N THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

BIVEN HUDSON,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Issue 1: Whether the appellate court erred in denying Mr. Hudson's motion for certificate of appealability as to the denial by the district court of his motion to vacate, set aside, or correct his sentence, brought pursuant to 28 U.S.C. §2255, alleging that he should be resentenced without a 15 year minimum mandatory enhancement as reasonable jurists could debate whether or not the magistrate and district courts erred in denying petitioner's Motion to Vacate discussed above?

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The Petitioner, BIVEN HUDSON, respectfully prays that a writ of certiorari issue to review the judgment/order of the United States Court of Appeals for the Eleventh Circuit entered on October 19, 2018.

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OPINION BELOW

On October 19, 2018 the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's convictions and sentence. A copy of the opinion is attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was the defendant in the district court and will be referred to by name or as the defendant. The respondent, the Untied States of America will be referred to as the government. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The petitioner is incarcerated and is serving his sentence in the Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court Below

Petitioner's case originates from felony convictions and sentences imposed in the Southern District of Florida.

On October 19, 2018 the Eleventh Circuit Court of Appeals affirmed Petitioners conviction and sentences.

This petition ensues from that opinion.

Statement of the Facts

The facts on appeal arise from the record of the change of plea and sentencing proceedings. The evidence of appellant's offense was as follows:

On October 31, 2013, a federal grand jury in the Southern District of Florida returned an indictment charging petitioner with possessing a firearm and ammunition having previously been convicted of a felony, in violation of 18 U.S.C. §§922(g) and 924(e). DE:8. Prior to trial, petitioner filed an unopposed motion asking this Court to direct the Bureau of Prisons ("BOP") to conduct a psychiatric evaluation of Appellant. DE:16. Petitioner in the motion stated that, given the factual background of the case, conversations with petitioner, and petitioner's mental health history, counsel was "concerned about Defendant's mental state as it relates to going forward with the instant proceedings". DE:16 ¶2. The District Court granted the motion, directing BOP to perform a psychiatric/psychological study pursuant to the provisions of 18 U.S.C. §§ 4241 and 4242 and to provide a report to the court and to the parties within 45 days. DE:17. On February 27, 2014, the examining physician at FDC, Dr. Rodolfo A. Buigas, Ph.D, issued his forensic report and forwarded it to the court and to the parties. The report determined that Appellant was competent to proceed and made the following findings: (1) there was no evidence to suggest that petitioner suffered from a mental illness at the time of the offense; (2) Petitioner exhibited no

symptoms of an active mental illness that would interfere with his rational understanding of the proceedings; (3) the report suggested that Petitioner had intentionally misrepresented or exaggerated his psychological symptoms during the examination (i.e., "malingering"); (4) and that petitioner was not candid with the examiner and failed to corroborate any of his claimed history of mental illness; (5) Petitioner had a history of substance abuse and was not consistently truthful about that abuse; and (6) Petitioner had an **unspecified anxiety disorder that likely was related to his substance abuse**. After the completion of the psychiatric evaluation, the case proceeded to trial, which began on March 17, 2014. DE:32. One day later, on March 18, 2014, the jury returned a guilty verdict of the charged offense. DE:42, 44, 46. Prior to sentencing, the Probation Office prepared a Presentence Investigation Report (PSI) to aid this Court in sentencing. The PSI set forth the evidence presented at trial, which alleged that Petitioner had burglarized a home belonging to a victim and had stolen several items from the home, including a loaded firearm. PSI ¶¶2-6. Specifically, the PSI reflected that, on October 16, 2013, officers with the Miami-Dade County Police Department responded to a burglary-in-progress at the victim's home, and one of the officers believed that he

saw petitioner exiting the back of the house holding a pillow case in his hands. PSI ¶¶2-4 Upon viewing the officer, petitioner immediately dropped the pillow case and started to flee on foot. The officers ran after him and apprehended him a short distance away. After the arrest, the officers searched the pillow case and found the loaded firearm and ammunition, along several other pieces of personal property belonging to the victim, including a camera, an antique compass, iPod speakers, and jewelry. PSI ¶6; DE:79:132-38, 143-44, 153, 157. Based on the above facts, the PSI set a base offense level at 24; then recommended a two-level increase under USSG § 2K2.1(b)(4)(A), because the firearm was stolen. PSI ¶12. Second, the PSI advised another four-level increase under USSG § 2K2.1(b)(6)(B), because petitioner possessed the firearm and ammunition "in connection with another felony offense," i.e., the burglary he committed of the victim's home during the offense. PSI ¶¶12-13, with a resulting total offense level of 30. PSI ¶17. The PSI further found that Petitioner was subject to the fifteen-year mandatory minimum sentence as an armed career criminal under the ACCA, his offense level increased to a level 34 pursuant to USSG § 4B1.4(b)(3). PSI ¶18. The PSI also set forth Appellant's criminal history, which included numerous prior

convictions, and placed him in Criminal History Category VI. PSI ¶¶22-43. With an adjusted offense level of 34 and a Criminal History Category VI, the PSI recommended an advisory guideline range of 262-327 months imprisonment. PSI ¶94. Prior to sentencing, the Government identified in a written filing the following six prior convictions in petitioner's criminal history that qualified as "violent felonies" under the ACCA: PSI Paragraph 27: Second Degree Robbery, Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Case Number F94-32399; PSI Paragraph 28: Armed Robbery (First Degree), Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Case Number F94-33305; PSI Paragraph 34: Burglary of an Occupied Dwelling, Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Case Number F01-21297; PSI Paragraph 35: Battery on Law Enforcement Officer (Count 1) and Resist Arrest With Violence (Count 2), Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Case Number F01-31058; PSI Paragraph 36: Robbery/Sudden Snatching, Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Case Number F01-31050; PSI Paragraph 37: Attempted Burglary of an Occupied Dwelling, Circuit Court of the• Eleventh Judicial District, in and for Dade County, Case Number F07-39381; (CRDE:70 (attached to

this response as Exhibit 2). Petitioner objected, arguing that his prior convictions did not qualify him for the fifteen year mandatory minimum sentence under ACCA. (DE:68), challenging the two burglaries (PSI ¶¶34, 37), the sudden snatching robbery (PSI ¶36), and the battery on a law enforcement officer (PSI ¶35). Petitioner also submitted a separate memorandum in which he raised a series of non-ACCA based challenges to the PSI. DE:62. He objected to (1) the two-level "stolen firearm" enhancement under USSG § 2K2.1(b)(4)(A); (2) the four-level "possession of a firearm in connection with another felony offense" enhancement under USSG § 2K2.1(b)(6)(B); (3) the absence of an acceptance of responsibility reduction under USSG § 3E1.1; and (4) assuming he qualified as an armed career criminal, the use of a level 34 as opposed to a level 33 under USSG § 4B1.4(b)(3). DE:62. The Government replied maintaining that the PSI properly calculated his adjusted offense level of 34. DE:64. The District Court held the sentencing hearing on June 18, 2014. DE:78, whereat the District Court addressed each of the prior convictions on which the government relied for the ACCA enhancement and held that all six qualified as violent felonies under then-binding precedent. DE:78. As to the second-degree robbery in paragraph 27 of the PSI and the armed robbery in

paragraph 28, the District Court held that both qualified under United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011), which held that the same robbery statute under which Petitioner was convicted qualified under the elements and residual clauses of the ACCA. DE78:4-7. Regarding the two burglaries in paragraphs 34 and 37, the District Court determined that they qualified under the residual clause of the ACCA, and specifically under United States v. Matthews, 466 F.3d 1271 (11th Cir. 2006), and James v. United States, 550 U.S. 192, 203 (2007). DE78:9-10, 15. As to the sudden-snatching robbery in paragraph 37, the District Court concluded that the conviction qualified as a violent felony under the residual clause of the ACCA, relying on United States v. Welch, 683 F.3d 1304, 1312-13 (11th Cir. 2012). Regarding the battery-on-a-law-enforcement-officer conviction in paragraph 35, the District Court determined t.hat it qualified under both the elements and residual clauses of the ACCA DE:78:10-12. Paragraph 35 of the PSI also contained a resisting-arrest-with violence conviction, which was also relied upon by the Government identified in its papers and relied upon as a "violent felony." DE:70:17-18. Admittedly, petitioner did not raise a constitutional vagueness challenge to the use of the residual clause under ACCA. Having concluded that Appellant had six qualifying

violent felonies, the District Court determined that he was subject to the fifteen-year mandatory minimum under ACCA. DE:78:15. The District Court then addressed, and rejected, the remaining objections to the PSI. DE:78:18-23. The District Court determined that (1) the two-level enhancement under USSG § 2K2.1(b)(4)(A) for the stolen firearm applied, because the firearm was allegedly carried away from the victim's home. DE:78:18-19. The District Court found that the four-level enhancement under USSG § 2K2.1(b)(6)(B) applied for possessing a firearm in connection with another felony offense, because petitioner was observed holding the pillow case which was later found to contain the gun in connection with the burglary DE:78:21. The District Court imposed a one level increase under USSG § 4B1.4(b)(3)(A) and (B) from an offense level 33 to an offense level 34, because petitioner was found to have possessed the firearm in connection with a crime of violence as defined in the Guidelines, that is, in connection with the burglary. DE:78:22- 23. The District Court also concluded that petitioner was entitled to a two-level reduction for acceptance of responsibility because, even though he went to trial, he admitted on the record at sentencing that he was guilty of the crime charged. DE:78:26. The District Court calculated an adjusted

offense level of 32, which when combined with his Criminal History Category of VI, produced an advisory guideline range of 210 to 262 months imprisonment. DE:78:30. The District Court then heard argument from the parties regarding the application of the 18 U.S.C. §3553(a) factors. DE:78:30-41. The Government requested a sentence of 262 months' imprisonment. DE:78:30-41. Petitioner requested a sentence at the mandatory minimum of 180 months' imprisonment, with recommendations for drug and psychiatric counseling and treatment. DE:78:39. The District Court imposed a sentence of 200 months imprisonment, a downward variance of 10 months from the bottom of the advisory guideline range. DE:78:42-44; CRDE:71. On June 29, 2016, the Eleventh Circuit Court of Appeals affirmed his conviction and sentence in an unpublished, per curiam opinion. United States v. Hudson, 608 F. App'x 915, No. 14-12898 (June 29, 2015). Petitioner filed a petition for certiorari in this Court, which was denied on December 7, 2015 (CRDE:83; see also Hudson v. United States, 136 S. Ct. 589, No. 15-6364 (Dec. 7, 2015)). On June 10, 2016,Appellant filed his 28 U.S.C. § 2255 Motion to Vacate. DE:1; DE:4.

REASONS FOR GRANTING THE WRIT

Issue 1: Whether the appellate court erred in denying Mr. Hudson's motion for certificate of appealability as to the denial by the district court of his motion to vacate, set aside, or correct his sentence, brought pursuant to 28 U.S.C. §2255, alleging that he should be resentenced without a 15 year minimum mandatory enhancement as reasonable jurists could debate whether or not the magistrate and district courts erred in denying petitioner's Motion to Vacate discussed above?

A certificate of appealability (hereinafter COA) must issue upon a "substantial showing of the denial of a constitutional right" by petitioner. 28 U.S.C. §2253(c)(2). To obtain a COA under this standard, petitioner did "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further."' Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)).

As this Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." Miller-El v. Cockrell, 537 U.S.

322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, this Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Id. at 338. Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. See Barefoot, 463 U.S. at 893; Miniel v. Cockrell, 339 F.3d 331, 336 (5th Cir. 2003); Mayfield v. Woodford, 270 F.3d 915, 922 (9th Cir. 2001).

This Court recently applied this standard in Welch v. United States, 136 S. Ct. 1257 (2016), which arose from the denial of a COA. Id. at 1263-1264. In that case, the Court broadly held that Johnson announced a substantive rule that applied retroactively to cases on collateral review. Id. at 1268. But in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." Id. at 1264, 1268. In that

case, the parties disputed whether Welch's robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. See Id. at 1263-1264,1268. Accordingly, the Court held that a COA should issue.

"Reasonable jurists could at least debate whether Appellant is entitled to relief" on his claim following Johnson. Welch, 136 S. Ct. at 1268.

Petitioner presented two basic arguments in his Motion to Vacate. First, Appellant argued that, in light of Johnson v. United States, 134 S. Ct. 2551 (2015) ("Johnson"), the District Court misclassified him as an armed career criminal under the Armed Career Criminal Act ("ACCA"). DE:1:4; DE:4:3-12. 18 U.S.C. § 924(e); that he did not have three prior convictions that qualify under the elements clause of ACCA after Johnson, Descamps v. United States, 570 U.S. ___, 133 S. Ct. 2276, 2289 (2013), and Mathis v. United States, ___ S. Ct. ___, No. 15-6092, 2016 WL 3434400 (June 23, 2016).

Additionally, petitioner raised a three-part ineffective assistance of counsel claim as to both his trial and appellate counsel alleging that his trial counsel was ineffective for (1) allegedly "failing to investigate

whether the petitioner was mentally competent to stand trial and (2) "failing to request during sentencing a two (2) point downward departure for diminished mental capacity pursuant to USSG § 5K2.13". DE:4:2. As to his appellate counsel, he claims constitutionally ineffective performance for failing to supplement his brief on direct appeal with his Johnson-based ACCA claim. DE:4:2. Also, petitioner requested an evidentiary hearing on his Petition.

Petitioner raised 4 issues in the District Court: 1) That petitioner was erroneously sentenced as an Armed Career Criminal under the Armed Career Criminal Act as applied by the Supreme Court in Johnson v. United States, 134 S.Ct. 2551 (2015); 2) ineffective assistance of counsel that the foregoing Johnson claim was not raised and should have been raised during his direct appeal by his appellate counsel; 3) ineffective assistance of counsel that his mental competence to stand trial was not investigated sufficiently by his trial counsel in the District Court both prior to and during his jury trial, and; 4) ineffective assistance of counsel directed at his trial counsel in the District Court for failure to request a downward guideline departure at sentencing pursuant to Chapter 5 of the United States Sentencing Guidelines, specifically USSG 5K2.13. DE:4. Petitioner argues that the

application of Johnson to his case criminal history relied upon by this Court in imposing his enhanced sentence (the 15 year mandatory minimum prison time imposed) requires that his sentence be vacated and that he be resentenced without the ACCA enhancement. At sentencing this Court relied upon 5 separate prior state court cases to enhance his sentence.

The first prior case cited appears in paragraph 28 of the PSI Report as Armed Robbery, Case Number F94-33305, Eleventh Judicial Circuit, Miami-Dade County, Florida. Pursuant to United States v. Welch, 683 F.3d 1304 (11th Cir. 2012), the pre-1999 conviction for "strong-arm robbery" under Fla. Stat. §812.13(1) must be analyzed as a "robbery by sudden snatching," an offense for which "any degree of force" sufficed. In Welch, this Court distinguished United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011) where it held that a 2001 conviction for attempted robbery was a "crime of violence" within both the elements and residual clauses of the Guidelines. Welch argued, and the Court agreed, that Lockley was not dispositive of whether his 1996 conviction under §812.13(1) was a violent felony, "because Lockley was convicted after Florida promulgated the 'sudden snatching' statute, so snatching from the person might have furnished the basis

for the 1996 robbery conviction here but not in Lockley." Welch, 683 F.3d at 1312.

Although the language of §812.13(1) has never changed, what was changed – significantly in 1999 (after both Welch and Appellant were convicted) – was Florida's statutory scheme for robberies. In 1999, the Florida legislature enacted a separate "robbery by sudden snatching" statute, Fla. Stat. §812.131. But as of 1996 (before the enactment of that statute), the Court recognized in Welch, non-forceful snatching offenses were still being prosecuted as "strong-arm" robberies under §812.13(1) in Florida. See Welch, 683 F.3d at 1311 and nn.28-38. Only after Welch was convicted, this Court held, was §813.131 enacted, establishing a separate crime of "'robbery by sudden snatching,' in between larceny and robbery." 683 F.3d at 1311.

This Court recognized in Welch that the enactment of §812.131 "appeared to have been a legislative response" to the Florida Supreme Court's decision in Robinson v. State, 692 So.2d 883, 886 (Fla. 1997), which clarified that "there must be resistance by the victim that is overcome by the physical force of the offender" to establish robbery, "so that the intermediate appellate decisions holding mere snatching to be sufficient were put in doubt." Welch, 683

F.3d at 1311. Nonetheless, the Welch Court found Robinson's clarification of the law irrelevant to whether the defendant's 1996 Florida robbery conviction qualified as an ACCA predicate, since "in 'determining whether a defendant was convicted of a 'violent felony,'" the Court must apply "the version of the state law that the defendant was actually convicted McNeill v. United States, 563 U.S. 816, 131 S.Ct. 2218, 2222 (2011)f violating." Welch, 683 F.3d at 1311 (citing).

The appellate court recognized in Welch, as of 1996 – and therefore, in 1994 when Appellant was convicted as well – the "latest authoritative pronouncement" as to the elements of robbery under §812.13(1) was in McCloud v. State, 335 So.2d 257 (Fla. 1976). And in McCloud, the Florida Supreme Court expressly held that "any degree of force suffices" for robbery, including the minimal amount of force necessary to "extract" property from a victim's "grasp," so long as the taking is not by "stealth." McCloud, 335 So.2d 258-259 (what distinguished robbery from larceny is the victim's awareness of the taking).

As in Welch, petitioner pled guilty to robbery under §812.13 "at a time when mere snatching" with "any degree of force" sufficed for conviction under then-controlling Florida Supreme Court law. Welch, 683 F.3d at 1311-1312.

Accordingly, for the same reason the Eleventh Circuit assumed for its "violent felony" analysis that Welch's 1996 robbery conviction under §812.13(1) was for "robbery by sudden snatching," this Court should so assume for petitioner's conviction here as well. The correctness of Welch's "least culpable conduct" analysis, notably, has since been validated by the Supreme Court in Moncrieffe v. Holder, 133 S.Ct. 1678, 1684 (2013).

Petitioner conceded that, in Welch this Court did not follow its own "least culpable conduct" analysis to its logical conclusion under the ACCA's elements clause. However, it did agree with Welch that at least "arguably the elements clause would not apply to mere snatching." Id. at 1312-1313 (emphasis added). Although the appellate court believed that question was "not cut and dried" at that time, it found it unnecessary to resolve definitively in 2012 since then-controlling precedent compelled a finding that even a non-forceful snatching was a "violent felony" within the residual clause. Id.

Now that the residual clause has been excised from the ACCA, however, and this Court has remanded in Welch's own §2255 case to definitively decide the elements clause question left open in 2012, see Welch v. United States, ___ U.S. ___, 136 S. Ct. 1257, 1268 (April 18, 2016)(remanding

to the Eleventh Circuit in recognition of the fact that "reasonable jurists could at least debate whether Welch is entitled to relief" after the voiding of the ACCA's residual clause), this Court will have to use the categorical approach as clarified by the Supreme Court in Moncrieffe and Descamps to itself resolve whether a pre-1999 robbery conviction qualifies as a "violent felony" within the ACCA's elements clause. And Moncrieffe and Descamps confirm that because – as the Eleventh Circuit recognized in Welch – according to the Florida Supreme Court the "least culpable conduct" under Florida's robbery statute at the time of petitioner's conviction was a taking by "any degree of force," Petitioner's robbery conviction is categorically overbroad vis-à-vis an offense within the ACCA's elements clause. Accordingly, it is no longer a countable ACCA predicate. That petitioner was sentenced for "armed robbery" under Fla. Stat. §812.13(2) 1994 does not change the above analysis. As a threshold matter, it is clear from the standard robbery instruction at the time of petitioner's conviction, that in 1994 Fla. Stat. §812.13(2)(a) and (b) were simply penalty enhancement provisions, not separate enhanced "offenses" with additional "elements." Notably – and differently than today – juries were not instructed in 1994 that they needed

to find that the state proved any of the "aggravating circumstances" in the statute ("carrying," of some "weapon," "in the course of committing a robbery") beyond a reasonable doubt. Therefore, according to Descamps, the fact that petitioner's underlying robbery conviction under §812.13(1) was categorically overbroad, ends the ACCA elements clause inquiry. Petitioner's ACCA sentence cannot be upheld based upon judicial findings as to facts on which he never had the protection of the Sixth Amendment. Descamps, 133 S.Ct. at 2289.

Even if petitioner's state court judge or a jury had been required to find the "aggravating circumstances" in §§812.13(2)1994 beyond a reasonable doubt, that would not change the result now dictated by Descamps in any manner, since each of the "aggravating circumstances" in §812.13(2)1994 is itself categorically overbroad vis-a-vis the ACCA's element clause. First, §812.13(2)1994 permits a sentence enhancement for "armed robbery" simply for "carrying" a weapon, which does not necessitate either using it, brandishing it in a threatening manner, or even visibly displaying it. According to State v. Baker, 452 So.2d 927 (Fla. 1984), it simply requires "possessing" it. See Id. at 929 ("The victim may never even be aware that a robber is armed, so long as the perpetrator has the weapon

in his possession during the offense."). In United States v. Archer, 531 F.3d 1347 (2008), the Eleventh Circuit expressly held that the mere act of "carrying" a weapon, and specifically a firearm, "does not involve the use, attempted use, or threatened use of force, and so is not a crime of violence under the elements clause." Id. at 1349 (emphasis added). Second, the word "weapon" in §812.13(2)(b) or "deadly weapon" in §812.13(2)(a) is not only indeterminate but categorically overbroad vis-a-vis any offense within the elements clause. Poison, anthrax, and chemical weapons are "weapons" that may easily cause death without the "use" of *any* "physical force." Other courts, notably, have declared convictions overbroad and outside the elements clause for precisely this reason. See: United States v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005). Although the Florida legislature has expressly defined the term "weapon" in Fla. Stat. §790.001(13) to include a "chemical weapon," under Florida law, the list of "weapons" in §790.001(13) has never limited the universe of items that may qualify a Florida defendant for an "armed robbery" enhancement. Juries and courts have always been permitted to use the much broader, open-ended definition of "weapon" in the standard §812.13 instruction, pursuant to which "any object that could be used to cause death or

inflict serious bodily injury" qualifies as a "weapon." Significantly, that definition creates an "objective test," pursuant to which any item could qualify as a "weapon," if it caused great bodily harm to the victim "during the course of the robbery," even if that was *not* the defendant's intent. See Williams v. State, 651 So.2d 1242, 1243 (Fla. 2nd DCA 1995)(under this "objective test," even coffee could trigger enhanced penalty for "armed robbery," if it caused great bodily harm). Finally, the phrase "in the course of committing the robbery" in §§812.13(2)1994, is itself broadly defined in a separate provision, §812.13(3)(a), which explains: "An act shall be deemed 'in the course of committing the robbery" if it occurs in an attempt to commit a robbery or in flight after the attempt or commission." Because of that expansive definition, Florida courts have upheld an enhanced penalty for "armed robbery" upon evidence that a defendant simply stole a gun after robbing a victim of money and other property, and fled with the gun as part of the "loot." State v. Brown, 496 So.2d 194 (Fla. 3rd DCA 1986) (defendant's conduct "fell within the unequivocal reach of the armed robbery provision," even if he did not "carry" the firearm during the "taking of the proceeds" from the cash register, because he then stole a gun from under the cash register,

and fled the scene with it). Such conduct plainly involves no more than knowing, illegal "possession" of a firearm, which the Eleventh Circuit has held is not a "violent felony" under the ACCA. United States v. McGill, 618 F.3d 1273, 1279 (11th Cir. 2010).

The appellate court had long recognized that its "first duty" is always "to follow the dictates of the United States Supreme Court," and it "must consider" whether intervening Supreme Court decisions have "effectively overruled" a prior precedent. United States v. Contreras, 667 F.2d 976, 979 (11th Cir. 1982). In similar circumstances, the appellate court easily declared prior precedents "effectively overruled." Dawson v. Scott, 50 F.3d 884, 892 (11th Cir. 1995). The second prior case cited appears in paragraph 34 of the PSI as Burglary of an Occupied Dwelling, Case Number F01-21297, Eleventh Judicial Circuit, Miami-Dade County, Florida. In 2001 when petitioner was convicted of his burglary offense, the Florida burglary statute provided that "'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(1)(a). Critically, the Florida legislature has long defined both the term "dwelling" for purposes of the burglary statute to always include the

"curtilage" of the building. See Fla. Stat. § 810.011(2) ("'Dwelling' means a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof.")

In Taylor v. United States, 495 U.S. 575 (1990), this Court construed the "burglary" offense enumerated in the ACCA to refer to "generic" burglary, which it defined as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Id. at 598. After Taylor, both the Supreme Court and this Court recognized that Florida burglary "does not meet the definition of burglary under ACCA that this Court set forth in Taylor," because Florida uniquely defines the term "dwelling" to include the curtilage. James v. United States, 550 U.S. 192, 197, 212 (2007).

Prior to the sentencing in this case, the appellate court had held that the ACCA's residual clause provided an alternative path to the enhancement for Florida burglaries. See United States v. Matthews, 466 F.3d 1271, 1275 (11th Cir. 2006) ("even if Matthews's third degree burglary

convictions are not for 'generic burglary,' they are convictions for violent crimes under the ACCA because they satisfy the alternative definition" in the residual clause). And notably, that remained the law in this Circuit until Johnson. See United States v. Kirk, 767 F.3d 1136, 1139-1141 & n.1 (11th Cir. 2014)

Now that Johnson has effectively excised the residual clause from the ACCA, thus abrogating Matthews and Kirk, the only possible way for Appellant's Florida burglary conviction to qualify as an ACCA predicate would be under the ACCA's enumerated offenses clause. And for the following reasons, the Florida burglary statute is not only non-generic and overbroad, but also indivisible according to Descamps because the definition of "dwelling" in Fla. Stat. § 810.011(2) is itself non-generic, overbroad, and indivisible. Therefore, under current law, no Florida burglary of a "dwelling" conviction ever qualifies as the enumerated offense of "burglary" in the ACCA.

Notably, every judge and magistrate judge in the Southern District of Florida to have considered the issue has consistently found after Descamps that Florida's definition of "dwelling" is indeed, indivisible on its face, categorically overbroad, and that a Florida burglary

of a dwelling conviction does not qualify as either the enumerated "violent felony" in the ACCA, or the enumerated "crime of violence" in the Guidelines. See, e.g.,

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  United States v. Cardoso, Case No. 13-CR-60103-Cohn, DE44 at 10 (S.D. Fla. May 8, 2014) (concluding that "Florida's burglary statute is non-generic and indivisible" because it "defines dwelling to include any building . . . together with the curtilage thereof. The inclusion of the word 'curtilage' in the definition of burglary makes Florida's burglary [of a] dwelling Statute broader than the generic burglary of a dwelling Statute. The Statute is indivisible because the definition of dwelling also includes the curtilage therefore. Accordingly, there is no legal basis for the Court to utilize the modified categorical approach.");

- United States v. Dixon, Case No. 13-CR-20370-Altonaga, DE45 at 8-9 (S.D. Fla. July 3, 2014) (expressly agreeing with the defense that "the definition of dwelling in the Florida statute is categorically overbroad and indeed it is indivisible, just with a plain reading of the statutory language, curtilage, therefore, plainly has to refer back to a building or conveyance. It makes no sense on its own");

- Wheeler v. United States, Case No. 14-cv-80782-Middlebrooks/Brannon, DE26, DE27 (S.D. Fla. Aug. 11, 2015) (order granting §2255 motion based on Johnson, and adopting Magistrate's Report and Recommending finding it "undisputed that Wheeler's prior three burglary convictions did not fall under the 'use of force' or the 'enumerated offense' clauses");

- Bush v. United States, Case No. 15-cv-81271-Dimitrouleas, DE16 at 2 (S.D. Fla. Nov. 5, 2015) (order granting §2255 motion based on Johnson, finding "that Burglary in Florida is not a divisible crime," and that the defendant therefore "does not qualify as an ACCA offender");

- Harrell v. United States, Case No. 14-cv-61396-Zloch/Hunt, DE28 at 2, DE25 at 6-7 (S.D. Fla. Mar. 1, 2016) ("As a result of Descamps, convictions pursuant to Florida's burglary of a dwelling crime may not be used to support a sentence enhancement under the enumerated-offense clause of §924(e);" adopting the Supplemental Report and Recommendation, concluding that "section 810.02, Florida statutes, is indivisible, and that the modified categorical approach, post-Descamps cannot be applied in this case");

- Villa v. United States, Case No. 15-22898-Civ Seitz/White, DE17 at 21-32(S.D.Fla. June 14, 2016) (Report and Recommendation agreeing with, and following, all of the above rulings; recommending that § 2255 relief be granted because the Florida burglary conviction no longer qualified as a predicate to support the ACCA enhancement; specifically finding that the movant is correct that "Florida's burglary statute is, in fact, indivisible;" that the government was incorrect in arguing to the contrary; citing Baker as confirming the indivisibility of the Florida burglary statute; and concluding that "review of Shepard approved documents is not authorized" and after Descamps "the inquiry is over"); and

- United States v. Antron Rogers, Case No. 16-20999-Civ-Huck/White, DE13 (S.D.Fla. June 17, 2016) (same).

In conclusion, reasonable jurists could debate the merits of petitioners claims raised – consistent with the other jurist to have considered this issue post-Descamps – that the Florida burglary statute is overbroad and indivisible. As a result, a conviction under the statute can never qualify as a violent felony under the ACCA's enumerated-offense clause. And as in Descamps, "[t]he modified approach . . . has no role to play in this case." 133 S.Ct. at 2285. Under the categorical approach, the

Court should simply declare that "the inquiry is over," *id.*, and that burglary conviction no longer qualifies as ACCA predicate after Johnson.

It is clear from Florida case law that at least one additional means of committing robbery – by "use of force" – sweeps more broadly than the ACCA's elements clause, since the quantum of "force" required for conviction is not the Johnson level of "violent force." See: Sanders v. State, 769 So.2d 506 (Fla. 5th DCA 2000) (affirming strong-arm robbery conviction under Fla. Stat. §812.13, and rejecting defendant's claim that he was only guilty of the newly-created "robbery by sudden snatching" crime under §812.131 because the State simply showed he had peeled back the victim's fingers before snatching money from out of his hand; explaining that the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by Sanders;" confirming that no more resistance, or "force," than that was necessary for a conviction under §812.13(1)).

It is clear from Sanders that the quantum of "force" necessary to "overcome a victim's resistance" will vary depending upon the type and degree of resistance by the victim, and that if the victim's resistance is slight, the

"force" necessary to overcome it – and seal a "strong-arm" robbery conviction in Florida – is likewise slight. Since the type of violent, pain-causing, injury-risking force required by Curtis Johnson v. United States, 559 U.S. 133, 140 (2010) is not necessary in every §812.13(1) case, and to this day a person may be found guilty of "strong-arm" robbery in Florida from using only de minimis force, the statute is categorically overbroad for this reason as well. And, post-Descamps, a conviction under a "categorically overbroad" statute cannot be an ACCA predicate. See 133 S.Ct. at 2285-2286, 2293.

Petitioner raises an allegation of ineffective assistance of counsel that the foregoing Johnson claims related to his prior record and pending sentence were not raised and should have been raised during his direct appeal by his appellate counsel. Johnson was decided during the pendency of Appellant's direct appeal on June 26, 2015. Petitioner's Notice of Appeal was filed on June 19, 2014. DE 73. Petitioner's Judgment and Sentence was affirmed by the Eleventh Circuit Court of Appeals on July 28, 2016. DE 82. Finally, On December 7, 2015 Petitioner's Petition for Writ of Certiorari was denied by the United States Supreme Court. DE 83. The Johnson decision is wholly applicable to petitioner's case now and would have been applicable to

the case on direct appeal when decided. Had this Court on direct appeal been supplemented with a supplemental brief raising the foregoing issues, this matter would not now need to be litigated on this appeal. Petitioner's appellant counsel could have raised the issue on direct appeal without waiting for the decision in United States v. Welch, 578 U.S.___ (2016) making relief under Johnson retroactive. Petitioner's brief should have been supplemented to raise the new constitutional rule in Johnson on direct appeal.

Secondly, Petitioner alleges ineffective assistance of counsel that his mental competence to stand trial was not investigated sufficiently by his trial counsel in the District Court both prior to and during his jury trial. The record of the case reflects that a motion for a mental health evaluation was made by the defense. The motion was granted and Appellant was evaluated prior to jury trial. No motion was made to this Court concerning the competency of Appellant before or during trial. The PSI reflects the results of the evaluation and the findings of the examiner as follows: "Paragraph 83: In a forensic examination on the defendant as ordered by the Court, the defendant was found to meet the "criteria for a classification of Malingering," as he was found to be "endorsing psychiatric

symptomatology, as well as legal knowledge impairment, to a level or degree that is not reported by genuinely impaired populations." He was further diagnosed with "Unspecified Anxiety Disorder" because "symptoms or history are characteristic of a anxiety disturbance which causes impairment in functioning, but fails to meet the criteria for a more specific disorder." Lastly, he was also diagnosed with Antisocial Personality Disorder, as the defendant "demonstrates a pattern of disregard for others and social norms since an early age." The record indicated that the mental health report was prepared prior to trial the issues was not raised on the record during the trial. While the findings of the Bureau of Prisons mental health professionals does point to at a minimum an actual diagnosis of “Unspecified Anxiety Disorder” and “Antisocial Personality Disorder”, respectfully the record is not sufficiently developed to make a determination as to what extent petitioner’s mental health condition affected his actions both during the underlying offense of conviction and the subsequent trial. Petitioner submits that an evidentiary hearing was required to determine to what extent petitioner’s mental health and the limited inquiry into same affected petitioner’s trial and his Sixth Amendment right to effective assistance of counsel.

Petitioner further submits that his trial counsel was ineffective due to failure to move this Court for a downward guideline departure pursuant to USSG 5K2.13 based upon petitioner's diminished mental capacity discussed above. Similar to the situation concerning petitioner's trial, while the sentencing record is clear enough that the mental health issue was never raised, the case record as a whole is indeterminate as to the possible grounds for such a motion again as discussed above. It could not be concluded that petitioner had no legally significant mental impairment or that he manifested a lack of competence at trial or during the commission of the offense. What was obvious is that there is some diagnosis of a mental disease which occurred prior to trial and subsequent thereto the issue was never raised again. Faced with an incomplete record to evaluate the issue petitioner submits that the appropriate remedy would have been to hold an evidentiary hearing to determine why the issue was never raised at trial and sentencing and then to determine to what extent the mental health issue would have affected petitioner's trial and sentence had the issue been raised.

Petitioner submits the reasonable jurists could debate whether or not the magistrate and district courts erred in denying petitioner's Motion to Vacate discussed above.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petitioner for writ of certiorari should be granted.

DATED this 17th day of January, 2019.

Respectfully submitted,

/s/ A. Wallace

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APPENDIX "A"