APPENDIX

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10293
Non-Argument Calendar

D.C. Docket Nos. 9:16-cv-80930-DTKH; 0:07-cr-60281-DTKH-1

WALLACE THORNTON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(September 19, 2018)

Before TJOFLAT, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

Wallace Thornton, a federal prisoner serving a 204-month sentence[1] under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate sentence, in which he asserted that his ACCA sentence was unconstitutional because he no longer had three qualifying prior violent felony convictions, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).[2] In relevant part, he argued that his two prior Florida aggravated battery convictions did not qualify as violent felonies under the ACCA's elements clause, despite our precedent to the contrary in *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2013), *abrogated on other grounds by Johnson*, 135 S. Ct. 2551. The district court determined that it was bound by *Turner*, and denied Thornton's § 2255 motion. Nevertheless, the district court granted Thornton a certificate of appealability on the issue of "[w]hether [his] conviction for Florida aggravated battery, pursuant to Fla. Stat. § 784.045(1), is a violent felony under the [ACCA]?"

Thornton maintains on appeal that his prior convictions for aggravated battery do not categorically qualify as violent felonies under the ACCA's elements

[1] Thornton pleaded guilty in 2008 to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1).

[2] In *Johnson*, the Supreme Court held that the residual clause of the violent felony definition in the ACCA was unconstitutionally vague and that imposing an increased sentence under that provision violated due process. 135 S. Ct. at 2557-58, 2563.

clause, that *Turner* was wrongly decided for various reasons, and that we should take this opportunity to reconsider our ruling in *Turner*. We affirm.

When reviewing the denial of a § 2255 motion, we review legal issues *de novo* and findings of fact for clear error. *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009). "We may affirm on any ground supported by the record." *Castillo v. United States*, 816 F.3d 1300, 1303 (11th Cir. 2016) (quoting *LeCroy v. United States*, 739 F.3d 1297, 1312 (11th Cir. 2014)). Further, under the prior-panel-precedent rule, "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. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

As an initial matter, Thornton failed to meet his burden of proof to establish entitlement to relief under *Johnson* because he did not establish that the district court more likely than not relied on the now-invalidated residual clause when imposing the ACCA enhancement, and the record is silent on this matter. *Beeman v. United States*, 871 F.3d 1215, 1221-22, 1224-25 (11th Cir. 2017) (holding that, in order to prove entitlement to relief based on *Johnson*, a § 2255 movant must establish that the district court more likely than not relied on the residual clause in imposing the ACCA enhancement, and where there is no evidence that the district court relied on the residual clause, the movant's claim must be denied). Although

Thornton maintains that *Beeman* was wrongly decided, it remains binding precedent. *Archer*, 531 F.3d at 1352.

Moreover, Thornton's argument that aggravated battery under Fla. Stat. § 784.045(1)(a)(2) is not a violent felony under the ACCA's elements clause is foreclosed by our prior binding precedent. In *Turner*, we held that convictions under Fla. Stat. § 784.045(1)(a)(1) and (1)(a)(2) categorically qualify as a violent felony under the ACCA's elements clause. *Turner*, 709 F.3d at 1341. Although Thornton maintains that *Turner* was incorrectly decided for various reasons and should therefore not foreclose his claim, we recently rejected a similar argument, explaining that, "even if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it." *United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir.), *cert. denied*, 138 S. Ct. 197 (2017); *see also United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) ("Under this Court's prior panel precedent rule, there is never an exception carved out for overlooked or misinterpreted Supreme Court precedent."), *cert. denied*, 137 S. Ct. 2264 (2017). Accordingly, we **AFFIRM**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

07-60281 CASE NO. CR-HURLEY MAGISTRATE JUDGE VITUNAC

21 U.S.C. § 841(a)(1)
18 U.S.C. § 924(c)(1)
18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(e)(1)

UNITED STATES OF AMERICA

v.

WALLACE THORNTON,

Defendant.
_____/

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about September 19, 2007, in Broward County, in the Southern District of Florida, the defendant,

WALLACE THORNTON,

did knowingly and intentionally possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

Pursuant to Title 21, United States Code, Section 841(b)(1)(C), it is further alleged that the controlled substance consisted of a mixture and substance containing a detectable amount of cocaine base, commonly referred to as "crack cocaine."

COUNT TWO

On or about September 19, 2007, in Broward County, in the Southern District of Florida, the defendant,

WALLACE THORNTON,

did knowingly use and carry a firearm, that is, a Jimenez .380 caliber semi-automatic pistol with a serial number 049278, during and in relation to a drug trafficking offense, that is, a violation of Title 21, United States Code, Section 841(a)(1), as set forth in Count 1 of this Indictment, and did possess said firearm in furtherance of such crime; all in violation of Title 18, United States Code, Section 924(c)(1)(A).

COUNT THREE,

On or about September 19, 2007, in Broward County, in the Southern District of Florida, the defendant,

WALLACE THORNTON,

having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, that is, a Jimenez .380 caliber semi-automatic pistol, bearing serial number 049278, and five rounds of 9mm Br C ammunition, any one of which being a violation; in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).

FORFEITURE

1. The allegations of Counts 2 and 3 of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeitures to the United States of America of certain property in which the defendant has an interest, pursuant to the provisions of Title

28, United States Code, Section 2461, Title 18, United States Code, Section 924(d)(1), and the procedures outlined at Title 21, United States Code, Section 853.

2. Upon the conviction of any violation of Title 18, United States Code, Sections 922(g)(1) and 924(c)(1)(A), the defendant shall forfeit to the United States any firearm or ammunition involved in or used in the commission of said violation.

3. The property subject to forfeiture includes, but is not limited to, a Jimenez .380 caliber semi-automatic pistol, serial number 049278, and five rounds of 9mm Br C ammunition.

A TRUE BILL

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

TERRY L. LINDSEY
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

WALLACE THORNTON,

Defendant

_____/

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

___ Miami ___ Key West
_X_ FTL ___ WPB ___ FTP

New Defendant(s) Yes ___ No ___
Number of New Defendants ___
Total number of counts ___

I do hereby certify that:

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 Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) NO
List language and/or dialect

4. This case will take 2 days to try

5. 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			

6. Has this case been previously filed in this District Court? (Yes or No) NO
If yes:
Judge: _____ Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) NO
If yes:
Magistrate Case No. _____
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of 09/19/07
Rule 20 from the _____ District of _____

Is this a potential death penalty case? (Yes or No) NO

7. Does this case originate from a matter pending in the U.S. Attorney's Office prior to April 1, 2003? ___ Yes _X_ No

8. Does this case originate from a matter pending in the U. S. Attorney's Office prior to April 1, 1999? ___ Yes _X_ No
If yes, was it pending in the Central Region? ___ Yes ___ No

9. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ___ No _X_

10. Does this case originate from a matter pending in the Narcotics Section (Miami) prior to May 18, 2003? ___ _X_ No

11. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? ___ Yes _X_ No

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TERRY LINDSEY
ASSISTANT UNITED STATES ATTORNEY
Court No. A5500037

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: WALLACE THORNTON **Case No:**_____

Count #: 1

Possession with intent to distribute cocaine

21 U.S.C. §841(a)(1)

* **Max.Penalty**: 20 years' imprisonment; $1,000,000 fine; at least 3 years' supervised release

Count #: 2

Use of a firearm in relation to a drug trafficking offense

18 U.S.C. §924(c)(1)(A)

* **Max.Penalty**: 5 years' imprisonment consecutive to any sentence imposed as to count 1; $250,000 fine; at least 3 years' supervised release

Counts #: 3

Felon in possession of a firearm

18 U.S.C. §§922(g)(1) and 924(e)(1)

***Max. Penalty:** 15 years' minimum mandatory up to Life imprisonment; $250,000 fine; up to 5 years' supervised release

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

WEST PALM BEACH DIVISION

UNITED STATES OF AMERICA

v.

WALLACE THORNTON

JUDGMENT IN A CRIMINAL CASE

Case Number: 0:07CR60281-001

USM Number: 77533-004

Counsel For Defendant: AFPD Lori E. Barrist
Counsel For The United States: AUSA Terry Lindsey
Court Reporter: Pauline Stipes

The defendant pleaded guilty to Count THREE of the Indictment on March 18, 2008. The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922 (g)(1)	Possession of a firearm by a convicted felon.	September 19, 2007	THREE

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

Counts ONE and TWO of the Indictment are dismissed on the motion of the United States.

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

Date of Imposition of Sentence:
June 6, 2008

DANIEL T. K. HURLEY
United States District Judge

June 16, 2008

DEFENDANT: WALLACE THORNTON
CASE NUMBER: 0:07CR60281-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **204 months. This is the total term of imprisonment imposed as to Count THREE of the Indictment.**

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

The court recommend the term of imprisonment be served at a facility in South Florida.

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: WALLACE THORNTON
CASE NUMBER: 0:07CR60281-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years. This is the total term of supervised release imposed as to Count THREE of the Indictment.**

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: WALLACE THORNTON
CASE NUMBER: 0:07CR60281-001

SPECIAL CONDITIONS OF SUPERVISION

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

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

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

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: WALLACE THORNTON
CASE NUMBER: 0:07CR60281-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.00	$	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: WALLACE THORNTON
CASE NUMBER: 0:07CR60281-001

SCHEDULE OF PAYMENTS

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

A lump sum payment of **$100.00** is due immediately.

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

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

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

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

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

FORFEITURE

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

One Jimenez .380 caliber semi-automatic pistol, serial number 049278, and five rounds of 9mm Br C ammunition. or to any firearm and ammunition involved in or used in the commission of said violation.

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

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-80930-Civ-Hurley
(Criminal Case No. 07-60281-Cr-Hurley)

WALLACE THORNTON,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent
_____/

MOTION TO VACATE SENTENCE UNDER 28 U.S.C. §2255 AND MEMORANDUM OF LAW IN SUPPORT

The movant, Wallace Thornton, through counsel, and pursuant to 28 U.S.C. §2255, asks that this Court vacate, set aside, or correct his sentence imposed under the Armed Career Criminal Act, 18 U.S.C. §924(e), in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and in support states:

1. On March 18, 2008, Mr. Thornton pled guilty to possession of a gun by a convicted felon.

2. At his June 6, 2008 sentencing, the court determined that Mr. Thornton qualified for an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. §924(e), or "ACCA," which requires a 15-year mandatory minimum sentence if a defendant has three previous convictions for a "violent felony" or "serious drug offense" committed on occasions different from one another. 18 U.S.C. §924(e)(1). The court thereupon imposed a sentence of 204 months.

3. ACCA defines a "violent felony" as a crime punishable by imprisonment for a term exceeding a 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 the use of explosives, or otherwise involves conduct that presents a serious risk of physical injury to another...

18 U.S.C. §924(e)(2)(B). The first paragraph is known as the "elements clause," while the phrase "otherwise involves conduct that presents a serious risk of physical injury to another" is commonly referred to as the "residual clause." *Johnson*, 135 S. Ct. at 2256.

4. On June 26, 2015, the Supreme Court held in *Johnson* that ACCA's residual clause is unconstitutionally vague and violates the due process clause of the U.S. Constitution. *Johnson,* 135 S. Ct. at 2563.

5. Application of *Johnson* to the instant case shows that Mr. Thornton's ACCA sentence was imposed in violation of the Constitution, and in excess of the statutory maximum 10 year sentence. Accordingly, he is entitled to relief pursuant to 28 U.S.C. §2255.

PROCEDURAL HISTORY

Mr. Thornton was charged in Count 1 with possession with intent to distribute crack cocaine in violation of 21 U.S.C. §841(a)(1), in Count 2 with use of a firearm in relation to a drug trafficking felony in violation of 18 U.S.C. §924(c)(1)(A), and in Count 3 with possession of a gun by a convicted felon in violation of 18 U.S.C. §§922(g)(1) and

924(e). [DE1]. Mr. Thornton pled guilty pursuant to a written plea agreement which provided that in exchange for his guilty plea to the 924(e) gun charge, the government would dismiss the other two charges pending against him. The plea agreement also stated that Mr. Thornton faced a mandatory minimum 15 year to life sentence. [DE36].

A presentence investigation report (PSI) was prepared. While the guideline for a gun offense is found in U.S.S.G. §2K2.1, because Mr. Thornton was "subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e)," he was classified as an armed career criminal, and U.S.S.G. §4B1.4 was used. The probation officer listed the following as qualifying convictions: (1) January 8, 1993 burglary of a dwelling (Dkt.#: 92-12581); (2) July 8, 1994 burglary of a dwelling (Dkt.#: 93-8128); (3) January 8,1993 aggravated battery (two counts) and aggravated assault (two counts) (Dkt.#: 92-15158); (4) March 5, 1996 delivery of cocaine (Dkt.#: 96-1517); and (5) November 14, 1996 aggravated battery with a firearm, robbery with a firearm, and shooting at occupied motor vehicle (Dkt.#: 95-26106). Because Mr. Thornton used or possessed the gun in connection with a controlled substance offense, his armed career criminal offense level was 34. [PSI¶24].

Three levels were deducted for pleading guilty, resulting in a total offense level of 31. [PSI¶27]. Mr. Thornton's criminal history category was VI, resulting in an advisory guideline range of 188 to 235 months, with a minimum term of imprisonment of 180 months. [PSI¶¶36,64,65]. An armed career criminal's term of supervised release is three to five years. [PSI¶67]. Without the enhancement, it is one to three years. *See* U.S.S.G. §5D1.2(a)(2).

At the sentencing hearing held June 6, 2008, the district court imposed a sentence of 204 months imprisonment and a five year term of supervised release. [DE41]. Mr. Thornton did not appeal his sentence, and has not previously filed a motion to vacate his sentence pursuant to 28 U.S.C. §2255.

On April 18, 2016, the Supreme Court decided *Welch v. United States,* 136 S. Ct. 1257 (2016), which held that *Johnson* applies retroactively.

GROUNDS FOR RELIEF

Mr. Thornton is no longer subject to the ACCA enhancement after *Johnson v. United States,* 135 S. Ct. 2551 (2015). Because burglary of a dwelling, aggravated battery, and aggravated assault are no longer considered "violent felonies," Mr. Thornton does not have the three required convictions for the ACCA enhancement. This court should therefore grant this motion, vacate his sentence, and set his case for resentencing.

I. Mr. Thornton's *Johnson* Claim is Cognizable Under §2255

Title 28 U.S.C. §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). Mr. Thornton claims that he was wrongly sentenced as an armed career criminal because, after *Johnson*, he does not have three qualifying predicate offenses. In light of *Johnson*'s holding that ACCA's residual clause is unconstitutionally vague, Mr. Thornton's ACCA sentence violates due process and was therefore "imposed in violation of the

Constitution."

Mr. Thornton's sentence was also "in excess of the maximum allowed by law." The statutory maximum sentence for possession of a gun by a convicted felon is 10 years. *See* 18 U.S.C. §924(a)(2). However, a defendant sentenced as an armed career criminal faces a term of imprisonment of "not less than 15 years" to life. *See* 18 U.S.C. §924(e)(1). Because a misapplication of the ACCA "results in a sentence that exceeds the statutory maximum," relief is available under §2255(a). *Spencer v. United States,* 773 F.3d 1132, 1143 (11th Cir. 2014)(en banc).

II. *Johnson* Applies Retroactively to this Case

Teague v. Lane, 489 U.S. 288 (1989), governs the application of new Supreme Court decisions like *Johnson* to cases on collateral review. Under *Teague,* while "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," *Id.* at 310, "[n]ew substantive rules generally apply retroactively" to cases on collateral review. *Schriro v. Summerlin,* 542 U.S. 348, 351 (2004); *see also In re Rivero,* 797 F.3d 986, 989 (11th Cir. 2015)(new rule announced in *Johnson* is substantive rather than procedural because it narrowed the scope of §924(e) by interpreting its terms, specifically the term "violent felony"); *Mays v. United States,* 817 F.3d 728, 736 (2016)(applying *Teague, Johnson* is retroactive because "it qualifies as a substantive rule...since it narrows the class of people that may be eligible for a heightened sentence under the ACCA").

Significantly, in *Welch v. United States,* the Supreme Court held that although

Johnson announced a new rule, it applied to Welch's §2255 proceeding because "*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." 136 S. Ct. 1257, 1268 (2016). Accordingly, *Johnson* applies retroactively to this §2255 proceeding.

III. Mr. Thornton's Motion is Timely

Mr. Thornton's motion is timely under §2255(f)(3), which provides a one year statute of limitations that runs from "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." *See* 28 U.S.C. §2255(f)(3). A right is "newly recognized" under §2255(f)(3) if it satisfies *Teague*'s "new rule" requirement. *Howard v. United States,* 374 F.3d 1068, 1073-1074 (11th Cir. 2004). *Welch* held that *Johnson* "announced a new rule" that was "retroactively applicable to cases on collateral review." *Welch,* 136 S. Ct. at 1268. Mr. Thornton therefore has one year from the date that *Johnson* was decided – or until June 26, 2016 – to file his §2255 motion. *See Dodd v. United States,* 545 U.S. 343, 360 (2005). His motion is timely under §2255(f)(3).

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

In enhancing Mr. Thornton's sentence under ACCA, the court relied on the following convictions: (1) PSI¶31: 1994 burglary of a dwelling; (2) PSI¶32: 1993 burglary of a dwelling; (3) PSI¶33: 1993 aggravated battery and aggravated assault; (4) PSI¶34: 1996 delivery of cocaine; and (5) PSI¶35: 1996 aggravated battery with a

firearm, robbery with a firearm, and shooting at an occupied vehicle. Mr. Thornton's sentence was wrongly enhanced under the ACCA because his convictions for burglary of a dwelling, aggravated battery, and aggravated assault are no longer violent felonies.

Burglary of a Dwelling is Not a Violent Felony

Under Florida law, "burglary means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein . . . ." Fla. Stat. §810.02. Critically, the statute defines the elements of "structure" and "dwelling" to include the curtilage thereof. Fla. Stat. §810.011(1)-(2). Accordingly, the Florida burglary statute is broader than generic burglary, which does not include burglary of the curtilage. *See James v. United States*, 550 U.S. 192, 212 (2007). The statute is also indivisible because "structure" and "dwelling" are defined to include the curtilage, and the Florida Supreme Court has made clear that burglary of the curtilage is not an alternative element or crime. *Baker v. State*, 636 So.2d 1342, 1344 (Fla. 1994) ("There is no crime denominated burglary of a curtilage").

Because the Florida burglary statute is overbroad and indivisible, convictions for burglary of a structure or dwelling can never qualify as generic burglary, and the modified categorical approach does not apply. *See United States v. Howard*, 742 F.3d 1342, 1345–49 (11th Cir. 2014)(where "none of the alternatives may match the elements of the generic crime..., 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"). Accordingly, the Eleventh Circuit as granted several successive

applications involving Florida burglary. *See, e.g.*, *In re Gomez*, No. 16-10516, Order at 5 (Mar. 3, 2016)("Convictions for burglary under Florida law do not qualify as 'violent felonies'" after *Johnson*); *In re Barber*, No. 16-10107, Order at 5–6 (Feb. 10, 2016) (observing that "the definition of 'burglary' under Florida law is broader than that of generic burglary" because it includes the curtilage; "the definitions of 'dwelling' and 'structure' under Fla. Stat. §810.011 [are not] divisible;" and therefore "burglary under [Fla. Stat.] §810.02 can qualify as a 'violent felony' under only the residual clause"); *In re Urquhart*, No. 16-11460 (Apr. 29, 2016).

Aggravated Battery is Not a Violent Felony

An aggravated battery in violation of Fla. Stat. §784.045, is a simple battery, in which the defendant either (1) "[i]ntentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement," or (2) "uses a deadly weapon." Like any other Florida battery, aggravated battery can be committed by a non-consensual and non-violent "touching." The Florida jury instructions make clear that the "touching or striking" component is a single, indivisible element. Accordingly, under the categorical approach, and the "least culpable act" rule, *see Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013), every conviction for aggravated battery must be considered a mere non-consensual "touching" in which the offender either knowingly causes great bodily harm, or uses a deadly weapon. And after *Descamps*[1] and *Estrella*[2],

[1] *United States v. Descamps,* 133 S. Ct. 2276 (2013).

[2] *United States v. Estrella,* 758 F.3d 1239 (11th Cir. 2014).

both alternatives are overbroad when compared to an offense that has "as an element" the use or threatened use of "violent force" against another. *See Curtis Johnson v. United States*, 559 U.S. 133 (2010).

A person can knowingly cause great bodily harm to another with only *de minimis* force – for instance, by softly applying a lotion or toxin to another's skin, knowingly it will cause a severe allergic reaction. And the second alternative, "using a deadly weapon" during a battery, does not require that the weapon ever "touch" the victim. Conviction is permissible if the defendant simply holds the weapon while committing a simple battery. *See, e.g., Severance v. State*, 972 So.2d 931, 934 (4th DCA 2007)(en banc)(clarifying that to "use a deadly weapon" for the 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").

Finally, the term "deadly weapon" in §784.045(1)(a)(2) is itself indeterminate and 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." And that broad definition does not necessitate the use or threat of violent force in every case. Poison is clearly a "deadly weapon" within that definition, and it can be easily administered to another without violent force.

While admittedly, in *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013), the Court held that an aggravated battery conviction qualified as a violent felony within the ACCA's elements clause, *Id.* at 1341, the Court did not conduct the type of strict, element-by-element comparison – and overbreadth analysis – required by the categorical approach after *Descamps*. The Court did not consider how the Florida courts have interpreted the language of the statute, or that Florida's standard jury instructions confirm that the "touches or strikes" component of the statute is indivisible. Since *Turner*'s elements clause analysis thus contravenes the approach now-dictated by *Descamps*, it should not preclude relief at this time. *See, e.g., United States v. Howard*, 742 F.3d 1334, 1338 (11th Cir. 2014)(acknowledging that *Descamps* had unsettled the "settled law" of this Circuit, and requiring that the Court revisit its earlier decision in *United States v. Rainer*, 616 F.3d 1212, 1213 (11th Cir. 2010), holding that "two crucial aspects of our decision in *Rainer* are no longer tenable after *Descamps*").

Although a panel of the Eleventh Circuit recently found after reviewing a *pro se* inmate's application to file a second or successive §2255 motion in light of *Johnson*, that a Florida aggravated battery with a firearm offense "appears to contain 'as an element' the use, attempted use, or threatened use of physical force against the person of another," *In re Robinson*, __ F.3d ___, 2016 WL 1583616 (11th Cir. April 19, 2016) (citing *Turner*), none of the above arguments were made in that *pro se* application. Here, the applicant has made a completely different showing, and based upon the

above argument and authority, it is sufficient to "warrant fuller exploration by the district court." *In re Holladay*, 331 F.3d 1169, 1173-74 (11th Cir. 2003).

Aggravated Assault is Not a Violent Felony

A conviction for "aggravated assault" under Fla. Stat. §784.021 is not a violent felony within the ACCA's elements clause because the Florida courts have held that a person may be convicted under §784.021 upon a *mens rea* of "culpable negligence," which is akin to recklessness. *See LaValley v. State*, 633 So.2d 1126 (Fla. 5th DCA 1995); *Kelly v. State*, 552 So.2d 206 (Fla. 5th DCA 1989); *Green v. State*, 315 So.2d 499 (4th DCA 1975); and *DuPree v. State*, 310 So.2d 396 (Fla. 2nd DCA 1975); *see generally United States v. Garcia-Perez*, 779 F.3d 278, 285 (5th Cir. 2015)(equating Florida's "culpable negligence" standard with "recklessness").

For an offense to be a violent felony within the ACCA's elements clause, however, it must have as an element the active and intentional employment of force, which requires more than negligence or recklessness. *See Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004)(the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" the phrase "use . . . of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct"); *United States v. Palomino Garcia*, 606 F.3d 1317, 1334-1336 (11th Cir. 2010)(because Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force," citing and following *Leocal*).

Admittedly, in *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013), the Court held that an aggravated assault conviction under §784.021 qualified as a violent felony within the ACCA's elements clause since "by its definitional terms, the offense necessarily includes an assault which 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.'" *Id.* at 1338 (emphasis in original). Therefore, the Court reasoned, "a conviction under section 784.021 will always include 'as an element the . . . threatened use of physical force against the person of another.'" *Id.* at 1338 (emphasis in original). The reasoning in *Turner*, however, is inconsistent with the strict, element-by-element comparison now required by the categorical approach as clarified in *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014).

In *Howard*, the Court confirmed that sentencing courts conducting divisibility analysis "are bound to follow any state court decisions that define or interpret the statute's substantive elements because state law is what the state supreme court says it is." *Id.* at 1346. And in *Turner*, the Court did not consider how Florida courts interpreted the *mens rea* element in the underlying assault statute, §784.011.

Based upon the Florida cases cited above, it is clear that the aggravated assault statute has been interpreted by the Florida courts to require no more than "culpable negligence," which is recklessness. Therefore, there is no "match" between the *mens rea* element in §784.021 and an offense that "has as an element the use, attempted use, or

threatened use of physical force against the person of another" as interpreted in *Leocal* and *Palomino Garcia*. As such, a conviction under §784.02 is categorically overbroad and not a violent felony within the elements clause.[3]

Since the elements clause analysis in *Turner* has been abrogated, it should not preclude relief at this time. *See, e.g., United States v. Howard*, 742 F.3d 1334, 1338 (11th Cir. 2014)(acknowledging that *Descamps* had unsettled the "settled law" of this Circuit, and requiring that the Court revisit its earlier decision in *United States v. Rainer*, 616 F.3d 1212, 1213 (11th Cir. 2010), holding that "two crucial aspects of our decision in *Rainer* are no longer tenable after *Descamps*").

CONCLUSION

[3] Although §784.021 is "divisible," and one "alternative" under §784.021 permits conviction for an assault "with a deadly weapon without intent to kill," *see* §784.021(a), the term "deadly weapon" is indeterminate and categorically overbroad vis-a-vis any offense within the elements clause. The term "deadly weapon," notably, is defined in the standard §784.021 instruction to include anything "used or threatened to be used in a way likely to produce death or great bodily harm." And poison, anthrax, and chemical weapons would each produce death or great bodily harm without the "use" of *any* "physical force." Other courts have declared convictions overbroad and outside the elements clause for precisely this reason. *See, e.g, 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, this statute presents the precise scenario presaged in *Howard*, in which "none of the alternatives may match the elements of the generic crime." *Howard*, 742 F.3d at 1346. And in that scenario, *Howard* held, "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." *Id.*

With burglary of a dwelling, aggravated battery, and aggravated assault no longer considered violent felonies, Mr. Thornton has only two predicate convictions. As such, he is no longer subject to the ACCA's enhanced penalty. Mr. Thornton respectfully requests that the court grant his §2255 motion and resentence him without the ACCA enhancement.

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 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/ Lori Barrist
Lori Barrist

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.:16-CV-80930-HURLEY/HOPKINS
07-CR-60281-HURLEY

WALLACE THORNTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION ON MOTION TO VACATE SENTENCE (DE 1)

THIS CAUSE is before this Court upon the District Court's Order referring Petitioner's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 for a Report and Recommendation. (DE 8).[1] Petitioner, a federal prisoner, challenges the armed career criminal enhancement applied to his sentence. (DE 1).

On March 18, 2008, Wallace Thornton pled guilty to possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). (DEcr 36 at 1). Thornton was sentenced as an armed career criminal based on his prior convictions for: (1) aggravated battery[2] [17th Circuit of Florida case no. 92-15158CF10A]; (2) burglary of an occupied dwelling [17th Circuit of Florida case no. 92-12581CF10]; (3) burglary of an occupied dwelling [17th Circuit of Florida case no. 93-008128CF10A]; (4) delivery of cocaine [17th Circuit of Florida

[1] Docket entries referring to the instant civil case (16-cv-80930) are referenced as (DE XX). Docket entries referring to the underlying criminal case (07-cr-60281) are referenced as (DEcr XX).

[2] In case no. 92-15158CF10A Thornton was convicted of two counts of aggravated battery and two counts of aggravated assault. (DE 21-1 at 6, 9). Only one of these four counts may serve as an ACCA predicate conviction, as all four arose from an incident occurring on July 3, 1992, and ACCA predicate offenses must occur on "occasions different from one another." 18 U.S.C. § 924(e)(1). The Second Amended Notice of §924(e) Sentence Enhancement - which listed the convictions on which the Government intended to rely for the ACCA enhancement - listed aggravated battery. (DEcr 33 at 1). Thus, this Court evaluates this predicate conviction as one for aggravated battery.

case no. 96-1517CF10]; and (5) aggravated battery with a firearm [18th Circuit of Florida case no. 95-26106]. (DEcr 33 at 1-2); (DE 21-1 at 6-7). On June 6, 2008, the Court sentenced Thornton to 204 months of imprisonment and 5 years of supervised release. (DEcr 41 at 2-3).

The Armed Career Criminal Act and *Samuel Johnson*

"Under the [Armed Career Criminal Act ("ACCA")], a defendant convicted of violating 18 U.S.C. § 922(g) is subject to a mandatory minimum sentence of 15 years (180 months) if he has three prior convictions for a violent felony or serious drug offense." *United States v. Fritts*, 841 F.3d 937, 938 (11th Cir. 2016) (citing 18 U.S.C. § 924(e)(1)). A violent felony is defined 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). "The first prong of this definition is referred to as the elements clause, while the second prong contains the enumerated crimes clause and, finally, . . . the residual clause." *Fritts*, 841 F.3d at 939.

In *Samuel Johnson*, the United States Supreme Court ("Supreme Court") held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." 135 S.Ct. 2551, 2563 (2015). "The Supreme Court, however, did 'not call into question application of the Act to the four enumerated offenses, or the remainder of the ACCA's definitions of a violent felony.'" *United States v. Hill*, 799 F.3d 1318, 1321 (11th Cir. 2015) (quoting *Samuel Johnson,* 135 S.Ct. at 2563). The Supreme Court has determined that "[*Samuel*] *Johnson* . . . has retroactive effect [ ] on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

Procedural Default

The Government argues Thornton's claim is barred because he failed to raise it at sentencing or on direct appeal. (DE 15 at 3-5). Thornton doesn't dispute that he did not raise this argument during sentencing and acknowledges that he did not appeal. (DE 1 at 4); (DE 16 at 11-16). "Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004) (per curiam). Thornton has defaulted on his claim.

Thornton asserts that his claim raises a jurisdictional defect, which cannot be defaulted. (DE 16 at 11-16). Thornton argues he "received an illegal sentence above the statutory maximum for his §922(g)(1) offense," in violation of this court's subject matter jurisdiction. (DE 16 at 11-12). "[J]urisdictional rules are reserved 'only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.'" *United States v. DiFalco*, 837 F.3d 1207, 1217 (11th Cir. 2016)[3] (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). Thus, "[a] jurisdictional defect occurs only where a federal court lacks power to adjudicate at all." *DiFalco*, 837 F.3d at 1217 (quotation omitted). A "district court's subject-matter jurisdiction over cases involving offenses against the laws of the United States . . . . is plainly vested in the district courts by Congress . . . . in 18 U.S.C. § 3231." *Id.* at 1218. Thus, the argument that a sentencing error means that "the district court lacked all authority to decide the criminal case or to impose a sentence in the first instance" is "obviously erroneous." *Id.*

[3] *DiFalco* abrogated the principal case Thornton relies on for his jurisdictional defect argument, *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998). *See DiFalco*, 837 F.3d at 1216-18.

"A defendant can avoid a procedural bar" if he "show[s] cause for not raising the claim of error on direct appeal *and* actual prejudice from the alleged error." *Lynn,* 365 F.3d at 1234. "[W]here a constitutional claim is so novel that its legal basis [wa]s not reasonably available to counsel, a defendant has cause for his failure to raise the claim . . . ." *Reed v. Ross*, 468 U.S. 1, 16 (1984). And when "a decision of th[e] [Supreme] Court [ ] explicitly overrule[s] one of [its] precedents," "there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a court to adopt the position that th[e] [Supreme] Court [ ] ultimately adopted." *Id.* at 17. In determining whether the legal basis for a defendant's claim was reasonably available, a court looks to the state of the law at the time of his sentencing and appeal. *See Geter v. United States*, 534 F. App'x 831, 836 (11th Cir. 2013) (examining state of the law at time of sentencing and appeal in evaluating whether § 2255 movant had established excuse for procedural default).

Thornton was sentenced on June 6, 2008. (DEcr 41 at 2-3). The basis for Thornton's challenge to his ACCA enhancement is the Supreme Court's *Samuel Johnson* case, where the Court found the ACCA residual clause to be unconstitutionally vague. *See Samuel Johnson,* 135 S. Ct. at 2563 (2015) ("We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process."). This decision overruled the Court's earlier precedent to the contrary and was the first time in over sixty years that the Court found a criminal sentencing statute to be unconstitutionally vague. *See id.* ("Our contrary holdings in *James* and *Sykes* are overruled."), *overruling James v. United States*, 550 U.S. 192 (April 18, 2007) *and Sykes v. United States*, 564 U.S. 1 (2011); Katherine Menendez, Johnson v. United States *Don't Go Away*, CRIM. JUST., Spring 2016, at 12, 17 (Before

Samuel Johnson, "it had been decades [ ] since the Court held a sentencing provision in a criminal statute to be unconstitutionally vague.") (pointing to *United States v. Evans*, 333 U.S. 483 (1948)). This shift was "virtually unforeseeable," such that "reasonably competent counsel [ ] cannot be said to have reasonably anticipated such [a] change[ ]." *See Moore v. Zant,* 885 F.2d 1497, 1507 (11th Cir. 1989). Accordingly, Thornton has shown cause for failing to raise the issue. *See Reed*, 468 U.S. at 16-17. *See also United States v. Webb*, 217 F. Supp. 3d 381, 388 (D. Mass. 2016) ("[Petitioner's] case is textbook *Reed*, since [*Samuel*] *Johnson* [ ] explicitly disavowed *James's* conclusion that the residual clause of the ACCA is not unconstitutionally vague, and *James* predates [petitioner's] sentencing.").

"To show prejudice, a petitioner need show only that without an error, the proceedings would have been different." *United States v. Brown*, No. 7:02-CR-024, 2016 WL 7441717, at *6 (W.D. Va. Dec. 23, 2016) (citing *Strickler v. Greene,* 527 U.S. 263, 289 (1999)). "Before [*Samuel*] *Johnson,* the [ACCA] applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After [*Samuel*] *Johnson,* the same person engaging in the same conduct is no longer subject to the [ACCA] and faces at most 10 years in prison." *Welch,* 136 S. Ct. at 1265. Thornton has shown prejudice. *See Brown*, 2016 WL 7441717 at *6 ("[H]ad the sentencing court not applied the ACCA enhancement, [petitioner's] statutory maximum penalty . . . would have been only 120 months, as opposed to the 262-month sentence he received following enhancement under the ACCA. Plainly, [petitioner] has established that the alleged error in his sentence worked to his actual and substantial disadvantage sufficient to establish prejudice.").

Convictions at Issue

Thornton doesn't dispute that his convictions for delivery of cocaine [case no. 96-1517CF10] and aggravated battery with a firearm [case no. 95-26106] remain violent felonies. (DE 16 at 1). The Government does not dispute that Thornton's two convictions for burglary of an occupied dwelling [case nos. 92-12581CF10 and 93-008128CF10A] no longer constitute violent felonies. (DE 15). *See United States v. Esprit*, 841 F.3d 1235, 1241 (11th Cir. 2016) ("[A] Florida burglary conviction is not a violent felony under ACCA."). In order for Thornton to have the requisite three convictions for an ACCA enhanced sentence, his conviction for aggravated battery in case no. 92-15158CF10A must constitute a violent felony. *See* 18 U.S.C. § 924(e)(1) (requiring three previous convictions for either a violent felony or serious drug offense).

Florida Aggravated Battery

Aggravated battery is not an enumerated offense and, therefore, may only qualify as a violent felony pursuant to the elements clause. *See* 18 U.S.C. § 924(e)(2)(B) (listing enumerated offenses as burglary, arson, extortion, and those which involve the use of explosives). To determine whether this conviction qualifies as a violent felony under the elements clause, this Court must determine whether the offense "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

Neither party disputes that Thornton was charged with aggravated battery pursuant to Fla. Stat. § 784.045(1)(a). (DE 1 at 8); (DE 15). However, it is unclear whether Thornton was charged under subsection (1)(a)(1) or (1)(a)(2). (DE 1 at 8-10). This is a distinction without difference, as the Eleventh Circuit has "determined that both subsections qualify as violent felonies under the elements clause." *United States v. Tarver*, No. 16-17533, 2017 WL 4679922, at *1 n.1 (11th Cir.

Oct. 18, 2017) (citing *Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1341(11th Cir. 2013), *abrogated on other grounds by Samuel Johnson*, 135 S.Ct. 2551). Although Thornton argues *Turner* was wrongly decided, this Court is bound to follow it. *See United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) ("[E]ven if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it."); *Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006) ("[A] prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel."). Thornton's conviction for aggravated battery in case no. 92-15158CF10A is a violent felony under the ACCA elements clause.

RECOMMENDATION

Because Thornton has the requisite three convictions for his ACCA sentence enhancement, this Court **RECOMMENDS** that Defendants' Motion to Vacate Sentence (DE 1) be **DENIED.**

CERTIFICATE OF APPEALABILITY

"[A] district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2255 Proceedings, Rule 11(a). "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)," *id.*, which requires the applicant to "ma[k]e a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner 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).

Although this Court recommends concluding that Thornton's Florida aggravated battery

conviction is a violent felony pursuant to binding Eleventh Circuit precedent, reasonable jurists do find this conclusion debatable. *See United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) (Pryor J., concurring in result) (agreeing that *Turner* case constitutes binding precedent, but urging Eleventh Circuit to rehear the *Golden* case *en banc* and overturn *Turner*). Therefore, this Court recommends that the District Court grant a certificate of appealability on the following issue: (1) whether Thornton's conviction for Florida aggravated battery, pursuant to Fla. Stat. § 784.045(1)(a), is a violent felony under the Armed Career Criminal Act.

NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with the Honorable Daniel T. K. Hurley, Senior United States District Court Judge for the Southern District of Florida, **within fourteen (14) days** of being served with a copy of this Report and Recommendation. Failure to timely file objections shall constitute a waiver of a party's "right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." 11th Cir. R. 3-1 (2016).

DONE and SUBMITTED in Chambers this 2nd day of November, 2017, at West Palm Beach in the Southern District of Florida.

James M. Hopkins

JAMES M. HOPKINS
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CIV-80930—HURLEY
CASE NO. 07-CR- 60281-HURLEY

WALLACE THORNTON,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

FINAL JUDGMENT DENYING MOTION TO VACATE SENTENCE, GRANTING CERTIFICATE OF APPEALABILITY & CLOSING CASE

THIS MATTER is before the Court following entry of an Order Adopting the Magistrate Judge's Report and Recommendation, Denying the Movant's Motion to Vacate Sentence under 28 U.S. C. § 2255 and Granting a Certificate of Appealability. Bearing in mind that Rule 58 of the Federal Rules of Civil Procedure requires a court to "set out . . . in a separate document" its judgment on a motion to vacate, set aside, or correct sentence, Fed. R. Civ. P. 58(a) and *Perez v. United States*, 277 Fed. Appx. 966, 967 (11th Cir. 2008), it is

ORDERED and **ADJUDGED**:

1. The Movant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. 2255 [DE 1] is **DENIED.**

2. A Certificate of Appealability is **GRANTED** on the single issue previously identified.

3. This case is **CLOSED.**

DONE and **SIGNED** in Chambers at West Palm Beach, Florida, this 21st day of November, 2017.

Daniel T. K. Hurley
United States District Judge

Copies provided to Movant and counsel of record.