APPENDIX

APPENDIX

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13795
Non-Argument Calendar

D.C. Docket Nos. 9:16-cv-80559-DMM; 9:14-cr-80227-DMM-11

JAMIE NEIL CAPALBO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(April 15, 2019)

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and FAY, Circuit Judges.

PER CURIAM:

Jamie Capalbo appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his 180-month sentence imposed following his convictions for conspiracy to distribute cocaine and possession of a firearm by a felon. Capalbo challenges his sentencing enhancement under the Armed Career Criminal Act, arguing that the district court erred in concluding that his Florida robbery and aggravated assault convictions qualify as ACCA predicates under the "elements" clause.

We review de novo the district court's conclusion that a particular offense constitutes a violent felony under the ACCA. United States v. Wilkerson, 286 F.3d 1324, 1325 (11th Cir. 2002). The ACCA stipulates that any crime punishable by a term of imprisonment exceeding one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another" is a violent felony for which a 15-year minimum sentence applies. 18 U.S.C. § 924(e)(2)(B)(i). This first prong of the ACCA's definition of violent felony is sometimes referred to as the "elements clause." United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012).[1] The Supreme Court has held that "Florida robbery qualifies as an ACCA-predicate offense under the elements clause." Stokeling v.

[1] The Supreme Court has held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551, 2563 (2015). But because we analyze Mills' prior offenses under only the elements clause of the ACCA, these due process concerns are not implicated.

United States, 586 U.S. ___, 139 S. Ct. 544, 555 (2019). We have held that aggravated assault in violation of section 784.021 of the Florida Statutes constitutes a violent felony under the ACCA's elements clause. See Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337–38 (11th Cir. 2013), abrogated on other grounds by Johnson, 135 S. Ct. at 2563.

As a result, Capalbo's claims that his Florida robbery and battery offenses are not violent felonies for ACCA purposes are foreclosed by binding precedent. See Stokeling, 139 S. Ct. at 555; Turner, 709 F.3d at 1337–38. Capalbo argues that Turner was wrongly decided because it incorrectly applied our earlier decision in United States v. Palomino Garcia, 606 F.3d 1317 (11th Cir. 2010). But even if we were convinced that Turner was wrongly decided, we are bound by it because it has not been abrogated by the Supreme Court or this Court sitting en banc. See United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 15, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-13795-GG
Case Style: Jamie Capalbo v. USA
District Court Docket No: 9:16-cv-80559-DMM
Secondary Case Number: 9:14-cr-80227-DMM-11

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joe Caruso, GG at (404) 335-6177.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:16-CV-80559-MIDDLEBROOKS
(14-CR-80227)

JAMIE CAPALBO,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT IN PART AND DENYING MOTION TO VACATE SENTENCE UNDER § 2255

THIS CAUSE comes before the Court upon the Report and Recommendation issued by Magistrate Judge Patrick A. White on June 5, 2017 (DE 36). Movant filed a Motion to Vacate pursuant to § 2255, seeking relief in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). Movant was appointed counsel to represent him and counsel filed an Amended Motion to Vacate under § 2255 (DE 23, "Motion").

The Report recommends that this Motion be denied because Movant still qualifies as an armed career criminal after *Johnson*. Objections to the Report have been filed. Upon a careful, *de novo* review of the record, the Court agrees with the Report's recommendations to deny the Motion to Vacate. However, contrary to the Report's recommendation, I find that a certificate of appealability should be issued. Accordingly,

It is **ORDERED AND ADJUDGED**:

(1) The Report (DE 36) is **ADOPTED IN PART**.

(2) The Motion to Vacate (DE 23) is **DENIED**.

(3) A Certificate of Appealability is **GRANTED** as to the following issue: whether Florida aggravated assault under Fla. Stat. § 784.021 is a crime of violence under the ACCA after *Johnson*.

(4) The Clerk of Court shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 27 day of June, 2017.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-80559-Civ-MIDDLEBROOKS
(14-80227-Cr-MIDDLEBROOKS)
MAGISTRATE JUDGE PATRICK A. WHITE

JAMIE CAPALBO,

Movant,

v.

REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA,

Respondent.
_____/

I. Introduction

The movant, **Jamie Capalbo**, filed this motion to vacate, as amended (Cv-DE#23), pursuant to 28 U.S.C. §2255, challenging the constitutionality of his enhanced sentence as an armed career criminal, pursuant to the Armed Career Criminal Act ("ACCA"), entered following a guilty plea in **case no. 14-80227-Civ-Middlebrooks.**

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 motion, as amended (Cv-DE#23), the government's response (Cv-DE#25) to this court's order to show cause, the movant's traverse (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. Claim

While proceeding *pro se*, movant filed numerous piecemeal §2255 motions and amendments (Cv-DE#s1,9,12,13), and as could best be discerned, construed liberally in light of Haines v. Kerner, 404 U.S. 519 (1972), he challenged the constitutionality of his enhanced sentence as an armed career criminal in light of the Supreme Court's ruling in Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015). An order was entered appointing counsel, and directing that one final, amended §2255 motion be filed. Thereafter, counsel filed the final amended motion (Cv-DE#23), raising as a sole ground for relief that the movant is entitled to vacatur of his sentence and a resentencing hearing because his sentence as an armed career criminal is no longer lawful. (Cv-DE23:3). The most recent filing by counsel thus became the operative §2255 motion, and all claims raised in movant's *pro se* filings, that were not re-pled have been deemed abandoned. See Lowery v. Ala. Power Co., 483 F.3d 1184, 1219 (11th Cir. 2007)("an amended complaint supersedes the initial complaint and becomes the operative pleading in the case"); see also S.D.Loc.R. 15.1.

III. Procedural History

By way of background, the movant was charged with and convicted of conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. §841(a)(1) and §846 (Count 1), and felon in possession of a firearm, in violation of 18 U.S.C. §922(g) and §924(e), following the entry of a guilty plea. (Cv-DE#26,606). In light of his status as an armed career criminal,

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

pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e), he faced a 15-year minimum mandatory and up to a term of life imprisonment.

Prior to sentencing, a PSI was prepared which reveals as follows. It was determined that movant qualified for an enhanced sentence as a career offender, pursuant to U.S.S.G. §4B1.1(a), because he had two prior felony controlled substance offenses, resulting in a base offense level 32. (PSI ¶451). However, because it was also determined that the movant qualified for an enhanced sentence as an armed career criminal, under U.S.S.G. §4B1.1, the offense producing the highest offense level was used. (Id.). The probation officer relied on the following prior convictions to support the ACCA enhancement: (1) flee or attempt to elude (high speed reckless), entered in Palm Beach County Circuit Court, **case no. 1999-CF-007412;** (2) robbery, entered in Palm Beach County Circuit Court, **case no. 2001-CF-004713-D,** (3) aggravated assault on a police officer (deadly weapon) and flee or attempting to elude, entered in Palm Beach County Circuit Court, **case no. 2005-CF-010332;** and, (4) possession with intent to sell cocaine, entered in Palm Beach County Circuit Court, **case no. 2005-CF-013863.** (PSI ¶¶456, 457,460,461). Because the ACCA enhancement resulted in a higher offense level, the movant's base offense level was set at a level 33. (PSI ¶451). A 3-level reduction to the base offense level was given based on movant's timely acceptance of responsibility, resulting in a total adjusted offense level 30. (PSI ¶¶452-454).

Next, the probation officer determined the movant had a total of 18 criminal history points, resulting in a criminal history category VI. (PSI ¶472). As a career offender, under U.S.S.G. §4B1.1(b), the criminal history was also a category VI. (PSI ¶473). Since he was also an armed career criminal, the criminal history category applicable under U.S.S.G. §4B1.4(c)(1),(2), or (3) is a

category VI. (PSI ¶474). Based on a total offense level 30 and a criminal history category VI, the movant faced 168 months imprisonment at the low end, and 210 months imprisonment at the high end of the guideline range. (PSI ¶520). Statutorily, as to Count 1, a violation of §841(b)(1)(C), the movant faced a 20-year maximum term of imprisonment. (PSI ¶519). As to Count 4, statutorily, the movant faced a 15-year minimum term and up to a maximum of life imprisonment for violation of 18 U.S.C. §924(e). (PSI ¶519). Since the statutorily required minimum sentence of 15 years is greater than the minimum guideline range, under U.S.S.G. §5G1.1(c)(2), the term was increased to 180 months at the low end and 210 months imprisonment at the high end of the guideline range. (PSI ¶520).

Prior to sentencing, movant filed objections to the PSI, arguing that he should receive a role adjustment, and that he does not have two prior controlled substance offenses. (Cr-DE#817). On July 17, 2015, movant appeared for sentencing. (Cr-DE#1172; Cv-DE#25:Ex.2). At that time, both the government and movant recommended that the court sentence movant to the low end of the guideline sentence, to a term of 180 months imprisonment. (Cr-DE#1172:2). The court accepted the joint recommendation, and after considering the statement of all parties, the PSI and statutory factors, under 18 U.S.C. §3553(a), the court ruled that a sentence at the low end of the advisory guidelines would be imposed. (Id.:3). Thereafter, the movant was sentenced to two concurrent terms of 180 months imprisonment, to be followed by three years supervised release. (Id.:3-4). The Judgment was entered by the Clerk on **July 21, 2015**. (Cr-DE#928,953). No direct appeal was prosecuted. (Cv-DE#1). As a result, the Amended Judgment of conviction became final on **August 4, 2015**, when the 14-day period

for prosecuting a direct appeal therefrom expired.[2]

Consequently, the movant had one year from the time his conviction became final, or no later than **August 4, 2016**, within which to timely file this federal habeas petition. 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)). Applying the anniversary method to this case means petitioner's limitations period expired on **August 4, 2016.**

Movant returned to this court filing his first §2255 motion, on **April 7, 2016**, the day he signed it. (Cv-DE#1). In accordance with the mailbox rule, a prisoner's pleading is deemed filed on the day he signs and then hands it to prison authorities for mailing in accordance with the mailbox rule.[3] Absent evidence to the contrary,

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[2]Where, as here, a defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a direct appeal expires. Adams v. United States, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999). On December 1, 2009, the time for filing a direct appeal was increased from 10 to 14 days days after the judgment or order being appealed is entered. Fed.R.App.P. 4(b)(1)(A)(i). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). Moreover, now every day, including intermediate Saturdays, Sundays, and legal holidays are included in the computation. See Fed.R.App.P. 26(a)(1). Here, movant was sentenced **after** the effective date of the amendment, thus he had **fourteen** days within which to file his notice of appeal. See Fed.R.App.P. 26(a)(1)(B).

[3]"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 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

it is presumed that the §2255 motion was filed on the date executed by the movant and not the date handed to prison authorities for mailing. Therein, he challenged his armed career criminal sentence enhancement. The motion was later superseded by amendment filed on **June 28, 2016.** The amendment relates back to the April 7, 2016 filing. Davenport v. United States, 217 F.3d 1341 (11 Cir. 2000).

IV. Threshold Issues

A. Timeliness

In its response, the government does not dispute that the movant's §2255 motion, filed on **April 7, 2016,** was timely filed under §2255(f)(1), because it was filed within one year from the time the movant's conviction became final. As will be recalled, the movant's conviction became final on **August 4, 2015,** and the one-year limitations period was due to expire on **August 4, 2016.** Movant returned to this court before expiration of the one-year period, filing his initial motion on **April 7, 2016.** Under §2255(f)(1), the motion is timely.

Moreover, the motion, filed **April 7, 2016** is also timely filed under §2255(f)(3) because it was filed within one year of the **June 26, 2015** Supreme Court decision in Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015), made retroactively applicable to cases on collateral review by Welch v. United States, ___ U.S. __ , _____, 136 S.Ct. 1257, 1264-65 (2016). As will be recalled, movant's conviction became final on **August 4, 2015.** The Johnson

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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).

decision was issued on **June 26, 2015.** The movant filed his §2255 motion on **April 7, 2016,** less than one year from either triggering event, under §2255(f)(1) or §2255(f)(3). Thus, as argued correctly by the government, this federal petition is timely filed.

B. Procedural Default

The government, however argues, that the movant's challenge to the constitutionality of his ACCA sentence is procedurally defaulted from review because he failed to preserve the issue at sentencing and then on appeal. (DE#25:6).

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. Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. 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 (11th Cir. 2004).

To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). 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).

Further, a meritorious claim of ineffective assistance of counsel can constitute cause. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000). Ineffective assistance of counsel claims, however, are generally not cognizable on direct appeal and are properly raised by a §2255 motion regardless of whether they could have been brought on direct appeal. Massaro v. United States, 538 U.S. 500, 503, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); see also United States v. Patterson, 595 F.3d, 1324, 1328 (11th Cir. 2010). To show prejudice, a petitioner must show 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).

If a petitioner is unable to 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").

Where the Supreme Court explicitly overrules well-settled

precedent and gives retroactive application to that new rule after a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). That is precisely the circumstance here. The Supreme Court in Johnson overruled precedent, announced a new rule, and then gave retroactive application to that new rule.

When judicial economy dictates, where the merits of the claims 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.[4] 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. General Legal Principles

Because collateral review is not a substitute for 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 its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28

[4]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).

U.S.C. §2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004)(citations omitted). The "fundamental miscarriage of justice" exception recognized in Murray v. Carrier, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent ...."

The law is well established that a district court need not reconsider issues raised in a section 2255 motion which have been resolved on direct appeal. Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Mills v. United States, 36 F.3d 1052, 1056 (11th Cir. 1994); United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981). Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255. Nyhuis, 211 F.3d at 1343 (quotation omitted). Broad discretion is afforded to a court's determination of whether a particular claim has been previously raised. Sanders v. United States, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) ("identical grounds may often be proved by different factual allegations ... or supported by different legal arguments ... or couched in different language ... or vary in immaterial respects").

Post-conviction relief is available to a federal prisoner under §2255 where "the sentence was imposed in violation of the Constitution or laws of the United States, or ... the court was without jurisdiction to impose such sentence, or ... the sentence was in excess of the maximum authorized by law." 28 U.S.C.

§2255(a); see 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.

Law re Armed Career Criminal Act

Ordinarily, where as here, the movant is convicted of felon in possession of a firearm, the maximum term of imprisonment is ten years. See 18 U.S.C. §922(g)(1) and §924(a)(2). However, pursuant to the Armed Career Criminal Act ("ACCA"), a felon in possession of a firearm, who has at least three prior convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another," is subject to a 15-year mandatory minimum term of imprisonment, and up to a term of life imprisonment. Id. at §924(e)(1).

The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that: (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, **or otherwise involves conduct that presents a serious potential risk of physical injury to another**. Id. at §924(e)(2)(B) (emphasis added). Subpart (i) of this definition is often referred to as the "elements clause." Subpart (ii) has two components: the first nine words constitute the "enumerated offense clause," and the last 15 words, which are emphasized above, are referred to as the "residual clause." See Mays v. United States, 817 F.3d 728, 730-31 (11th Cir. 2016).

On June 26, 2015, the Supreme Court held, in Johnson v. United States, ___ U.S. _____, 135 S.Ct. 2551 (2015), that the residual clause of §924(e)(2)(B)(ii), referring to a felony that "presents a serious potential risk of physical injury to another," is unconstitutionally vague; and as such, imposing an increased sentence under the residual clause violates the Constitution's guarantee of due process, because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. Johnson, __ U.S. at ___, ___ 135 S. Ct. at 2557-58, 2563. However, the Johnson Court, specifically did not call into question the application of either the elements or the enumerated crimes clause. Id. at 2563. Ten months later the Supreme Court held, in Welch v. United States, that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. Welch, ___ U.S. ___, ____, 136 S. Ct. 1257, 1264-65 (2016).

VI. Discussion-ACCA Enhancement

The movant challenges here his enhanced sentence as an armed career criminal under the ACCA. Pursuant to U.S.S.G. §2K2.1(a)(2), because the movant committed the offense of conviction, a violation of §922(g)(1) and §924(e), and had two prior convictions of either a crime of violence or a controlled substance offense, PSI enhanced movant's sentence as an armed career criminal pursuant to the ACCA. (PSI ¶445). The PSI noted that the movant's following prior convictions qualified as predicate offenses to support the ACCA enhancement: **(1) flee or attempt to elude (high speed reckless)**, entered in Palm Beach County Circuit Court, case no. 1999-CF-007412; **(2) robbery**, entered in Palm Beach County Circuit Court, case no. 2001-CF-004713-D; **(3) aggravated assault on a police officer (deadly weapon) and flee or attempting to elude**, entered in Palm Beach County Circuit Court, **case no. 2005-CF-010332**; and,

(4) possession with intent to cocaine, entered in Palm Beach County Circuit Court, **case no. 2005-CF-013863.** (PSI ¶¶456, 457,460,461).

Careful review of the PSI, together with the SOR, reveals that the court adopted the PSI without change. (SOR:¶I.A). However, the court neither explicitly nor implicitly indicated at sentencing upon which ACCA clause it relied in applying the ACCA enhancement. The PSI is also silent on the issue, merely recognizing that the movant is an armed career criminal under the provisions of §924(e) (PSI ¶451).

Thus, it must be determined whether, in light of Johnson, the movant has three prior convictions that still qualify as predicate offenses, to support the ACCA sentencing enhancement, under an analysis based on the present state of the law. In other words, to support an ACCA enhanced sentence, movant must have three qualifying predicate offenses which constitute felony convictions for crimes of violence or serious drug offenses.

When applying §924(e), courts should generally only look to the elements of the prior statute of conviction, or to the charging documents and jury instructions, but not the facts of each of defendant's prior conduct. See Taylor v. United States, 495 U.S. 575, 600-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1999). With the sole exception of convictions obtained in violation of the right to counsel, a defendant has no right to challenge the validity of prior state convictions in his federal sentencing proceeding when such convictions are used to enhance a sentence under the ACCA. Custis v. United States, 511 U.S. 485, 487 (1994).

Turning to the Armed Career Criminal Act ("ACCA"), it provides an enhanced sentencing for individuals who violate §922(g) and have "three previous convictions for a violent felony, serious drug

offense, or both, committed on occasions different from one another....” 18 U.S.C. §924(e)(1). Pertinent to this case, the ACCA defines “violent felonies” as any crime punishable by imprisonment for a term exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, ***or otherwise involves conduct that presents a serious potential risk of physical injury to another....***

18 U.S.C. §924(e)(2)(B) (emphasis added); see also, In re Robinson, 2016 WL 1583616, at *1 (11 Cir. Apr. 19, 2016). Subsection (e)(2)(B)(i) is known as the “elements clause,” the first portion of subsection (e)(2)(B)(ii) is known as the “enumerated crimes clause,” and the last portion of Section (B)(ii), in bold type above, is known as the “residual clause.” Id.

On June 26, 2015, the United States Supreme Court struck down the italicized clause, commonly known as the residual clause, as a violation of the Fifth Amendment's guarantee of due process. See Johnson, 576 U.S. ___, ____, 135 S.Ct. 2551, 2557 (2015). Specifically, the Supreme held that the ACCA’s residual clause violated due process because it violated "[t]he prohibition of vagueness in criminal statutes.” 135 S.Ct. at 2556-2557. The Supreme Court further explained that the vagueness doctrine "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences.” Id. at 2557. The ACCA defines a crime and fixes a sentence. See 18 U.S.C. §924(e). In other words, Johnson “narrowed the class of people who are eligible for” an increased sentence under ACCA. In re Rivero, 797 F.3d 986 (11th Cir. 2015)(citing Bryant v. Warden, FCC Coleman-Medium, 738 F.3d

1253, 1278 (11th Cir. 2013)).

However, the Supreme Court in Johnson did not invalidate ACCA's elements clause or enumerated crimes clause. Johnson, 135 S.Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). Moreover, on April 18, 2016, the Supreme Court announced that Johnson is retroactively applicable to cases on collateral review. Welch v. United States, 136 S.Ct. 1257 (2016).

To determine whether the movant's prior predicate offenses still qualify as predicate offenses to support the ACCA enhancement, the court is mindful that it must only examine the elements of the offenses and not the movant's specific conduct in determining whether the prior convictions qualify as predicate offenses for purposes of the ACCA. See United States v. Chitwood, 676 F.3d 971, 976-77 (11 Cir. 2012)(describing the categorical approach).

Aggravated Assault. The movant claims his prior conviction for aggravated assault on a police officer with a deadly weapon, entered in **Palm Beach County Circuit Court, case no. 2005-CF-010332**, is not a violent felony for purposes of the ACCA's elements clause, because Florida courts have found that a defendant may be convicted of aggravated assault on a showing of culpable negligence, which is akin to recklessness. (Cv-DE#23:15). The government counters, however, that aggravated assault, post-Johnson, is categorically a violent felony under the elements clause of the ACCA. (Cv-DE#25:8). The government's position is well taken in this regard.

It is now well settled in this Circuit that aggravated assault

is categorically a violent felony under the ACCA's elements clause. In re Hires, 825 F.3d 1297, 1301 (11th Cir. 2016) (citing Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-38 & n.6 (11th Cir. 2013), *abrogated on other grounds by* Johnson, 576 U.S. _____, 135 S.Ct. 2551, 192 L.Ed.2d 569. "We previously have held that a conviction under Florida's aggravated assault statute categorically qualifies as a violent felony under the ACCA's still-valid elements clause." In re Rogers, 825 F.3d 1335, 1341 (11th Cir. 2016)(citing Turner). In Turner, the Eleventh Circuit reasoned that an aggravated assault conviction "will always include as an element the threatened use of physical force against the person of another." 709 F.3d at 1338 (quotations marks and alteration omitted). The Court noted that it was not necessary to review the underlying facts of the conviction to classify aggravated assault as a violent felony because, by its own terms, the offense required a threat to do violence to the person of another. Id.

More recently, the Eleventh Circuit revisited the issue in United States v. Golden, 854 F.3d 1256, 1257 (11th Cir. 2017)(*per curiam*), pet for reh'g den'd Mar. 23, 2017. In Golden, the Eleventh Circuit reiterated that aggravated assault, under Florida law, qualifies as a violent felony for purposes of the ACCA. United States v. Golden, 854 F.3d at 1257 (citing, Turner, 709 F.3d at 1338) (petition for rehearing denied Mar. 23, 2017) (affirming post-Johnson that Turner is binding precedent and Fla.Stat. §784.021 remains categorically a violent felony under the elements clause). Turner addressed the "elements" clause of the ACCA, 18 U.S.C. §924(e)(2)(B)(i), and that clause is also identical to the elements clause of U.S.S.G. §4B1.2(a)(1). See United States v. Fritts, 841 F.3d 937, 940 (11th Cir. 2016). As a result, Turner is binding.

As applied here, when considering the Shepard documents,[5] the Judgment in Palm Beach County Circuit Court, Case No. 2005-CF-010332, reveals that the movant was charged with and convicted of aggravated assault on a police officer with a deadly weapon, a second degree felony, in violation of Fla.Stat. §784.021[6] and §784.07(2)(c) and §775.0823. (See Cv-DE#25:Ex.3). In light of Turner and Golden, aggravated assault on a police officer, under Florida law, constitutes a crime of violence for purposes of an ACCA enhancement because it requires a finding of an intentional act that includes the intended use of physical force against another. Therefore, this predicate offense was properly considered when determining movant's ACCA status. Movant has not demonstrated here deficient performance or prejudice under Strickland arising from counsel's failure to pursue this argument either at sentencing or on appeal. He is thus not entitled to relief on this basis.

Robbery. Next, the movant argues that his prior Florida robbery conviction is also no longer a qualifying predicate offense for purposes of the ACCA. (Cv-DE#23:12). Review of the PSI reveals that the probation officer and the court relied upon movant's prior conviction for robbery, entered in Palm Beach County Circuit Court, **case no. 2001-CF-004713-D**, as a predicate offense to support the ACCA enhancement. (PSI ¶457). The Judgment in that case reveals that movant was convicted of violating Fla.Stat. 812.13(1),(2)(c) (2001).[7]

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[5]In Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court held that a sentencing court could examine only a limited category of documents in determining whether a prior guilty plea constituted a "burglary," and thus a "violent felony," under the Armed Career Criminal Act ("ACCA"). See id. at 16, 125 S.Ct. 1254.

[6]Aggravated assault is an assault with a deadly weapon without intent to kill; or with intent to commit a felony. Fla.Stat. §784.021(1)(a)-(b).

[7]In pertinent part, Florida Statutes defines robbery:

> 1) "Robbery" means the taking of money or other property which may be the subject of larceny from the

Prior to the issuance of Johnson v. United States, supra., the Eleventh Circuit had determined that a Florida robbery conviction qualified as a violent felony under the sentencing guidelines. See United States v. Lockley, 632 F3d 1238 (11th Cir. 2001). In three decisions issued post-Johnson, the Eleventh Circuit addressed the question of whether robbery, under Florida law, is categorically a violent felony under the ACCA. See United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016); United States v. Fritts, 841 F.3d 937 (11th Cir. 2016); and United States v. Conde, 2017 WL 1485021 (11th Cir. Apr. 26, 2017). In Seabrooks, the three judge panel agreed that Lockley was controlling in its determination of whether a robbery conviction, under Florida law, was a crime of violence under the ACCA elements clause. Seabrooks, 839 F.3d at 1346 (J. Martin, concurring) ("[T]his panel opinion stands only for the proposition that our Circuit precedent in [Lockley] requires Mr. Seabrooks's 1997 Florida convictions for armed robbery to be counted in support of his [ACCA] sentence."). In Fritts, 841 F.3d at 940-942, the Eleventh Circuit reiterated that, under Florida law, "robbery is categorically a crime of violence under the

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> person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s.775.082, s.775.083, or s.775.084.
>
> (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s.775.082, s.775.083, or s.775.084.
>
> (c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

elements of even the least culpable of these acts criminalized by Florida Statute §812.13(1)." In Conde, the Eleventh Circuit rejected the argument that a Florida robbery conviction, under Fla.Stat. §812.13, entered prior to the Florida Supreme Court's opinion in Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997), did not constitute a crime of violence, finding that "Florida robbery has *always* required the 'substantial degree of force' required by the ACCA's elements clause." Conde, 2017 WL 1485021 at *2 (citing Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271 (2010)) (emphasis added).

More recently, the Eleventh Circuit again found that a Florida robbery conviction is categorically a violent felony under the ACCA's elements clause. See United States v. Bostick, ___ Fed.Appx. ___, 2017 WL 164313 (11 Cir. 2017)(finding 2010 Florida robbery conviction was categorically a violent felony under ACCA's elements clause). In Bostick, the Eleventh Circuit reiterated that its binding precedent in Fritts, Lockley and Seabrooks, that all Florida robbery convictions, in violation of Fla.Stat. §812.13, are categorically violent felonies under the ACCA's elements clause.

In light of the foregoing, the movant's prior Florida conviction for robbery is a violent felony under the elements clause of the ACCA. The movant's argument to the contrary fails. Consequently, he is not entitled to relief on this basis, and this prior conviction was properly considered a violent felony for purposes of the ACCA enhancement. Thus, it is a qualifying second prior conviction which supports the ACCA enhancement.

Possession With Intent to Sell Cocaine. Finally, both parties do not dispute that the movant's prior conviction for possession with intent to sell cocaine, entered in Palm Beach County, Circuit Court **case no. 2005-CF-013863**, qualifies as a serious drug offense

for purposes of the ACCA enhancement.

Under the ACCA, the term "serious drug offense" is defined as "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). Under Florida law, "a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla.Stat. §893.13(1)(a). If the controlled substance involved in the crime is cocaine, it is a second-degree felony, punishable by up to 15 years of imprisonment. See Fla.Stat. §893.13(1)(a), §893.03(2)(a), §775.082(3)(d).

After the Supreme Court's 2015 Johnson decision, the Eleventh Circuit has reiterated that crimes under Florida Statute §893.13(1) continue to qualify as "serious drug offenses" within the meaning of the ACCA. See United States v. Pearson, 662 Fed. Appx. 896, 899-900 (11th Cir. 2016), cert. den'd, ___ U.S. ___, 2017 WL 785880 (U.S. May 1, 2017)(citing United States v. Smith, 775 F.3d 1262, 1266-68 (11 Cir. 2014)). Given the foregoing binding precedent, together with the concession of the parties here, the movant's prior conviction for possession with intent to sell cocaine qualified as the third predicate offense for purposes of the ACCA enhancement.

Under the totality of the circumstances present here, since the movant had at least three prior predicate offenses that were either crimes of violence or serious drug offenses, he was properly enhanced as an armed career criminal following the 2015 Supreme Court decision in Johnson. Consequently, movant has failed to show

either deficient performance or prejudice arising from counsel's failure to preserve or otherwise further pursue this issue at sentencing, much less challenge the issue on direct appeal. See Strickland v. Washington, 466 U.S. 668 (1984) and Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). Further, the movant has not demonstrated that he no longer qualifies as an armed career criminal. Thus, he is not entitled to a resentencing hearing without the ACCA enhancement. Therefore, relief is not warranted in this §2255 proceeding.

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

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules

Governing §2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255-Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "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." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001).

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the Chief Judge in objections.

VIII. Conclusion

Based on the foregoing, it is recommended that this motion to

vacate be DENIED, that no certificate of appealability issue, 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 5th day of June, 2017.

UNITED STATES MAGISTRATE JUDGE

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