APPENDIX

APPENDIX

A-1

2017 WL 4570661
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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.

Darryl Tyrone **REPRESS**, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 17-10844
|
Non-Argument Calendar
|
(October 13, 2017)

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket Nos. 1:16-cv-22601-CMA; 1:04-cr-20713-CMA-1

Attorneys and Law Firms

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

Robert Benjamin Cornell, U.S. Attorney's Office, Fort Lauderdale, FL, Nicole D. Mariani, Aileen Cannon, Wifredo A. Ferrer, Daya Nathan, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Respondent-Appellee

Before HULL, WILSON and JILL PRYOR, Circuit Judges.

Opinion

PER CURIAM:

***1** Darryl Tyrone Repress, a federal inmate, appeals the district court's order denying his 28 U.S.C. § 2255 motion to vacate. Specifically, Repress argues that the district court erred in concluding that his 1982 and 1983 Florida convictions for robbery with a firearm qualified as Armed Career Criminal Act ("ACCA") predicates notwithstanding the Supreme Court's decision in *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). Because binding circuit precedent forecloses Repress's arguments on appeal, we affirm.

I.

Repress was convicted in 2005 of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Among other convictions, Repress had two prior convictions for robbery with a firearm (in 1982 and 1983), a conviction for attempted first degree murder, and a conviction for possession with intent to deliver cocaine, all under Florida law. His presentence investigation report ("PSI") stated that Repress was subject to an enhanced sentence under ACCA, which requires a minimum 15-year prison sentence whenever a § 922(g) defendant has three prior "violent felony" or serious drug convictions. *See* 18 U.S.C. § 924(e).

At the time of Repress's sentencing, ACCA provided three definitions of "violent felony." The "elements clause" covered any offense that "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). The next subsection in the statute contained the other two definitions. *See id.* § 924(e)(2)(B)(ii). That subsection defined "violent felony" as any offense that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The first 9 words made up the "enumerated crimes clause," and the last 13 comprised the "residual clause."

The district court adopted the PSI and sentenced Repress as an Armed Career Criminal to 188 months' imprisonment. [1] Repress's direct appeal was dismissed as untimely. After that appeal was dismissed, the Supreme Court decided *Johnson*, in which it struck ACCA's residual clause definition of "violent felony" as unconstitutionally vague. 135 S.Ct. at 2563; *see also Welch v. United States*, — U.S. —, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) (explaining that *Johnson*'s holding is retroactively applicable to cases on collateral review). Repress then filed the instant § 2255 motion, arguing that his ACCA-enhanced sentence was unlawful because under *Johnson* his 1982 and 1983 Florida convictions for robbery with a

firearm no longer qualified as violent felonies. The district court denied his motion, determining that the convictions qualified under ACCA's elements clause and therefore were unaffected by *Johnson*'s rule, but granted him a certificate of appealability.

1 Neither the PSI nor the record at sentencing indicates which definition of "violent felony" encompassed Repress's convictions for robbery with a firearm and attempted first degree murder. On appeal, neither party addresses Repress's attempted first degree murder conviction; therefore, we do not either. Indeed, because we conclude his robbery convictions qualify as ACCA predicate offenses, and the parties do not dispute that Repress's drug conviction qualifies as a predicate, it is immaterial whether his attempted first degree murder conviction qualifies.

***2** This is Repress's appeal.

II.

"In a section 2255 proceeding, we review legal issues *de novo* and factual findings under a clear error standard." *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999). A district court's determination that a conviction qualifies as a violent felony under ACCA is a legal conclusion, which we review *de novo*. *United States v. Gandy*, 710 F.3d 1234, 1236 (11th Cir. 2013).

III.

Repress's sole argument on appeal is that the district court erred in denying his § 2255 motion on the ground that his Florida convictions for robbery with a firearm qualify as ACCA predicates notwithstanding *Johnson*. For the reasons that follow, we conclude that the district court did not err.

Under Florida law at the time of Repress's convictions, robbery was defined as "the taking of money or other property which may be the subject of a larceny from the person or custody of another by force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (1981). A robbery was a first degree felony "[i]f in the course of committing the robbery the offender carried a firearm or other deadly weapon." *Id.* § 812.13(2)(a). The district court denied Repress's claim based on *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), which held without explanation that a 1974 Florida conviction for robbery with a firearm qualified as a violent felony under ACCA's elements clause. The 1974 Florida robbery statute contained the same definition of robbery and enhancement for robbery with a firearm as the 1981 version under which Repress was convicted. *See* Fla. Stat. § 812.13(1), (2)(a)(1974).

After the district court denied Repress's § 2255 motion, this Court held, in *United States v. Fritts*, that *Dowd* remained binding circuit precedent. 841 F.3d 937, 939-40 (11th Cir. 2016) (explaining that *Dowd* had not been undermined by *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013)), *cert. denied*, — U.S. —, 137 S. Ct. 2264, — L.Ed.2d — (2017). We are bound to follow *Dowd* and *Fritts* "unless and until [they are] 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).

Repress contends that *Dowd* and *Fritts*, as well as other cases construing Florida's robbery statues, failed to answer whether his 1982 and 1983 robbery with a firearm convictions remain ACCA predicates after *Johnson*. We disagree: *Dowd*, by construing the same statutory definition of robbery with a firearm as the one under which Repress was convicted, answered that question. And although it may have been arguable when Repress filed his § 2255 motion whether *Dowd* remained good law, *Fritts* settled that question. Repress asserts that *Dowd*, *Fritts*, and other decisions construing Florida's robbery statute failed to account for vagaries of state law or consider additional reasons why a conviction for robbery with a firearm should not qualify as a predicate under ACCA's elements clause. Even assuming Repress is correct, we are bound to follow *Dowd* and *Fritts*. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1301-04 (11th Cir. 2001) (explaining that our prior panel precedent binds subsequent panels even if the prior panel overlooked reasons brought to the subsequent panel's attention and regardless of whether the subsequent panel agrees with the prior panel's result).

***3** For these reasons, we conclude that the district court rightly held that Repress's convictions for robbery with a

firearm qualified as ACCA predicates him for an ACCA-enhanced sentence. We affirm.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2017 WL 4570661

End of Document

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

04-20713 CR-ALTONAGA

MAGISTRATE JUDGE SANDERA

Case No. _____

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(e)
21 U.S.C. § 841(a)
18 U.S.C. § 924(c)(1)(A)
18 U.S.C. § 924(d)(1)
18 U.S.C. § 853

UNITED STATES OF AMERICA

vs.

DARRYL TYRONE REPRESS,

Defendant.

_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

On or about September 15, 2004, in Miami-Dade County, in the Southern District of Florida, the defendant,

DARRYL TYRONE REPRESS,

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

COUNT 2

On or about September 15, 2004, in Miami-Dade County, in the Southern District of Florida, the defendant,

DARRYL TYRONE REPRESS,

did knowingly and intentionally possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

Pursuant to Title 21, United States Code, Section 841(b)(1)(C), it is further alleged that this violation involved a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance.

It is further alleged that the mixture and substance containing a detectable amount of cocaine weighed at least one hundred grams.

COUNT 3

On or about September 15, 2004, in Miami-Dade County, in the Southern District of Florida, the defendant,

DARRYL TYRONE REPRESS,

did knowingly and intentionally possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

Pursuant to Title 21, United States Code, Section 841(b)(1)(D), it is further alleged that this violation involved less than fifty kilograms of marijuana.

It is further alleged that the marijuana weighed less than two hundred fifty grams.

COUNT 4

On or about September 15, 2004, in Miami-Dade County, in the Southern District of Florida, the defendant,

DARRYL TYRONE REPRESS,

did possess a firearm in furtherance of a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is, a violation of Title 21, United States Code, Section 841, as set

forth in Count 2 and Count 3 of this Indictment; all in violation of Title 18, United States Code, Section 924(c)(1)(A)(i).

FORFEITURE

Counts One and Four

The allegations of Count One and Four 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 has an interest, pursuant to the provisions of Title 28, United States Code, Section 2461; Title 18, United States Code, Section 924(d)(1); and the procedures outlined at Title 21, United States Code, Section 853.

Upon conviction of any violation of Title 18, United States Code, Section 922(g)(1), or 924(c)(1) the defendant shall forfeit to the United States any firearm or ammunition involved in or used in the commission of said violation; including but not limited to a Model SW40C Smith and Wesson, .40 caliber firearm, serial number PAM3978.

All pursuant to Title 18, United States Code, Section 924(d)(1) as incorporate by Title 28, United States Code, Section 2461 and the procedures set forth at Title 21, United States Code, Section 853.

Counts Two and Three

The allegations of Counts Two and Three of this Indictment are realleged and by this reference fully incorporated herein for the purpose of alleging forfeitures to the United States of America of certain property in which the defendant has an interest, pursuant to the provisions of Title 21, United States Code, Section 853.

Upon conviction of any of the violations alleged in Counts Two and Three, the defendant

shall forfeit to the United States any property constituting or derived from any proceeds which the defendant obtained, directly or indirectly, as the result of such violations, and any property which the defendant used or intended to be used in any manner or part to commit or to facilitate the commission of such violations, including but not limited to approximately ~~ten~~ one thousand ninety one dollars in United States currency seized from the defendant on September 15, 2004; pursuant to Title 21, United States Code, Section 853.

Clerks 9-28-04

A TRUE BILL

FOREPERSON

MARCOS DANIEL JIMENEZ
UNITED STATES ATTORNEY

JONATHAN E. LOPEZ
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA CASE NO. 04 - 20713 CR-ALTONAGA

vs.

DARRYL TYRONE REPRESS,

Defendant.

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

X	Miami	___	Key West	
___	FTL	___	WPB	___ FTP

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

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 2-3 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) Yes
If yes:
Magistrate Case No. 04-3181-RLD
Related Miscellaneous numbers: ___
Defendant(s) in federal custody as of 9/15/2004
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? ___ Yes X No

JONATHAN E. LOPEZ
ASSISTANT UNITED STATES ATTORNEY
Court No. A5500750

*Penalty Sheet(s) attached

REV.1/14/04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET 04-20713CR-ALTONAGA MAGISTRATE JUDGE BANDSTRA

Defendant's Name: Darryl Tyrone Repress **Case No:** _____

Count #: 1

Felon in possession of a firearm.

Title 18, United States Code, Sections 922 (g)(1) and 924(e)

*** Max.Penalty:** Life imprisonment

Count #: 2

Possession with intent to distribute cocaine

Title 21, United States Code, Section 841(a)(1)

*** Max.Penalty:** 20 years' imprisonment

Count #: 3

Possession with intent to distribute marijuana

Title 21, United States Code, Section 841(a)(1)

***Max. Penalty:** 10 years' imprisonment

Count #: 4

Possession of firearm in furtherance of drug trafficking offense

Title 18, United States Code, Sections 924(c)(1)(A)

***Max. Penalty:** Life imprisonment

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

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

vs.

DARRYL TYRONE REPRESS

JUDGMENT IN A CRIMINAL CASE

Case Number: 04-20713-CR-ALTONAGA

USM Number: 71293-004

Counsel For Defendant: Orlando do Campo, Esq.
Counsel For The United States: Jonathan Lopez, Esq.
Court Reporter: Barbara Medina

The defendant pleaded guilty to Count(s) 1 of the Superseding Information.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. §§ 922(g)(1) and 924(e)	Possession of a Firearm by a Convicted Felon	September 15, 2004	1

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

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:
May 5, 2005

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

May 6, 2005

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DEFENDANT: DARRYL TYRONE REPRESS
CASE NUMBER: 04-20713-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 **188 months**.

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

Designation to a facility located in or near South Florida
and participation in a drug treatment program.

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: DARRYL TYRONE REPRESS
CASE NUMBER: 04-20713-CR-ALTONAGA

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 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: DARRYL TYRONE REPRESS
CASE NUMBER: 04-20713-CR-ALTONAGA

SPECIAL CONDITIONS OF SUPERVISION

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

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

The defendant shall obtain written approval from the U.S. Probation Officer before entering into any self-employment.

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

DEFENDANT: DARRYL TYRONE REPRESS
CASE NUMBER: 04-20713-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	$2,000.00	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: DARRYL TYRONE REPRESS
CASE NUMBER: 04-20713-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 U.S. COURTS and is to be addressed to:

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

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

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

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.

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.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-22601-ALTONAGA
(Criminal Case No.04-20713-CR-Altonaga)

DARRYL REPRESS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

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

Mr. Repress, through undersigned counsel, respectfully files this amended motion to vacate, set aside, or correct this sentence, pursuant to 28 U.S.C. § 2255 and Fed. R. Civ. P. 15(a)(1), and, in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015), and in support thereof, states:

1. On February 23, 2005, Mr. Repress pled guilty to count one of his superseding information, charging him with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) and 924(e).

2. At his sentencing, on May 6, 2005, the Court determined that Mr. Repress qualified for an 188-month sentence as an Armed Career Criminal ("ACCA"),

3. Mr. Repress 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 demonstrates that Mr. Repress does not qualify as an ACCA. Mr. Repress 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). This amended § 2255 motion relates back to the original § 2255 motion, which was filed by counsel prior to that date. *See* Fed. R. Civ. P. 15©(1)(B). Thus, this motion is timely under § 2255(f)(3).

5. Accordingly, Mr. Repress is entitled to relief under § 2255.

PROCEDURAL HISTORY

Mr. Repress was charged in a one count superseding information with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) and 924(e). [DE:53].[1]

[1] "DE" refers to docket entries in Mr. Moss's underlying criminal case, 04-20713-CR-ALTONAGA.

Mr. Repress entered into a written plea agreement, pleading guilty to the superseding information [DE:56]. On February 23, 2005, the Court conducted a change of plea hearing. [DE:55]. In the Pre-Sentence Investigation Report ("PSI"), U.S. Probation advised that Mr. Repress qualified as an ACCA, but did not specify what prior offenses it was relying on in the PSI. It is possible that U.S. Probation relied upon the convictions in paragraphs 31 (robbery with a firearm in 1982), 32 (robbery with a firearm in 1982), and 36 (possession with intent to deliver cocaine),

On May 6, 2005, Mr. Repress was sentenced by the Court to a term of imprisonment of 188-months as an ACCA. [DE:62]. Mr. Repress appealed his conviction and sentence. [DE:69]. Mr. Repress also filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. [DE:71]. Mr. Repress' motion to vacate was denied on April 1, 2014. [DE:79]. Mr. Repress' appeal was dismissed by the 11th Circuit Court of Appeals on December 22, 2014. [DE:84]. On July 1, 2016 the 11th Circuit Court of Appeals granted Mr. Repress authorization to file this second or successive § 2255 motion.

GROUNDS FOR RELIEF

According to *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), a pre-1999 conviction for "strong-arm robbery" under Fla. Stat. §812.13(1) must be analyzed as a "robbery by sudden snatching," an offense for which "any degree of force" sufficed. In *Welch*, the Eleventh Circuit distinguished *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) where it had found a 2001 conviction for

attempted robbery was a "crime of violence" within both the elements and residual clauses of the Guidelines. Welch argued, and the Court agreed, that *Lockley* was not dispositive of whether his 1996 conviction under §812.13(1) was a violent felony, "because Lockley was convicted after Florida promulgated the 'sudden snatching' statute, *so snatching from the person might [have] furnish[ed] the basis for [the 1996] robbery conviction here but not in Lockley.*" *Welch*, 683 F.3d at 1312 (emphasis added).

Although the language of §812.13(1) has never changed, what *did* change – quite significantly in 1999 (*after* both Welch and Mr. Repress were convicted) – was Florida's statutory scheme for robberies. In 1999, the Florida legislature enacted a separate "robbery by sudden snatching" statute, Fla. Stat. §812.131. But as of 1996 (before the enactment of that statute), the Court recognized in *Welch*, non-forceful snatching offenses were still being prosecuted as "strong-arm" robberies under §812.13(1) in Florida. *See Welch*, 683 F.3d at 1311 and nn.28-38. Only *after* Welch was convicted, the Eleventh Circuit underscored, was §813.131 enacted, establishing a separate crime of "'robbery by sudden snatching,' in between larceny and robbery." 683 F.3d at 1311.

The Eleventh Circuit recognized in *Welch* that the enactment of §812.131 "appear[ed] to have been a legislative response" to the Florida Supreme Court's decision in *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997), which clarified that "there must be resistance by the victim that is overcome by the physical force of the offender" to establish robbery, "so that the intermediate appellate decisions holding

mere snatching to be sufficient were put in doubt." *Welch*, 683 F.3d at 1311. Nonetheless, the *Welch* Court found *Robinson*'s clarification of the law irrelevant to whether the defendant's 1996 Florida robbery conviction qualified as an ACCA predicate, since "[i]n 'determining whether a defendant was convicted of a 'violent felony,'" the Court must apply "the version of the state law that the defendant was actually convicted of violating." *Welch*, 683 F.3d at 1311 (citing *McNeill v. United States*, 563 U.S. 816, 131 S.Ct. 2218, 2222 (2011)).

As the Eleventh Circuit recognized in *Welch*, as of 1996 – and therefore, in 1982 when Mr. Repress was convicted as well – the "latest authoritative pronouncement" as to the elements of robbery under §812.13(1) was in *McCloud v. State*, 335 So.2d 257 (Fla. 1976). And in *McCloud*, the Florida Supreme Court expressly held that "any degree of force suffices" for robbery, including the minimal amount of force necessary to "extract" property from a victim's "grasp," so long as the taking is not by "stealth." *McCloud*, 335 So.2d 258-259 (what distinguished robbery from larceny is the victim's awareness of the taking).

Like Welch, Mr. Repress pled guilty to robbery under §812.13 "at a time when mere snatching" with "any degree of force" sufficed for conviction under then-controlling Florida Supreme Court law. *Welch,* 683 F.3d at 1311-1312. Accordingly, for the same reason the Eleventh Circuit assumed for its "violent felony" analysis that Welch's 1996 robbery conviction under §812.13(1) was for "robbery by sudden snatching," this Court should so assume for Mr. Repress' conviction here as well. The correctness of *Welch*'s "least culpable conduct"

analysis, notably, has since been validated by the Supreme Court in *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013).

Admittedly, in *Welch* the Eleventh Circuit did not follow its own "least culpable conduct" analysis to its logical conclusion under the ACCA's elements clause. However, it did agree with Welch that at least *"[a]rguably the elements clause would not apply to mere snatching."* *Id.* at 1312-1313 (emphasis added). Although the Court believed that question was "not cut and dried" at that time, it found it unnecessary to resolve definitively in 2012 since then-controlling precedent compelled a finding that even a non-forceful snatching was a "violent felony" within the residual clause. *Id.*

Now that the residual clause has been excised from the ACCA, however, and the Supreme Court has remanded in Welch's own §2255 case to definitively decide the elements clause question left open in 2012, *see Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257, 1268 (April 18, 2016)(remanding to the Eleventh Circuit in recognition of the fact that "reasonable jurists could at least debate whether Welch is entitled to relief" after the voiding of the ACCA's residual clause), this Court will have to use the categorical approach as clarified by the Supreme Court in *Moncrieffe* and *Descamps* to itself resolve whether a pre-1999 robbery conviction qualifies as a "violent felony" within the ACCA's elements clause. And *Moncrieffe* and *Descamps* confirm that because – as the Eleventh Circuit recognized in *Welch* – according to the Florida Supreme Court the "least culpable conduct" under Florida's robbery statute at the time of Mr. Repress' conviction was a taking by "any degree of force,"

Mr. Repress' robbery conviction is categorically overbroad vis-à-vis an offense within the ACCA's elements clause. Accordingly, it is no longer a countable ACCA predicate.

That Mr. Repress was sentenced for "armed robbery" under Fla. Stat. §812.13(2)(1982) does not change the above analysis. As a threshold matter, it is clear from the standard robbery instruction at the time of Mr. Repress' conviction, that in 1982 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 1982 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. Repress' underlying robbery conviction under §812.13(1) was categorically overbroad, ends the ACCA elements clause inquiry. Mr. Repress' 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. Repress' state court judge or a jury *had* been required to find the "aggravating circumstances" in §§812.13(2) 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) is itself categorically overbroad vis-a-vis the ACCA's element clause.

First, §812.13(2) 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), the Eleventh Circuit expressly held that the mere act of "carrying" 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) 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 the

Eleventh Circuit 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 Circuit 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* and *McGill* (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.

The Eleventh Circuit 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 Eleventh Circuit 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.

CONCLUSION

Wherefore, Mr. Repress now moves this Court to correct his sentence accordingly.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on July 6, 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 or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/ Jan C. Smith, II,*
Jan C. Smith, II, AFPD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22601-CIV-ALTONAGA

DARRYL TYRONE REPRESS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court upon Movant, Darryl Tyrone Repress's ("Repress['s]" or "Movant['s]") Amended Motion to Correct Sentence . . . ("Motion") [ECF No. 6], filed on July 6, 2016. Respondent, the United States of America ("Respondent" or "the Government") filed a Response in Opposition . . . ("Response") [ECF No. 9] on July 20, 2016. On August 18, 2016, Repress filed a Reply . . . ("Reply") [ECF No. 12]. The Court has reviewed the parties' submissions, the record, and applicable law.

I. BACKGROUND

On February 23, 2005, Repress pled guilty to one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. sections 922(g) and 924(e). (*See United States v. Repress*, Case No. 04-cr-20713-ALTONAGA (S.D. Fla. 2004) ("*Repress I*") Plea Agreement [ECF No. 56] 1). The Presentence Investigation Report ("PSI") advised Repress qualified as an armed career criminal under the Armed Career Criminal Act ("ACCA"), 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 ¶ 22).

The ACCA defines a violent felony as any crime punishable by imprisonment for a term exceeding one year that: (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; (2) is burglary, arson, or extortion, or involves use of explosives; or (3) otherwise involves conduct that presents a serious potential risk of physical injury to another. *See* 18 U.S.C. § 924(e)(2)(B). These three clauses are known as: (1) the "elements clause;" (2) the "enumerated clause;" and (3) the "residual clause," respectively. *In re Hires*, No. 16-12744-J, 2016 WL 3342668, at *1 (11th Cir. June 15, 2016).

In *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), the Supreme Court of the United States held imposing an increased sentence under the residual clause violates due process. The Court explained the residual clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony. . . . [T]hese uncertainties produce more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2554 (alterations added). The Court further stated the decision did "not call into question application of the Act" to the elements clause or the enumerated clause, but instead was limited to the residual clause. *Id.* at 2563. Shortly thereafter, in *Welch v. United States*, the Supreme Court held its ruling in *Johnson* applies retroactively to cases on collateral review. *See* 136 S. Ct. 1257, 1268 (2016).

The PSI listed Repress's multiple prior convictions, including: (1) a 1982 conviction for "robbery with a firearm" ("Robbery Conviction"); (2) a 1983 conviction for "robbery with a firearm" and attempted first degree murder ("Robbery with Attempted Murder Conviction"); and (3) a 1998 conviction for possession with intent to deliver cocaine ("Drug Offense Conviction"). (PSI ¶¶ 31–32, 36). The PSI did not indicate which of Repress's prior offenses — whether the three listed above or any of Repress's other offenses — U.S. Probation relied on in determining the ACCA applied to his case. (*See* Mot. 3; *see also* PSI ¶ 22). On May 5, 2005, the Court held

a sentencing hearing, at which Repress's counsel made no *Shepard*-based objections to the PSI, and agreed the ACCA enhancement applied. (*See Repress I*, Transcript of Sentencing . . . ("Sentencing Transcript") [ECF No. 78] 3:20–22; *see also* Reply 3). The Court agreed as well and sentenced Repress to 188 months of imprisonment, 3 years of supervised release, and a $2,000.00 fine. (*See generally Repress I*, Judgment in a Criminal Case [ECF No. 62]).

Like the PSI, the sentencing transcript does not indicate which convictions the Court relied on in concluding the ACCA applied. (*See generally* Sentencing Transcript). Both Repress and the Government assume the three qualifying convictions were Repress's Robbery Conviction, Robbery with Attempted Murder Conviction, and Drug Offense Conviction. (*See generally* Mot.; Resp.). The Court assumes the same for the purpose of the Motion.

On July 1, 2016, the United States Court of Appeals for the Eleventh Circuit granted Repress's application for leave to file the instant Motion as a second or successive motion under 28 U.S.C. section 2255. (*See generally* USCA Order . . . [ECF No. 5]). In the Motion, Repress argues, in light of *Johnson*, he no longer qualifies as an armed career criminal under the ACCA; thus, his sentence should be reduced. (*See* Mot. 2). In particular, Repress asserts his convictions for "robbery with a firearm" — the Robbery Conviction and Robbery with Attempted Murder Conviction — do not qualify as violent felony convictions under the ACCA's elements or enumerated clauses, in part because he was convicted before 1999, when the Florida Legislature created the statute criminalizing robbery-by-sudden-snatching. (*See generally id.*).

II. LEGAL STANDARDS

A. Florida Robbery Pre-1999

Before 1999 in Florida, there was no intermediary statute between robbery and larceny, criminalizing robbery-by-sudden-snatching. Florida's robbery statute, Florida Statute section 812.13, defines robbery as:

> [T]he taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

FLA. STAT. § 812.13 (alteration added). Although the definition of robbery has not changed, the Florida courts' interpretation of section 812.13 and Florida's statutory scheme for robberies changed in 1997 and 1999, respectively.

Because there was no separate statute for robbery-by-sudden-snatching before 1999, "a defendant could commit robbery . . . either by use of force or by 'sudden snatching,' which Florida courts construed as not requiring force." *In re Jackson*, No. 16-13536-J, 2016 WL 3457659, at *2 (11th Cir. June 24, 2016) (alteration added) (citing *Welch*, 683 F.3d at 1311 n. 29). There was a divide in Florida "on whether a snatching, as of a purse, or cash from a person's hand, or jewelry on the person's body, amounted to robbery." *Welch*, 683 F.3d at 1311.

To resolve this ambiguity and the inconsistent application of section 812.13, the Florida Supreme Court held in *Robinson v. State*, 692 So. 2d 883 (Fla. 1997): "in order for the snatching of property from another to amount to robbery, the perpetrator must employ more than the force necessary to remove the property from the person. . . . [T]here must be resistance by the victim that is overcome by the physical force of the offender." *Id.* at 886 (alterations added). The *Robinson* court clarified robbery by snatching could no longer be prosecuted under section

812.13, *see id.* 886–87, and it "put in doubt" the "intermediate appellate decisions holding mere snatching to be sufficient" under section 812.13, *Welch*, 683 F.3d at 1311.

In October 1999, after *Robinson*, Florida's legislature created a statute criminalizing robbery-by-sudden-snatching, section 812.131, thereby placing robbery-by-sudden-snatching into its own category separate from robbery under section 812.13. *See id.* "This statute appears to have been a legislative response to [*Robinson*] holding that 'there must be resistance by the victim that is overcome by the physical force of the offender' to establish robbery." *Id.* (alteration added) (quoting *Robinson*, 692 So. at 886). Therefore, any defendant convicted under section 812.13 before 1999 could have potentially been convicted of robbery-by-sudden-snatching, which does not require force. *See id.* After 1999, section 812.13 comprised only forceful acts. *See id.*

B. The Categorical and Modified Categorical Approach

The Supreme Court has repeatedly instructed courts to apply the categorical approach in determining whether a crime qualifies as a violent felony under the ACCA. *See, e.g.*, *Johnson*, 135 S. Ct. at 2557; *see also Welch*, 136 S. Ct. at 1262 ("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.").

Under the categorical approach, a court is limited to looking at "how the law defines the offense and not in terms of how an individual offender might have committed [the offense] on a particular occasion." *Johnson*, 135 S. Ct. at 2557 (alteration added). That is, a court may only look at how the law defines a defendant's prior offenses and cannot look at the particular facts underlying those prior offenses. *See Descamps v. United States*, 133 S. Ct. 2276, 2280 (2013) (The "ACCA's language shows that Congress intended sentencing courts 'to look only to the fact

that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.'" (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990))).

In this approach, courts "look no further than the statute and judgment of conviction," *United States v. Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010), and must assume "the conviction rested upon nothing more than the least of the acts criminalized," *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014) (quoting *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013)). The categorical approach applies to statutes that are indivisible — that is, where the "statute defines only a single crime with a single set of elements." *Mathis v. United States*, 136 S. Ct. 2243, 2245 (2016). If the statute is divisible — because it "lists multiple crimes by listing multiple, alternative elements," *id.* — courts are permitted to "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Descamps*, 133 S. Ct. at 2281.

If the offense of conviction falls under the enumerated clause — that is, constitutes burglary, arson, or extortion — the court must apply the categorical approach and compare the elements of the crime with the elements of the corresponding ACCA crime of violence. *See id.* If the statute's elements are broader than the generic ACCA crime, the "prior convictions cannot give rise to ACCA's sentence enhancement." *Mathis*, 136 S. Ct. at 2246. For example, a burglary statute criminalizing unlawful entry into a "building, structure [or] land, water, or air vehicle" is broader than a generic burglary crime that only requires unlawful entry into a "building or other structure." *Id.* (citations omitted; alteration in original).

In *Mathis*, the Supreme Court held it made no difference whether the facts underlying the defendant's conduct fell within the generic burglary offense because Iowa's burglary statute was

broader than the generic burglary offense — requiring entry into a building or other structure — given Iowa's statute listed entry into a land, water, or air vehicle. *See id.* It did not matter the defendant in *Mathis* actually burgled structures, rather than vehicles, because courts cannot look at the facts of the offense but only at the elements of the statute; and the elements of Iowa's burglary statute were broader than the generic elements of burglary. *See id.* at 2250.

III. ANALYSIS

The parties contest whether: (1) Repress's robbery convictions qualify as violent felonies under the ACCA's elements clause; (2) Repress must demonstrate he was sentenced under the residual clause; and (3) Repress's *Johnson* claim is procedurally barred. (*See* Resp. 4–5). The Court addresses only the first issue, finding it dispositive.

A. Repress's Robbery Convictions Under the ACCA's Elements Clause

Repress argues his robbery convictions do not qualify as violent felonies under the ACCA's elements clause because he was convicted of these offenses in 1982 and 1983, before the Florida legislature created the statute criminalizing robbery-by-sudden-snatching in 1999. (*See* Reply 5). He contends the Court must assume, under the "least culpable act" rule, his robbery convictions were for robbery-by-sudden-snatching, as opposed to general robbery.[1] (*See id.* 6); *see also Moncrieffe*, 133 S. Ct. at 1684 ("Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized . . . ." (first two alterations in original) (quoting *Curtis Johnson v. United States,* 559 U.S. 133, 137 (2010))). The Government has conceded in other cases that a robbery-by-sudden-snatching no longer qualifies

[1] Just like its robbery statute, Florida's robbery-by-sudden-snatching statute includes a provision where the offender is armed during the robbery. *See* FLA. STAT. § 812.131(2)(a) ("If, in the course of committing a robbery by sudden snatching, the offender carried a firearm or other deadly weapon, the robbery by sudden snatching is a felony of the second degree . . . ." (alteration added)).

as an ACCA violent felony after *Johnson*, *see Dieujuste v. United States*, Case No. 15-80618-cv-RYSKAMP (2016) [ECF No. 20] 12; consequently, Repress insists his robbery convictions cannot qualify as ACCA predicate crimes.

The Court disagrees. The fact Repress was convicted of two counts of robbery *with a firearm* distinguishes the instant case from *Dieujuste*. The Eleventh Circuit has repeatedly held armed robbery is a violent felony under the ACCA's elements clause. Specifically, in *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), the Eleventh Circuit concluded the appellant's 1974 "armed robbery conviction is undeniably a conviction for a violent felony," citing to the ACCA's elements clause. Further, in *United States v. Oner*, 382 F. App'x 893, 896 (11th Cir. 2010), the Eleventh Circuit held armed robbery remained a violent felony under the elements clause, even anticipating the Supreme Court's decision in *Johnson*, because "[t]he carrying of a firearm or other deadly weapon during a robbery surely implicates violent force and of the most severe kind" (alteration added).

If Repress was re-convicted today, depending on the unknown underlying facts of his two robbery convictions, it is possible he would be convicted of armed robbery-by-sudden-snatching under Florida Statute section 812.131(2)(a) instead of armed robbery under section 812.13(2)(a). The substantive difference between the two statutes is that armed robbery expressly includes as an element "the use of force, violence, assault, or putting in fear," FLA. STAT. § 812.13(1), while armed robbery by sudden snatching does not require a showing that: (1) the "offender used any amount of force beyond that effort necessary to obtain possession of the money or other property;" or (2) that there "was any resistance offered by the victim to the offender or that there was injury to the victim's person," *id.* § 812.131(1). Rather, an offender commits armed robbery-by-sudden-snatching when he takes "money or other property from the victim's person,

with intent to permanently or temporarily deprive the victim or the owner of the money or other property;" the victim becomes aware of the taking while it is occurring; and the offender carries a firearm or other deadly weapon during the robbery. *Id.* § 812.131.

Under the categorical approach, it appears robbery-by-sudden-snatching without a firearm does not satisfy the ACCA's elements clause because it does not have "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). However, armed robbery-by-sudden-snatching does satisfy the ACCA's elements clause under the categorical approach, as carrying a "firearm or other deadly weapon" during the robbery creates the threatened use of physical force against the person of another. *See Oner*, 382 F. App'x at 896 ("The carrying of a firearm or other deadly weapon during a robbery surely implicates violent force and of the most severe kind.").

United States v. Rafidi, No. 15-4095, 2016 WL 3670273 (6th Cir. July 11, 2016), is instructive. In *Rafidi*, the United States Court of Appeals for the Sixth Circuit analyzed whether a defendant's conviction for assaulting a federal law enforcement officer should be elevated to a violent felony under the ACCA's elements clause because the defendant was convicted under the statute's subsection, which involved an additional element — the use of a deadly or dangerous weapon. *See id.* at **4–5. In its analysis, the Sixth Circuit stated:

> [N]ot every crime becomes a crime of violence when committed with a deadly weapon.[] But if a statute ha[s] as an element some degree of, or the threat of, physical force in the more general sense, then the use of a deadly weapon may transform this more general force into the necessary violent force to constitute a crime of violence within the meaning of *Johnson I*. . . Under this reasoning, if a defendant commits a violation of § 111 through intentionally causing physical contact with the federal officer — even if this physical contact is not in itself capable of causing physical pain or injury, . . . —§ 111(*b*)'s additional required element of using a deadly weapon during this encounter would elevate this lower degree of physical force into violent force sufficient to establish § 111(b) as a crime of violence.

Id. at *5 (alterations added; internal citations and quotation marks omitted; emphasis in original).

Just as the Sixth Circuit found a statute providing for non-dangerous physical contact could be elevated to a violent felony when coupled with use of a deadly weapon, the Court finds a non-dangerous "snatching" of money or property from a victim's person becomes a violent felony when the snatcher carries a firearm or deadly weapon during the crime. The logic behind *Rafidi* applies with equal force here. While carrying a deadly weapon will not elevate every offense to a violent felony, where, as in the robbery-by-sudden-snatching statute, the offender physically contacts the victim and commits the offense with the victim's knowledge, introducing a firearm into the mix dramatically alters the dynamic and creates a "threatened use of physical force." 18 U.S.C. § 924(e)(2)(B)(i). Thus, armed robbery-by-sudden-snatching qualifies as a violent felony under the ACCA's elements clause. Whether, after 1999, Repress would have been convicted of armed robbery or armed robbery-by-sudden-snatching matters not, as both offenses qualify as violent felonies under the elements clause.[2]

Because Repress's robbery convictions qualify as violent felonies under the elements clause, the Court need not address Repress's alternative argument Florida armed robbery is categorically overbroad in violation of *Descamps*. (*See* Mot. 7–9). The *Descamps*-overbreadth analysis only applies in cases where the offense qualifies under the ACCA's enumerated clause, rather than the elements clause. *See generally Descamps*, 133 S. Ct. at 2281 (applying the overbreadth analysis to the enumerated crime of burglary). If the enumerated clause is implicated, the court must compare the elements of the statute the defendant was convicted of against the elements of the "generic" enumerated crime. *See id.*; *see also Mathis*, 136 S. Ct. at

[2] Repress's argument that in 1982, section 812.13's provisions regarding carrying a firearm were simply penalty enhancements as opposed to separate enhanced offenses with additional elements, also fails to persuade. (*See* Mot. 7). Repress cites no case law or legislative history to support this point, and it is difficult to imagine a statutory scheme in which the carrying of a firearm is not an element of the offense to be determined by the factfinder. Notably, Repress does not address this argument in his Reply. (*See generally* Reply).

2246 (holding if the statute's elements are broader than those of the generic ACCA enumerated crime, the "prior convictions cannot give rise to ACCA's sentence enhancement."). Because Repress's robbery convictions qualify as violent felonies under the ACCA's elements clause, rather than the enumerated clause, the Court does not conduct the *Descamps*-overbreadth analysis.

Further, because Repress's robbery convictions qualify under the elements clause, they do not implicate *Johnson*, which only invalidated the ACCA's residual clause. *See* 135 S. Ct. at 2563 (stating the Court's decision did "not call into question application of the Act" to the elements clause or the enumerated clause, but instead was limited to the residual clause). Thus, because Repress has two convictions for "robbery with a firearm," one conviction for attempted first degree murder, and one serious drug offense conviction, he has at least three prior convictions for "a violent felony or a serious drug offense," and his ACCA sentencing enhancement remains valid.[3] *See* 18 U.S.C. § 924(e).

B. 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 U.S. 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 petitioner must

[3] The Court also rejects, as other courts have, Defendant's argument every robbery conviction under section 812.13 is categorically overbroad because the statute's element of "force" does not require "violent force" in every case. (Reply 9). *See United States v. Chisolm*, No. 614CR282ORL28GJK, 2015 WL 10682726, at *8 (M.D. Fla. Oct. 29, 2015) (rejecting the defendant's argument "physical force" under the ACCA's elements clause requires "violent force," and "violent force" is not an element of robbery in Florida; finding instead the element of "use of force, violence, assault, or putting in fear" in section 812.13 satisfies the "physical force" requirement).

> 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).

While the Court denies Repress's Motion, it acknowledges the uncertainty of the post-*Johnson* case law, particularly in a context such as this, where: (1) the PSI fails to state the specific statutes violated or the facts of the underlying offenses; and (2) no other court has yet ruled on whether Florida's armed robbery by sudden snatching constitutes a violent felony under the ACCA's elements clause. Thus, because "reasonable jurists" could find the Court's assessment debatable, a certificate of appealability is warranted.

IV. CONCLUSION

Based on the foregoing analysis, it is

ORDERED AND ADJUDGED as follows:

1. The Motion **[ECF No. 6]** is **DENIED**.
2. A certificate of appealability shall **ISSUE**.
3. The Clerk is instructed to mark this case as **CLOSED**.

DONE AND ORDERED in Miami, Florida, this 12th day of September, 2016.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22601-CIV-ALTONAGA
(Criminal Case No. 04-20713-CR-ALTONAGA)

DARRYL TYRONE REPRESS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

MOVANT'S MOTION TO ALTER OR AMEND JUDGMENT

Movant, Darryl Repress, by and through undersigned counsel, hereby files this motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e),[1] and in support thereof, states as follows:

The Court should reconsider its conclusion that Mr. Repress' armed robbery convictions qualify as ACCA predicates within the elements clause.

In at least two other cases, this Court has recognized that under the categorical approach and the "least culpable act" rule of *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013), pre-2000 robbery convictions within Florida's 3rd DCA must be analyzed as convictions for robbery by sudden snatching, since snatching was the least culpable conduct prosecutable under the statute prior to the 1997 decision in *Robinson v. State*, 692 So.2d 883 (Fla. 1997) and the Florida legislature's Oct. 1, 1999 enactment of the robbery by

[1] Fed. R. Civ. P. 59(e) permits any party to file a motion to alter or amend a judgment within 28 days of its rendering. Since the Court's Order denying Repress' § 2255 motion was entered on September 12th, this motion is timely under Rule 59(e).

sudden snatching statute (Fla. Stat. §812.131). *See, e.g., Kelvin Pace v. United States*, Case No. 16-21794-Civ-Altonaga, DE24 (Sept. 23, 2016) and *Michael Lee v. United States*, Case No. 15-61450-Civ-Altonaga, DE12 (Aug. 23, 2016).

Consistent with the rulings in these cases, the Court has rightly assumed here as well that Mr. Repress' 1982 and 1983 underlying robbery convictions under Fla. Stat. § 812.13(1) must be considered to have been for sudden snatching. (DE13:9). Although the Court has reaffirmed that "robbery-by-sudden-snatching without a firearm does not satisfy the ACCA's elements clause," (DE13:9), and it notes with significance that the government conceded in *Dieujuste v. United States*, Case No. 15-80618-Civ-Ryskamp, that a conviction for robbery by sudden snatching is not an ACCA violent felony after *Johnson* (DE13:7-8), the Court nonetheless finds that "[t]he fact that Repress was convicted of two counts of robbery *with a firearm* distinguishes the instant case from *Dieujuste,*" (DE13:8), and that that "armed robbery-by-sudden snatching does satisfy the ACCA's elements clause under the categorical approach." (DE13:9).

Respectfully, the latter finding is in error and the Court's previously-entered judgment should be amended for the following reasons:

1. The Court's holding that "[t]he *Descamps*-overbreadth analysis only applies in cases where the offense qualifies under the ACCA's enumerated clause, rather than the elements clause" (DE13:10-11), is inconsistent with – and contrary to – the Eleventh Circuit's decision in *United States v. Estrella*, 758 F.3d 1239 (11th Cir. 2014). While the Court is

correct that *Descamps* analyzed an offense within the ACCA's enumerated offenses clause, (DE13:10), neither the Supreme Court nor the Eleventh Circuit has ever limited *Descamps*' overbreadth analysis to enumerated offenses. To the contrary, almost immediately after *Descamps*, the Eleventh Circuit extended *Descamps'* reasoning well beyond the enumerated offenses clause, and beyond the ACCA entirely, to other statutory contexts. *See, e.g., Donawa v. U.S. Attorney General*, 735 F.3d 1275, & n. 3 (11th Cir. 2013) (applying *Descamps*' analysis to the immigration context, and specifically, to whether a Florida drug offense under Fla. Stat. § 893.13 qualified as an "aggravated felony" under the INA, because "[t]he general analytical framework and principles [] are analogous, and so this Court has routinely imported holdings from one context to the other").

Moreover, it was only a matter of months after *Donawa*, that the Eleventh Circuit in *Estrella* expressly extended *Descamps*' principles to the elements clause of the Guidelines – thus confirming that *Descamps*' overbreadth analysis applies equally in analyzing whether an offense qualifies as a violent felony within the identically-worded elements clause of the ACCA. *See* 758 F.3d at 1244-1248 (holding, under the subheading "Legal Framework," that *Descamps'* divisibility and overbreadth analysis applies in determining whether a conviction qualifies as a "crime of violence" under the elements clause of § 2L1.2); *see generally id.* at 1248-1254 (finding the "type-of-structure-targeted element and the *mens rea* element in Fla. Stat. § 790.19 to be overbroad).

The Eleventh Circuit clarified in *Estrella* that a conviction will qualify as a predicate within the elements clause "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 (emphasis added; 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.* (emphasis added; citations omitted). "Where the judge or jury made no finding of an element at the time a defendant was actually convicted of the earlier crime," the Eleventh Circuit underscored in *Estrella*, "it is decidedly not our role to step in and do it now. Rather, the enhancement must be based only on the elements for which the defendant was convicted at the time." *Id.* at 1248.

The Court's holding at 10-11 that *Descamps*' overbreadth analysis does not apply to the elements clause, is contrary to *Estrella*.

2. It is clear from the Eleventh Circuit's decision in *United States v. Lockett*, 810 F.3d 1260 (11th Cir. 2016) and the Supreme Court's decision in *Mathis v. United States*, 136 S.Ct. 2243 (June 23, 2016) that the Florida robbery statute is indivisible – which renders a conviction under §812.13(1) categorically overbroad. In *Lockett*, the Eleventh Circuit held that the key to

"figuring out" whether a statute is divisible under *Descamps* is whether the jury is "*required*" to find one of several "alternative elements beyond a reasonable doubt, rather than just convict under a statute that happens to list alternative definitions or alternative means for the same crime without requiring jurors to pick which one applies." 810 F.3d at 1267. However, the Eleventh Circuit recognized, "the text of a statute won't always tell us if a statute is listing alternative means or definitions, rather than alternative elements." *Id.* at 1268. Therefore, the Court pointed out, it must "'look to the state's courts to answer this question,'" *id.* at 1270 (citing *United States v. Howard*, 742 F.3d 1334, 1341 (11th Cir. 2014)), because the state's standard jury instructions "will make clear" whether a jury *must* find a statutory factor unanimously beyond a reasonable doubt. If so, that factor is an "element;" if not, it is an alternative "means" of committing a single, indivisible offense. *Id.* at 1269, 1271.

Notably, the Supreme Court's recent decision in *Mathis* has validated *Lockett*'s analysis in this regard. For indeed, the Supreme Court held that a statute that merely "spells out various factual ways of committing some component of the offense – a jury need not find (or a defendant admit) any particular item" – is indivisible. 136 S.Ct. at 2249. For that reason, the Court held, the disjunctively-worded Iowa burglary statute was overbroad and indivisible, since "a jury need not agree" on which of the alternative locations specified was burglarized. *Id.* at 2250, The Supreme Court explicitly agreed with this Court's approach in *Howard* and *Lockett* that in determining whether a statutory alternative is an element or means,

sentencing judges must follow state courts decisions that definitively answer that question. 136 S.Ct. at 2256. But while there was an authoritative decision from the Iowa Supreme Court that easily resolved the "element or means?" question in *Mathis*, the Supreme Court recognized that authoritative state court decisions will not always exist. *Id.* And in those circumstances, the Supreme Court noted, the jury instructions can indeed clarify whether a statutory alternative is an element the prosecutor must prove to the jury beyond a reasonable doubt, or rather, "only a possible means of commission" on which proof beyond a reasonable doubt is not required. *See* 136 S.Ct. at 2249, 2256-2257.

Lockett and *Mathis* are instructive in considering the divisibility of the Florida robbery statute because the language in Fla. Stat. § 812.13(1) that "in the course of the taking there is the use of force, violence, assault, ***or*** putting in fear" is worded in the disjunctive, like the statutes considered in *Lockett* and *Mathis*. It is clear from Florida's standard robbery instruction, however, that "force," "violence", "assault," and "putting in fear" are simply alternative "means" of committing a single indivisible *element* of the offense. For indeed, Florida juries are *not* (and have never been) instructed to choose between and agree upon these alternatives. Instead, they must only find beyond a reasonable doubt – as an element of the offense – that the taking was either by force, *or* violence, *or* assault, *or* putting in fear (and they need not agree which of these occurred). Therefore, there can be no doubt after *Lockett* and *Mathis* that this particular "element" of a Florida robbery offense is indivisible – and that renders the offense as a whole indivisible as well.

The indivisibility of § 812.13(1) in this regard is significant for Mr. Repress' case. For indeed, as the Eleventh Circuit recognized in *United States v. Welch*, 683 F.3d 1304, 1311-1312 (11th Cir. 2012), and this Court likewise recognized in *Pace* and *Lee*, in 1982 and 1983 convictions for robbery by "use of force" included sudden snatchings, given that the authoritative Florida Supreme Court decision interpreting § 812.13(1) at that time held that "any degree of force" sufficed for a robbery conviction.[2] Since the quantum of "force" required for conviction in ***every*** Florida robbery case in 1995 was most definitely *not* the *Johnson* level of "violent force," after *Descamps* and *Estrella*, a 1995 conviction under an indivisible statute like §812.13(1) is "categorically overbroad" vis-a-vis an offense within the elements clause. And after *Descamps*, a "categorically overbroad" conviction can never be an ACCA predicate. 133 S.Ct. at 2285-2286, 2293.

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[2] Although footnote 3 of the Court's September 12th order appears to approve of the view expressed by the district court *United States v. Chisolm*, 166 F.Supp.3d 1279 (M.D.Fla. Oct. 29, 2015), the reasoning in *Chisholm* is directly contrary to this Court's reasoning in *Lee* and *Pace*, and with the Court's correct assumption herein that Mr. Repress' underlying robbery convictions must be analyzed – under the categorical approach – as mere snatchings.

In any event, *Chisholm* is distinguishable from the instant case in that the defendant in *Chisholm* was convicted of robbery in 1986 within the Second DCA, and as the *Chisholm* court noted with significance, "[t]he Second District ruled both prior to and after 1986 that more than mere 'snatching' is required to sustain a robbery conviction." 166 F.Supp.3d at 1289. Here, by contrast, as the Court recognized in *Pace*, the Third DCA did not clearly so hold until the decision in *S.W. v. State*, 513 1088 (Fla. 3rd DCA 1987). And notably, that was ***after*** both of Mr. Repress' robbery convictions here at issue. *Pace*, DE24:12-14. As such, *Chisolm* is inapposite, and should not have had any persuasive value in the resolution of this case.

3. According to the standard jury instructions at the time of Mr. Repress' convictions here, the aggravating factors in §812.13(2) were *not* "elements" of a separate "armed robbery" offense necessitating findings beyond a reasonable doubt. And *Lockett* and *Mathis* make clear that the Sixth Amendment precludes this Court from upholding an ACCA sentence based upon non-elemental facts that did not require a jury finding beyond a reasonable doubt. The Court states that it is not persuaded by "Repress's argument that in 1982, section 812.13's provisions regarding carrying a firearm were simply penalty enhancements as opposed to separate enhanced offenses with additional elements," because Repress "cites no caselaw" to support that point, "and it is difficult to imagine a statute scheme in which the carrying of a firearm is not an element the offense to be determined by the factfinder. (DE13:10 n. 2). But notably, the primary authorities that support that point are those that support the arguments above: namely, *Lockett* and *Mathis* – and specifically, the Sixth Amendment holdings of these cases.

As pointed out in Mr. Repress' Amended § 2255 motion, DE6:7 – and notably, ***not*** disputed by the government in its Response, DE9 – Florida's standard robbery instruction in 1982 was different than the instruction today. Specifically, as indicated in the attached 1982 instruction, at the time of Mr. Repress' convictions the judge could impose greater "punishment" for "carrying" "some kind of weapon" "in the course of committing the robbery," without having a jury find those "aggravating factors" ***beyond a reasonable doubt***. The standard instruction in

1982 advised Florida juries that there were only four true "elements" of the offense which had to be found beyond a reasonable doubt, and "carrying" "some kind of weapon" was not among them. Jury findings were routinely sought by judges on those aggravating factors for the purpose of punishment, but – by contrast to the standard instruction today – in 1982 those additional findings relevant only to punishment were ***not*** required to be ***beyond a reasonable doubt***.

And given that, *Lockett* and *Mathis* compel the conclusion here that the aggravating factors in §812.13(2) were *not* "elements" of a separate "armed robbery" offense at the time of Mr. Repress' convictions. According to these decisions, Repress was only ***convicted*** of ordinary robbery under §812.3(1). And indeed, there is nothing that would support the Court's conclusion that he was ***convicted*** of "armed robbery" in the record before the Court, or in the law. In fact, the Sixth Amendment compels the contrary conclusion.

In *Descamps*, the Supreme Court explained that an elements-based categorical approach was necessary to "avoid the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." 133 S. Ct. at 2287. That was so because the Sixth Amendment requires a jury to find any fact that increases a defendant's sentence beyond the statutory maximum, except the fact of a prior conviction. *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. Accordingly,

any factual finding regarding a predicate offense would "raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." *Id.* In that regard, "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.* Thus, any finding by the Court here going beyond the elements of the offense would exceed the narrow prior-conviction exception to the Sixth Amendment.

The Supreme Court recently re-affirmed *Descamps*' reasoning in *Mathis*, by underscoring that it is the Sixth Amendment guarantee that ties the categorical approach strictly to the *elements* of the offense, and requires careful distinction between various "means" of committing an offense, and its "elements." *See Mathis,* 136 S.Ct. at 2253 (noting "Sixth Amendment problems associated with a court's exploration of means rather than elements"). And in fact, *Mathis*' broader holding reaffirming *Descamps*' "elements-based inquiry" rested even more firmly than *Descamps* on the Sixth Amendment, as indeed, the Court explained that to comply with *Apprendi*, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." 136 S.Ct. at 2252. Since a federal judge "is prohibited from conducting such an inquiry himself," the Supreme Court held, "so too he is barred from making a disputed determination about what the defendant and state judge must have understood as the factual basis of the prior plea or what the jury in a prior trial must have accepted as the

theory of the crime." *Id.* (citations omitted). Again, "[h]e can do no more, consistent with the Sixth Amendment, than determine ***what crime, with what elements***, the defendant was convicted of." *Id.* (emphasis added). And here, the "elements" Repress was actually ***convicted*** of – beyond a reasonable doubt – did *not* include "carrying" a "weapon" "during the course of the robbery."[3]

Notably, for this very reason and specifically citing *Apprendi* and *Mathis*, Judge Ungaro recently granted a successor § 2255 movant relief from his ACCA sentence in *Steven Jackson v. United States*, Case No. 16-22649-Civ-Ungaro. *See Jackson*, DE 12 at 14 (noting that although the Court "could" make a finding that Jackson was convicted of armed robbery in 1976 by "looking at the statute as a whole (including the penalty provisions), the Judgment and the sentence along with using common sense," "***the Court cannot do so without running afoul of Supreme Court precedent***. *See Mathis*, 136 S.Ct. at 2246")(emphasis added). In fact, Judge Ungaro explained, even

> Applying the more liberal modified categorical approach and looking at the *Shepard* documents available, there is nothing that clearly establishes Movant was convicted of robbery with a firearm to the satisfaction of the Supreme Court's standard set forth in *Mathis*. There is no verdict form indicating whether the jury found beyond a reasonable doubt that he committed the robbery with a firearm, the firearm is not mentioned in the Judgment and sentence, and there is no transcript reflecting a finding beyond a reasonable doubt that Movant committed the robbery with a firearm and there is no Florida

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[3] *See also Richardson v. United States*, 526 U.S. 813, 817 (1999)("[c]alling a particular kind of fact ***an 'element'*** carries certain legal consequences," and "[t]he consequence that matters for this case is that a jury in a federal criminal case cannot convict unless the jury unanimously finds that the Government has proved each element")(emphasis added).

> case law relevant in time to establish that the firearm would have been a required part of the jury's verdict. That means, in this case, even though it may seem obvious that Movant was convicted of armed robbery where the charging document states that Movant "did unlawfully by force, violence, assault or putting in fear, take certain property to wit: U.S. currency . . . and in the course of committing said robbery, carried a firearm, to wit: a pistol, in violation of Florida statutes 812.13" and his sentence of 99 years as reflected in the Judgment and Sentence could only have been accomplished if he was in fact carrying a firearm or a deadly weapon (See, § 813.13(2)(a) and § 775.082(2)(b), Florida Statutes (1975)), ***the Court is bound by the Florida courts' definition of robbery without looking to the facts that may have increased the penalty. Mathis, 136 S.Ct. at 2254. Any further analysis would raise serious Sixth Amendment concerns because only a jury, not a judge, may find facts that increase the maximum penalty. See Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).***

Jackson, DE 12 at 14-15 (emphasis added).

The Court should reason similarly here, as indeed, there are no documents in the record of the sentencing in this case that even specify the statute of conviction – let alone, clarify suggest that Mr. Repress was "***convicted***" under § 812.13(2). On this record, and under now-governing law, the Court must find that the *only* crime Repress was even arguably ***convicted of***, in 1982 and 1983 was ordinary robbery under §812.3(1). A finding by this Court that he was convicted of "armed robbery," would violate Mr. Repress' Sixth Amendment rights given that at the time of conviction a jury was not required to make a finding of "carrying" a weapon beyond a reasonable doubt.

4. It is clear from the briefing in *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006) (attached hereto), that the Eleventh Circuit's holding in that case that the defendant's 1974 armed robbery conviction was

"undeniably a violent felony" was *not* a categorical holding, but instead, a now-clear misapplication of the "modified categorical approach." And therefore, *Dowd* is neither controlling nor persuasive at this time. The Court notes that in *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), the Eleventh Circuit concluded that the appellant's 1974 "'armed robbery conviction is undeniably a conviction for a violent felony,' citing the ACCA's elements clause." (DE13:8). However, the attached briefing from *Dowd* confirms that the only dispute between the parties in that case was one of ***proof.*** *Compare* Appellant's Brief at 38-45 (arguing that the prosecutor failed to prove three ACCA predicates using proper *Shepard* documents, when all he initially introduced were Alabama Board of Corrections records, pre-sentence reports prepared U.S. Probation officers, and the testimony of former Probation Officer Longshore about the 1974 conviction deriving from an uncounseled pre-sentence interview; although the prosecutor thereafter introduced "certified" copies of convictions, the stamped "certifications" were "not self-authenticating," and these documents should have been excluded) *with* Appellee's Brief at 10 n. 10, and 27-32 (responding that Dowd's prior convictions were "adequately proven;" any error in offering Longshore's factual testimony was harmless since the government thereafter submitted "certified copies of four of Dowd's prior convictions;" "the nature of his prior convictions was not at issue," and "the charging documents," "such as those submitted in Dowd's case, were specifically identified in *Shepard* as acceptable documentation of prior convictions, even where the nature of such conviction is not at issue").

The *Dowd* panel ultimately agreed with the government that its "additional documentation" including "a copy of the charging document and the entry of judgment and sentence" for the 1974 armed robbery was adequate, since a charging document "clearly satisf[ies] the requirements of *Shepard*." 451 F.3d at 1255.

And therefore, the attached briefing confirms that *Dowd*'s holding that the defendant's 1974 armed robbery conviction "is *undeniably* a violent felony" under 18 U.S.C. §924(e)(2)(B)(i), 451 F.3d at 1255, was ***not*** a "categorical" holding based upon the "elements" of the offense. It was indisputably based upon a *Shepard* document (the charging document), pursuant to the "modified categorical approach" as applied in this Circuit prior to *Descamps v. United States*, 133 S.Ct. 2276 (2013), but which this Court has since declared is "no longer tenable" for indivisible statutes. *See Howard*, 742 F.3d at 1343 (prior circuit law is "no longer tenable" to the extent it assumed the "modified categorical approach" could be applied to any non-generic statute irrespective of divisibility, and in considering factual allegations in indictments).

For the reasons set forth above, *Lockett* and *Mathis* have confirmed that the Florida robbery statute is ***indivisible.*** And given the indivisibility of the Florida robbery statute, it is clear that *Dowd*'s holding that the defendant's 1974 armed robbery conviction was "undeniably a violent felony," resulted from what is now recognized as a ***mis***application of the "modified categorical approach."

As per *Howard*, that holding is "no longer tenable" and does not bind this Court in any manner at this time.

5. *United States v. Oner*, 382 F.App'x 893, 896 (11th Cir. 2010), which followed *Dowd*, is not persuasive for the same reasons *Dowd* is not persuasive, and for additional reasons -- including that the *Oner* panel never considered the Florida Supreme Court's definitive holding in *Baker* that the term "carrying" in § 812.13(2) simply requires "possessing" a firearm, *not* displaying or brandishing it. The Court finds it significant that in *United States v. Oner*, 382 Fed. Appx. 893 (11th Cir. June 15, 2010) (unpublished), a panel of the Eleventh Circuit held that "armed robbery remained a violent felony under the elements clause, even anticipating the Supreme Court's decision in *Johnson*, because '[t]he carrying of a firearm or other deadly weapon during a robbery surely implicates violent force and of the most severe kind.'" (DE13:8, citing *Oner*, 893 Fed. Appx. at 896). But what the *Oner* panel actually held was simply that the Supreme Court's clarification in *Curtis Johnson* that the phrase "physical force" in the ACCA's elements clause means "violent force," did not require it "to revisit our holding in *Dowd*," which the *Oner* panel felt bound to follow. And notably, it was not *Curtis Johnson* which abrogated the approach in *Dowd*; it was *Descamps* and *Mathis* – later Supreme Court precedents – that clarified that the Florida robbery statute was indivisible, and that the modified categorical approach is never applicable in analyzing a conviction under an indivisible statute.

Oner is also distinguishable for two additional reasons that may not have been apparent to the Court from the panel's unpublished decision cited at DE13:8, but are apparent upon close scrutiny of the briefing in *Oner*. First, the briefing in

Oner clarifies that the armed robbery conviction there at issue derived from a Polk County conviction in Case No. CF***00***-666. *See* Brief of the Appellant in *United States v. Oner*, 2009 WL 7216158 at *2 (11th Cir. Feb. 16, 2009). The significance of the "***00***" case number is that it confirms Oner was prosecuted under Fla. Stat. §812.13 ***after*** the enactment and effective date of the separate "robbery by sudden snatching" statute (October 1, 1999). And therefore, Oner – ***unlike*** Mr. Repress – could ***not*** have been convicted of "armed robbery by sudden snatching."

Second, it is clear from the briefing in *Oner* that neither party alerted the panel in that case to the controlling Florida Supreme Court decision in *State v. Baker*, 452 So.2d 927 (Fla. 1984), which had clarified that "carrying" a weapon under § 812.13(2) only required "possessing" it. *See id.* at 929 ("The victim may never even be aware that a robbery is armed, so long as the perpetrator has the weapon in his possession during the offense.") In fact, the government – in its brief – misled the panel as to the governing standard ***in Florida*** by citing an Eighth Circuit case, *United States v. Pulliam*, 566 F.3d 784, 788 (9th Cir. 2009), which construed a Missouri statute that prohibited knowingly "[e]xhibit[ing], in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner. *See* Brief of the United States in *United States v. Oner*, 2010 WL 5064824 at **8-9 (11th Cir. March 15, 2010). The *Oner* panel's assumption that "[t]he carrying of a firearm of other deadly weapon during a robbery surely implicates violent force and of the most severe kind," 382 Fed. Appx. at 896, was misinformed by Missouri law. It was *not* informed, as it should have

been, by the distinct meaning of "carrying" under Florida law (which is markedly different from Missouri law). And because the *Oner* panel failed to consider that the Florida Supreme Court in *Baker* had definitively interpreted the term "carry" in §812.13(2) to require no more than mere "possession" of a weapon – and that Florida clearly did ***not*** require displaying or brandishing of the weapon to the victim – the *Oner* panel likewise failed to consider that in *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), the Eleventh Circuit had definitively held that simply carrying a concealed firearm – that is, possessing, without brandishing it – was not an offense within the elements clause. *Id.* at 1349.

Undersigned counsel respectfully urges the Court to reconsider its reliance upon the non-precedential decision in *Oner*, and find that it is unpersuasive for the above reasons. Instead, the Court should defer to the Florida Supreme Court's interpretation of §812.13(2) in *Baker*, because the Eleventh Circuit has since mandated in a precedential decision that federal courts are "bound by [state] courts' determination and construction of the substantive elements of [a] state offense." *United States v. Rosales-Bruno*, 676 F.3d 1017, 1021 (11th Cir. 2012). And ultimately, the Court should find – as per another precedential decision, *Archer* – that carrying a concealed firearm during a robbery by sudden snatching cannot bring a snatching offense within the purview of the ACCA's elements clause.

6. The 6th Circuit's recent decision in *United States v. Rafidi*, 829 F.3d 437 (6th Cir. 2016) is inapposite, and therefore, *not* instructive, because the Florida robbery statute – unlike 18 U.S.C. § 111(b) – does not

require "*use*" of a firearm. It only requires "carrying" of a firearm, which the Florida Supreme Court definitively held in *Baker* simply necessitates possessing it. The Court finds the 6th Circuit's recent decision in *Rafidi* is "instructive," and that "the logic of *Rafidi* applies with equal force here," because "the Sixth Circuit found a statute providing for non-dangerous physical contact could be elevated to a violent felony when coupled with use of a deadly weapon." (DE13:9-10). But the flaw in that analogy is that the federal statute at issue in *Rafidi*, 18 U.S.C. § 111(b) required "***using*** a deadly or dangerous weapon," *see* 829 F.3d at 445, 446 – ***not*** simply "carrying" a weapon, or possessing it in a concealed fashion. *Baker* confirms that the latter is a possible basis of conviction under Fla. Stat. § 812.13(2). And *Archer* confirms that carrying a concealed firearm is most definitely not an offense that has "as an element the use, attempted use, or threatened use of physical force against the person of another."

7. The Court states that "no other court has yet ruled on whether Florida's armed robbery by sudden snatching constitutes a violent felony under the ACCA's elements clause." (DE13:12). But that is incorrect. Judge Ungaro so ruled in *Jackson* on Sixth Amendment grounds. And the Second and Ninth Circuits have held – upon considering state robbery statutes similar to Florida's – that an armed robbery conviction that can result from the use of less-than-violent force whilc "carrying" a firearm is simply *not* a violent felony. At least two circuit court of appeals have recently re-considered robbery statutes similar to Florida's, post-*Descamps* and *Mathis*. And

notably, these courts have found upon *de novo* review – and even under plain error review – that older precedents holding "armed robbery" qualified as a "violent felony" without considering any state caselaw, had been abrogated by the different mode of analysis compelled by intervening Supreme Court cases. Particularly persuasive here given the Court's ruling on sudden snatching, is *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016), where the Ninth Circuit expressly held – after considering Massachusetts caselaw – that a conviction under the Massachusetts armed robbery statute was not a violent felony ***because it allowed for armed robberies by sudden snatching***. *See id.* at 979-981 (noting that the underlying offense permitted conviction upon the use of "any force, however slight;" and, since all that was required by the Massachusetts courts for an "armed robbery" conviction was the mere possession of a weapon, without using or even displaying it, that "does not bring Massachusetts' armed robbery statute within ACCA's force clause;" finding prior First Circuit decision addressing the same armed robbery statute unpersuasive since "[t]he court's discussion of the [*Curtis*] *Johnson* issue consists of only a single sentence, provides no reasoning and makes no mention of the Massachusetts case law deeming the degree of force immaterial to a conviction for armed robbery"); *see also United States v. Corey Jones*, ___ F.3d ___, 2016 WL 3923838 at **5-7 (2nd Cir. July 21, 2016)(recognizing, after considering New York caselaw, that although New York's robbery statute required "forcible stealing" in every case, proof of "forcible stealing" did "not always involve 'force capable of causing physical pain or injury to another;" and a robber's "use of less-than-violent

force while carrying on his person but not using or threating to use a deadly weapon," "cannot turn what is otherwise less than violent force into violent force;" rejecting government's arguments to the contrary based upon precedent that predated *Curtis Johnson*, and was "thus irrelevant;" district court plainly erred by counting first-degree robbery conviction for "forcible stealing" while "armed with a deadly weapon" as a crime of violence).

The Court should reason similarly here. The pre-1997 Fla. Stat. §812.13 is analogous to the Massachusetts statute construed in *Parnell* in that it allowed for armed robberies by sudden snatching. It is also analogous to the statutes construed in both *Parnell* and *Corey Jones*, in that no more than "carrying" or "possessing" a firearm has ever been required in Florida to elevate an ordinary robbery to "armed robbery." *Baker*, 452 So.2d at 929. And it is clear from the decisions in *Dowd* and *Oner* (read against the briefing in those cases), that neither the *Dowd* panel nor the *Oner* panel considered *Baker*.

As explained in *Corey Jones*, where the underlying robbery offense itself is itself categorically overbroad because it can be committed by ***less-than-violent force***, the mere fact that a weapon is "carried" or possessed, cannot bring the offense within the elements clause. Both *Parnell* and *Jones* are persuasive here, given that the Eleventh Circuit has at least twice recognized now, that simply carrying or possessing a dangerous weapon is not a violent felony within the elements clause. *Archer*, 531 F.3d at 1349; *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010).

Finally, although it is unclear from the decision in *Lee v. United States*, 2016 WL 1464118 (W.D.N.Y. April 12, 2016) whether the defendant in that case was convicted under the Florida robbery statute at a time when sudden snatching sufficed, it is nonetheless notable that the district court in *Lee* found an "armed robbery" conviction under the Florida robbery statute categorically overbroad for other reasons, namely: (1) Florida's robbery statute is "indivisible;" (2) the statute does not specify against whom or what "force" must be directed; (3) a robbery by putting in fear does not necessarily require the use of the *Johnson* let of violent force; and (4) "the fact that the defendant 'carried a firearm or other deadly weapon' does not equate to the use of '[physical' 'force capable of causing physical pain or injury to another person.'" *Id.* at **6-7. Since "Florida's robbery under FLA. STAT. §812.13(1) and (2)(a) is not a categorical match for 'physical force' under *Johnson*, 559 U.S. at 140, and because the statute is indivisible," the *Lee* court reasoned, a Florida conviction for armed robbery was simply not an ACCA violent felony under current law. *Id.* at *7 (holding that the movant was entitled to be resentenced on his underlying § 922(g) conviction without the ACCA enhancement).

The *Lee* court's reasoning on that point is persuasive, and the Court should so hold here.

CONCLUSION

For the foregoing reasons, Mr. Repress respectfully requests that the Court reconsider, alter, and amend the judgment entered on September 12, 2016; that the Court grant his §2255 motion to vacate; and – because he has served in excess of the statutory maximum penalty for a § 922(g) offense – that the Court release him from his illegal custody at this time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on the 6th day of October, 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 or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Jan C. Smith, II,
Jan C. Smith, II, AFPD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22601-CIV-ALTONAGA

DARRYL TYRONE REPRESS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court upon Movant, Darryl Tyrone Repress's ("Repress['s]" or "Movant['s]") Motion to Alter or Amend Judgment ("Motion") [ECF No. 14], filed on October 6, 2016. Respondent, the United States of America ("Respondent" or "the Government") filed a Response in Opposition . . . ("Response") [ECF No. 17] on November 7, 2016; and Repress filed a Reply . . . ("Reply") [ECF No. 20] on December 8, 2016. The Court has reviewed the parties' written submissions, the record, and applicable law.

I. BACKGROUND

On February 23, 2005, Repress pled guilty to a one-count Superseding Information [CR ECF No. 53][1] charging him with possession of a firearm by a convicted felon, in violation of 18 U.S.C. sections 922(g) and 924(e). (*See* Plea Agreement [CR ECF No. 56] 1). The Presentence Investigation Report ("PSI") advised Repress qualified as an armed career criminal under the Armed Career Criminal Act ("ACCA"), 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*

[1] References to docket entries in Repress's criminal case, *United States v. Repress*, Case No. 04-20713-CR-ALTONAGA (S.D. Fla. 2004) ("*Repress I*"), are denoted with "CR ECF No."

Repress I, PSI ¶ 22). Neither the Government nor Defendant filed objections to the PSI. (*See* Transcript of Sentencing . . . ("Sentencing Transcript") [CR ECF No. 78] 3:14–15).

On May 5, 2005, the Court held a sentencing hearing during which neither Repress nor his counsel objected to the PSI or disputed the ACCA sentencing enhancement applied. (*See id.* 3:20–22). The Court sentenced Repress to 188 months of imprisonment and 3 years of supervised release based on his status as an armed career criminal. (*See generally* Judgment in a Criminal Case [CR ECF No. 62]). Although neither the PSI nor the sentencing transcript indicates which convictions qualified Repress for the ACCA sentence enhancement, the parties and the Court assumed the predicate convictions were for robbery with a firearm in 1982, robbery with a firearm in 1983, and possession with intent to deliver cocaine in 1998. (*See* September 12 Order [ECF No. 13] 2–3).

On July 1, 2016, the Eleventh Circuit Court of Appeals granted Repress's 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), which voided the ACCA's so-called "residual clause" as unconstitutionally vague. (*See generally* USCA Order . . . [ECF No. 5]). A prior conviction can qualify for a sentence enhancement under the ACCA if it is a "violent felony" as defined in what is known as the "elements clause" (section 924(e)(2)(B)(i)), the "enumerated clause," or the residual clause (section 924(e)(2)(B)(ii)). After *Johnson*'s invalidation of the residual clause, Repress filed the present action arguing he no longer qualified as an armed career criminal under the ACCA since his convictions for "robbery with a firearm" do not qualify as violent felonies under the ACCA's elements or enumerated clauses. (*See generally* Amended Motion to Correct Sentence . . . ("Motion to Correct Sentence") [ECF No. 6]). After considering the parties' arguments, the

undersigned entered the September 12 Order, denying the Motion to Correct Sentence. Repress then filed the present Motion to Alter or Amend Judgment under Federal Rule of Civil Procedure 59(e).

II. ANALYSIS[2]

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 at the time of trial. *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)).

In the Motion, Repress asks the Court to reconsider its finding his armed robbery convictions qualify as ACCA predicates under the elements clause. (*See generally* Mot.). But Repress does not meet his burden of showing the Court committed error, and he does not present any newly discovered evidence or new law to support altering or amending the September 12 Order.

[2] The Court directs the reader generally to the September 12 Order for a more comprehensive discussion of the statutory scheme of Florida Robbery before 1999 and of the line of cases analyzing the ACCA before and after *Johnson*.

The elements clause defines violent felonies as those offenses which have as an element "the use, attempted use, or threatened use of physical force against the person of another[.]" 18 U.S.C. § 924(B)(i) (alteration added). In the September 12 Order, the Court was tasked with determining whether robbery with a firearm qualifies as a violent felony under the elements clause. In Florida, robbery is:

> [T]he taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

FLA. STAT. § 812.13(1) (alteration added). Florida delineates three categories of robbery in descending order of seriousness: (1) robbery with a firearm or deadly weapon;[3] (2) robbery with a weapon; and (3) robbery without a weapon. *See id.* § 812.13(2). The Florida 1999 statute separately criminalizing robbery-by-sudden-snatching similarly delineates two degrees of that offense depending on whether the offender: (1) "carried a firearm or other deadly weapon" or (2) "carried no firearm or other deadly weapon." *Id.* § 812.131(1)–(2).

Based on the record before it, the Court determined Repress could have been convicted of robbery with a firearm or robbery-by-sudden-snatching with a firearm. (*See* September 12 Order 8). Applying Supreme Court and Eleventh Circuit precedent, the Court concluded both offenses qualify as violent felonies under the elements clause. (*See id.* 8–9).

Repress does not cite any new law to support his contrary position. Further, he must contend with the new Eleventh Circuit opinions in *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016), and *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), which appear to support the conclusions of the September 12 Order. In *Seabrooks*, a divided panel affirmed the

[3] Robbery with a firearm is defined as follows: "If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or . . . ." FLA. STAT. § 812.13(2)(a) (alteration added).

ACCA sentencing enhancement for a defendant's 1997 convictions for armed robbery. All three judges agreed *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), alone could compel finding the armed robbery convictions qualified as violent felonies under the elements clause. *See Seabrooks*, 839 F.3d at 1344 (Baldock, J., concurring as to Parts I, II, and II.D, and in the judgment). *Fritts*, decided less than a month after *Seabrooks*, affirmed the ACCA sentencing enhancement for a defendant's 1989 armed robbery conviction and held a Florida armed robbery conviction "categorically qualifies as a violent felony under the ACCA's elements clause." 841 F.3d at 942. *Seabrooks* and *Fritts* are controlling, and their reasoning supports the Court's September 12 Order.

Repress's attempts to distinguish or limit the reach of *Seabrooks* and *Fritts* come up short. He fails to persuade the fact his convictions were for robbery *with a firearm* is not a relevant and critical component of the analysis. (*See* Reply 3–5). Repress's counsel did not object to the PSI, which reflected the 1982 and 1983 robbery convictions were for "Robbery with a Firearm." (*Repress I*, PSI ¶¶ 31–32). Neither did he raise objections at the sentencing hearing; indeed, Repress's counsel agreed the ACCA sentencing enhancement applied. (*See* Sentencing Transcript 3:20–22).

Repress re-argues robbery with a firearm is not a separate offense, but rather a "penalty enhancement." (Mot. 8). These arguments are unconvincing,[4] and regardless, he may not use a

[4] Aside from the somewhat ambiguous 1982 jury instruction (*see* Fla. Standard Jury Instructions in Criminal Cases, 1981 Ed. [ECF No. 14-1]), Repress fails to provide conclusive support for the contention the elements of the purported "penalty enhancements" need not have been proved beyond a reasonable doubt, despite the text of the statute and the fact judges "routinely sought" jury findings on these matters. (Mot. 8–9). Indeed, Florida cases around the time of Repress's robbery convictions indicate robbery and robbery with a firearm were distinct offenses comprised of overlapping but different elements requiring jury findings. *See Reddick v. State*, 394 So. 2d 417, 417–18 (Fla. 1981) (determining trial judge erred in denying request to instruct jury on all three stages or degrees of robbery); *Growden v. State*, 372 So. 2d 930, 931 (Fla. 1979) (same; deciding whether subsections (a), (b), and (c) of section 812.13(2) are "merely sentencing guidelines for the trial judge or whether they are lesser degrees of the offense or lesser

Rule 59 motion to "relitigate old matters" the Court considered in previous briefing. *Arthur*, 500 F.3d at 1343 (quoting *Michael Linet, Inc.*, 408 F.3d at 763).

Repress has not shown the September 12 Order contains errors of law or fact. Absent new, controlling case law or newly discovered evidence to support his position, the Court will not disturb the conclusions of the September 12 Order.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 14]** is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 28th day of December, 2016.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

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included offenses which must be submitted to the jury," and concluding the subsections specify different degrees of robbery).