APPENDIX

APPENDIX

A-1

2020 WL 1867910
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Jimmy Lee FRANKLIN, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 19-13422
|
Non-Argument Calendar
|
(April 14, 2020)

Synopsis

Background: Following affirmance on direct appeal of defendant's conviction for being a felon in possession of a firearm and ammunition, and his 180-month prison term under the Armed Career Criminal Act (ACCA), 284 Fed.Appx. 701, he filed pro se motion to vacate. After that motion was denied, defendant obtained authorization to file a second or successive motion to vacate. The United States District Court for the Southern District of Florida, No. 1:16-cv-22192-CMA, 1:06-cr-20709-CMA-1, Cecilia M. Altonaga, J., denied the motion. Defendant appealed.

Holdings: The Court of Appeals held that:

defendant was required to prove that it was more likely than not that sentencing court relied on ACCA's residual clause, rather than the elements clause; and

defendant failed to show that sentencing court could have relied on ACCA's residual clause.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Codenotes

Recognized as Unconstitutional
18 U.S.C.A. § 924(e)(2)(B)(ii)

Attorneys and Law Firms

Brenda Greenberg Bryn, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Fort Lauderdale, FL, for Petitioner-Appellant

Laura Thomas Rivero, Jason Wu, Assistant U.S. Attorney, Emily M. Smachetti, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, for Respondent-Appellee

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket Nos. 1:16-cv-22192-CMA; 1:06-cr-20709-CMA-1

Before BRANCH, LAGOA, and HULL, Circuit Judges.

Opinion

PER CURIAM:

***1** Jimmy Franklin appeals the district court's denial of his counseled and authorized second 28 U.S.C. § 2255 motion to vacate sentence in which he asserted a challenge to his sentence under the Armed Career Criminal Act ("ACCA") based on *Johnson v. United States*, ––– U.S. ––––, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015). The district court granted Franklin a certificate of appealability ("COA") on the following issue:

> In a case where the sentencing record does not reveal which clause of the ACCA was the basis for the enhancement, whether a section 2255 movant must prove it is "more likely than not" the court relied only on the residual clause, as the First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have held; or rather, the movant need only show the ACCA enhancement "may have" rested on the residual clause, as the Second, Third, Fourth, and Ninth Circuits have held.

Because Franklin's claim is foreclosed by our binding precedent, we affirm.

I. Background

In 2007, Franklin pleaded guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g) and 924(e). Franklin's presentence investigation report ("PSI") classified him as an armed career criminal, pursuant to 18 U.S.C. § 924(e), [1] based on three prior violent felony convictions, citing the following Florida convictions: (1) 1987 robbery with a firearm, attempted robbery with a firearm, and aggravated assault; (2) 1987 battery on a law enforcement officer; and (3) 1997 attempted armed robbery. The PSI did not specify whether those convictions qualified as violent felonies under the ACCA's elements clause or residual clause. Franklin did not raise any objections to the PSI either before or during the sentencing hearing. Similarly, he did not raise any challenge to the ACCA enhancement at sentencing, and the district court did not specify whether it was relying on the elements clause or the residual clause in determining that Franklin's prior convictions qualified as violent felonies for purposes of the ACCA. The district court sentenced Franklin to 180 months' imprisonment, followed by 5 years' supervised release. [2] We affirmed on direct appeal. *United States v. Franklin*, 284 F. App'x 701 (11th Cir. 2008).

***2** In 2009, Franklin, proceeding *pro se*, filed his initial 28 U.S.C. § 2255 motion, which was denied. In 2015, however, pursuant to 28 U.S.C. §§ 2255(h) [3] and 2244(b)(3)(A), Franklin received authorization from this Court to file a second or successive § 2255 motion based on the Supreme Court's then-recent decision in *Johnson*, 135 S. Ct. at 2557–58, 2563, which held that the residual clause of the ACCA was unconstitutionally vague.

In his counseled second § 2255 motion, [4] Franklin argued that neither his prior 1987 Florida conviction for robbery with a firearm, attempted robbery with a firearm, and aggravated assault, nor his 1997 Florida conviction for attempted armed robbery qualified as violent felonies for purposes of the ACCA post-*Johnson*. Notably, he did not raise any challenge to his 1987 conviction for battery on a law enforcement officer. In response, the government argued that all of the prior convictions originally identified in the PSI qualified as violent felonies under the ACCA's elements clause, and, therefore, he was not entitled to relief. The district court first determined that the record was unclear as to whether Franklin was sentenced under the ACCA's residual clause, the elements clause, or the enumerated offenses clause. [5] Nevertheless, the district court determined that Franklin was not entitled to relief because his prior convictions for armed robbery, attempted armed robbery, and battery on a law enforcement officer [6] all qualified as predicate violent felonies under the ACCA's elements clause. Accordingly, the district court dismissed Franklin's second § 2255 motion and denied a COA.

Franklin filed a motion to alter or amend judgment, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, arguing that the district court erred in upholding the ACCA enhancement because his prior conviction for battery on a law enforcement officer is not categorically a violent felony under the ACCA's elements clause. The district court denied this motion, noting that this was the first time Franklin made any argument concerning his battery on a law enforcement officer conviction, and that, under the modified categorical approach, it properly considered information contained in the PSI in determining that this conviction qualified under the ACCA's elements clause.

***3** Franklin filed a notice of appeal and sought a COA from this Court, which was denied. He then filed a petition for a writ of *certiorari* with the United States Supreme Court. The Supreme Court granted the petition, vacated this Court's COA denial, and remanded the case for further consideration in light of the Solicitor General's response memorandum, in which the government agreed with Franklin that his prior conviction for battery on a law enforcement officer did not categorically qualify as a violent felony under the ACCA's elements clause. *Franklin v. United States*, —— U.S. ——, 139 S. Ct. 1254, 203 L.Ed.2d 270 (2019).

On remand and prior to briefing in this Court, Franklin and the government jointly moved for summary reversal of the district court's order denying the second § 2255 motion, requesting that the judgment be vacated and the case remanded to the district court so that the parties could brief, and the district court could consider, the impact of this Court's intervening decision in *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017), which held that in order to prove entitlement to relief based on *Johnson*, the movant must show that the district court "more likely than not" relied on the residual clause, and solely on the residual clause in imposing the ACCA enhancement. We granted the motion.

On remand in the district court, Franklin filed a supplemental memorandum, arguing that, based on the "legal landscape" at the time of his 2007 sentencing, it was "more likely than not" that the district court relied on the residual clause in counting his battery on a law enforcement officer conviction as an ACCA predicate violent felony. Specifically, he asserted that: (1) at his 2007 sentencing, it was clear in this Circuit that Florida battery convictions qualified under the ACCA's residual clause, which is why he did not object at sentencing, and given his lack of objection, there would have been no reason for the district court to consider the elements clause; (2) whether a battery on a law enforcement officer conviction qualified under the ACCA's elements clause was "uncertain" at that time; (3) courts were permitted, and arguably even encouraged, to impose ACCA enhancements under the residual clause; and (4) it was not until 2008, after his sentencing, "that the Supreme Court put any constraint on using the residual clause as the go-to path for the enhancement."

The government responded that, five months prior to Franklin's sentencing, we issued *United States v. Llanos-Agostadero*, 486 F.3d 1194, 1197 (11th Cir. 2007), *overruling recognized by United States v. Diaz-Calderone*, 716 F.3d 1345, 1349 (11th Cir. 2013), which held that Florida aggravated battery on a pregnant women was a crime of violence under one of the Sentencing Guidelines' provisions, and in doing so, we drew parallels to Florida battery on a law enforcement officer as a crime of violence under the Sentencing Guidelines' career-offender provision's elements clause, U.S.S.G. § 4B1.2(a). The government explained that the definition of a "crime of violence" for purposes of the career-offender provision was virtually identical to the definition of a violent felony under the ACCA, such that decisions about one have been applied to the other. Accordingly, the government maintained that the law in this Circuit at the time of Franklin's sentencing was clear that Florida battery on a law enforcement officer was a crime of violence under the Guidelines' career offender provision's elements clause, and, in turn, was a violent felony under the ACCA's elements clause. Thus, Franklin could not show that it was more likely than not that the district court relied solely on the residual clause in imposing the ACCA enhancement.

***4** Upon review, the district court acknowledged that it had no independent recollection of Franklin's 2007 sentencing. However, it agreed with the government that, in light of *Llanos-Agostadero*, it was not more likely than not that it relied on the residual clause in counting Franklin's Florida battery on a law enforcement officer conviction as an ACCA violent felony. The district court explained that it "would not have ignored binding precedent" and instead would have determined that the conviction in question qualified under the ACCA's elements clause. Accordingly, Franklin was not entitled to relief. Franklin subsequently moved for a COA, noting that there was a circuit split as to the burden of proof a § 2255 movant asserting a *Johnson*-based claim must meet with the First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits adopting the "more likely than not" standard, and the Second, Third, Fourth, and Ninth Circuits adopting the "may have" relied on standard (which was the standard originally applied by the district court in ruling on Franklin's second § 2255 motion). The district court granted Franklin's request for a COA as set forth above. This appeal followed.

II. Standard of Review

"[W]e review the district court's legal conclusions in a § 2255 proceeding *de novo* and the underlying facts for clear error." *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003). Further, under the prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). Finally, "the scope of our review ... is limited to the issue[ ] enumerated in the COA." *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011).

III. Discussion

Franklin argues that *Beeman*, in which we adopted the "more likely than not" burden of proof, was wrongly decided for various reasons. [7] Franklin's claim is foreclosed by binding precedent as *Beeman* remains the applicable standard § 2255 movants asserting *Johnson*-based claims must meet in this Circuit. *Archer*, 531 F.3d at 1352; *see also Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) ("[W]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time.").

Alternatively, in its § 2255 order, the district court indicated "it would not have ignored binding precedent" and instead

at the time of sentencing would have determined that the conviction in question qualified under the ACCA's elements clause. Since *Johnson* did not involve the elements clause, Franklin's *Johnson*-based claim fails. In other words, even the "may have relied on" burden does not help Franklin. Accordingly, we affirm.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2020 WL 1867910

Footnotes

1 Under the Armed Career Criminal Act ("ACCA"), a defendant convicted of violating 18 U.S.C. § 922(g) who has three or more prior convictions for "a violent felony or a serious drug offense, or both, committed on occasions different from one another," faces a mandatory minimum 15-year sentence. *See* 18 U.S.C. § 924(e)(1). At the time of Franklin's sentencing, the ACCA defined a "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. § 924(e)(2)(B). The first prong of this definition was the "elements clause," while the second prong contained the "enumerated crimes clause" and the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

2 Franklin was released from prison on September 13, 2019 and is currently serving his term of supervised release.

3 In relevant part, section 2255(h) provides that "[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain ... 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)(2). *Johnson* announced such a rule. *See Welch v. United States*, —— U.S. ——, 136 S. Ct. 1257, 1264–65, 1268, 194 L.Ed.2d 387 (2016).

4 The district court *sua sponte* appointed counsel for Franklin, and counsel thereafter filed a § 2255 motion.

5 As the magistrate judge noted in the report and recommendation, at the time of the district court proceedings on Franklin's second § 2255 motion, the movant's burden of proof was unclear in cases such as Franklin's where the record was silent as to which clause the district court had relied. *Compare In re Chance*, 831 F.3d 1335 (11th Cir. 2016) (suggesting that the § 2255 movant just needed to show that the district court may have relied on the residual clause), *with In re Moore*, 830 F.3d 1268 (11th Cir. 2016) (suggesting that the movant had to show that the district court actually relied on the residual clause).

6 Notably, the magistrate judge concluded that, although the parties had not raised any challenge to Franklin's conviction for battery on a law enforcement officer, the conviction did not qualify as a violent felony for purposes of the ACCA post-*Johnson*. The government objected to this finding. The district court determined that this conviction was a qualifying violent felony under the modified categorial approach.

7 Franklin acknowledges that his claim is foreclosed by binding precedent and that he is simply preserving the issue for Supreme Court review.

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-20709-CR-ALTONAGA/TURNOFF

18 U.S.C. § 922(g)(1)
18 U.S.C. § 931
18 U.S.C. § 924(d)(1)
21 U.S.C. § 853

UNITED STATES OF AMERICA

vs.

JIMMY LEE FRANKLIN,

Defendant.
_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

On or about May 16, 2006, in Miami-Dade County, in the Southern District of Florida, the defendant,

JIMMY LEE FRANKLIN,

having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

It is further alleged that said firearm and ammunition is:

(a) One (1) Romarm 7.62 mm. semi-automatic rifle;

(b) Fourteen (14) rounds of 7.62 mm. ammunition;

(c) One (1) Smith & Wesson .38 caliber revolver; and

(d) Six (6) rounds of .38 caliber ammunition.

COUNT 2

On or about May 16, 2006, in Miami-Dade County, in the Southern District of Florida, the defendant,

JIMMY LEE FRANKLIN,

having been previously convicted of a felony that is a crime of violence, did knowingly possess body armor, sold and offered for sale in interstate and foreign commerce, in violation of Title 18, United States Code, Section 931.

FORFEITURE

The allegations in Count 1 of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeitures to the United States of America of property in which the defendant, **JIMMY LEE FRANKLIN,** has an interest pursuant to the provisions of Title 18, United States Code, Section 924(d)(1), and Title 28, United States Code, Section 2461(c).

1. Upon conviction of the violation alleged in Count 1 of this Indictment, the defendant, **JIMMY LEE FRANKLIN**, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d)(1), as made applicable hereto by Title 28, United States Code, Section 2461(c), any firearm and ammunition involved in or used in the commission of such violation.

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

(a) One (1) Romarm 7.62 mm. semi-automatic rifle;

(b) Fourteen (14) rounds of 7.62 mm. ammunition;

(c) One (1) Smith & Wesson .38 caliber revolver; and

(d) Six (6) rounds of .38 caliber ammunition.

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

A TRUE BILL

/

FOREPERSON

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

GEORGE M. KARAVETSOS
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

JIMMY LEE FRANKLIN,

Defendant. /

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Indictment:

New Defendant(s) Yes ___ No ___
Number of New Defendants ___
Total number of counts ___

Court Division: (Select One)

X Miami ___ Key West
___ FTL ___ WPB ___ FTP

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No

   List language and/or dialect _____

4. This case will take 1 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

(Check only one)			(Check only one)	
I	0 to 5 days	X	Petty	
II	6 to 10 days		Minor	
III	11 to 20 days		Misdem.	
IV	21 to 60 days		Felony	X
V	61 days and over			

6. Has this case been previously filed in this District Court? (Yes or No) No
   If yes:
   Judge: _____ Case No. _____
   (Attach copy of dispositive order)
   Has a complaint been filed in this matter? (Yes or No) No
   If yes:
   Magistrate Case No. _____
   Related Miscellaneous numbers: _____
   Defendant(s) in federal custody as of _____
   Defendant(s) in state custody as of _____
   Rule 20 from the _____ District of _____

   Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the U.S. Attorney's Office prior to April 1, 2003? ___ Yes X No

8. Does this case originate from a matter pending in the U. S. Attorney's Office prior to April 1, 1999? ___ Yes X No
   If yes, was it pending in the Central Region? ___ Yes ___ No

9. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ___ Yes X No

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

GEORGE M. KARAVETSOS
ASSISTANT UNITED STATES ATTORNEY
COURT NO. A5500533

Penalty Sheet(s) attached

REV.1/14/04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PENALTY SHEET

Defendant's Name: **JIMMY LEE FRANKLIN**

Case No:

Count #: 1

Possession of a firearm and ammunition by a convicted felon.

Title 18, United States Code, Section 922(g)(1)

*** Max. Penalty:** Life imprisonment

Count #: 2

Possession of body armor by a convicted felon.

Title 18, United States Code, Section 931

***Max. Penalty:** Five years' imprisonment

Count #:

*** Max. Penalty:**

Count #:

***Max. Penalty:**

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

A-3

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

JIMMY LEE FRANKLIN

JUDGMENT IN A CRIMINAL CASE

Case Number: 06-20709-CR-ALTONAGA

USM Number: 78370-004

Counsel For Defendant: Michael D. Spivack, Esq.
and Anne M. Lyons, Esq.
Counsel For The United States: Sean P. Cronin, Esq.
Court Reporter: Barbara Medina

The defendant pled guilty to Count 1 of the Indictment.
The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)(1)	Possession of a Firearm and Ammunition by a Convicted Felon	May 16, 2006	1

The defendant is sentenced as provided in the following pages of this judgment.

Count 2 is dismissed on the motion of the United States.

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

Date of Imposition of Sentence:
October 16, 2007

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

October 16, 2007

DEFENDANT: JIMMY LEE FRANKLIN
CASE NUMBER: 06-20709-CR-ALTONAGA

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **180 months**.

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

The defendant be designated to a facility located in or near South Florida, and that he receive treatment for substance abuse.

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: JIMMY LEE FRANKLIN
CASE NUMBER: 06-20709-CR-ALTONAGA

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **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 unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

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

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: JIMMY LEE FRANKLIN
CASE NUMBER: 06-20709-CR-ALTONAGA

SPECIAL CONDITIONS OF SUPERVISION

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

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

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

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

DEFENDANT: JIMMY LEE FRANKLIN
CASE NUMBER: 06-20709-CR-ALTONAGA

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under 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: JIMMY LEE FRANKLIN
CASE NUMBER: 06-20709-CR-ALTONAGA

SCHEDULE OF PAYMENTS

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

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

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

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

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

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

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

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

Forfeiture of the defendant's right, title, and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed order of forfeiture within three days of this proceeding.

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

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22192-CV-ALTONAGA
(06-20709-CR-ALTONAGA)

JIMMY LEE FRANKLIN
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

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

Mr. Jimmy Lee Franklin, through undersigned counsel, respectfully moves this Court to correct his sentence, pursuant to 28 U.S.C. § 2255, and states:

1. On October 16th, 2007, Mr. Franklin was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1).
2. At sentencing, Mr. Franklin was subject to the Armed Career Criminal Act's ("ACCA") 15-year mandatory minimum sentence. 18 U.S.C. § 924(e).
3. Mr. Franklin now requests relief in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (June 26, 2015), which held that the ACCA's "residual clause" in § 924(e)(2)(B)(ii) is unconstitutionally vague.

4. Application of *Johnson* to this case shows that Mr. Franklin's sentence was imposed in excess of the statutory maximum.
5. Accordingly, Mr. Franklin is entitled to relief under § 2255.

PROCEDURAL HISTORY

On November 16th, 2006, the grand jury returned an indictment charging Mr. Franklin with Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. §§922(g)(1) and 924(e) (Count One); Possession of Body Armor by a Convicted Felon, in violation of 18 U.S.C. §931 (Count Two). (Cr-DE#1).

On August 1, 2007, pursuant to a negotiated plea agreement with the government, Mr. Franklin pleaded guilty to Count One of the indictment. (Cr-DE#45).

A Presentence Investigation Report ("PSI") was prepared in anticipation of sentencing, wherein the probation officer determined that an offense involving possession of a firearm and ammunition by a convicted felon, who committed the offense subsequent to sustaining at least one felony conviction of either a crime of violence or a controlled substance offense, had a base offense level of 20. (PSI¶19). Moreover, because one of the firearms was stolen, the offense level was increased by two levels. (PSI¶20). The adjusted offense level was set at 22. (PSI¶24). However, because the probation officer determined that Mr. Franklin qualified as an Armed Career Criminal, his offense level increased to a level 33. (PSI¶25).

The probation officer further determined Mr. Franklin had a subtotal of seven criminal history points. (PSI¶40). However, because Mr. Franklin committed the offense while serving a term of 12 months probation, 2 further criminal history points were added. (PSI¶41). This placed Mr. Franklin in a Criminal History Category of IV. Moreover, because the probation officer determined that Mr. Franklin was an Armed Career Criminal, his Criminal History Category was again calculated to be a category IV. (PSI¶42). Based on a Total Offense Level of 33 and a Criminal History Category of IV, the guideline imprisonment range was set between 188 to 235 months. (PSI¶88).

On October 16th, 2007, Mr. Franklin appeared for sentencing wherein he received a sentence of 180 months imprisonment as to Count One, to be followed by 5 years of supervised release and a special assessment of $100. (Cr-DE#54). The Clerk entered judgment on October 16th, 2007. (Cr-DE#55). Mr. Franklin filed a timely notice of appeal. (Cr-DE#56). On July 1st, 2008, the Eleventh Circuit, per curiam, affirmed Mr. Franklin's conviction. (Cr-DE#78). No petition for writ of certiorari was filed.

For purposes of the federal one-year limitations period, the judgment of conviction in the underlying criminal case became final on October 1, 2008, when time expired for filing a petition for writ of certiorari, ninety days following affirmance of Mr. Franklin's conviction on direct appeal.

Mr. Franklin filed his first motion to vacate within one year from the time the judgment became final. Mr. Franklin filed his first §2255 motion timely. (Cr-DE#79) (Cv-DE#1). The first motion to vacate was denied on June 11th, 2009. (Cv-DE#11). On May 17th, 2016, a petition was filed with the Eleventh Circuit Court of Appeals to allow the filing of a successive motion to vacate, set aside, or correct sentence. (Cr-DE#85). The petition was granted on June 15th, 2016. (Cr-DE#85).

GROUNDS FOR RELIEF

Mr. Franklin is no longer an armed career criminal. As an initial matter: Mr. Franklin s claim is cognizable on collateral review; *Johnson* applies retroactively to this case; and Mr. Franklin's claim is timely.

I. Mr. Franklin's Claim is Cognizable Under § 2255

Section 2255(a) authorizes a federal prisoner claiming "that [his] sentence was imposed in violation of the Constitution . . . or that the sentence was in excess of the maximum authorized by law . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). The statutory maximum sentence for being a felon in possession of a firearm, in violation of § 922(g)(1), is ordinarily ten years' imprisonment. 18 U.S.C. § 924(a)(2). However, under the ACCA, where the defendant "has three previous convictions . . . for a violent felony[1] or a serious drug offense, or both, committed on occasions different from

[1] As relevant here, the term "violent felony" includes certain crimes that "(i) ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another ["elements clause"]; or (ii) is burglary, arson, or extortion, involves use of explosives ["enumerated offenses"], or otherwise involves conduct that

one another, such person shall be fined under this title and imprisoned not less than fifteen years." *Id.* § 924(e)(1). Thus, this Court "can collaterally review a misapplication of the Armed Career Criminal Act because . . . that misapplication results in a sentence that exceeds the statutory maximum." *Spencer v. United States*, 773 F.3d 1132, 1143 (11th Cir. 2014) (en banc).

II. Mr. Franklin's Motion is Timely

As relevant here, § 2255 imposes a one-year statute of limitations that runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). That date runs from the date the Supreme Court recognizes the new right. *Dodd v. United States*, 545 U.S. 343, 360 (2005).

Mr. Franklin's motion is timely under § 2255(f)(3). In declaring the ACCA's residual clause unconstitutionally vague, *Johnson* recognized a new right because that result was not "dictated by precedent" at the time Jimmy Lee Franklin's conviction became final. *See Howard v. United States*, 374 F.3d 1068, 1073–74 (11th Cir. 2004). To the contrary, the Supreme Court itself, as well as the Eleventh Circuit, had repeatedly rejected vagueness challenges to the residual clause. *Sykes v. United States*, 564 U.S. 1 (2011); *James v. United States*, 550 U.S. 192, 210 n. 6 (2007); *United States v. Gandy*, 710 F.3d 1234, 1239 (11th Cir. 2013). And, as explained above, *Johnson* applies retroactively because it is a substantive rule.

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presents a serious potential risk of physical injury to another ["residual clause"]." 18 U.S.C. § 924(e)(2)(B).

Therefore, Mr. Franklin has one year from the date *Johnson* was decided—June 26, 2016—to seek relief. *See Dodd v. United States*, 545 U.S. 343, 360 (2005). Thus, this motion is timely under § 2255(f)(3).

III. *Johnson* Applies Retroactively to this Case

In *Welch v. United States*, the Supreme Court squarely held that "*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." 578 U.S. at __, 136 S. Ct. 1257, 1268 (2016); *see id.* at 1265 ("the rule announced in *Johnson* is substantive"); *Mays v. United States*, 817 F.3d 728, 736 (11th Cir. 2016) (concluding even before *Welch* that "*Johnson* is retroactive because it qualifies as a substantive rule . . . since it narrows the class of people that may be eligible for a heightened sentence under the ACCA."). Thus, there can be no dispute that *Johnson* applies retroactively to this case.

IV. The categorical and modified categorical approach

Before explaining why Mr. Franklin is no longer an armed career criminal, it is necessary to briefly set out the governing analytical framework. That framework, summarized below, was refined most recently in *Descamps v. United States*, 133 S. Ct. 2275 (2013), which is "the law of the land" and "must be . . . followed." *United States v. Howard*, 73 F.3d 1334, 1344 n.2 (11th Cir. 2014).

In determining whether a prior conviction qualifies as a "violent felony," sentencing courts must apply the "categorical approach." Under that approach, "courts may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Descamps*,

133 S. Ct. at 2283 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). In adopting this approach, the Court emphasized both Sixth Amendment concerns (explained below) and the need to avert "'the practical difficulties and potential unfairness of a [daunting] factual approach.'" *Id.* at 2287 (quoting *Taylor*, 495 U.S. at 601). As a result, courts "look no further than the statute and judgment of conviction." *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014) (citation omitted). And, in doing so, they "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2011) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

After *Johnson*, a conviction may qualify as a "violent felony" if it is one of the ACCA's enumerated offenses. In determining whether a prior conviction so qualifies, the court must ask whether "the relevant statute has the same elements as the 'generic' ACCA crime." *Descamps*, 133 S. Ct. at 2283. If so, "then the prior conviction can serve as an ACCA predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is necessarily guilty of all the generic crime's elements." *Id.* (citation and ellipses omitted). However, "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." *Id.* "The key . . . is elements, not facts." *Id.*

A prior conviction may also qualify as a "violent felony" if it satisfies the ACCA's elements/force clause. The categorical approach applies equally in that context. Again looking no further than the statute and judgment of conviction, a conviction

will qualify as an ACCA predicate "only if the statute on its face requires the government to establish, 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 the statute." *Estrella*, 758 F.3d at 1244 (citation omitted). "Whether, in fact, the person suffering under this particular conviction actually used, attempted to use, or threatened to use physical force against a person is quite irrelevant. Instead, the categorical approach focuses on whether in every case a conviction under the statute *necessarily* involves proof of the element." *Id.* (citations omitted).

To implement the categorical approach, the Supreme Court has "recognized a narrow range of cases in which sentencing courts" may look beyond the statute and judgment of conviction and employ what it is referred to as the "modified categorical approach." *Descamps*, 133 S. Ct. at 2283–84. Those cases arise where the statute of conviction contains alternative elements, some constituting a violent felony and some not. In that scenario, "the statute is 'divisible,'" in that it "comprises multiple, alternative versions of the crime." *Id.* at 2284. As a result, "a later sentencing court cannot tell, without reviewing something more [than the statute and judgment of conviction], if the defendant's conviction" qualifies as violent felony. *Id.*

Two key points must be made about the modified categorical approach. First, *Descamps* made clear that "the modified categorical approach can be applied only when dealing with a divisible statute." *Howard*, 742 F.3d at 1344. Thus, where the statute of conviction "does not concern any list of alternative elements" that must be

found by a jury, there is no ambiguity requiring clarification, and therefore the "modified approach . . . has no role to play." *Descamps*, 133 S. Ct. at 2285–86; *see Estrella*, 758 F.3d at 1245–46; *Howard*, 742 F.3d at 1345–46. "[I]f the modified categorical approach is inapplicable," then the court must limit its review to the statute and judgment of conviction. *Howard*, 742 F.3d at 1345. And, even if a statute is divisible, the court need not employ the modified categorical approach if none of the alternatives would qualify. *Id.* at 1346–47.

Second, even where the modified categorical approach does apply, it does not permit courts to consider the defendant's underlying conduct. Rather, "the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *Descamps*, 133 S. Ct. at 2285. And, in order to ensure that the focus remains on the statutory elements rather than the defendant's underlying conduct, the court is restricted in what documents it may consider.

In *Shepard v. United States*, 544 U.S. 13, 15 (2005), the Supreme Court held that courts are "limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." What these *Shepard* documents have in common is that they are "conclusive records made or used in adjudicating guilt." *Id.* at 21; *see id.* at 23 ("confin[ing]" the class of permissible documents "to

records of the convicting court approaching the certainty of the record of conviction"). That accords with their function in the modified categorical approach—namely, to permit the court to identify the elements for which the defendant was convicted. *Descamps*, 133 S. Ct. at 2284.

Importantly, and as the Supreme Court explained in *Descamps*, that inexorable focus on the elements derives in large part from "the categorical approach's Sixth Amendment underpinnings." *Id.* at 2287–88. Other than the fact of a prior conviction, a jury must find beyond a reasonable doubt any fact that increases a defendant's sentence beyond the prescribed statutory maximum. *Id.* at 2288 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). The reason for the "prior conviction" exception is that, during the earlier criminal proceeding, the defendant either had a jury or waived his constitutional right to one. *See Apprendi*, 530 U.S. at 488.

As the Supreme Court made clear in *Descamps*, the use of *Shepard* documents "merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits." 133 S. Ct. at 2288. This is so because "the only facts the court can be sure the jury . . . found [beyond a reasonable doubt] are those constituting elements of the offense;" and, similarly, "when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements." *Id.* But where a court relies on non-*Shepard* documents to increase a defendant's sentence, it "extend[s] judicial fact finding" "beyond merely identifying a prior conviction," violating the Sixth Amendment. *Id.*

In sum, in determining whether a conviction qualifies as a violent felony, a court must generally consider only the statute and judgment of conviction. Only if the statute is divisible may the court consider *Shepard* documents, and it may do so only for the sole purpose of ascertaining the statutory elements for which the defendant was convicted. Once those elements are identified, the court must determine whether the least of the acts prohibited thereby constitutes a generic offense enumerated in the ACCA or necessarily requires the use, attempted use, or threatened use of violent, physical force against another. In no case may a court rely on non-*Shepard* documents or analyze whether the defendant's underlying conduct constituted a violent felony.

V. Mr. Franklin is No Longer an Armed Career Criminal

In this case, the record reflects that the court relied on the following convictions to enhance the applicant's sentence under the ACCA: (1)(a) a 1986 State of Florida conviction for Armed Robbery With a Firearm, (1)(b) for Attempted Armed Robbery, and (1)(c) for Aggravated Assault; (2) a 1986 State of Florida Conviction for Battery on a Law Enforcement Officer; and (3) a 1996 State of Florida Armed Robbery conviction. In light of *Johnson*, the applicant no longer has three qualifying "violent felonies" and is therefore no longer an armed career criminal, as explained below.

In regards to the 1986 State of Florida conviction for Armed Robbery With a Firearm, in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), this Court found a 2001 conviction for attempted robbery under Fla. Stat. §812.13(1) was a

"crime of violence" within both the elements and residual clauses of the Career Offender provision of the Guidelines. Notably, though, *Johnson* has since abrogated Lockley's residual clause holding, and *Moncrieffe* and *Descamps* have together abrogated its elements clause holding.

Lockley expressly acknowledged that §812.13(1) – by its terms – did not constitute an exact match to the elements clause because "putting in fear" did not "specifically require the use or threatened use of physical force against the person of another." 632 F.3d at 1245. Despite that, however, the Court found that a §812.13(1) conviction satisfied the elements clause, because in its view it was "inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force." *Id.* But that "inconceivability analysis" cannot be squared with the strict categorical analysis now dictated by *Moncrieffe* and *Descamps*. The elements clause assumptions in *Lockley* have been directly abrogated by these intervening Supreme Court precedents which now mandate an element-by-element comparison, and preclude enhancement whenever there is a "mismatch" in "elements."

Moreover, *Descamps* has exposed another flaw in Lockley's assumptions by making clear that the intent element in any §812.13 offense is categorically overbroad vis-a-vis an offense within the elements clause. According to the Supreme Court, the term "use" in the phrase "use, attempted use, or threatened use of physical force against the person of another" requires an "active employment" of force, which "most naturally" requires a high degree of intent. *Leocal v. Ashcroft*, 543 U.S. 1, 10

(2004). But notably, according to the Florida courts' own interpretation of a robbery by "putting in fear" – caselaw *Lockley* did not consider, but must be considered and deferred to after *Descamps* – a conviction under §812.13(1) for a robbery by "putting in fear" only requires proof that a "reasonable person" in the victim's position would be "put in fear" during "the course of the taking." The Florida courts do not require the State to prove the offender actually intended to put anyone in fear, or that the victim was actually put in fear. See *State v. Baldwin*, 709 So.2d 636 (Fla. 2nd DCA 1998); *Brown v. State*, 397 So.2d 1153 (Fla. 5th DCA 1981).

Finally, close examination of Florida's standard robbery instruction suggests that the crucial second element for conviction – that "force, violence, assault, or putting in fear was used in the course of the taking" – is indivisible under Descamps. By its terms, the instruction indicates there are only four true "elements" of a §812.13 robbery offense; that the second "element" ("[f]orce, violence, assault, or putting in fear was used in the course of the taking") is a list of "alternative means" of committing a single robbery offense; and that the jury need not agree unanimously on a "means." Each juror simply must find that either "force," or "violence," or "assault," or "putting in fear" "was used in the course of the taking." Therefore, according to *Descamps*, the second element of a §812.13 offense is indivisible.

And notably, it is clear from Florida case law that at least one additional means of committing robbery – by "use of force" – sweeps more broadly than the ACCA's elements clause, since the quantum of "force" required for conviction is not the *Johnson* level of "violent force." *See, e.g., Sanders v. State*, 769 So.2d 506 (Fla. 5th

DCA 2000) (affirming strong-arm robbery conviction under Fla. Stat. §812.13, and rejecting defendant's claim that he was only guilty of the newly-created "robbery by sudden snatching" crime under §812.131 because the State simply showed he had peeled back the victim's fingers before snatching money from out of his hand; explaining that the victim's "clutching of his bills in his fist as *Sanders* pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by *Sanders*;" confirming that no more resistance, or "force," than that was necessary for a conviction under §812.13(1)).

It is clear from *Sanders* that the quantum of "force" necessary to "overcome a victim's resistance" will vary depending upon the type and degree of resistance by the victim, and that if the victim's resistance is slight, the "force" necessary to overcome it – and seal a "strong-arm" robbery conviction in Florida – is likewise slight. Since the type of violent, pain-causing, injury-risking force required by *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) is not necessary in every §812.13(1) case, and a person may be found guilty of "strong-arm" robbery in Florida from using only de minimis force, the statute is categorically overbroad for this reason as well. And, post-*Descamps*, a conviction under a "categorically overbroad" statute cannot be an ACCA predicate. *See* 133 S.Ct. at 2285-2286, 2293.

In addition, in regards to the 1986 State of Florida conviction for Armed Robbery With a Firearm, Mr. Franklin was sentenced for "armed robbery" under Fla. Stat. §812.13(2)(1986) does not change the above analysis. As a threshold matter, it is clear from the standard robbery instruction at the time of Mr. Franklin's conviction,

that in 1986 Fla. Stat. §812.13(2)(a) and (b) were simply penalty enhancement provisions, not separate enhanced "offenses" with additional "elements." Notably – and differently than today – juries were not instructed in 1986 that they needed to find that the state proved any of the "aggravating circumstances" in the statute ("carrying," of some "weapon," "in the course of committing a robbery") beyond a reasonable doubt. Therefore, according to Descamps, the fact that Mr. Franklin's underlying robbery conviction under §812.13(1) was categorically overbroad, ends the ACCA elements clause inquiry. Mr. Franklin's ACCA sentence cannot be upheld based upon judicial findings as to facts on which he never had the protection of the Sixth Amendment. *Descamps,* 133 S.Ct. at 2289.

But notably, even if Mr. Franklin's state court judge or a jury had been required to find the "aggravating circumstances" in §§812.13(2)(1986) beyond a reasonable doubt, that would not change the result now dictated by *Descamps* in any manner, since each of the "aggravating circumstances" in §812.13(2)(1986) is itself categorically overbroad vis-a-vis the ACCA's element clause.

First, §812.13(2)(1986) permits a sentence enhancement for "armed robbery" simply for "carrying" a weapon, which does not necessitate either using it, brandishing it in a threatening manner, or even visibly displaying it. According to *State v. Baker*, 452 So.2d 927 (Fla. 1984), it simply requires "possessing" it. *See id*. at 929 ("The victim may never even be aware that a robber is armed, so long as the perpetrator has the weapon in his possession during the offense."). In *United States v. Archer*, 531 F.3d 1347 (2008), this Court expressly held that the mere act of "carry-

ing" a weapon, and specifically a firearm, "does not involve the use, attempted use, or threatened use of force, and so is not a crime of violence under [the elements clause." *Id*. at 1349 (emphasis added).

Second, the word "weapon" in §812.13(2)(b) [or "deadly weapon" in §812.13(2)(a)] is not only indeterminate but categorically overbroad vis-a-vis any offense within the elements clause. Poison, anthrax, and chemical weapons are "weapons" that may easily cause death without the "use" of any "physical force." Other courts, notably, have declared convictions overbroad and outside the elements clause for precisely this reason. See, e.g,, *United States v. Perez-Vargas,* 414 F.3d 1282 (10th Cir. 2005); *United States v. Torres-Miguel*, 701 F.3d 165, 168-169 (4th Cir. 2012); *Matter of Guzman-Polanco, 26 I & N Dec.* 713, 717-718 (BIA Feb. 24, 2016). And although the Florida legislature has expressly defined the term "weapon" in Fla. Stat. §790.001(13) to include a "chemical weapon," under Florida law, the list of "weapons" in §790.001(13) has never limited the universe of items that may qualify a Florida defendant for an "armed robbery" enhancement. Juries and courts have always been permitted to use the much broader, open-ended definition of "weapon" in the standard §812.13 instruction, pursuant to which "any object that could be used to cause death or inflict serious bodily injury" qualifies as a "weapon." Significantly, that definition creates an "objective test," pursuant to which any item could qualify as a "weapon," if it caused great bodily harm to the victim "during the course of the robbery," even if that was not the defendant's intent. See *Williams v. State*, 651

So.2d 1242, 1243 (Fla. 2nd DCA 1995)(under this "objective test," even coffee could trigger enhanced penalty for "armed robbery," if it caused great bodily harm).

Finally, the phrase "in the course of committing the robbery" in §§812.13(2)(1986), is itself broadly defined in a separate provision, §812.13(3)(a), which explains: "An act shall be deemed 'in the course of committing the robbery" if it occurs in an attempt to commit a robbery or in flight after the attempt or commission." Because of that expansive definition, Florida courts have upheld an enhanced penalty for "armed robbery" upon evidence that a defendant simply stole a gun after robbing a victim of money and other property, and fled with the gun as part of the "loot." *State v. Brown*, 496 So.2d 194 (Fla. 3rd DCA 1986) (defendant's conduct "fell within the unequivocal reach of the armed robbery provision," even if he did not "carry" the firearm during the "taking of the proceeds" from the cash register, because he then stole a gun from under the cash register, and fled the scene with it). Such conduct plainly involves no more than knowing, illegal "possession" of a firearm, which this Court has held is not a "violent felony" under the ACCA. *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010).

Although a panel of the Eleventh Court of Appeals noted in 2006 that it had "conclud[ed] without difficulty," that a Florida armed robbery conviction was "undeniably a conviction for a violent felony," *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), it offered nothing beyond "[s]ee 18 U.S.C. §924(e)(2)(B)(i)" to support that "undeniable" conclusion. There is no stated analysis in the opinion, and it is therefore unclear what the panel relied upon to reach that conclusion.

Moreover, *Dowd* was decided prior to *Archer* (in 2010); *Curtis Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson* I); *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012); *Moncrieffe* (in 2013); and *Descamps* (in 2013 as well). And the *Dowd* panel's presumption that a 1975 Florida "armed robbery" conviction was "undeniably" an offense within the ACCA's elements clause cannot be squared with the strict, element-by-element comparison now required by the categorical approach.

This Court has long recognized that its "first duty" is always "to follow the dictates of the United States Supreme Court," and it "must consider" whether intervening Supreme Court decisions have "effectively overruled" a prior precedent. *United States v. Contreras*, 667 F.2d 976, 979 (11th Cir. 1982). In similar circumstances, the Court has easily declared prior precedents "effectively overruled." *See Dawson v. Scott*, 50 F.3d 884, 892 n. 20 (11th Cir. 1995); *Archer*, 531 F.3d at 1352; *United States v. Howard*, 742 F.3d 1334, 1337, 1343-1345 (11th Cir. 2014); *see also* Scalia, Antonin, J., *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989) (lower courts are not only bound by the narrow "holdings" of higher court decisions, but also by their "mode of analysis"). Based upon the different "mode of analysis" now dictated by *Archer*, *Curtis Johnson*, *Welch*, *Moncrieffe*, and *Descamps, Dowd* has been effectively overruled at this time.

Although a panel of this Court recently found after reviewing a pro se inmate's application to file a second or successive §2255 motion in light of *Johnson*, that a Florida "armed robbery" conviction "appears to contain 'as an element the use, attempted use, or threatened use of physical force against the person of anoth-

er," and that "[n]either *Johnson* nor any other case" suggests that such a conviction did not count as an ACCA predicate," *In re Robinson*, ___ F.3d ___, 2016 WL 1583616 (11th Cir. April 19, 2016), none of the above-cited cases were cited by Mr. Robinson, nor did he make any of the above arguments in his pro se application. However, even assuming Mr. Robinson did not show a "reasonable likelihood" that his pro se challenge to a Florida armed robbery conviction had "possible merit," Mr. Franklin here has made a completely different, much stronger showing sufficient to "warrant fuller exploration by the district court. *Holladay*, 331 F.3d at 1173-74.

In regards to the related 1986 State of Florida Attempted Armed Robbery conviction, if a 1986 State of Florida conviction for Armed Robbery With a Firearm does not qualify, a 1986 State of Florida conviction for Attempted Armed Robbery can't qualify as a violent felony under the ACCA.

In regards to the related State of Florida conviction for Aggravated Assault, a conviction for "aggravated assault" under Fla. Stat. §784.021 is not a violent felony within the ACCA's elements clause because the Florida courts have held that a person may be convicted under §784.021 upon a mens rea of "culpable negligence," which is akin to recklessness. *See LaValley v. State*, 633 So.2d 1126 (Fla. 5th DCA 1995); *Kelly v. State*, 552 So.2d 206 (Fla. 5th DCA 1989); *Green v. State*, 315 So.2d 499 (4th DCA 1975); and *DuPree v. State*, 310 So.2d 396 (Fla. 2nd DCA 1975); *see generally United States v. Garcia-Perez*, 779 F.3d 278, 285 (5th Cir. 2015) (equating Florida's "culpable negligence" standard with "recklessness").

For an offense to be a violent felony within the ACCA's elements clause, however, it must have as an element the active and intentional employment of force, which requires more than negligence or recklessness. *See Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004) (the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" the phrase "use . . . of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct"); *United States v. Palomino Garcia*, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force;" citing and following *Leocal*).

Admittedly, in *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013) the Court held that an aggravated assault conviction under §784.021 qualified as a violent felony within the ACCA's elements clause since "by its definitional terms, the offense necessarily includes an assault which is 'an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so." *Id*. at 1338 (emphasis in original). Therefore, the Court reasoned, "a conviction under section 784.021 will always include 'as an element the . . . threatened use of physical force against the person of another." *Id*. at 1338 (emphasis in original). The reasoning in Turner, however, is inconsistent with the strict, element-by-element comparison now required by the categorical approach as clarified in *Descamps v. United States*, 133 S.Ct. 2276 (2013) and *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014).

In *Howard*, the Court confirmed that sentencing courts conducting divisibility analysis "are bound to follow any state court decisions that define or interpret the statute's substantive elements because state law is what the state supreme court says it is"). *Id*. at 1346. And in *Turner*, the Court did not consider how Florida courts interpreted the mens rea element in the underlying assault statute, §784.011.

Based upon the Florida cases cited above, it is clear that the aggravated assault statute has been interpreted by the Florida courts to require no more than "culpable negligence," which is recklessness. Therefore, there is no "match" between the mens rea element in §784.021 and an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" as interpreted in *Leocal* and *Palomino Garcia*. As such, a conviction under §784.02 is categorically overbroad and not a violent felony within the elements clause.

Since the elements clause analysis in *Turner* has been abrogated, it should not preclude relief at this time. See, e.g., *United States v. Howard*, 742 F.3d 1334, 1338 (11th Cir. 2014) (acknowledging that *Descamps* had unsettled the "settled law" of this Circuit, and required that the Court revisit its earlier decision in *United States v. Rainer*, 616 F.3d 1212, 1213 (11th Cir. 2010); holding that "two crucial aspects of our decision in *Rainer* are no longer tenable after *Descamps*").

In regards to the 1996 State of Florida Attempted Armed Robbery conviction, for the same reasons that the 1986 State of Florida conviction for Armed Robbery With a Firearm does not qualify, and the 1986 State of Florida conviction for Attempted

Armed Robbery doesn't qualify the 1996 conviction doesn't qualify as a violent felony under the ACCA.

CONCLUSION

Because Mr. Franklin no longer qualifies as an armed career criminal, he respectfully requests that this Court grant this § 2255 motion and re-sentence him without the Armed Career Criminal Act enhancement.

Respectfully Submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY certify that on June 24, 2016 , I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

By: *s/ Michael D. Spivack*
Michael D. Spivack

SERVICE LIST

JIMMY LEE FRANKLIN **v.** UNITED STATES OF AMERICA

Case No. 16-22192-CIV-ALTONAGA/WHITE
(06-20709-CR-ALTONAGA)

United States District Court, Southern District of Florida

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A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22192-CIV-ALTONAGA/White

JIMMY LEE FRANKLIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court upon Movant, Jimmy Lee Franklin's amended Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 [ECF No. 9], filed on June 24, 2016. Respondent, the United States of America, filed an Answer and Memorandum of Law in Opposition [ECF No. 10] on July 5, 2016 and a Notice of Supplemental Authority [ECF No. 11] on July 29, 2016. Magistrate Judge Patrick A. White entered a Report of Magistrate Judge [ECF No. 12], recommending the Motion be denied. Franklin timely filed Objections to the Report [ECF No. 13] on May 16, 2017. The Government filed its own Objections ("Government Objections") [ECF No. 14] as well as a Response to Movant's Objections [ECF No. 16]. The Court has reviewed the parties' written submissions, the record, and applicable law.

When a magistrate judge's "disposition" is properly objected to, district courts must review the disposition *de novo*. FED. R. CIV. P. 72(b)(3). Although Rule 72 is silent on the standard of review, the United States Supreme Court has determined Congress's intent was to require *de novo* review only when objections are properly filed, not when neither party objects. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985); *Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1169 (N.D. Iowa 1999) (quoting 28 U.S.C. § 636(b)(1)). Since the parties filed timely objections, the Court

reviews the record *de novo*.

I. BACKGROUND

On August 1, 2007, Franklin plead guilty to, and was adjudicated guilty of, one count of possession of a firearm and ammunition by a convicted felon under 18 U.S.C. sections 922(g)(1) and 924(e). (*See* Plea Agreement [CR ECF No. 47][1] ¶ 1; Minute Entry for August 1, 2007 Change of Plea Hearing [CR ECF No. 45]).

The Presentence Investigation Report ("PSI")[2] advised Movant qualified as an armed career criminal under the Armed Career Criminal Act, 18 U.S.C. section 924(e), which provides for enhanced sentencing where a criminal defendant violates 18 U.S.C. section 922(g) and has at least three prior convictions for a violent felony or a serious drug offense. *See* 18 U.S.C. § 924(e); (*see also* PSI ¶ 25). The PSI indicated Movant was subject to the ACCA enhancement because of convictions for violent felonies associated with three separate Florida cases:

1. the "**1986 Case**," in which Movant was convicted of: (1) robbery with a firearm; (2) attempted robbery with a firearm; and (3) aggravated assault;
2. the "**1987 Case**,"[3] in which Movant was convicted of battery on a law enforcement officer; and
3. the "**1996 Case**," in which Movant was convicted of two counts of attempted armed robbery.

(*See id.* ¶¶ 25, 31, 32, 38). The PSI did not specify which offenses from each case supported the ACCA enhancement.

Neither the Government nor Movant filed objections to the PSI. (*See* Addendum to the Presentence Report). Movant was sentenced to a 180-month term of imprisonment, the

[1] References to docket entries in Movant's criminal case, Case No. 06-20709-CR-ALTONAGA, are denoted with "CR ECF No."

[2] The PSI and its Addendum are not on the public docket.

[3] The Government notes a typo in the PSI resulted in the incorrect notation of this case as being from 1988. (*See* Gov't's Resp. to Movant Objs. 1 n.1).

minimum statutory term under the ACCA. (*See* PSI ¶ 87; Judgment in a Criminal Case [CR ECF No. 55] 2).

Movant filed his first motion to vacate his sentence under 28 U.S.C. section 2255 — which was ultimately denied — on January 8, 2009. On January 31, 2011, Movant filed a *pro se* petition for habeas corpus under 18 U.S.C. section 1241 in the Middle District of Florida, challenging his conviction for battery on a law enforcement officer in light of recent Supreme Court and Eleventh Circuit case law, including *Curtis Johnson v. United States*, 559 U.S. 133 (2010). (*See* Answer 3). That petition, too, was denied. (*See id.*, Ex. B, Order ("Middle District Order") [ECF No. 10-2]).

On May 17, 2016, Movant filed an application for leave to file a second or successive motion under 28 U.S.C. section 2255 in light of the United States Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). (*See* Answer 5). The Eleventh Circuit Court of Appeals granted Franklin's application on June 14, 2016. (*See generally* USCA Order [ECF No. 1]).

In *Johnson*, the United States Supreme Court considered the legality of a conviction under the so-called "residual clause" of the ACCA. The ACCA requires a 15-year mandatory minimum sentence for a defendant convicted of being a felon in possession of a firearm who also has three previous convictions for a "violent felony" or "serious drug offense." *See* 18 U.S.C. § 924(e)(1).

A "violent felony" is any crime punishable by more than a one-year term that: (1) "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)(i); or (2) "is burglary, arson, or extortion, involves the use of explosives, or [(3)] otherwise involves conduct that presents a serious potential risk of physical

injury to another," *id.* § 924(e)(2)(B)(ii) (alteration added). The first part of the violent felony definition, contained in subsection (2)(B)(i), is known as the "elements clause," while the second and third parts in subsection (2)(B)(ii) are known as the "enumerated clause" and the "residual clause," respectively. In *Johnson*, the Supreme Court struck down the residual clause as void for vagueness. *See* 135 S. Ct. at 2557–60, 2563.

After *Johnson*'s invalidation of the residual clause, Franklin filed the present Motion arguing he no longer qualifies as an armed career criminal under the ACCA since he does not have three qualifying convictions for violent felonies under the ACCA's elements or enumerated clauses. (*See* Mot. 11–22).

II. ANALYSIS

Franklin can proceed on the Motion if: (1) it is unclear from the record which clause the Court relied on in applying the ACCA enhancement; and (2) Franklin's prior convictions no longer qualify him for the ACCA sentencing enhancement after *Johnson*. *See Leonard v. United States*, No. 16-22612-CIV, 2016 WL 4576040, at *2 (S.D. Fla. Aug. 22, 2016) (citation omitted); *see also In re Chance*, 831 F.3d 1335, 1339–41 (11th Cir. 2016); *but see In re Moore*, 830 F.3d 1268, 1271–72 (11th Cir. 2016). As the record is not clear regarding whether Movant was sentenced under the ACCA's residual clause as opposed to the elements or enumerated clause (*see* Report 14–15; *see also* PSI ¶ 25), the Court focuses on whether Movant has three prior convictions that still qualify as violent felonies after *Johnson*.

As discussed, Movant's ACCA enhancement was based upon three prior Florida cases: (1) the 1986 Case involving convictions for robbery with a firearm, attempted robbery with a firearm, and aggravated assault; (2) the 1987 Case involving a conviction for battery on a law

enforcement officer; and (3) the 1996 Case involving two convictions for attempted armed robbery.[4]

To determine whether an offense qualifies as a violent felony under the ACCA, courts apply the "categorical approach" or the "modified categorical approach" depending on the statute of conviction. *See, e.g.*, *Johnson*, 135 S. Ct. at 2557; *see also Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) ("The categorical approach is the framework the Court has applied in deciding whether an offense qualifies as a violent felony under the Armed Career Criminal Act.").

If the statute is indivisible — that is, if it lists only one set of elements for committing the offense — courts apply the categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). Under the categorical approach, a court is limited to looking at the statute's definition, *i.e.*, the elements of a defendant's prior convictions and not the facts underlying the prior offenses. *See id.*; *Mathis v. United States*, 136 S. Ct. 2243, 2246 ("[T]he underlying brute facts or means of commission . . . make[] no difference; even if [the defendant's] conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence." (citation and internal quotation marks omitted; alterations added)).

[4] At the outset, the Court acknowledges Movant's argument he does not have three separate convictions for sentencing purposes from the 1986 Case or two separate convictions from the 1996 Case. (*See* Movant Objs. 1–2; Gov't Resp. to Movant Objs. 1–2). The ACCA permits an enhancement for three previous convictions for a violent felony "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Movant maintains the armed robbery, attempted armed robbery, and aggravated assault in the 1986 Case "arose from the same criminal event" and so "must be counted as one conviction." (Movant Objs. 2 (citing *United States v. Sweeting*, 933 F.2d 962, 967 (11th Cir. 1991))). The Government concedes the PSI indicates these three crimes "took place simultaneously" and therefore were not committed on different occasions for ACCA enhancement purposes. (Gov't Resp. to Movant Objs. 2). Similarly, Movant's two attempted armed robbery convictions from the 1996 Case are considered one conviction for purposes of the ACCA enhancement. (*See id.*). As a result, in order for Movant's sentence to stand, each of the three Florida cases must contain at least one conviction for a violent felony.

The modified categorical approach is reserved for analyzing ACCA enhancements under divisible statutes, which provide multiple alternative elements capable of satisfying the offense. *See Descamps*, 133 S. Ct. at 2281. A court applying the modified categorical approach may consider a limited class of documents known as *Shepard*[5] documents to determine which of the possible elements of an alternatively worded statute were factually satisfied by a defendant's conduct. *See id.* at 2283–84.

The Court considers the 1986, 1987, and 1996 Cases to determine whether each involved a conviction that still qualifies as a violent felony after *Johnson*.

Armed Robbery. Movant was convicted of one count of armed robbery in the 1986 Case. Florida defines "robbery" as "the taking of money or other property which may be the subject of a larceny from the person or custody of another . . . when in the course of the taking there is the use of force, violence, assault, or putting in fear." FLA. STAT. § 812.13(1) (alteration added). Armed robbery occurs "[i]f in the course of committing the robbery the offender carried a firearm or other deadly weapon." *Id.* § 812.13(2)(a) (alteration added).

Since the filing of the Motion, the Eleventh Circuit has held a conviction for armed robbery categorically qualifies as a violent felony under the ACCA's elements clause. *See United States v. Fritts*, 841 F.3d 937, 943–44 (11th Cir. 2016). *Fritts* explained the Eleventh Circuit's prior precedents in *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006), and *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), already indicated Florida armed robbery and Florida robbery, even without a firearm, both qualify as violent felonies. *See Fritts*, 841 F.3d at 939–42. Movant argues *Dowd* and *Lockley* "cannot be squared with the strict categorical analysis now dictated" by subsequent Supreme Court precedent. (Movant Objs. 3). But *Fritts*

[5]*Shepard v. United States*, 544 U.S. 13 (2005).

ensures their holdings remain good law even after the Supreme Court's subsequent refining of the categorical approach. *See* 841 F.3d at 940–42.

Accordingly, Movant's 1986 conviction for armed robbery qualifies as a violent felony under the ACCA and constitutes his first of three prior convictions sustaining the ACCA enhancement.[6]

Attempted Armed Robbery. Movant was convicted of two counts of attempted armed robbery in the 1996 Case.[7] The ACCA's elements clause encapsulates violent felonies that have as an element "the use, *attempted use*, or threatened use of physical force." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Armed robbery categorically qualifies as a violent felony; by extension, attempted armed robbery qualifies also. (*See* Report 20 (citing *Lockley*, 632 F.3d at 1245) (explaining *Lockley* found attempted robbery satisfied the elements clause of the "crime of violence" provision in the Sentencing Guidelines)). Thus, Movant's 1996 convictions for attempted armed robbery stand as the second prior conviction supporting his ACCA enhancement.

Battery on a Law Enforcement Officer. Movant was convicted of battery on a law enforcement officer in the 1987 Case. Movant previously challenged the battery's status as a violent felony in a 28 U.S.C. section 2241 petition which was denied by the Middle District of Florida (*see* Government's Answer, Ex. B, Order in *Franklin v. Warden, FCC Coleman – Medium*, Case No. 5:11-cv-43-OC-38TBS ("Middle District Order") [ECF No. 10-2]); however,

[6] As stated, since Movant's 1986 convictions for attempted armed robbery and aggravated assault were not "committed on occasions different from" the 1986 armed robbery, 18 U.S.C. § 924(e)(1), the Court does not address those offenses. Because these three convictions were part of the same criminal episode, they constitute one prior conviction for the purposes of the ACCA enhancement.

[7] As with the 1986 Case, the two attempted armed robbery convictions in the 1996 Case were part of the same criminal event and can only count as one conviction for the ACCA enhancement. Movant was also convicted of one count of attempted armed robbery in the 1986 Case.

the present Motion does not at all discuss whether the offense is a violent felony, instead focusing on armed robbery, attempted armed robbery, and aggravated assault (*see generally* Mot.). For its part, the Government maintains battery on a law enforcement officer qualifies as a violent felony. (*See* Gov't's Answer 8–11; Gov't Objs. 7–9).

The felony offense of battery on a law enforcement officer under Florida Statutes section 784.07(2)(b) requires the same conduct as misdemeanor battery under Florida Statutes section 784.03(1)(a), with the added element the battery is directed against a law enforcement officer. A battery occurs when a person either: (1) "[a]ctually and intentionally touches or strikes another person against the will of the other," or (2) "[i]ntentionally causes bodily harm to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 136 (2010) (alterations in original) (quoting FLA. STAT. § 784.03(1)(a)).

Relying on *Curtis Johnson*, the Report summarily concludes battery on a law enforcement officer does not qualify as a violent felony under the ACCA. (*See* Report 18 (citing *Curtis Johnson*, 559 U.S. at 136–37) (other citations omitted)). But *Curtis Johnson* does not preclude use of a Florida battery conviction to support an ACCA enhancement if violent force was actually used in committing the battery. Instead, recognizing the battery statute is divisible and contains disjunctive elements, the Supreme Court determined courts should apply the modified categorical approach to decide "which version of the offense [the] defendant was convicted of." *Descamps*, 133 S. Ct. at 2284 (alteration added); *see Curtis Johnson*, 559 U.S. at 136.

Under the modified categorical approach, the Court may consider *Shepard* documents including charging documents, plea agreements, and transcripts of plea colloquies to determine which statutory phrase describes Movant's conviction. *Curtis Johnson*, 559 U.S. at 144

(citations omitted). Undisputed statements in a presentence investigation report may also be considered. *United States v. McCloud*, 818 F.3d 591, 595–96 (11th Cir. 2016) (citations omitted).

Movant did not object to the PSI and its summary of the battery offense. (*See* Gov't Objs. 9–10 (citing Middle District Order)). He has not argued his battery conviction no longer qualifies as a violent felony after *Johnson*. (*See* Gov't Resp. to Movant Objs. 2). Accordingly, Movant's conviction for battery on a law enforcement officer constitutes a third prior conviction for a violent felony, which, together with the convictions for armed robbery and attempted armed robbery, sustain his ACCA enhancement.

III. CERTIFICATE OF APPEALABILITY

A certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (alteration added). The Supreme Court has described the limited circumstances when a certificate of appealability should properly issue after the district court denies a habeas petition:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The [Movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000) (alteration added). Movant does not satisfy his burden, and the Court will not issue a certificate of appealability

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Report **[ECF No. 12]** is **ACCEPTED AND ADOPTED** as follows:

1. Movant, Jimmy Lee Franklin's Motion **[ECF No. 9]** is **DISMISSED**.

2. A certificate of appealability shall **NOT ISSUE**.

3. The Clerk of the Court is directed to **CLOSE** this case, and all pending motions are **DENIED as moot**.

DONE AND ORDERED in Miami, Florida, this 17th day of July, 2017.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Patrick A. White;
counsel of record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22192-CIV-ALTONAGA/White

JIMMY LEE FRANKLIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court upon Movant, Jimmy Lee Franklin's Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e) ("Motion") [ECF No. 19], filed August 8, 2017. The Court has carefully considered the Motion. The parties are directed to the Court's July 17 Order [ECF No. 17] accepting and adopting the Report of Magistrate Judge [ECF No. 12] for a recitation of the facts.

Federal Rule of Civil Procedure 59(e) allows a party the ability to seek post-trial relief in the form of a motion to alter or amend judgment. *See* FED. R. CIV. P. 59(e). "The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law and fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (alteration in original) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)). A party may not use Rule 59 to relitigate old matters or present arguments and evidence that could have been presented prior to the entry of judgment. *See id.* at 1343 (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)). "[T]he decision to alter or amend a judgment is committed to the sound discretion of the district court." *Mitra v. Glob. Fin. Corp.*, No. 08-80914-CIV, 2009 WL

2423104, at *1 (S.D. Fla. Aug. 6, 2009) (alteration added) (citing *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992)).

During its application of the modified categorical approach in the July 17 Order, the Court considered the unobjected-to summary of Movant's 1987 battery on a law enforcement officer offense, as stated in the PSI, to determine whether the offense qualified as a prior conviction for a violent felony so as to sustain an enhancement under the Armed Career Criminal Act. (*See* Order 7–9). Movant asserts the Court's "reliance on the Presentence Report as a *Shepard* document was a manifest error and thus, grounds for granting" his Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Habeas Motion") [ECF No. 9]. (Mot. 1). Alternatively, Movant appears to suggest a proper application of the modified categorical approach, including consideration of the PSI, would indicate the battery on a law enforcement officer was not a violent felony. (*See id.* 5–7).

This is the first time Movant has made any argument regarding his battery-on-a-law-enforcement-officer conviction. He did not raise the claim the battery conviction is not a violent felony in his Application for Leave to File a Second or Successive Motion. (*See* Application [ECF No. 1] 6–36). The amended Habeas Motion and Movant's Objections [ECF No. 16] do not analyze whether battery on a law enforcement officer is a violent felony — despite the Government's discussion of the subject (*see* Answer [ECF No. 10] 8–11). The Court examined the conviction to address the Government's Objections [ECF No. 14] to the Report's finding battery on a law enforcement officer categorically does not qualify as a violent felony. (*See id.* 7–9).

There is no error with regard to the Court's use of the PSI because the Court properly relied on the PSI prepared for the Movant's sentence at issue in this habeas proceeding, not the PSI of an unrelated case. *See United States v. Ramirez-Flores*, 743 F.3d 816, 823 (11th Cir. 2014) (citation omitted) (considering undisputed facts in a presentence report in using modified

categorical approach); *cf. United States v. Braun*, 801 F.3d 1301, 1305–06 (11th Cir. 2015) (holding a sentencing court may not rely on a presentence report from an unrelated proceeding and the district court erred in relying on the PSI prepared for a prior conviction for felony possession of a firearm). Movant alternatively asks the Court to consider legal arguments that were not raised in his original Application and the Habeas Motion (*see* Mot. 5–7), but Rule 59(e) forecloses presentation of arguments that were available to Movant before the judgment, *see Arthur*, 500 F.3d at 1343 (citation omitted).

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 19]** is **DENIED**. The language in the Court's July 17 Order [ECF No. 17] is revised to state the Habeas Motion **[ECF No. 9]** is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 11th day of August, 2017.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Jimmy Lee Franklin, *pro se*;
Magistrate Judge Patrick A. White;
counsel of record

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14495-HH

JIMMY LEE FRANKLIN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: TJOFLAT, WILSON and BRANCH, Circuit Judges.

BY THE COURT:

Jimmy Franklin, a federal prisoner proceeding with counsel, appeals the district court's denial of his counseled and authorized second 28 U.S.C. § 2255 motion to vacate, raising a challenge to his sentence under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and its denial of his *pro se* Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. We summarily granted Franklin a certificate of appealability ("COA"), in light of the Supreme Court's vacatur of the previous denial of Franklin's motion for a COA. Before briefing, the government and Franklin jointly filed a motion for summary reversal of the district court's order denying his § 2255 motion.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied,"

or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

In a § 2255 proceeding, we review a district court's legal conclusions *de novo* and its factual findings for clear error. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003).

The Armed Career Criminal Act ("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). The first prong of this definition is sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes" and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012). On June 26, 2015, the Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague 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*, 135 S. Ct. at 2557-58, 2563. Thereafter, the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264-65, 1268 (2016).

In *Beeman*, we held that a § 2255 movant must prove that it was "more likely than not" that the use of the residual clause led the sentencing court to impose the ACCA enhancement. *Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 1168 (2019). In doing so, we rejected the movant's premise that a *Johnson* movant had met his burden

unless the record affirmatively showed that the district court relied upon the ACCA's elements clause. *Id.* at 1223. We clarified that the relevant issue is one of historical fact—whether at the time of sentencing the defendant was sentenced solely under the residual clause. *Id.* at 1224 n.5. Moreover, we determined that, as the movant had not suggested a remand for an evidentiary hearing and chose to proceed on the basis of the record as it existed instead, we could address in the first instance whether he could carry his burden of proving a *Johnson* claim under the appropriate standard. *Id.* at 1221.

In *Pickett*, we vacated and remanded the district court's grant of the movant's second § 2255 motion, where the district court granted relief pursuant to *Johnson* and *Welch* in part because it was unclear from the record whether he had been sentenced under the elements or the residual clause. *United States v. Pickett*, 916 F.3d 960, 962-63, 967 (11th Cir. 2019). Both parties acknowledged that the burden announced in *Beeman* was applicable and agreed that the record was silent as to which clause was on the district court's mind when it applied the ACCA enhancement. *Id.* at 963-64. We stated that it was unclear whether and under which clause the movant's ACCA predicate offenses qualified as violent felonies at the time of his sentencing. *Id.* at 964-66. Nevertheless, we held that remand was appropriate because the parties had no occasion to address the requirements established in *Beeman* in the district court, and the district court was in a better position to review in the first instance what likely happened, especially because we were remanding the case to the same judge who initially sentenced the movant. *Id.* at 967.

Here, remand is appropriate. Both parties indicate that they do not wish to rest on the record as it exists. *See Beeman*, 871 F.3d at 1221. As this case's circumstances align almost identically to those in *Pickett*, we will follow *Pickett*'s remedy to allow the parties to present their

arguments about *Beeman* and to allow the district court to decide the issue in the first instance. *Pickett*, 916 F.3d at 967; *Davis*, 406 F.2d at 1162.

Accordingly, the parties' joint motion for summary reversal is GRANTED.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-cv-22192-CMA
(Underlying Criminal Case No. 06-cr-20709-CMA)

JIMMY LEE FRANKLIN,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF § 2255 MOTION

This matter is before the Court upon reversal and remand from the Supreme Court and the Eleventh Circuit. The Supreme Court granted Mr. Franklin's petition for certiorari, vacated the Eleventh Circuit's judgment denying him a certificate of appealability ("COA"), and remanded his case to the Eleventh Circuit to consider the government's concession that his Florida battery on a law enforcement officer (BOLEO) conviction was not an ACCA "violent felony" and he was not an Armed Career Criminal. *Franklin v. United States*, 139 S.Ct. 1254 (Feb. 25, 2019). Upon remand, the Eleventh Circuit issued Mr. Franklin a COA and set a briefing schedule. However, the parties filed a joint motion for summary reversal in light of *United States v. Pickett*, 916 F.3d 960 (11th Cir. 2019), seeking a remand to this Court to consider *Beeman v. United States*, 871 F.3d 1215 (11th Cir. Sept. 22, 2017) in the first instance and determine if Mr. Franklin met his burden of proof under that case.

On May 30th, the Court granted that motion, and the mandate issued (*see* attached).

In *Pickett*, the Eleventh Circuit vacated an order granting a § 2255 motion prior to the issuance of the decision in *Beeman* because the parties had not had an opportunity to address *Beeman*'s requirement that the movant show it is "more likely than not" that the district court "only relied on the residual clause." 916 F.3d at 964, 967. Here, as in *Pickett*, the Eleventh Circuit has reversed a judgment in a § 2255 case issued prior to *Beeman*, and in light of *Beeman*, directed this Court to clarify its thinking in counting a Florida BOLEO as an ACCA predicate in 2007.

For the reasons set forth below, Mr. Franklin respectfully requests that the Court find that it is indeed "more likely than not" that it relied *only* on the residual clause in counting his Florida BOLEO conviction as an ACCA "violent felony" at the 2007 sentencing, and that under *Beeman*, Mr. Franklin is therefore entitled to relief from his ACCA sentence.

PROCEDURAL HISTORY

1. On November 16, 2006, a federal grand jury charged Mr. Franklin with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §922(g)(1) and §924(e). (CRDE 1).[1] On August 8, 2007, Mr. Franklin pled guilty to that offense. (CRDE 47).

[1] All references to filings in Mr. Franklin's underlying criminal case, Case No. 06-20709-CR-Altonaga, will be cited as "CRDE." All references to filings in Mr. Franklin's § 2255 case, Case No. 16-22192-CIV-Altonaga, will be cited as "DE."

2. In the PSI, the probation officer recommended that Mr. Franklin be sentenced as an Armed Career Criminal because he had three qualifying "violent felonies," one of which was a conviction in a 1987 case for battery on a law enforcement officer ("BOLEO"). (PSI, ¶¶ 25, 32). As an Armed Career Criminal, Mr. Franklin's offense level rose from a 22 to a 33; he faced a statutory term of imprisonment of 15 years to life (rather than 0-10 years); and his advisory Guideline range increased to 188-235 months imprisonment. (PSI, ¶¶42, 87, 88).

3. Mr. Franklin did not object to the recommended ACCA enhancement, or to the PSI in any manner.

4. At the October 16, 2007 sentencing, no mention was made of the particular definitional clause of the ACCA upon which the probation officer or the Court was relying. The government stated that it sought a sentence at the low end of the Guidelines, and since that was the 180-month minimum mandatory, the Court imposed a 180-month term followed by 5 years supervised release. (CRDE 61).

5. In June 2015, the Supreme Court declared the residual clause of the ACCA unconstitutionally vague and void. *Samuel Johnson v. United States*, 135 S.Ct. 2551 (June 26, 2015). Thereafter, Mr. Franklin sought to file a successor § 2255 motion challenging the legality of his ACCA sentence in light of *Johnson*'s elimination of the residual clause, and the Eleventh Circuit authorized him to do so. *In re Jimmy Franklin*, Case No. 16-12528-J, Order at 3 (11th Cir. June 14, 2015).

6. On June 15, 2015, Mr. Franklin filed such a motion, arguing that in light of *Johnson* and the elimination of the ACCA's residual clause, it was now clear that he had been erroneously sentenced as an Armed Career Criminal. (DE1).

7. On May 5, 2017, the magistrate judge issued a report recommending denial of Mr. Franklin's § 2255 motion. (DE 12). As a threshold matter, the magistrate judge found that the standard for determining whether a successor § 2255 motion met the statutory criteria for relief under 28 U.S.C. § 2255(h) was "far from settled within the Eleventh Circuit," given the conflicting standards suggested by dicta in *In re Moore*, 830 F.3d 1268, 1273 (11th Cir. 2016) and *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016) (DE 12:7-11). The magistrate judge recommended following *Chance*'s suggestion that where it was unclear from the record on which ACCA clause the judge rested the enhancement, the movant's burden was only to show that the sentencing judge "*may* have used the residual clause."

Concluding that Mr. Franklin met that burden, the magistrate turned to whether under current law Mr. Franklin's priors qualified as ACCA predicates within the elements clause. Although the magistrate found as a threshold matter that "[a] conviction for battery on a law enforcement officer does not qualify as a violent felony for purposes of the ACCA" (DE 12:18, citing *Curtis Johnson v. United States*, 559 U.S. 133, 136-37 (2010)), the magistrate found that even without the BOLEO conviction, Mr. Franklin had three other still-qualifying "violent felonies." Accordingly, the magistrate recommended that this Court deny the § 2255, and a certificate of appealability. (DE 12: 21-23).

8. Both parties objected to different aspects of the Report and Recommendation. Pertinent to the issues herein, the government objected to the magistrate judge's rejection of the analysis in *Moor*e, in favor of the analysis in *Chance* (DE 14:3-7), and to his finding that Mr. Franklin's BOLEO was not a qualifying "violent felony" within the elements clause, under the modified categorical approach.

9. After the Court reviewed the record *de novo*, it concurred with the magistrate judge's application of *Chance*. (DE 17: 4). However, the court agreed with the government that Mr. Franklin remained an Armed Career Criminal even after *Samuel Johnson* because his BOLEO conviction continued to qualify as a "violent felony" within the ACCA's elements clause, under the modified categorical approach. (DE 17:6-9). The Court explained:

> *Curtis Johnson* does not preclude use of a Florida battery conviction to support an ACCA enhancement if violent force was actually used in committing the battery. Instead, recognizing the battery statute is divisible and contains disjunctive elements, the Supreme Court determined courts should apply the modified categorical approach to decide "which version of the offense [the] defendant was convicted of." *Descamps*, 133 S.Ct. at 2284 (alteration added); *see Curtis Johnson*, 559 U.S. at 136.
>
> Under the modified categorical approach, the Court may consider *Shepard* documents including charging documents, plea agreements, and transcripts of plea colloquies to determine which stator phrase describes Movant's conviction. *Curtis Johnson*, 559 U.S. at 144 (citations omitted). Undisputed statements in a presentence investigation report may also be considered. *United States v. McCloud*, 818 F.3d 591, 595-96 (11th Cir. 2016) (citations omitted).

(DE 17:8-9). Since Mr. Franklin "did not object to the PSI and its summary of the battery offense," the Court found, his BOLEO conviction constitutes "a third prior

conviction for a violent felony, which, together with the convictions for armed robbery and attempted armed robbery, sustain his ACCA enhancement." (DE 17:9). The Court denied Mr. Franklin a certificate of appealability. (DE 17:9).

10. On August 10, 2017, Mr. Franklin filed a timely *pro se* motion for reconsideration pursuant to Fed. R. Civ. P. 59(e), arguing that the Court's finding that his BOLEO conviction qualified as a "violent felony" constituted "manifest error" after *Mathis v. United States*, 136 S.Ct. 2243 (2016), since the "touching or striking" language in Fla. Stat. § 784.03(1)(a) was "one element with two alternative means." The next day, August 11, 2017, the Court issued an order denying the motion. (DE 20).

11. On September 22, 2017, the Eleventh Circuit issued its opinion in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), clarifying the burden that a § 2255 movant like Mr. Franklin must make to establish a valid *Johnson* claim. Specifically, the Court held, a § 2255 movant must prove that it is "more likely than not" that the sentencing court relied *only* on the residual clause. *Id.* at 1222, 1224.

12. On October 4, 2017, Mr. Franklin filed a timely notice of appeal, and on October 16, 2017, he sought a certificate of appealability on whether this Court erred by concluding that his BOLEO conviction was a "violent felony" within the elements clause under the modified categorical approach. On January 2, 2018, Judge Tjoflat denied Mr. Franklin a certificate of appealability. *Franklin v. United States*, Order (11th Cir. May 30, 2019) (No. 17-14495).

13. On April 6, 2018, Mr. Franklin sought certiorari on whether the "touch or strike" language in the Florida battery offense was indivisible under *Descamps* and *Mathis*, and if so, whether it was error to hold that a Florida conviction for battery on a law enforcement officer categorically requires the use of "violent force" as defined in *Curtis Johnson*.

14. On July 6, 2018, the Solicitor General filed a memorandum acknowledging that the Florida battery statute is divisible into only "*two* parts:" one that covers "actually and intentionally touch[ing] or strik[ing] another person against the will of the other," and the other that covers "intentionally caus[ing] bodily harm to another person." Memorandum of the United States, *Franklin v. United States*, No. 17-8401, at 4 (Jul. 6, 2018) (citation omitted; emphasis added). Thus, a "touching or striking" battery was not itself further divisible, as this Court had held. "Since it was clear from *Curtis Johnson* that a conviction for a 'touching or striking' battery requires only the "most 'nominal contact,' such as a 'tap on the shoulder without consent," the government agreed that "a conviction for that type of simple battery does not categorically qualify as a 'violent felony' under the ACCA." Memorandum at 5.

Here, the government acknowledged, there was "[n]othing in the record" to indicate that Mr. Franklin's conviction was for "bodily harm" battery. Memorandum at 5. "And because 'touching or striking' battery does not categorically require the use of violent force," the government also acknowledged that Mr. Franklin's BOLEO conviction "does not qualify as a violent felony under

the ACCA's elements clause." Memorandum at 5. Accordingly, the government asked the Supreme Court to grant certiorari, vacate this Court's judgment, and remand (GVR) for further consideration of Mr. Franklin's challenge to his ACCA sentence in light of its position. Memorandum at 5-6.

15. On February 25, 2019, the Supreme Court GVR'd the case, remanding to the Eleventh Circuit "in light of the position asserted by the Solicitor General in his brief for the United States filed on July 5, 2018." *Franklin v. United States*, 139 S.Ct. 1254 (Feb. 25, 2019).

16. On April 12, 2019, Judge Tjoflat granted Mr. Franklin a certificate of appealability "[i]n light of the Supreme Court's decision granting certiorari." *Franklin v. United States, Order*, (11th Cir. Apr. 12, 2019) (No. 17-14495). The Court then set a briefing schedule, with Mr. Franklin's initial brief to be filed on or before May 22, 2019.

17. On April 23, 2019, the parties filed a joint motion for summary reversal and remand under *United States v. Pickett*, 916 F.3d 960 (11th Cir. 2019) to allow consideration of *Beeman*. The Eleventh Circuit explained in *Pickett* that because *Beeman* requires a showing that a defendant was "more likely than not" sentenced under the residual clause, that in turn required a determination of "what the district court actually had in mind when it sentenced Pickett under ACCA." *Id.* at 961, 964. However, the Eleventh Circuit clarified, a defendant did *not* have to show "that the convictions *only qualified under* the residual clause—that would be an escalation of the burden of proof above what *Beeman* requires." *Id.* at 964.

One (but not the only) way of showing what the district court had in mind at the time of sentencing, the Court noted in *Pickett*, was to consider the "legal landscape" at the time of sentencing. In that regard, the Eleventh Circuit recognized that when Mr. Pickett was sentenced in February of 2007, a Florida battery conviction "almost certainly qualified under the residual clause, though no binding precedent said as much at the time." *Id.* at 964–65 (noting that while an unpublished decision of that Court had so held, it was "nonbinding and difficult to locate;" however, the district court "would not have needed to dig so deep in order to find that the convictions easily qualified under the residual clause.") Indeed, the Court found, the residual clause "was the most obvious clause under which the convictions qualified," *id.* at 965, and the "district court likely would have quickly determined that Pickett's battery convictions qualified under the residual clause." *Id.* at 966.. By contrast, the Court found, it was "uncertain at best" whether BOLEO also qualified under the elements clause at that time. *Id.* at 964-66. But even so, the Court held, Mr. Pickett still needed to show that it was at least "unlikely that the trial court thought the convictions also qualified under the elements clause." *Id.*

"With the residual clause plainly available," the Eleventh Circuit acknowledged, "the district court would not have needed to consider the elements clause at all." *Id.* However, since the Eleventh Circuit simply did "not know what else [the district court] might have thought," the Court remanded the case. *Id.* at 966. And indeed, it encouraged the district court on remand in *Pickett* to make a factual finding about "what actually happened" – "which clause(s) it had actually

considered at the original sentencing," and then, in light of that, "whether Pickett can show, as a historical fact, that he was more likely than not sentenced under only the residual clause." *Id.* at 967.

18. When the parties in this case filed their joint motion for summary reversal and remand under *Pickett*, they first advised the Eleventh Circuit of their agreement that the "touch or strike" language of the Florida battery statute was *not* divisible. In that regard, they noted with significance that the Eleventh Circuit had itself just so recognized in *United States v. Vereen*, 920 F.3d 1300, 1314 (11th Cir. Apr. 5, 2019). And since a "touching or striking" battery was *not* a qualifying ACCA predicate, they noted that the only remaining issue to be decided in Mr. Franklin's case was whether he could meet his burden under *Beeman* of showing that it was "more likely than not" that the district court imposed the ACCA enhancement under the residual clause, and "only the residual clause." *Id.* at 1221-22, 1224.

On that issue, the parties noted that *Pickett* was on point and indicated a remand was in order. In neither *Pickett* nor this case, they explained, did the parties have an "opportunity to address" – nor did the district court have an opportunity to determine – whether it was "more likely than not" that in finding that Florida BOLEO was an ACCA "violent felony," it "*only relied*" on the residual clause. *Pickett*, 916 F.3d at 964, 966-67. Because (1) *Beeman* was rendered after this Court denied Mr. Franklin's § 2255 motion; (2) there could be no substantial question that his case should be remanded under *Pickett*; and (3) time was of the essence since Mr. Franklin had almost completely served his entire 15 year ACCA

term by that juncture,[2] the parties urged the Eleventh Circuit to summarily reverse and remand his case to allow this Court to conduct a *Beeman* inquiry.

19. On May 30, the Eleventh Circuit granted the parties' joint motion, and reversed this Court's judgment denying Mr. Franklin's § 2255 relief. *Franklin v. United States*, Order (11th Cir. May 30, 2019) (No. 17-14495). In remanding to this Court for reconsideration in light of *Beeman*, the Eleventh Circuit agreed that both a summary disposition and remand were appropriate under *Pickett*, as "this case's circumstances align almost identically to those in *Pickett*," and "[b]oth parties indicate that they do not wish to rest on the record as it exists." *Id.* at 3 (citing *Beeman*, 871 F.3d at 1221). As such, the Court "follow[ed] *Pickett*'s remedy to allow the parties to present their arguments about *Beeman* and to allow the district court to decide the issue in the first instance." *Id.* at 3-4 (citing *Pickett*, 916 F.3d at 967).

LEGAL ARGUMENT

Given the Eleventh Circuit's decision in *Pickett* and its reversal and remand based upon *Pickett* in this case, Mr. Franklin respectfully requests that this Court make explicit what was "more likely than not" the case at his 2007 sentencing: that this Court relied solely on the residual clause to impose the ACCA enhancement. The Eleventh Circuit's opinion in *Pickett* acknowledges that in 2007, Florida battery

[2] In that regard, the parties advised that Mr. Franklin's BOP release date on his 15-year ACCA sentence was (then) December 26, 2019, with an expected June 27, 2019 release to a halfway house. However, Mr. Franklin's release date has just been re-calculated to take into account the new gain time provisions of the First Step Act. As such, his newly-calculated release date is even sooner – **September 13, 2019** – and he is now at a halfway house awaiting the termination of his ACCA sentence on that date.

convictions had "easily qualified" under the residual clause, which was "plainly available." 916 F.3d at 965–66. Indeed, it was for that very reason that Mr. Franklin did not object to the ACCA enhancement. And given that there was no objection at the 2007 sentencing, it would have been entirely unnecessary for this Court to even consider the elements clause at the sentencing – let alone use the elements clause as an alternative basis for imposing the ACCA enhancement.

Three additional facts about the "legal landscape" at the time make it exceedingly unlikely that the Court would have "also" imposed the enhancement under the elements clause. *First*, as the Eleventh Circuit recognized in *Pickett*, whether a BOLEO offense qualified under the elements clause was still "uncertain" as a matter of law in 2007. *Id.* at 966. *Second*, what was certain – and had been certain since the Supreme Court's 1990 decision in *Taylor v. United States*, 495 U.S. 575 (1990) – was that sentencing courts were permitted to impose all ACCA enhancements under the residual clause, even if a predicate potentially qualified under another clause. Indeed, the Supreme Court had explicitly encouraged courts to do so in *Taylor*. *See id.* at 598, 609 n. 9 (confirming that "[t]he Government remains free to argue that *any offense* – including offenses similar to [the enumerated crime of] generic burglary – should count towards enhancement as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another" under the residual clause) (emphasis added). *Third*, it was not until April of 2008 (after Mr. Franklin's sentencing) in *Begay v. United States*, 553

U.S. 137 (2008), that the Supreme Court put *any* constraint on using the residual clause as the go-to path for the enhancement.

Since Mr. Franklin was sentenced during the 18-year residual clause "free-for-all" that existed between *Taylor* and *Begay*, common sense compels the conclusion that it is "more likely than not" that this Court counted his BOLEO offense as an ACCA "violent felony" solely under the residual clause. Indeed, that common sense conclusion is bolstered by the fact that other judges on this very Court have now explicitly confirmed that in imposing ACCA sentences at uncontested sentencings during this very same time period, they focused only on the residual clause.

Judge Middlebrooks. Notably, upon remand in *Pickett*, Judge Middlebrooks stated that even though he had no specific recollection of that particular sentencing, it was indeed "more likely than not" that he relied solely upon the residual clause in counting Mr. Pickett's Florida BOLEO conviction as an ACCA "violent felony" in 2007. In so finding, Judge Middlebrooks referenced his prior statement in footnote 11 of his order granting Mr. Pickett's § 2255 motion, rightly recognizing that "Mr. Pickett had little reason to object to the PSI given the residual clause." *Pickett v. United States*, Case No. 16-cv-61298-DMM, DE 28 (June 7, 2019) (citing DE 11; finding that Mr. Pickett has thus satisfied his burden of proof under *Beeman*).[3] Moreover, Judge Middlebrooks has acknowledged that he even relied solely on the residual clause a year later – in October 2008 – in imposing

[3] Upon remand in *Pickett*, the government notably did not oppose reinstating the original order granting § 2255 relief.

an ACCA sentence upon another similarly-situated defendant, Roderick Vann, based upon a BOLEO conviction. *See Vann v. United States*, Case No. 16-cv-80853, DE 28:5–7 (Oct. 26, 2017) (denying government's motion for reconsideration under *Beeman* of court's grant of § 2255 motion; expressly finding that Mr. Vann had met his burden of proof based on the legal landscape at the time of sentencing). *See also Railey v. United States*, Case No. 11-cr-80048-DMM, DE 85:12 (Nov. 9, 2017) (finding that it was also "more likely than not" that the court relied on the residual clause in counting other Florida battery convictions – for felony battery and aggravated battery on a pregnant woman – as ACCA violent felonies at a 2011 sentencing, given the *Curtis Johnson* decision in 2010; having thus met *Beeman*, the movant had met his burden of proving a *Johnson* claim).

Judge Seitz. Notably, in the wake of *Beeman*, Judge Seitz acknowledged that her "default practice" was to rely only on the residual clause in uncontested ACCA sentencings where the predicate was not enumerated. In explaining why that was, Judge Seitz first underscored that "there was no legal requirement that a sentencing court state on the record its finding as to which of the three ACCA clauses . . . the qualifying state conviction fell under." *Curry v. United States*, Case No. 16-cv-22898, DE 25:2 (Mar. 7, 2018). However, she explained, in determining whether the ACCA applied, she applied the following approach: "If the state conviction fell within the enumerated clause, it was readily determined. If it did not fall within the enumerated clause, then the residual clause was considered. Because its language was broad enough to include a host of offenses the ACCA was

attempting to address, the undersigned defaulted to the residual clause when applying the ACCA enhancement in this and all other similar cases. This spared the court the time consuming and mechanistic approach of comparing the often disparate elements of the state conviction with the requirements under the elements clause of the ACCA." *Id.*

Judge Seitz has acknowledged that she employed that same default practice in 2006, when she sentenced Shannon Dawson, whose ACCA enhancement (like Mr. Franklin's) was based on a Florida BOLEO conviction. *Dawson v. United States*, Case No. 16-cv-22399, DE 29:16 n.12 (Feb. 28, 2018) ("It is noteworthy, as a matter of fact, that the undersigned was the sentencing judge in this case. The Court affirmed the Magistrate Judge's finding in the prior habeas that Movant had been sentenced under the residual clause as that was the Court's default practice at the time of sentencing."). And in fact, in recently applying the Eleventh Circuit's *Pickett* decision in *Curry* (which involved a 2005 sentencing), Judge Seitz commented that *Mr. Pickett himself* would satisfy *Beeman* under her default practice. *See Curry*, Case No. 16-cv-22898, DE 44:16 (May 10, 2019) (granting relief post-*Pickett* after finding that Mr. Curry and Mr. Pickett were similarly situated).

* * *

For all of the above reasons, the Court should make a factual finding that, more likely than not, it relied solely on the residual clause in sentencing Mr. Franklin as an Armed Career Criminal. That finding would be consistent with: the Eleventh Circuit's discussion of the legal landscape on BOLEO and the elements

and residual clauses in 2007; the Supreme Court's confirmation in footnote 9 of *Taylor* that all predicates could be considered under the residual clause; Judge Middlebrooks' statements in *Pickett*, *Vann*, and *Railey*; and the default practice of Judge Seitz which – presumably—was the safe, default practice of many Judges in this District, when considering a BOLEO conviction as an ACCA predicate where no objection was raised. In such cases, there was no logical reason for a judge to broach the more difficult topic of whether there was an exact match in elements between the Florida BOLEO statute and the ACCA's elements clause.

As Judges Middlebrooks and Seitz have done, the Court here as well should find that since *Beeman* has been met, Mr. Franklin's motion to vacate his illegal ACCA sentence under § 2255 should be granted. That result is warranted because there is no dispute at this time that as a matter of law, Mr. Franklin is not an Armed Career Criminal today, and he has greatly overserved his lawful maximum sentence under 18 U.S.C. § 924(a)(2). Denying him relief from his enhanced ACCA sentence would create unwarranted sentencing disparities in this District with the defendants in *Pickett*, *Vann*, *Railey*, *Dawson*,[4] and *Curry*.

CONCLUSION

For the foregoing reasons, Mr. Franklin respectfully requests that this Court expressly find that it relied solely on the residual clause to impose his ACCA enhancement. With that finding, he asks that the Court grant his § 2255 motion,

[4] The government elected to dismiss (rather than pursue) its appeal from the order granting Mr. Dawson § 2255 relief. *See* 11th Cir. Case No. 18-12133 (government appeal dismissed July 2, 2018).

and re-sentence him to the 120 month statutory maximum under § 924(a)(2) so that he may be immediately released from the custodial portion of his sentence and begin serving a reduced term of supervised release. Notably, at a total offense level of 22 and criminal history category IV, Mr. Franklin's guideline range without the ACCA enhancement would be 63-78 months imprisonment. Since he has already served double the top of that range at this time, he asks that the Court to take that into account by imposing a reduced term of 1 year supervised release.

Respectfully Submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: */s/Brenda G. Bryn*
Brenda G. Bryn
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I HEREBY certify that on June 24, 2019 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/Brenda G. Bryn

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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May 30, 2019

Brenda Greenberg Bryn
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Appeal Number: 17-14495-HH
Case Style: Jimmy Franklin v. USA
District Court Docket No: 1:16-cv-22192-CMA
Secondary Case Number: 1:06-cr-20709-CMA-1

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

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Christopher Bergquist, HH
Phone #: 404-335-6169

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14495-HH

JIMMY LEE FRANKLIN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: TJOFLAT, WILSON and BRANCH, Circuit Judges.

BY THE COURT:

Jimmy Franklin, a federal prisoner proceeding with counsel, appeals the district court's denial of his counseled and authorized second 28 U.S.C. § 2255 motion to vacate, raising a challenge to his sentence under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and its denial of his *pro se* Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. We summarily granted Franklin a certificate of appealability ("COA"), in light of the Supreme Court's vacatur of the previous denial of Franklin's motion for a COA. Before briefing, the government and Franklin jointly filed a motion for summary reversal of the district court's order denying his § 2255 motion.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied,"

or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

In a § 2255 proceeding, we review a district court's legal conclusions *de novo* and its factual findings for clear error. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003).

The Armed Career Criminal Act ("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). The first prong of this definition is sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes" and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012). On June 26, 2015, the Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague 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*, 135 S. Ct. at 2557-58, 2563. Thereafter, the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264-65, 1268 (2016).

In *Beeman*, we held that a § 2255 movant must prove that it was "more likely than not" that the use of the residual clause led the sentencing court to impose the ACCA enhancement. *Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 1168 (2019). In doing so, we rejected the movant's premise that a *Johnson* movant had met his burden

unless the record affirmatively showed that the district court relied upon the ACCA's elements clause. *Id.* at 1223. We clarified that the relevant issue is one of historical fact—whether at the time of sentencing the defendant was sentenced solely under the residual clause. *Id.* at 1224 n.5. Moreover, we determined that, as the movant had not suggested a remand for an evidentiary hearing and chose to proceed on the basis of the record as it existed instead, we could address in the first instance whether he could carry his burden of proving a *Johnson* claim under the appropriate standard. *Id.* at 1221.

In *Pickett*, we vacated and remanded the district court's grant of the movant's second § 2255 motion, where the district court granted relief pursuant to *Johnson* and *Welch* in part because it was unclear from the record whether he had been sentenced under the elements or the residual clause. *United States v. Pickett*, 916 F.3d 960, 962-63, 967 (11th Cir. 2019). Both parties acknowledged that the burden announced in *Beeman* was applicable and agreed that the record was silent as to which clause was on the district court's mind when it applied the ACCA enhancement. *Id.* at 963-64. We stated that it was unclear whether and under which clause the movant's ACCA predicate offenses qualified as violent felonies at the time of his sentencing. *Id.* at 964-66. Nevertheless, we held that remand was appropriate because the parties had no occasion to address the requirements established in *Beeman* in the district court, and the district court was in a better position to review in the first instance what likely happened, especially because we were remanding the case to the same judge who initially sentenced the movant. *Id.* at 967.

Here, remand is appropriate. Both parties indicate that they do not wish to rest on the record as it exists. *See Beeman*, 871 F.3d at 1221. As this case's circumstances align almost identically to those in *Pickett*, we will follow *Pickett*'s remedy to allow the parties to present their

arguments about *Beeman* and to allow the district court to decide the issue in the first instance. *Pickett*, 916 F.3d at 967; *Davis*, 406 F.2d at 1162.

Accordingly, the parties' joint motion for summary reversal is GRANTED.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 16-22192-CIV-ALTONAGA
(06-20709-CR-ALTONAGA)

JIMMY LEE FRANKLIN,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____ /

GOVERNMENT'S RESPONSE TO MOVANT'S
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF SECTION 2255 MOTION

The United States of America, by and through the undersigned Assistant United States Attorney, hereby files this Response to the Movant's Supplemental Memorandum in Support of Section 2255 Motion (CVDE 27).[1]

Pursuant to the order of the Eleventh Circuit Court of Appeals granting the parties' joint motion for summary reversal (CVDE 27-1), the issue before this Court is whether or not the Movant has satisfied his burden under *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), of proving that it is more likely than not that the Court relied solely upon the residual clause of the Armed Career Criminal Act ("ACCA") in determining that his conviction for battery on a law enforcement officer ("BOLEO") was a violent felony. Here, Movant cannot satisfy that burden in light of the legal landscape at the time of his sentencing.

This Court sentenced Movant on October 16, 2007 (CRDE 54). Five months earlier, the Eleventh Circuit issued its decision in *United States v. Llanos-Agostadero*, 486 F.3d 1194, 1197

[1] Documents filed in this case will be referred to as CVDE followed by the appropriate docket entry number. Documents filed in Movant's underlying criminal case will be referred to as CRDE followed by the appropriate docket entry number.

(11th Cir. May 15, 2007). The issue in *Llano-Agostadero* was whether or not the defendant's prior conviction for aggravated battery on a pregnant woman was a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii)). "Application Notes for U.S.S.G. § 2L1.2(b)(1) provide that a 'crime of violence' means, *inter alia,* 'any offense under . . . state . . . law that has as an element the use, attempted use, or threatened use of physical force against the person of another.' U.S.S.G. § 2L1.2(b)(1), comment. (n.1(B)(iii))." *Id*. at 1196. The Eleventh Circuit noted that this is identical to the definition of a "crime of violence" in U.S.S.G.§ 4B1.2(a)(1). *Id*., at 1197. "[T]he offense of aggravated battery on a pregnant woman under Florida law has as an element that the defendant commit simple battery." *Id*. (citing *Small v. State,* 889 So.2d 862, 863 (Fla.Dist.Ct.App.2004)). The Eleventh Circuit went on to note that in *United States v. Glover,* 431 F.3d 744 (11th Cir. 2005), it "set forth the elements of simple battery under Florida law and held that simple battery on a law enforcement officer, in violation of Fla. Stat. §§ 784.03 and 784.07, is a crime of violence under U.S.S.G. § 4B1.2(a)." *Id*. Because "there is no persuasive reason why simple battery on a law enforcement officer is a 'crime of violence,' . . . while simple battery on a pregnant woman (which constitutes aggravated battery) is not" the Eleventh Circuit concluded "that aggravated battery on a pregnant woman, in violation of Fla. Stat. § 784.045(1)(b), is a crime of violence under U.S.S.G. § 2L1.2(b)(1)."

"The definition of 'violent felony' under ACCA is nearly identical to the definition of 'crime of violence' under the Sentencing Guidelines, and both definitions have included an identical residual clause. 18 U.S.C. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a)(2)(2006). As a result, decisions about one have been applied to the other." *United States v. Pickett*, 916 F.3d 960, 965 n.2 (11th Cir. 2019) (citing *United States v. Matchett*, 802 F.3d 1185, 1193–94 (11th Cir. 2015)). Accordingly, the law in this Circuit in place at the time of Movant's sentencing was clear that

BOLEO was a crime of violence under the elements clauses of U.S.S.G. §§ 2L1.2(b)(1) and 4B1.2(a)(1) and, in turn, a violent felony under the elements clause of the ACCA. Movant cannot establish that it was more likely than not that this Court ignored the binding precedent of *Llanos-Agostadero* and determined his ACCA eligibility based solely on the residual clause.[2]

Llanos-Agostadero makes this case distinguishable from *United States v. Pickett*, 916 F.3d 960 (11th Cir. 2019). The defendant in that case was sentenced on February 2, 2007, *id.*, at 962, approximately a month and a half prior to the issuance of the decision in *Llanos-Agostadero*. The Eleventh Circuit found that the "precedential landscape" at the time of Pickett's sentencing was "uncertain," in part, because of its conclusion that "[i]n context" the statement in *Glover* that BOLEO is a crime of violence "seems" to be "dicta." *Id*. at 966. Whatever uncertainty there was in the legal landscape at the time of Pickett's sentencing was resolved by the time of Movant's sentencing in light of the Eleventh Circuit's statements in *Llanos-Agostadero* that "*Glover . . . held* that simple battery on a law enforcement officer, in violation of Fla. Stat. §§ 784.03 and 784.07, is a crime of violence" and "that aggravated battery on a pregnant woman, in violation of Fla. Stat. § 784.045(1)(b), is a crime of violence." *Llanos-Agostadero,* 486 F.3d at 1197-98 (emphasis added).

[2] Nowhere in his supplemental memorandum does Movant address the impact of *Llanos-Agostadero* on the precedential landscape at the time of his sentencing.

WHEREFORE, the Court should enter an order finding that Movant has failed to satisfy his burden of proving that it is more likely than not that this Court relied exclusively on the residual clause when it classified his BOLEO conviction as a crime of violence and DENYING the motion to vacate, accordingly.[3]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 1, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Sean Paul Cronin
Sean Paul Cronin
Assistant United States Attorney

[3] If, despite the then-binding precedent of *Llanos-Agostadero,* the Court expressly finds that it relied solely on the residual clause to impose the ACCA enhancement, the United States would not oppose, under the particular circumstances of this case, the granting of the Section 2255 motion.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22192-CIV-ALTONAGA

JIMMY LEE FRANKLIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court following the Order [ECF No. 27-1] of the Eleventh Circuit Court of Appeals granting the parties' joint motion for a summary reversal to allow the undersigned to determine whether it is more likely than not that the Court relied exclusively on the residual clause when it classified Movant's conviction for battery on a law enforcement officer ("BOLEO") as a crime of violence at his sentencing hearing. Movant, Jimmy Lee Franklin, filed a Supplemental Memorandum in Support of § 2255 Motion [ECF No. 27], to which the Government filed a Response [ECF No. 28]. The Court has carefully reviewed the parties' memoranda, the record, and applicable law.

On October 16, 2007, the undersigned sentenced Mr. Franklin in case number 06-20709-Cr, as an Armed Career Criminal after he pled guilty to being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. sections 922(g)(1) and 924(e), because he had three qualifying "violent felonies." (*See* Supp. Mem. ¶¶ 1–4). Among those offenses was the BOLEO. (*See id.*). Given *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), the Court is now asked to determine whether it is more likely than not that she relied solely on the residual clause of the Armed Career Criminal Act ("ACCA") in determining Mr. Franklin's BOLEO conviction was a

violent felony. It is unremarkable that the Court has no specific recollection of Mr. Franklin's sentencing hearing, some 12 years later.

Yet, the Court must agree with the Government it is more likely than not that she did not rely on the ACCA's residual clause in counting the BOLEO conviction as an ACCA violent felony. In *United States v. Llanos-Agostadero*, 486 F.3d 1194, 1197–98 (11th Cir. 2007), the Eleventh Circuit stated "*Glover* . . . held that simple battery on a law enforcement officer, in violation of Fla. Stat. §§ 784.03 and 784.07, is a crime of violence," and "aggravated battery on a pregnant woman, in violation of Fla. Stat. § 784.045(1)(b), constitutes a crime of violence." (alteration added). As noted by the Government, "the law in this Circuit . . . at the time of Movant's sentencing was clear that BOLEO was a crime of violence under the elements clauses of U.S.S.G. §§ 2L1.2(b)(1) and 4B1.2(a)(1) and, in turn, a violent felony under the elements clause of the ACCA." (Resp. 2–3 (alteration added)). The Court would not have ignored the binding precedent of *Llanos-Agostadero*, decided on May 15, 2007, to determine Mr. Franklin's ACCA eligibility based solely on the residual clause, but instead would have decided BOLEO was a crime of violence under the ACCA's elements clause.

DONE AND ORDERED in Miami, Florida, this 8th day of July, 2019.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22192-CIV-ALTONAGA/Goodman

JIMMY LEE FRANKLIN,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER

THIS CAUSE came before the Court on Movant's Motion for a Certificate of Appealability [ECF No. 30], filed under 28 U.S.C. section 2253(c)(2). The Court agrees with Movant's analysis that reasonable jurists could debate whether Movant's Motion to Correct Sentence [ECF No. 9] should have been resolved in a different manner or the issues he raised were adequate to deserve encouragement to proceed further. (*See* Motion for a Certificate 2 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000))). Accordingly, it is

ORDERED AND ADJUDGED that Movant's Motion for a Certificate of Appealability **[ECF No. 30]** is **GRANTED**. A certificate of appealability is entered on the following issue:

> In a case where the sentencing record does not reveal which clause of the ACCA was the basis for the enhancement, whether a section 2255 movant must prove it is "more likely than not" the court relied only on the residual clause, as the First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have held; or rather, the movant need only show the ACCA enhancement "may have" rested on the residual clause, as the Second, Third, Fourth, and Ninth Circuits have held.

DONE AND ORDERED in Miami, Florida, this 23rd day of July, 2019.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE