APPENDIX

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14692-G

JEROME HAYES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Jerome Hayes is a federal prisoner serving a sentence of 188 months' imprisonment after a jury convicted him of possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1), and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). This Court affirmed his convictions and sentences. *United States v. Hayes*, 334 F. App'x 222 (11th Cir. 2009). He filed the instant 28 U.S.C. § 2255 motion to vacate sentence, arguing that he was improperly sentenced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), because he lacked the necessary predicate

offenses. Specifically, he asserted that two of the four convictions under Fla. Stat. Ann. § 893.13 used to classify him as an armed career criminal were improper because they arose after Florida removed the *mens rea* requirement from that law.

After the state responded and Hayes replied, a magistrate judge issued a report and recommendation ("R&R"), recommending denial of Hayes's § 2255 motion. The court reasoned that Hayes's claim was foreclosed by this Court's precedent of *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014), which affirmed a district court's sentence of defendant as an armed career criminal based on violations of § 893.13 despite the lack of a *mens rea* element. Over Hayes's objections, the district court adopted the R&R and denied Hayes's motion. The district court also denied a certificate of appealability ("COA"), which Hayes now seeks from this Court.

DISCUSSION:

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). Moreover, "no COA should issue where the

claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law. *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted), *cert. denied*, 136 S. Ct. 1661 (2016).

In his motion, Hayes argued that he was erroneously sentenced as an armed career criminal because two of his convictions for violations of § 893.13 that were used as predicate offenses occurred after 2002, when Florida removed the requirement that the defendant knew of the illicit nature of the substance. Hayes contended that this alteration made Florida's statute broader than its federal analogue, and, after *Descamps v. United States*, 133 S. Ct. 2276 (2013), a defendant may not be sentenced as an armed career criminal based upon a prior conviction under a categorically overbroad, indivisible statute whose elements do not match the elements of the generic federal crime.

The magistrate judge recommended denying the claim. Citing *Smith*, it reasoned that this Court had already answered the question of whether a conviction under § 893.13 can serve as an ACCA predicate offense, even though it lacked a *mens rea* element. In his objections to the R&R, Hayes argued that *Smith* should not be followed, and explained its conflicts with several Supreme Court precedents. After *de novo* review, the district court adopted the R&R and denied Hayes's motion.

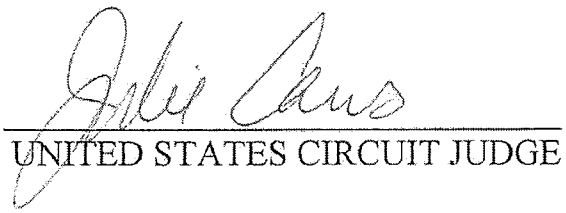
This Court reviews *de novo* whether a prior conviction qualifies as an ACCA "serious drug offense." *United States v. Robinson*, 583 F.3d 1292, 1294 (11th Cir. 2009). Under the ACCA, the maximum sentence for being a felon in possession of a firearm under § 922(g) is generally ten years' imprisonment. 18 U.S.C. § 924(a). However, a defendant convicted under § 922(g) is subject to a mandatory-minimum 15-year prison sentence if he has 3 prior convictions for serious drug offenses committed on occasions different from one another. *Id.* § 924(e)(1). A violation of § 893.13(1) is an ACCA-predicate "serious drug offense," despite the statute's lack of a *mens rea* element. *Smith*, 775 F.3d at 1266-68. This is so regardless of the Florida legislature's removal of a *mens rea* element from § 893.13 in 2002. *United States v. Phillips*, 834 F.3d 1176, 1184 (11th Cir. 2016). A prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting *en banc*. *United States v. Baston*, 818 F.3d 651, 662 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 850 (2017).

Reasonable jurists would not debate the district court's denial of this claim on its merits. This Court's precedent in *Smith* that a violation of § 893.13(1) is an ACCA-predicate "serious drug offense" forecloses Hayes's arguments that it is not, regardless of whether he disagrees with this Court's reasoning in *Smith*. *Smith*, 775 F.3d at 1268; *Baston*, 818 F.3d at 662. That his convictions occurred

after the Florida legislature's removal of a *mens rea* element from § 893.13 does not impact this result. *Phillips*, 834 F.3d at 1184. Thus, no COA is warranted on this claim.

CONCLUSION:

Because Hayes did not demonstrate that jurists of reason would find debatable the district court's denial of the claims raised in his § 2255 motion, his motion for a COA is DENIED. *See Slack*, 529 U.S. at 484.



UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number: 14-22269-CIV-MARTINEZ-GOODMAN
(Case Number: 07-20154-CR-MARTINEZ)

JEROME HAYES,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE GOODMAN'S REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Jonathan Goodman, United States Magistrate Judge, for a Report and Recommendation on Movant's counseled motion to vacate, filed pursuant to 28 U.S.C. § 2255 [ECF No. 1]. Magistrate Judge Goodman filed a Report and Recommendation [ECF No. 8], recommending that the motion to vacate be denied and that no certificate of appealability be issued. The Court has reviewed the entire file and record and has conducted a *de novo* review of the Objections to the Magistrate Judge's Report and Recommendation. After careful consideration, it is hereby:

ADJUDGED that United States Magistrate Judge Goodman's Report and Recommendation [ECF No. 8] is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ADJUDGED that Movant's counseled motion to vacate, filed pursuant to 28 U.S.C. § 2255 [ECF No. 1], is **DENIED**. A certificate of appealability is **DENIED**. This case is **CLOSED**, and all pending motions are **DENIED** as **MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 22 day of August, 2017.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Goodman
All Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-CIV-22269-MARTINEZ/GOODMAN
(Criminal Case No. 07-CR-20154-MARTINEZ)

JEROME HAYES,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Movant, Jerome Hayes, through undersigned counsel, respectfully objects to the Magistrate Judge's Report and Recommendation ("R&R") as set forth below.

On July 22, 2008, Mr. Hayes was found guilty after a trial of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1).

In preparing the presentence investigation report (PSI), the probation officer initially assigned Mr. Hayes an adjusted offense level of 28 pursuant to U.S.S.G. § 2K2.1. (PSI ¶ 21). However, the probation officer classified Mr. Hayes as an armed career criminal pursuant to 18 U.S.C. 924(e) based upon his prior convictions for serious drug offenses consisting of possession with intent to sell or deliver cocaine (F98-16204A); the sale, manufacture or delivery of cocaine (F98-33357B); possession with intent to sell, manufacture or deliver cocaine (F03-14040A); and

the sale or delivery with intent to sell cocaine (F05-3985). As an armed career criminal, Mr. Hayes's offense level was increased to 34 pursuant to U.S.S.G. § 4B1.4(b)(3)(A). (PSI ¶ 22). Mr. Hayes's criminal history category was VI. (PSI ¶ 64). The PSI did not recommend a 3-level reduction for acceptance of responsibility because Mr. Hayes proceeded to trial. Accordingly, the PSI recommended a guideline level of 34 with a criminal history category of VI for an advisory guideline range of 262-327 months imprisonment. (PSI ¶ 110). As an armed career criminal, Mr. Hayes also faced a mandatory minimum sentence of 15 years imprisonment. (PSI ¶ 109).

On August 21, 2007, the district court essentially credited Mr. Hayes with acceptance and imposed a sentence of 188 months imprisonment. (DE 87).

Mr. Hayes timely appealed his sentence. (DE 88). This is Mr. Hayes' first §2255 petition.

Mr. Hayes's instant §2255 petition is predicated on the Supreme Court's June 20, 2013, decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), holding that a defendant may not be sentenced as an Armed Career Criminal based upon a prior conviction under a categorically overbroad, indivisible state statute which has elements that do not "match" the elements of the "generic" federal crime. That is precisely the case with Mr. Hayes's convictions under Fla. Stat. §893.13.

On August 10, 2017, the Magistrate Judge issued a Report & Recommendation ("R&R") recommending the denial of Mr. Hayes' §2255 Petition and a Certificate of Appealability based thereon.

The question before the Magistrate Judge was whether a prior Florida drug conviction under Fla. Stat. §893.13 qualified as a predicate for ACCA, even though the Florida drug offense failed to have as an element a mens rea with respect to the illicit substance at issue in the prior conviction. Citing to *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014) and a host of other unpublished Eleventh Circuit decisions, the Magistrate Judge determined that the issue was clearly foreclosed, and that Mr. Hayes' petition should be denied. The Magistrate Judge further recommended that the district court deny Mr. Hayes a Certificate of Appealability.

The Magistrate Judge Erred When It Found That Florida Drug Convictions Sustained After 2002 Could Serve as Predicate Drug Offenses for Purposes of ACCA.

Not only Congress, but 49 out of the 50 states (all except Florida), require – either expressly, or impliedly by judicial decision – that to convict a defendant of possession with intent to distribute a controlled substance the prosecution must prove as an "element" that the defendant knew the illicit nature of the substance he possessed. Notably, and despite that near-nationwide consensus, two years ago the Eleventh Circuit Court of Appeals held in a precedential and far-reaching decision, *United States v. Smith*, 774 F.3d 1262 (11th Cir. Dec. 22, 2014) that *mens rea* is not even an *implied* element of the definition of "serious drug offense" in 18 U.S.C. §924(e)(2)(A)(ii) of the Armed Career Criminal Act, or of the similarly-worded definition of "controlled substance offense" in U.S.S.G. §4B1.2(b), a predicate for the harsh Career Offender enhancement in the Guidelines. In so holding, the Eleventh Circuit explained:

> We need not search for the elements of "generic" definitions of "serious drug offense" and "controlled substance offense" because these terms are defined by a federal statute and the Sentencing Guidelines, respectively. A "serious drug offense" is "an offense under State law," punishable by at least ten years of im-

> prisonment, "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). And a "controlled substance offense" is any offense under state law, punishable by more than one year of imprisonment, "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance ... or the possession of a controlled substance ... with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).
>
> No element of mens rea with respect to the illicit nature of the controlled substance is expressed or implied by either definition. We look to the plain language of the definitions to determine their elements, United States v. Duran, 596 F.3d 1283, 1291 (11th Cir.2010), and we presume that Congress and the Sentencing Commission "said what [they] meant and meant what [they] said," United States v. Strickland, 261 F.3d 1271, 1274 (11th Cir.2001) (internal quotation marks and citation omitted); see also United States v. Shannon, 631 F.3d 1187, 1190 (11th Cir.2011). The definitions require only that the predicate offense "involv[es]," 18 U.S.C. § 924(e)(2)(A)(ii), and "prohibit [s]," U.S.S.G. § 4B1.2(b), certain activities related to controlled substances.
>
> Smith and Nunez argue that the presumption in favor of mental culpability and the rule of lenity, *Staples v. United States,* 511 U.S. 600, 606, 619, 114 S.Ct. 1793, 1797, 1804 [] (1994), require us to imply an element of *mens rea* in the federal definitions, but we disagree. The presumption in favor of mental culpability and the rule of lenity apply to sentencing enhancements only when the text of the statute or guideline is ambiguous. *United States v. Dean,* 517 F.3d 1224, 1229 (11th Cir.2008); *United States v. Richardson,* 8 F.3d 769, 770 (11th Cir.1993). The definitions of "serious drug offense," 18 U.S.C. § 924(e)(2)(A)(ii) , and "controlled substance offense," U.S.S.G. § 4B1.2(b), are unambiguous.

As a result of *Smith*, a conviction under the post-2002 version of Fla. Stat. §893.13 – the *only* strict liability possession with intent to distribute statute in the nation – may now properly be counted as both an ACCA and Career Offender predicate in the Eleventh Circuit. The Eleventh Circuit has so held in countless other cases, since *Smith*. Indeed, the Eleventh Circuit has followed *Smith* rigidly, refusing to consider on-point precedents of the Supreme Court.

A. The Eleventh Circuit's Determination That a Conviction Under a Strict Liability State Drug Statute Like Florida Stat. §893.13 Is a Proper ACCA Predicate, Improperly Disregards and Conflicts With the Supreme Court's Holding in *Begay v. United States*, 553 U.S. 137 (2008).

In *Begay*, the Supreme Court held that the definition of "violent felony" in 18 U.S.C. §924(e)(2)(B)(ii) must be interpreted in light of Congress' purpose in amending the ACCA in 1986 and expanding the list of predicate crimes, which was to harshly punish the "particular subset of offender" whose "past crimes" had predictive value regarding the "possibility of future danger with a gun" – making it "more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." *Id.* at 145-147. The "relevance" of an ACCA predicate, the Supreme Court clarified in *Begay*, is not that it reveals the offender's mere "callousness toward risk" (as is the case with most crimes, including DUI). Rather, a prior crime is "relevant" for purposes of the ACCA *only* if "show[s] an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Id.* at 146. And, there is "no reason to believe that Congress intended a 15-year mandatory prison term "where that increased likelihood does not exist." *Id.* While a prior record of "purposeful, violent, and aggressive" crimes increases that likelihood, the Supreme Court held that a prior record of strict liability crimes is "different" – and does *not*. *Id.* at 148.

Two of Mr. Hayes' convictions for sale of cocaine under Fla. Stat. §893.13 are indisputably prior records of strict liability crimes. On May 2, 2002, the Florida legislature formally removed the judicially-implied knowledge element from §893.13 by enacting Fla. Stat. §893.101

(May 13, 2002) which declared that any conviction under §893.13 going forward would *not* require the prosecution to prove as an "element" that the defendant "knew the illicit nature" of the substance he possessed with intent to sell. Accordingly, for these precise reasons the Supreme Court held in *Begay* that a prior conviction for DUI is *not* a predictor of future dangerousness with a gun and therefore not a proper ACCA predicate. The magistrate judge should have held that a post-2000 conviction for violating Fla. Stat. §893.13 – which contains no *mens rea* element, and like DUI, is a strict liability crime – does not increase the likelihood of future dangerousness with a gun, and is not a proper ACCA predicate.

The Eleventh Circuit did not consider *Begay* in *Smith*. While it justified its refusal to consider *Begay* in the decision below by insisting that there is no "overlooked reason" exception to its prior panel precedent rule, its continued conclusion that a strict liability crime is a proper ACCA predicate conflicts directly with *Begay*. Accordingly, *Smith* should not be followed and Mr. Hayes should be granted relief.

B. The Eleventh Circuit's Determination That It "Need Not Search for the Elements" of a "Generic' Definition" of a "Serious Drug Offense" Conflicts With the Supreme Court's Holding in *Taylor v. United States*, 495 U.S. 575 (1990).

In *Taylor*, the Supreme Court explained that Congress took a "categorical approach to predicate offenses" in the ACCA, by designating ACCA predicates using "uniform, categorical definitions intended to capture all offenses of a certain level of seriousness." The "uniform definition" Congress intended, the Supreme Court concluded, was the "generic definition" which is

determined by the elements of the listed offense as defined by the majority of the states. *Id.* at 590, 601-602.

The Eleventh Circuit did not dispute in *Smith* – because it could not – that Fla. Stat. §893.13 is a "non-generic" possession with intent to distribute statute due to the Florida legislature's elimination of proof of *mens rea* as an element in 2002. In *Donawa v. U.S. Attorney General*, 735 F.3d 1275 (11th Cir. 2013), the Eleventh Circuit had rightly found there to be no "match" between the elements of §893.13 and its "federal analogue," 21 U.S.C. §841, since §841 expressly requires proof – as an element for conviction – that the defendant knew the illicit nature of the substance, while the post-2002 version of §893.13 does not. 735 F.3d at 1281. And in *Florida v. Adkins*, 96 So.3d 412 (Fla. 2012), cited in *Donawa*, the Florida Supreme Court had expressly recognized that the post-2002 version of Fla. Stat. §893.13 was "out of the mainstream" of all state controlled substance offense statutes, since the "overwhelming majority" – either by statute or judicial decision – require "knowledge of the illicit nature of the substance" as an element of any controlled substance offense. *Id.* at 424.

In asserting – without supportive authority – that it "need not search for the elements" of a "'generic' definition" of "serious drug offense" because the term "serious drug offense" is "defined by a federal statute," 18 U.S.C. §924(e)(2)(A)(ii), the Eleventh Circuit attempted to circumvent *Taylor*, and avoid having to acknowledge that (1) there was no "match" between the elements of a post-2002 conviction under §893.13 and those of a generic possession with intent to distribute offense (which necessitates proof of *mens rea*), and (2) in those circumstances, *Taylor* and *Descamps,* 133 S.Ct. 2276, together compelled a finding that such a conviction was not a proper ACCA predicate. But the problem with that *Taylor*-avoidance strategy is not simply

that there is no support for it under the law; the analogy between the term "serious drug offense" (as defined in §924(e)(2)(A)(ii)) and the term "burglary" in §924(e)(2)(B)(ii)(the undefined term at issue in *Taylor*) on which it is premised is inexact, and therefore inapt since the terms "burglary" and "serious drug offense" are *not* parallel terms in the ACCA. An apt and proper comparison would have been between "serious drug offense" and "violent felony" (both, categories of ACCA predicates), or between "burglary" and "possession with intent to...distribute" (both, specifically-enumerated offenses within those broad categories). What the Eleventh Circuit improperly ignored was that Congress did *not* further define *either* "burglary" *or* "possession with intent to...distribute" in the ACCA. And therefore, according to *Taylor*, courts must presume Congress intended ***both*** of these undefined enumerated offenses crimes to have "uniform, categorical definitions intended to capture all offenses of a certain level of seriousness," 495 U.S. at 590, 601-602 – namely, their generic definitions as determined by the criminal codes of most states. *Id.* at 598. According to the reasoning and analysis in *Taylor*, after *Descamps* a post-2002 conviction under Florida's non-generic drug statute should *never* qualify as an ACCA predicate.

C. The Eleventh Circuit's Reliance on a Simplistic "Plain Language" Analysis of ACCA's "Serious Drug Offense" Provision, Even Though Such Analysis Resulted in a Harshly-Penalized Federal Statute That Lacked a Mens Rea Element, Conflicts With the Supreme Court's Holding in *Staples v. United States*, 511 U.S. 600 (1994).

The Eleventh Circuit in *Smith* improperly attempted to avoid the presumption of *mens rea* the Supreme Court dictated in *Staples*. In fact, without legal basis, it misstated and then ignored the rule in *Staples*, and applied the opposite presumption – that Congress "said what [it]

meant and meant what [it] said"– in construing a provision in a harshly-penalized federal criminal statute without an express *mens rea* term. It so holding, the Eleventh Circuit misplaced its reliance, and hinged a precedential and far-reaching decision, on a patently inapposite case, *United States v. Strickland*, 261 F.3d 1271, 1274 (11th Cir. 2001), in which the question of construction had nothing to do with *mens rea.*

Although the "plain language" rule applied in *Strickland* is generally the first rule of construction in a case where there is no question about *mens rea*, the Supreme Court was clear in *Staples* that the "plain language" rule is *neither* the first rule *nor* ever an appropriate rule of construction – and that a different and contrary presumption is called for – in construing a harshly-penalized statute without an express *mens rea* term. In that *unique* statutory context (different from the context in *Strickland*), the proper presumption has always been the common law presumption that an offender must know the facts that make his conduct illegal. *Mens rea* is the rule, the Supreme Court explained in *Staples*, *not* the exception. And therefore, the Supreme Court held in *Staples*, that a *mens rea* element must be presumed in any harshly-penalized criminal offense even without an express "knowingly" term, so long as there is no indication either express or implied that "Congress intended to dispense with a "conventional *mens rea* element." *See* 511 U.S. at 605 (Congressional "silence" as to *mens rea* in drafting a statute "does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element"); *id.* at 618 ("a severe penalty" is a "factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement"); *id.* at 618-619 (in the absence of any "express or implied" indication that Congress intended to "eliminate a *mens rea* requirement" in a harshly-penalized federal statute, "*the usual presumption that a defendant must know the facts that make his conduct*

illegal should apply")(emphasis added). See also *United States v. Savage*, 542 F.3d 959, 965-966 (2nd Cir. 2008), the Second Circuit held that a mere "offer to sell" does *not* fit within the Guidelines' definition of "controlled substance offense" in §4B1.2(b), because "a crime not involving the *mental culpability to commit a substantive narcotics offense* [does not] serve as a predicate 'controlled substance offense'" under the Guidelines." *Id.* at 965-966 (emphasis added); *United States v. Fuentes-Oyervides*, 541 F.3d 286, 289 (5th Cir. 2008) (finding that a violation of Ohio statute was a "drug trafficking offense" within the purview of §2L1.2(b)(1)(A) because it "requires *a level of understanding that the drugs* are for sale or resale," and "explicitly includes a *mens rea* requirement concerning distribution;" holding that so long as a state statute requires the defendant "to distribute a controlled substance *while he knows or should know that the substance* is intended for sale," "he commits an act of distribution under the Guidelines." *Id.* at 289 (emphasis added).

The Eleventh Circuit's assertion in *Smith* that the presumption in favor of mental culpability in *Staples* only applies to sentencing enhancements when the "text of the statute ... is ambiguous," is unsupported in the law. Contrary to the misleading suggestion in the decision, *United States v. Dean*, 517 F.3d 1224, 1229 (11th Cir. 2008) provides no support for that wrong principle. The Eleventh Circuit notably did not even acknowledge *Staples* in *Dean*. Instead, it took a narrow, literal, "plain language" approach to a question of construction about *mens rea*, and from that circumscribed inquiry, concluded that the sentencing enhancement for discharge of a firearm under §924(c)(1)(A)(iii) did not apply only to intentional discharges of the firearm because §924(c)(1)(A)(iii) requires only that a person "use or carry" the firearm, and did not "reference" a "*mens rea* requirement." 517 F.3d at 1229-1230.

The Supreme Court, notably, granted certiorari to review the Eleventh Circuit's reasoning. And it is clear from the Supreme Court's own opinion, *Dean v. United States*, 556 U.S. 568 (2009), and its own and very different approach to the *mens rea* question in that case, that the Supreme Court believed the Eleventh Circuit's strict, "plain language" approach to a question about *mens rea* was unwarranted and wrong. While the Supreme Court did ultimately agree with the Eleventh Circuit's conclusion that §924(c)(1)(A)(iii) does not require proof of intent, the Supreme Court did *not* base its own conclusion in that regard on the mere absence of the words "knowingly" or "intentionally" in §924(c)(1)(A)(iii) as the Eleventh Circuit had. Instead, the Supreme Court reached that conclusion only after carefully considering not only the language Congress used in that specific provision, but the language and the *structure* of the entire statute, *id.* at 577, as well as the presumption of *mens rea* dictated by *Staples*.

In its review of the language and structure of §924(c) as a whole, the Supreme Court noted with significance that Congress had expressly included an intent requirement for "brandishing" in subsection (ii) of §924(c)(1)(A), but declined to include one in subsection (iii). *Id.* at 572-573. But the Supreme Court, notably, did not stop its analysis there. It acknowledged the presumption in *Staples* that criminal prohibitions require the government to prove the defendant intended the conduct made criminal. It suggested that the *Staples* presumption *would* apply to a harsh penalty provision *if* such an enhancement would otherwise be predicated upon "blameless" conduct. But in the case before it, the Supreme Court declined to apply the *Staples* presumption and imply a *mens rea* term into §924(c)(1)(A)(ii), since in a §924(c)(1)(A)(iii) case "the defendant is already guilty of unlawful conduct twice over: a violent or drug trafficking offense and the use, carrying, or possession of a firearm in the course of that offense. That unlawful conduct was

not an accident. ... [T]he fact that the actual discharge of a gun covered under §924(c)(1)(A)(iii) may be accidental," "does not mean that the defendant is blameless." *Id.* at 575-576.

The opposite conclusion, however, is compelled here. Defendants classified as Armed Career Criminals based upon prior convictions under Fla. Stat. §893.13(a)(1) are *not* "guilty of unlawful conduct twice over" in their federal cases, as was the defendant in *Dean*. Had the Eleventh Circuit considered and applied *the Supreme Court's* reasoning and analysis in *Dean* to the question of whether *mens rea* should be implied as an element of any "serious drug offense" as defined in §924(e)(2)(A)(ii) – had it considered the language and structure of the ACCA as a whole as the Supreme Court did in *Dean*, the *Staples* presumption as the Supreme Court likewise did in *Dean*, and that a conviction under Fla. Stat. §893.13 is effectively for "blameless conduct" since the state is not required to prove the defendant "knew the illicit nature of the substance" possessed – the Eleventh Circuit would have correctly found that *mens rea* is an implied element of any "serious drug offense" within §924(e)(2)(A)(ii), and that the district court erred in predicating the ACCA enhancement on a strict liability crime.

The Supreme Court's analysis and searching approach to the *mens rea* question in *Dean* is consistent with, and supports, a reading of the definition of "serious drug offense" in §924(e)(2)(A)(ii) to include an implied *mens rea* element. And the analysis in *Dean* also confirms the error in the Eleventh Circuit's continual superficial approach to questions of construction involving *mens rea*. Unfortunately, since *Smith* is precedential in the Eleventh Circuit, the unfounded reasoning and declarations about *Staples* in that decision has reverberated and controlled other Eleventh Circuit cases such as Mr. Hayes's case. Because this approach is in error, Mr. Hayes requests relief through the instant petition.

D. *Staples* dictates that *mens rea* should be implied in §924(e)(2)(A)(ii) if there is no indication either express or implied that Congress intended to dis pense with a conventional *mens rea* element" in that provision; Congress did not intend – and could never have imagined – that a conviction under a strict liability "possession with intent to distribute statute" would be counted as a "serious drug offense" within §924(e)(2)(A)(ii).

In adding a "serious drug offense" as an ACCA predicate in 1986, and defining that new predicate in parallel provisions of §924(e)(2)(A), Congress gave *no* indication that it intended to cast a wider "net" for qualifying *state* drug crimes than federal drug crimes – or sought to include strict liability *state* drug crimes as ACCA predicates. Notably, *all* of the *federal* drug crimes Congress designated as ACCA predicates in §924(e)(2)(A)(i) – *e.g.*, "offense[s] under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. §951 et seq.) or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law"– indisputably require proof of *mens rea as an element*. And there is no indication that Congress intended its parallel definition of state drug offenses that would qualify as ACCA predicates to be different in this crucial respect.

Both the original Senate bill, S. 2312 (May 14, 1986), and original House bill, H.R. 4639 (May 21, 1986), proposed defining the new "serious drug offense" predicate as simply "an offense for which a maximum term of imprisonment of ten years or more is required by the Controlled Substances Act (21 U.S.C. 801 et sq.), or the first section of Public Law 96-350 (21 U.S. C. 955a)." That single definition was intended to cover *both* state and federal offenses. Although a subsequent bill added both State and Federal import and export "drug trafficking felonies," it was not until the final bill, H.R.

4885, that the state and federal definitions were separated. According to the "section-by-section" analysis in the Report accompanying that final bill, the definition of "serious drug offense" in §924(e)(2)(A)(ii) was intended to cover "offenses under the *Federal drug trafficking laws* ... for which imprisonment of 10 years or more is applicable," while the definition in §924(e)(2)(A)(ii) "describes in general terms (similar to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961) *those State drug* ***trafficking*** *offenses* for which a maximum confinement of 10 years or more is prescribed." (Emphasis added). There is ***no*** indication, from this history and analysis of the 1986 amendment that added the separate state and federal definitions for the new "serious drug offense" predicate, that Congress intended for any state drug offense other than a *state drug* ***trafficking*** *crime* to qualify as a "serious drug offense" and new predicate. The Eleventh Circuit, plainly, did not consider the history of the new definitions. But even without knowing that history, it was wrong and illogical for it to interpret §924(e)(2)(A)(ii) in a manner suggesting Congress had defined the *same* term and ACCA predicate – "serious drug offense"– which triggered the *same* harsh penalty, in a manner that required proof of *mens rea only* for *federal* drug offenses and *not state* drug offenses. The Eleventh Circuit's inconsistent reading of Congress' parallel definitions of "serious drug offense" in §924(e)(2)(A) violated multiple well-settled rules of construction. For instance, it violated the rule that individual sections of a single statute passed by the same Congress *must* be read "*in pari materia*" and "construed together." *See, e.g, Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). It violated the rule that in matters of statutory construction no word or provision in a statute can or should ever be read "in isolation," or solely pursuant to its dictionary meaning, since "context" always "gives meaning." *See, e.g, Yates v. United States*, 135 S.Ct. 1074, 1081-1082 (2015). And it also vio-

lated the corollary of that rule that if the same term is used throughout a statute, the Court must consider its meaning throughout. *See, e.g.,United States v. Santos*, 553 U.S. 507, 512 (2008).

But most inexplicably, the Eleventh Circuit chose to simply ignore, and therefore also violate, the very rules of construction the Supreme Court has carefully applied in interpreting related provisions in the ACCA. The problem, here, goes beyond the fact that the Eleventh Circuit ignored *Begay*, and Congress' stated intent in the ACCA (as stated in *Begay*). In *McNeil v. United States*, the Supreme Court interpreted the definition of "serious drug offense" by considering "[t]he 'broader context of the statute as a whole,' specifically the adjacent definition of 'violent felony.'"131 S.Ct. at 2221-2221 (2011)(noting that the broader ACCA context confirmed its interpretation of the term "serious drug offense;" emphasizing that in any statutory construction case the Court must not only consider the language itself, but also "the context in which that language is used"). Similarly, in *Curtis Johnson*, the Court did *not* consider the term "physical force" in §924(e)(2)(B)(i) in isolation, or restrict its attention to the dictionary meaning of those terms, but instead, considered the phrase "physical force" "in the context of a statutory definition of 'violent felony.'" Against that context, it was able to conclusively determine that "'physical force' means violent force." *Id.* at 140.

Here, inconsistently with these precedents, the Eleventh Circuit ignored "context" entirely, as it notably has done in other statutory construction cases reversed by the Supreme Court. It narrowly considered only the plain, dictionary meaning of the *words* used in §924(e)(2)(A)(ii), in complete isolation from their context, and without any regard for Congress' clearly-expressed intent that only "*serious*" prior drug crimes that involved "trafficking" (which necessitates that the defendant know the illicit nature of the substance he is trafficking) qualify a §922(g)(1) offender for the harsh ACCA enhancement. While the Court in *Curtis Johnson* refused to adopt any construction of the term "violent

felony" in the ACCA that would be a "comical misfit," that is precisely what the Eleventh Circuit's construction of the term "serious drug offense" is here.

Had the Eleventh Circuit considered rather than ignored the pertinent rules of construction identified above – or, at minimum, read the definition of "serious drug offense" in §924(e)(2)(A)(ii) in *pari materia* with, and in the "context" of, Congress' definition of that same term in §924(e)(2)(A)(i), and with its definition of the other ACCA predicate, "violent felony," as previously construed by the Supreme Court – it would easily have realized that *mens rea* must be an element of any "serious drug offense." And, had the Eleventh Circuit considered the statutory backdrop at the time of the 1986 amendment, against which Congress wrote its dual definitions of "serious drug offense" into the ACCA (as the Supreme Court did in *United States v. Rodriguez*, 553 U.S. 337, 390-391 (2008)), it could not have interpreted §924(e)(2)(A)(ii) in the illogical manner it did, suggesting that Congress intended to "dispense with" proof of *mens rea* for *state* drug predicates, but not for federal ones. *Cf. Voisine*, 136 S.Ct. at 2278-2280 (interpreting the term "use" in the phrase "use ... of physical force" in §921(a)(33)(A) in light of the "background" and "history" of 18 U.S.C. §922(g)(9), and Congress' goal of barring "those domestic abusers convicted of garden-variety assault or battery misdemeanors" from owning guns; rejecting petitioners' reading because it would render §922(g)(9) "broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness").

There is no logical reason Congress could or would have intended in 1986 that a conviction under a strict liability state drug statute would serve as a predicate for an ACCA enhancement when at the time *mens rea* was an express or judicially-implied element in *every* federal drug trafficking statutes, in 48 out of the 50 state controlled substance statutes (including Florida's). According to a survey conducted by the Maryland Court of Appeals as of 1988, only *two* states out of the 50 (North Dakota

and Washington) construed their drug statutes not to require proof of *mens rea* as an element of "the offense of possession of controlled substances." *Dawkins v. State*, 547 A.2d 1041, 1045 & n. 7 (Md. 1988). And even that is not an entirely accurate statistic. For notably, the State of Washington has only construed its "mere possession" statute, and *not* its "possession with intent to distribute statute," as a strict liability crime. *See State v. Bradshaw*, 98 F.3d 1190 (Wash. 2004)(*en banc*)(confirming that the Washington courts had not "construed possession *under the mere possession statute* as a term of art, and we have specifically construed the statute not to include knowledge")(emphasis added). Therefore, in 1986, there actually was *only* one state – North Dakota – that treated its "possession with intent to deliver" offense as a strict liability crime. *See State v. Rippley*, 319 N.W.2nd 129 (N.D. 1982). And there is *no* evidence Congress knew North Dakota was an outlier in 1986 – let alone intended to sweep in a conviction under any state that did not require proof of *mens rea* – when it defined the new "serious drug offense"/ACCA predicate.

In any event, only a few years after Congress wrote its definitions of "serious drug offense" into the ACCA, the North Dakota Legislature repealed its strict liability "possession with intent to distribute statute," and added a *mens rea* element into that statute, by newly specifying that "'it is unlawful for any person to *willfully*, as defined in section 12.1-02-02, manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.' (Emphasis added)." *See State v. Bell*, 649 N.W.2nd 243 (N.D.2002)(citing North Dakota Session Laws 1989, ch. 267 §1, filed March 28, 1989, effective Aug. 1, 1989; noting that the Legislature defined the term "willfully" in the 1989 amended statute to mean that the defendant engaged in the conduct "intentionally, knowingly, or recklessly"). North Dakota, plainly, "switched camps" in 1989, and has remained in the mainstream of possession with intent to distribute statutes since that time.

Florida, of course, "switched camps" in the other direction in 2002. And since that time, Florida has remained the *only* outlier – the *only* state in the country to interpret a "possession with intent to distribute" offense as a strict liability crime. Given that Florida was well within the "mainstream" in 1986 when Congress defined "serious drug offense" in §924(e)(2)(A)(ii) to include "an offense under State law, involving .. possessing with intent to ... distribute, a controlled substance offense," since at that time the Florida courts read their own "possession with intent to distribute" statute to require affirmative proof the defendant knew the illicit nature of the controlled substance, it was error for the Eleventh Circuit to construe §924(e)(2)(A)(ii) in a manner Congress could never imagined when it drafted that provision. Congress could never have anticipated in 1986, that only eight years later, Florida would become the only state in the country to interpret its "possession with intent to distribute" statute as a strict liability crime.

E. At the very least, the Magistrate Judge should have applied the rule of lenity.

Had the Magistrate Judge properly applied the Supreme Court's precedents and all pertinent rules of construction, and found §924(e)(2)(A)(ii) "ambiguous" on the issue of *mens rea* rather than completely "unambiguous" without any *mens rea* requirement, the rule of lenity would have required the court to adopt the defense-favorable reading of §924(e)(2)(A)(ii) until Congress itself clarified whether *mens rea* was an element of any state "possession with intent to distribute" offense within the purview of that provision. *See United States v. Santos*, 553 U.S. 507, 512-515 (2008). Notably, even assuming for the sake of argument that the literal, "plain language" reading of §924(e)(2)(A)(ii) were considered an "equally rational" reading of the "possession with intent to distribute" language in §924(e)(2)(A)(ii), the rule of lenity would still require in that situation that the "tie" go to the petitioners

F. The clear error in the Eleventh Circuit's holding in *Smith* that a conviction under a strict liability state drug statute is a proper ACCA predicate is confirmed by the Supreme Court's post-*Smith* decisions in *Elonis* and *McFadden*

The Supreme Court's post-*Smith* decisions in *Elonis v. United States*, 135 S.Ct. 2276 (2015) and *McFadden v. United States*, 135 S.Ct. 2298 (2015) confirm the error in the R&R – relying on *Smith* which holds that *mens rea* is not an implied element of any "serious drug offense" as defined in 18 U.S.C. §924(e)(2)(A). In *Elonis*, the Supreme Court rejected the same, overly-literal approach to statutory construction adopted in *Smith*. Notably, the government contended in *Elonis* that a person could rightly face up to five years imprisonment for transmitting a threat in interstate or foreign commerce in violation of 18 U.S.C. §875(c) without proof that he intended his communication to contain a threat, since Congress did not include any *mens rea* term in §875(c). According to the government, Congress' inclusion of express "intent to extort" requirements in other subsections of §875 precluded the judicial implication of an "intent to threaten" requirement into §875(c). *Elonis*, 135 S.Ct. at 2008.

In rejecting the government's argument that the absence of *mens rea* language in §875(c) was significant in any manner, the Supreme Court reiterated that "the fact that [a] statute does not specify any required mental state [] does not mean that none exists," and held that §875(c) indeed requires proof that the defendant intended his communications as threats – not simply that a reasonable person would regard them as threatening. 135 S.Ct. at 2009.

The error in *Smith*'s holding that the language in §924(e)(2)(A)(ii) is "unambiguous" and does not contain a *mens rea* requirement is further confirmed by the Solicitor General's candid concession, and the Supreme Court's ultimate reasoning and holding, in *McFadden*. Notably, the Supreme Court granted certiorari in *McFadden* to resolve a circuit conflict on a related issue to that in *Smith*: whether

the Controlled Substance Analogue Enforcement Act of 1986 (21 U.S.C. §813) is properly read to include an implied *mens rea* requirement. In his Initial Brief on the Merits, McFadden argued that the Fourth Circuit had erroneously read the absence of an express *mens rea* term in the Analogue Act to only require the government to prove the defendant intended the substance for human consumption – *not* that he *knew* that the substance he distributed was a "controlled substance analogue." Brief for the Petitioner, 2015 WL 881768 at **16, 20-21 (March 2, 2015). As support, McFadden argued similarly to the appellants in *Smith* that (1) Congress enacted the Analogue Act against a "backdrop" of interpreting criminal statutes to necessitate *mens rea*; and (2) "[a]bsent significant reason to believe that Congress intended otherwise," *Staples* required courts to imply a requirement that the defendant "know the facts that make his conduct illegal." *Id.* at **26-28. Somewhat unexpectedly, in the government's responsive brief, the Solicitor General agreed that the Fourth Circuit had erroneously instructed the jury, and that "violations of the Analogue Act must be governed by the mental-state requirement that courts have universally found in the CSA, 21 U.S.C. §841(a) – namely, that a defendant must have known that the substance he possessed or distributed was controlled or regulated, 'that is, that the substance "was some kind of prohibited drug."'" Brief of the United States, 2015 WL 1501654 at *20 (April 1, 2015). At the April 21, 2015 oral argument, McFadden's counsel advised the Supreme Court that the briefing had greatly narrowed the parties' initial disagreement, and since the government now expressly agreed that to prove a violation of the Analogue Act, it "must show that the defendant *knowingly* distributed an analogue," the only point of contention remaining was how the requisite knowledge may be proved. 2015 WL 1805500 at **3-4 (April 21, 2015).

While the Court resolved that dispute by holding that the requisite knowledge required by *Staples* could be proved in either of two ways in an Analogue Act prosecution – by proving the defendant's knowledge that substance was "listed or treated as listed by operation of the Analogue Act," or by demonstrating his knowledge of the physical characteristics of the substance that give rise to that treatment," 135 S.Ct. 2305, 2306 – its more important holding for the instant case (undermining *Smith*) was that the Fourth Circuit's interpretation of the Analogue Act to require *no* proof of *mens rea* was erroneous, and it should have applied the same mental state requirement as in 21 U.S.C. §841 notwithstanding the absence of an express *mens rea* term in §813. *Id.* The Court's holding that "the government must prove that a defendant *knew* that the substance with which he was dealing was a controlled substance" even without an express *mens rea* term in the Analogue Act, underscores and confirms the error in *Smith*'s contrary reading of §924(e)(2)(A)(ii) not to require proof of *mens rea*. *Elonis* and *McFadden* confirm that it was error for the Magistrate Judge to recommend denial of Mr. Hayes' §2255 petition upon convictions under Florida's unique, non-generic drug statute. Based upon these authorities, the Court should grant Mr. Hayes's relief as requested in his instant petition.

CONCLUSION

In light of the above, the Movant Mr. Hayes, requests that this Court reject the Magistrate Judge's Report and Recommendation and grant him relief under his §2255 petition, or alternatively, grant him a Certificate of Appealability.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on August 21, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/Margaret Foldes

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 14-CIV-22269-MARTINEZ/GOODMAN
CASE NO. 07-CR-20154-MARTINEZ

JEROME HAYES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATIONS ON 28 U.S.C. § 2255 MOTION

Movant Jerome Hayes filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence. [ECF No. 1]. The United States filed an opposition response [ECF No. 5], and Hayes filed a reply [ECF No. 6]. United States District Judge Jose E. Martinez referred all pretrial matters in this case to the Undersigned. [ECF No. 7].

For the reasons discussed below, the Undersigned **respectfully recommends** that the District Court **deny** the § 2255 motion, not issue a certificate of appealability, and **close** this case.

I. Fla. Stat. § 893.13 and the ACCA

Hayes raises but one issue: "whether the Florida state drug crime set out in Fla. Stat. § 893.13 can serve as a predicate offense for the armed career criminal act enhancement ("ACCA"), 18 U.S.C. § 924(e), even though § 893.13 lacks a *mens rea* element with respect to the nature of the illicit substance." [ECF No. 6, p. 1]. The

Eleventh Circuit has affirmatively answered that question with a resounding "Yes." *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014) (affirming district court's sentence of defendant as an armed career criminal based on violations of § 893.13 despite lack of *mens rea* element).

Smith remains good, binding law. The Eleventh Circuit has since refused numerous invitations to overturn *Smith*, recognizing it as binding precedent and relying on it to reject the same argument Hayes raises here. *See, e.g., United States v. Pridgeon*, 853 F.3d 1192, 1196, 1198 (11th Cir. 2017) (rejecting argument that "convictions under § 893.13 of the Florida Statutes cannot serve as predicate offenses under the career offender guideline because § 893.13 allows for a conviction regardless of whether the defendant knew that the substance possessed was an illicit controlled substance[,]" explaining, "We are bound to follow *Smith*. In any event, we agree with *Smith's* above reasoning.").[1]

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[1] In fact, such cases are legion, and some are very recent. *United States v. Williams*, No. 16-16403, 2017 WL 2712964, at *3 (11th Cir. June 23, 2017); *United States v. McKenzie*, No. 16-15936, 2017 WL 2492032, at *2 (11th Cir. June 9, 2017); *McDowell v. Warden, FCC Coleman-Medium*, No. 16-10047, 2017 WL 2352000, at *3 (11th Cir. May 31, 2017); *United States v. Lott*, No. 16-11993, 2017 WL 1857238, at *1 (11th Cir. May 8, 2017); *Bell v. United States*, No. 16-11267, 2017 WL 1402986, at *2 (11th Cir. Apr. 20, 2017); *United States v. Turner*, No. 16-11836, 2017 WL 1244836, at *6 (11th Cir. Apr. 5, 2017); *United States v. Pearson*, 662 F. App'x 896, 900 (11th Cir. 2016), cert. denied 137 S. Ct. 2097 (2017); *United States v. Senecharles*, 660 F. App'x. 812, 814 (11th Cir. 2016); *United States v. Telusme*, 655 F. App'x 743, 745 (11th Cir. 2016), cert. denied 137 S. Ct. 2091 (2017); *Jones v. United States*, 650 F. App'x. 974, 977 (11th Cir. 2016), cert. denied 137 S. Ct. 316 (2016); *United States v. Holmes*, 647 F. App'x. 1014, 1017 (11th Cir. 2016); *United States v. Patterson*, 615 F. App'x. 594, 596 (11th Cir. 2015), cert. denied 136 S. Ct. 427 (2015); *United States v. Jackson*,

Accordingly, the Undersigned recommends that the District Court **deny** Hayes's § 2255 motion and **close** this case.[2]

II. Certificate of Appealability

Rule 11(a) of the Rules Governing § 2255 Proceedings provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued, then "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." To merit a certificate, Hayes must show "that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise." *United States v. Rhodes*, Nos. 8:13-cr-347-T-23TGW, 8:16-cv-1752-T-23TGW, 2016 WL 4702430, at *4 (M.D. Fla. Sept. 8, 2016) (citing 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001)).

Here, given the overwhelming authority foreclosing Hayes's argument, he cannot show that reasonable jurists would debate either the merits of the claims or any procedural issues. Thus, the Undersigned recommends that the District Court find that Hayes is not entitled to a certificate of appealability.[3]

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604 F. App'x. 913, 914 (11th Cir. 2015).

[2] Given my recommendation that the § 2255 motion be denied on the merits, the Undersigned need not decide whether the motion was timely.

[3] As now provided by Rule 11(a), "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is

III. Objections

The parties will have 10 days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with the District Judge. Each party may file a response to the other party's objection within 10 days of the objection.[4] Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, on August 10, 2017.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

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an objection to this recommendation by either party, then that party may bring this argument to the attention of the District Court in the objections permitted to this Report and Recommendations.

[4] The Undersigned is shortening the time for objections and responses because of the clear legal authority resolving this case.

Copies furnished to:
The Honorable Jose E. Martinez
All counsel of record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.
(Crim.Case No. 07-20154-Cr-MARTINEZ)

JEROME HAYES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

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

Movant, Jerome Hayes, by and through undersigned counsel, files this motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and memorandum in support, and states:

1. On July 22, 2008, Mr. Hayes was found guilty after a trial of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1).

2. In preparing the presentence investigation report (PSI), the probation officer initially assigned Mr. Hayes an adjusted offense level of 28 pursuant to U.S.S.G. § 2K2.1. (PSI ¶ 21). However, the probation officer classified Mr. Hayes as an armed career criminal pursuant to 18 U.S.C. 924(e) based upon his prior convictions for serious drug offenses consisting of possession with intent to sell or deliver cocaine (F98-16204A); the sale, manufacture or delivery of cocaine (F98-33357B); possession with intent to sell, manufacture or deliver cocaine (F03-14040A); and the sale or delivery with intent to sell cocaine (F05-3985). As an armed career criminal, Mr. Hayes's

offense level was increased to 34 pursuant to U.S.S.G. § 4B1.4(b)(3)(A). (PSI ¶ 22). Mr. Hayes's criminal history category was VI. (PSI ¶ 64). The PSI did not recommend a 3-level reduction for acceptance of responsibility because Mr. Hayes proceeded to trial. Accordingly, the PSI recommended a guideline level of 34 with a criminal history category of VI for an advisory guideline range of 262-327 months imprisonment. (PSI ¶ 110). As an armed career criminal, Mr. Hayes also faced a mandatory minimum sentence of 15 years imprisonment. (PSI ¶ 109).

3. On August 21, 2007, the district court essentially credited Mr. Hayes with acceptance and imposed a sentence of 188 months imprisonment. (DE 87).

4. Mr. Hayes timely appealed his sentence. (DE 88). He has not previously filed a motion to vacate his sentence pursuant to 28 U.S.C. §2255.

5. Mr. Hayes's instant §2255 petition is predicated on the Supreme Court's June 20, 2013, decision in *Descamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276 (2013), holding that a defendant may not be sentenced as an Armed Career Criminal based upon a prior conviction under a categorically overbroad, indivisible state statute whose elements do not "match" the elements of the "generic" federal crime. That is precisely the case with Mr. Hayes's convictions under Fla. Stat. §893.13.

GROUND FOR RELIEF

Mr. Hayes was improperly sentenced as an Armed Career Criminal, and has therefore received a punishment that the law does not allow.

MEMORANDUM OF LAW

I. Mr. Hayes is not an Armed Career Criminal.

Under 18 U.S.C. § 924(e)(1) a person who possesses a firearm and has three prior convictions for either a violent felony or a serious drug offense, or both, is classified as an Armed Career Criminal, and must be sentenced to a mandatory minimum fifteen years imprisonment.

A "serious drug offense" means –

> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. § 924(e)(2)(A)(ii).

Four convictions were used to classify Mr. Hayes as an Armed Career Criminal. They were all convictions under Fla. Stat. §893.13 for possession with intent to sell, deliver or manufacture a controlled substance or cocaine. Two of these cases were sustained after 2002. They were case no. F03-14040A and F05-3985, commenced in 2003 and 2005. These two prior convictions were improperly classified as serious drug offenses.

a. The Supreme Court's decision in *Descamps* has unsettled the settled law of this Circuit

In *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (June 20, 2013), the Supreme Court overturned a longstanding and widespread practice among many federal circuits – including our own – that had misused the "modified categorical approach" to judicially substitute a "facts-based inquiry for an elements-based one." *Id.* at 2293. The "modified approach," the Court clarified in *Descamps*, "has no role to play" where the prior statute of conviction contains a single,

"indivisible" set of elements, rather than an "alternative" list of elements. *Id.* at 2285. Where there is only *one* manner of violating the statute, the sentencing court is limited to the "categorical approach," and may *not* look behind the judgment and consider non-elemental facts, even if they are "admitted" by the defendant. *See id.* at 2289. The "categorical" inquiry, by contrast to the modified approach, is narrow and limited to determining whether the elements of the statute of the prior conviction "match" – or do not "match" – the elements of a "generic" federally-listed crime. *Id.* at 2292. If it turns out from the categorical inquiry and this comparison, that the state statute is either "overbroad" or "missing" an element of the generic crime, the Supreme Court held in *Descamps*, the prior conviction may *not* be used for federal enhancement purposes. *See id.* at 2290-2292.

The California burglary statute the Supreme Court examined in *Descamps* "swept widely," and included many crimes "beyond the normal, 'generic' definition of burglary." 133 S.Ct. at 2282. It did not require "breaking and entering" or any other form of "unlawful entry," but instead criminalized "entering" a "house or other building, tent, vessel ..., floating home, ... railroad car .... with intent to commit grand or petit larceny or any felony." It therefore covered "simple shoplifting." *See id.* at 2285-2286. There was no "match" between the elements of such a statute and those of "generic burglary," the Court explained, "because generic burglary's unlawful-entry element excludes any case in which a person enters premises open to the public, no matter his intent; the generic crime requires breaking and entering or similar unlawful activity." *Id.* at 2292. The California statute was "missing" the generic unlawful entry element, and that rendered any California burglary conviction categorically "overbroad." *See id.*

The Supreme Court was emphatic in *Descamps* that a district court presented with a prior conviction under a non-generic, "overbroad," and "indivisible" statute may *not* go behind the

judgment to consult the information or any other "*Shepard* documents" to determine the "conduct" of conviction. When considering a conviction under a statute which defines the crime "not alternatively," but "more broadly than the generic offense," the Supreme Court held, *Shepard*'s "modified approach" *cannot* convert the conviction into the narrower enumerated crime. *Id.* at 2286. It is legally "irrelevant" – after *Descamps* – that as a factual matter, the defendant may have "committed" or "admitted" the generic offense. *Id.* at 2288-2289.

That *Descamps* has "unsettled" the prior "settled" law of the Eleventh Circuit in this regard is clear from two quite significant post-*Descamps* decisions written by Chief Judge Carnes: *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014), and *United States v. Jones*, 743 F.3d 826 (11th Cir. 2014). In *Howard*, the Chief Judge expressly recognized that the "settled law" of the Circuit, as set forth in *United States v. Rainer*, 616 F.3d 1212, 1213 (11th Cir. 2010), "has been unsettled by the Supreme Court's recent decision in *Descamps*." *Howard*, 742 F.3d at 1337. Specifically, the Chief Judge explained, "[t]wo crucial aspects of our decision in [*Rainer*] are no longer tenable after *Descamps*" – first, *Rainer's* "assumption that the modified categorical approach could be applied to any non-generic statute," and second, *Rainer*'s "application of the modified categorical approach" "by asking whether the factual allegations of the indictments charged the defendant with an act that fit under the generic definition of burglary of a building." *Howard*, 742 at 1343, 1345. *See also id.* at 1345 ("*Descamps* declared that the modified categorical approach should "focus on the elements, rather than the facts, of a crime;" "if the statute under which the defendant was previously convicted is indivisible, the modified categorical approach is inapplicable;" "[a]nd if the modified categorical approach is inapplicable, the *Shepard* documents are irrelevant to the ACCA issue").

After recognizing the substantial jurisprudential changes effected by *Descamps*, the Chief Judge attempted to further clarify *Descamps'* new "divisibility" analysis – by explaining that even if a statute is "divisible" in the sense that there are alternative ways of violating the statute, if "none of the alternatives" "match the elements of the generic crime," the court "should skip over any *Shepard* documents and simply declare that the prior conviction is not a predicate offense based on the statute itself." *Howard*, 742 F.3d at 1346. Applying these new dictates to a conviction under the Alabama burglary statute, the Chief Judge concluded that the Alabama burglary statute "is non-generic and indivisible" because it includes as "illustrative examples" of buildings "any vehicle, aircraft or watercraft," and "illustrative examples are not alternative elements" – which "means that a conviction under Alabama Code §13A-7-7 cannot qualify as a generic burglary under the ACCA." *Id.* at 1348-1349. Because none of the statutory "alternatives" under the Alabama burglary statute (in particular, the "building alternative") "matched" the elements of generic burglary, the Court concluded, an Alabama burglary conviction could no longer be deemed a "violent felony" under the Armed Career Criminal Act. *See Howard*, 742 F.3d at 1346-1349. In the ensuing decision in *Jones*, the Eleventh Circuit concluded that even an unobjected-to ACCA enhancement predicated on conviction under Alabama's non-generic, indivisible burglary statute was reversible "plain error," after *Howard*. *Jones*, 743 F.3d at 829-830 (Carnes, C.J.). And notably, in both *Howard* and *Jones*, the Eleventh Circuit vacated the defendants' enhanced ACCA sentences and remanded with instructions for the defendants to be resentenced "without the ACCA enhancement." *Howard*, 742 F.3d at 1349; *Jones*, 743 F.3d at 830.

Like the California burglary statute construed in *Descamps*, and the Alabama burglary statute construed by the Eleventh Circuit in *Howard* and *Jones*, Fla. Stat. § 893.13 is also non-generic,

overbroad *and* "*indivisible.*" While admittedly, there are multiple ways to violate Fla. Stat. §893.13, for the reasons set forth below every one of those "alternatives" – after May 13, 2002 – is non-generic, the Florida drug statute is categorically overbroad, and a post-2002 conviction under that statute *cannot* properly serve as an ACCA predicate.

b. Mr. Hayes's 2003 and 2005 convictions for possession with intent to sell, manufacture or deliver a controlled substance and possession with intent to sell or deliver cocaine under Fla. Stat. §893.13 was improperly classified as a "serious drug offense" under the ACCA because it does not require the *mens rea* element required by the generic offense.

Under 18 U.S.C. § 924(e)(2)(A)(ii) a serious drug offense includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance...for which a maximum term of imprisonment of ten years or more is prescribed by law[.]" At issue in the present case is whether Mr. Hayes's 2003 and 2005 convictions cited in paragraphs 58 and 60 of the PSI, are serious drug offenses.

As an initial matter, the label a state attaches to a crime of conviction is *not* determinative of whether that conviction satisfies the definition within the ACCA. *See United States v. Palomino Garcia,* 606 F.3d 1317, 1327-28 (11th Cir. 2010). Thus, the Court is required to apply the categorical approach set forth by the Supreme Court in *Taylor v. United States,* 495 U.S. 575, 110 S. Ct. 2143 (1990), and compare the state statute with the generic federal offense. In *United States v. Donawa,* 735 F.3d 1275 (11th Cir. 2013) the Eleventh Circuit held that a conviction under Fla. Stat. § 893.13 is *not* equivalent to the generic federal trafficking offense because "[a] person could be convicted under the Florida statute without any knowledge of the nature of the substance in his possession."

Id. at 1281. As such, Mr. Hayes's 2003 and 2005 Florida convictions are not ACCA predicates because they do not require the element of *mens rea* as to the illicit nature of the substance.

A. Florida Statute § 893.13 is not a generic "serious drug offense."

In *United States v. Robinson*, 583 F.3d 1292 (11th Cir. 2009) the Eleventh Circuit held that "[w]hen determining whether a particular conviction qualifies as a serious drug offense under §924(e), we are generally limited to a formal categorical approach, which looks 'only to the fact of conviction and the statutory definition of the prior offense,' instead of the actual facts underlying the defendant's prior conviction." *Id.* at 1295 (citing *Taylor*, 495 U.S. at 602, 110 S. Ct. at 2160). Thus, the categorical approach applies to the determination of whether a prior offense is a "serious drug offense" under the ACCA.

To determine whether an offense qualifies as a predicate offense under the ACCA, courts must "derive the elements of a generic offense . . . by considering the elements of the crime that are common to most states' definitions of that crime, as well as learned treatises, and the Model Penal Code." *Palomino Garcia*, 606 F.3d at 1331. **"To do so, we examine whether the state statute 'roughly correspond[s] to the definitions of [the crime] in a majority of the States' criminal codes,' as well as prominent secondary sources, such as criminal law treaties and the Model Penal Codes**." *Id.* (quoting *Taylor*, 495 U.S. at 589, 110 S. Ct. at 2153) (citations omitted) (emphasis added).

Two cases examine the Florida legislature's removal of the State's burden of proving *mens rea* with respect to the illicit nature of the substance. *See Florida v. Adkins,* 96 So. 3d 412, 423-24 (Fla. 2012) (Pariente, J., concurring); *Donawa,* 735 F.3d at 1275. First, in *Adkins,* the non-generic nature of Fla. Stat. § 893.13 was clarified by Justice Pariente's concurring opinion, which expressly

pointed out that § 893.13 is well outside the mainstream and noted that 48 "states, either by statute or judicial decision, require that knowledge of a controlled substance" be an element of a criminal narcotics offense. 96 So. 3d at 423-24. In stark contrast to those 48 states, Florida does not require *mens rea* as to the illicit nature of the substance. *See id.* The concurrence also presents information from a national survey on the same issue and acknowledges the uniformity between the federal government and the majority of states. *Id.* at n.1 (discussing how the majority of states have adopted the federal Uniform Controlled Substance Act).

In the second case, *Donawa,* the Eleventh Circuit noted that it had previously held that a conviction under Fla. Stat. §-893.13(1)(a)(2) qualified as an aggravated felony for purposes of immigration laws. 735 F.3d at 1281 (citing *Fequiere v. Ashcroft*, 279 F.3d 1325, 1326 n.3 (11th Cir. 2002)). After *Fequire*, however, the Florida legislature amended the state drug statute, "significantly changing the nature of the offense." *See id.* The amended version of the statute – pursuant to which Mr. Hayes was convicted – "eliminated from the Florida statutory scheme what had been, at the time of [the] *Fequiere* decision, a required element with the burden of proof resting on the government: *mens rea* with respect to the illicit nature of the substance." *Id.*; *see also Adkins,* 96 So. 3d at 415 (recognizing that knowledge of illicit nature of controlled substance was not an element of offense under § 893.13); *Shelton v. Sec'y, Dep't of Corr.,* 691 F.3d 1348, 1350 (11th Cir. 2012) (noting amendment of the statute on May 13, 2002).

The Eleventh Circuit recognized that the federal drug trafficking statute, 21 U.S.C. § 841(a)(1), "in contrast to Florida's current law, requires the government to establish, beyond a reasonable doubt and without exception, that the defendant had knowledge of the nature of the substance in his possession." *Donawa*, 735 F.3d at 1281. Because the Florida statute did not require

proof of knowledge – and after *Descamps,* § 893.13 is an "indivisible" statute, since knowledge is not an element of any statutory "alternative" – there is no role for the "modified categorical approach" to play in considering convictions under the post-2002 version of §893.13. As the Eleventh Circuit held in *Donawa*, a post-2002 conviction under Fla. Stat. §893.13 is *never* equivalent to the "generic federal offense" of drug trafficking. *See id.* ("A person could be convicted under the Florida statute without any knowledge of the nature of the substance in his possession. That same person could not be convicted of the federal crime."). Therefore, the conviction was *not* an "aggravated felony" as was relevant to Donawa's case. *See id.* at 1283.

Although *Donawa* applied *Descamps* to the definition of "drug trafficking" under 18 U.S.C. § 924(c)(2), the analysis employed by the Court demonstrates that a conviction under Fla. Stat. §893.13 cannot be considered a generic offense under the ACCA. *See* 18 U.S.C. § 924(e)(2)(A)(ii) (defining "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law"). The majority of states, as well as federal law, require *mens rea* as to the illicit nature of the substance. Accordingly, Florida's drug statute is *not* generic and *cannot* be an ACCA predicate. *See Donawa,* 735 F.3d at 1281-83 (discussing the Florida statute's lack of *mens rea*).

B. Traditional rules of construction for statutes silent as to *mens rea* confirm that "knowledge of the illicit nature of the substance" must be an element of a "serious drug offense" under the ACCA's definition.

Donawa explained the magnitude of the 2002 Florida amendment: Florida decisively diverged from controlled substance offenses defined in federal law and from the overwhelming majority of states. To read the ACCA's definition of "serious drug offense" to include a state drug

crime that lacks *mens rea* defies traditional rules of construction for serious felony offenses whose definitions are silent as to *mens rea.*[1]

1. The common law rule is that mens rea is a required element of a serious criminal offense.

As a general rule of criminal law dating back to the common law, the law does not condemn as a serious criminal offense any act unless the prosecution can prove the actor had sufficient criminal knowledge, that he was aware of all the facts that made the conduct unlawful. "The general rule at common law was that scienter was a necessary element in the indictment and proof of every crime." *United States v. Balint*, 258 U.S. 250, 251, 42 S. Ct. 301, 302 (1922). Accordingly, the rule construing criminal punishments to require knowledge, scienter, awareness of some wrongdoing, or *mens rea*, "has been 'followed in regard to statutory crimes even where the statutory definition did not in terms include it.'" *Balint,* 258 at 251-52, 42 S. Ct. at 302.

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[1]As stated, *supra,* Florida in 2002 excluded from its controlled substance offense definitions under Fla. Stat. § 893.13(1)(a) an integral element contained in analogous federal controlled substance statutes: proof that the defendant had knowledge of the nature of the substance in his possession. *Donawa*, 735 F.3d at 1281. Until that occurred, settled law in Florida required the state to prove the defendant's knowledge of the nature of the substance, whether or not the element was stated in the statute or charging instrument. *Id.; see also Chicone v. State*, 684 So. 2d 736 (Fla. 1996); *Scott v. State*, 808 So. 2d 166 (Fla. 2002); *Shelton*, 691 F.3d at 1348. That monumental change in law assured that any post-2002 conviction under § 893.13 would **not** be substantially similar or analogous to the vast majority of controlled substance offenses committed in this nation. In fact, they would be substantially different from all of the listed federal drug trafficking crimes and the vast majority of state drug trafficking crimes.

2. *Staples v. United States, 511 U.S. 600, 606, 114 S. Ct. 1783, 1797 (1994), expressly adopted the common law rule requiring mens rea as an element of a serious criminal offense.*

In *Staples* the Supreme Court examined a statute that was silent as to *mens rea* and held that *mens rea* was an implied element based on the common law rules discussed above. 511 U.S. at 605, 114 S. Ct. at 1797. There, the Supreme Court was asked to construe 26 U.S.C. § 5861(d), in which Congress provided "[i]t shall be unlawful for any person ... to receive or *possess* a firearm which is not registered to him," but did *not* specify that the "possession" of a "firearm" must be "knowing." Congressional "silence" as to *mens rea* in drafting that statute, the Supreme Court explained,

> does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. On the contrary, we must construe the statute in light of the background rules of the common law, ... in which the requirement of some *mens rea* for a crime is firmly embedded. As we have observed, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. ...
>
> There can be no doubt that this established concept has influenced our interpretation of criminal statutes. Indeed, we have noted that the common-law rule requiring *mens rea* has been "followed in regard to statutory crimes even where the statutory definition did not in terms include it." Relying on the strength of the traditional rule, we have stated that offenses that require no *mens rea* generally are disfavored, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.

Staples, 511 U.S. at 605, 114 S. Ct. at 1797.

The Supreme Court found no express indication that Congress intended to dispense with *mens rea* as an element of a § 5861(d) offense. In reaching that holding, the Supreme Court reasoned that it must "construe the statute in light of the background rules of the common law [...] in which

the requirement of some *mens rea* for a crime is firmly embedded. As we have observed, '[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" *Id.*

Additionally, the Supreme Court determined that no congressional intent to dispense with *mens rea* could be implied given the "potentially harsh penalty attached to violation of § 5861(d)–up to 10 years imprisonment." *Id.* at 511 U.S. at 616, 114 S. Ct. at 1802. The Supreme Court viewed that statute's "harsh penalty" of up to 10 years as confirming its reading of the statute. *Id.* "Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea[,]*" *id.*, and a severe penalty is a "factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." *Id.* at 511 U.S. at 618, 114 S. Ct. at 1804. Accordingly, the Supreme Court read § 5861(d) to include an implied *mens rea* element, which required the government prove the defendant "knew the features of his AR-15 that brought it within the scope of the Act." *Id.* And if the *Staples* Court was concerned about a 10-year statutory *maximum*, there can be no question that the ACCA's 15-year mandatory minimum requires that *mens rea* be implied into §924(e)(2)(B)(ii).

3. Looking at the common law rule requiring mens rea, together with Staples, Congress's silence as to mens rea in the ACCA's definition of "serious drug offense" cannot be construed to allow a conviction without mens rea to act as a predicate under the ACCA.

In 1986 Congress expanded the predicate offenses for the ACCA penalties from just robbery and burglary to include "serious drug offenses:"

> SEC. 1402. EXPANSION OF PREDICATE OFFENSES FOR ARMED CAREER CRIMINAL PENALTIES.

> (a) IN GENERAL. — Section 924(e)(1) of title 18, United States Code, is amended by striking out "for robbery or burglary, or both," and inserting in lieu thereof "for a violent felony or a serious drug offense or both."
>
> (b) DEFINITIONS. — Section 924(e)(2) of title 18, United States Code, is amended by striking out subparagraph (A) and all that follows through subparagraph (B) and inserting in lieu thereof the following:
>
> "(A) the term 'serious drug offense' means —
>
> "(I) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the first section or section 3 of Public Law 96–350 (21 U.S.C. 955a et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> "(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law; [...]

Pub.L. 99-570, 1986 HR 5484, § 1402.

There is no indication that Congress did not require *mens rea* as to the drug offenses under state law. Support for that conclusion comes from examining the principal source of state controlled substance laws at that time: the Uniform Controlled Substances Act (UCSA). As the Supreme Court of Maryland observed in 1988, as of that date, 48 states had adopted the UCSA. *Dawkins v. State,* 547 A.2d 1041, 1045 n.6 (Md. 1988). Section 401, Prohibited Acts A, is the analogue of federal controlled substance offense law and was based in large part on federal law.[2] In its 1990 release, it defined the kind of controlled substance offenses at issue here to include scienter:

> (a) Except as authorized by this [Act], a person may not *knowingly or intentionally* manufacture, distribute, or deliver a controlled substance, or possess a controlled substance with intent to manufacture, distribute, or deliver, a controlled substance.

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[2] The commentary states "[t]he criminal penalties in subsection (a) are classified based on the penalties in the federal act, 21 U.S.C. § 841(b) as amended by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1002 (the 'Narcotics Penalties and Enforcement Act of 1986')."

UCSA 1990 § 401 (emphasis supplied). Thus, when Congress amended the ACCA to include "serious drug offenses" as a predicate, it was against a federal and state backdrop of drug offense laws that required *mens rea* as to the illicit nature of the substance.[3] This legislative history confirms that congressional silence in the ACCA *cannot* be construed as having removed *mens rea* from the ACCA's "serious drug offense" definition.

Here, just as in *Staples*, there is neither an express or an "implied" indication that Congress ever intended to dispense with the "knowledge of the illicit nature of the substance" which was at the time, a necessary "element" of any generic "serious drug offense," because it was either an express or judicially-implied element in *every* federal drug trafficking statute, *and* in 48 out of the 50 state controlled substance statutes in 1986.[4] And in the absence of any express or implied intent

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[3]Before 2002 Florida was one of the vast majority of states that required *mens rea* as to the illicit nature of the substance, mirroring the UCSA. *See Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996) ("We believe it was the intent of the legislature to prohibit the knowing possession of illicit items and to prevent persons from doing so by attaching a substantial criminal penalty to such conduct. Thus, we hold that the State was required to prove that Chicone knew of the illicit nature of the items in his possession") (emphasis supplied); *see also Shelton v. Secretary, Dep't of Corr.*, 691 F.3d 1348 (11th Cir. 2012) (reviewing Florida law). Many other states had long required proof of knowledge, as demonstrated by a survey of the states conducted by the Supreme Court of Maryland in 1988. That court concluded "that the overwhelming majority of states, either by statute or by judicial decision, require that the possession be knowing." *Dawkins*, 547 A.2d at 1045. The Maryland Supreme Court found only two states, North Dakota and Washington, had held, as of 1988, "that knowledge is not an element of the offense of possession of controlled substances." *Dawkins*, 547 A.2d at 1041 n.7. *See also State v. Adkins*, 96 So. 3d 412, 423-24 & n.1 (Fla. 2012) (Pariente, J.,concurring in result) (citing *Dawkins* to say "Forty-eight states, either by statute or judicial decision, require that knowledge of a controlled substance – mens rea ('guilty mind') – be an element of a criminal narcotics offense").

[4]*See Dawkins v. State*, 547 A.2d 1041, 1045 & n. 7 (Md. 1988)(surveying states, and concluding that the "overwhelming majority of states" had adopted the Uniform Controlled Substances Act, and thus required–either by statute or judicial decision–"that possession be knowing;" noting that as of 1988, only two states, North Dakota and Washington, had held "that knowledge is not an element of the crime of possession"); *see also Florida v. Adkins*, 96 So.3d 412, 424 (Fla. 2012)(noting that post-2002, Fla. Stat. §893.13 fell outside the mainstream of state

by the Congress to dispense with *mens rea*, *Staples* dictates that "the usual presumption that a defendant must know the facts that make his conduct illegal" applies. Applying that presumption to the definition of "serious drug offense" in §924(e)(2)(B)(ii) here, a defendant's "knowledge of the illicit nature of the substance" possessed, distributed, or imported must be deemed an *implied* "element" of any "serious drug offense" subjecting him to the enhanced ACCA penalties.

This "rule of construction" was well-established long before *Staples*. Since it derives from the common law, it was obviously known to the Congress in 1986 when it defined "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance offense, . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." Congress had every right in 1986 to assume that its reference to statutes involving "*possessing* with intent to distribute"would be construed to require "*knowing possession*" of the controlled substance, even *without* specification in that regard. That was precisely how the Florida courts–*and at least 15 other state courts as of 1986*–traditionally construed the phrase "possession with intent to distribute" in their own controlled substance statutes that lacked an express *mens rea* term.[5] And notably, that was precisely how the federal courts – including the Eleventh Circuit – "traditionally" construed the importation crime in

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narcotics statutes, given that 48 states–either by statute or judicial decision–require that knowledge of a controlled substance as an element; citing *Dawkins* survey).

[5]*See Dawkins*, 547 A.2d at 1044-1048 (reading a knowledge element into the Maryland drug statute even though the legislature omitted that element, after surveying other states, and determining the "overwhelming majority of states""either by statute or judicial decision" required that "possession be knowing;" noting that "[i]n addition to Maryland, the statutes of fifteen other states plus the District of Columbia are silent as to the knowledge element," but that "[e]ven though the statutes are silent as to a *scienter* requirement, most of these jurisdictions have, by judicial decision, determined that knowledge is an element of the crime of possession;" citing cases).

21 U.S.C. §952(a). *Compare* 21 U.S.C. §952(a)(1985)("It shall be unlawful to import into the customs territory of the United States," or "to import into the United States," "from any place outside thereof .... any controlled substance ...") *with* Eleventh Circuit Pattern Offense Instruction for 21 U.S.C. §952(a)(1985)(defendant can be found guilty of importing a controlled substance in violation of §952(a) only if government proves beyond a reasonable doubt that he brought or transported the substance into the United States " *knowingly and willfully*")(Emphasis added).

4. The Rule of Lenity should apply in Mr. Hayes's favor.

Finally, with respect to rules of statutory construction, our "construction of a criminal statute must be guided by the need for fair warning." *United States v. Castleman,* — S. Ct. —, 134 S.Ct. 1405, 1417 (2014) (citation omitted). Should this Court determine that "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended[,]" *id.,* then the Rule of Lenity should apply in Mr. Hayes's favor. *See, e.g., United States v. Santos,* 553 U.S. 507, 128 S. Ct. 2020 (2008). Again, in *Robinson,* the Eleventh Circuit held that, generally, the formal categorical approach is applied when "determining whether a particular conviction qualifies as a serious drug offense" under the ACCA. 583 F.3d at 1295. Additionally, both common law rules of statutory construction, as well as *Staples,* support a reading that includes *mens rea.* To the extent the government may urge this Court to find that some ambiguity exists on this point despite *Robinson* or *Staples,* the Rule of Lenity resolves this issue in Mr. Hayes's favor.

II. *Descamps* is retroactively applicable on collateral review.

"New *substantive* rules generally apply retroactively." *Schiro v. Summerlin,* 542 U.S. 348, 352, 124 S. Ct. 2519 (2004) (emphasis in original). New substantive rules include "decisions that

narrow the scope of a criminal statute by interpreting its terms." *Id.*, 542 U.S. at 351, 124 S. Ct. at 2522; *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610, (1998). "Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Schiro*, 542 U.S. at 352, 124 S. Ct at 2522-2523.

For example, *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581 (2008), which delineated what it means to have a prior "violent felony" conviction for purposes of an enhanced sentence under the ACCA, is a substantive rule of criminal law that applies retroactively. *See Jones v. United States*, 689 F.3d 621 (6th Cir. 2012); *Welch v. United States*, 604 F.3d 408 (7th Cir. 2010); *Lindsey v. United States*, 615 F.3d 998, 1000 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1712 (2011). In *Welch*, the court explained,

> In essence, *Begay* narrowed substantially Mr. Welch's exposure to a sentence of imprisonment. Without the ACCA enhancement, Mr. Welch faced a statutory *maximum* of 10 years' imprisonment. With the ACCA enhancement, Mr. Welch faced a statutory *minimum* of 15 years' imprisonment. In short, the application of the ACCA imposed, at a minimum, five years of imprisonment that the law otherwise could not have imposed upon him under his statute of conviction. Such an increase in punishment is certainly a substantive liability.

Welch, 604 F.3d at 415 (emphasis in original).

Chambers v. United States, 555 U.S. 122, 129 S. Ct. 687 (2009), which further narrowed the reach of the ACCA, similarly articulated a "substantive rule of statutory interpretation" requiring retroactive application. *United States v. Shipp*, 589 F.3d 1084, 1089 (10th Cir. 2009). This is so because a defendant who, after *Chambers*, "does not constitute an 'armed career criminal' for purposes of the ACCA . . . received 'a punishment that the law cannot impose upon him.'" *Id.* at 1091 (quoting *Schiro*, 542 U.S. at 352).

In *Descamps*, like *Begay* and *Chambers*, the Supreme Court reduced the reach of the ACCA. Moreover, as shown in § I., above, after *Descamps* (as applied to Fla. Stat. §893.13 in *Donawa*), Mr. Hayes is *not* an "Armed Career Criminal." He has therefore received "a punishment that the law cannot impose upon him." *Schiro*, 542 U.S. at 352. As such, *Descamps* (as applied to §893.13 in *Donawa*) is a new rule of substantive law that applies retroactively to collateral cases.

III. This motion is timely because filed within a year of *Descamps*.

A section 2255 motion is timely if it is filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). As demonstrated in § II. above, *Descamps* is retroactively applicable to collateral cases. *Descamps* also "newly recognized" that certain defendants are not Armed Career Criminals under the ACCA. Mr. Hayes's section 2255 motion is therefore timely because it was filed within a year of *Descamps*.

If a Supreme Court decision is a "new rule" under the retroactivity analysis required by *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), it constitutes a "newly recognized" right for purposes of § 2255(f)(3). *Howard v. United States*, 374 F.3d 1068, 1073 (11th Cir. 2004). A rule is "new" under *Teague*, "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S. Ct. at 1070 (emphasis in original). "And a holding is not so dictated, . . . unless it would have been 'apparent to all reasonable jurists.'" *Chaidez v. United States*, 133 S. Ct. 1103 (2013) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-528, 117 S. Ct. 1517 (1997)).

The split in the federal courts of appeal on the question presented in *Descamps* indicates that its holding was not "apparent to all reasonable jurists" and therefore was not "dictated by precedent." *See Caspari v. Bohlen*, 510 U.S. 383, 395, 114 S. Ct. 948, 956 (1994) (novelty of rule shown where "[t]wo federal courts of appeals and several state courts had reached conflicting holdings on the issue"); *Butler v. McKellar*, 494 U.S. 407, 415, 110 S. Ct. 1212, 1217-18 (1990) (that rule was "new" "is evidenced by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits"). Prior to *Descamps*, the federal courts of appeal were divided on the question. *See Descamps*, 133 S. Ct. at 2283 ("We granted certiorari to resolve a Circuit split on whether the modified categorical approach applies to statutes . . . that contain a single, 'indivisible' set of elements sweeping more broadly than the corresponding generic offense."). Several courts of appeals (including our own) had held, contrary to the rule later established in *Descamps*, that the modified categorical approach applied to broad, indivisible statutes. *See id.*, 133 S. Ct. at 2283 n.1 (citing cases). The pre-*Descamps* split on the question "shows that it was susceptible to debate among reasonable minds, which means that the answer had not been dictated previously." *Howard*, 374 F.3d at 1076 (internal quotation marks omitted).

Eleventh Circuit precedent supports the conclusion that *Descamps* is "new." That court recognized in *Howard* that its prior "settled law . . . has been unsettled by the Supreme Court's recent decision in *Descamps*," and explained why "[t]wo crucial aspects of our [prior case law] are no longer tenable after *Descamps*." *United States v. Howard*, 742 F.3d 1334, 1338, 1343 (11th Cir. 2014). That *Descamps* caused the Eleventh Circuit to overrule itself confirms that the rule *Descamps* announced is "new."

Finally, *Descamps* is "new" notwithstanding its statements that prior case law "all but resolve[d]" the question presented. 133 S. Ct. at 2283. "[T]he fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*. Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts." *Butler*, 494 U.S. at 415, 110 S. Ct. at 1217. Thus, "horatory dicta used in opinions to underscore their faithfulness to precedent should not be considered binding upon the separate question of whether they announced a new rule under *Teague*." *O'Dell v. Netherland*, 95 F.3d 1214, 1235 (4th Cir. 1996) (*en banc*), *aff'd*, 521 U.S. 151, 117 S. Ct. 1969 (1997). Rather, "even if prior Supreme Court decisions 'inform, or even control, the analysis' of the claim, it is still a 'new rule' claim unless the rule is actually dictated by preexisting precedent." *Spaziano v. Singletary*, 36 F.3d 1028, 1042 (11th Cir. 1994).

Here, the split in the lower courts on the use of the modified categorical approach, the Eleventh Circuit's prior decision in *Rainer*, and its post-*Descamps* decision in *Howard* (rejecting the analysis in *Rainer*) plainly show that the holding in *Descamps* was not "apparent to all reasonable jurists." As such, that decision was not dictated by preexisting precedent. *Chaidez v. United States*, 133 S. Ct. 1103 (2013). Rather, *Descamps* is a "new rule" under *Teague,* and thus "newly recognized" for purposes of § 2255(f)(3).

Mr. Hayes's motion is timely because it is filed within a year of *Descamps*.

RELIEF REQUESTED

WHEREFORE, the Movant, Jerome Hayes, asks this Court to grant his Motion to Vacate his Sentence Pursuant to 28 U.S.C. § 2255 and resentence him without the Armed Career Criminal enhancement, or any other relief to which he may be entitled. To the extent oral argument might be of assistance to the Court on any of the issues raised herein, undersigned counsel requests oral argument on behalf of Mr. Hayes.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Margaret Foldes*
Margaret Foldes
Assistant Federal Public Defender
Florida Bar No. 083674
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301
Tel: (954) 356-7436; Fax: (954) 356-7556
E-mail: margaret_foldes@fd.org

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct, and that I have been authorized by Movant, John Hayes, to sign this motion under 28 U.S.C. § 2255 on his behalf.

By: *s/Margaret Foldes*
Margaret Foldes
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I HEREBY certify that on June 18, 2014, 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 or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/*Margaret Foldes*
Margaret Foldes

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.) **NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.**

I. (a) PLAINTIFFS

JEROME HAYES

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Margaret Foldes, Assistant Federal Public Defender
One East Broward Boulevard, Ste 1100, Fort Lauderdale, FL 33301
954-356-7436

DEFENDANTS

UNITED STATES OF AMERICA

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT LAND INVOLVED.

Attorneys (If Known)

United States of America, 99 NE 4th Street, Miami, FL 33132

(d) Check County Where Action Arose: ☑ MIAMI- DADE ☐ MONROE ☐ BROWARD ☐ PALM BEACH ☐ MARTIN ☐ ST. LUCIE ☐ INDIAN RIVER ☐ OKEECHOBEE ☐ HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☑ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☒ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus-Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☑ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Re-filed- (see VI below) ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. RELATED/RE-FILED CASE(S).

(See instructions second page): a) Re-filed Case ☐ YES ☐ NO b) Related Cases ☐ YES ☐ NO

JUDGE JOSE E. MARTINEZ DOCKET NUMBER 07-20154-CR-JEM

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause **(Do not cite jurisdictional statutes unless diversity)**:

28 U.S.C. § 2255

LENGTH OF TRIAL via _____ days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☐ No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE

SIGNATURE OF ATTORNEY OF RECORD *s/ Margaret Foldes*

DATE June 18, 2014

FOR OFFICE USE ONLY

AMOUNT _____ RECEIPT # _____ IFP _____

A - 6

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

JEROME HAYES

JUDGMENT IN A CRIMINAL CASE

Case Number: 07-20154-CR-MARTINEZ

USM Number: 78438-004

Counsel For Defendant: Michael Spivack, AFPD
Counsel For The United States: Daniel Rashbaum
Court Reporter: Larry Herr

The defendant pleaded guilty to Count(s) 1, 2, 3 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
21 U.S.C.§ 841(a)(1).	Possession with intent to distribute a detectable amount of cocaine base.	February 23, 2007	One
21 U.S.C.§ 841(a)(1).	Possession with intent to distribute marijuana	February 23, 2007	Two
18 U.S.C.§§ 922(g)(1).	Being a convicted felon in possession of a firearm	February 23, 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.

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

Date of Imposition of Sentence:
August 17, 2007

JOSE E. MARTINEZ
United States District Judge

August 21, 2007

DEFENDANT: JEROME HAYES
CASE NUMBER: 07-20154-CR-MARTINEZ

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **188 months**. This sentence consists of **concurrent** terms of 188 months as to each of Counts One and Three and **60** months as to Count Two.

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

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: JEROME HAYES
CASE NUMBER: 07-20154-CR-MARTINEZ

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **4 years**. This term consists of three years as to Count One, two years as to Count Two, and four years as to Count Three, all counts to run concurrently.

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: JEROME HAYES
CASE NUMBER: 07-20154-CR-MARTINEZ

SPECIAL CONDITIONS OF SUPERVISION

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

Substance Abuse Treatment: The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

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

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

DEFENDANT: JEROME HAYES
CASE NUMBER: 07-20154-CR-MARTINEZ

CRIMINAL MONETARY PENALTIES

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

Total Assessment	Total Fine	Total Restitution
$300.00	**$**	**$**

*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: JEROME HAYES
CASE NUMBER: 07-20154-CR-MARTINEZ

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of **$300.00** due immediately.

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

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

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

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

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

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

A - 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

07-20154-CR-MARTINEZ/BANDSTRA

CASE NO. _____

21 U.S.C. § 841(a)
18 U.S.C. § 922(g)(1)
21 U.S.C. § 853
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

JEROME HAYES,

Defendant.

_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

On or about February 23, 2007, in Miami-Dade County, in the Southern District of Florida, the defendant,

JEROME HAYES,

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 this violation involved a mixture and substance containing a detectable amount of cocaine base.

COUNT 2

On or about February 23, 2007, in Miami-Dade County, in the Southern District of Florida,

the defendant,

JEROME HAYES,

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)(D), it is further alleged that this violation involved marijuana.

COUNT 3

On or about February 23, 2007, in Miami-Dade County, in the Southern District of Florida, the defendant,

JEROME HAYES,

having been previously 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; in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

FORFEITURE

1. The allegations 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 property, in which the defendant has an interest, pursuant to Title 18, United States Code, Section 924(d)(1), as incorporated by Title 28, United States Code, Section 2461 and the procedure outlined at Title 21, United States Code, Section 853.

2. Upon conviction of any of the violations alleged in Counts 1 and 2 of this indictment, the defendant, **JEROME HAYES**, shall forfeit to the United States, pursuant to Title 21, United States Code, Section 853, any property constituting or derived from any proceeds which the

defendants obtained, directly or indirectly, as the result of such violation, and any property which the defendants used, or intended to be used, in any manner or part, to commit or to facilitate the commission of such violation.

3. Upon conviction of any violation of Title 18, United States Code, Section 922(g)(1) the defendant, **JEROME HAYES**, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d)(1), as made applicable hereto by Title 28, United States Code, Section 2461(c), any firearm and ammunition involved in or used in the commission of such violation.

4. The property subject to forfeiture includes, but is not limited to:

(a) .38 Smith and Wesson revolver, and

(b) .38 caliber ammunition.

All pursuant to Title 18, United States Code, Section 924(d)(1); as incorporated by Title 28, United States Code, Section 2461 and Title 21, United States Code, Section 853.

A TRUE BILL

FOREPERSON

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

ARMANDO ROSQUETE
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

JEROME HAYES,

Defendant.

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

X Miami ____ Key West
____ 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 3 days for the parties 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) Yes
If yes:
Magistrate Case No. 07-2226-Turnoff
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of February 23, 2007
Defendant(s) in state custody as of _____
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? ____ Yes X No

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

ARMANDO ROSQUETE
ASSISTANT UNITED STATES ATTORNEY
Florida Bar No. 0648434

*Penalty Sheet(s) attached

REV.1/14/04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: JEROME HAYES **Case No:** _____

Count #:1

Possession with intent to distribute cocaine base

Title 21, United States Code, Section 841(a)

***Max. Penalty:** 20 Years' Imprisonment

Count #:2

Possession with intent to distribute marijuana

Title 21, United States Code, Section 841(a)

***Max. Penalty:** 5 Years' Imprisonment

Count #: 3

Felon in possession of a firearm

Title 18, United States Code, Sections 922(g)(1), 924(e)

***Max. Penalty:** Life Imprisonment

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