

No. \_\_\_\_\_

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In the

**Supreme Court of the United States**

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TIMOTHY LINDSEY,  
*PETITIONER,*

V.

UNITED STATES OF AMERICA,  
*RESPONDENT,*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit**

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**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI**

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# United States Court of Appeals for the Fifth Circuit

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No. 20-10072  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

February 15, 2022

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

TIMOTHY LINDSEY,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:16-CV-514  
USDC No. 4:09-CR-135-1

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Before JOLLY, WILLETT, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:\*

Timothy Lindsey, federal prisoner # 15723-077, has appealed the district court's judgment dismissing his successive motion under 28 U.S.C. § 2255 challenging his 180-month sentence imposed under the Armed

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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Career Criminal Act (ACCA). Previously, we granted Lindsey's motion for authorization to file a successive § 2255 motion based on the holding of *Johnson v. United States*, 576 U.S. 591 (2015). We specified, however, that the grant was "tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Lindsey has failed to make the showing required to file such a motion."

Thereafter, Lindsey filed a successive § 2255 motion based on *Johnson* and *Welch v. United States*, 578 U.S. 120, 127-30 (2016). The Government asserted that Lindsey had failed to show that his motion relied on *Johnson* because his predicate Texas burglary convictions qualified as violent felonies under the ACCA's enumerated-offense clause as, at the time of his sentencing in 2010, those convictions qualified as generic burglaries. The district court determined that it lacked jurisdiction because Lindsey had failed to demonstrate that it was more likely than not that the sentencing court relied on the ACCA's residual clause when Lindsey was sentenced. *See United States v. Clay*, 921 F.3d 550, 554 (5th Cir. 2019); *United States v. Wiese*, 896 F.3d 720, 726 (5th Cir. 2018).

Lindsey asserts that a Texas burglary under TEXAS PENAL CODE § 30.02(a) is indivisible and is categorically broader than the enumerated offense of burglary. He concedes that this question is foreclosed by *United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019) (en banc), but he raises the issue to preserve it for further review. He moves this court to expand the certificate of appealability to include the merits and to find for him. The motion is DENIED. *See id.*; *see also United States v. Wallace*, 964 F.3d 386,

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389-90 (5th Cir.) (discussing and declining to limit *Herrold*), *cert. denied*, 141 S. Ct. 910 (2020)<sup>1</sup>.

Lindsey asserts that this court's prefiling authorization satisfies the only statutory prerequisite for filing a second or successive § 2255 motion. He contends that the gatekeeping requirements of 28 U.S.C. §§ 2244(b) and 2255(h) are non-jurisdictional. As will be discussed, this court held otherwise in *Clay* and *Wiese*. Under the rule of orderliness, one panel of this court may not overturn another panel's decision absent an intervening change in the law. *See Austin v. Davis*, 876 F.3d 757, 778 (5th Cir. 2017).

“A second or successive habeas application must meet strict procedural requirements before a district court can properly reach the merits of the application.” *Wiese*, 896 F.3d at 723; *see* §§ 2244(b), 2255(h). A prisoner pursuing a successive § 2255 motion must pass through two jurisdictional “gates” to have his motion heard on the merits. *Wiese*, 896 F.3d at 723 (internal quotation marks and citation omitted). Lindsey has passed through the first gate by obtaining this court’s authorization to file a successive motion. *See id.* To pass through the second gate, Lindsey must prove that “it was more likely than not that he was sentenced under the residual clause.” *Clay*, 921 F.3d at 559. The district court determined that Lindsey had failed to meet that burden.

Lindsey invokes *United States v. Taylor*, 873 F.3d 476, 482 (5th Cir. 2017), which, he contends, was inconsistent with *Wiese* and *Clay*, and is controlling. This contention has been rejected previously. *See United States v. Medina*, 800 F. App’x 223, 225 n.2 (5th Cir.), *cert. denied*, 141 S. Ct. 1048

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<sup>1</sup> Unpublished opinions issued in or after 1996 “are not precedent” except in limited circumstances, 5TH CIR. R. 47.5.4, but they “may be persuasive authority,” *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

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(2020); *United States v. Hernandez*, 779 F. App'x 195, 199 n.3 (5th Cir. 2019). While *Medina* and *Hernandez* are not binding, *see 5TH CIR. R. 47.5.4*, they are persuasive authority, *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006), and we choose to adopt them here. *See Clay*, 921 F.3d at 555 & 558 n.3 (noting that this court declined in *Taylor* to establish a standard for determining whether the sentencing court relied improperly on the residual clause); *Wiese*, 896 F.3d at 720 (same); *Taylor*, 873 F.3d at 481.

Lindsey asserts that, under 2010 law, the sentencing court could not determine that his habitation burglaries were enumerated burglaries without the state court records, which it did not have, and that the district court could not rely on the characterization of an offense in the presentence report when applying the prior conviction enhancement. These contentions are without merit.

Under *United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008), the sentencing court could have determined that Lindsey's Texas burglary convictions qualified as enumerated burglaries under § 30.02(a)(1) or not at all. In *Wiese*, this court recognized that, in determining a sentencing court's potential reliance on the residual clause, it could look at the sentencing record for direct evidence of the sentence, the relevant background legal environment, and the presentence report and other relevant materials before the district court. 896 F.3d at 725; *see also Clay*, 921 F.3d at 558. In this case the presentence report shows that three of Lindsey's burglaries were generic burglaries under § 30.02(a)(1). In each prior case, the probation officer found, based on court disposition records, that Lindsey "intentionally . . . , without the effective consent of the owner, entered a habitation with intent to commit theft." Thus, contrary to Lindsey's contention, the record reflects that the sentencing court did have access to the terms of the pertinent state documents. We note that Lindsey asserted no objection to the probation officer's findings.

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For the foregoing reasons, the district court did not err in holding that Lindsey failed to meet his burden of showing by a preponderance of the evidence that the sentencing court relied on the ACCA residual clause. *See Clay*, 921 F.3d at 559. The judgment is AFFIRMED.

United States Court of Appeals  
for the Fifth Circuit

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No. 20-10072  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

February 15, 2022

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

TIMOTHY LINDSEY,

*Defendant—Appellant.*

---

Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:16-CV-514

---

Before JOLLY, WILLETT, and ENGELHARDT, *Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

United States Court of Appeals  
for the Fifth Circuit

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No. 20-10072

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UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

TIMOTHY LINDSEY,

*Defendant—Appellant.*

---

Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:16-CV-514  
USDC No. 4:09-CR-135-1

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ORDER:

Timothy Lindsey, federal prisoner # 15723-077, pleaded guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). He was sentenced under the Armed Career Criminal Act (ACCA) to 180 months of imprisonment. *See* 18 U.S.C. § 924(e). We granted Lindsey tentative authorization to file a successive 28 U.S.C. § 2255 motion raising claims grounded in *Johnson v. United States*, 576 U.S. 591 (2015).

*Johnson* determined that the residual clause of the ACCA was unconstitutionally vague, 576 U.S. at 601–02, and *Johnson* was made

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retroactively applicable by *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). The district court determined that Lindsey failed to show that his claims relied on the rule announced in *Johnson* because the court sentencing Lindsey did not rely on the residual clause. As a result, the district court dismissed the § 2255 motion for lack of jurisdiction. *See Reyes-Quena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) (holding that the district court's gatekeeping function from "28 U.S.C. § 2244(b)(4) has . . . been incorporated into 28 U.S.C. § 2255").

The court grants Lindsey's motion for a certificate of appealability on the issue of whether the district court had jurisdiction to consider Lindsey's successive § 2255 motion. *See* 28 U.S.C. § 2253(c)(2); *Slack Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The clerk of the court is directed to issue a briefing schedule.

/s/ Jennifer Walker Elrod  
JENNIFER WALKER ELROD  
*United States Circuit Judge*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

TIMOTHY LINDSEY §  
VS. § ACTION NO. 4:16-CV-514-Y  
UNITED STATES OF AMERICA § (Crim. No. 4:09-CR-135-Y)

ORDER DISMISSING SUCCESSIVE MOTION  
TO VACATE SENTENCE AND DENYING CERTIFICATE OF APPEALABILITY

Pending before the Court is Defendant's successive Motion Under 28 U.S.C. Section 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (doc. 4). After review of the motion, the related briefs, and the applicable law, the Court concludes, for the reasons urged by the government, that it lacks jurisdiction to consider Defendant's successive motion.

Defendant has failed to demonstrate that it is more likely than not that the Court relied on the residual clause of the Armed Career Criminal Act ("ACCA") when imposing the sentencing enhancement authorized by that Act. See 18 U.S.C. 924(e)(1)(B)(i). As a result, he has failed to demonstrate that his motion rests on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See 28 U.S.C. § 2255(h)(2). His motion is therefore untimely.

And Defendant's motion lacks substantive merit as well. As his brief admits, burglary convictions under section 30.02(a)(1) of Texas's burglary statute have been considered equivalent to "generic burglary" for some time, and they are thus sufficient to serve as predicate offenses for purposes of the ACCA's sentencing enhancement under its enumerated-offense clause. (Def.'s Br. in Support of §

2255 Mot (doc. 5) 2 (citing *United States v. Constante*, 544 F.3d. 584 (5th Cir. 2008)); *see also* 18 U.S.C. § 924(e)(2)(B)(ii). Recent case law further establishes that convictions under section 30.02(a)(3) of Texas's burglary statute also qualify as "generic burglary" for purposes of the ACCA enhancement. *See United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (concluding that section 30.02(a)(3) of Texas's burglary statute constitutes "generic burglary" for purposes of the ACCA's enhancement) (quoting *Quarles v. United States*, 139 S. Ct. 1872, 1877 (2019) (concluding that "generic burglary" occurs "if the defendant forms the intent to commit a crime at any time during the continuous event of unlawfully remaining in a building or structure") and *United States v. Stitt*, 139 S. Ct. 399, 404, 407 (2018) (concluding that "generic burglary" "includes burglary of a "nonpermanent or mobile structure that is adapted or used for overnight accommodation"')). As a result, each of Defendant's prior burglary offenses constituted predicate offenses for purposes of the ACCA enhancement.

The Court further concludes that jurists of reason would neither disagree with this resolution of Defendant's constitutional claims nor conclude that the issues raised by Defendant are adequate to deserve encouragement to proceed further. Consequently, a certificate of appealability under Federal Rule of Appellate Procedure 22(b) shall not issue.

SIGNED January 2, 2020.

  
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TERRY R. MEANS  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 16-10728

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In re: TIMOTHY LINDSEY,

Movant

A True Copy  
Certified order issued Jun 21, 2016

*Tyler W. Cawley*

Clerk, U.S. Court of Appeals, Fifth Circuit

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Motion for an order authorizing  
the United States District Court for the  
Northern District of Texas, Fort Worth to consider  
a successive 28 U.S.C. § 2255 motion

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Before HIGGINBOTHAM, SMITH, and OWEN, Circuit Judges.

PER CURIAM:

Timothy moves for authorization to file a successive 28 U.S.C. § 2255 motion challenging his conviction and sentence for possession of a firearm by a convicted felon. Lindsey contends that his sentence was improperly enhanced under the Armed Career Criminal Act's residual clause. *See* 18 U.S.C. § 924(e). He relies on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause as unconstitutionally vague and established a new rule of constitutional law made retroactive to cases on collateral review. *See* § 2255(h)(2); *see Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016).

In order to file a successive § 2255 motion, Lindsey must make a *prima facie* showing that his motion "contain[s]" either "newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty" or "a new rule of

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constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” § 2255(h); *Reyes-Requena v. United States*, 243 F.3d 893, 897-98 (5th Cir. 2001).

Our assessment of Lindsey’s motion is limited by the records available to us, and we express no view of the ultimate merit of his claims. We have sufficient information, however, to grant him authorization to proceed further under § 2255(h)(2). *See Reyes-Requena*, 243 F.3d at 899.

Accordingly, IT IS ORDERED that Lindsey’s motion for authorization is GRANTED. Our grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Lindsey has failed to make the showing required to file such a motion. *See* 28 U.S.C. § 2244(b)(4); *Reyes-Requena*, 243 F.3d at 899; *In re Morris*, 328 F.3d 739, 741 (5th Cir. 2003).

The Clerk is DIRECTED to transfer the motion for authorization and related pleadings to the district court for filing as a § 2255 motion. *See Dornbusch v. Comm'r*, 860 F.2d 611, 612-15 (5th Cir. 1988). The filing date shall be, at the latest, the date the motion for authorization was filed in this court, unless the district court determines that an earlier filing date should apply. *See Spotville v. Cain*, 149 F.3d 374, 376 (5th Cir. 1998) (prisoner mailbox rule).

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 15-10839

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In re: TIMOTHY LINDSEY,

Movant

A True Copy  
Certified order issued Jan 12, 2016

*Tyler W. Caylor*  
Clerk, U.S. Court of Appeals, Fifth Circuit

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Motion for an order authorizing  
the United States District Court for the  
Northern District of Texas, Fort Worth to consider  
a successive 28 U.S.C. § 2255 motion

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Before DAVIS, JONES, and HAYNES, Circuit Judges.

PER CURIAM:

Timothy Lindsey, federal prisoner # 15723-077, seeks authorization to file a successive 28 U.S.C. § 2255 motion. Lindsey pleaded guilty to being a felon in possession of a firearm and was sentenced to 180 months under the Armed Career Criminal Act (“ACCA”).

We will permit the filing of a second or successive § 2255 motion only if Lindsey makes a *prima facie* showing that his claims rely on either (1) “newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense” or (2) “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” § 2255(h); *see* 28 U.S.C. § 2244(b)(3)(C).

Lindsey asserts that his sentence is invalid because *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new rule establishing that his prior

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burglaries are not violent felonies under the ACCA. We have determined, however, that *Johnson* does not apply retroactively to cases on collateral review. *In re Williams*, 2015 U.S. App. LEXIS 19732 (5th Cir. Nov. 12, 2015)(No. 15-30731). Lindsey's arguments based upon two decisions of our courts are similarly unavailing. *United States v. Emeary*, 794 F.3d 526 (5th Cir. 2015); *United States v. Constante*, 544 F.3d 584 (5th Cir. 2008). *Constance* and *Emeary* did not announce a new rule of constitutional law. See *Emeary*, 794 F.3d at 529 (following *Constance*); *Constance*, 544 F.3d at 587 (observing that the decision was only a determination of the statutory provision under which the defendant was convicted); § 2255(h)(2).

Although *Constance* was decided in 2008 and was the controlling law when Lindsey was sentenced, he did not rely on *Constance* to object to the characterization of his prior burglaries at sentencing or in his § 2255 motion, nor did he seek a certificate of appealability from the denial of that motion.

For these reasons, IT IS ORDERED that the motion for authorization to file a successive § 2255 motion is DENIED.

# United States District Court

NORTHERN DISTRICT OF TEXAS  
Fort Worth Division

UNITED STATES OF AMERICA

## JUDGMENT IN A CRIMINAL CASE

v.

TIMOTHY LINDSEY

Case number: 4:09-CR-135-Y (01)

Bret Helmer, assistant U.S. attorney

M. Shawn Matlock, attorney for the defendant

On December 9, 2009, the defendant, Timothy Lindsey, entered a plea of guilty to count one of the one-count indictment filed on October 14, 2009. Accordingly, the defendant is adjudged guilty of such count, which involves the following offense:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE CONCLUDED	COUNT
18 U.S.C. § 922(g)(1)	Possession of a Firearm by a Convicted Felon, a Class A felony	August 14, 2009	One

The defendant is sentenced as provided in pages two through three of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100 for count one of the one-count indictment.

The defendant shall notify the United States attorney for this district within thirty 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.

Sentence imposed May 3, 2010

  
\_\_\_\_\_  
TERRY R. MEANS  
UNITED STATES DISTRICT JUDGE

Signed May 3, 2010

20-10072.279

## IMPRISONMENT

The defendant, Timothy Lindsey, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 180 months on count one of the one-count indictment. The sentence imposed in this case shall run consecutively to pending parole revocation sentences in Case Nos. 0447814A, 0450136D, 0454372A, and 0458815D in the 213th Judicial District Court, Tarrant County, Texas, and Case Nos. 0826727D and 0830193D in the 297th Judicial District Court, Tarrant County, Texas.

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

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years on count one of the one-count indictment.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

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

In addition the defendant shall:

- not commit another federal, state, or local crime;
- not possess illegal controlled substances;
- not possess a firearm, destructive device, or other dangerous weapon;
- cooperate in the collection of DNA as directed by the probation officer;

report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons;

participate in workforce development programs and services involving activities relating to occupational and career development including, but not limited to, assessments and testing, educational instruction, training classes, career guidance, counseling, case management, and job search and retention services, as directed by the probation officer until successfully discharged from the program;

participate in a program (inpatient and/or outpatient) approved by the probation office for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use; abstain from the use of alcohol and all other intoxicants during and after completion of treatment; contribute to the costs of services rendered (copayment) at the rate of at least \$25 per month;

participate in mental health treatment services, as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, and contributing to the costs of services rendered (co-payment) at the rate of at least \$25 per month; and

refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

### **FINE/RESTITUTION**

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

### **RETURN**

I have executed this judgment as follows:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
United States marshal

BY \_\_\_\_\_  
deputy marshal

**20-10072.281**