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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10336-B

LESTER LEON SANDERS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Lester Leon Sanders moves for a certificate of appealability in order to appeal the district court's dismissal of his 28 U.S.C. § 2255 motion to vacate sentence. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22245-CIV-LENARD/WHITE
(Criminal Case No. 03-20048-Cr-Lenard)

LESTER LEON SANDERS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

THIS CAUSE is before the Court following the Court's Order Denying Movant Lester Leon Sanders's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. Pursuant to Rule 58(a) of the Federal Rules of Civil Procedure, it is hereby **ORDERED AND ADJUDGED** that:

1. **FINAL JUDGMENT** shall be entered in favor of Respondent United States of America; and

2. This case is now **CLOSED.**

DONE AND ORDERED in Chambers at Miami, Florida this 28th day of November, 2018.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22245-CIV-LENARD/WHITE
(Criminal Case No. 03-20048-Cr-Lenard)

LESTER LEON SANDERS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING IN PART, REJECTING IN PART, AND SUPPLEMENTING REPORT OF THE MAGISTRATE JUDGE (D.E. 18), DISMISSING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE, DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on the Report of Magistrate Judge Patrick A. White issued May 17, 2017, ("Report," D.E. 18), recommending that the Court deny Movant Lester Leon Sanders's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, ("Motion," D.E. 8, 9, 10). Movant filed Objections on May 31, 2017, ("Objections," D.E. 19), and Supplemental Objections on May 8, 2018, (D.E. 21). Upon review of the Report, Objections, Supplemental Objections, and the record, the Court finds as follows.

I. Introduction

In November of 2003, Movant was adjudicated guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). See United States v. Sanders, Case No. 03-20048-Cr-Lenard, Judgment, Cr-D.E. 79 (S.D. Fla. Nov. 7, 2003).

The Court sentenced Movant under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), to 240 months' imprisonment, to be followed by five years of supervised release. See id.

An individual adjudicated guilty of being a felon in possession of a firearm under 18 U.S.C. § 922(g) is subject to a maximum sentence of ten years' imprisonment. 18 U.S.C. § 924(a)(2). However, if the defendant has three prior convictions for a "violent felony or a serious drug offense," the ACCA enhances the sentence to a mandatory minimum fifteen years' imprisonment. 18 U.S.C. § 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[.]

18 U.S.C. § 924(e)(2)(B). Subsection (i) is referred to as the "elements clause"; subsection (ii)'s first nine words are referred to as the "enumerated clause";[1] and subsection (ii)'s final thirteen words are referred to as the "residual clause." See In re Rogers, 825 F.3d 1335, 1338 (11th Cir. 2016).

In Johnson v. United States, the United States Supreme Court held that the ACCA's residual clause is unconstitutionally vague. __ U.S. __, 135 S. Ct. 2551, 2563 (2015). In Welch v. United States, the Supreme Court held that Johnson announced a

[1] This clause is also referred to as the "enumerated crimes" or "enumerated offenses" clause.

new substantive rule of constitutional law that applies retroactively to cases on collateral review. __ U.S. __, 136 S. Ct. 1257, 1268 (2016).

Movant argues that after the Supreme Court's decision in Johnson, he no longer qualifies for an ACCA enhancement. (Mot. at 2.) Accordingly, he seeks an Amended Judgment imposing an unenhanced sentence, which would entitle him to immediate release. (Supp. Memo., D.E. 10 at 36.)

II. Background

On July 17, 2003, a jury found Movant guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). United States v. Sanders, Case No. 03-20048-Cr-Lenard, Jury Verdict, Cr-D.E. 66 (S.D. Fla. July 17, 2003) (hereafter, "Cr-D.E. [Docket Entry]"). The United States Probation Office issued a Presentence Investigation Report ("PSI") recommending that Movant receive a sentence enhancement pursuant to the ACCA, 18 U.S.C. § 924(e).[2] (PSI ¶ 25.) The PSI did not specify which prior offenses it relied upon, but in the instant proceedings, the Parties assert that the Court relied on the following Florida state court convictions:

1. aggravated battery in case no. J93-13333, (id. ¶ 28);

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[2] 18 U.S.C. § 924(e)(1) provides:

> 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 violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(Emphasis added).

2. aggravated battery with a deadly weapon in case no. F98-2413, (id. ¶ 32);
3. burglary of a dwelling in case no. F01-13143, (id.);
4. robbery in case no. 97-9087-A, (id. ¶ 30);
5. robbery with a firearm in case no. F98-2413, (id. ¶ 31); and
6. attempted first degree murder with a deadly weapon in case no. F98-2413, (id. ¶ 31).

(See Supp. Memo., D.E. 10 at 12 n.3; Govt.'s Resp., D.E. 11 at 1-2.) Based upon a total offense level of 33 and a criminal history category of V, the guideline imprisonment range was 210 to 262 months' imprisonment. (PSI ¶ 74.)

Movant filed objections to the PSI challenging only a two-level increase under U.S.S.G. § 3C1.2 for obstruction of justice. (Cr-D.E. 71 ¶¶ 3, 7.) Movant did not challenge the ACCA enhancement. (See id.)

The transcript of the sentencing hearing has not been made a part of the record in this case or the criminal case. However, on November 10, 2003, the Court entered Judgment sentencing Movant to 240 months' imprisonment, to be followed by five years' supervised release. (Cr-D.E. 79.)

Movant prosecuted a direct appeal, arguing that the Court abused its discretion in admitting his prior convictions under Rule 404(b). (See 11th Cir. Op. (Cr-D.E. 98) at 5.) On August 31, 2004, the Eleventh Circuit affirmed Movant's conviction and sentence. (Id. at 6-9.) Mandate issued May 18, 2005. (Cr-D.E. 100.) The Supreme Court denied Movant's petition for writ of certiorari on October 3, 2005. Sanders v. United States, 546 U.S. 897 (2005).

On May 19, 2006, Movant filed his first motion under 28 U.S.C. § 2255 alleging that (1) the Court lacked subject matter jurisdiction over his criminal case, (2) he was denied the effective assistance of counsel, (3) the Court issued erroneous jury instructions, and (4) his sentence was unlawfully enhanced under Blakely v. Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), and Apprendi v. New Jersey, 530 U.S. 466 (2000). See Sanders v. United States, Case No. 06-21379-Civ-Lenard, D.E. 1, 2 (S.D. Fla. docketed May 30, 2006) (hereafter "Sanders I, D.E. [Docket Entry]"). Judge White issued a Report recommending that the Court deny the Motion on the merits. Sanders I, D.E. 15. On May 4, 2007, the Court adopted the Report and denied the Section 2255 Motion. Sanders I, D.E. 19. On November 15, 2017, the Eleventh Circuit dismissed Movant's appeal because he failed to make a substantial showing of the denial of a constitutional right. Sanders I, D.E. 30.

After the Supreme Court issued its decision in Welch, 136 S. Ct. at 1257, Movant filed an application under Section 2255(h) seeking permission from the Court of Appeals to file a second or successive 2255 motion. (See D.E. 1 at 8.) On June 16, 2016, the Eleventh Circuit Court of Appeals granted Movant's application to file a second or successive 2255 motion, finding that because it was "unable to determine whether the district court based its decision that Sanders had three ACCA-predicate violent felonies on the residual clause or the elements or enumerated-crimes clauses[,]" Movant had "presented a prima facie case under Johnson." (Id. at 6.)

On July 5, 2016, Movant filed a pro se Motion under 28 U.S.C. § 2255. (D.E. 8.) On August 12, 2016, Movant, through appointed counsel, filed a Supplemental

Memorandum of Law in Support of Movant's Pro Se Motion. (D.E. 10.) In the Supplemental Memorandum, Movant argues that it is unclear which ACCA clause(s) the Court enhanced his sentence under, the Supreme Court in Johnson declared the residual clause to be unconstitutionally vague, and his prior convictions for burglary of a dwelling, robbery, robbery with a firearm, aggravated battery, and attempted first degree murder do not qualify as "violent felonies" under the ACCA"s "enumerated" or "elements" clauses. (Id. at 12-34.) Movant bases his argument on the assumption that Descamps v. United States, 133 S. Ct. 2275 (2013) and Mathis v. United States, 136 S. Ct. 2243, 2257 (2016), apply retroactively when determining whether his prior convictions qualify as predicate offenses under the ACCA's elements and enumerated clauses. (See id. at 4-10.) The Government opposes the Motion. (D.E. 11.)

On May 17, 2017, Judge White issued his Report finding that Movant's claims are procedurally barred because although he can establish cause for failing to raise this issue at sentencing, he cannot establish prejudice because his ACCA enhancement remains valid regardless of whether Johnson applies. (D.E. 18 at 7-8.) As an initial matter, Judge White recommended applying the framework espoused in dicta in In re Chance, 831 F.3d 1335, 1340-41 (11th Cir. 2016), which asserted that a Johnson-progeny 2255 movant should prevail on his motion if he shows that: (1) the district court may have relied on the residual clause when it applied the ACCA enhancement; and (2) in light of Johnson, the movant's prior convictions no longer qualify him for the ACCA enhancement based on the current state of the law, including Descamps and Mathis. (Id. at 13, 16.) Judge White found that Movant is not entitled to a second or successive 2255 Motion under Johnson

because, based on the current state of the law, Movant's prior convictions for aggravated battery, aggravated battery with a deadly weapon, robbery, armed robbery, and attempted first degree murder with a deadly weapon all qualify as violent felonies under the ACCA's elements clause.[3] (Id. at 24-28.)

On May 31, 2017, Movant filed Objections. (D.E. 19.) He argues that his claim is not procedurally barred, and that aggravated battery, robbery, and attempted first degree murder are not violent felonies under the ACCA. (See id.) On May 8, 2018, Movant filed Supplemental Objections (without seeking or receiving leave to do so) to inform the Court that the Supreme Court has granted certiorari to consider whether a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the ACCA. (D.E. 21.)

III. Legal Standard

Pursuant to 28 U.S.C. § 2255, a prisoner in federal custody may move the court which imposed his sentence to vacate, set aside, or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). However, "[a] second or successive motion must be certified . . . by a panel of the appropriate court of appeals to contain" either:

> **(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

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[3] However, Judge White found that Movant's prior conviction for burglary of a dwelling does not qualify as a violent felony under the ACCA. (Id. at 25.)

> **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C).

The Court of Appeals' determination is limited. See Jordan v. Sec'y, Dep't of Corrs., 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that the court of appeals' determination that an applicant has made a prima facie showing that the statutory criteria have been met is simply a threshold determination). If the Court of Appeals' authorizes the applicant to file a second or successive 2255 Motion, "'[t]he district court is to decide the [§ 2255(h)] issue[s] fresh, or in the legal vernacular, de novo.'" In re Moss, 703 F.3d 1301, 1303 (11th Cir. 2013) (quoting Jordan, 485 F.3d at 1358). Only if the district court concludes that the applicant has established the statutory requirements for filing a second or successive motion will it "proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise." Id.

IV. Discussion

For Movant to be entitled under 28 U.S.C. § 2255(h) to file a second or successive 2255 Motion, he must show that the motion contains a Johnson issue—specifically, that the Court enhanced his sentence using the ACCA's now-voided residual clause. See In re Moore, 830 F.3d 1268, 1270 (11th Cir. 2016).

As an initial matter, the Court rejects Judge White's recommendation that the Court apply the framework espoused in In re Chance, which suggested that a movant should prevail on his Section 2255 motion if he shows that the sentencing court may have relied on the ACCA's residual clause, and in light of Johnson, the movant's prior convictions no longer qualify him for the ACCA enhancement based on the current state of the law. (See Report at 13, 16.) The Eleventh Circuit subsequently rejected that standard in Beeman v. United States, 871 F.3d 1215, 1222 (11th Cir. 2017). See Curry v. United States, 714 F. App'x 968, 969 (11th Cir. 2018) (recognizing that Beeman "discarded the approach taken by the panel in In re Chance"); Williams v. United States, 285 F. Supp. 3d 1341, 1343 (S.D. Fla. 2018).

In Beeman, the Eleventh Circuit held that a Section 2255 movant raising a Johnson claim "must show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence." 871 F.3d at 1222. "If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause." Id. The relevant issue is one of "historical fact," that is, whether at the time of sentencing the movant was sentenced solely under the residual clause. Id. at 1224 n.5. Judicial precedent at the time of sentencing is strong circumstantial evidence if it indicates that a prior conviction only qualifies as a violent felony under the residual clause. Id. However, cases decided after sentencing "cast[] very little light, if any, on the key question of historical fact here: whether in [2003] [Sanders] was, in fact, sentenced under the residual clause only." Id.

Movant has not satisfied his burden under Beeman. First, the record is silent as to which ACCA clause or clauses the Court used to apply the ACCA enhancement.[4] Second, Movant has not argued, much less established, that at the time of sentencing, his prior convictions for aggravated battery, aggravated battery with a deadly weapon, robbery, armed robbery, and/or attempted first degree murder with a deadly weapon qualified as violent felonies only under the residual clause.[5] Consequently, Movant has not proven that it is more likely than not that the sentencing court predicated his ACCA enhancement solely on the residual clause. See Frey v. United States, __ F. App'x __, 2018 WL 5255226, at *2 (11th Cir. 2018) (holding that the movant could not satisfy his burden under Beeman because the record was silent as to what clause the ACCA enhancement was based upon, and at the time of sentencing there was no case law indicating that his prior Indiana burglary conviction qualified as a violent felony only under the residual clause); see also Garcia v. United States, 739 F. App'x 601, 602 (11th Cir. 2018); Robertson v. United States, __ F. App'x __, 2018 WL 4691727, at *3 (11th Cir. 2018); Thornton v. United States, 737 F. App'x 991, 992 (11th Cir. 2018); Smith v. United States, __ F. App'x __, 2018 WL 4355909, at *3 (11th Cir. 2018); Bivins v. United States, __ F. App'x __, 2018 WL 4091822, at *4 (11th Cir. 2018); Harper v.

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[4] As was the case in Beeman, 871 F.3d at 1221, Movant has not requested an evidentiary hearing and has instead chosen to proceed on the basis of the record as it now exists.

[5] The Court notes that since Movant's sentencing, the Eleventh Circuit has definitively held that Florida convictions for aggravated battery, robbery, and armed robbery constitute violent felonies under the ACCA's elements clause. Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-38 (11th Cir. 1013) (aggravated battery); United States v. Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011) (robbery); United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir. 2006).

United States, __ F. App'x __, 2018 WL 3434506, at *3 (11th Cir. 2018); Ubele v. United States, __ F. App'x __, 2018 WL 3409142, at *2 (11th Cir. 2018); United States v. North, 738 F. App'x 683, 686 (11th Cir. 2018); Upshaw v. United States, 739 F. App'x 538, 540 (11th Cir. 2018); Daniel v. United States, 738 F. App'x 669, 672 (11th Cir. 2018); Harris v. United States, 737 F. App'x 974, 978 (11th Cir. 2018); Butler v. United States, 736 F. App'x 778, 781 (11th Cir. 2018); Perez v. United States, 730 F. App'x 804, 808 (11th Cir. 2018); Curry, 714 F. App'x 969; Oxner v. United States, 719 F. App'x 916, 919 (11th Cir. 2017).

Because Movant failed to show that it is more likely than not that he was sentenced as an armed career criminal based solely on the residual clause, he has not established a prima facie case under Section 2255(h), and the Court therefore is without jurisdiction to consider the Motion. Alternatively, and for the same reason, Movant's Section 2255 Motion fails on the merits, as he has not proven by a preponderance of the evidence that he was sentenced in violation of the laws or constitution of the United States. See 28 U.S.C. § 2255(a).

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Report of the Magistrate Judge issued May 17, 2017 (D.E. 18) is **ADOPTED IN PART, REJECTED IN PART, AND SUPPLEMENTED** consistent with this Order;
2. Movant's Motion under 28 U.S.C. § 2255 is **DISMISSED FOR LACK OF JURISDICTION** or, alternatively, **DENIED ON THE MERITS**;

3. A Certificate of Appealability **SHALL NOT ISSUE**;

4. All pending motions are **DENIED AS MOOT**; and

5. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 28th day of November, 2018.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-CV-22245-LENARD
(03-CR-20048-LENARD)
MAGISTRATE JUDGE PATRICK A. WHITE

LESTER LEON SANDERS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE RECOMMENDING MOTION TO VACATE BE DENIED IN LIGHT OF JOHNSON V. UNITED STATES

I. Introduction

The movant, a federal prisoner, currently confined at the Lewisburg United States Penitentiary, in Lewisburg, Pennsylvania, has filed this motion to vacate, after obtaining authorization from the Eleventh Circuit to file a second or successive Section 2255 motion to vacate, pursuant to 28 U.S.C. §2255.[1] See In re Lester Sanders, Eleventh Circuit Court of Appeals, Case No. 16-12685-J, Order entered June 16, 2016.

Petitioner is challenging the constitutionality of his enhanced sentence as an armed career criminal, entered following a jury trial in **case no. 03-20048-Cr-Lenard.** Movant seeks relief in light of the Supreme Court's ruling in Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551 (2015) (hereinafter, "Samuel Johnson"), made retroactively applicable to cases on collateral

[1]The 11th Circuit's order and the movant's application are construed as a motion to vacate.

review by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257, ____, L.Ed.2d ___ (2016).

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 §2255 Cases in the United States District Courts.

Presently before the court is the Eleventh Circuit's memorandum opinion granting permission to file this successive §2255 motion (Cv-DE#1), the Petitioner's amended complaint (Cv DE# 8, 9, 10), the government's answer in opposition to the complaint (Cv DE# 11), and Petitioner's reply thereto (Cv DE# 13, 15).

II. Procedural History

On January 21, 2003, a federal grand jury charged Petitioner with being a felon in possession of a firearm in violation of §922(g)(1) and §924(e) (Count 1). (Cr DE# 8). On July 17, 2003, a jury found Petitioner guilty of being a felon in possession of a firearm. (CR DE# 66).

Prior to sentencing, a PSI was prepared, applying the 2002 Guidelines, which reveals as follows. The base offense level was set at 24 because the Petitioner committed the instant offense subsequent to sustaining at least two prior felony convictions of either a crime of violence or a controlled substance offense, §2K2.1(a)(2). (PSI ¶19). Because the firearm was stolen, the offense level was increased by 2 levels, §2K2.1(b)(4). (PSI ¶20).

The adjusted offense level of 24 was increased, pursuant to U.S.S.G. §4B1.4(a), to level 33, because of the movant's status as

an armed career criminal under §924(e). (PSI ¶25). The PSI did not identify the prior offenses on which it relied. In the instant proceedings, the parties take the position that the court relied on the following state court convictions: aggravated battery in case no. J93-13333 (PSI ¶28), aggravated battery with a deadly weapon in case no. F98-2413 (PSI ¶32); burglary of a dwelling in case no. F01-13143 (PSI ¶32); robbery in case no. 97-9087-A (PSI ¶30); robbery with a firearm in case no. F98-2413 (PSI ¶31); and attempted first degree murder with a deadly weapon in case no. F98-2413 (PSI ¶31). The total offense level was set at 33. (PSI ¶27).

The PSI next determined that the movant had a total of 12 criminal history points and a criminal history category of V. (PSI ¶36). Statutorily, the term of imprisonment was 15 years and the maximum term was life, 18 U.S.C. §924(e)(1). (PSI ¶74). Based on a total offense level of 33 and a criminal history category of V, the guideline imprisonment range was 210 to 262 months. (PSI ¶75).

On November 6, 2003, Petitioner appeared for sentencing. (Cr DE# 80). The court sentenced Petitioner to 240 months' imprisonment. (Cr DE# 79). The Clerk entered judgment on November 7, 2003. (Cr-DE# 79).

Movant prosecuted a direct appeal. (Cr DE# 81). On August 31, 2004, the Eleventh Circuit Court of Appeals affirmed the judgment of conviction in a written but unpublished opinion. United States v. Sanders, 116 Fed.Appx. 251 (11th Cir. 2004); (Cr-DE#100). Certiorari review was denied by the Supreme Court on **October 3, 2005**. Sanders v. United States, 126 S.Ct. 231 (2005).

Thus, the judgment of conviction became final on **Monday, October 3, 2005**, when the Supreme Court denied his petition for

writ of certiorari.[2] The movant had one year from the time his judgment became final, or no later than **Tuesday, October 3, 2006,**[3] within which to timely file his federal habeas petition, challenging the judgment of conviction. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, 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)).

Seven months after the judgment became final, Movant returned to this court on **May 19, 2006** timely filing his first §2255 motion, assigned case no. 06-CV-21379-Lenard. (06-CV-21379, DE#1). A Report recommended that the motion be denied on the merits. (06-CV-21379, DE# 15). The District Court issued an order adopting the report. (06-CV-21379, DE# 19). Petitioner appealed. (06-CV-21379, DE# 20). The Eleventh Circuit dismissed Petitioner's appeal because

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[2]The Supreme Court has stated 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. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufman, 282 F.3d 1336 (11th Cir. 2002); Wainwright v. Sec'y Dep't of Corr's, 537 F.3d 1282, 1283 (11th Cir. 2007)(conviction final under AEDPA the day U.S. Supreme Court denies certiorari, and thus limitations period begins running the next day). 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 the date of entry. The 90 day time period runs 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).

[3]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)); see also, 28 U.S.C. §2255.

Petitioner failed to make a substantial showing of the denial of a constitutional right. (06-CV-21379, DE# 30).

On **June 26, 2015,** the United States Supreme Court held that the ACCA's residual clause--defining a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another"--is unconstitutionally vague. Samuel Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551, 2563 (2015). The Supreme Court, however, expressly did not invalidate the ACCA's elements clause or the enumerated crimes clause. Id. ("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"). Then, on **April 18, 2016,** the Supreme Court held that Samuel Johnson announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257 (2016).

On **June 16, 2016,** the Eleventh Circuit granted movant's application for authorization to file a successive §2255 motion, finding the movant had made a *prima facie* showing under 28 U.S.C. §2255(h) that he was entitled to relief under Samuel Johnson. (Cv-DE#1). The application was transferred to this court, and opened by the Clerk as a §2255 motion to vacate. (Cv-DE#1). This court issued an order appointing counsel and setting a briefing schedule. (Cv-DE# 4). The parties have complied with the court's briefing schedule and the case is now ripe for review. (Cv DE# 8, 9, 10, 11, 13, 14).

III. Threshold Issues

A. Timeliness

On **June 26, 2015**, the United States Supreme Court held that the ACCA's residual clause--defining a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another"--is unconstitutionally vague. Samuel Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551, 2563 (2015). The Supreme Court, however, expressly did not invalidate the ACCA's elements clause or the enumerated crimes clause. Id. ("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"). Then, on **April 18, 2016**, the Supreme Court held that Samuel Johnson announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257 (2016).

Petitioner correctly takes the position that the Petition is timely as it was filed within one year of the Supreme Court's issuance of Samuel Johnson on June 26, 2015. The government does not dispute this argument.

B. Procedural Bar

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). 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 [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). 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).

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. Samuel

Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. However, no actual prejudice would result from finding a procedural default here because, as set forth below, regardless of whether Samuel Johnson applies, Petitioner's ACCA enhancement remains valid. Accordingly, Movant cannot establish cause-and-prejudice to overcome the procedural bar.

IV. Standard of Review

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.

However, a federal prisoner who already filed a §2255 motion and received review of that motion is required to move the court of appeals for an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct sentence. See 28 U.S.C. §2255(h); 28 U.S.C. §2244(b)(3)(A).

If, as here, the Court of Appeals grants leave to file a successive §2255 motion, the trial court must review the record *de novo* to ascertain whether the movant meets the statutory criteria for relief under 28 U.S.C. §2255(h). See Jordan v. Sec'y Dep't of Corr's, 485 F.3d 1351, 1357-58 (11 Cir. 2007); Leone v. United

States, __ F.Supp.2d ___, 2016 WL 4479390, *4 (S.D. Fla. Aug. 24, 2016)(stating a district court conducts *de novo* review after Court of Appeal grants leave to file a successive §2255 motion). Nothing in the Court of Appeals' ruling binds the district court. In re Chance, 831 F.3d at 1335, 1338 (11 Cir. 2016). Only if the district court concludes that the applicant has established the statutory requirements for filing a second or successive motion will it "'proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise.'" Leone v. United States, ___ F.Supp.2d ___, 2016 WL 4479390, *4 (S.D. Fla. Aug. 24, 2016)(Lenard, J.) (quoting In re Moss, 703 F.3d ---, 1303 (11 Cir. 20--)

Thus, pursuant to 28 U.S.C. §2244, the court must determine whether the movant has shown that his claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. §2244(b)(2)(A). If the movant has not made this showing, then the case must be dismissed. 28 U.S.C. §2244(b)(4).

The standard for conducting the foregoing review is far from settled with the Eleventh Circuit. In In re Moore, one panel granted a movant's §2255 application "because it [was] unclear whether the district court relied on the residual clause or other ACCA clauses in sentencing Moore, so Moore met his burden of making out a *prima facie* case that he is entitled to file a successive §2255 motion raising his Johnson claim." Id. at 1272. In dicta, the Moore panel further added:

> [T]he district court cannot grant relief in a §2255 proceeding unless the movant meets hi burden that he is entitled to relief, and in this context the movant cannot meet that burden unless he proves that hew as sentenced using the residual clause and that the use of

> that clause made a difference in the sentence. If the district court cannot determine whether the residual clause was used in sentencing and affected the final sentence--if the court cannot determine one way or the other--the district court must deny the §2255 motion. It must do so because the movant will have failed to carry his burden of showing all that is necessary to warrant §2255 relief.

Id. at 1273.

Just six days after Moore, a different Eleventh Circuit panel called into doubt the Moore panel's reasoning. In re Chance 831 F.3d at 1339. In Chance, the Eleventh Circuit panel stated that the Moore court's suggestion that an inmate must affirmatively show that he was sentenced under the residual clause was "wrong, for two reasons." Id. at 1340. First, Moore incorrectly "implie[d] that the district judge deciding [a movant's] upcoming §2255 motion can ignore decisions of the Supreme Court that were rendered since that time in favor of a foray into a stale record." Id. Under Moore's approach, "unless the sentencing judge uttered the magic words 'residual clause' ... a defendant could not benefit from [the Supreme Court's] binding precedent." Id.

Second, the Chance court noted that a movant would face nearly impossible odds in proving whether the sentencing court relied on the residual clause "at his potentially decades-old sentencing." Id. "Nothing in the law require[d] a judge to specify which clause of §924(c)--the residual or elements clause--it relied upon in imposing a sentence." Id. Thus, the Chance court concluded that the Moore Court's approach was "unworkable." Id. To the Chance court, "it makes no difference whether the sentencing judge used the words 'residual clause' or 'elements clause' or 'some similar phrase,'" because "the required showing is simply that §924(c) may no longer authorize his sentence as that statute stands after Johnson--not

proof of what the judge said or thought at a decades-old sentencing." Id.

Where, as here, "an applicant is raising a true Johnson claim, such as here where the district court may have relied on the now-voided residual clause, it is unclear what effect, if any, Descamps[v. United States, 133 S.Ct. 2276 (2013)] might have on the next step of the Johnson analysis [after successiveness permission is granted] as to whether a particular crime might still qualify under another ACCA clause." In re Adams, 825 F.3d 1283, 1286 (11th Cir. 2016) (distinguishing a Descamps "standalone claim" from a true Samuel Johnson claim that requires the Court to "look to the text of the relevant statutes, including the ACCA, to determine which, if any ACCA clauses [the movant's] prior convictions fall under" and "[i]n fulfilling this duty, we should look to guiding precedent, such as Descamps, to ensure we apply the correct meaning of the ACCA's words.").

The Chance panel noted that, "[i]n applying the categorical approach, it would make no sense for a district court to have to ignore precedent such as Descamps v. United States, __ U.S. __, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), and Mathis v. United States, __ U.S. __, 136 S.Ct. 2243, __ L.Ed.2d __ (2016), which are the Supreme Court's binding interpretations of that approach." In re Chance, 2016 WL 4123844 at *4. By contrast, other Eleventh Circuit panels have opined that it is improper to consider Descamps because it is not retroactive for purposes of a second or successive §2255 motion and, therefore, Samuel Johnson cannot be used as a "portal" to raise a Descamps claim, whether "independent or otherwise." In re Hires, 825 F.3d 1297, 1303 (11th Cir. 2016) (denying a successiveness application because the movant's prior convictions qualified under ACCA's elements clause; noting that "Descamps does not qualify as a new rule of constitutional law for §2255(h)(2)

purposes, and, thus, Descamps cannot serve as a basis, independent or otherwise, for authorizing a second or successive §2255 motion....").

The Chance panel further noted that both Chance and Moore are only *dicta* and that District Court's review is *de novo*. 2016 WL 4123844 at *5; see Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351 (11th Cir. 2007) (the district court is to decide the §2244(b)(1) & (2) issues fresh, or in the legal vernacular, *de novo*).

After Moore and Chance, numerous district courts have grappled with the movant's burden of proof where the record was silent as to how the sentencing court applied the ACCA. The majority of these courts adopted Chance's reasoning, both with regards to the movant's burden of proof and the controlling law for analyzing a Samuel Johnson claim. See, e.g., United States v. Wolf, No. 04-cr-347-1, 2016 WL 6433151, at *2-4 (M.D. Pa. Oct. 31, 2016); United States v. Winston, NO. 01-cr-00079, 2016 WL 4940211, at *4-6 (W.D. Va. Sept. 16, 2016); Leonard v. United States, 16-22612, 2016 WL 4576040 at *2 (S.D. Fla. Aug. 22, 2016) (Altonaga, J.) (following the approach outlined in Chance to conclude that a movant "can sustain his Section 2255 Motion if: (1) it is unclear from the record which clause the sentencing court relief on in applying the ACCA enhancement; and (2) in light of Johnson, [his] prior convictions no longer qualify him for the ACCA sentencing enhancement" based on the present state of the law including Descamps and Mathis); Leone v. United States, __ F.Supp.3d __, 2016 WL 4479390 at *9 (S.D. Fla. Aug. 24, 2016) (Lenard, J.) (following the approach outlined in Moore to conclude that a movant whose "Johnson claim is inextricably intertwined with Descamps and Mathis" failed to satisfy §2255(h) because, "[o]ther than the new rule made retroactive by the Supreme Court (i.e., Johnson), the Court must apply the law as it existed at the time of sentencing to

determine whether the Movant's sentence was enhanced under the ACCA's residual clause"); United States v. Ladwig, No. 03-Cr-232, 2016 WL 3619640, at *3 (E.D. Wash. June 28, 2016)("Because [the movant] has shown that the court might have relied upon the unconstitutional residual clause in finding that his burglary and attempted rape convictions qualified as violent felonies, the court finds that he has established constitutional error.").

The undersigned recommends following the approach suggested by the Chance panel on both the Movant's burden of proof and the law that is applicable to the Samuel Johnson analysis. Thus, when it is unclear on which ACCA clause the sentencing judge rested a predicate conviction, the movant's burden is to show only that the sentencing judge may have used the residual clause. See Diaz v. United States, 2016 WL 4524785, at *5 (W.D. N.Y. Aug. 30, 2016); United States v. Navarro, 2016 WL 1253830, at *3 (E.D. Wash. Mar. 10, 2016). "Of course, ... this procedure ... invites the government to show (on the merits) that the predicate offense otherwise fits within the ACCA's force or enumerated clauses." United States v. Winston, NO. 01-cr-00079, 2016 WL 4940211, at *6 (W.D. Va. Sept. 16, 2016).

With regards to the burden of proof, it would also be unfair to require a §2255 movant to affirmatively prove that the sentencing court relied on ACCA's residual clause because "[n]othing in the law requires a judge to specify which clause of §924(c) - residual or elements clause - it relied upon in imposing a sentence." Chance, 2016 WL 4123844 at *4. Further, even if a sentencing judge mentions the residual or elements clause, "it would not prove that the sentencing judge 'sentenced [the defendant] using the residual clause.'" Id.

A compelling comparison can be drawn between claims of Samuel

Johnson error and the error that results from a general verdict following unconstitutional jury instructions. See United States v. Winston, 2016 WL 4940211 (W.D. Va. Sept. 16, 2016). As the Supreme Court explained in that context:

> a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested.

Zant v. Stephens, 462 U.S. 862, 881 (1983).

Under this theory, when it is unclear upon which ACCA clause the sentencing judge rested a predicate conviction, the movant's burden is to show only that the sentencing judge *may* have used the residual clause. See Winston, 2016 WL 4940211 at *6. This procedure is subject to harmless error analysis in that the Government may show on the merits that the predicate offense fits within ACCA's force or enumerated clauses. Id.

With regards to the law governing a Samuel Johnson claim, the current state of the law, including cases such as Descamps and Mathis, should be applied to determine whether relief is warranted. It is undisputed that cases like Descamps are not retroactively applicable on collateral review because they are not substantive or watershed rules of procedure. See King v. United States, 610 Fed. Appx. 825 (11th Cir. 2015).

Rather, Descamps "merely applied prior precedent to reaffirm that courts may not use the modified categorical approach to determine whether convictions under indivisible statutes are

predicate ACCA violent felonies." Id. at 828. Settled rules, that is, rules dictated by precedent existing when a defendant's conviction became final, apply retroactively on collateral review. See Chaidez v. United States, __ U.S. __, 133 S.Ct. 1103, 1107 (2013) (unless a Teague exception applies, "[o]nly when [the Supreme Court] appl[ies] a settled rule may a person avail herself of the decision on collateral review."). This is so because it is the Supreme Court's duty to "say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Rivers v. Road Express, Inc., 511 U.S. 298, 312-13 (1994).

When the Supreme Court construes a statute, "it is explaining its understanding of what the statute has meant continuously since the date when it became law." Id. at 313 n. 12. Since Descamps applies settled rules of law, "the Court may therefore consider [movant's] defensive arguments about why his ... convictions never properly qualified as ACCA predicates under the enumerated or elements clauses." Fugitt v. United States, 2016 WL 5373121 at *3 (W.D. Wash. Sept. 26, 2016).

Several district courts have applied the current state of the law, rather than the law at the time of sentencing, to determine whether Samuel Johnson claims are meritorious. See, e.g., United States v. Harris, 2016 WL 4539183 (M.D. Pa. Aug, 31, 2016) (in an initial §2255 motion, concluding that the movant can rely on current law to establish that his prior convictions do not qualify him for enhanced sentencing under the elements or enumerated offense clauses); Smith v. United States, 2015 WL 11117627 at *6 (E.D. Tenn. Nov. 24, 2016) (in an initial §2255 motion, applying

Sixth Circuit case law from 2011, even though Defendant was sentenced in 2006, when assessing whether prior conviction fits within force clause). This approach has also been applied to successive §2255 motions. See United States v. Ladwig, __ F.Supp.3d __, 2016 WL 3619640 at *4-5 (E.D. Wash June 28, 2016) (explaining why, when faced with Government's argument that other ACCA clauses supported enhancement, courts should apply current precedent to those clauses, even to successive petitions that raise Johnson challenges); see also United States v. Christian, 2016 WL 4933037 (9th Cir. Sept. 16, 2016) (reversing denial of successive §2255 motion because, applying Descamps, the movant did not have a sufficient number of violent felonies to sustain an ACCA sentencing enhancement).

Therefore, in the instant case, the Movant demonstrates he is entitled to relief, pursuant to §2255(h), if he shows that: (1) it is unclear from the record which clause the sentencing court relied on in applying the ACCA enhancement; and, (2) in light of Samuel Johnson, his prior convictions no longer qualify him for the ACCA sentencing enhancement, based on the present state of the law, including Descamps and Mathis. See Leonard, 2016 WL 4576040, at *2; see also Mack v. United States, 16-CV-23021-MARRA:DE#17 (adopting the reasoning set forth in Chance, granting the §2255 motion, and ordering movant's immediate release from custody).

V. Discussion

Given the foregoing standards, it must first be determined whether the movant has demonstrated that the sentencing court *may* have relied on the ACCA's residual clause when imposing an armed career criminal enhancement at sentencing.

As will be recalled, the Petitioner's ACCA enhancement was

based on aggravated battery in case no. J93-13333 (PSI ¶28), aggravated battery with a deadly weapon in case no. F98-2413 (PSI ¶32); burglary of a dwelling in case no. F01-13143 (PSI ¶32); robbery in case no. 97-9087-A (PSI ¶30); robbery with a firearm in case no. F98-2413 (PSI ¶31); and attempted first degree murder with a deadly weapon in case no. F98-2413 (PSI ¶31).

The PSI next determined that the movant had a total of 12 criminal history points and a criminal history category of V. (PSI ¶37). Statutorily, the movant faced a 15-year minimum term of imprisonment and a maximum term of life for violating 18 U.S.C. §924(e)(1). (PSI ¶74). Absent an ACCA enhancement, the maximum sentence for violation of §922(g) is ten years' imprisonment. See 18 U.S.C. §922(g). Based on a total offense level of 33 and a criminal history category V, the guideline imprisonment range was 210 to 262 months. (PSI ¶87). On November 6, 2003, the court sentenced Petitioner to 240 months' imprisonment. (Cr DE# 79).

It is unclear from the record on which clause of the ACCA the court relied in sentencing the movant because the court did not explicitly or implicitly indicate at sentencing upon which 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 ¶25). Since it is unclear from the record whether the court relied upon the residual clause, as opposed to the enumerated offenses clause of the ACCA, the movant has satisfied the first factor of the Chance test. Therefore, the court next turns to a determination of the second factor.

The second inquiry requires a determination whether, in light of Samuel Johnson, the movant's prior convictions no longer qualify him for 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 facts of conviction and 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 previous 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).

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."

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 Samuel Johnson, 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, Samuel 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 Samuel Johnson did not invalidate ACCA's elements clause or enumerated crimes clause. Samuel 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."). On April 18, 2016, the Supreme Court announced that Samuel Johnson is retroactively applicable to cases on collateral review. Welch v. United States, 136 S.Ct. 1257 (2016).

Generally, any fact that increases either the statutory maximum or statutory minimum sentence is an element of the crime, that must be submitted to a jury and proved beyond a reasonable

doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000); Alleyne v. United States, 570 U.S. ___, ___, 133 S.Ct. 2151, 2163-64 (2013). However, there is one exception to the rule--the fact of a prior conviction may be found by the sentencing judge, even if it increases the statutory maximum sentence for the offense. Descamps, 133 S.Ct. at 2289. The Supreme Court has explained that the reason for the exception is that the defendant either had a jury trial that led to the conviction, or waived the right when pleading guilty. See Descamps, at 2288. Thus, when determining whether a prior conviction qualifies as a violent felony under the ACCA, courts may only look to the elements of the crime, not the underlying facts of the conduct that led to the conviction. Id. Additionally, district courts may make findings regarding the nature of a prior conviction for ACCA purposes. United States v. Day, 465 F.3d 1262, 1264-65 (11th Cir. 2006)(*per curiam*).

In other words, 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 or conduct underlying a defendant's prior conviction. See Descamps v. United States, __ U.S. __, 133 S.Ct. 2283-85 (2013)(quoting Taylor v. United States, 495 U.S. 575, 600-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). Thus, courts should "look no further than the statute and judgment of conviction." United States v. Estrella, 758 F.3d 1239, 1244 (11th Cir. 2014)(citation omitted). In so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, ____ U.S. ___, 133 S.Ct. 1678, 1684 (2011)(quoting, Curtis Johnson v. United States, 559 U.S. 133, 137 (2010)) ("Curtis Johnson").

Absent an ACCA enhancement, the maximum sentence for violation §922(g) is ten years imprisonment. See 18 U.S.C. §924(a)(2). With the sole exception of convictions obtained in violation of the

right to counsel, a defendant has no right to challenge the validity of previous 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).

After Samuel Johnson, for a prior conviction to qualify as a "violent felony," for purposes of the ACCA, the court must determine whether it falls under the elements clause because it "has as an element the use, attempted use, or threatened use of physical force against the person of another" or under the enumerated offenses clause because it is "burglary, arson, or extortion." 18 U.S.C. §924(e)(1). In that regard, the Supreme Court first instructs courts to "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime [burglary, arson, or extortion]--i.e., the offense as commonly understood." Descamps, 133 S.Ct. at 2281. If the elements of the state offense are either "the same as, or narrower than, those of the generic offense," then any conviction under the statute qualifies as a predicate offense for purposes of the ACCA enhancement. Descamps, supra; see also, United States v. Lockett, 810 F.3d 1262, 1266 (11th Cir. 2016). Likewise, under the categorical approach, if the prior conviction on its face requires proof, beyond a reasonable doubt and without exception, an element involving the use, attempted use, or threatened use of physical force against a person for every charge brought under that statute, then it too qualifies as a violent felony under the ACCA. Descamps, 133 S.Ct. at 2283-84. This is called the "categorical approach." Descamps, supra. But "if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." Descamps, 133 S.Ct. at 2283.

For the limited purpose of helping to implement the

categorical approach, the Supreme Court has also recognized a "narrow range of cases" in which courts can utilize what is called the "modified categorical approach." Descamps. at 2284 (quotation omitted). The modified categorical approach allows courts to review certain documents from the state proceedings, known as "Shepard documents," to determine if the state court convicted the defendant of the generic offense. Id. at 2283-84 (quotation omitted); see also, Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). Even though the modified categorical approach lets courts briefly look at the facts, it "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's." Descamps, 133 S.Ct. at 2285. Thus, the inquiry ""is always about what elements the defendant was convicted of, not the facts that led to that conviction." United States v. Lockett, 810 F.3d at 1266 (citing Descamps, 133 S.Ct. at 2285).

The Eleventh Circuit has recognized that, after Descamps, it can no longer assume that the modified categorical approach applies to all non-generic statutes. See Lockett, supra. (citing Howard, 742 F.3d at 1343). Rather, the Eleventh Circuit has recognized that "the modified categorical approach can be applied only when dealing with a **divisible** statute: a statute that 'sets out one or more elements of the offense in the alternative.'" Lockett, supra (citing Descamps, 133 S.Ct. at 2284)(emphasis added). The Court may refer to Shepard documents to determine under which version of the crime the defendant was convicted. These Shepard documents include, "the charging document, the plea agreement or transcript of colloquy between the judge and defendant, or ... some comparable judicial record of this information." Shepard, 544 U.S. at 26, 125 S.Ct. at 1263.

However, if a statute "lists multiple, alternative elements, and so effectively creates different crimes," after looking only at the Shepard documents, if the court cannot ascertain under which crime a defendant was convicted, then no conviction under the statute can be assumed to be generic. Lockett, supra. In other words, the modified categorical approach only applies "to explicitly divisible statutes" because the "ACCA's test and history" show that "Congress made a deliberate decision to treat every conviction of a crime in the same manner; and, that cannot work if a "statute sweeps more broadly than the generic crime." Lockett, supra at 1266 (quoting Descamps, 133 S.Ct. at 2283, 2287, 2290). If the statute "does not concern any list of alternative elements," then the "modified approach ... has no role to play," and is thus not applicable. Descamps, 133 S.Ct. 2285-86; Howard, 742 F.3d at 1345-46. Where the modified categorical approach cannot be utilized, the court should limit its review only to the statute and judgment of conviction. Howard, 742 F.3d at 1345. In either case, however, courts are not permitted to consider a defendant's underlying conduct, or the facts forming the basis for the conviction. Descamps, 133 S.Ct. at 2285.

Simply put, Descamps instructs courts on how to determine if a statute is divisible. In essence, the Supreme Court explains that if a statute "lists multiple, alternative elements, it effectively creates several different crimes," and as a result it is divisible. Descamps, 133 S.Ct. at 2285 (quotation and alternation omitted). However, if the prior offense of conviction does not require the jury or factfinder to actually find all of the elements of the generic, enumerated offense, then the statute is not divisible. Descamps at 2290, 2293.

Turning to the movant's prior convictions, to satisfy the second factor in Chance, it must be determined whether movant's

convictions for aggravated battery in case no. J93-13333 (PSI ¶28); aggravated battery with a deadly weapon in case no. F98-2413 (PSI ¶32); burglary of a dwelling in case no. F01-13143 (PSI ¶32); robbery in case no. 97-9087-A (PSI ¶30); robbery with a firearm in case no. F98-2413 (PSI ¶31); and attempted first degree murder with a deadly weapon in case no. F98-2413 (PSI ¶31) are no longer qualifying predicate offenses for purposes of 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).

a. Aggravated battery Petitioner states that his prior conviction for aggravated battery in case no. J93-13333 and aggravated battery with a deadly weapon in case no. F98-2413 (PSI ¶28, 32) no longer qualify as crimes of violence.(Cv DE# 10:25-31). The government counters that these offenses do qualify as crimes of violence. (Cv DE# 11:2-3).

In Turner, 709 F.3d at 1337-38, the Eleventh Circuit held that Florida's aggravated battery offense categorically qualifies as a predicate offense under the ACCA's "elements" clause. Moreover, In re Rogers, 825 F.3d 1335, 1341 (11th Cir. 2016), decided after Descamps, the Eleventh Circuit denied a motion for leave to file a second or successive motion to vacate pursuant to §2255 on the basis that Turner is "binding precedent [that] clearly classifies [aggravated battery] as elements clause offense."

In light of the foregoing, aggravated battery and aggravated battery with a deadly weapon under Florida law constitutes a crime of violence for purposes of an ACCA enhancement.

b. Burglary of dwelling. Petitioner argues that his prior conviction for burglary of a dwelling in case no. F01-13143 (PSI ¶32) no longer qualifies as a predicate offense for purposes of the ACCA enhancement. (Cv DE# 10:12-15). The government is silent on this issue.

Petitioner correctly argues that the Florida burglary conviction fails to qualify as a crime of violence. See Mathis v. United States, -- S.Ct. --, 2016 WL 3434400, *3 (June 23, 2016); see also James v. United States, 550 U.S. 192, 212, 127 S. Ct. 1586, 1599, 167 L. Ed. 2d 532 (2007) overruled on other grounds by Samuel Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) ("We agree that the inclusion of curtilage takes Florida's underlying offense of burglary outside the definition of 'generic burglary'"). This conviction does not constitute a predicate offense for purposes of the ACCA.

c. Robbery. The parties dispute whether Petitioner's prior conviction for robbery under Fla.Stat. §812.13(1) in case no. 97-9087-A (PSI ¶30) qualifies as a violent felony for purposes of the ACCA enhancement. (Cv DE# 10:15-23; Cv DE# 11:3-9).

Prior to the issuance of Samuel Johnson, the Eleventh Circuit had found 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 after Samuel 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, 2017WL1485021 (11th Cir. April 26, 2017). In Seabrook, the three judge panel all agreed that Lockley was controlling in its determination of whether a robbery

under Florida law was a crime of violence under the ACCA elements clause. Seabrooks, 839 F.3d at 1346 (Judge Martin, concurring) ("[T]his panel opinion stands only for the proposition that our Circuit precedent in [Lockely] 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 941, the court reiterated that under Florida law "robbery is categorically a crime of violence under the elements of even the least culpable of these acts criminalized by Florida Statutes §812.13(1)." In Conde, in rejecting 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, the Eleventh Circuit held 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).

In light of this binding precedent, the movant's prior Florida conviction for robbery is a violent felony under the elements clause of the ACCA.

d. Armed Robbery. The parties dispute that the prior conviction for armed robbery in case no. F98-2413 (PSI ¶31) qualifies as a crime of violence for purposes of the ACCA enhancement. (Cv DE# 10:23-25; Cv DE# 11:3-9).

In United States v. Dowd, 451 F.3d 1244 (11th Cir. 2006), United States v. Oner, 382 F. App'x 893 (11th Cir. 2010), and United States v. Johnson, 634 F. App'x 227 (11th Cir. 2015), the Eleventh Circuit held that Florida armed robbery is a "violent felony" within the meaning of the ACCA's elements clause and, therefore, nothing in Samuel Johnson, which merely invalidated the

residual clause, affects the continuing viability of Florida armed robbery as an ACCA predicate offense.

In Dowd, the Eleventh Circuit held that the defendant's 1974 Florida armed robbery conviction "undeniably is a conviction for a violent felony." 451 F.3d at 1255 (citing 18 U.S.C. § 924(e)(2)(B)(I)). In Oner, 382 Fed. App'x at 896, the Eleventh Circuit concluded that nothing in Johnson[4] required it to revisit its holding in Dowd, and further stated that "[t]he carrying of a firearm or other deadly weapon during a robbery surely implicates violent force and of the most severe kind."

The Eleventh Circuit has repeatedly affirmed that armed robbery is a violent felony under the elements clause of the ACCA in the wake of Samuel Johnson. See In re Hires, 2016 WL 3342668, *4; In re Thomas, __ F.3d __, 2016 WL 3000325, *3 (11th Cir. May 25, 2016); In re Robinson, __ F.3d __, 2016 WL 1583616, *1 (11th Cir. April 19, 2016). More recently, in United States v. Fritts, 841 F.3d 937(11th Cir. November 8, 2016), the Eleventh Circuit held that all Florida robbery, regardless of the date of conviction, is a violent felony under the elements clause. Id. at 940 ("Our Dowd precedent and our conclusion here are also supported by our decisions holding that a Florida robbery conviction under § 812.13(1), even without a firearm, qualifies as a "crime of violence" under the elements clause.").

Contrary to the movant's argument, armed robbery under Florida law constitutes a crime of violence for purposes of an ACCA enhancement.

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[4]That is, the Supreme Court's 2010 Johnson case which dealt with the issue of the degree of force required for an ACCA "violent felony," see Johnson v. United States, --U.S.--, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), as opposed its recent 2015 Samuel Johnson decision, which invalidated the residual clause.

e. Attempted first degree murder with a deadly weapon. The parties dispute that the prior conviction for attempted first degree murder with a deadly weapon in case no. F98-2413 (PSI ¶31) qualifies as a crime of violence for purposes of the ACCA enhancement. (Cv DE# 10:31-35; Cv DE# 11:9-14) .

A Florida conviction for attempted murder with a deadly weapon under Fla. Stat. §§ 782.04(1), 777.04(1), and 775.087 is a "crime of violence" under ACCA without resorting to ACCA's residual clause. Florida attempted murder in the first degree is a "crime of violence" in that it "has as an element the use, attempted use, or threatened use of physical force against the person of another" 18 U.S.C. §924(e)(2)(B). Specifically, according to the Florida Standard Jury Instructions 6.2, to be found guilty of the offense, the State must prove beyond a reasonable doubt that: (1) the defendant did some act intended to cause death to a victim that went beyond just thinking or talking about it; (2) he acted with a premeditated design to kill the victim; and (3) the act would have resulted in the death of the victim except that someone prevented him from killing the victim or he failed to do so. In re Standard Jury Instructions in Criminal Cases-Report No. 2013-02, 137 So.3d 995, 997 (Fla. 2014) (per curiam). See also Floyd v. United States, 2015 WL 1257397 (M.D. Fla. March 18, 2015) (Florida first-degree attempted murder is a "crime of violence" in that it has as an element the use, attempted use, or threatened use of physical force against the person of another).

Contrary to the movant's argument, attempted first degree murder with a deadly weapon under Florida law constitutes a crime of violence for purposes of an ACCA enhancement.

In conclusion, the movant has not demonstrated that, in light of Samuel Johnson, the movant's prior convictions no longer qualify

him for the ACCA sentencing enhancement. While burglary of dwelling does not constitute a predicate offense, the movant has at least three prior felony convictions that do qualify as valid predicate offenses under the ACCA-aggravated battery, aggravated battery with a deadly weapon, robbery, robbery with a firearm, and attempted first degree murder. As a result, he is not entitled to relief.

VI. 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.

VII. 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 17th day of May, 2017.

UNITED STATES MAGISTRATE JUDGE

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A - 5

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

LESTER LEON SANDERS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 03-20048-CR-LENARD

Counsel For Defendant: Ramona Tolley
Counsel For The United States: Kirk Ogrosky
and Barbara Papademetriou
Court Reporter: Richard Kaufman

The defendant was found guilty on Count(s) 1 of the Indictment.
ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 U.S.C. 922(g)(1)	Convicted Felon in Possession of a Firearm	1/4/2003	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Defendant's Soc. Sec. No. 264-93-8401
Defendant's Date of Birth: 11/2/1978
Deft's U.S. Marshal No.: 69346-004

Date of Imposition of Sentence:
November 6, 2003

Defendant's Mailing Address:
18041 N.W. 14 Avenue
Miami, FL 33169

Defendant's Residence Address:
18041 N.W. 14 Avenue
Miami, FL 33169

JOAN A. LENARD
United States District Judge

November 7, 2003

DEFENDANT: LESTER LEON SANDERS
CASE NUMBER: 03-20048-CR-LENARD

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **240 Months**.

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

Defendant be designated to an institution in Florida or as close to Florida as possible

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: LESTER LEON SANDERS
CASE NUMBER: 03-20048-CR-LENARD

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Five (5) years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: LESTER LEON SANDERS
CASE NUMBER: 03-20048-CR-LENARD

SPECIAL CONDITIONS OF SUPERVISION

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

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

DEFENDANT: LESTER LEON SANDERS
CASE NUMBER: 03-20048-CR-LENARD

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.00	**$-0-**	**$-0-**

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: LESTER LEON SANDERS
CASE NUMBER: 03-20048-CR-LENARD

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of **$100.00** due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

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

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

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

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

The defendant shall forfeit the defendant's interest in the following property to the United States:

1. **.357 Magnum Taurus revolver (serial #5134921)**
2. **approximately 11 rounds of .357 caliber ammunition**
3. **approximately 1 round of .38 caliber ammuniton**

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