated on "a willful and malicious burning of property." Compare Fla. Stat. § 806.01(1) with Velez-Alderete, 569 F.3d at 546. However, at the October 18th hearing, the government argued that the Florida arson statute is divisible, that only the "willfully and unlawfully" portion is involved in Edwards' case, and that only that portion should be compared to generic arson.

5. Divisible statutes and the modified categorical approach

In Mathis, the Supreme Court acknowledged that, "The comparison of elements that the categorical approach requires is straightforward when a statute sets out a single (or 'indivisible') set of elements to define a single crime. The court then lines up that crime's elements alongside those of the generic offense and sees if they match." Mathis, 136 S. Ct. at 2248. The Supreme Court added that "Some statutes, however, have a more complicated (sometimes called 'divisible') structure, making the comparison of elements harder." Id. at 2249 (citing Descamps v. United States, 133 S. Ct. 2276, 2283 (2013)). In those cases,

> this Court approved the "modified categorical approach" for use with statutes having multiple alternative elements. See, *e.g., Shepard v. United States*, 544 U.S. 13, 26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). Under that approach, a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of. See *ibid.*; *Taylor*, 495 U.S., at 602, 110 S. Ct. 2143. The court can then compare that crime, as the categorical approach commands, with the relevant generic offense.

Id. at 2249.

Here, Movant was charged with committing arson "willfully and unlawfully, or while in the commission of any felony." See Gov't Ex. 2 at 3. However, no specific felony was alleged in the charging document. Id.

The applicable Florida Standard Jury Instruction reads, in pertinent part:

> To prove the crime of Arson, the State must prove the following [three] [four] elements beyond a reasonable doubt:

***

Give 2a or 2b

2. a. The damage was done willfully and unlawfully.

b. The damage was caused while defendant was engaged in the commission of (felony alleged).

***

See Gov't Ex. 1.

Given the alternative elements for proving arson and the absence of an alleged underlying felony, the undersigned concludes that the arson statute is divisible and that Edwards was convicted for committing arson "willfully and unlawfully" rather than "while in the commission of a felony." Mathis, 136 S. Ct. at 2248-49.

6. Comparison of the divisible Florida arson with generic arson

The final task is to line up the elements of the divisible Florida arson committed "willfully and unlawfully" with those of the generic offense to see if they match. Mathis, 136 S. Ct. at 2248-49. As noted above, the Fifth Circuit has concluded that "the generic, contemporary definition of arson involves a willful and malicious burning of property." Velez-Alderete, 569 F.3d at 546. Therefore, the question is whether "willful and unlawful" matches "willful and malicious."

In Lofton v. State, 416 So. 2d 522 (Fla. 4th DCA 1982), Florida's Fourth District Court of Appeal explained that the arson statute "was amended effective June 1, 1979" to prohibit "the 'willful and unlawful' burning, as opposed to the 'willful and malicious' burning contained in the prior statute." Id. at 522-23. The court further explained,

> Under the former statute, arson convictions were difficult to obtain because of the problems inherent in proving malice, i.e., the defendant's evil intent. For example, in *Gould v. State*, 312 So.2d 225 (Fla. 1st DCA 1975), the First District Court of

> Appeal reversed the arson conviction of a defendant who had burned his own house with intent to defraud the insurer of the house because proof of malice was lacking.
>
> In order to alleviate this problem, the Legislature substituted the word "unlawfully" for the word "maliciously." Under this new wording the State need not prove an evil intent on the part of the perpetrator. It need only be shown that the willful act was done without a legitimate, lawful purpose.

Id. at 523. Given this interpretation of Florida's arson statute by a Florida court, the undersigned concludes that the "willful and unlawful" elements of the divisible Florida arson do not match with the "willful and malicious" elements of generic arson as defined by the Fifth Circuit. Therefore, the divisible Florida arson statute under which Edwards was convicted does not qualify as an enumerated predicate crime for purposes of the ACCA. Mathis, 136 S. Ct. at 2249.[1]

CONCLUSION

Because Edwards lacks the three predicate convictions required for sentencing enhancement pursuant to the ACCA, the undersigned RESPECTFULLY RECOMMENDS that Edwards' Motion to Vacate be GRANTED.

Pursuant to Local Magistrate Judge Rule 4(b), the parties have **fourteen days** from the date of this Report and Recommendation to file written objections, if any, with the Honorable Robert N. Scola, Jr. Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. See Resolution Tr. Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993). Further, "failure to object in accordance with the provisions of [28 U.S.C.] § 636(b)(1) waives the right to challenge on appeal the district court's

[1] The government cites to United States v. Whaley, 552 F.3d 904, 907 (8th Cir. 2009) for the proposition that there is little difference among the following mental states: "intentionally," "willfully," "maliciously," "wantonly," and "knowingly." See Response to Motion to Vacate [D.E.. 9 at 5 n.4]. However, this general comment from the Eight Circuit must yield to the clear pronouncements from Florida's Fourth District Court of Appeal and the Fifth Circuit regarding Florida arson and generic arson.

order based on unobjected-to factual and legal conclusions." See 11th Cir. R. 3-1 (I.O.P. - 3).

RESPECTFULLY SUBMITTED in Miami, Florida this 20th day of January, 2017.

ALICIA M. OTAZO-REYES
UNITED STATES MAGISTRATE JUDGE

cc: United States District Judge Robert N. Scola, Jr.
Counsel of Record