Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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August 11, 2021

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

Appeal Number: 21-11301-J
Case Style: Deante Blackman v. USA
District Court Docket No: 8:16-cv-01659-SCB-TBM
Secondary Case Number: 8:06-cr-00353-SCB-TBM-1

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

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Davina C Burney-Smith, J/ abm
Phone #: (404) 335-6183

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11301-J

DEANTE BLACKMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Deante Blackman, a federal prisoner, moves this Court for a certificate of appealability ("COA") to appeal the denial of his amended 28 U.S.C. § 2255 motion.

I.

Mr. Blackman is serving a 308-month sentence after pleading guilty to: (1) aiding and abetting another who attempted to murder a witness, 18 U.S.C. §§ 1512(a)(1)(C), 1111 (Count 1); (2) aiding and abetting another who carried a firearm that was discharged during and in relation to a crime of violence, that is,

Count 1, 18 U.S.C. § 924(c)(1)(A) (Count 3); (3) conspiracy to distribute cocaine (Count 4); and (4) possession with intent to distribute cocaine base (Count 6).

In June 2016, Mr. Blackman filed a 28 U.S.C. § 2255 motion, arguing that his § 924(c) conviction was invalid in light of Johnson v. United States, 576 U.S. 591 (2015). The District Court dismissed his § 2255 motion as untimely and in May 2017 this Court granted Mr. Blackman a COA on the issue of whether, in light of Johnson, the court erred in determining that his § 2255 motion was time-barred under 28 U.S.C. § 2255(f)(3). This Court then stayed Mr. Blackman's appeal pending the resolution of United States v. Davis, 139 S. Ct. 2319 (2019). Following the decision in Davis, this Court lifted the stay, and vacated and remanded the District Court's order dismissing Mr. Blackman's § 2255 motion for consideration of his Davis claim in the first instance.

In the District Court, Mr. Blackman filed an amended § 2255 motion seeking to vacate his § 924(c) conviction on two grounds: (1) his sentence on that conviction failed to comport with due process as outlined in Johnson because the predicate offenses listed in his indictment are not crimes of violence; and (2) in light of Davis, his § 924(c) conviction was imposed in violation of due process because it rested solely on § 924(c)'s residual clause. As the District Court explained, both grounds rest on the resolution of the same substantive issue: whether Mr. Blackman's § 924(c) predicate offense of aiding and abetting an attempted killing under 18

U.S.C. § 1512(a)(1)(C) qualifies as a crime of violence under § 924(c)'s elements clause or whether it fell solely under the (unconstitutionally vague) residual clause.

In February 2021, the District Court issued an order denying Mr. Blackman's amended § 2255 motion because his vagueness challenge was procedurally defaulted. The court also denied him a COA. The court determined Mr. Blackman could establish cause for his default, because his vagueness challenge to § 924(c) was not reasonably available to him at his February 2007 sentencing. Nevertheless, the court held that Mr. Blackman could not demonstrate prejudice or actual innocence. Mr. Blackman now moves this Court for a COA.

II.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the District Court denied a motion to vacate on procedural grounds, the movant must show that reasonable jurists would debate (1) whether the motion states a valid claim of the denial of a constitutional right, and (2) whether the District Court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000).

Collateral review under § 2255 is not a substitute for a direct appeal. Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004). A defendant can overcome this procedural bar by establishing either (1) cause for the default and actual prejudice from the alleged error, or (2) that he is actually innocent of the crimes for

which he was convicted. Id. To show actual innocence, a movant must present new, reliable evidence that he is factually innocent of the crime of conviction. Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851 (1995).

III.

Reasonble jurists would not debate the District Court's procedural ruling. That is because Mr. Blackman's Johnson/Davis claim was procedurally barred based on Blackman's failure to raise a vagueness challenge to his § 924(c) conviction at sentencing or on direct appeal. See Lynn, 365 F.3d at 1232. Although the District Court determined that Mr. Blackman could establish cause for the procedural bar, because it reasoned that his vagueness challenge to § 924(c) was not reasonably available to him at his February 2007 sentencing, this Court has since reached the opposite conclusion. See Granda v. United States, 990 F.3d 1272, 1287-88 (11th Cir. 2021) (holding that defendant could not establish cause for defaulting his Johnson/Davis claim because, at the time of his 2009 direct appeal, such a claim was reasonably available to him as he did not lack the "building blocks of a due process vagueness challenge to the § 924(c) residual clause."). Mr. Blackman therefore cannot show cause for failing to exhaust his claims. And, as the District Court found, no evidence establishes that Mr. Blackman is actually innocent of the crimes for which he was convicted.

Mr. Blackman's motion for a COA is DENIED.

Barbara B. Martin

UNITED STATES CIRCUIT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEANTE BLACKMAN,

Petitioner,

v. Case Nos: 8:16-cv-1659-SCB-TBM
8:06-cr-353-SCB-TBM

UNITED STATES OF AMERICA,

Respondent.
_____/

O R D E R

Before the Court is Petitioner Deante Blackman's amended motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 26) and memorandum in support (Doc. 27).[1] The Government filed a response in opposition (Doc. 32), to which Blackman has replied (Doc. 35). Having carefully considered the parties' submissions together with the record in Blackman's criminal case proceedings, the Court finds that Blackman's amended § 2255 motion is due to be denied without need for an evidentiary hearing.[2]

[1] References to filings in Blackman's criminal case, Case No. 8:06-cr-353-SCB-TBM, are cited throughout this Order as "Cr. Doc. [document number]."

[2] No hearing is required when the record establishes that a § 2255 claim lacks merit. *United States v. Lagrone*, 727 F.2d 1037, 1038 (11th Cir. 1984).

I. STATEMENT OF THE CASE AND FACTS

Shortly after midnight on October 26, 2005, Blackman and three others pistol-whipped Joseph Alexander outside of Alexander's home and then forced their way into Alexander's home. (Cr. Doc. 31, ¶ 14). Once inside, they demanded that Alexander, an admitted drug dealer, tell them where the money and cocaine were located. (*Id.*, ¶ 15). Blackman and one of the other men left to get their vehicle. (*Id.*, ¶ 17). They returned a short time later and pulled into Alexander's driveway. (*Id.*). While Blackman and the other individual were waiting in the driveway, the other two men opened fire on Alexander as they were walking out of the house. (*Id.*). Alexander's girlfriend called 911 to report the robbery and shooting after Blackman and the others left. (*Id.*). Alexander sustained approximately nine gunshot wounds. (*Id.*).

On August 22, 2006, a federal grand jury returned a seven-count indictment charging Blackman with various crimes. (Cr. Doc. 1). Counts One and Three, which are at issue in the instant amended motion to vacate, charged Blackman with aiding and abetting another who attempted to kill a witness, in violation of 18 U.S.C. §§ 1512(a)(1)(C), 1512(a)(3)(B)(i), 1111, and 2 (Count One), and aiding and abetting another who carried a firearm that was discharged during and in relation to a crime of violence, namely, the offenses charged in Counts One and Two, in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(A)(iii), and 2 (Count

Three).[3] (Cr. Doc. 1).

Blackman subsequently entered into a written plea agreement with the Government in which he agreed to plead guilty to Counts One, Three, Four and Six in exchange for the dismissal of the other counts. (Cr. Doc. 14). The plea agreement provided that the elements of Count One were: (1) that Blackman or a person he aided and abetted attempted to killed Alexander, as charged; and, (2) that Blackman or a person he aided and abetted attempted to kill Alexander knowingly and willfully with the intent to prevent the communication by Alexander to a law enforcement officer or a judge of the United States of information relating to the commission or possible commission of a federal offense. (*Id*. at 3). The plea agreement provided that the elements of Count Three were: (1) that Blackman or a person he aided and abetted committed the crime of violence charged in Count One; (2) that during the commission of that offense Blackman or a person he aided and abetted knowingly carried a firearm; and (3) that Blackman or a person he aided and abetted carried the firearm "in relation to" the crime of violence.[4] (*Id*.

[3] The other counts charged Blackman with conspiracy to commit Hobbs Act robbery (Count Two), conspiracy to possess with intent to distribute 500 grams or more of cocaine (Count Four); attempt to possess with intent to distribute 500 grams or more of cocaine (Count Five), possession with intent to distribute 5 grams or more of cocaine base (Count Six), and aiding and abetting another who carried a firearm that was discharged during and in relation to a drug trafficking crime (Count Seven) (Cr. Doc. 1).

[4] While the indictment identified Counts One and Two as the predicate "crimes of violence" in the § 924(c) offense charged in Count Three, as set forth above, the plea agreement specified that the § 924(c) offense charged in Count Three was predicated on the "crime of violence" charged in Count One only. (Cr. Doc. 14 at 4).

at 4). The plea agreement also included a factual basis consistent with the facts set forth in the preceding paragraph. (*See* Cr. Doc. 14 at 16).

On November 30, 2006, Blackman pleaded guilty, pursuant to the terms of the written plea agreement, to Counts One, Three, Four, and Six. During the plea colloquy, Blackman stated that he understood the elements of Count Three, including that the person he aided and abetted "committed the crime of violence, the attempted murder " charged in Count One. (Cr. Doc. 41 at 15-16, 18-19, 22). He also admitted that he participated in the offenses as alleged in the factual basis. (*Id*. at 41-43).

On February 27, 2007, Blackman was sentenced to a total term of imprisonment of 308 months—concurrent terms of 188 months on Counts One, Four, and Six, and a consecutive term of 120 months on Count Three. (Cr. Doc. 25). Blackman did not file a direct appeal.

On June 20, 2016, Blackman, through counsel, filed a § 2255 motion to vacate his sentence, arguing that his § 924(c) conviction was invalid in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015).[5] He argued that although *Johnson* invalidated the residual clause in the ACCA, its holding should be extended to 18 U.S.C. § 924(c) on collateral review because

[5] In *Johnson*, the Supreme Court held that the residual clause in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague. 576 U.S. at 604-06. The Supreme Court subsequently extended its holding in *Johnson* to the residual clause in 18 U.S.C. § 16(b). *Sessions v. Dimaya*, 584 U.S. __, 138 S. Ct. 1204, 1210-16 (2018).

§ 924(c)(3)(B)'s residual clause is not materially different from that in the ACCA. He argued further that if *Johnson's* holding was extended, the predicate crimes of violence listed in his indictment, namely, conspiracy to commit Hobbs Act robbery (Count Two) and aiding and abetting an attempted murder of a federal witness (Count One), did not qualify as crimes of violence under § 924(c)'s elements clause. (Doc. 1). The Government moved to dismiss the motion as untimely, following which Blackman filed a reply. (Docs. 9, 10). The Court granted the Government's motion and dismissed Blackman's § 2255 motion, finding that his conviction had been final for more than one year and he could not satisfy the exception to the one-year statute of limitations under 28 U.S.C. § 2255(f)(3) because *Johnson* did not address the statute under which he was convicted. (Doc. 15 at 2). Blackman filed a notice of appeal. (Doc. 17). The Court construed the notice as a motion for a certificate of appealability ("COA") and denied it. (Doc. 19). Blackman then sought a COA from the Eleventh Circuit to appeal the denial of his § 2255 motion.

On May 10, 2017, the Eleventh Circuit granted a COA on one issue—whether the district court erred in determining that Blackman's § 2255 motion was time-barred under § 2255(f)(3) in light of *Johnson*. (Doc. 20). The Eleventh Circuit held Blackman's appeal in abeyance pending the issuance of the mandate in *Ovalles v. United States*,[6] and continued the stay until the Supreme Court decided

[6] *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), *reh'g en banc granted*, opinion

United States v. Davis, 588 U.S. __, 139 S. Ct. 2319 (2019). *See Blackman v. United States*, 805 F. App'x 993, 994 (11th Cir. 2020). On June 24, 2019, the Supreme Court decided *Davis*, holding that § 924(c)(3)(B)'s residual clause—like the residual clauses in the ACCA and 18 U.S.C. § 16(b), is unconstitutionally vague.[7] 588 U.S. at __, 139 S. Ct. at 2336.

On March 18, 2020, the Eleventh Circuit vacated this Court's dismissal of Blackman's § 2255 motion, explaining that:

> Here, it is clear that *Davis* announced the new rule of constitutional law applicable to Blackman's challenge to his § 924(c) conviction, rather than *Johnson*. *See In re Hammoud*, 931 F.3d at 1038-39. And, because *Davis* represented an extension of the Supreme Court's decisions in *Johnson* and *Dimaya*, we conclude that the district court's conclusions that *Johnson* did not apply to § 924(c) and, therefore, that Blackman's § 2255 motion was untimely, were erroneous. *See Davis*, 139 S. Ct. at 2325-27; *In re Hammoud*, 931 F.3d at 1038-40 (explaining that the rule announced in *Davis* was primarily based on *Johnson* and *Dimaya*). However, because *Davis* was decided while Blackman's appeal was pending, the district court necessarily never considered it. Regardless, because Blackman raised his *Davis* claim within one year of the *Davis* decision, we conclude that his § 2255 motion was timely filed. *See* 28 U.S.C. § 2255(f)(3).
>
> Moreover, the district court never considered whether Blackman had shown that his § 924(c) conviction relied solely on the residual clause. *See In re Hammoud*, 931 F.3d at 1040-41; *Beeman*, 871 F.3d at 1222-25. It also did not address the merits of Blackman's arguments that his predicate convictions do not categorically qualify as crimes of violence under § 924(c)(3)(A)'s elements clause. The district court is in a better position to review Blackman's *Davis* claim in the first instance. *In re Hammoud*, 931 F.3d at 1040-41.

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vacated, 889 F.3d 1259 (11th Cir. 2018), *and on reh'g en banc*, 905 F.3d 1231 (11th Cir. 2018), *opinion reinstated in part*, 905 F.3d 1300 (11th Cir. 2018), *abrogated by United States v. Davis*, 139 S. Ct. 2319 (2019).

[7] The Eleventh Circuit determined that *Davis* announced a new substantive rule, and that the rule applies retroactively. *In re Hammoud*, 931 F.3d 1032, 1038-39 (11th Cir. 2019).

Blackman, 805 F. App'x at 995-96. Accordingly, the Eleventh Circuit remanded the matter for this Court to consider whether Blackman is entitled to relief in light of *Davis* and *In re Hammoud*. *Blackman*, 805 F. App'x at 995. The mandate was issued on May 11, 2020. (Doc. 23).

On May 27, 2020, Blackman, through counsel, filed an unopposed motion for leave to supplement his § 2255 motion to add one additional claim—that his § 924(c) conviction must be vacated in light of *Davis*. (Doc. 24). Blackman clarified that he did not seek leave to withdraw or abandon his *Johnson* claim, explaining that, contrary to the Eleventh Circuit's decision in *In re Hammoud*, he takes the position that *Davis* is merely a straightforward application of the rule announced in *Johnson*.[8] (*Id*. at 2-3). According to Blackman, this position allows him to satisfy § 2255(f)'s timeliness requirements regardless of whether *In re Hammoud* is overturned and regardless of whether *Davis* is a new rule or merely an application of the rule announced in *Johnson*. (*Id*. at 3). On May 29, 2020, the Court granted Blackman's unopposed motion to supplement. (Doc. 25).

II. PETITIONER'S CLAIMS AND BURDEN OF PROOF

Blackman, through counsel, filed his amended § 2255 motion on May 29, 2020, and his memorandum in support on June 29, 2020. (Docs. 26, 27). In

[8] The Eleventh Circuit noted Blackman's claim that *In re Hammoud* was wrongly decided but concluded the claim was foreclosed by its prior precedent rule. *Blackman*, 805 F. App'x at 995, n.3 (citing *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)). As such, this Court does not revisit that claim.

accordance with his position on timeliness, Blackman seeks to vacate his § 924(c) conviction on two grounds: (1) his sentence on that conviction fails to comport with due process as outlined in *Johnson* because the predicate offenses listed in the indictment are not crimes of violence; and (2) in light of *Davis*, his § 924(c) conviction was imposed in violation of due process because it rested solely on § 924(c)'s residual clause. (Doc. 26 at 4, 5).

A prisoner in federal custody may file a motion to vacate, set aside, or correct his sentence by asserting "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). A petitioner bears the burden of proof and persuasion on each and every aspect of his claim, *In re Moore*, 830 F.3d 1268, 1272 (11th Cir. 2016), which is "a significantly higher hurdle than would exist on direct appeal" under plain error review, *United States v. Frady*, 456 U.S. 152, 164-66 (1982). In the context of a *Davis* claim, a petitioner bears the burden of showing that his § 924(c) conviction resulted solely from application of the residual clause. *In re Hammoud*, 931 F.3d at 1041 (citations omitted).

III. DISCUSSION

While Blackman asserts two grounds for relief, both grounds rest on the resolution of one substantive issue: whether Blackman's § 924(c) predicate offense

of aiding and abetting an attempted killing under 18 U.S.C. § 1512(a)(1)(C) qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). Prior to addressing that issue, however, the Government's contention that Blackman's claim(s) is procedurally barred is discussed in brief.

A. Procedural Default

The Government contends that Blackman procedurally defaulted his challenge that § 924(c)(3)(B) is unconstitutionally vague by failing to raise it at sentencing or on direct appeal. It argues that Blackman cannot demonstrate cause because no external impediment prevented him from challenging his conviction on Count Three, and because such a challenge was reasonably available to him at the time of his conviction. (Doc. 32 at 6-10). Blackman replies that he can show cause and prejudice to excuse the default because the basis of his claim(s) was not reasonably available at the time he was sentenced and there is a reasonable probability he would not have been convicted on Count Three absent use of the residual clause. Blackman also asserts that he is actually innocent of violating § 924(c) because his predicate offense is not a crime of violence under § 924(c)'s elements clause. (Doc. 35).

Under the procedural-default rule, a petitioner generally is barred from presenting a claim in a § 2255 motion if he did not raise the claim on direct appeal. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). Procedural default may be excused if a petitioner shows cause for not raising the claim on direct

appeal and actual prejudice resulting from the error, or, alternatively, that he is actually innocent of the crime of conviction. *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004).

"[A] claim that is so novel that its legal basis is not reasonably available to counsel may constitute cause for a procedural default." *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citations and internal quotation marks omitted). A constitutional claim is not "reasonably available" if the Supreme Court decision establishing that claim: (1) explicitly overrules one of the Court's precedents; (2) overturns a longstanding and widespread practice to which the Court has not spoken, "but which a near-unanimous body of lower court authority has expressly approved;" or (3) disapproves of a practice that the Court "arguably has sanctioned in prior cases." *Reed v. Ross*, 468 U.S. 1, 17 (1984). "By definition, when a case falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a . . . court to adopt the position that [the Supreme Court] has ultimately adopted," and such a case will satisfy the cause requirement. *Id.; see also Rose v. United States*, 738 F. App'x 617, 626 (11th Cir. 2018).

Blackman satisfies the cause requirement because his argument—that his § 924(c) conviction and sentence under Count Three are illegal because the residual clause of § 924(c)(3) is unconstitutionally vague—was not reasonably available to him at the time he was sentenced in February 2007. Before *Davis*, the

Supreme Court had rejected vagueness challenges to the ACCA's similar residual clause. *See James v. United States*, 550 U.S. 192 (2007); *Sykes v. United States*, 564 U.S. 1 (2011). Prior to *Johnson*, appellate courts had rejected similar vagueness challenges. *See e.g.*, *United States v. Weeks*, 711 F.3d 1255 (11th Cir. 2013); *United States v. Childs*, 403 F.3d 970 (8th Cir. 2005); *United States v. Presley*, 52 F.3d 64 (4th Cir. 1995); *United States v. Veasey*, 73 F.3d 363 (6th Cir. 1995). And, both *Davis* and J*ohnson* have been given retroactive application. Consequently, at the time Blackman was sentenced, his claim(s) that § 924(c)'s residual clause was invalid was "so novel that its legal basis [was] not reasonably available to counsel" and therefore his failure to raise the claim "is sufficiently excusable to satisfy the cause requirement."[9] *Rose*, 738 F. App'x at 626.

Blackman, however, fails to demonstrate prejudice. His § 924(c) predicate offense of aiding and abetting another who attempted to kill a witness was supported by an adequate factual basis in the plea agreement and during Blackman's plea colloquy, and, as addressed below, the offense constituted a crime of violence under § 924(c)'s elements clause. Accordingly, his procedural default of the claim(s) is not excused.

Blackman also fails to establish actual innocence. The factual basis to

[9] This finding is in accord with most courts to decide the issue. *See, e.g., United States v. Garcia*, 811 F. App'x 472, 479-80 (10th Cir. 2020); *Serrano v. United States*, No. 3:19-cv-19, 2020 WL 5653478, at *7 (M.D. Tenn. Sept. 23, 2020) (collecting cases); *Hammoud v. United States*, Case No. 8:19-cv-2541-T-27JDW, 2020 WL 3440649, at *3 n.4 (M.D. Fla. June 23, 2020) (same), *appeal docketed*, No. 20-13138 (11th Cir. Aug. 20, 2020).

which Blackman stipulated, including that he aided and abetted another who attempted to kill a witness by shooting at the witness, supports the conviction. At best, Blackman's argument is one of legal innocence, not of factual innocence, as is necessary to overcome a procedural bar. *See McKay*, 657 F.3d at 1198-99 (a defendant must "show that he is factually innocent of the conduct or underlying crime that serves as the predicate for the enhanced sentence"); *Lynn*, 365 F.3d at 1235, n 18 ("actual innocence means factual innocence, not mere legal insufficiency"). Because there is no evidence establishing that Blackman is actually innocent, and because his predicate offense constituted a crime of violence under § 924(c)'s elements clause as discussed below, his procedural default may not be excused on this basis.

B. Whether Aiding and Abetting Another Who Attempted to Kill a Witness under 18 U.S.C. § 1512(a)(1)(C) Qualifies as a Crime of Violence under the Elements Clause of 18 U.S.C. § 924(c)(3)(A)

Blackman's claim(s) fails on the merits. For the reasons that follow, because the crime of aiding and abetting another who attempted to kill a witness in violation of 18 U.S.C. § 1512(a)(1)(C) qualifies as a "crime of violence" under the elements clause of § 924(c), and because Blackman fails to show "that his § 924(c) conviction resulted from application of solely the residual clause," *In re Hammoud*, 931 F.3d at 1041, Blackman is not entitled to relief.[10]

[10] As the parties note, the crime of aiding and abetting another who attempted to kill a witness charged in Count One, rather than the crime of conspiracy to commit Hobbs Act robbery charged in Count Two, served as the predicate crime for Blackman's § 924(c) guilty plea and conviction

Section 924(c) criminalizes using or carrying a firearm during and in relation to a crime of violence. 18 U.S.C. § 924(c)(1)(A). Section 924(c)(3) defines "crime of violence" in one of two ways. Section 924(c)(3)(A)—commonly known as the "elements clause" or the "use-of-force clause"—defines "crime of violence" as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Section 924(c)(3)(B)—commonly known as the "residual clause"—defines "crime of violence" as a felony offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). In *Davis*, the Supreme Court held that § 924(c)(3)(B)'s residual clause is unconstitutionally vague. 139 S. Ct. at 2336. Consequently, in light of *Davis*, Blackman's conviction for aiding and abetting a violation of § 924(c) is valid only if his underlying conviction on Count One for aiding and abetting another who attempted to kill a witness qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). *See id.*; *see also Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017) ("To prove a *Johnson* claim, a movant must establish that his sentence enhancement 'turn[ed] on the validity of the residual

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on Count Three. (*See* Doc. 27 at 5, 14-15; Doc. 32 at 4, 18-19; Cr. Doc. 14 at 4). In any event, the Eleventh has held that conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence" under § 924(c)'s elements clause and thus would only qualify as a predicate offense under the unconstitutional residual clause. *See Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019).

clause.'"). Based on prior precedent, the Court finds that it does.

To determine whether an offense constitutes a "crime of violence" under the elements clause of § 924(c), courts apply a categorical approach and "look to whether the statutory elements of the predicate offense necessarily require, at a minimum, the threatened or attempted use of force." *Brown*, 942 F.3d at 1075 (citation omitted). As indicated above, Blackman's § 924(c) predicate offense is a violation of the federal witness tampering statute, 18 U.S.C. § 1512(a)(1)(C), i.e., the offense charged in Count One.[11] In relevant part, § 1512(a)(1)(C) forbids the "kill[ing] or attempt[ed] kill[ing]" of "another person" with a certain "intent," namely, an "intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . .." 18 U.S.C. § 1512(a)(1)(C). An element of a § 1512(a)(1)(C) offense necessarily includes the killing or attempted killing of another person. *See id*. ("Whoever kills or attempts to kill another person, . . ."); *see also Fowler v. United States*, 563 U.S. 668, 672 (2011) ("This language makes clear that in a prosecution the Government must

[11] As indicated above, Blackman was convicted of violating 18 U.S.C. §§ 1512(a)(1)(C), 1111, and 2 as charged in Count One. (Cr. Doc. At 1). The substantive offense is the attempted killing of a witness, in violation of 18 U.S.C. § 1512(a)(1)(C). Section 1111 is the federal murder statute and section 2 is the federal aiding and abetting statute. Section 1111 states, in pertinent part, that "[m]urder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or. . ., is murder in the first degree. Any other murder is murder in the second degree."). 18 U.S.C. § 1111(a). Section 2 states, in pertinent part, that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2 (a).

prove (1) a killing or attempted killing, . . .").

The Eleventh Circuit has not yet addressed whether violating 18 U.S.C. § 1512 by attempting to kill a witness is a crime of violence under § 924(c)(3)(A)'s elements clause.[12] The Eleventh Circuit, however, has held that second-degree murder under 18 U.S.C. § 1111(a) is a crime of violence under § 924(c)(3)(A)'s elements clause.[13] *Thompson v. United States*, 924 F.3d 1153, 1158-59 (11th Cir. 2019) ("Because § 1111(a), by its plain terms, criminalizes the actual killing of another person, the level of force used must necessarily be capable of causing physical pain or injury . . . second-degree murder under § 1111(a) categorically qualifies as a crime of violence under § 924(c)'s elements clause.");[14] *see also United States v. St. Hubert*, 909 F.3d 335, 352 (11th Cir. 2018) (holding that when a substantive federal offense qualifies as a crime of violence under the elements clause of § 924(c), *an attempt* to commit that offense is itself a crime of violence,

[12] At least one circuit has held that witness tampering by murder in violation of § 1512(a)(1) is categorically a crime of violence under the elements clause of § 924(c)(3)(A). *See United States v. Mathis*, 932 F.3d 242, 264-65 (4th Cir. 2019) (explaining that "[m]urder *requires* the use of force capable of causing physical pain or injury to another person" and so "qualifies categorically as a crime of violence under the force clause") (quotation marks omitted) (emphasis added).

[13] Section 1111 was referenced in Count One. Specifically, Blackman was charged with aiding and abetting "another who with malice aforethought, did unlawfully, willfully, deliberately, maliciously, and with premeditation, attempt to kill Joseph Alexander, by shooting Joseph Alexander with a firearm, *which killing would have been murder as defined by" 18 U.S.C. § 1111*. (Cr. Doc. 1) (emphasis added).

[14] Because second-degree murder under § 1111(a) qualifies as a crime of violence under § 924(c)'s elements clause, *see Thompson*, 924 F.3d at 158-59, it follows that first-degree murder under § 1111(a) also qualifies as a crime of violence under § 924(c)'s elements clause.

"given § 924(c)'s 'statutory specification that an element of attempted force operates the same as an element of completed force, and the rule that conviction of attempt requires proof of intent to commit all elements of the completed crime.'") (emphasis added), *abrogated in part on other grounds by Davis*, 139 S. Ct. at 2324, 2336.

While Blackman was convicted of *aiding and abetting* another who attempted to kill a witness, the Eleventh Circuit has held that a conviction for aiding and abetting a crime of violence qualifies as a crime of violence for purposes of § 924(c)(3)(A). *See Steiner v. United States*, 940 F.3d 1282, 1293 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 320 (2020) (citations omitted); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016). It follows, then, that Blackman's predicate offense of aiding and abetting an attempted killing of a witness is a crime of violence under the elements clause of § 924(c)(3)(A).

Blackman's arguments to the contrary are foreclosed by governing authority. Blackman argues that (1) aiding and abetting another who attempted to murder a witness is not a crime of violence under § 924(c)'s elements clause because it does not have as an element the use of force, and (2) even if it is, he was convicted of aiding and abetting the offense and an aider and abettor need not commit each element as is required for conviction of substantive attempted murder. (Doc. 27 at 7-11). Blackman's first argument is foreclosed by *Thompson*, and his second argument is foreclosed by *In re Colon*. *See Archer*, 531 F.3d at 1352 ("Under the

prior precedent rule, we are bound to follow prior binding precedent unless and until it is overruled by us sitting *en banc* or the Supreme Court").

In sum, because Blackman's conviction on Count Three was under § 924(c)(3)(A), the Supreme Court's decision in *Davis* does not afford him relief. Blackman offers no evidence that he was convicted specifically under the residual clause; nor does he argue that the elements clause is itself unconstitutional. For these reasons, Blackman's § 924(c) conviction is constitutional. *See United States v. Harris*, __ F. App'x __, 2020 WL 6947347, at *2-3 (11th Cir. Nov. 25, 2020) (concluding that § 924(c) conviction was constitutional where appellant's predicate offense of carjacking met the definition of crime of violence under the elements clause and was not affected by *Davis*).

IV. CONCLUSION

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

Petitioner Deante Blackman's amended motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 26) is **DENIED**. The Clerk is directed to enter judgment in favor of Respondent in the civil case and to close the case.

CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

IT IS FURTHER ORDERED that Blackman is not entitled to a COA. A prisoner seeking a motion to vacate has no absolute entitlement to appeal a district

court's final order in a proceeding under § 2255. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a COA. *Id.* "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). To make such a showing, Blackman "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Blackman has not made the requisite showing in these circumstances. Finally, because Blackman is not entitled to a COA, he is not entitled to appeal *in forma pauperis*.

DONE AND ORDERED at Tampa, Florida, this 18th day of February 2021.

SUSAN C. BUCKLEW
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:06-CR-353-T-24TBM

DEANTE BLACKMAN

PLEA AGREEMENT

Pursuant to Fed. R. Crim. P. 11(c), the United States of America, by Paul I. Perez, United States Attorney for the Middle District of Florida, and the defendant, Deante Blackman, and the attorney for the defendant, Pedro L. Amador, Esquire, mutually agree as follows:

A. **Particularized Terms**

1. Counts Pleading To

The defendant shall enter a plea of guilty to Counts One, Three, Four and Six of the Indictment. Count One charges the defendant with Aiding and Abetting Another Who Attempted to Murder a Witness, in violation of Title 18, United States Codes, Sections 1512(a)(1)(C), 1512(a)(3)(B)(i), 1111 and 2. Count Three charges the defendant with Aiding and Abetting Another Who Carried a Firearm which was Discharged During and in Relation to a Crime of Violence, in violation of Title 18, United States Code, Sections 924(c)(1)(A), 924(c)(1)(A)(iii) and 2. Count Four charges the defendant with Conspiracy to Distribute 500 grams or More of Cocaine, in violation of Title 21, United States Code, Sections 846, 841(a)(1) and 841(b)(1)(B)(ii). Count Six

Defendant's Initials _____ AF Approval _____

charges the defendant with Possession with Intent to Distribute five (5) grams or More of Cocaine Base, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B)(iii) and Title 18, United States Code, Section 2.

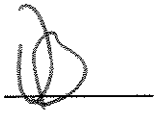
2. Maximum Penalties

Count One carries a maximum sentence of twenty (20) years imprisonment, a fine of not more than $250,000.00, a term of supervised release of not more than three (3) years, and a special assessment of $100, said special assessment to be due on the date of sentencing.

3. Minimum and Maximum Penalties

Count Three carries a minimum term of imprisonment of ten (10) years, up to a maximum of Life, which sentence must be consecutive to the sentence imposed in Counts One, Four and Six, a fine of not more than $250,000.00, a term of supervised release of not more than five years, and a special assessment of $100, said special assessment to be due on the date of sentencing.

Counts Four and Six carry a minimum term of imprisonment of five (5) years up to a maximum of forty (40) years, a fine of not more than $2,000,000.00, a term of supervised release of at least four years, and a special assessment of $100, said special assessment to be due on the date of sentencing. With respect to certain offenses, the Court shall order the defendant to make restitution to any victim of the offense(s), and with respect to other offenses, the Court may order the defendant to make restitution to any victim of the offense(s), or to the community, as set forth below.

Defendant's Initials 

4. Under Apprendi v. New Jersey, 530 U.S. 466 (2000), in order for a maximum sentence of forty (40) years to be applicable to Count Four, the following facts must be proven beyond a reasonable doubt:

The offense involved 500 grams or more of cocaine.

Under Apprendi v. New Jersey, 530 U.S. 466 (2000), in order for a maximum sentence of forty (40) years to be applicable to Count Six, the following facts must be proven beyond a reasonable doubt:

The offense involved five (5) grams or more of cocaine base.

Under Apprendi v. New Jersey, 530 U.S. 466 (2000), in order for a ten year minimum mandatory consecutive sentence to be applicable to Count Three, the following facts must be proven beyond a reasonable doubt:

The firearm was discharged.

5. Elements of the Offense(s)

The defendant acknowledges understanding the nature and elements of the offense(s) with which defendant has been charged and to which defendant is pleading guilty. The elements of Count One are:

First: That the Defendant or person he aided and abetted attempted to killed Joseph Alexander, as charged; and,

Second: That the Defendant or a person he aided and abetted attempted to kill Joseph Alexander knowingly and willfully with the intent to prevent the communication by Joseph Alexander to a law enforcement officer or a judge of the United States of information relating to the commission or possible commission of a Federal offense.

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The elements of Count Three are:

First: That the Defendant, or a person he aided and abetted committed the crime of violence charged in Count One of the Indictment;

Second: That during the commission of that offense the Defendant, or a person he aided and abetted knowingly carried a firearm, as charged; and,

Third: That the Defendant, or a person he aided and abetted carried the firearm "in relation to" the crime of violence.

The elements of Count Four are:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and,

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it.

The elements of Count Six are:

First: That the Defendant knowingly and willfully possessed cocaine base as charged; and,

Second: That the Defendant possessed the substance with the intent to distribute it.

6. Counts Dismissed

At the time of sentencing, the remaining counts against the defendant will be dismissed pursuant to Fed. R. Crim. P. 11(c)(1)(A).

7. No Further Charges

If the Court accepts this plea agreement, the United States Attorney's Office for the Middle District of Florida agrees not to charge defendant with committing any other federal criminal offenses known to the United States Attorney's Office at the

time of the execution of this agreement, related to the conduct giving rise to this plea agreement.

8. Mandatory Restitution to Victim of Offense of Conviction

Pursuant to 18 U.S.C. §§ 3663A(a) and (b), defendant agrees to make full restitution to Joseph Alexander.

9. Guidelines Sentence

Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States will recommend to the Court that the defendant be sentenced within the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines, as adjusted by any departure the United States has agreed to recommend in this plea agreement. The parties understand that such a recommendation is not binding on the Court and that, if it is not accepted by this Court, neither the United States nor the defendant will be allowed to withdraw from the plea agreement, and the defendant will not be allowed to withdraw from the plea of guilty.

10. Acceptance of Responsibility - Three Levels

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will not oppose the defendant's request to the Court that the defendant receive a two-level downward adjustment for acceptance of responsibility, pursuant to USSG §3E1.1(a). The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

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Further, at the time of sentencing, if the defendant complies with the provisions of USSG §3E1.1(b), the United States agrees to file a motion pursuant to USSG §3E1.1(b) for a downward adjustment of one additional level. The defendant understands that the determination as to whether the defendant has qualified for a downward adjustment of a third level for acceptance of responsibility rests solely with the United States Attorney for the Middle District of Florida, and the defendant agrees that the defendant cannot and will not challenge that determination, whether by appeal, collateral attack, or otherwise.

11. Cooperation - Substantial Assistance to be Considered

Defendant agrees to cooperate fully with the United States in the investigation and prosecution of other persons, and to testify, subject to a prosecution for perjury or making a false statement, fully and truthfully before any federal court proceeding or federal grand jury in connection with the charges in this case and other matters, such cooperation to further include a full and complete disclosure of all relevant information, including production of any and all books, papers, documents, and other objects in defendant's possession or control, and to be reasonably available for interviews which the United States may require. If the cooperation is completed prior to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" in accordance with the policy of the United States Attorney for the Middle District of Florida, warranting the filing of a motion at the time of sentencing recommending (1) a downward departure from the applicable guideline range pursuant to USSG §5K1.1, or (2) the imposition of a sentence below a statutory minimum, if any, pursuant to 18 U.S.C. § 3553(e), or (3) both. If the cooperation is completed

subsequent to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" in accordance with the policy of the United States Attorney for the Middle District of Florida, warranting the filing of a motion for a reduction of sentence within one year of the imposition of sentence pursuant to Fed. R. Crim. P. 35(b). In any case, the defendant understands that the determination as to whether "substantial assistance" has been provided or what type of motion related thereto will be filed, if any, rests solely with the United States Attorney for the Middle District of Florida, and the defendant agrees that defendant cannot and will not challenge that determination, whether by appeal, collateral attack, or otherwise.

12. Use of Information - Section 1B1.8

Pursuant to USSG §1B1.8(a), the United States agrees that no self-incriminating information which the defendant may provide during the course of defendant's cooperation and pursuant to this agreement shall be used in determining the applicable sentencing guideline range, subject to the restrictions and limitations set forth in USSG §1B1.8(b).

13. Cooperation - Responsibilities of Parties

a. The government will make known to the Court and other relevant authorities the nature and extent of defendant's cooperation and any other mitigating circumstances indicative of the defendant's rehabilitative intent by assuming the fundamental civic duty of reporting crime. However, the defendant understands that the government can make no representation that the Court will impose a lesser sentence solely on account of, or in consideration of, such cooperation.

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b. It is understood that should the defendant knowingly provide incomplete or untruthful testimony, statements, or information pursuant to this agreement, or should the defendant falsely implicate or incriminate any person, or should the defendant fail to voluntarily and unreservedly disclose and provide full, complete, truthful, and honest knowledge, information, and cooperation regarding any of the matters noted herein, the following conditions shall apply:

(1) The defendant may be prosecuted for any perjury or false declarations, if any, committed while testifying pursuant to this agreement, or for obstruction of justice.

(2) The United States may prosecute the defendant for the charges which are to be dismissed pursuant to this agreement, if any, and may either seek reinstatement of or refile such charges and prosecute the defendant thereon in the event such charges have been dismissed pursuant to this agreement. With regard to such charges, if any, which have been dismissed, the defendant, being fully aware of the nature of all such charges now pending in the instant case, and being further aware of defendant's rights, as to all felony charges pending in such cases (those offenses punishable by imprisonment for a term of over one year), to not be held to answer to said felony charges unless on a presentment or indictment of a grand jury, and further being aware that all such felony charges in the instant case have heretofore properly been returned by the indictment of a grand jury, does hereby agree to reinstatement of such charges by recision of any order dismissing them or, alternatively, does hereby waive, in open court, prosecution by indictment and consents that the United States may proceed by information instead of by indictment with regard to any felony charges

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which may be dismissed in the instant case, pursuant to this plea agreement, and the defendant further agrees to waive the statute of limitations and any speedy trial claims on such charges.

(3) The United States may prosecute the defendant for any offenses set forth herein, if any, the prosecution of which in accordance with this agreement, the United States agrees to forego, and the defendant agrees to waive the statute of limitations and any speedy trial claims as to any such offenses.

(4) The government may use against the defendant its own admissions and statements and the information and books, papers, documents, and objects that the defendant has furnished in the course of the defendant's cooperation with the government.

(5) The defendant will not be permitted to withdraw the guilty pleas to those counts to which defendant hereby agrees to plead in the instant case but, in that event, defendant will be entitled to the sentencing limitations, if any, set forth in this plea agreement, with regard to those counts to which the defendant has pled; or in the alternative, at the option of the United States, the United States may move the Court to declare this entire plea agreement null and void.

14. Forfeiture of Assets

The defendant agrees to forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, pursuant to Title 21, United States Code, Section 853, Title 18, United States Code, Sections 924(d) and 981(a)(1)(c), Title 28, United States Code, Section 2461(c), whether in the possession or control of the United States or in the possession or control

Defendant's Initials _____

of the defendant or defendant's nominees. The defendant agrees and consents to the forfeiture of these assets pursuant to any federal criminal, civil, and/or administrative forfeiture action. The defendant also hereby agrees that the forfeiture described herein is not excessive and, in any event, the defendant waives any constitutional claims that the defendant may have that the forfeiture constitutes an excessive fine.

The defendant admits and agrees that the conduct described in the Factual Basis below provides a sufficient factual and statutory basis for the forfeiture of the property sought by the government. Pursuant to the provisions of Rule 32.2(b)(1), the United States and the defendant request that at the time of accepting this plea agreement, the court make a determination that the government has established the requisite nexus between the property subject to forfeiture and the offense(s) to which defendant is pleading guilty and enter a preliminary order of forfeiture. Pursuant to Rule 32.2(b)(3), the defendant agrees that the preliminary order of forfeiture shall be final as to the defendant at the time it is entered, notwithstanding the requirement that it be made a part of the sentence and be included in the judgment.

The defendant agrees to forfeit all interests in the properties described above and to take whatever steps are necessary to pass clear title to the United States. These steps include, but are not limited to, the surrender of title, the signing of a consent decree of forfeiture, and signing of any other documents necessary to effectuate such transfers.

Defendant further agrees to take all steps necessary to locate property and to pass title to the United States before the defendant's sentencing. To that end, defendant agrees to fully assist the government in the recovery and return to the United

States of any assets, or portions thereof, as described above wherever located. The defendant agrees to make a full and complete disclosure of all assets over which defendant exercises control and those which are held or controlled by a nominee. The defendant further agrees to be polygraphed on the issue of assets, if it is deemed necessary by the United States.

The defendant agrees that the United States is not limited to forfeiture of the property described above. If the United States determines that property of the defendant identified for forfeiture cannot be located upon the exercise of due diligence; has been transferred or sold to, or deposited with, a third party; has been placed beyond the jurisdiction of the Court; has been substantially diminished in value; or has been commingled with other property which cannot be divided without difficulty; then the United States shall, at its option, be entitled to forfeiture of any other property (substitute assets) of the defendant up to the value of any property described above. This Court shall retain jurisdiction to settle any disputes arising from application of this clause. The defendant agrees that forfeiture of substitute assets as authorized herein shall not be deemed an alteration of the defendant's sentence.

B. Standard Terms and Conditions

1. Special Assessment and Fine

On each count to which a plea of guilty is entered, the Court shall impose a special assessment, to be payable to the Clerk's Office, United States District Court, and due on date of sentencing. The defendant understands that this agreement imposes no limitation as to fine.

Defendant's Initials _____

2. Supervised Release

The defendant understands that the offense(s) to which the defendant is pleading provide(s) for imposition of a term of supervised release upon release from imprisonment, and that, if the defendant should violate the conditions of release, the defendant would be subject to a further term of imprisonment.

3. Sentencing Information

The United States reserves its right and obligation to report to the Court and the United States Probation Office all information concerning the background, character, and conduct of the defendant, to provide relevant factual information, including the totality of the defendant's criminal activities, if any, not limited to the count(s) to which defendant pleads, to respond to comments made by the defendant or defendant's counsel, and to correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject to any limitations set forth herein, if any.

Pursuant to 18 U.S.C. § 3664(d)(3) and Fed. R. Crim. P. 32(d)(2)(A)(ii), the defendant agrees to complete and submit, upon execution of this plea agreement, an affidavit reflecting the defendant's financial condition. The defendant further agrees, and by the execution of this plea agreement, authorizes the United States Attorney's Office to provide to, and obtain from, the United States Probation Office or any victim named in an order of restitution, or any other source, the financial affidavit, any of the defendant's federal, state, and local tax returns, bank records and any other financial information concerning the defendant, for the purpose of making any recommendations

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to the Court and for collecting any assessments, fines, restitution, or forfeiture ordered by the Court.

4. Sentencing Recommendations

It is understood by the parties that the Court is neither a party to nor bound by this agreement. The Court may accept or reject the agreement, or defer a decision until it has had an opportunity to consider the presentence report prepared by the United States Probation Office. The defendant understands and acknowledges that, although the parties are permitted to make recommendations and present arguments to the Court, the sentence will be determined solely by the Court, with the assistance of the United States Probation Office. Defendant further understands and acknowledges that any discussions between defendant or defendant's attorney and the attorney or other agents for the government regarding any recommendations by the government are not binding on the Court and that, should any recommendations be rejected, defendant will not be permitted to withdraw defendant's plea pursuant to this plea agreement. The government expressly reserves the right to support and defend any decision that the Court may make with regard to the defendant's sentence, whether or not such decision is consistent with the government's recommendations contained herein.

5. Appeal of Sentence-Waiver

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant's sentence or to challenge it collaterally on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to

the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by Title 18, United States Code, Section 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by Title 18, United States Code, Section 3742(a).

6. Middle District of Florida Agreement

It is further understood that this agreement is limited to the Office of the United States Attorney for the Middle District of Florida and cannot bind other federal, state, or local prosecuting authorities, although this office will bring defendant's cooperation, if any, to the attention of other prosecuting officers or others, if requested.

7. Filing of Agreement

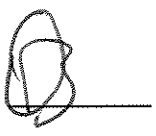
This agreement shall be presented to the Court, in open court or in camera, in whole or in part, upon a showing of good cause, and filed in this cause, at the time of defendant's entry of a plea of guilty pursuant hereto.

8. Voluntariness

The defendant acknowledges that defendant is entering into this agreement and is pleading guilty freely and voluntarily without reliance upon any discussions between the attorney for the government and the defendant and defendant's attorney and without promise of benefit of any kind (other than the concessions contained herein), and without threats, force, intimidation, or coercion of

Defendant's Initials _____

any kind. The defendant further acknowledges defendant's understanding of the nature of the offense or offenses to which defendant is pleading guilty and the elements thereof, including the penalties provided by law, and defendant's complete satisfaction with the representation and advice received from defendant's undersigned counsel (if any). The defendant also understands that defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that defendant has the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against defendant, the right against compulsory self-incrimination, and the right to compulsory process for the attendance of witnesses to testify in defendant's defense; but, by pleading guilty, defendant waives or gives up those rights and there will be no trial. The defendant further understands that if defendant pleads guilty, the Court may ask defendant questions about the offense or offenses to which defendant pleaded, and if defendant answers those questions under oath, on the record, and in the presence of counsel (if any), defendant's answers may later be used against defendant in a prosecution for perjury or false statement. The defendant also understands that defendant will be adjudicated guilty of the offenses to which defendant has pleaded and, if any of such offenses are felonies, may thereby be deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to have possession of firearms.

Defendant's Initials 

9. Factual Basis

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and were this case to go to trial, the United States would be able to prove those specific facts and others beyond a reasonable doubt:

FACTS

Shortly after midnight on October 26, 2005, the defendant and three associates armed with firearms forced their way into the Auburndale, Florida, home of admitted drug dealer Joseph Alexander. Once inside, the intruders pistol whipped Alexander and demanded money and cocaine. Specifically, they repeatedly demanded the "key" referring to a kilogram of cocaine which they would have distributed had they received the substance. When the men first entered the residence, Alexander's girlfriend, Denise Crespo, was sleeping in a bedroom. Crespo was awakened by the men and led at gun point to the living room. After the robbers obtained more than five (5) grams of cocaine base, two of the defendant's associates began firing their handguns at Alexander, who was shot numerous times. In shooting Alexander, the defendant's associates were attempting to kill Alexander with the intent to prevent him from notifying federal authorities of the commission of federal offenses.

10. Entire Agreement

This plea agreement constitutes the entire agreement between the government and the defendant with respect to the aforementioned guilty plea and no other promises, agreements, or representations exist or have been made to the defendant or defendant's attorney with regard to such guilty plea.

11. Certification

The defendant and defendant's counsel certify that this plea agreement has been read in its entirety by (or has been read to) the defendant and that defendant fully understands its terms.

DATED this 2 day of November, 2006.

PAUL I. PEREZ
United States Attorney

Deante Blackman

DEANTE BLACKMAN
Defendant

By: _____

JAMES A. MUENCH
Assistant United States Attorney

_____

PEDRO L. AMADOR, Esquire
Attorney for Defendant

_____

JAMES C. PRESTON
Assistant United States Attorney