APPENDIX A

19-10101

Antwan Bernard Williams
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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
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Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 03, 2019

Clerk - Middle District of Florida
U.S. District Court
801 N FLORIDA AVE
TAMPA, FL 33602-3849

Appeal Number: 19-10101-C
Case Style: Antwan Williams v. USA
District Court Docket No: 8:18-cv-01648-EAK-AEP
Secondary Case Number: 8:16-cr-00349-EAK-AEP-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10101-C

ANTWAN BERNARD WILLIAMS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, appellant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Because appellant has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.

Appellant's motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANTWAN BERNARD WILLIAMS,

v.

Case No. 8:16-cr-349-T-17AEP
8:18-cv-1648-T-17AEP

UNITED STATES OF AMERICA.

ORDER

This cause is before the Court on pro se Antwan Bernard Williams' timely-filed 28 U.S.C. § 2255 motion to vacate, set aside, or correct an allegedly illegal sentence. (Doc cv-1; cr-64).

The Government filed a response to the motion (Doc. cv-5) and Williams filed a reply to the response. (Doc. cv-6).

After review, the Court will deny Williams' motion.

PROCEDURAL HISTORY

On December 1, 2016, Antwan Bernard Williams pled guilty pursuant to a plea agreement to unlawfully possessing a firearm as a convicted felon. (*See* Docs. cr-24, 26, 32.) Because the Court determined that Williams qualified as an armed career criminal under the Armed Career Criminal Act ("ACCA"), this Court sentenced Williams to the mandatory minimum of 180 months imprisonment. (*See* Doc. cr-61.) Williams did not pursue a direct appeal.

On July 9, 2018, Williams filed this section 2255 petition (Doc. cv-1), which the

Government opposes.

STATEMENT OF FACTS

At approximately 12:12 a.m. on May 7, 2016, a Plant City Police Department officer saw a silver Toyota sedan pass him with only one working headlight. (*See* Doc. cr- 24 at 18; Presentence Investigation Report ("PSR") at ¶ 16.)) The officer pulled out behind the Toyota sedan, followed it, and activated his car's emergency equipment as the Toyota sedan pulled into a residential drive way in Plant City. (*See* Doc. cr-24 at 18; PSR at ¶ 16.) As the officer approached the driver's side of the car, Williams—the Toyota sedan's sole occupant—started to make suspicious movements. (*See* Doc. cr- 24 at 18; PSR at ¶ 17.) The officer shined his flashlight into the car and saw a long, extended firearm magazine and the butt of a handgun between Williams' right thigh and the car's center console. (*See* Doc. cr-24 at 18; PSR at ¶ 17.) The officer ordered Williams to get out of the car and called for backup. (*See* Doc. cr-24 at 18-19; PSR at ¶ 17.) After the second officer arrived, they located a Glock 9mm pistol with an extended magazine in Williams' car and Williams said that he had the firearm for protection. (*See* Doc. cr-24 at 19; PSR at ¶ 18-19.) Williams asked the officers to take the firearm and let him go because he knew he would be facing prison time. (*See* Doc. cr-24 at 19; PSR at ¶ 18-19.)

At the time he possessed the firearm, Williams was a convicted felon and had not had his right to possess a firearm restored. (*See* Doc. cr-24 at 17-18; PSR at ¶ 10-15.) Among others, Williams had been convicted in Florida of Aggravated Assault and Aggravated Battery in 1993, Delivery of Cocaine Within 1,000 Feet of a Church in 2004, and Aggravated

Battery (Great Bodily Harm) in 2011. (*See* Doc. 24 at 17-18; PSR at ¶ 10-11, 13-14.)

As indicated above, Williams pled guilty pursuant to a plea agreement to a one-count Indictment charging him with possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). (*See* Docs. cr-1, 24.) The plea agreement informed Williams that if the Court determined that he qualified as an armed career criminal subject to enhanced penalties pursuant to 18 U.S.C. § 924(e), then he would face a penalty of at least 15 years imprisonment. (*See* Doc. cr-24 at 2.) Williams acknowledged and said he understood those penalties during his change-of-plea hearing, (*see* Doc. cr-65 at 5 (change-of-plea transcript)), before agreeing with the facts in the plea agreement, (*see* id. at 11-14). At the end of the hearing, Williams indicated that he had no questions. (Id. at 15.)

In the PSR, the Probation Office set Williams' adjusted offense level at 33 because his prior felony convictions qualified him as an armed career criminal. (PSR at ¶¶ 31-33.) Williams qualified as an armed career criminal based on three Florida felony convictions: aggravated battery; delivery of cocaine within 1,000 feet of a church; and aggravated assault. (Id. at ¶¶ 31–32.) With a total offense level of 30 and a mandatory-minimum imprisonment term of 15 years, Williams' advisory guideline range was 180 months' imprisonment. (Id. at ¶¶ 36, 124.)

At sentencing, Williams informed this Court he reviewed both versions of the PSR with counsel and he had no objections. (Doc. cr-67 at 3–4 (sentencing transcript)). This Court adopted the statements in the PSR as findings of fact. (Id. at 4.) After Williams made a brief statement, (id. at 6–7), this Court sentenced Williams to 180 months' imprisonment,

the mandatory-minimum. (Doc. 61; Doc. 67 at 8). Before concluding the sentencing, this Court advised Williams of his right to appeal his sentence. (Doc. cr-67 at 11).

Now, in his pending section 2255 petition, Williams argues that he is actually innocent of his armed career criminal designation, pursuant to 18 U.S.C. § 924(e) in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Mathis v. United States*, 136 S. Ct. 2243 (2016), and that his counsel was constitutionally ineffective. (*See* generally Doc. cv-1-1.)

Williams' claims lacks merit and do not entitle him to relief.

LEGAL STANDARDS

Burden of Proof

In general, on collateral review the petitioner bears the burden of proof and persuasion on each and every aspect of his claim, *see In re Moore*, 830 F.3d 1268, 1272 (11th Cir. 2016) (collecting cases), which is "a significantly higher hurdle than would exist on direct appeal" under plain error review, *see United States v. Frady*, 456 U.S. 152, 164–66 (1982). Accordingly, if this Court "cannot tell one way or the other" whether the claim is valid, then the defendant has failed to carry his burden. *Moore*, 830 F.3d at 1273; *cf. United States v. Rodriguez*, 398 F.3d 1291, 1300 (11th Cir. 2005) (in plain error review, "the burden truly is on the defendant to show that the error actually did make a difference ... Where errors could have cut either way and uncertainty exists, the burden is the decisive factor in the third prong of the plain error test, and the burden is on the defendant."). Williams cannot meet this burden.

Cognizability

Williams' claims are cognizable. Section 2255 authorizes an attack on a sentence on four grounds: (1) it was imposed in violation of the Constitution or laws of the United States; (2) it was imposed without jurisdiction; (3) it exceeds the maximum authorized by law; or (4) it is otherwise subject to collateral attack. 28 U.S.C. § 2255. Williams' *Johnson/Mathis*-based challenge to his sentence is cognizable because it alleges that his sentence was imposed "in violation of the Constitution ... of the United States." 28 U.S.C. § 2255(a). Williams' claim that counsel was ineffective is grounded in the Sixth Amendment and is cognizable under 28 U.S.C. § 2255. *See, e.g., Lynn v. United States*, 365 F.3d 1225, 1234 n.17 (11th Cir. 2004) (ineffective assistance claims should be decided in section 2255 proceedings).

Procedural Default

"Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn* 365 F.3d at 1234 (citing *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001)). Claims that are ripe for direct appeal but not raised are procedurally defaulted, and may not be raised for the first time in a motion to vacate under section 2255. *Lynn*, 365 F.3d at 1234. "This rule generally applies to all claims, including constitutional claims." *Id.* (citing *Reed v. Farley*, 512 U.S. 339, 354 (1994)).

A movant may avoid a procedural default either by showing (1) cause for and prejudice from the default, or (2) that "a constitutional violation has probably resulted in the

conviction of one who is actually innocent." *Lynn*, 365 F.3d at 1234 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

With respect to cause and prejudice, "to show cause for procedural default, [a movant] must show that some objective factor external to the defense prevented [him] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [the movant's] own conduct." *Lynn*, 365 F.3d at 1235 (citing *Smith v. Jones*, 256 F.3d 1135, 1145 (11th Cir. 2001)). The movant must also show that "actual prejudice" resulted from the claims' not being raised on direct appeal. *Lynn*, 365 F.3d at 1234 (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)). Williams procedurally defaulted on his "actual innocence" claim. 2 Not only is Williams incorrect on the merits of this claim, but Williams also procedurally defaulted on this claim by not raising it before this Court or on appeal. Williams cannot be excused from the procedural-default rule because he has not suffered any prejudice, he claims only legal innocence (not factual innocence), and there is no new novel theory of law that was not already available to him. As a result, the Court need not reach the merits of the claim Williams calls "actual innocence." Because this claim affects Williams' ineffective assistance of counsel claim, the Court addresses the merits.

INEFFECTIVE ASSISTANCE OF COUNSEL

To succeed on an ineffective assistance of counsel claim, a petitioner must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). When evaluating performance, this Court must apply a "strong presumption" that counsel has "rendered

adequate assistance and [has] made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately. *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (*en banc; quoting White v. Singletary*, 972 F.2d 1218, 1220–21 (11th Cir. 1992)).

To establish deficient performance, a petitioner must show that "no competent counsel would have taken the action that his counsel did take." *See Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir.2000) (*en banc*). A petitioner demonstrates prejudice only when he establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* If the petitioner fails to establish either of the *Strickland* prongs, his claim fails. *See Maharaj v. Sec'y, Dep't of Corr.*, 432 F.3d 1292, 1319 (11th Cir. 2005).

DISCUSSION

Williams makes two arguments. First, he argues that he does not qualify as an armed career criminal and, thus, he could not be sentenced to more than 10 years imprisonment. (Civ. cv-1-1 ("Mot.") at 3-18). Second, Williams argues that because he was not an armed

career criminal, his counsel was constitutionally ineffective for failing to challenge his 15-year sentence before this Court. (*Id.* at 18-19). Williams is wrong and was correctly sentenced as an armed career criminal.

Williams' "Actual Innocence" Claim Fails Because this Court Correctly Determined that Williams is Subject to § 924(e)'s Enhanced Penalties

As indicated above, Williams argues that, pursuant to the Supreme Court's opinions in *Johnson, Mathis*, and others, none of his drug distribution, aggravated assault, or aggravated battery convictions are qualifying offenses under the ACCA. Binding Eleventh Circuit case law says otherwise.

In *Johnson*, the Supreme Court held that the residual clause in the definition of "violent felony" in the ACCA is unconstitutionally vague and that "imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process." 135 S. Ct. at 2563. Notably, *Johnson's* holding has no bearing on the statute's definition of a "serious drug offense." *United States v. Darling*, 619 F. App'x. 877, 880 n.5 (11th Cir. 2015). In *Mathis*, the Supreme Court held that the modified categorical approach, which is used to determine whether a prior conviction is for a violent felony or serious drug offense as defined in the ACCA, may not be applied to statutory offenses listing alternative "means," rather than alternative "elements." 136 S. Ct. at 2247–48. To determine whether a prior conviction qualifies as a predicate, courts must "compare the elements of the crime of conviction with the elements of the 'generic' version of the listed offense—i.e., the offense as commonly understood." *Id.* at 2247.

Williams' 2003 conviction for delivering cocaine within 1,000 feet of a church is an

ACCA serious drug offense. The ACCA includes a mandatory minimum 15-year term of imprisonment for anyone convicted of possessing a firearm after having been convicted of three violent felonies, serious drug offenses, or both. 18 U.S.C. § 924(e)(2). A "serious drug offense" is "an offense under State law involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . " punishable by at least ten years of imprisonment. *See* 18 U.S.C. § 924(e)(2)(A)(ii).

Williams was convicted in Hillsborough County, Florida, for delivery of cocaine within 1,000 feet of a church in 2003, in violation of Florida Statute § 893.13(1)(e)(1).4 (*See* Attachment A [To Document 5] at 1 [Information charging Williams with delivery].) That offense was punishable by up to 30 years in prison. *See* Fla. Stat. § 775.082. As a result, Williams' drug conviction is a "serious drug offense" as defined in the ACCA. *See, e.g., United States v. Hale*, 805 F. App'x. 876, 879-80 (11th Cir. 2017) (holding that a conviction under Fla. Stat. 893.13(1)(e)(1) for delivery of a controlled substance within 1,000 feet of a church is an ACCA serious drug offense); *see also United States v. White*, 837 F.3d 1225, 1233 (11th Cir. 2016) (drug offenses involving distribution are ACCA qualifiers); *United States v. Pridgeon*, 853 F.3d 1192, 1198 (11th Cir.), *cert. denied*, 138 S. Ct. 215 (2017); *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014) (Fla. Stat. § 893.13 is a serious drug offense).

Despite the applicable case law, Williams incorrectly argues that, "[a]t the time of Petitioner's conviction[,] Florida Statute § 893.13(a) provided that "it was unlawful for any person to sell, purchase, manufacture, or deliver, or possess with the intent to sell a

controlled substance within 1000 feet of a protected location." (Mot. at 5). Williams goes on to say Florida Statute § 893.13 is indivisible and that because the "purchase" of controlled substances cannot be the basis for an ACCA "serious drug offense," Williams' 2004 delivery conviction is not an ACCA qualifying conviction. (Id. at 5-11.) Williams is wrong and confuses the statute of conviction (Florida Statute § 893.13) with a different Florida statute about drug trafficking (Florida Statute § 893.135). Florida Statute § 893.13(1)(e)(1) did not include the term "purchase" in 2003, and it does not now. (*See* Attachment B to Doc. 5 [2003 version of Fla. Stat. § 893.13(1)(e)(1)].)

As a result, Williams' position is both factually and legally incorrect and binding case law establishes that his 2004 drug conviction is an ACCA qualifying conviction.

Williams' Aggravated Assault

Williams next argues that his 1993 aggravated assault conviction, in violation of Florida Statute § 784.021—a third degree felony, punishable up to five years' imprisonment—is not a qualifying conviction. (Mot. at 11–16). He is mistaken.

Although Johnson ended reliance on the residual clause to establish that an offense is a violent felony, aggravated assault also qualifies under the ACCA's elements clause, which requires that the offense have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(e)(2)(B)(i). The Eleventh Circuit so held in *Turner v. Warden*, 709 F.3d 1328 (11th Cir. 2013):

> [B]y its definitional terms, the [Florida offense of aggravated assault] necessarily includes an assault, which is 'an intentional, unlawful threat by word or act **to do violence** to the person of another, coupled with an apparent ability to do so.' Therefore, a conviction under section 784.021 will

> always include 'as an element the ... threatened use of physical force against the person of another,' and Turner's conviction for aggravated assault thus qualifies as a violent felony for purposes of the ACCA.

(emphasis in original) (citations omitted). *Turner*'s holding remains good law after *Johnson*. *See In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016). *See also*, *Thornton v. United States*, 2018 WL 4992432 *2 (11th Cir., Sept. 19, 2018) ("Even if Turner is flawed, that does not give us, as a later panel, the authority to disregard it." (citing *United States v. Golden*, 854 F. 3d 1256. 1257 (11th Cir.) *cert. denied* 138 S.Ct. 197, 199 (2017)).

In his petition, Williams recognizes the Eleventh Circuit's precedent, but argues that *Turner* was incorrectly decided. (Mot. 1-1 at 15.) And while it is true that members of the Eleventh Circuit have questioned the use of *Turner*, *Turner* remains binding on this Court. *See United States v. Deshazior*, 882 F.3d 1352, 1355 (11th Cir. 2018) (again affirming that *Turner* remains binding), petition for cert. filed, No. 17-8766 (U.S. May 3, 2018); *United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) (same).

Therefore, Williams' 1993 conviction for aggravated assault still qualifies as a violent felony.

Williams' Aggravated Battery

Williams also argues that his 2011 conviction for aggravated battery, in violation of Fla. Stat. § 784.045, does not qualify as an ACCA violent felony because it can be committed without using violence. (Mot. at 16-18). Overwhelming binding Eleventh Circuit case law forecloses this argument.

In addition to addressing aggravated assault, the Eleventh Circuit in *Turner* held that

aggravated battery in violation of Florida Statute § 784.045(1)(a) is a violent felony under the ACCA's elements clause. That decision, which has been reaffirmed on multiple occasions, is binding upon this Court. *See, e.g. United States v. Boatwright*, 713 F. App'x. 871, 876–77 (11th Cir. 2017); *United States v. Tarver*, 712 F. App'x. 885, 886 (11th Cir. 2017); *United States v. Hale*, 705 F. App'x. 876, 880 (11th Cir. 2017).

Florida aggravated battery can involve either the intentional or knowing causation of great bodily harm, or the use of a deadly weapon. Fla. Stat. § 784.045. *Turner* held that, "[e]ither way, the crime has as an element the use, attempted use, or threatened use of physical force, indeed, violent force—that is, force capable of causing physical pain or injury to another person." 709 F.3d at 1341 (citations and internal quotation marks omitted); *see also United States v. Tinker*, 618 F. App'x 635, 637 (11th Cir. 2015).

And, although aggravated battery under Florida law can also include battery on a pregnant woman the batterer knows to be pregnant, Fla. Stat. § 784.045(1)(b), the statute is divisible because subsections (1)(a) and (1)(b) are alternative elements listed disjunctively that go toward the creation of separate crimes. *See Mathis*, 136 S. Ct. at 2249-50, 2256-57 ("[A]n indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime.").

In this case, dividing the statute and employing the modified-categorical approach, the *Shepard* documents here show that Williams' aggravated battery convictions came under section 784.045(1)(a) and not subsection (1)(b), which addresses battery on a pregnant

victim. (*See* Attachment A at 17 [citing "F.S. 784.045(1)(a)(1)" and alleging the same].) Specifically, the charging document alleges that the aggravated battery took place with the knowledge or intent to "cause great bodily harm, permanent disability, or permanent disfigurement." (Id.) Moreover, the victim, Phillip Williams, was male. (Id.); *see also Turner*, 709 F.3d. at 1341 ("Using the modified categorical approach, and because the victim of the crime was a male, we can rule out battery upon a pregnant female as the basis for *Turner's* conviction.").

Accordingly, binding case law establishes that Williams' 2011 aggravated battery conviction is also an ACCA qualifying conviction.

Williams' Ineffective Assistance of Counsel Claim Fails Because this Court Correctly Determined that Williams is Subject to § 924(e)'s Enhanced Penalties.

Next, Williams argue that his counsel was ineffective for failing to challenge the ACCA's application to his prior convictions and sentence in this case. (Mot. at 18-20.) To show that he suffered constitutionally ineffective assistance of counsel, Williams has the burden of establishing that his counsel's performance was deficient and that it worked to his actual and substantial disadvantage. *See Reece v. United States*, 119 F.3d 1462, 1465–68 (11th Cir. 1997). Williams cannot make the necessary showing because his entire ineffective assistance claim is premised on his mistaken belief that he should not have been sentenced as an armed career criminal. (See Mot. at 18-20). As explained above, Eleventh Circuit case law plainly establishes that Williams' ACCA arguments lack merit and "[a] lawyer cannot be deficient for failing to raise a meritless claim." *See Freeman v. Atty. Gen.*, 536 F.3d 1225,

1233 (11th Cir. 2008). As a result, Williams' ineffective-assistance contention must fail.

Williams also cannot establish prejudice. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Because his ACCA claim is unavailing, and because this Court correctly sentenced him as an armed career criminal, he has also failed to establish prejudice.

Nothing in Williams' reply convinces the Court that his § 2255 motion should be granted.

Accordingly, the Court orders:

That Williams' 28 U.S.C. § 2255 motion to vacate, set aside or correct an illegal sentence (Doc. cv-1; cr-64) is denied. The Clerk is directed to enter judgment for the Government and to close this case.

Williams is not entitled to a certificate of appealability (COA). He does not have the absolute right to appeal. 28 U.S.C. § 2253(c)(1). A COA must first issue. *Id.* To merit a COA, he must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. See 28 U.S.C. § 2254(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Petitioner has not made the requisite showing. Finally, because he is not entitled to a COA, he is not entitled to appeal in forma pauperis.

ORDERED at Tampa, Florida, on October 3rd, 2018.

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

AUSA: Daniel George
Antwan Bernard Williams