APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11936-A

ANTWAYNE TREMAYNE LOWRY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Antwayne Tremayne Lowry, a federal prisoner serving a 180-month sentence for possessing a firearm as a convicted felon, appeals the District Court's denial of his motion to vacate his sentence under 28 U.S.C. § 2255. This order denies the certificate.

Mr. Lowry was sentenced under the Armed Career Criminal Act (ACCA) due to three prior Florida convictions for possession with intent to sell or deliver cocaine. ACCA mandates a fifteen-year minimum sentence for a person convicted of a "serious drug offense," defined 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." 18 U.S.C. § 924(e)(2)(A)(ii). The Florida crime of possession of cocaine with intent to sell or deliver comes within this definition.

One of Mr. Lowry's convictions was sustained when Mr. Lowry was 17 years old. He argued in his § 2255 motion that this conviction should not count toward his three ACCA predicate convictions because he was a juvenile when convicted. The District Court denied his motion, finding the record showed Mr. Lowry was tried and convicted as an adult. Mr. Lowry seeks a certificate of appealability from that denial.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003); see 28 U.S.C. § 2253(c)(2). An applicant for a habeas petition meets this standard by showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000).

Reasonable jurists would not debate the District Court's denial of Mr. Lowry's § 2255 motion. The government produced state court records showing

that Mr. Lowry was tried and convicted as an adult for possessing with intent to sell or deliver cocaine. Mr. Lowry did not provide any evidence that called those records into question. The law of this Circuit is that adult convictions may be counted as ACCA predicates even if obtained while the defendant was a minor. See United States v. Cure, 996 F.2d 1136, 1141 (11th Cir. 1993). Thus, Mr. Lowry's conviction for Florida possession of cocaine with intent to sell or deliver was properly counted toward his ACCA sentence.

Mr. Lowry's motion for a certificate of appealability is therefore DENIED.

Barry D. Martin
UNITED STATES CIRCUIT JUDGE

APPENDIX "B"

United States District Court
for the
Southern District of Florida

Antwayne Tremayne Lowry, Movant,	)	
	)	
v.	)	Civil Action No. 16-61203-Civ-Scola
	)	
United States of America,	)	
Respondent.	)	

Order Adopting Magistrate Judge's Report And Recommendation

This case was referred to United States Magistrate Judge Patrick A. White, consistent with Administrative Order 2003-19 of this Court, for a ruling on all pre-trial, nondispositive matters and for a report and recommendation on any dispositive matters. On March 9, 2018, Judge White issued a report, recommending that the Court deny Defendant Antwayne Tremayne Lowry's 28 U.S.C. § 2255 motion challenging the constitutionality of his enhanced sentence as an armed career criminal. (Report of Mag. J., ECF No. 28.) Lowry, represented by appointed counsel, has not filed any objections and the time to do so has passed.

Judge White concluded that although Lowry's claim is procedurally barred, he would nonetheless evaluate the merits of his claim as they are readily disposed of. Lowry complains that the district court improperly enhanced his sentence under the Armed Career Criminal Act because it relied on a 1998 juvenile adjudication for a drug offense as one of his three predicate convictions. Judge White rejected Lowry's argument for two reasons: (1) a juvenile adjudication qualifies as a "serious drug offense" under ACCA; and (2) Lowry was, in any event, convicted as an adult and not adjudicated delinquent as a juvenile. The Court accepts Judge White's second point and therefore affirms his report and recommendation on that basis: even Lowry acknowledges that, although he was only seventeen at the time, his 1998 drug case was direct filed in Miami-Dade County Circuit Court. Lowry has not presented any evidence to support his apparent contention that he was either convicted and sentenced as a youthful offender or that he was adjudicated as a juvenile delinquent. The Court can find nothing in the record to rebut the Government's showing that Lowry was convicted and sentenced as an adult in his 1998 drug case. Accordingly, this conviction qualifies as a predicate offense under ACCA.

Because no objections have been filed, the Court has reviewed Judge White's report and recommendation for clear error. Based on this review, the

Court **affirms and adopts** Judge White's recommendation (**ECF No. 28**) that Lowry's amended motion to vacate (**ECF No. 19**) be **denied**. The Court also adopts Judge White's recommendation not to issue a certificate of appealability. Lastly, the Court directs the Clerk to **close** this case.

Done and ordered, at Miami, Florida, on March 26, 2018.

Robert N. Scola, Jr.
United States District Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-61203-Civ-SCOLA
(13-60231-Cr-HURLEY)
MAGISTRATE JUDGE P.A. WHITE

ANTWAYNE TREMAYNE LOWRY,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The movant, a federal prisoner, filed this motion to vacate, pursuant to 28 U.S.C. §2255, challenging the constitutionality of his enhanced sentence as an armed career criminal, entered following a guilty plea in case no. 13-60231-Cr- Hurley.

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

The Court has reviewed the movant's initial §2255 motion (Cv-DE# 1), together with the amended motion with a supporting appendix (Cv-DE#19,20,21), the government's answer (Cv-DE# 22), the movant's reply (Cv DE# 26), together with the Presentence Investigation Report ("PSI"), Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file under attack here,

including the change of plea and sentencing transcripts.[1]

II. Claims

As could best be discerned, construed liberally in light of Haines v. Kerner, 404 U.S. 519 (1972), in his *pro se* application, together with the more concise, operative §2255 memorandum (Cv-DE#19), filed on movant's behalf by court appointed counsel, the movant raises the following grounds for relief: The movant's armed career criminal enhancement to his sentence was unlawful due to the court's reliance on a juvenile conviction in Miami-Dade Circuit Court, case no. F98-7276. (Cv-DE#19:2).

III. Procedural History

On September 19, 2013, a federal grand jury in the Southern District of Florida returned an indictment charging movant with being a convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§922(g)(1) and 924(e) (CR-DE# 1). Movant entered into a plea agreement with the United States wherein he agreed to plead guilty to the charge in exchange for the United States' promise to recommend his receipt of the acceptance-of-responsibility adjustment at sentencing provided that he satisfied certain conditions (CR-DE# 23).

Following a change-of-plea colloquy, the Court accepted movant's guilty plea. (CR-DE# 53, Change of Plea Hearing Transcript, p. 54).

[1]The undersigned takes judicial notice of its own records as contained on CM/ECF in those proceedings. See Fed.R.Evid. 201.

Prior to sentencing, a PSI was prepared setting movant's initial base offense level at a level 20, pursuant to U.S.S.G. §2K2.1(a)(4)(A), because his offense involved unlawfully possessing a firearm or ammunition, after sustaining at least one felony conviction of a controlled substance offense (see F02-035615). (PSI ¶12). An additional 4-level enhancement to the base offense level was given, under U.S.S.G. §2K2.1(B)(4)(A), because the firearm had an altered or obliterated serial number, §2K2.1(b)(4)(B). (PSI ¶13).

More important to the issue before this court, the PSI reveals that the movant was subjected to an enhanced sentence as an armed career criminal, as set forth in U.S.S.G. §4B1.4(b)(3)(B), due to his conviction for a violation of 18 U.S.C. §924(e). (PSI ¶18). The PSI listed three prior Miami-Dade County convictions for possession with intent to sell or deliver cocaine in case nos. F98-7276, F98-040794, and F02-035615. (PSI ¶¶ 18, 23, 24, 27).

He received a three-level reduction due to timely acceptance of responsibility. (PSI ¶¶19, 20). His total offense level was set at 30. (PSI ¶21).

Next, the probation officer determined that the movant had a total of 3 criminal history points, resulting in a criminal history category II. (PSI ¶29). Since the movant was subject to an ACCA enhanced sentence, under U.S.S.G. §4B1.4(c)(3), the criminal history was raised to category IV. (PSI ¶29).

Statutorily, as to the offense of conviction, a violation of 18 U.S.C. §924(e)(1), the movant faced a 15-year minimum mandatory and up to a term of life imprisonment. (PSI ¶60). Based on a total

offense level 30 and a criminal history category IV, the movant faced 135 months imprisonment at the low end, and 168 months imprisonment at the high end of the guideline range. (PSI ¶61). However, pursuant to §5G1.1(b), where the statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence. (PSI ¶61). Therefore, the guideline sentence was 180 months. (PSI ¶61).

Prior to sentencing, movant filed objections to the PSI, challenging the recommendation that the movant was an armed career criminal on the basis that the prior convictions used to impose the enhancement were not charged in the indictment. (CR DE# 26). Petitioner filed *pro se* objections where he specifically took issued with the PSI's reliance on his conviction for possession with intent to distribute cocaine in case no. F98-7276 as he was only 17 when convicted. (CR DE# 27). The government filed a response wherein it argued that the Miami-Dade Circuit Court conviction and sentence in case no. F98-7276 was not imposed pursuant to the Youthful Offender Act. (CR DE# 29). The government attached a copy of the information, conviction, and sentence in case no. F98-7276. (CR DE# 29-1).

On July 16, 2014, the movant appeared for sentencing. (Cr-DE# 55, Sentencing Hearing Transcript). The Court sentenced movant to 180 months' imprisonment and four years' supervised release (CR-DE# 40).

The movant appealed, raising the following claim, "Lowry argues that the district court erroneously sentenced him as an armed career criminal because his 2003 conviction for possession with intent to sell or deliver cocaine, in violation of Fla. Stat.

§893.13, was not a 'serious drug offense' within the meaning of the ACCA." United States v. Lowry, 599 Fed. Appx. 358 (11th Cir. 2014). The Eleventh Circuit denied this claim, affirming the conviction and sentence on March 27, 2015. Id. Certiorari review was denied by the U.S. Supreme Court on **June 8, 2015.** Smith v. United States, ___ U.S. ____, 135 S.Ct. 2827, 192 L.Ed.2d 864 (2015).

Therefore, the movant's judgment and resultant sentence became final on **June 8, 2015,** when certiorari review was denied.[2] Applying the anniversary method to this case means the movant had one year from the time his conviction became final, or no later than **June 8, 2016,** within which to timely file this federal habeas petition.[3]

The movant returned to this court filing his initial *pro se* §2255 motion, in accordance with the mailbox rule, on **June 2, 2016.**[4] (Cv-DE#1:11). An Order appointing counsel, requiring an

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[2]Once a judgment is entered by a United States Court of Appeals, a petition for writ of certiorari must be filed within 90 days of its entry, which commences from the date of entry of the judgment, rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir. 2003). Further, the Supreme Court has made clear that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); Clay v. United States, 537 U.S. 522, 527-529, 123 S.Ct. 1072, 1077-79, 155 L.Ed.2d 88 (2003); accord, Nguyen v. United States, 420 Fed. Appx. 875, 877 (11th Cir. 2011); Kaufmann v. United States, 282 F.3d 1336, 1339 (11th Cir. 2002); Washington v. United States, 243 F.3d 1299, 1300 (11th Cir. 2001).

[3]See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)).

[4]"Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil

amended motion, and setting a briefing schedule was entered by the Court. (Cv-DE#4). In compliance therewith, the movant, through counsel, filed an amended §2255 motion on **December 12, 2016,** essentially raising the same arguments initially presented by the *pro se* litigant. (Cv-DE#21). Consequently, the amended motion relates back to the timely filed motion, in accordance with Davenport v. United States, 217 F.3d 1341 (11 Cir. 2000). The government also complied with the court's order, filing an answer (Cv-DE#22). Movant filed a reply thereto. (Cv DE# 26). Given that the parties have complied with the court's briefing schedule, the case is now ripe for review.

IV. Threshold Issues

A. Timeliness

In its response (Cv DE# 22:2), the government does not dispute that this §2255 proceeding instituted on **June 2, 2016,** was timely filed under §2255(f), because it was filed within a year from the time movant's conviction became final.

Even if it were not timely instituted, the government has waived the statute of limitations defense from consideration by this court under United States v. Frady, 456 U.S. 152, 162, 167-68, 102 S.Ct. 1584, 1594, 1599-1600, 7 L.Ed.2d 816 (1982). See Wood v. Milyard, 566 U.S. 463, 470 n.5, 472, 132 S.Ct. 1826, 1833, 1835,

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or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

182 L.Ed.2d 733 (2012). In Wood, the Supreme Court held that a district court abuses its discretion by considering a statute of limitation defense that has been affirmatively waived, as opposed to merely forfeited. (Id.). See also In Re Jackson, 826 F.3d 1343, 1347 (11 Cir. 2016) (citing Day v. McDonough, 547 U.S. 198, 210, 126 S.Ct. 1675, 1684, 164 L.Ed.2d 376 (2006) and Wood v. Milyard, 546 U.S. 463, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012)); Rogers v. United States, 569 Fed. Appx. 819, 821 (11th Cir. 2014) (Determining government's miscalculation was not related to the timeliness of the motion, but rather an intelligent waiver of the statute of limitations defense, citing Day v. McDonough, 547 U.S. at 202 and Gay v. United States, 816 F.2d 614, 616 n. 1 (11th Cir.1987) ("[T]he principles developed in habeas cases also apply to § 2255 motions.")).

B. Procedural Default

The government correctly argues that the movant's claim is procedurally defaulted due to his failure to raise it on direct appeal. (Cv DE# 22:3).

A defendant, in federal custody, may utilize 28 U.S.C. §2255 to vacate, set aside, or correct a sentence imposed under the ACCA. Spencer v. United States, 773 F.3d 1132, 1143 (11 Cir. 2014) (*en banc*) ("We can collaterally review a misapplication of the [ACCA] because, unlike an advisory guideline error, that misapplication results in a sentence that exceeds the statutory maximum."). Although an ACCA claim is cognizable in a §2255 motion, as a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding. Massaro v. United States, 538 U.S. 500, 504 (2003); see also Greene v. United

States, 880 F.2d 1299, 1305 (11th Cir. 1989). In other words, under the procedural default rule, all claims, including constitutional ones, not raised on direct appeal, "may not be raised on collateral review unless the petitioner shows cause and prejudice." Massaro v. United States, 538 U.S. at 504; Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010); Lynn v. United States, 365 F.3d 1225, 1232-34 (11th Cir. 2004).

There are, however, two exceptions to the procedural default rule, (1) cause and prejudice, and (2) a "miscarriage of justice, or actual innocence." See McKay v. United States, 657 F.3d 1990, 1996 (11 Cir. 2011). To meet the requirements for the first exception, the movant must demonstrate "cause for not raising the claim of error on direct appeal *and* actual prejudice from the alleged error." McKay v. United States, 657 F.3d at 1996 (emphasis in original). Under the second, actual innocence-miscarriage of justice exception, the "movant's procedural default is excused if he can show that he is actually innocent either of the crime of conviction or, in the capital sentencing context, of the sentence itself." Id. "This exception is exceedingly narrow in scope as it concerns a petitioner's 'actual' innocence rather than his 'legal' innocence." Johnson v. Alabama, 256 F.3d 1156, 1171 (11 Cir. 2001). Regarding the cause and prejudice analysis, "the question is not whether legal developments or new evidence has made a claim easier or better, but whether at the time of the direct appeal the claim was available at all." Lynn v. United States, 365 F.3d 1225, 1235 (11 Cir. 2004).

1. Exception (1)-Cause and Prejudice

a. Cause

The Supreme Court has held that a petitioner can show cause for failing to raise an issue when "some objective factor external to the defensen prevented [him] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [his] own conduct." Weinacker v. United States, 2017 WL 5665450, at *3 (11 Cir. June 16, 2017); See Murray v. Carrier, 477 U.S. 478, 488 (1986); Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999); accord Lynn v. United States, 365 F.3d at 1235. The Supreme Court has further held that cause for not raising a claim can be shown when a claim "is so novel that its legal basis was not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998); see also, Reed v. Ross, 468 U.S. 1, 16 (1984).

Here, Movant has failed to show any cause for his procedural default. Although movant did file *pro se* objections to the PSI's use of the prior conviction at issue here, namely, possession with intent to distribute cocaine in case no. F98-7276 (PSI ¶23), he did not pursue the issue on direct appeal. Instead, he challenged the viability of his ACCA sentence on appeal based on a different predicate conviction, namely, his conviction for possession with intent to sell or deliver cocaine in case no. F02-035615. See United States v. Lowry, 599 Fed. Appx. 358 (11th Cir. 2014). Accordingly, movant has failed to establish any "cause" for his procedural default.

b. Prejudice

To show prejudice, a petitioner must demonstrate actual prejudice resulting from the alleged constitutional violation.

United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977). As will be recalled, the movant's statutory minimum for the offense of conviction increased from 10 years to 15 years because of the ACCA enhancement. Moreover, his status as an armed career criminal under the guidelines resulted in an increase to the movant's initial base offense level from a level 24 to a level 33 (before factoring in his three-level reduction for acceptance of responsibility) and resulted in an increase in his criminal history category from II to IV. Without the ACCA enhancement, the movant's advisory guideline range, based on a total adjusted offense level 21, with a criminal history category II, would have resulted in a term of 41 months imprisonment, on the low end, and 51 months imprisonment at the high end of the advisory guidelines. Statutorily, a violation of 18 U.S.C. §922(g), without the ACCA enhancement, calls for a term of 10 years' imprisonment, but with the ACCA enhancement, it was increased, pursuant to 18 U.S.C. §924(e) to 15 years imprisonment. Therefore, if movant in fact **does not** have the three prior qualifying predicate offenses, then prejudice has also been established.

2. Exception (2)-Fundamental Miscarriage of Justice

If, however, the movant fails to meet the first exception of the procedural default, because he cannot show cause and prejudice, another avenue may exist for obtaining review of the merits of a procedurally defaulted claim. Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional violation has probably resulted in the conviction of one who is

actually innocent." Murray, 477 U.S. at 495-96; see also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Id. at 496; see also Bousley, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992)("the miscarriage of justice exception is concerned with actual as compared to legal innocence"). No such showing has been made here.

Nevertheless, when judicial economy dictates, where the merits of the claim may be reached and readily disposed of, judicial economy has dictated reaching the merits of the claim while acknowledging the procedural default and bar in the alternative.[5] See Lambrix v. Singletary, 520 U.S. 518 (1997). See also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999)(stating that judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 528 U.S. 846 (1999); Chambers v. Bowersox, 157 F.3d 560, 564 n. 4 (8th Cir. 1998)(stating that "[t]he simplest way to decide a case is often the best.").

V. Standard of Review

Generally, because collateral review is not a substitute for

[5]Even if a claim is technically unexhausted here, the Court has exercised the discretion now afforded by Section 2255, as amended by the AEDPA, which permits a federal court to deny on the merits a habeas corpus application containing unexhausted claims. See Johnson v. Scully, 967 F.Supp. 113 (S.D.N.Y. 1996); Walker v. Miller, 959 F.Supp. 638 (S.D. N.Y. 1997; Duarte v. Miller, 947 F.Supp. 146 (D.N.J. 1996).

direct appeal, the grounds for collateral attack on final judgments, pursuant to §2255, are extremely limited. A prisoner is entitled to relief under §2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded the court's jurisdiction to impose such sentence, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28 U.S.C. §2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011);Hill v. United States, 368 U.S. 424, 426-27 (1962). A sentence is "otherwise subject to collateral attack" if there is an error constituting a "fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979); Hill v. United States, 368 U.S. at 428.

VI. Discussion

Movant challenges his ACCA enhancement arguing that his prior conviction for possession with intent to sell/distribute cocaine in case no. F98-7276 was not a valid predicate offense because he was a youthful offender at the time of the conviction.(Cv-DE#19:2).

Pursuant to U.S.S.G. §4B1.4(a), if a defendant is subject to an enhanced sentence under 18 U.S.C. §924(e), he is considered an armed career criminal under the sentencing guidelines. The guidelines make clear that a violation of 18 U.S.C. §924(e)(1), subjects a defendant to an enhanced ACCA sentence, if the offense of conviction is a violation of 18 U.S.C. §922(g) and the defendant has at least three prior convictions for a "violent felony" or "serious drug offense," or both, committed on occasions different from one another. See U.S.S.G. §4B1.4 app.n.1 (2013). The terms "violent felony" or "serious drug offense" are defined in 18 U.S.C. §924(e)(2), and are not identical to the definitions of "crime of

violence" and "controlled substance offense" used in U.S.S.G. §4B1.1 (Career Offender). See U.S.S.G. §4B1.4 app.n.1 (2013).

At sentencing, as previously narrated, the government relied upon three prior felony convictions to support the ACCA enhancement. (PSI ¶18).

Careful review of the sentencing transcripts reveals that the court agreed with the government that the movant's prior predicate convictions qualified to support the ACCA enhancement. (Cr-DE#78).

Movant was properly sentenced as an armed career criminal. The ACCA, in relevant part, provides that:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for … a serious drug offense, … shall be fined under this title and imprisoned not less than fifteen years . . .
>
> (2) As used in this subsection –
>
> (A) the term "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)(1) and (2). Section 922(g)(1) in turn provides that "[i]t shall be unlawful for any person (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. 18 U.S.C.

§922(g)(1).

Movant does not dispute that the challenged predicate qualifies as a "serious drug offense" under the statute in that it "is a second degree felony offense in Florida punishable by up to 15 years in prison" (CV-DE# 19:2). However, he argues that it cannot be used as an ACCA predicate because it was an act of "juvenile delinquency" for which he was ultimately sentenced to serve one year and one day in prison (Id.:3). Movant appears to argue that only those juvenile offenses that involve violent felonies may be used as a predicate offense under the ACCA.

Movant's argument fails because it disregards the language of the statute applicable to "serious drug offenses," and also overlooks the fact that the Movant was in fact prosecuted by the State as an adult, not a juvenile.

The Eleventh Circuit rejected a defendant's claim that his prior drug conviction did not qualify as a predicate offense under the ACCA where the charge was original filed in juvenile court and later "direct filed" in Circuit Court:

> [The defendant] offers no authority suggesting that his convictions' ACCA status could be affected by either his age at conviction or the fact his case began in juvenile court. Our decisions have held the opposite: that prior convictions during the defendant's adolescence still count under the ACCA. See, e.g., United States v. Spears, 443 F.3d 1358, 1360-61 (11th Cir. 2006) (holding that a robbery conviction at age seventeen still counted as an ACCA predicate).

United States v. Johnson, 570 F.Appx. 852, 856-857 (11th Cir. 2014). Moreover, while the defendant in Spears had been a juvenile when he committed the crime and convicted as an adult, the Court

cited to precedent holding that even convictions obtained in juvenile court may be considered as predicates for ACCA enhancement. Spears, 443 F.3d at 857 (citing United States v. Burge, 407 F.3d 1183, 1187 (11th Cir. 2005) ("A juvenile adjudication may be a 'prior conviction' under the ACCA."). See also United States v. Safeeullah, 453 F.Appx. 944, 948 (11th Cir. 2012) (unpublished) (defendant's prior conviction for possessing cocaine with intent to distribute falls directly within the ACCA's statutory definition of "serious drug offense," and rejecting defendant's challenge to same on basis that he was only 17 years old at the time of the offense where Georgia state law (similar to Florida state law) allowed an adult adjudication and he was convicted as an adult)).

The ACCA applies to persons who have been convicted in any court of a "crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. §922(g)(1), which is determined in accordance with the "law of the jurisdiction in which the proceedings were held." 18 U.S.C. §921(20). In Florida, "any person over 14 can be tried as an adult and that . . . conviction shall be treated as an adult conviction for future purposes under Florida law." United States v. Cure, 996 F.2d 1136, 1141 (11th Cir. 1993). Movant was sentenced as an adult under Florida law to a sentence of one year and one day, thus satisfying the ACCA's requirements. See (CR DE# 29-1, State Court Documents in Case No. F98-7276).

The movant's argument that his prior conviction was not a valid predicate offense because he may have been sentenced as a youthful offender also fails. The Florida Youthful Offender Act provides that a state court "may" sentence a defendant as a youthful offender if he or she meets certain criteria, Fla. Stat. §958.04(1), and that the custodial sentence of any defendant

sentenced as a youthful offender "shall" be capped at six years, Fla. Stat. §958.04f(2)(d). In United States v. Wilks, 464 F.3d 1240, 1242-43 (11th Cir. 2006), the Eleventh Circuit held that Florida youthful offender convictions may qualify as ACCA predicate offenses.

Movant relies on Wilks for the proposition that in order for his prior conviction to count as a predicate offense, his sentence was required to be at least one year and one month. Movant was sentenced in case no. F98-7276 to one year and one day. As the government correctly points out, the facts in Wilks are distinguishable because the court was addressing how to treat offenses committed under the age of 18 when scoring a defendant's criminal history in connection with a career offender enhancement under U.S.S.G. §4A1.2(d). Under Wilks, 464 F.3d 1240, for such offenses to be scorable, the defendant must have been convicted as an adult and received a sentence of imprisonment exceeding one year and one month. Here, because movant did not receive a career offender enhancement, that requirement is inapplicable as the ACCA does not require that predicate convictions be scorable under U.S.S.G. §4A1.2.

In addition, the Eleventh Circuit in Wilks reiterated its holding in Spears that a robbery crime committed when the defendant was seventeen "counted towards ACCA enhancement because he was prosecuted as an adult and the offense was punishable by a term of imprisonment exceeding one year." 464 F.3d at 1242-43 (citing Spears, 443 F.3d at 1360-61).

Accordingly, based on the foregoing, movant was properly sentenced as an armed career criminal. Consequently, he is not entitled to relief on this basis, and the prior conviction in case

no. F98-7276 properly supported the movant's armed career criminal enhancement. Thus, movant has three prior qualifying predicate offenses to support the ACCA enhancement.

Additionally, the movant is again reminded that he may not raise for the first time in objections to the undersigned's Report any new arguments or affidavits to support these claims. Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009) (citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009). To the extent the movant attempts to do so, the court should exercise its discretion and decline to consider the argument. See Daniel, supra; See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). This is so because "[P]arties must take before the magistrate, 'not only their best shot but all of the shots.'" See Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987) (quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

VII. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA"). See 28 U.S.C. §2253(c)(1); Harbison v. Bell, 556 U.S. 180, 129 S.Ct. 1481 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

See Slack v. McDaniel, 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Upon consideration of the record as a whole, this Court should deny any request for a certificate of appealability. Notwithstanding, if petitioner does not agree, he may bring this argument to the attention of the district judge in objections.

VIII. Conclusion

Based on the foregoing, it is recommended that this motion to vacate be DENIED; that final judgment be entered; and, the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 9TH day of March, 2018.

UNITED STATES MAGISTRATE JUDGE

cc: Antwayne Tremayne Lowry
Reg. No. 04101-104
Oakdale FCI
Inmate Mail/Parcels
Post Office Box 5000
Oakdale, LA 71463

Arthur Louis Wallace, III, Esquire
Attorney for Movant

2211 E. Sample Road, Suite 203
Lighthouse Point, FL 33064
Email: WallaceLawFirm@Yahoo.com

Donald F. Chase , II
United States Attorney's Office
500 E Broward Boulevard, 7th Floor
Fort Lauderdale, FL 33394
954-660-5693
Fax: 356-7336
Email: donald.chase@usdoj.gov