APPENDIX

APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11527-A

NATHANIEL BEVERLY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Nathaniel Beverly, a federal prisoner serving a 210-month sentence, seeks a certificate of appealability ("COA") to challenge the District Court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence. In September 2015, Mr. Beverly filed a pro se 28 U.S.C. § 2255 motion to vacate sentence, arguing that his sentence had been unconstitutionally enhanced under the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). He claims to be actually innocent of his ACCA enhancement. He argues that he was entitled to relief under

Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause of the violent felony definition in the ACCA is unconstitutionally vague and that imposing an increased sentence under that provision, therefore, violates due process. He says his prior convictions, specifically, Florida burglary of a dwelling; possession of heroin with intent to sell; possession of cocaine with intent to sell; and manslaughter, do not qualify as predicate offenses for his ACCA enhancement.

The government responded that Mr. Beverly's prior convictions for Florida possession of cocaine with intent to sell and possession of heroin with intent to sell both qualify as serious drug offenses under the ACCA. The government also argues that Mr. Beverly's Florida convictions for armed robbery and manslaughter qualify as violent felonies under the ACCA. However, the government concedes that Mr. Beverly's Florida conviction for burglary of a dwelling may not qualify after Johnson.

In response, Mr. Beverly moved the District Court to grant his § 2255 motion. He says that his Florida drug convictions do not qualify as ACCA predicates because the government used a "hypothetical approach." Mr. Beverly points to Carachuri-Rosendo v. Holder, 560 U.S. 563, 130 S. Ct. 2577 (2010), to say the government could not use a hypothetical approach unless aggravating factors had been applied. Mr. Beverly relies on the part of ACCA's definition of

"serious drug offense" as being one for which state law imposes a maximum term of imprisonment of ten years of more. Mr. Beverly argues that his conviction for possession of heroin with intent to sell could not have received a term of imprisonment of ten years or more. The Magistrate Judge entered a paperless order construing Mr. Beverly's motion as a traverse to the government's response.

Mr. Beverly then got a lawyer and filed a memorandum of law in support of his § 2255 motion. In this memorandum, Mr. Beverly argued he was no longer an armed career criminal after Johnson because his Florida convictions for burglary of a dwelling, manslaughter, robbery, and possession with intent to distribute heroin did not qualify as ACCA predicates. Once these prior convictions are eliminated, he says he has at most one viable ACCA predicate offense, for Florida possession with intent to sell cocaine.

As for his Florida manslaughter conviction, Mr. Beverly says the government disclaimed reliance on this conviction as a predicate for the ACCA enhancement at the time of his sentencing, so it waived its right to rely on this conviction in future proceedings. He argues alternatively that manslaughter did not qualify as a violent felony within the ACCA's elements clause. As for his Florida robbery conviction, he argues that his conviction was not a violent felony within the ACCA's elements clause. He says that the government's argument that he was convicted of armed robbery was waived at his sentencing and was

meritless. Additionally, Mr. Beverly says that, under current law, his conviction for possession of heroin with intent to sell no longer qualifies as a serious drug offense. Mr. Beverly argues that, based on Carachuri-Rosendo, when he was convicted for possessing with intent to sell heroin in 1997, Florida's presumptive guideline system would not have allowed a sentence of ten or more years' imprisonment. This conviction therefore did not qualify as a serious drug offense.

The government conceded that Mr. Beverly's convictions for Florida burglary of a dwelling and manslaughter no longer qualified as ACCA predicate offenses. The government pointed out that the parties agreed that Mr. Beverly's conviction for Florida possession of cocaine with intent to sell qualified as an ACCA serious drug offense. As for Mr. Beverly's Florida robbery conviction, the government said that his conviction was for armed robbery. The government contended that his convictions for armed robbery and possession of heroin with intent to sell still qualified as ACCA predicate offenses.

A Magistrate Judge issued a report and recommendation ("R&R"), recommending that Mr. Beverly's § 2255 motion be denied and no COA issue. The Magistrate Judge noted that Mr. Beverly did not challenge his 1992 conviction for Florida possession of cocaine with intent to sell, and the government conceded that his 1997 conviction for Florida burglary of a dwelling and 1992 conviction for Florida manslaughter no longer qualify as predicate offenses. Thus, Mr. Beverly's

case turned on whether his 1978 conviction for Florida robbery and his 1997 conviction for Florida possession of heroin with intent to sell qualify as ACCA predicate offenses. The Magistrate Judge agreed that Mr. Beverly's 1978 conviction was for armed robbery, and found that Florida armed robbery was a violent felony under the ACCA's elements clause. But if Mr. Beverly's robbery had not been armed, the Magistrate Judge said it would not have qualified as a violent felony under the elements clause. As to Mr. Beverly's 1997 conviction for Florida possession of heroin with intent to sell, the Magistrate Judge held that Mr. Beverly's reliance on Carachuri-Rosendo was misplaced. Unlike in Carachuri-Rosendo, Mr. Beverly's conviction actually carried a maximum term of imprisonment of ten years or more. Also, the Magistrate Judge found that Mr. Beverly could not attack his drug conviction as an ACCA predicate on this basis because Carachuri-Rosendo did not announce a new substantive rule of constitutional law that was retroactively applicable on collateral review. Mr. Beverly's challenge to this drug conviction was time-barred, according to the Magistrate Judge, because Carachuri-Rosendo was decided in June 2010 and Mr. Beverly did not file his § 2255 motion until September 2015.

The government filed objections to the R&R, arguing, in part, that a pre-1997 Florida unarmed robbery conviction qualified as a violent felony under the ACCA's elements clause. The government asked the District Court to reject the

R&R's analysis that, if Mr. Beverly's robbery had been unarmed, it would not have qualified as a violent felony.

Mr. Beverly also objected to the R&R. He argued that the Magistrate Judge erred in finding he was convicted of armed robbery, rather than unarmed robbery. He also said the Magistrate Judge's finding that armed robbery was a violent felony was incorrect. Additionally, he argued that the Magistrate Judge erred in finding his Carachuri-Rosendo claim time-barred. That is because his argument that his conviction for possession of heroin with intent to sell was no longer a serious drug offense was not asserted as a free-standing claim for relief, but rather as an argument in support of his Johnson claim. This argument demonstrates how the government-conceded Johnson errors in his case (counting Florida burglary and manslaughter convictions as ACCA predicates) were harmful.

The government then filed a notice of supplemental authority, attaching our decision in United States v. Fritts, 841 F.3d 937 (11th Cir. 2016). The government asked the District Court to deny Mr. Beverly's claim that his Florida conviction for armed robbery did not qualify as a violent felony. Mr. Beverly responded that the government confused dicta in Fritts with the narrower holding.

The District Court found that the Magistrate Judge was correct to characterize Mr. Beverly's 1978 Florida robbery conviction as a conviction for a violent felony within the ACCA's elements clause based on United States v.

Dowd, 451 F.3d 1244 (11th Cir. 2006). The District Court also cited, among other cases, United States v. Lockley, 632 F.3d 1238 (11th Cir. 2001), United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016), and Fritts. The court agreed, as well, with the Magistrate Judge's analysis of the other two convictions used to support Mr. Beverly's ACCA enhancement—those being the 1997 Florida conviction for possession of heroin with intent to sell and the 1992 Florida conviction for possession of cocaine with intent to sell. After reviewing the parties' objections, the District Court adopted the R&R, denied Mr. Beverly's § 2255 motion, and denied him a COA.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000) (quotation omitted). Beyond that, "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law. Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015) (per curiam) (quotation omitted). When reviewing a District Court's denial of a § 2255 motion, we review

"findings of fact for clear error and questions of law de novo." Rhode v. United States, 583 F.3d 1289, 1290 (11th Cir. 2009).

In order to qualify as an armed career criminal under the ACCA, a defendant must have at least three prior convictions for a serious drug offense or a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. § 924(e)(2)(B). The first prong of this definition is referred to as the "elements clause," while the second prong contains both the "enumerated crimes clause" and the "residual clause." United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012). The Supreme Court in Johnson held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. Johnson, 135 S. Ct. at 2557–58, 2563. In Welch, the Supreme Court held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257, 1264–65, 1268 (2016).

Mr. Beverly was sentenced under the ACCA. His presentence investigation report ("PSR") stated that he had five prior convictions that qualified him for enhancement under ACCA: (1) a 1992 Florida conviction for manslaughter; (2) a 1992 Florida conviction for possession of cocaine with intent to sell; (3) a 1996 Florida conviction for burglary of a dwelling; (4) a 1997 Florida conviction for possession of heroin with intent to sell; and (5) a 1978 Florida conviction for robbery. Mr. Beverly did not challenge his 1992 Florida conviction for possession of cocaine with intent to sell as a predicate for his ACCA sentence, and the government conceded that his 1996 Florida conviction for burglary of a dwelling and 1992 Florida conviction for manslaughter could no longer serve as predicates. That means Mr. Beverly's case turns on whether his Florida convictions for robbery in 1978 and possession of heroin with intent to sell in 1997 qualify as ACCA predicate offenses.

Both Mr. Beverly's 1978 conviction for robbery and his 1997 conviction for possession of heroin with intent to sell continue to qualify as predicate offenses to support an ACCA sentence after Johnson. Before 1997, Florida's intermediate appellate courts were divided as to whether a sudden snatching amounted to robbery under Fla. Stat. Ann. § 812.13. See United States v. Welch, 683 F.3d 1304, 1311 & n.29 (11th Cir. 2012) (citing cases). In 1997, the Florida Supreme Court held that mere snatching of property did not amount to robbery under

§ 812.13 unless the perpetrator employed force greater than that necessary to simply remove the property from the person. Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997). In other words, the Florida robbery statute required "resistance by the victim that is overcome by the physical force of the offender." Id.

Last year in Fritts, this Court held that Florida robbery convictions under § 812.13 were categorically violent felonies under the ACCA's elements clause. 841 F.3d at 944. Given our Court's binding precedent in Fritts, reasonable jurists would not debate whether, post-Johnson, Mr. Beverly's 1978 Florida robbery conviction remains an ACCA violent felony.

As for Mr. Beverly's prior conviction for Florida possession of heroin with intent to sell, a serious drug offense is defined in this context as "an offense under State law, involving . . . distributing, or possessing with intent to . . . distribute, a controlled substance, . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). We have held that convictions under Fla. Stat. Ann. § 893.13(1) are serious drug offenses. See United States v. Smith, 775 F.3d 1262, 1268 (11th Cir. 2014). Although the PSR did not specify the statute of conviction, it appears that Mr. Beverly was convicted for possession of heroin with intent to sell under Fla. Stat. Ann. § 893.13(1)(a). See Fla. Stat. Ann. § 893.13(1)(a)(1) (prohibiting, inter alia, selling, manufacturing, delivering, or possessing with intent to sell controlled substances);

see also id. § 893.03(1)(b)(11) (defining heroin as a controlled substance). The maximum penalty for this prior Florida drug conviction was at least the ten years necessary to qualify as a serious drug offense, as required under § 924(e)(2)(A)(ii). See Fla. Stat. Ann. §§ 893.03(1)(b), 775.082(3)(d).

Mr. Beverly's reliance on Carachuri-Rosendo is misplaced. He relies on Carachuri-Rosendo to argue that his conviction for possession of heroin with intent to distribute does not qualify as a "serious drug offense" under ACCA. However, the "serious drug offense" prong of ACCA is unaffected by Johnson. Beyond that, Carachuri-Rosendo did not announce a new substantive rule of constitutional law retroactively applicable on collateral review. In any event, Mr. Beverly's challenge is time-barred under 28 U.S.C. § 2255(f)(3) because Carachuri-Rosendo was decided in June 2010, and Mr. Beverly did not file his § 2255 motion until September 2015. See 28 U.S.C. § 2255(f)(3). Thus, reasonable jurists would not debate whether, post-Johnson, Mr. Beverly's earlier Florida conviction for possession of heroin with intent to sell qualifies as a predicate under the ACCA's serious-drug-offense provision.

Our circuit precedent requires that "no COA should issue where the claim is foreclosed by binding circuit precedent." Hamilton, 793 F.3d at 1266. As discussed, at least three of Mr. Beverly's convictions qualify as predicate convictions under the ACCA's elements clause or serious-drug-offense provision.

He cannot therefore make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2); Hamilton, 793 F.3d at 1266. Because Mr. Beverly has not shown that reasonable jurists would find debatable the District Court's denial of his § 2255 motion, his motion for a COA is DENIED.

Barbara B. Martin
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

November 22, 2017

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 17-11527-A
Case Style: Nathaniel Beverly v. USA
District Court Docket No: 9:15-cv-81366-DTKH
Secondary Case Number: 9:05-cr-80020-DTKH-1

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

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Denise E. O'Guin, A
Phone #: (404) 335-6188

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CR-HURLEY

CASE NO: 05-

JOHN E. VITUNAC
CHIEF UNITED STATES MAGISTRATE JUDGE

18 USC 922(g)(1)
18 USC 924(e)

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATHANIEL BEVERLY,

Defendant.

_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

On or about December 7, 2004, in Palm Beach County, in the Southern District of Florida, the defendant,

NATHANIEL BEVERLY,

having been convicted of a crime punishable by a term of imprisonment exceeding one year, did knowingly possess a firearm, in and affecting interstate commerce, to wit: a Sears Model 3T Caliber .22 CALIBER, SEMI-AUTOMATIC RIFLE in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

COUNT 2

On or about December 7, 2004, in Palm Beach County, in the Southern District of Florida, the defendant,

NATHANIEL BEVERLY,

having been convicted of a crime punishable by a term of imprisonment exceeding one year, did

knowingly possess one or more rounds of ammunition, to wit: Winchester Ammunition in and affecting interstate commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

A TRUE BILL

FOREPERSON

MARCOS DANIEL JIMENEZ
UNITED STATES ATTORNEY

WILLIAM T. ZLOCH
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

NATHANIEL BEVERLY,
_____/

CASE NO. 05-80020-CR-HURLEY

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

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

Court Division: (Select One)

___ Miami ___ Key West
___ FTL _X_ WPB ___ FTP

I do hereby certify that:

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

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

3. Interpreter: (Yes or No) NO
   List language and/or dialect _____

4. This case will take 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) NO
If yes:
Magistrate Case No. _____
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of 12/07/04
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

WILLIAM T. ZLOCH
ASSISTANT UNITED STATES ATTORNEY
Florida Bar No. 0105619

Penalty Sheet(s) attached

REV.1/14/04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant Name: NATHANIEL BEVERLY

Count: I

Max. Penalty: 15 YEARS TO LIFE IMPRISONMENT $250,000 FINE

==========

Count: II

Max. Penalty: 15 YEARS TO LIFE IMPRISONMENT $250,000 FINE

==========

Count:

Max. Penalty:

==========

Count #

Max. Penalty:

==========

Count

Max. Penalty:

==========

***This is merely a preliminary estimate of the maximum possible incarceration. It does not include any other possible consequences including but not limited to fine, special assessment, restitution, special parole, probation, supervised release, etc.**

A-3

United States District Court

Southern District of Florida

WEST PALM BEACH DIVISION

UNITED STATES OF AMERICA

v.

NATHANIEL BEVERLY

JUDGMENT IN A CRIMINAL CASE

Case Number: 9:05CR80020-001

USM Number: 75124-004

Counsel For Defendant: AFPD Peter V. Birch
Counsel For The United States: AUSA Willian T. Zloch
Court Reporter: Pauline Stipes

The defendant was found guilty on Counts 1 and 2 of the two-count indictment on August 5, 2005. The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922 (g) and § 924 (e)	Possession of a firearm and ammunition by a convicted felon.	December 7, 2004	1 and 2

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

It is 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:
November 18, 2005

DANIEL T. K. HURLEY
United States District Judge

~~November~~ Dec. 1, 2005

DEFENDANT: NATHANIEL BEVERLY
CASE NUMBER: 9:05CR80020-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **210 months. This term of imprisonment is imposed as to Count 1 of the Indictment. Count 2 merges with Count 1, therefore no punishment is imposed as to Count 2 of the Indictment.**

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

> The court recommend the defendant be permitted to participate in the 500 hour drug / alcohol rehabilitation program; and the term of imprisonment be served at a facility in South FL.

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: NATHANIEL BEVERLY
CASE NUMBER: 9:05CR80020-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years. This term of supervised release is imposed as to Count 1 of the Indictment. Count 2 merges with Count 1, therefore no punishment is imposed as to Count 2 of the Indictment.**

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: NATHANIEL BEVERLY
CASE NUMBER: 9:05CR80020-001

SPECIAL CONDITIONS OF SUPERVISION

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

The defendant shall participate in an approved treatment program for drug and/or alcohol abuse as directed by the U.S. Probation Office, and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment, if deemed necessary. The defendant will contribute to the costs of services rendered (co-payment) in an amount determined by the U.S. Probation Officer, based on ability to pay, or availability of third party payment.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days, unless excused 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 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: NATHANIEL BEVERLY
CASE NUMBER: 9:05CR80020-001

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	$	$

*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: NATHANIEL BEVERLY
CASE NUMBER: 9:05CR80020-001

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 is** 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 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 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.

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

A-4

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District of Florida/West Palm Beach Division
Name *(under which you were convicted)*: NATHANIEL BEVERLY	Docket or Case No.:
Place of Confinement: FCI-WILLIAMSBURG/P.O. BOX 340/SALTERS, SC 29590	Prisoner No.: 75124-004
UNITED STATES OF AMERICA V.	Movant *(include name under which convicted)*: NATHANIEL BEVERLY

MOTION 15-cv-81366-Hurley/White

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF FLORIDA/WEST PALM BEACH FLORIDA DIVISION)

(b) Criminal docket or case number (if you know): 9:05-CR-80020-001

2. (a) Date of the judgment of conviction (if you know): December 7, 2004

(b) Date of sentencing: Nov. 11, 2005

3. Length of sentence: 210 months

4. Nature of crime (all counts): 18 U.S.C. § 922(g)(1) and § 924(e), Possession of a Fire-armed and ammunition by a convicted felon.

5. (a) What was your plea? (Check one)
(1) Not guilty [x] (2) Guilty [ ] (3) Nolo contendere (no contest) [ ]

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?
Petitioner was found Guilty By Jury on both counts of the indictment

6. If you went to trial, what kind of trial did you have? (Check one) Jury [x] Judge only [ ]

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes [x] No [ ]

8. Did you appeal from the judgment of conviction? Yes [x] No [ ]

9. If you did appeal, answer the following:

(a) Name of court: IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

(b) Docket or case number (if you know): No. 05-16958-DD

(c) Result: Affirmed

(d) Date of result (if you know): October 2006

(e) Citation to the case (if you know):

(f) Grounds raised: Attoreny challenged his status as a ACCA under section § 924(e)(2)(B)(ii) that he does not have the requisite predicate offenses for enahncement purposes.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes [x] No [ ]

If "Yes," answer the following:

(1) Docket or case number (if you know):

(2) Result: Affirmed

(3) Date of result (if you know): August 24, 2006

(4) Citation to the case (if you know):

(5) Grounds raised: Attorney challenged whether section § 924(e)(2)(B)(ii) as unconstitutionally vague.

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes [x] No [ ]

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: IN THE UNITED STATES SUPREME COURT

(2) Docket or case number (if you know): No. 05-16958

(3) Date of filing (if you know): August 24, 2006

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒

(7) Result:

(8) Date of result (if you know): N/A

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: N/A

(2) Docket of case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒

(7) Result:

(8) Date of result (if you know): N/A

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☐ No ☒

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

Unavailable

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Petitioner Is Actually Innocent of the Armed Career Criminal

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner is challenged his status as a Armed Career Criminal, that his prior convictions does not qualify as predicate offenses for enhancement purposes ACCA. See, United States V. Johnson, No. 13-7120 (2015)

MEMORANDUM OF SUPPORTING LAWS

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes [X] No [ ]

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes [ ] No [X]

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes [ ] No [ ] N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes [ ] No [ ] N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes [ ] No [ ] N/A

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available):

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND TWO: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐ N/A

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed:

N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available):

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐ N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐ N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐ N/A

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available):

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND THREE: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐ N/A

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed:

N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available):

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐ N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐ N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐ N/A

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available):

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐ N/A

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed:

N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐ N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐ N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐ N/A

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available):

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

N/A

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:

(a) At the preliminary hearing:
Peter Birch 400 Australian Ave., Suite 300, West Palm Beach, FL 33401-5040

(b) At the arraignment and plea: Same

(c) At the trial: Peter Birch

(d) At sentencing: Peter Birch

(e) On appeal: Brenda Bryn One East Broward Blvd., Suite 1100
Ft. Lauderdale, FL 33301

(f) In any post-conviction proceeding:
Pro-Se

(g) On appeal from any ruling against you in a post-conviction proceeding:

same

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes [ ] No [X]

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes [ ] No [X]

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes [X] No [ ]

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Petitioner petition is timely filed after Johnson, U.S. No. 13-7120 (2015)

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

Remand for resentencing without Armed Career Criminal enhancement.

or any other relief to which movant may be entitled.

Pro-Se
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on 9/25/2015
(month, date, year)

Executed (signed) on 9/25/2015 (date)

Mr. Nathaniel Beverly
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

Name Prisoner #
8301 P.O. Box 340
FCI Williamsburg
Salters, SC 29590

09/25/15

⇔75124-004⇔
Clerk Of Court
US District Court
701 Clematis ST
Room 402
WEST PALM BCH, FL 33401
United States

may ... information or cla... correspondence for f... return the enclos...

... if the writer e... ...ing to another address, ... above address

... Officer

LEGA

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
DIVISION PALM BEACH

NATHANIEL BEVERLY,
Petitioner,

Vs.

UNITED STATES OF AMERICA,
Respondent(s),

MOTION PURSUANT TOT TITLE: 28 U.S.C. § 2255(f)(3)(4), vacate, Set-Aside, or Correction of Sentence

MEMORANDUM OF SUPPORTING FACTS

15-cv-81366-Hurley/White

MOTION PURSUANT TO TITLE: 28 U.S.C. § 2255(f)(3)(4)
Vacate, Set-Aside, or Correction of Sentence
MEMORANDUM OF SUPPORTING FACTS

Now Comes, the Petitioner mr. Beverly, hereinand-(After)(Beverly), in a Pro-Se, manner moving this Honorable Court to grant his petition under section 28 U.S.C. § 2255(f)(3)(4) to Vacate, Set-Aside, or Correction of Sentence.

1.

Statements of Facts:

Petitioner Mr. Beverly, is filing this petition in light of the recent decision made by the Supreme Court in Johnson V. United States, __No. 13-7120__U.S.__,(2015) which affects individuals similar to Mr. Beverly who has been illegally sentenced to enhanced sentence under section 21 U.S.C. § 924(e)(2)(B)(ii).

Subsection: (f)--; A 1-year statutory period of limitations shall apply to a motion under this section. This statutory limitation period shall run from the latest of four grounds:

(3)-the date on which the right asserted was initially recognized by the Supreme Court, if that right has been made newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

(4)-the date on which the statute of limitations run one year from " the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. "

INTRODUCTION

Through undersigned in a Pro-Se, Mr. Beverly, a federal prisoner, hereby files this memorandum of law in support of his application for authorization to file a petition under section 28 U.S.C. § 2255(f)(3)(4) to petition Vacate, Set-Aside, or correction of Sentence. Mr. Beverly, is currently serving a mandatory minimum 15---year term of imprisonment, imposed pursuant to the Armed Career Criminal Act (ACCA). See 18 U.S.C. § 924(e).

He now seeks to bring a claim under Johnson V. United States, 135 S.Ct. 2551 (June 26, 2015), where the Supreme Court held, for the first time, that the ACCA's residual clause was unconstitutionally vague. In so holding, Johnson established " a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. " 28 U.S.C. § 2255(f)(3).

I PROCEDURAL HISTORY

In March 3, 2005, a federal grand jury sitting in the Southern District of Florida charged Mr. Beverly with " knowingly " Possessing a .22 caliber rifle (Count One), and more than one round of ammunition (Count Two), after " having been convicted of a crime punishable by a term of imprisonment exceeding one year," in violation of Title 18, U.S.C. § 922(g)(1) and 924(e). Mr. Beverly pled not guilty to the charges.

The indictment did not specify the prior crime(s) of which Mr. Beverly had been convicted, nor characterized any such crimes as " violent felonies. "

A.

To support the ACCA enhancement, the government relied on Mr. Beverly prior Florida convictions for: 1)-Possession w/intent to sell cocaine #DT. 91012894CF), 2)-Burglary of a dewelling #DT. 96007427CF); 3)-Possession of heroin w/intent to sell #DT. 9700-5898CF) and which none of these convictions qualify as a crime of violence or a serious drug offense under the ACCA.

Petitioner Mr. Beverly is challenging his status as a Armed Career Criminal and he is actually innocent of of this sentence enhancement. Johnson, No. 13-7120 (2015).

On appeal, this Court likewise rejected Beverly arguments and affired his sentence. Beverly V. United States, No. 05-16958-DD (11th. Cir. 2006). with respect to the Burglary of a Dewelling was a crime of violence and qualified as a violent felony under the residual clause. See .., James V. United States, __U.S.__, 550 and 192 (2007). Overruled by Johnson V. United States, __No. 13-7120__(2015).

2.

B.

In this particular case, the petitioner Mr. Beverly, is challenging his status as a armed career criminal. 924(e). The government identified three (3) potential prior convictions to enhance the petitioner Mr. Beverly under the ACCA.

Actually Innocent of The ACCA Enhancement Under Section § 924(e)

In this particular case, the government identified three potential prior convictions and the first (1)-Burglary of a Dewelling DT# 96007427CF pled guilty to the lesser included offense of burglary which is non-violent felony. Under Florida Stat. § 810.02(1)-(3) this is a non-violent felony because the definition only describe Burglary as " burglary involved entry into a dewelling or an occuppied structure under the residual clause.

3.

Petitioner Mr. Beverly, contention is that this prior conviction does not qualify as a crime of violence for the ACCA. Since the Supreme Court decision in Johnson V. United States, __U.S.__No. 13-7120__(2015) struck down this language of the residual clause under section § 924(e)(2)(B)(ii) as unconstitutionally vague. This predicate offense no longer qualify as a violent felony for the armed career criminal enhancement and Mr. Beverly is entitled to relief. And the Second Prior Conviction is for Possession of Heroin w/intent to Sell DT # 97005898CF does not qualify as a serious drug offense for the ACCA.

Petitioner Mr. Beverly, contends that this predicate offense does not qualify as a

serious drug offense under section § 924(e)(2)(B)(ii). Because this prior conviction does proscribe a statutory maximum of ten (10)-years or more. This sister's Circuit of the Fourth Circuit just decided a case under the ACCA in a similar matter. See ..., Newbold V. United States, __No. 10-6929__,(4th. Cir. 2015). And THird prior conviction that the presentencing report identified is for a currently to a drug offense for Manslaughter DT# 91-12896CF And Poessession of Cocaine w/ intent to Sell DT# 91012896CF does not qualify under the ACCA enhancement. See ... Johnson V. United States , __U.S.__, No. 13-7120__,(2015).

MR. BEVERLY JOHNSON CLAIMS SATISFIES 28 U.S.C. § 2255(f)(3)

The statutory maximum sentence for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), is normally ten years' imprisonment. 18 U.S.C. § 924(a)(2). However, under ACCA, where the defendant " has three previous convictions .... for violent felony or a serious drug offense, or both, committed on occasions different from one another, as such person shall be fined under this title and imprisoned not less than fifteen years. " Id. § 924(e)(1). The term " violent felony " includes certain crimes that "(i)" ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another [elements clause "]; or (ii) is burglary, arson, or extortion, involves use of explosives [" enumerated offenses "], or otherwise involves conduct that presents a serious potential risk of physical injury to another [" residual clause "]. " Id § 924(e)(2)(B).

In Johnson, the Supreme Court "h[e]ld that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. " 135 S.Ct. at 2563. The Court explained that the ACCA's residual clause " denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges, " and therefore did not " survive[ ] the Constitution's prohibition on vague criminal laws. " Id. at 2555, 2557.

Accordingly, " [i]ncreasing a defendant's sentence under the clause denies due process of law. " Id. at 2557.

As explained below: 1) Johnson is a new rule that was previously unavailable; 2) Johnson's new rule is one of constitutional law; and 3) the Supreme Court has made Johnson retroactively applicable to cases on collateral review. This Circuit Sister's Circuit the Fourth Circuit has already reached this conclusion. United-States V. Lewis, __No. 3:14-CV-00612__,(4th. Cir. 2015)(we conclude that Johnson announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive to final convictions. "). This Court should follow suit.

In this case the Petitioner Mr. Lewis, challenged his status as a Armed Career Criminal under the " residual clause " for common law robbery. " The Fourth Circuit district court reviewed this case under Johnson V. United States, __No. 13-7120__U.S.___,(2015).

A. Johnson Established a New Rule that was Previously Unavailable

For purposes of § 2255(f)(3), a " rule is new if it ' was not dictated by precedent existing at the time the defendant's conviction became final. ''' In re Morgan, 713 F.3d 1365, 1366-67 (11th. Cir. 2013)(quoting Teague V. Lane, 489___U.S.__, 288, 301 (1989). Johnson clearly meets this crierion. Not only did prior precedent not dictate the conclusion that the ACCA's residual clause was unconstitutionally vague, it squarely foreclosed that conclusion.

Before Johnson, both the Supreme Court and this Court had held that the ACCA's residual clause was not unconstitutionally vague. Sykes V. United States , 131 S. Ct. 2277 (2011)(residual Clause " states an intelligible principle and provides - guidance that allows a person to confirm his or her conduct to the law ")(quotation ommitted); James, 550__U.S.___, at 210 n.6 (" we are not persuaded ...that the residual clause is unconstitutionally vague "); United States V. Gandy, 710 F. 3d 1234, 1239 (11 th. Cir.2013)(reaching same holding, relying on Sykes and James). In declaring the ACCA's residual clause unconstitutionally vague, Johnson broke new ground and expressly overruled its prior precedents in James and Sykes. Johnson, 135 S.Ct. at 2563 (" Our contrary holdings in James and Sykes are overruled. ").

Because that newfound conclusion was not dictated by prior precedent and, in fact was foreclosed by prior precedent----Johnson established a new rule.

4.

See Price, 2015 WL 4621024, at *1 (Johnson announces a new rule: It explicitly overrules [a] line of Supreme Court decisions ....and it broke new ground by invalidating a provision of ACCA. "); In re Moss, 703 F.3d 1301, 1302(11th. Cir. 2013)(concluding that a Supreme Court decision established a new rule because it " was the first recognition " of a particular constitutional prohibition)(quotation ommited); In re Holladay, 331 F.3d 1169, 1172 (11th. Cir. 2003)(same). Indeed, this Court has found new rule under circumstances far less clear. See .... Morgan, 713 F.3d at 1367 (" Although the confluence of these two lines of precedent led to the [Supreme Court] decision, " it nevertheless " was not dictated by these precedents " and was therefore a new rule.)(quotation and brackets ommitted).

And, because Johnson's new rule was announced on June 26, 2015, it was " previously unavailable " to Mr. Beverly during the pendency of his direct appeal on which was filed on March 23, 2006 and denied in February 2007. See In re Hill, 113 F.3d 181, 182 (11th. Cir. 1997)(" In general, we have interpreted the term ' previously unavailable ' with reference to the availability of the claim at the time the first federal habeas application was filed. ").

B. Johnson's New Rule is One of Constitutional Law:

In Johnson, the Supreme Court repeatedly explained that its holding was grounded in the Due Process Clause of the Constitution, which prohibits the imposition of vague criminal laws. See Johnson, 135 S.Ct. at 2555 (framing issue as whether [the residual clause] survives the Constitution's prohibition of vague criminal laws "); Id. at 2556-57(Summarizing " prohibition of vagueness " grounded in the Fifth-Amendment); id. at 2557(" Increasing a defendant's sentence under the [residual-] clause denies due process of law. "); id.

(" Two features of the residual clause conspire to make it unconstitutionally - vague."); id at 2558 (" the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates "); id at 2560 (" Invoking so shapeless a provision to constitution's guarantee of due process. "); id 2563 (" we hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. ").

Final Conclusion:

For the purposes of § 2255(f)(3), " a new rule of constitutional law is made retroactive not only through an express pronouncement of retroactivity [by the Supreme Court], but also ' through multiple holdings that logically dictate the retroactivity of the new rule. "' Holladay, 331 F.3d at 1172 (Tyler V. Cain, 533 U.S. , 656, 668 (2001).

Conclusion

THEREFORE, the Petitioner Mr. Beverly respectfully submits and prays that this Honorable Court to grant this petition in light of Johnson V. United States, U.S. No. 13-7120 (2015) and the petitioner is requesting that this Court will remanded him back to the district court for resentencing.

Date: 9*25* 2015.

Respectfully Submitted

Sign: N. Nathaniel Beverly

Mr. Nathaniel Beverly
FCI-Williamsburg
P.O. Box 340
Salters, SC 29590

Certificate of Service

I Nathaniel Beverly hereby verify, certify, that a true copy of this petition was served on all parties involved in this matter and placed into the Institutional Mailing System.

Date: 9* 25* 2015.

Sign: Mr. Nathaniel Beverly.

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-81366-CIV-HURLEY/WHITE
(05-80020-CR-HURLEY)

NATHANIEL BEVERLY,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOVANT'S *PRO SE* MOTION TO VACATE AND TRAVERSE TO THE GOVERNMENT'S RESPONSE TO THE ORDER TO SHOW CAUSE, AND REQUEST FOR IMMEDIATE RELEASE FROM ILLEGAL CUSTODY

The Federal Public Defender, through undersigned counsel, respectfully files this supplemental memorandum of law in support of Mr. Beverly's *pro se* Motion to Vacate his Sentence Pursuant to 28 U.S.C. §2255 (DE1) and his traverse (DE14) to the government's response to the Order to Show Cause (DE13), and explains below why Mr. Beverly is correct that the Court should grant his §2255 motion, vacate his previously-imposed ACCA sentence, and immediately release him from his illegal custody at this time.

PROCEDURAL HISTORY

1. On March 3, 2005, a federal grand jury charged Mr. Beverly with being a felon in possession of a firearm (Count 1) and ammunition (Count 2) in violation of 18 U.S.C. §922(g)(1). (Crim Dkt. DE1).

2. On March 14, 2005, Mr. Beverly was arrested, and he remained pretrial detained pending trial. (PSI, p. 2).

3. On August 8, 2005, a jury found Mr. Beverly guilty of both counts being a felon in possession of a firearm (Count 1), and ammunition (Count 2).

4. On November 18, 2005, the Court sentenced Mr. Beverly to a term of 210 months as an Armed Career Criminal. Notably, without the ACCA enhancement, Mr. Beverly's base offense level (calculated under USSG §2K2.1) was a level 24, and – at a Criminal History Category V – his advisory Guideline range was 92-115 months imprisonment. However, the probation officer indicated in the PSI, Mr. Beverly had 5 prior Florida convictions that qualified as ACCA predicates, namely:

(1) a 1997 conviction for burglary of a dwelling (Dkt. No. 96007427CF);

(2) a 1978 conviction for robbery (Dkt. No. 77001937CF);

(3) a 1997 conviction for possession of heroin with intent to sell (Dkt. No. 97005898CF);

(4) a 1992 conviction for possession of cocaine with intent to sell (Dkt. 91012896CF); and

(5) a 1992 conviction for manslaughter (Dkt. No. 91012894CF).

(PSI, ¶24). As an Armed Career Criminal, the probation officer indicated, Mr. Beverly's offense level rose from a 24 to a 33; his Criminal History Category was increased from a V to a VI; he faced a statutory term of imprisonment of 15 years to life (rather than 0-10 years); and his advisory Guideline range increased to 210-262 months imprisonment. (PSI, ¶¶18-33, 61-62). Mr. Beverly objected to being sentenced as an Armed Career Criminal since none of the enhancing facts had been charged in his indictment or proved to the jury at his trial.

At the sentencing hearing, the government advised that it had the judgments of conviction for 4 of the 5 above-listed cases – those for burglary of a dwelling, robbery, possession of heroin with intent to sell, and possession of cocaine with intent to sell – and was relying upon those 4

convictions as ACCA predicates not only for the current sentencing, but for "future proceedings." The government notably did *not* have the judgment for the 1992 manslaughter conviction, and did *not* rely upon that conviction as a predicate or alternative predicate for the enhancement at the sentencing. The AUSA specifically referenced and relied *only* upon the convictions alleged in ¶29, 32, 35, and 36 as predicates. *See* Exhibit A hereto (11/18/05 Sentencing Transcript) at 296-306.

5. Mr. Beverly appealed his conviction and sentence to the Eleventh Circuit, but the Court affirmed both. He sought certiorari but certiorari was denied. Notably, though, he did not seek collateral relief from his ACCA sentence pursuant to 28 U.S.C. §2255, until after the Supreme Court issued its momentous decision in *Johnson v. United States*, __ U.S. ____, 135 S.Ct. 2551 (June 26, 2015), declaring the ACCA's residual clause unconstitutionally vague and therefore void.

6. On October 2, 2015, Mr. Beverly filed a *pro se* motion to vacate his sentence pursuant to 28 U.S.C. §2255, arguing that in light of *Johnson*, it was now clear that he had been erroneously sentenced as an Armed Career Criminal. (DE1).

7. On that same date, Mr. Beverly filed a *pro se* memorandum of law in support of his §2255 motion, arguing that at least one of his convictions previously counted as a predicate for the enhancement – namely, his 1997 conviction for Florida burglary of a dwelling – was no longer a "violent felony" within the ACCA's residual clause, and without it, he did not have three convictions that would qualify him as an Armed Career Criminal under current law. (DE4). On that point, he noted, *first* that his 1992 Florida manslaughter conviction likewise no longer qualified for the ACCA enhancement, and *second*, that under current Supreme Court law

his 1997 Florida conviction for possession with intent to sell heroin did not qualify as a "serious drug offense" as defined in 18 U.S.C. §924(e)(2)(A)(ii), since the maximum term of imprison for that offense was not 10 years or more. As support for the second point, he cited *United States v. Newbold*, 791 F.3d 455 (4th Cir. June 30, 2015), where the Fourth Circuit – in like circumstances – found that a N.C. drug conviction did not qualify as a "serious drug offense" under the ACCA since such an offense was not actually punishable by more than 10 years under North Carolina's presumptive sentencing scheme, and that the defendant was entitled to §2255 relief on that basis. (DE4:3-4).

Because these three convictions did not qualify as ACCA predicates under current Supreme Court law, Mr. Beverly argued, it had become clear that he was "actually innocent" of the ACCA enhancement. And since he had filed this – his first – §2255 motion within 1 year of *Johnson*, he asked the Court to vacate his enhanced ACCA sentence and remand his case for resentencing. (DE4:3-7).

8. On October 6, 2015, this Court issued an Order to Show Cause to the government (DE8), and on January 19, 2016, the government filed its Response to the Order to Show Cause. (DE13). In that Response, the government conceded that Mr. Beverly's §2255 motion was timely under 28 U.S.C. §2255(f)(3) because it is his first such motion, it was filed within 1 year from *Johnson*, and the new rule established in *Johnson* is substantive. (DE13:8-12). However, the government maintained, Mr. Beverly still qualified as an Armed Career Criminal, notwithstanding that the ACCA's residual clause was now unconstitutionally vague, and even if the "burglary of a dwelling" conviction no longer qualified as a "violent felony." According to

the government, Mr. Beverly still had four other predicates which continued to qualify him as an Armed Career Criminal. (DE13:12-13, 18-19).

First, the government asserted, it had "never limited itself to the use of only three qualifying convictions pursuant to ACCA." (DE13:16). *Second*, the government claimed, both Mr. Beverly's possession with intent to sell heroin conviction and his possession with intent to sell cocaine conviction were for "second degree felonies punishable by possible maximum terms of imprisonment of 15 years, according to Fla. Stat. §893.13(1)(a), §775.082, and "still qualify" as "ACCA serious drug offenses" pursuant to *McCarthy v. United States*, 135 F.3d 754 (11th Cir. 1998). *Finally*, the government argued, two of Mr. Beverly's remaining convictions – one purportedly for "*armed* robbery" under Fla. Stat. §812.13(1) and (2)(a), and the other for manslaughter under Fla. Stat. §789.07(1) – still qualified as violent felonies under the ACCA's elements clause. (DE13:16-18).

9. On February 2, 2016, Mr. Beverly filed a *pro se* pleading entitled "Motion Pursuant to the Government's Opposition Petition to Petitioner Petition Under Section 28 U.S.C. §2255(f)(3) Post-*Johnson*." (DE14). In that pleading, he urged the Court to grant his petition and reject the government's arguments in opposition on grounds, *inter alia*, that: (1) the government had conceded in its Response, DE13:19, that his burglary of a dwelling conviction no longer qualified as an ACCA predicate after *Johnson*; (2) his 1978 robbery and 1992 manslaughter convictions likewise no longer qualified as violent felonies after *Johnson*; and (3) for the reasons stated in *Newbold* and based on the Supreme Court's analysis in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), his 1997 possession with intent to distribute heroin conviction could not have received a term of imprisonment of ten years or more. (DE14:3-4). As such, he reiterated,

he did not have three currently-qualifying ACCA predicates. And since he had already been incarcerated at that point ***for 11 years*** (which exceeded the maximum he could be forced to serve without the ACCA enhancement), he asked the Court to grant his motion to vacate and resentence him. (DE14:4-5).

10. On February 8, 2016, Magistrate Judge White entered a paperless order construing the above pleading as a "traverse to the government's response to this court's show cause order," and noting that it would be considered "together with his motion and the government's response." (DE15).

11. On March 11, 2016, at the request of Mr. Beverly, undersigned counsel entered a notice of appearance on his behalf in this matter. The Federal Public Defender previously represented Mr. Beverly at trial, sentencing, direct appeal, and on his petition for writ of certiorari to the Supreme Court. Undersigned counsel represented Mr. Beverly in the latter two proceedings.

12. On April 8, 2016, in *Welch v. United States*, the Supreme Court confirmed that – as the government had already conceded in this case – *Johnson* announced a new "substantive rule that has retroactive effect in cases on collateral review." 578 U.S. ___, 135 S.Ct. 1257, 1268 (April 8, 2016).

GROUND FOR RELIEF:
BEVERY IS NO LONGER AN ARMED CAREER CRIMINAL,
HE HAS OVERSERVED THE LAWFUL 10 YEAR MAXIMUMUM
IN 18 U.S.C. § 924(a)(2), AND HE SHOULD BE IMMEDIATELY RELEASED

For the reasons detailed below, Mr. Beverly is no longer subject to the ACCA enhancement after *Johnson*. As noted *supra*, the government rightly conceded even prior to *Welch* that *Johnson* applied retroactively to this case, and that Beverly's § 2255 motion (his first

such motion) was timely filed within 1 year of *Johnson*'s elimination of the ACCA's residual clause. (DE13:8-12). At this time, it is clear that his sentence exceeds the otherwise-applicable statutory maximum because neither his Florida burglary of a dwelling conviction; his manslaughter conviction; his robbery conviction; nor his possession with intent to distribute heroin conviction currently qualify as ACCA predicates under any clause of the ACCA. Without the convictions in PSI ¶¶29, 32, 35, and 36 as predicates, at this time Mr. Beverly has at most one still-viable ACCA predicate (that for possession with intent to sell cocaine in 1992). And with only one still-qualifying ACCA predicate, his enhanced sentence cannot be upheld. Since Mr. Beverly has already overserved the otherwise applicable 10 year maximum for a §922(g) offender without an ACCA enhancement, he should be immediately released from his now-illegal custody at this time.

I. THE CATEGORICAL APPROACH

Before explaining why Mr. Beverly is no longer an Armed Career Criminal in light of *Johnson*, it is necessary to briefly set out the governing analytical framework for determining whether a previously-counted "violent felony" remains a "violent felony" under current law. That framework, referred to as the "categorical approach" and summarized below, was clarified by the Supreme Court in *Descamps v. United States*, 133 S. Ct. 2275 (2013), after almost two decades of misapplication by some courts since the declaration of that approach in *Taylor v. United States*, 495 U.S. 575 (1990).

Although the government attempts to minimize the momentous impact of *Descamps* by acknowledging that intervening precedent only on the last page of its Response, DE13:19, *Descamps* is unquestionably "the law of the land" now, and "must be . . . followed." *United*

States v. Howard, 73 F.3d 1334, 1344 n.2 (11th Cir. 2014). The correctness of *Descamps*' clarified framework for analysis has just been re-confirmed by the Supreme Court in *Mathis v. United States*, 136 S.Ct. 2243 (June 23, 2016). And the Eleventh Circuit has squarely recognized that because *Descamps* announced an "old" rule, it always applies in resolving first § 2255 cases timely filed within one year of *Johnson*. *Mays v. United States*, 817 F.3d 728, 730 (11th Cir. 2016).

In determining whether a prior conviction qualifies as a "violent felony," the Supreme Court has never veered from its holding in *Taylor* that sentencing courts must apply the "categorical approach." Under that approach, the Court reiterated in *Descamps*, "courts may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Descamps*, 133 S. Ct. at 2283 (quoting *Taylor*, 495 U.S. at 600). In adopting this approach initially, the Court emphasized both Sixth Amendment concerns (explained below) and the need to avert "'the practical difficulties and potential unfairness of a [daunting] factual approach.'" *Id.* at 2287 (quoting *Taylor*, 495 U.S. at 601). While there can now be no dispute at this point that the categorical approach requires that courts "look no further than the statute and judgment of conviction" to determine the elements of the offense of conviction, *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014) (citation omitted), both the Eleventh Circuit and the Supreme Court have explained that courts must also consider interpretive caselaw to determine whether statutory language refers to an actual element or simply a "means" of committing the offense, and the full array of conduct a broad statutory element comprises. *See United States v. Howard*, 742 F.3d 1342, 1346 (11th Cir. 2014); *Mathis*, 136 S.Ct. at 2256-2257. Finally, courts must employ the "least

culpable act rule," under which they "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2011) (quoting *Curtis Johnson*, 559 U.S. at 137).

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

A prior conviction may also still qualify as a "violent felony" if it satisfies the ACCA's elements/force clause. And indeed, as the Eleventh Circuit confirmed after *Descamps* in *Estrella*, the categorical approach applies equally in the elements clause context. Again, looking no further than the statute and judgment of conviction, a conviction will qualify as an ACCA predicate under 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).

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

Two key points must be made about the modified categorical approach. First, *Descamps* made clear that "the modified categorical approach can be applied only when dealing with a divisible statute." *Howard*, 742 F.3d at 1344. Thus, where the statute of conviction "does not concern any list of alternative elements" that must be found by a jury, there is no ambiguity requiring clarification, and therefore the "modified approach . . . has no role to play." *Descamps*, 133 S. Ct. at 2285–86; *see Estrella*, 758 F.3d at 1245–46; *Howard*, 742 F.3d at 1345–46. "[I]f the modified categorical approach is inapplicable," then the court must limit its review to the statute and judgment of conviction. *Howard*, 742 F.3d at 1345. And, even if a statute is divisible, the court may not employ the modified categorical approach if none of the alternatives would qualify. *Id.* at 1346–47. Second, even in the narrow range of cases where the modified categorical approach could apply, it never permits courts to consider the defendant's underlying

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

In *Shepard v. United States*, 544 U.S. 13, 15 (2005), the Supreme Court held that courts applying the "modified categorical approach" are "limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." What these *Shepard* documents have in common is that they are "conclusive records made or used in adjudicating guilt." *Id.* at 21; *see id.* at 23 ("confin[ing]" the class of permissible documents "to records of the convicting court approaching the certainty of the record of conviction"). That accords with their function in the modified categorical approach—namely, to permit the court to identify the elements for which the defendant was convicted. *Descamps*, 133 S. Ct. at 2284.

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

defendant either had a jury or waived his constitutional right to one. *See Apprendi*, 530 U.S. at 488.

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

Completely ignoring the dictates and Sixth Amendment rationale of *Descamps* here, the government has mistakenly urged the Court in its Response to uphold Mr. Beverly's enhanced ACCA sentenced based upon factual allegations in the PSI about his prior state offenses which he did not dispute at his 2005 sentencing. *Descamps* was clear, however, that federal courts may *not* rely *any* non-elemental fact – even if undisputed" or affirmatively admitted by a defendant at his state plea colloquy – without violating the defendant's Sixth Amendment rights. *See* 133 S.Ct. at 2285; 2287-2288 ("Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant;" the only facts the court can be sure the jury found "are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances;" whatever the defendant "says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment"); *id.* at 2287 (the elements-based categorical approach is necessary to "avoid the Sixth Amendment

concerns that would arise from sentencing courts' making findings of fact that properly belong to juries").

But indeed, even if the government genuinely believed that there might be some question as to the correct interpretation of *Descamps* prior to the Supreme Court's decision in *Mathis*, there can be no possible question after the Supreme Court's June 23rd decision in *Mathis* that the Sixth Amendment affirmatively precludes the Court from upholding an ACCA sentence based upon "undisputed PSI facts." For indeed, *Mathis* reaffirmed that under *Descamps*, the categorical approach must "focus solely on whether the elements of the crime of conviction sufficiently match the elements" of the federal offense, "while ignoring the particular facts of the case." *Id.* at 2248. "Statements of 'non-elemental fact' in the records of prior convictions are prone to error," the Court underscored in *Mathis*, "precisely because their proof is unnecessary." *Id.* at 2253.

The Supreme Court made clear in *Mathis* that it is indeed the Sixth Amendment guarantee that ties the categorical approach strictly to the elements of the offense. As to the specific question presented in that case, the Court held in *Mathis* that a statute is not "divisible" under *Descamps* – authorizing resort to the "modified categorical approach" – if it simply identifies alternative "means" of satisfying a single element, irrespective of whether those "means" are listed disjunctively in the statute. *See id.* at 2253 (noting "Sixth Amendment problems associated with a court's exploration of means rather than elements"). But importantly, the Court's broader holding, reaffirming *Descamps*' "elements-based inquiry," also rested on the Sixth Amendment because to comply with *Apprendi*, the Court explained, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant

committed that offense." *Id.* at 2252. A federal judge "is prohibited from conducting such an inquiry himself; and 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.*

Accordingly, and for the reasons further detailed below, this Court must resolve this case using the categorical approach, without resorting to the "modified categorical approach." It may *not* consider allegations of non-elemental "facts" in *any* document – including Mr. Beverly's federal PSI, which is not even a *Shepard*-approved document because it is not a "conclusive record[ ] made or used in adjudicating guilt," *Shepard*, 544 U.S. at 21, and was not a part of the underlying state proceedings. Thus, even if Mr. Beverly did not object to certain factual allegations in the PSI about the underlying facts in his prior offenses, that has *no* legal significance post-*Descamps* and *Mathis*. Instead, what matters after *Descamps* and *Mathis* is that Mr. Beverly did not invoke or waive his constitutional right to a jury trial to find non-elemental "facts" during his earlier criminal proceedings. And therefore, any use of PSI facts to enhance – or uphold – Mr. Beverly' sentence at this time, would violate his Sixth Amendment rights.

* * *

In sum, in determining whether a conviction still qualifies as a violent felony after *Johnson*'s elimination of the residual clause, the categorical approach requires that the Court consider only the statute and judgment of conviction. Only if the statute is divisible into

alternative crimes, *Descamps* teaches, may the Court consider *Shepard* documents. Once the elements of the offense of conviction are identified, the Court must determine whether the least of the acts prohibited thereby is a "match" for a generic offense enumerated in the ACCA; whether it necessarily requires the use, attempted use, or threatened use of violent, physical force against another; or instead, whether there is a "mismatch" in elements and the prior crime of conviction is "categorically overbroad." In *no* case, post-*Descamps* and *Mathis*, may the Court consider for *any* purpose allegations of non-elemental "fact" whether undisputed or affirmatively admitted. It may never impose or uphold a "violent felony" enhancement based upon the defendant's underlying conduct, rather than the elements of the prior offense of conviction, as to do so would violate the Sixth Amendment.

II. In light of *Johnson*, Mr. Beverly is Not an Armed Career Criminal

A defendant convicted of violating 18 U.S.C. §922(g) ordinarily is subject to a maximum term of 10 years imprisonment. 18 U.S.C. §924(a)(2). But, according to the Armed Career Criminal Act, 18 U.S.C. §924(e)(1), if he has "three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense or both, committed on occasions different from one another," he is subject to an enhanced minimum term of 15 years imprisonment and may be sentenced up to life.

Congress defined the term "violent felony" for purposes of the ACCA enhancement in 18 U.S.C. §924(e)(2)(B) to mean:

> any crime punishable by imprisonment for a term exceeding one year . . . that:
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary. . . , or otherwise involves conduct that presents a serious risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).

And, as also pertinent here, it defined the term "serious drug offense" in §924(e)(2)(A)(i) to mean:

> an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

In *Johnson v. United States*, 135 S.Ct. 2551 (June 26, 2016), the Supreme Court declared the "otherwise" or residual clause in §924(e)(2)(B)(ii) to be unconstitutionally vague, and therefore, effectively void. But while the government is correct that *Johnson* did not call into question application of the ACCA "to the four enumerated offenses, or the remainder of the [ACCA's] violent felony definition" (DE13:16, quoting *Johnson*, id. at 2563), in determining whether any of the previously-counted convictions remain "violent felonies" under either the enumerated or elements clauses of §924(e)(2)(B), or "serious drug offenses" sufficient to uphold the ACCA enhancement under current law, the Court must take into account the Supreme Court's clarification of the law governing both the "violent felony" and "serious drug offense" determinations since Mr. Beverly's sentencing.

And under current, controlling Supreme Court and Eleventh Circuit precedent, Mr. Beverly no longer qualifies as an Armed Career Criminal after *Johnson*'s elimination of the residual clause because he does not have three convictions that currently qualify as "violent felonies" under *any* other ACCA clause at this time. For the reasons detailed below, Mr. Beverly's 1997 burglary of a dwelling conviction may not be counted as a "violent felony" within the ACCA's enumerated clause (as the government, notably, concedes). Nor may his1978 robbery or 1992 manslaughter convictions be counted as a "violent felony" within the

ACCA's elements clause. And without those three convictions, Mr. Beverly no longer qualifies as an Armed Career Criminal. His ACCA enhancement is illegal under current law, and his sentence should be vacated.

Although it is unnecessary for the Court to resolve or even consider whether Mr. Beverly's 1997 possession with intent to distribute heroin conviction remains a "serious drug offense" within the purview of 18 U.S.C. §924(e)(2)(A)(ii) at this time – since it is clear that without the burglary, robbery, and manslaughter convictions he does not have three ACCA predicates – for the reasons set forth at the conclusion of his memorandum, under current law his 1997 possession with intent to distribute heroin conviction does not qualify as a "serious drug offense" for purposes of the ACCA, and thus may not be used to uphold the enhancement either.

A. As the government rightly conceded in this case prior to *Mathis*, and it has conceded in every other case in this district post-*Mathis*, a Florida conviction for "burglary of a dwelling" is *not* a "violent felony" within the ACCA's enumerated offenses clause.

Its January 19, 2016 Response to the Order to Show Cause, written six months before the Supreme Court's dispositive decision on this issue in *Mathis*, the government conceded that Mr. Beverly's 1997 Florida "burglary of a dwelling" conviction would *not* qualify as an ACCA violent felony with the enumerated offenses clause under the categorical approach. (DE13:18). However, notwithstanding that every district judge and magistrate judge in this district to have considered the issue as of January 19, 2016 had held that the Florida burglary statute was indivisible and categorically overbroad, and as such, the modified categorical approach *never* applied, *see, e,g.*, *United States v. Cardoso*, Case No. 13-60103-CR-Cohn, DE44 at 10 (S.D. Fla. May 8, 2014); *United States v. Dixon*, Case No. 13-20370-Cr-Altonaga, DE45 at 8-9 (S.D. Fla. July 3, 2014); *Wheeler v. United States*, Case No. 14-80782-CIV-Middlebrooks, DE26, DE27

(S.D. Fla. Aug. 11, 2015); *Anthony Bush v. United States*, Case No. 15-81271-CIV-Dimitrouleas, DE16 at 2 (S.D. Fla. Nov. 5, 2015); *Tallius Harrell v. United States*, Case No. 14-CIV-61396-Zloch, DE28 at 2, DE25 at 6-7 (S.D.Fla. Mar. 1, 2016), the government continued to "submit" without authority that this type of conviction "*could* still qualify as a violent felony" "under a modified categorical approach" after *Descamps*. (DE13:18).

Nonetheless, the government acknowledged that it "did not receive all of the documents for the BOD as set out in the PSI ¶35," and notably, it did not even attach the actual judgment to its Response. (DE13:18-19 & n. 4).[3] Although it pointed out that "[b]ased on the uncontested facts set out in the PSI," Mr. Beverly "committed a generic battery [sic]," the government rightly "concede[d]" (in anticipation of the ruling the Supreme Court would hand down in *Mathis*) that "this may be legally insufficient." *Id.* At that time, however, it was already legally insufficient according to *Descamps*. The language in that decision permits of no other interpretation. *See* 133 S.Ct. at 2285 ("Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is *irrelevant*.")(Emphasis added).

In any event, *Mathis* – by confirming the above analysis in *Descamps* and clarifying that a statute is divisible *only* where the offense contains alternative "elements," not alternative "means" or ways to satisfy an "element" – has rendered it beyond dispute that because the Florida burglary statute includes "the curtilage thereof" in the indivisible definition of "dwelling," a conviction under the statute is categorically overbroad and never an ACCA

[3]Notably, the only document the government attached – as DE13-10 – is the "information" in Dkt. No. 96-07427-CF. Just for accuracy, undersigned counsel has attached the actual judgment, and a later amended judgment in that case as Exhibit B hereto. Both judgments confirm that, as indicated in PSI ¶35, Mr. Beverly did *not* plead to the originally-charged crime of "burglary with assault and battery." Instead, he pled to a lesser offense: "burglary of a dwelling," a 2nd degree felony, in violation of Fla. Stat. 810.02(1) & (3).

predicate. *See Mathis*, 136 S.Ct. at 2256 (instructing courts to apply "authoritative sources of state law" to determine whether a statute is divisible, and whether a location is burgled is a "means" or "element"); *Baker v. State*, 636 So.2d 1342, 1344 (Fla. 1994)(definitively construing Fla. Stat. §810.02, and confirming that the terms "building" and "curtilage" are *not* "alternatives," but part of a single *indivisible* definition of both "structure" and "dwelling" in the statute, by stating: "*There is no crime denominated burglary of a curtilage*; the curtilage is not a separate location wherein a burglary can occur. Rather it is an integral part of the structure or dwelling that it surrounds. Entry onto the curtilage is, for the purposes of the burglary statute, entry into the structure or dwelling.")(emphasis added).

Accordingly, in the aftermath of *Mathis*, the government has expressly and correctly conceded in case after case in this district, including in cases before this very Court, that "the holding of *Mathis* makes clear that the Florida burglary statute is not divisible, is never generic burglary under the enumerated offenses clause, and therefore never qualifies as a violent felony for ACCA purposes." *McKinnon v. United States*, No. 16-22519-CIV-CcOOKE, DE4 at 2 (S.D. Fla. June 30, 2016); *accord Jarvis v. United States*, No. 15-81050-CIV-HURLEY, DE31 at 2; *Kelly v. United States*, No. 16-21910-CIV-GRAHAM, DE15 at 3 (S.D. Fla. June 28, 2015). And as of this writing, judges and magistrate judges throughout this district have so recognized and granted motions to vacate and released other defendants from custody for precisely that reason. *See, e.g., McKinnon*, DE5; *Jarvis*, DE32 & DE36; *Kelly*, DE16 & DE18. Therefore, the Court should hold as a threshold matter of law in the instant case, that Mr. Beverly's Florida burglary of a dwelling conviction is categorically no longer an ACCA predicate after *Johnson*, and cannot be used to uphold his ACCA sentence at this time. Moreover, for the reasons that follow, it

should hold that Mr. Beverly does not have 3 still-qualifying ACCA predicates after *Johnson*, and as such, his ACCA enhancement cannot be upheld and he should be released from his illegal sentence.

B. Although the government waived its right to rely upon Mr. Beverly' 1992 conviction for manslaughter as an ACCA predicate, as the government has now conceded in other cases, under current law a Florida manslaughter conviction is *not* a "violent felony" within the ACCA's elements clause.

At Mr. Beverly's sentencing, the Government affirmatively waived its right to rely upon Mr. Beverly's 1992 Florida manslaughter conviction in "future proceedings." And, as will be detailed below, both governing Supreme Court and Circuit law dictate that such a waiver must be strictly enforced against the government at this time. Notably, though, even if the Court *could* consider the government's intentionally-waived and now barred claim that Mr. Beverly's Florida manslaughter conviction provides an alternative basis for upholding his enhanced ACCA sentence, after *Descamps* and *Mathis* a Florida manslaughter conviction is categorically overbroad vis-a-vis an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." And since such a conviction no longer qualifies as a "violent felony" within the ACCA's elements clause, as a matter of law this prior cannot be used to uphold Mr. Beverly's ACCA enhancement at this time.

1. The government waived its right to rely on Mr. Beverly's 1991 manslaughter conviction in future proceedings, and under settled Supreme Court and Circuit law, that waiver must be rigidly enforced.

At Mr. Beverly's 2005 sentencing, the government intentionally and expressly disclaimed reliance upon Mr. Beverly's 1992 manslaughter conviction as a predicate for the ACCA enhancement. The AUSA was clear that he was only relying upon "four specific convictions" for the ACCA enhancement. (Exhibit A at 300). And he listed those convictions as those in

paragraphs 29, 32, 35, and 36 of the PSI. (Exhibit A at 301). By neglecting to include the manslaughter conviction referenced in ¶31 of the PSI as a predicate, or as an alternative predicate even for "future proceedings" (Exhibit A at 300), the government irretrievably waived reliance upon that conviction as a substitute predicate in this proceeding.

Both Supreme Court and Circuit law are clear that in such circumstances, the government is precluded from relying upon a new predicate for upholding the ACCA enhancement. The Eleventh Circuit has been emphatic that the government is bound to its position at sentencing, and that newly asserted reliance upon different convictions raised for the first time in a collateral proceeding or even on direct review, will *not* be entertained. *See Bryant v. FCC Coleman-Medium*, 738 F.3d 1253, 1279 (11th Cir. 2013)(holding that the government waived reliance upon a *different prior* conviction which it asserted – for the first time on collateral review – was an alternative basis to uphold an ACCA enhancement; noting with significance that neither at sentencing, nor on direct appeal, did the government rely upon the defendant's burglary conviction as a predicate felony for §924(e) purposes; granting defendant's motion to vacate his sentence pursuant to 28 U.S.C. §2241; following *United States v. Canty*, 570 F.3d 1251, 1256-1257 (11th Cir. 2009) ("We require litigants to make all their objections to a sentencing court's findings of fact, conclusions of law, and the manner in which the sentence was imposed at the initial sentencing hearing. The rule applies to the defense and the prosecution alike;" "The Government is entitled to an opportunity to offer evidence and seek rulings from the sentencing court in support of an enhanced sentence. But, the Government is entitled to only one such opportunity, and it had that opportunity at the sentencing hearing"); *United States v. Petite*, 703 F.3d 1290, 1292 n. 2 (11th Cir. 2013) (government waived reliance on a *different prior*

conviction which it asserted – for the first time on direct review – was an alternative basis to uphold ACCA enhancement; "The government cannot offer for the first time on appeal a new predicate conviction in support of an enhanced ACCA sentence"); *see also United States v. Adams*, 815 F.3d 1291, 1292 n. 2 (11th Cir. 2016) (by "disavowing reliance on a fourth conviction to form the basis of the ACCA enhancement," the government "waived its opportunity to offer evidence and seek a ruling on the fourth conviction's status as an ACCA-qualifying offense; citing *Canty*). And notably, the Supreme Court has twice held that the government will "forfeit" its right to argue that the ACCA enhancement may even be upheld under an alternative *clause* of the ACCA if it did not so argue either at sentencing or on direct appeal. *See Curtis Johnson v. United States*, 559 U.S. 133, 145 (2010); Descamps, 133 S.Ct. 2276,2293 n. 6 (2013).

The government has disregarded all of these binding precedents in asserting – for the first time in this collateral proceeding – that Mr. Beverly's 1992 manslaughter conviction is an alternative basis for upholding Mr. Beverly's erroneously-imposed ACCA enhancement. According to the Supreme Court and the Eleventh Circuit, the government may no longer argue that Mr. Beverly's 1992 manslaughter conviction is a violent felony under any clause of the ACCA. And indeed, in at least two other §2255 cases within this district, the government has candidly conceded that where it

> announced to the district court and the defendant that it was relying on [only certain] enumerated convictions to support the ACCA enhancement, the government has concluded that it cannot, under existing Eleventh Circuit precedent, *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1279 (11th Cir. 2013), attempt to substitute any other conviction for the burglary conviction that no longer qualifies as a violent felony under the ACCA.

Brown v. United States, Case No. 16-22303-CIV-UNGARO (DE9 at 3 n. 5); *see also Anthony Johnson v. United States*, Case No. 16-80641-CIV-HURLEY (DE6 at 10 n. 2) (agreeing that since it raised no objection to the Court's failure to consider alternative convictions at sentencing, under *Bryant* "it is now barred from attempting to substitute" other convictions).

In any event, for the reasons detailed below, the government's previously-waived and nonetheless newly-asserted contention that Mr. Beverly's Florida manslaughter conviction continues to qualify as a violent felony after *Johnson*, is simply wrong on the merits. Indeed, the government has conceded error on that precise basis in *Anthony Johnson* and this Court has already impliedly so found by releasing Anthony Johnson from his illegal custody.

2. Mr. Beverly's 1992 Florida manslaughter conviction is *not* a "violent felony" as defined in §924(e)(2)(B).

The government claims without citing *any* authority that Mr. Beverly's manslaughter conviction still qualifies as an ACCA "violent felony" because it "has as an element the use, attempted use, and threatened use of physical force against the person of another." (DE13:17). Notably, in the recent case of *United States v. Garcia-Perez*, 779 F.3d 278 (5th Cir. 2015), the Fifth Circuit – conducting the now-mandated "elements only" analysis – addressed the precise statute here at issue and held that notwithstanding the "*causation of death*" element in Fla. Stat. 782.07, a Florida manslaughter conviction does not "have as an element the use of physical force." *Id.* at 283 (explaining that in order to qualify as a "crime of violence" within the identically-worded elements clause in the Guidelines, "the intentional use of force must be a constituent part of [the prior offense] that must be proved" to convict. The 'force' necessary under this provision must rise to the level of 'destructive or violent force.'") In so holding, the Fifth Circuit rightly pointed out that:

> Florida courts have repeatedly set out the elements that must be proved to convict under the manslaughter statute, and an element of force makes no appearance. Rather, the state must show that "(1) the victim is dead, (2) *the death was caused by the act*, procurement or culpable negligence of the defendant, and (3) the killing was not justified or excusable homicide." A Florida manslaughter conviction simply does not require proof of force.

Id. (emphasis added). "Bolstering this conclusion," the Fifth Circuit pointed out that it had

> previously held that an "injury to a child" offense defined in terms of the *causation of injury* by intentional act did not contain a force element. [*United States v. Andino-Ortega*, 608 F.3d 305, 310-311 (5th Cir. 2010)] This was because "[i]f any set of facts would support a conviction without proof of that [force] component, then the component most decidedly is not an element of the crime." [*Id.* at 311 (quoting *United States v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004)(*en banc*))]. Intentional injury to a child could be committed by poison, for example, which would not be "use of physical force" for these purposes. [Id.] This holding logically extends to offenses defined in terms of the *causation of death*, such as the Florida statue at issue. We find that §782.07(1) does not have an element of force.

Garcia-Perez, 779 F.3d at 283-284 (emphasis added).

The Fifth Circuit's analysis in *Garcia-Perez* is a correct application of the Supreme Court's controlling decisions in *Curtis Johnson* and *Leocal v. Ashcroft*, 543 U.S. 1 (2004). And it is consistent with the Eleventh Circuit's own elements clause decisions in *United States v. Harris*, 608 F.3d 1222 (11th Cir. 2012); *United States v. Owens*, 672 F.3d 966 (11th Cir. 2012); *United States v. Palomino-Garcia*, 606 F.3d 1317 (11th Cir. 2010); and *United States v. Estrella*, 758 F.3d 1239 (11th Cir. 2014). These intervening elements clause precedents – all, handed down since Mr. Beverly's sentencing – dictate a finding at this time that his 1992 conviction for Florida manslaughter did *not* "have as an element the use, attempted use, or threatened use of physical force against the person of another," and no longer qualifies as an ACCA predicate.

As indicated above, the government has actually so conceded before this Court, and the Court so found in *Anthony Johnson v. United States*, Case No. 16-80641-CIV-HURLEY/WHITE

(DE6 at 9-11; DE10; DE11 at 2). And thereafter, the government has also so conceded before the Eleventh Circuit. *See* July 28, 2016 *Joint* Supplemental Letter Brief in *United States v. Taiwan Driver*, Case No. 14-11555, at 3-4, 9 (upon remand by the Supreme Court for further consideration of defendant's ACCA sentence in light of *Johnson*, agreeing that for the reasons stated by the Fifth Circuit in *Garcia-Perez*, defendant's manslaughter conviction "is not a qualifying ACCA predicate after *Johnson* because it does not satisfy the elements clause;" also agreeing that such "error is plain," and that the Court should remand the case for resentencing without the ACCA enhancement).

The government's conclusory assertion at DE13:17 that Mr. Beverly's manslaughter conviction continues to qualify as a "violent felony" within the elements clause is unsupported by any citation of authority. It is contrary to all of the above-cited authorities. It is untenable after *Mathis* and inconsistent with the Sixth Amendment (by relying on undisputed PSI facts). And it is also inconsistent with the government's well-considered concessions in both *Anthony Johnson* and *Driver*. For the reasons stated above and in the pleadings filed in *Anthony Johnson* and *Driver*, it is now clear as a matter of law that Mr. Beverly's Florida manslaughter conviction is *not* a countable violent felony after *Johnson*. Accordingly, as the Court has already found in *Anthony Johnson*, Mr. Beverly's ACCA enhancement cannot be upheld based upon such a conviction at this time.

C. Mr. Beverly's 1978 Florida 4th DCA robbery conviction is *not* a "violent felony" within the ACCA's elements clause.

The government likewise mistakenly asserts that the ACCA enhancement can be upheld based upon Mr. Beverly's 1978 Florida, 4th DCA robbery conviction, referenced in PSI ¶29. Notably, this Court has just held – by adopting the well-reasoned Report and Recommendation

in *Melvin Jones v. United States*, Case No. Case No. 15-81380-CIV-HURLEY/WHITE -- that a pre-1999 4th DCA robbery conviction is ***not*** a violent felony within the ACCA's elements clause. In fact, the Court released Melvin Jones from his illegally-enhanced ACCA sentence, on that precise basis. *See* Exhibit c hereto (order adopting the Report and Recommendation in *Melvin Jones*, Exhibit D), and Exhibit E (order releasing Melvin Jones). The Court should rule similarly here for the reasons stated in *Melvin Jones*, and further detailed in subsections 2 and 3 below.

This case is legally indistinguishable from *Melvin Jones.* Both cases are controlled by *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), where the Eleventh Circuit recognized that any pre-1999 robbery conviction under Fla. Stat. §812.13(1) – but in particular, a conviction in the 4th DCA prior to the enactment of Fla. Stat. §812.131 – must be analyzed as a "robbery by sudden snatching," an offense for which "any degree of force" sufficed. Tellingly, the government has not even cited *Welch* in its Response.

That omission is an implied concession of error. Failure to cite directly-controlling precedent cannot be justified by the government's novel attempt to re-characterize Mr. Beverly's *conviction* in Dkt. No. 77001937CF as one for "*armed* robbery" in violation of Fla. Stat. §§812.13 "*and* (2)(a)." (DE13:18) (Emphasis added). Notably, for the multiple reasons detailed in Part 3 below, that claim is ill-founded, demonstrably wrong, and can and should be easily rejected.

1. The government has ignored the Eleventh Circuit's controlling precedent in *Welch*, recognizing that a pre-1999 robbery must be analyzed as "robbery by sudden snatching," as it could be committed by "any degree of force.

As this Court noted with significance in *Melvin Jones*, Exhibits C & D at 8-16, the Eleventh Circuit in *Welch* distinguished its prior decision in *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 Eleventh Circuit 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* Welch, Melvin Jones, and Mr. Beverly were each 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 many Florida DCAs – and importantly, in the Fourth DCA, the jurisdiction where Welch, Melvin Jones, and Mr. Beverly were convicted. *See Welch*, 683 F.3d at 1311 and nn.28-38 (noting with significance that in 1996 when Welch was convicted, "the state courts of appeal were divided 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," and that in *Santiago v. State*, 497 So.2d 975, 976 (Fla. 4th DCA 1986), the 4th DCA had upheld a strong-arm robbery conviction for simply tearing a necklace off a victim's neck, explaining that evidence of force "*be it ever so little*" was sufficient). Only *after* Welch was convicted, the Court 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 certainly, therefore, ***in 1978*** when Mr. Beverly 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 had 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). In *Santiago*, notably, Florida's Fourth DCA specifically cited and strictly followed *McCloud*, in holding that "[t]he facts of this case [reaching into the victim's car and tearing two necklaces from around her neck], unlike picking a pocket or snatching a purse without any force or violence, shows sufficient force, *be it ever so little* to support robbery." 497 So.2d at 976 (emphasis added).

Like Welch and Melvin Jones, Mr. Beverly 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 and Fourth DCA 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," and this Court rightly so assumed in *Melvin Jones*, Exhibits C & D at 16, this Court should so assume for Mr. Beverly's 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 Eleventh Circuit 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 this Court left open in 2012, *see Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257, 1268 (April 18, 2016), this Court will have to resolve that question here using the categorical approach as clarified by the Supreme Court in *Moncrieffe* and *Descamps*; the Eleventh Circuit's own clarification of *Descamps*' divisibility analysis in *United States v.*

Lockett, 810 F.3d 1262 (11th Cir. 2016); and the Supreme Court's recent confirmation of the correctness of *Lockett*'s analysis in *Mathis*. After these intervening precedents, resolution of whether a mere robbery by snatching qualifies as a "violent felony" within the ACCA's elements clause could not be more "cut and dried" in Mr. Beverly's favor. The Court should so hold here.

As this Court correctly recognized by adopting the Report and Recommendation in *Melvin Jones*, there is no telling how long it will take the Eleventh Circuit to resolve the elements clause issue left open in *Welch*. *See* Exhibits C & D at 15. Welch's opening brief upon remand was filed on June 20th, but there will need to be a full round of briefing, and likely oral argument. The government has not yet even filed its Answer Brief in *Welch*. Indeed, on July 15th – due to responsibilities in other cases – counsel for the government filed a motion to extend the government's deadline for filing that brief until September 5th. *See* Docket in Case No. 14-15733. While admittedly, there is now a fully-briefed appeal before the Eleventh Circuit, *United States v. Isaac Seabrooks*, Case No. 15-10380, which raises the identical issue as in *Welch*, and the *Seabrooks* appeal is set for oral argument on September 15th, there no way to know how long it will take for a decision to issue in either *Seabrooks* or *Welch*. It could take months after oral argument (as is often the case in the over-burdened Eleventh Circuit). And notably, both *Seabrooks* and *Welch* raise other issues as well, and those issues could be case-dispositive. Accordingly, it is possible that the Court will not issue a published opinion in either *Seabrooks* or *Welch* that will definitively resolve whether a pre-1999 Florida robbery conviction has "violent force" as an element. The bottom line from all of this is that the Court cannot wait for an Eleventh Circuit ruling to resolve Mr. Beverly's §2255 motion. For notably, as detailed at the conclusion of this memorandum, Mr. Beverly has

already served far more than the 10-year statutory maximum penalty that would apply if he no longer qualifies as an Armed Career Criminal after *Johnson*. Mr. Beverly is now serving an illegal sentence.

In *Melvin Jones*, the Court rightly concluded that it could *not* "await final disposition" of the question before the Eleventh Circuit, and that it needed to expeditiously resolve that question in Jones' case, since Jones "ha[s] already served more than the 10-year statutory maximum sentence that would otherwise apply" if his pre-1997 robbery conviction [did] not qualify as an ACCA violent felony." Exhibit C & D at 15. And notably, upon determining – based upon *Welch*, and the ensuing Supreme Court decisions in *Moncrieffe* and *Descamps* that such a conviction was not a "violent felony" within the ACCA's elements clause – the Court agreed that that Jones should be "re-sentenced immediately" because he had overserved the otherwise-applicable 10-year maximum penalty for a §922(g)(1) offense. Exhibit C & D at 22.

For like reasons, as documented in Part IV (the conclusion of this memorandum), time is clearly of the essence in resolving the issue for Mr. Beverly as well. As the Court did in *Melvin Jones*, here as well it must determine whether Mr. Beverly's 1978 robbery conviction qualifies as a "violent felony" within the ACCA's elements clause, in light of *Welch* (which remains precedential), as well as subsequent Supreme Court and Circuit precedent clarifying and applying the "categorical approach." Ultimately, for the reasons detailed below, the Court should hold that such a conviction did not have "violent force" as an element; that conviction was categorically overbroad vis-a-vis the ACCA's elements clause; Mr. Beverly's enhanced ACCA sentence is therefore illegal at this time; and since Mr.

Beverly has now ***substantially overserved the statutory maximum sentence*** permissible without the ACCA enhancement, he should be immediately released from custody.

2. According to the analysis now dictated by the "categorical approach," as clarified in *Moncrieffe, Descamps*, and *Mathis*, Mr. Beverly's 1978 conviction under Fla. Stat. §812.13(1) did *not* have "as an element" the use of violent force, his conviction was categorically overbroad *vis-a-vis* the ACCA's elements clause, and there is no basis to count that prior as an ACCA predicate at this time.

The government has not only inexplicably ignored *Welch* in its Response on robbery. It does not acknowledge either *Moncrieffe* or *Descamps* in that discussion, even though both precedents now mandate that this Court look to the elements of the "least of the acts criminalized" in applying the "categorical approach." As the Eleventh Circuit held in in *Welch*, and this Court recognized in *Melvin Jones*, the least of the acts criminalized under §812.13(1) in Florida's Fourth DCA at the time of Mr. Beverly's conviction in 1978 was a mere "robbery by sudden snatching." The government ignores – because it cannot contest – that a robbery by snatching could be accomplished *in 1978* by only the "slightest" of force, that it required nothing beyond the force necessary to snatch the item, and as a matter of law that is *not* the type of "violent force" ("force capable of causing physical pain or injury to another person") required of an offense within the ACCA's elements clause.

Notably, in another Southern District of Florida case, the government candidly conceded – and Judge Ryskamp found – that a conviction for "robbery by sudden snatching" in violation of Fla. Stat. §812.131 (the precise crime the Eleventh Circuit has recognized was prosecuted under §812.13(1) at the time of Mr. Beverly's conviction) – *cannot* qualify as a "violent felony" since the "robbery by sudden snatching statute" does not require "as an element the use,

attempted use, or threatened use of physical force against the person of another." *See* DE17:9-10 in *Edlord Dieujuste v. United States*, Case No. 15-80618-Civ-Ryskamp/White (conceding that Dieujuste's previously-imposed ACCA sentence, predicated upon a Florida "robbery by sudden snatching" conviction, should be vacated because such a conviction does not meet the definition of "violent felony" in 18 U.S.C. §924(e)(2)(B)(i)); DE20:12-14 (Report and Recommendation recommending that Dieujuste's motion to vacate pursuant to 28 U.S.C. §2255 in light of *Johnson* be granted "[b]ased on the government's concession that the movant is entitled to vacatur and a new resentencing); DE21 (order adopting Report and Recommendation, granting Dieujuste's motion to vacate, and vacating his enhanced ACCA sentence). In *Melvin Jones*, the Court noted with significance the government's concession in *Dieujuste* as "another reason" for its conclusion that Jones' 1995 strongarm robbery conviction in Florida's 4th DCA could have been for "a taking by sudden snatching," for which "any degree of force" ""be it ever so little" then sufficed. Exhibit C & D at 16-17. It should so find here as well.

The government provides no reason why Mr. Beverly's 1978 4th DCA robbery conviction should not be analyzed in that precise way at this time.[1] Its Response inexplicably

[1]Notably, it is clear from Florida caselaw after enactment of the "robbery by sudden snatching statute" that the quantum of "force" legally necessary to seal a strongarm robbery conviction actually remains quite slight – and far *less* than the *Johnson* level of "violent force" -- to this day. *See, e.g., Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000) (affirming strongarm robbery conviction under Fla. Stat. §812.13, and rejecting defendant's claim he was only guilty of the newly-created "robbery by sudden snatching" crime under §812.131 because the State simply showed he had peeled back the victim's fingers before snatching money from out of his hand; explaining that the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by Sanders;" confirming that no more resistance, or "force," than that was necessary for a strongarm robbery conviction under §812.13(1*). See also Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011) (rejecting defendant's argument that actual "violence" was necessary for a strongarm robbery conviction in Florida, and that his act of "engaging in a tug-of-war over the victim's purse" could not constitute robbery because it "was not done with violence or the threat of

ignores *Estrella*, where the Eleventh Circuit expressly applied the "legal framework" of *Moncrieffe* and *Descamps* in determining whether a prior conviction qualified as a crime of violence within the Guidelines' elements clause. 758 F.3d at 1244-1248. The Eleventh Circuit was clear in *Estrella* that if a predicate sweeps more broadly than an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" that ends the elements clause inquiry unless the statute of conviction is "divisible." *See id.* at 1245-1246. And there can be no possible doubt after the Eleventh Circuit's analysis in *United States v. Lockett*, 8100 F.3d 1262 (11th Cir. 2016), and the Supreme Court's decision in *Mathis*, that Florida's robbery statute is indeed indivisible, since the third "element" of Mr. Beverly's robbery conviction – that "[t]he taking was means of force, violence or assault or by putting (person alleged) in fear" – was itself indivisible, and therefore a "categorically overbroad" element. *See Lockett,* 810 F.3d at 1267, 1269 (the key to determining whether a statute is divisible 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;" and that will generally be in the state's standard instruction for the offense. If that instruction makes clear that the jury *must* find a certain fact unanimously beyond a reasonable

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violence;' holding that it was sufficient that there was "the use of force to overcome the victim's resistance").

It is undeniable from the pre-*Robinson* caselaw surveyed in *Welch*, the post-*Robinson* decisions in *Sanders* and *Benitez-Saldana*, the Florida legislature's use of the different terms "force" *and* "violence" within §812.13(1), and "Florida's 'elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage,'" *United States v. Shannon*, 631 F.3d 1187, 1189 (11th Cir. 2011)(citing *Mendenhall v. State*, 48 So.3d 740, 749 (Fla. 2010)), that a robbery "by force" in Florida has actually *never* required the use of the *Johnson* level of "*violent* force" for conviction.

doubt, that fact is an "element," not simply an alternative "means" of committing the same offense).

Mathis, plainly, has confirmed the correctness of *Lockett*'s analysis in this regard. *See* 136 S.Ct. at 2249, 2257 (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; Iowa burglary statute was overbroad and indivisible because "a jury need not agree" on which of the alternative locations specified was burglarized; jury instructions generally will confirm whether a statutory alternative is an element that 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).

Notably, in 1978 when Mr. Beverly was convicted under Fla. Stat. §812.13(1), Florida's standard robbery instruction advised juries:

> *The essential elements of this offense which must be proved beyond a reasonable doubt before there can be a conviction in this case are that*:
>
> 1. The defendant did take from the person or immediate custody of (person alleged) the (money or property described in charge).
>
> 2. The property was taken against the will of (person alleged).
>
> 3. *The taking was by means of force, violence or assault or by putting (person alleged) in fear.*

Fla. Std. Instr. (Robbery. F.S. 812.13)(1978)(emphasis added).

It is clear from this instruction (and *Lockett* and *Mathis*) that at the time of Mr. Beverly's conviction, there were only three true "elements" of a §812.13(1) robbery offense; that the third "element" ("the taking was by means of force, violence, or assault, or putting (person alleged) in fear") was simply a list of "alternative means" of committing a single robbery offense; and that

the jury need not have agreed unanimously on a "means." Each juror simply must have found that either "force," *or* "violence," *or* "assault," *or* "putting in fear" "was used in the course of the taking." According to *Lockett*, the third element of a §812.13(1) offense was therefore indivisible. And *Mathis* has confirmed definitively that "force" and "putting in fear" are *not* alternative "elements;" they are alternative "means" of satisfying this single element.

Since it is clear from the Florida caselaw discussed *supra* that at least *one* "means" of committing robbery (by "use of force") sweeps more broadly than the ACCA's elements clause – because the quantum of "force" required for conviction in ***every*** case is *not* the *Johnson* level of "violent force" – the indivisible third "element" of §812.13(1) at the time of Mr. Beverly's conviction was "categorically overbroad" vis-a-vis an offense within the elements clause. For that reason, Mr. Beverly's robbery conviction under §812.13(1) was itself "categorically overbroad." And, after *Welch*, *Moncrieffe*, *Descamps*, *Estrella*, *Lockett*, and *Mathis*, it would be error to uphold his ACCA enhancement based upon that conviction at this time. As a matter of law, a "categorically overbroad" conviction can never be an ACCA predicate. *Descamps* 133 S.Ct. at 2285-2286, 2293.

3. The government erroneously attempts to avoid the above analysis, and the result it dictates (vacating Mr. Beverly's ACCA sentence) by newly and baselessly asserting that Mr. Beverly was *convicted* of "*armed* robbery" in violation of Fla. Stat. §812.3(1) *and (2)(a)*. Not only did the government waive that argument at Mr. Beverly's sentencing; it is clear from the 1978 judgment and standard jury instructions that it is meritless.

The government conclusorily asserts that Mr. Beverly was not convicted of simple, *unarmed* robbery in violation of Fla. Stat. §812.13(1), but instead, of a different crime: "*armed* robbery" in violation of Fla. Stat. §812.13(1) "*and (2)(a)*." And therefore, it claims, the unpublished decision in *United States v. Oner*, 382 Fed. Appx. 893 (11th Cir. 2010) (rejecting

defendant's argument, pre-*Curtis Johnson* and *Welch*, that his 2000 "*conviction* for armed robbery *under Fla. Stat. §812.13(2)(a)* does not qualify as a "violent felony" under the ACCA") is persuasive. (DE13:18) (emphasis added). The government is wrong for multiple reasons.

First, the 1978 judgment simply indicates that Mr. Beverly was convicted of "robbery as charged in the information." (DE13-7). And notably, the information lists his offense of conviction as "robbery," not armed robbery. (DE13-7). Accordingly, the probation officer rightly listed Mr. Beverly's offense of conviction in PSI ¶29, as "*Robbery*," not "armed robbery." And notably, at *no* time during Mr. Beverly's 2005 sentencing, did the government ever suggest that the 1978 *conviction* was not for ordinary, unarmed robbery, but rather for "*armed* robbery." Quite to the contrary, at the sentencing, the government went to great lengths to make sure that paragraph 24 (where the ACCA predicates were listed), be amended include "another predicate offense that appears in paragraph 29 of the pre-sentence investigation report," which "reflects that the defendant was convicted of *robbery*." (Exhibit A: 10-11, 31). And indeed, the court gave the government fair warning that all objections to the ACCA predicates needed to be articulated at that time, by stating that if the pre-sentence investigation report "says that Mr. Beverly was convicted of a [particular prior] on such and such a day, unless there is a factual objection to that, I am taking that to be true." The court noted on the record, thereafter, that "there is no objection to the historical accuracy" of "those convictions." (Exhibit A:33). And the AUSA responded, "There is no other argument to presented at this time." (Exhibit A:34).

Thus, even if it *could* be argued that the PSI wrongly listed the conviction in paragraph 29 as robbery rather than armed robbery – which it *cannot* for the reasons that follow – as a matter of law the government waived any possible argument in that regard at Mr. Beverly's

sentencing. *Bryant v. FCC Coleman-Medium*, 738 F.3d 1253 (11th Cir. 2013) (government waived reliance on a different prior for the first time on collateral review; following *United States v. Canty*, 570 F.3d 1251, 1256-1257 (11th Cir. 2009)(government waived its right to seek to have an enhancement upheld based upon undisputed PSI facts, where it failed to rely on those facts at sentencing to support its claim that the defendant qualified as an Armed Career Criminal)).

However, even if the Court were to consider the merits of the government's clearly-waived and now-barred attempt to recharacterize the 1978 robbery conviction as one for "armed robbery," it should reject the government's newfound arguments in that regard. They are meritless under controlling Supreme Court and Circuit precedent, which mandate deference to the state's own determination of the "elements" of an offense. *See United States v. Howard*, 742 F.3d 1342, 1346 (11th Cir. 2014); *Mathis*, 136 S.Ct. at 2256-2257. While admittedly, the 1977 information in the robbery case alleged that "in the course of committing the robbery," Mr. Beverly "was armed with a certain firearm," and "pointed it," it is clear from Florida's standard robbery instruction at the time of his conviction in 1978, that such factual allegations in the information were ***not*** "elements" of "robbery" *or* of an enhanced "armed robbery" ***offense*** under Fla. Stat. §812.13(2)(a) to be found by the jury beyond a reasonable doubt.

Notably–and quite differently than today–juries were *not* instructed in 1978 that if they found the defendant guilty of the listed elements of robbery, they needed to make an additional finding as to whether the state proved *beyond a reasonable doubt* that the defendant "carried," a "firearm," "in the course of committing a robbery." There is no mention of any of these enhancing facts in the standard 1978 robbery instruction. *Compare* Fla. Std. Instr. for F.S. 812.13

(Robbery)(1978) *with* Fla. Std. Instr. (15.1. Robbery. §812.13, Fla. Stat.)(2016)("[I]f you find the defendant guilty of the crime of robbery, *you must further determine beyond a reasonable doubt* if "in the course of committing the robbery" the defendant carried some type of weapon. An act is 'in the course of committing the robbery' if it occurs in an attempt to commit robbery or in flight after the attempt or commission")(emphasis added).

It is clear from this that, by contrast to today (and by contrast to *2000* when the defendant in *Oner* was *convicted* of "armed robbery" under §812.13(2)(a)), in 1978 when Mr. Beverly was convicted of "robbery," Fla. Stat. §812.13(2)(a) was simply a penalty enhancement provision, *not a* separate enhanced "offenses" with additional "elements." Moreover, even *if* such an enhancement had required a jury or judicial finding beyond a reasonable doubt as to sentencing factors such as the "carrying" of a weapon in 1978 (which it did not), that would not change the above "categorical analysis" in any way. For indeed, the Florida Supreme Court has confirmed that the term "carrying" in §812.13(2) simply requires that the offender "possess" it. *See State v. Baker*, 452 So.2d 927, 929 (Fla. 1984) ("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"). And the Eleventh Circuit has itself squarely recognized – twice – that mere "possession" of a firearm or other weapon most definitely "does not involve the use, attempted use, or threatened use of force." *United States v. Archer*, 531 F.3d 1347, 1349 (11th Cir. 2008); *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010) (possession of a sawed-off shotgun is "not a violent felony under the ACCA"). Thus, as a matter of law, mere "possession" of a firearm cannot bring an otherwise, categorically overbroad conviction falling outside the elements clause, back within it.

According to *Descamps*, if Mr. Beverly's robbery conviction under §812.13(1) was itself categorically overbroad, that ends the ACCA elements clause inquiry. Any additional "finding" by a judge regarding "aggravating circumstances" such as firearm possession, relevant only to enhanced punishment cannot obviate, or cure, the overbreadth of the underlying conviction. *Lockett*, 810 F.3d at 1271-1272 (court may *not* uphold an ACCA sentence based upon judicial findings as to facts on which the defendant "never had the protection of the Sixth Amendment;" citing and following *Descamps*, 133 S.Ct. at 2289).

Since the Supreme Court in *Mathis* has now definitively confirmed the correctness of the "elements only" analysis in *Descamps* and *Lockett*, and that undisputed non-elemental PSI facts are legally irrelevant in that analysis, it is beyond dispute under now-controlling law that Mr. Beverly's ***conviction*** was for robbery, *not* for *armed* robbery. And therefore, for the reasons stated above and in *Melvin Jones*, the Court should find that his 1978 4th DCA robbery conviction is not a qualifying "violent felony" within the ACCA's elements clause.

III. Under current law, Mr. Beverly's 1997 conviction for possession with intent to sell heroin no longer qualifies as a "serious drug offense." For that reason as well, he does not have 3 convictions that currently qualify him for the ACCA enhancement.

Based upon the above argument and authority, Mr. Beverly no longer qualifies as an Armed Career Criminal. If this Court so finds, it need not resolve or even consider whether his 1997 conviction for possession with intent to sell heroin currently qualifies as a "serious drug offense" as defined in the ACCA. For indeed, if Mr. Beverly's burglary, manslaughter, and robbery convictions no longer qualify as "violent felonies" after *Johnson*, it makes no difference whether or not he has two drug convictions that would qualify as "serious drug offenses" under

current law. The Court needs three – not two – still-qualifying predicates to uphold his ACCA enhancement after *Johnson*. And that, Mr. Beverly does not have.

But if, for some reason, the Court disagrees with the foregoing argument and authority, and finds that Mr. Beverly has at least one still-qualifying "violent felony" under current law, it should consider the argument in this section. It will then see – and it should hold for the reasons detailed therein – that Mr. Beverly's 1997 conviction for possession with intent to distribute heroin does *not* qualify as "serious drug offenses" under current Supreme Court precedent. And on that basis, the Court should grant his motion to vacate.

1. Under current, controlling, Supreme Court law, namely, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), an offense under state law "for which a maximum term of imprisonment of ten years or more is prescribed by law" requires that the defendant have *actually* – not hypothetically – faced a sentence of ten years or more, based upon his offense and criminal history.

The government mistakenly contends that because Mr. Beverly's 1997 Florida conviction for possession with intent to sell heroin was a second degree felony punishable by a "possible" maximum term of imprisonment of 15 years according to Fla. Stat. §892.13(1)(a) and §775.082, that conviction was an "adequate" ACCA predicate. (DE13:17). As support for its contention that "[p]rior state convictions which carried possible maximum statutory terms in excess of ten years are adequate predicate offenses," the government cites *McCarthy v. United States*, 135 F.3d 754 (11th Cir. 1998) where the Eleventh Circuit rejected the argument that "the high end of the presumptive range [under the Florida sentencing guideline scheme] was the [relevant] maximum" for purposes of §924(e)(2)(A)(ii)'s requirement that the offense was one for which "a maximum term of imprisonment of ten years or more is prescribed by law." (DE13:17).

But what the government neglects to inform the Court is that the rule stated in *McCarthy* – that the Court does not "look to the particular facts of [the defendant's] prior convictions and sentences" because "[t]he only true maximum sentence for the offense category is the statutory maximum" – was subsequently rejected by the Supreme Court in *Carachuri-Rosendo* v *Holder,* 560 U.S. 563 (2010). Based on *Carachuri-Rosendo* and various circuit decisions such as the Fourth Circuit's decision in *Newbold* applying and interpreting *Carachuri-Rosendo*, the determination of what a "serious drug offense" is for enhancement under the ACCA *must* now be guided by *the actual maximum* term of imprisonment the defendant faced (based upon his offense, his prior criminal history, and the judge's findings), rather than a "hypothetical" term of imprisonment a hypothetical defendant might face according to the Legislature.

In *Carachuri-Rosendo,* the Supreme Court decided whether a prior Texas drug conviction qualified as an "aggravated felony" under the Immigration and Nationality Act. The Court held that in order for the prior conviction to qualify as a "felony," Carachuri had to have been "convicted of" a drug trafficking crime for which the "maximum term of imprisonment authorized exceeds one year." 560 U.S. at 576. Under Texas law in effect at the time he was convicted,[10] Carachuri could have received a sentence of more than 12 months, but *only* if the state proved that he had been previously convicted of a drug offense. Because the state did not do so, the Supreme Court held, Carachuri could not have received a sentence of more than one year, and was thus not actually convicted of an "aggravated felony." *Id.* at 581-82.

The Fourth, Fifth, Eighth, and Tenth Circuits have applied the reasoning of *Carachuri-Rosendo* to convictions under the structured sentencing schemes in North Carolina, Kansas,

[10] The question whether a prior offense is punishable by a maximum term of imprisonment exceeding one year is determined by the law in effect at the time of conviction. *See McNeill v. United States*, 131 S. Ct. 2218, 2220 (2011).

Oregon, and New Mexico. In *Simmons v. United States*, 649 F.3d 237 (4th Cir. 2011)(*en banc*), the Fourth Circuit held that a prior North Carolina conviction for possession with intent to sell no more than ten pounds of marijuana was not a "felony drug offense" for purposes of a §851 enhancement because the defendant, with a "prior record level" of only 1 and where the prosecutor alleged no facts in aggravation sufficient to warrant an aggravated sentence, was subject to a statutory maximum sentence of eight months' community punishment (no imprisonment) under the state's sentencing system. *Id.* at 241. As a result, he was not convicted of an offense punishable by imprisonment by more than one year, and so was not convicted of a "felony drug offense."

Similarly, in *United States v. Haltiwanger*, 637 F.3d 881 (8th Cir. 2011) on remand from the Supreme Court for further consideration in light of *Carachuri-Rosendo*, the Eighth Circuit held that a prior Kansas conviction for possession of a controlled substance without affixing a tax stamp does not qualify as a "felony drug offense" for purposes of §851 because the defendant could not have actually been sentenced to more than seven months. *Id.* at 884 (reversing a prior decision upholding the 20-year mandatory minimum). And notably, in *United States v. Brooks*, 751 F.3d 1204 (10th Cir. 2014), the Tenth Circuit extended that same reasoning to the Career Offender guideline by holding that under *Carachuri-Rosendo* a prior Kansas conviction for fleeing and eluding, for which the defendant could not have *actually* been sentenced to more than seven months, does not qualify as a "felony" for purposes of the Career Offender guideline, and therefore, it was not a "crime of violence" for purposes of the Career Offender guideline.

It is likely that these decisions were what prompted the government to concede in a recent case before the Fifth Circuit that under *Carachuri-Rosendo*, a defendant previously

convicted of drug offenses in Oregon and sentenced under the state's presumptive guideline system was not convicted of "felony drug trafficking offenses" for purposes of the illegal reentry guideline at U.S.S.G. §2L1.2 because the maximum sentence that the state court could have *actually* imposed under the Oregon guidelines, absent additional fact finding by a jury or factual admissions by the defendant, was 90 to 180 days. *See* United States' Agreed Motion for Summary Remand, *United States v. Ernesto Martinez*, Fifth Circuit No. 14-41020 (Jan. 15, 2015) (concession of error based upon *Carachuri-Rosendo*; acknowledging that under current law "[t]he presumptive sentences in each of Martinez' cases – the maximum sentence the state court could impose without additional fact-finding – are below one year, so that neither prior conviction counts as a felonyo") (Exhibit F).[11] Five days after the government filed that concession in Ernesto Matinez, the Fifth Circuit granted it and remanded Mr. Martinez' case to the district court for resentencing. (Exhibit G).

But most apropos here, as Mr. Beverly correctly pointed out in his *pro se* motion, DE4:3-4, is *United States v. Newbold*, 791 F.3d 455 (4th Cir. 2015), where the Fourth Circuit applied the reasoning in *Carachuri-Rosendo* and *Simmons* to ACCA enhancements, holding that the controlling inquiry under §924(e)(2)(A)(ii) after *Carachuri-Rosendo* is "the maximum penalty [the defendant] potentially faced" under a presumptive guideline scheme "given his particular offense and his particular criminal history," and that "where there are no aggravating factors we consider the presumptive term to be the maximum applicable punishment." *Id.* at 462; *see also id.* at 463-464 ("There is simply nothing to support the idea that Newbold ever faced more than the presumptive term of three years for the state court, PWID conviction that the government

[11] Under Oregon's presumptive guideline system, a judge may not legally or constitutionally impose a sentence outside the presumptive range in the absence of a jury finding of or the defendant's agreement to facts that authorize a higher sentence. *See State v. Dilts*, 103 P.3d 95, 99 (Or. 2004).

now seeks to use as a federal ACCA predicate;" state sentencing law at the time of conviction controls; vacating ACCA sentence because – under N.C. law at the time – Newbold did not have the requisite "serious drug offenses" making him an Armed Career Criminal). Notably, the Tenth Circuit has now ruled similarly in *United States v. Romero-Leon*, 622 Fed. Appx. 712 (10th Cir. 2015) (holding that under New Mexico's sentencing scheme in place in 1999, the maximum of the applicable unaggravated sentencing range, where neither the government nor the judge considered an upward departure to the aggravated range, and no upward departure was imposed, though it could have been; because that maximum was only 9 years – as opposed to the putative statutory maximum of 12 years – the prior conviction did not qualify as a "serious drug offense" for purposes of the ACCA).

2. Under the presumptive guideline system in effect in Florida in 1997 when Mr. Beverly was convicted for possessing with intent to sell heroin, Mr. Beverly could *not actually* have been sentenced to ten or more years imprisonment based upon his particular offense and his particular criminal history. Thus, this conviction does not qualify as a "serious drug offense" under current Supreme Court law.

The Fourth, Fifth, Eighth, and Tenth Circuit decisions in the above cases are persuasive here since *at the time of Mr. Beverly was convicted for his possession with intent to sell heroin offense,* Florida likewise employed a presumptive guideline system analogous to that in North Carolina, Kansas, Oregon, and New Mexico. Initially, from 1983 to 1998, Florida employed a presumptive guideline system that placed legal limits on the maximum term of imprisonment that a judge could impose for a given offense based on the particulars of the offense and the offender. *See generally Miller v. Florida*, 482 U.S. 423, 424-27 (1987) (describing the Florida sentencing scheme enacted in 1983). Through 1993, offenses were grouped into nine "offense categories," such as "robbery" (Category 3) or "drug offenses" (Category 7). *See* Fla. R. Crim.

P. 3.701, 3.988 (1986). For sentencing, a "scoresheet" was prepared based on the defendant's "primary offense," in which "points would be assigned based on the primary offense, additional offenses at the time of conviction, prior record, legal status at the time of the offense, and victim injury. The defendant's total point score then would be compared to a chart for that offense category, which provided a presumptive sentence for that composite score." *Miller*, 482 U.S. at 426. The presumptive guideline sentence was "assumed to be appropriate for the composite score of the offender." Fla. R. Crim. P. 3701(d)(8) (1986). Although the Florida Legislature originally specified that departures were to be "avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence," *id.* 3701(d)(11), the standard was changed slightly in 1987 to remove the requirement that the reasons be "clear and convincing." *See Florida Rules of Criminal Procedure Re: Sentencing Guidelines*, 522 So. 2d 374, 375, 377-78 (Fla. 1988).

Nonetheless, throughout the initial period when Florida used a presumptive guideline system, departures were required to be "accompanied by a written statement delineating the reasons for the departure," *id.*, which were required to "be articulated at the time sentence is imposed." *Id.* committee note (d)(11). If the judge failed to articulate legitimate reasons for a sentence greater than the presumptive guideline range, the sentence was illegal. *See Williams v. Florida*, 500 So.2d 501 (Fla. 1986); *State v. Whitfield*, 487 So.2d 1045, 1046-47 (Fla. 1986); *see also Miller*, 482 U.S. at 425 (recognizing that the guideline system had "the force and effect of law").

In 1988, the guidelines were amended to add a "permitted range," within which the court could legally impose sentence without meeting the requirements for departure, so that the top of

that "permitted range" became the maximum legal sentence. *See Florida Rules of Criminal Procedure Re: Sentencing Guidelines*, 522 So. 2d 374 (1988). Although this guideline system was revised in 1994 and again in 1995, throughout this period it remained a system of points setting forth presumptive maximum sentences based on the number of points. *See* Fla. Crim. R. 3.703, 3.992 (1994 Rules as Amended). Finally, in 1998, Florida's presumptive guideline scheme was replaced by the Criminal Punishment Code. *See* Fla. Stat. §921.002. Under the Criminal Punishment Code, the sentencing judge has the discretion to "impose a sentence up to and including the statutory maximum for any offense." *See id.* §921.002(1)(g).

Prior to 1998, a judge could not have *constitutionally* sentenced a defendant above the maximum guideline sentence he could have received based on relevant factual findings made by the jury or admitted by the defendant. *See State v. Johnson*, 122 So. 3d 856, 862-63 (Fla. 2013) (recognizing that under *Apprendi* and *Blakely*, the statutory maximum under Florida's guideline system for purposes of the Sixth Amendment was the maximum of the guideline range based on facts, other than the fact of prior conviction, proven to a jury or admitted by the defendant, but holding that *Blakely* was not retroactive).

It is clear from the sentencing guideline scoresheet for Mr. Beverly's 1997 conviction for possession with intent to sell heroin (Exhibit H), that Mr. Beverly scored 28 points for that offense, and 88.6 points for his prior record. As such, his "enhanced sentence subtotal sentence points" was 92.6 – which equated to 64.6 months state prison. As indicated on the guideline scoresheet, without making additional findings the sentencing judge was permitted to increase or decrease that sentence "by up to 25 percent." Accordingly, pursuant to the presumptive guideline sentencing scheme then in effect, the minimum prison sentence that could be imposed

was 48.45 months, while the maximum was 80.75 months. Plainly, therefore, without any additional findings by the judge (and there were none here), the judge could not *actually* have sentenced Mr. Beverly to any more than 80.75 months in state prison. And indeed, as indicated on the judgment and sentence, the judge chose a term of 60 months – right in the middle of the presumptive range – for Mr. Beverly for that offense. Since it is clear after *Carachuri-Rosendo* that the judge could *not actually* have sentenced him to ten years or more in jail for his heroin offense, his conviction for that offense cannot now be deemed a "serious drug offense" for purposes of §924(e)(2)(A)(ii).

And for that reason as well, Mr. Beverly is not an Armed Career Criminal at this time.

IV. Time is of the essence for Mr. Beverly as he has now greatly over-served the maximum 10-year sentence he would otherwise be subject to without the ACCA enhancement.

Mr. Beverly was arrested on March 14, 2005, and has been in continuous federal custody since that date. (PSI, p.2). At this point, he has served ***over 11 years and 4 months*** in continuous months in federal custody. Without even considering the gain time he has accrued for good behavior in prison, it is beyond dispute that he has substantially overserved the 10 year maximum sentence authorized by Congress for a § 922(g) offender without an ACCA enhancement. Under such circumstances, Mr. Beverly's now-clearly illegal, enhanced ACCA sentence should not stand even a day longer.

CONCLUSION

For the reasons demonstrated above, it is clear under current Supreme Court and Eleventh Circuit law that *none* of the convictions previously counted as ACCA predicates qualify as ACCA predicates any longer. Accordingly, since Mr. Beverly demonstrably no longer qualifies

as an Armed Career Criminal, he asks this Court to grant his § 2255 motion and resentence him forthwith without the ACCA enhancement. **Because he has greatly overserved the statutory maximum penalty without the ACCA enhancement and is currently serving an illegal sentence, he respectfully requests that this Court expedite this matter and order his immediate release from custody.**

Respectfully submitted,

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FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY certify that on August 1, 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 AUSA Diana Acosta, United States Attorney's Office, 101 S. U.S. Hwy 1, Suite 3100, Ft. Pierce, FL 34950, via transmission of Notices of Electronic Filing generated by CM/ECF.

s/Brenda G. Bryn
Brenda G. Bryn

A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CV-81366-HURLEY

NATHANIEL BEVERLY,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION AND DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE AND CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

THIS CAUSE is before the court upon the Movant's motion to vacate, set aside and correct sentence pursuant to 28 U.S.C. § 2255 [DE 1], which matter was previously referred to Magistrate Judge Patrick White for proposed findings and a recommended disposition.

On August 26, 2016, Magistrate Judge White filed a Report and Recommendation [DE 22] recommending that petitioner's motion to vacate, set aside and correct sentence be denied. On September 9, 2016, both the Movant and the Respondent filed Objections to the Report [DE 23, 24]. On November 14, 2016, the Government filed a Notice of Supplemental Authority [DE 26], citing *United States v. Fritts*, 841 F.3d 937 (11th Cir. November 8, 2016) (pre- *Robinson* 1989 Florida armed robbery conviction under Fla. Stat. § 812.13 held to categorically qualify as "violent felony" under ACCA elements clause) as instructive of the Eleventh Circuit's continued reliance on *United States v Dowd*, 41 F.3d 1244 (11th Cir. 2006) (holding 1974 Florida conviction for armed robbery as qualifying predicate under ACCA's elements clause) in the wake of intervening United States Supreme Court

precedent in *Johnson* and its progeny.

In this case, the Magistrate Judge properly looked at the underlying information on the Movant's Florida robbery conviction to determine under which subsection of the Florida robbery statute the Movant was convicted. Noting that the information charged simple "robbery," but further set forth facts regarding how the robbery was committed, to wit, a statement that during the course of committing the robbery the Movant was armed with a deadly weapon, contrary to Fla. Stat. 812.13(2)(a) [DE 22, p. 30], the Magistrate Judge correctly concluded, applying *Dowd* – which is still binding precedent in this Circuit – hat the Movant's 1978 robbery conviction in this case is properly characterized as a conviction for a violent felony within the meaning of the ACCA elements clause. *See United States v. Lockley,* 632 F.3d 1238, 1240 n. 1 (11th Cir. 2001). *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016) (Lockely not abrogated by recent (1989 conviction for armed robbery); *United States v. Seabrooks*, 839 F.3d 1326 (121th Cir. 2016) (1997 conviction for armed robbery). *See also United States v. Bostick*, 2017 WL 164313, ___ Fed. Appx. ___ (11th Cir. Jan. 27, 2017) citing *Lockley*, *Fritts* and *Seabrooks* for proposition that conviction under 812.13(1) categorically qualifies as violent felony under elements clause of ACCA).

With this background, the Court agrees that the Movant's 1978 Florida robbery conviction in this case qualifies as a "violent felony" for purposes of the ACCA elements clause. The Court further agrees with the the Magistrate Judge's analysis of the other two convictions used to support his ACCA sentencing enhancement [1997 possession of heroin with intent to sell; 1992 conviction for possession of cocaine with intent to sell].

Accordingly, after carefully reviewing the Magistrate Judge's Report and Recommendation [DE 22], and after making a *de novo* determination on the record as to all portions of the Magistrate Judge's disposition as to which specific written objection has been made, it is **ORDERED** and **ADJUDGED**:

1. Magistrate Judge White's Report and Recommendation entered August 26, 2016 [DE 22] is **APPROVED AND ADOPTED** in full.

2. The petitioner's motion to vacate, set aside and correct sentencing pursuant to 28 U.S.C. § 2255 [DE 1] is **DENIED.**

3. Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) is **DENIED.**

4. The Clerk of Court is directed to enter this case as **CLOSED** and terminate all pending motions as **MOOT.**

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 9th day of February, 2017.

Daniel T. K. Hurley
United States District Judge

cc. All counsel
Magistrate Judge Patrick White

A-7

No. 17-11527

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATHANIEL BEVERLY
Petitioner/Appellant,

v.

UNITED STATES OF AMERICA,
Respondent/Appellee.

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

MOTION FOR CERTIFICATE OF APPEALABILITY BY APPELLANT NATHANIEL BEVERLY

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THIS CASE IS ENTITLED TO PREFERENCE
(28 U.S.C. §2255 APPEAL)

CERTFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Nathaniel Beverly v. United States of America
Case No. 17-11527

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Acosta, Diana Margarita, Assistant United States Attorney

Beverly, Nathaniel, Petitioner/Appellant

Birch, Peter Vincent, Assistant Federal Public Defender

Bryn, Brenda, Assistant Federal Public Defender

Caruso, Michael, Federal Public Defender

Hurley, Hon. Daniel T.K., United States District Judge

Ferrer, Wifredo A., Former United States Attorney

Greenberg, Benjamin G., Acting United States Attorney

Hopkins, Hon. James M., United States Magistrate Judge

Hurley, Hon. Daniel T.K., United States District Judge

Lynch, Hon. Frank J. United States Magistrate Judge

Smachetti, Emily M., Assistant United States Attorney

Vitunac, Hon. Ann E., United States Magistrate Judge

Watts, Leon, Former Assistant Federal Public Defender

White, Hon. Patrick A., United States Magistrate Judge

Zloch, William T., Assistant United States Attorney

MOTION FOR CERTIFICATE OF APPEALABILITY

Nathaniel Beverly, through undersigned counsel, respectfully moves this Court for a certificate of appealability ("COA") on the following question:

Whether the district court erred by denying Mr. Beverly's motion to vacate, set aside, or correct his sentence, brought pursuant to 28 U.S.C. §2255, alleging that he was illegally sentenced as an Armed Career Criminal after *Johnson v. United States*, 135 S. Ct. 2551 (2015)?

I. PROCEDURAL HISTORY

On March 3, 2005, a federal grand jury charged Mr. Beverly with being a felon in possession of a firearm (Count 1) and ammunition (Count 2) in violation of 18 U.S.C. §922(g)(1). (CRDE 1).[1]

On March 14, 2005, Mr. Beverly was arrested, and he remained pretrial detained pending trial. (PSI, p. 2).

On August 8, 2005, a jury found Mr. Beverly guilty of both counts. (CRDE DE 40).

In the pre-sentence investigation report (PSI), the probation officer determined that Mr. Beverly's base offense level (calculated under U.S.S.G. §2K2.1) was a level 24, and that his Chapter 2 adjusted offense level was 24 as

[1] All references to filings in Mr. Beverly's underlying criminal case, Case No. 05-80020-Cr-Hurley, will be cited as "CRDE." All references to filings in Mr. Beverly's § 2255 case, Case No. 15-81366-Cr-Hurley/White, will be cited as "DE."

well. (PSI, ¶ 23). At a Criminal History Category V (PSI, ¶ 39), his Chapter 2 advisory Guideline range was 92-115 months imprisonment. However, the probation officer found, Mr. Beverly had 5 prior Florida convictions that qualified him for enhanced sentencing as an Armed Career Criminal, namely:

(1) a 1997 conviction for burglary of a dwelling (Dkt. No. 96007427CF);

(2) a 1978 conviction for robbery (Dkt. No. 77001937CF);

(3) a 1997 conviction for possession of heroin with intent to sell (Dkt. No. 97005898CF);

(4) a 1992 conviction for possession of cocaine with intent to sell (Dkt. 91012896CF); and

(5) a 1992 conviction for manslaughter (Dkt. No. 91012894CF).

(PSI, ¶24). As an Armed Career Criminal, the probation officer indicated, Mr. Beverly's offense level rose to a 33; his Criminal History Category was increased from a V to a VI; he faced a statutory term of imprisonment of 15 years to life (rather than 0-10 years); and his advisory Guideline range increased to 210-262 months imprisonment. (PSI, ¶¶18-33, 61-62).

At the November 21, 2005 sentencing hearing, the government advised that it had the judgments of conviction for 4 of the 5 above-listed cases – those for burglary of a dwelling, robbery, possession of heroin with intent to sell, and

possession of cocaine with intent to sell – and was relying upon those 4 convictions as ACCA predicates not only for the current sentencing, but for "future proceedings." The government notably did *not* have the judgment for the 1992 manslaughter conviction, and did *not* rely upon that conviction as a predicate or alternative predicate for the enhancement at the sentencing. The AUSA specifically referenced and relied only upon the convictions alleged in ¶ ¶ 29, 32, 35, and 36 as predicates. (CRDE 51: 296-306).

Based upon those four convictions, the district court sentenced Mr. Beverly to a term of 210 months imprisonment as an Armed Career Criminal, to be followed by 5 years supervised release. (CRDE 45).

Mr. Beverly appealed his conviction and sentence to this Court, and both were affirmed. *United States v. Beverly*, 194 Fed. Appx. 624 (11th Cir. Aug. 24, 2006). He sought certiorari but certiorari was denied. *Beverly v. United States*, 549 U.S. 1147 (2007). He did not, however, seek collateral relief from his ACCA sentence pursuant to 28 U.S.C. §2255, until after the Supreme Court issued its momentous decision in *Johnson v. United States*, __ U.S. ____, 135 S.Ct. 2551 (June 26, 2015), declaring the ACCA's residual clause unconstitutionally vague and therefore void.

On October 2, 2015, Mr. Beverly filed a *pro se* motion to vacate his sentence pursuant to 28 U.S.C. §2255, arguing that in light of *Johnson* and the elimination

of the ACCA's residual clause, it was now clear that he had been erroneously sentenced as an Armed Career Criminal. (DE 1). In his accompanying *pro se* memorandum of law, Mr. Beverly argued that his Florida burglary of a dwelling conviction was no longer a "violent felony" within the ACCA's residual clause, and that without it, he did not have three other convictions that would qualify him as an Armed Career Criminal under current law. (DE 4). On that point, he noted that his 1992 Florida manslaughter conviction likewise no longer qualified for the ACCA enhancement without the residual clause, and that under current Supreme Court law his 1997 Florida conviction for possession with intent to sell heroin did not qualify as a "serious drug offense" as defined in 18 U.S.C. §924(e)(2)(A)(ii) either, since the actual maximum term of imprisonment for that offense was not 10 years or more.

As support for the second point, he cited *United States v. Newbold*, 791 F.3d 455 (4th Cir. June 30, 2015), where the Fourth Circuit – in like circumstances – had found that a North Carolina drug conviction did not qualify as a "serious drug offense" under the ACCA because such an offense was not actually punishable by more than 10 years under North Carolina's presumptive sentencing scheme. The Fourth Circuit held that Newbold was entitled to §2255 relief on that basis. (DE 4:3-4).

Because his own convictions for burglary, manslaughter, and possession of heroin with intent to sell did not qualify as ACCA predicates under current Supreme Court law, Mr. Beverly argued, he did not have three still-qualifying predicates, and he was therefore "actually innocent" of the ACCA enhancement. Accordingly, he asked the Court to vacate his enhanced sentence. (DE 4:3-7).

In its Response to the Order to Show Cause, the government maintained that Mr. Beverly remained an Armed Career Criminal – notwithstanding that the ACCA's residual clause was now unconstitutionally vague, and even if his burglary of a dwelling conviction no longer qualified as a "violent felony." According to the government, Mr. Beverly's convictions for possession with intent to distribute heroin; possession with intent to distribute cocaine; and "*armed* robbery" under Fla. Stat. §812.13(1) and (2)(a) were still-qualifying ACCA predicates. (DE13:12-13, 16-19).[2]

On August 1, 2016, undersigned counsel filed a supplemental memorandum of law in support of Mr. Beverly's *pro se* motion to vacate, arguing *inter alia* that his 1978 robbery conviction with Florida's Fourth District Court of Appeals was not a "violent felony" within the ACCA's elements clause, nor was his 1997 conviction for possession with intent to distribute heroin a "serious drug offense"

[2] Although the government also maintained (without citing any authority) that Mr. Beverly's manslaughter conviction remained a "violent felony" within the elements clause (DE 13:17), it thereafter conceded that the manslaughter conviction did *not* qualify. (DE 19:4).

under current law. (DE 17). If either of those convictions was not a countable ACCA predicate, counsel argued, Mr. Beverly was not an Armed Career Criminal and should be immediately released from custody since he had already overserved the otherwise applicable 10-year maximum. (DE 17: 30-31).

As to the robbery, counsel argued first that in *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), this Court had recognized that a conviction within Florida's Fourth DCA after *McCloud v. State*, 335 So.2d 257 (Fla. 1976), but prior to *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997), must be analyzed as "robbery by sudden snatching" – an offense which did not involve violent force and rendered Mr. Beverly's robbery conviction categorically overbroad. (DE 17:25-36). Second, counsel argued, it was clear from the post-*Robinson* Florida caselaw that the quantum of force legally necessary to seal a strongarm robbery conviction actually remained quite slight – and far less than the *Curtis Johnson* level of "violent force" to this day. (DE 177:33-34, n. 1; citing *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000); *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011)). Counsel argued that it was undeniable from the pre-*Robinson* caselaw surveyed in *Welch*, the post-*Robinson* decisions in *Sanders* and *Benitez-Saldana*, and well settled rules of statutory construction, "that a robbery 'by force' in Florida has actually *never* required the use of the *Johnson* level of '*violent* force' for conviction."

Third, counsel strenuously disputed the government's new claim raised for the first time in its Response to the Order to Show Cause that Mr. Beverly was *convicted* of *armed* robbery. It was clear from the standard jury instructions at the time of Mr. Beverly's conviction, counsel argued, that the factual allegations in the information about being "armed with a certain firearm" were not elements of an enhanced "armed robbery" *offense* under Fla. Stat. § 812.13(2)(a), to be found by the jury beyond a reasonable doubt. (DE 17:36-40).

As to the 1997 possession with intent to sell heroin conviction, counsel argued that under current, controlling Supreme Court law, namely, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), an offense under state law "for which a maximum term of imprisonment of ten years or more is prescribed by law" requires that the defendant have *actually* – not hypothetically – have faced a sentence of ten years or more, based upon his offense and criminal history. And, under the presumptive guideline system in effect in Florida in 1997 when Mr. Beverly was convicted for possessing with intent to sell heroin, counsel explained, he could *not actually* have been sentenced to ten or more years imprisonment based upon his particular offense and criminal history. To the contrary, according to the Guidelines scoresheet for the offense (DE 17, Ex. 8), the maximum prison sentence that could have been imposed based upon Mr. Beverly's offense and prior record was 80.75 months. And therefore, counsel argued, without any additional

findings by the judge (and there were none here), the judge could *not* have *actually* sentenced Mr. Beverly to ten years or more in jail. As such, his 1997 conviction for possession of heroin with intent to sell could not now be used to uphold his ACCA sentence. (DE 17:40-48).

The government responded (for the first time) that Mr. Beverly could not show that he was sentenced under the residual clause, and that his ACCA challenge was procedurally barred. (DE 19:7-9). As to the merits, the government conceded that at the time of Mr. Beverly's sentencing, both the parties and the PSI had referred to the 1978 robbery conviction as "robbery" not "armed robbery." However, the government pointed out, the judgment incorporated the information which alleged that the robbery was armed. (DE 19: 5).

Mr. Beverly replied, *inter alia*, that the government had waived its eleventh hour assertion of a procedural bar, and that its arguments that the 1978 conviction was for armed robbery ran afoul of the Sixth Amendment since no jury finding on carrying a weapon were required at the time of conviction. (DE 21:14-23).

Five days later, on August 26, 2016, the magistrate judge issued a report recommending denial of Mr. Beverly's § 2255 motion. (DE 22). As a threshold matter, the magistrate judge rejected the government's new assertion that Mr. Beverly had not shown that he was sentenced under the residual clause. On that issue, the magistrate judge found the reasoning in *In re Chance*, 831 F.3d 1335

(11th Cir. 2016) and *United States v. Ladwig*, 192 F. Supp.3d 1153, 2016 WL 3619640 (E.D. Wash. June 28, 2016) persuasive. Here as in *Chance* and *Ladwig*, the magistrate judge noted, the record was "similarly unclear as to which clause the district court relied upon," and Mr. Beverly had "established constitutional error under *Johnson*, because it was possible that the enhancement rested on the residual clause." (DE 22:9-13). The magistrate judge also found, as Mr. Beverly had argued, that the government had waived its right to assert a procedural bar when it did not raise such a bar in its Response to the Order to Show Cause. (DE 22: 13-16).

With regard to the 1978 robbery conviction, the magistrate judge acknowledged that under the categorical approach, courts must presume that a prior conviction "'rested upon nothing more than the least of the acts criminalized.'" (DE 22, citing *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2011)). And, the magistrate judge noted with significance, Mr. Beverly pled guilty within Florida's Fourth DCA which was the same DCA where the defendant in *Welch* was convicted of robbery in 1996 – prior to the Florida Supreme Court's clarification in *Robinson v. State*, 692 So.2d 883 (Fla. 1997) that a robbery conviction could not be based upon mere sudden snatching. Prior to *Robinson*, the magistrate judge acknowledged, several DCAs including the Fourth had interpreted the holding of *McCloud v. State*, 335 So.2d 257, 259 (Fla. 1976) that

"any degree of force" sufficed to convert larceny into robbery, to mean that only "a little" force was necessary for a robbery conviction under Fla. Stat. § 812.13(1). (DE 22:23, citing *Welch*, 683 F.3d at 1311, which had cited *Santiago v. State*, 497 So.2d 975, 976 (Fla. 4th DCA 1986) for that principle).

As such, the magistrate judge found, *Welch* required the district court to presume "that Movant pleaded guilty in a Florida district where, at the time, mere snatching sufficed." (DE 22:23-25; citing *Welch*, *McCloud*, and *Santiago*). And, he noted, he had "little difficulty" concluding that a sudden snatching did not have "violent force" as an element (DE 22:25-26), or rejecting the government's argument that *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) which involved a 2001 robbery, controlled a pre-*Robinson* Fourth DCA robbery case (DE 22:26). "[A]t the time of Movant's conviction," unlike Lockley's, the magistrate judge explained, "the 'controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into robbery.'" (DE 22, citing *Welch*, 683 F.3d at 1311). Accordingly, "regardless of what the Florida Supreme Court intended when it stated in *McCloud* that any degree of force would suffice," the magistrate judge found, "the fact remains that *McCloud* changed the legal landscape in certain Florida jurisdictions until the Florida Supreme Court corrected it in *Robinson*." (DE 22:29-30).

While thus agreeing with Mr. Beverly that the "force, violence, assault, or putting in fear" language in § 812.13(1) was "overbroad" at the time of his 1978 conviction (DE 22:35 n. 7), the magistrate did not find that dispositive of whether that conviction remained a qualifying ACCA predicate. For indeed, the magistrate judge found (in agreement with the government), Mr. Beverly had actually been convicted "for armed robbery, not ordinary robbery." As support for that finding, the magistrate pointed out that the information stated that "in the course of committing the robbery Movant was armed with a deadly weapon 'contrary to Florida statute 812.13(2)(a).'" (DE 22:30). And the magistrate judge found it "perfectly permissible" under the "modified categorical approach for the court to look at the information to determine which subsection of the statute Movant was convicted of violating." (DE 22: 30-43).

The magistrate judge acknowledged that *Descamps v. United States*, 133 S.Ct. 2276 (20103) and *Mathis v. United States*, 136 S.Ct. 2243 (2016) had clarified that the modified categorical approach (and consultation of "*Shepard* documents") was only permissible when analyzing divisible statutes. However, he found, "under *Mathis*, it is clear that Florida's robbery statute is divisible into 1) 'armed' robbery with a firearm or deadly weapon under subsection (2)(a), 2) "armed" robbery with a weapon under subsection (2)(b), and 'ordinary' robbery under subsection (2)(c). As such," he concluded, "it is appropriate to use the

modified categorical approach to determine which version of the statute Movant was convicted of violating." (DE 22:33-36).

Although he agreed with Mr. Beverly that according to the standard jury instructions in 1978 judges were not required to submit the weapon enhancement to the jury, he did not agree that this meant § 812.13(2) was simply a penalty provision rather than a separate robbery offense. In the magistrate judge's view, it "does not mean that the weapons enhancement was not an element of the crime. All it means is that this element was not being submitted to the jury in violation of *Apprendi*, which is not surprising, since *Apprendi* had of course not been decided at the time." (DE 22:36-37).

Moreover, the magistrate judge also disagreed with Mr. Beverly's argument that the holding of *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) that the defendant's 1974 armed robbery conviction was "undeniably a violent felony," had been abrogated by intervening Circuit and Supreme Court precedent. (DE 22:31). The magistrate judge acknowledged that the Florida Supreme Court had confirmed in *State v. Baker*, 452 So.2d 927, 929 (Fla. 1982), that the weapons enhancement under § 812.13(2) applied if the defendant simply possessed a firearm; that the *Dowd* Court failed to consider the Florida Supreme Court's authoritative interpretation of the statute in *Baker*; and that this Court had squarely held (after *Dowd*) in *United States v. Archer* 531 F.3d 1347, 1349 (11th Cir. 2008)

and *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010) that simply carrying or possessing a firearm was not an offense that "has as an element the use, attempted use, or threatened use" of violent force. (DE 22:38-40). Nevertheless, the magistrate judge found, under the prior panel precedent rule the holding in *Dowd* remained binding even if – as was now clear – "*Dowd* was wrongly decided." (DE 22: 40). "[T]he fact [that] the *Dowd* Court failed to conduct the analysis in accordance with the law at the time," the magistrate judge (mis)stated,[3] "does not mean that [*Dowd*] has been abrogated or effectively overruled by Supreme Court precedents reiterating and clarifying the applicable standard." (DE 22:40). According to the magistrate judge, a district court could not decline to follow a binding (albeit, now-wrong) Circuit precedent. It was "for the Eleventh Circuit, not this Court, to decide whether its decision in *Dowd* has been effectively abrogated or overruled by intervening Supreme Court precedent." (DE 22:41).

The magistrate judge also rejected Mr. Beverly's alternative argument that he was no longer an Armed Career Criminal because his 1997 conviction for possession of heroin with intent to sell was not a qualifying "serious drug offense" after *Carachuri-Rosendo v. Holder*, 560 U.S 563, 567 (2010), given that he did not actually face 10 or more years imprisonment for that offense under the Florida presumptive Guideline system in effect in 1997. (DE 22:43-49). Although the

[3] *Dowd*, notably, was decided prior to *Curtis Johnson*, *Moncrieffe*, *Descamps*, nor *Mathis* had been decided

magistrate judge agreed that "*Carachuri-Rosendo* is generally applicable and persuasive outside of the immigration context for purposes of establishing whether a prior conviction qualifies as a serious drug offense," he found *Carachuri-Rosendo* did not apply here because it "involved significantly different facts;" the decision did not apply on collateral review; and a stand-alone *Carachuri-Rosendo* claim was time-barred. (DE 22:43-46). It was impermissible, the magistrate judge found, to "use the portal opened by *Johnson*" to obtain review of an "unreviewable ACCA predicate serious drug offense." He disagreed with Mr. Beverly's position that the challenge he had raised to his heroin conviction simply showed that the conceded *Johnson* errors as to the burglary or manslaughter convictions, were not harmless. (DE 22:49).

Concluding that reasonable jurists could not debate that Mr. Beverly no longer qualified as an Armed Career Criminal for any reason, the magistrate judge recommended denial of a certificate of appealability. (DE 22:51).

Undersigned counsel filed detailed and timely objections to the magistrate judge's findings, *inter alia*: (1) that the 1978 Florida robbery statute was "divisible" into the separate offenses of robbery and armed robbery, and that Mr. Beverly was *convicted* of *armed* robbery, not ordinary robbery; (2) that *Dowd*'s "undeniably a violent felony" holding was a ruling under the categorical approach, rather than a now-clear misapplication of the modified categorical approach; (3)

that the district court was "bound" to follow *Dowd* until this Court holds that it has been abrogated; (4) that a categorically overbroad robbery conviction can be brought within the ACCA's elements clause simply because a weapon was "carried" (but not used, or brandished – only possessed), which was contrary to the ruling of other circuits; and (5) that Mr. Beverly's *Carachuri-Rosendo* "claim" was "time-barred, when in fact, the argument that his 1997 possession with intent to sell heroin conviction was no longer a "serious drug offense" was *not* a free-standing claim for relief, but simply proof that the two government-conceded *Johnson* errors (counting the Florida burglary and manslaughter convictions) were harmful. (DE 24).

Before the district court ruled on those objections, a panel of this Court handed down its decision in *United States v. Fritts*, 841 F.3d 937 (11th Cir. November 8, 2016). And thereafter, the government filed *Fritts* as supplemental authority arguing that the Court had now explicitly ruled in its favor "in the case at bar, holding that all Florida robbery, regardless of the date of conviction, is a violent felony under the elements clause." (DE 26).

Undersigned counsel responded that the government had confused dicta in *Fritts* with *Fritts*' more narrow, fact-specific holding which could extend no further than the facts and circumstances before the Court in that case. Specifically, the robbery at issue in *Fritts* occurred in the Second DCA, which had already

determined at the time of Fritts' conviction that snatching did not suffice for robbery. As such, the *Fritts* court could not have determined whether a Fourth DCA conviction after *McCloud*, but prior to *Robinson*, such as Mr. Beverly's, could have been for a snatching. (DE 27:1-6). And, to the extent the mode of analysis in *Fritts* conflicted with *Welch* in a Fourth DCA case, counsel argued, the prior panel precedent rule dictated that the earliest case controlled. (DE 27: 7).

On February 9, 2017, the district court issued an order adopting the magistrate's Report and Recommendation "in full," overruling Mr. Beverly's objections, and denying his motion to vacate. (DE 28). The court explained:

> In this case, the Magistrate Judge properly looked at the underlying information on the Movant's Florida robbery conviction to determine under which subsection of the Florida robbery statute the Movant was convicted. Noting that the information charged simple "robbery," but further set forth facts regarding how the robbery was committed, to wit, a statement that during the course of committing the robbery the Movant was armed with a deadly weapon, contrary to Fla. Stat. 812.13(2)(a)[DE 22,p. 30], the Magistrate Judge correctly concluded applying [*United States v.*] *Dowd* [,41 F.3d 1244 (11th Cir. 2006)] – which is still binding precedent in this Circuit – [t]hat the Movant's 1978 robbery conviction in this case is properly characterized as a conviction for a violent felony within the meaning of the ACCA elements clause. *See United States v. Lockley*, 632 F.3d 1238, 1240 n.1 (11th Cir. 2001). *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2010) (*Lockley* not abrogated by recent (1989 conviction for armed robbery) [sic]; *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016) (1997 conviction for armed robbery). *See also United States v. Bostick*, 2017 WL 164313, ___ Fed. Appx. ___ (11th Cir. Jan. 27, 2017) citing *Lockley*, *Fritts* and *Seabrooks* for proposition that conviction under 812.13(1) categoricaly qualifies as violent velony under elements clause of ACCA).

> With this background, the Court agrees that the Movant's 1978 Florida robbery conviction in this case qualifies as a "violent felony" for purposes of the ACCA elements clause. The Court further agrees with the Magistrate Judge's analysis of the other two convictions used to support his ACCA sentencing enhancement [1997 possession of heroin with intent to sell; 1992 conviction for possession of cocaine with intent to sell].

(DE 28:1-2). At the conclusion of that order, the district court denied Mr. Beverly a certificate of appealability. (DE 28:3).

On April 5, 2017, Mr. Beverly filed a timely notice of appeal from the denial of his §2255 motion. (DE 30).

II. LEGAL STANDARD

A certificate of appealability ("COA") must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. §2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

As the Supreme Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost

on the merits, the Supreme Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. *See also Buck v. Davis*, ___ U.S. ___, 2017 WL 685534, *11-12 (U.S. Feb. 22, 2017).

Under this "debatable among reasonable jurists" standard, the fact that there is a split among various courts on the question satisfies the standard for obtaining a COA. *See Lambright v. Stewart*, 220 F.3d 1022, 1028-29 (9th Cir. 2000). Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001); *see also Welch v. United States*, 136 S. Ct. 1257, 1263-1264, 1268 (2016) (Court of Appeals erred by denying a COA, because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence").

III. REASONABLE JURISTS COULD DEBATE WHETHER MR. BEVERLY HAS THREE QUALIFYING ACCA PREDICATES

Reasonable jurists could debate whether Mr. Beverly is entitled to relief on his ACCA claim following *Johnson* for five separate reasons.

1. It is debatable among reasonable jurists whether a post-*McCloud*, pre-*Robinson* robbery conviction within Florida's Fourth DCA could have been for a mere snatching, and for that reason, is not a qualifying ACCA predicate.

In *Welch v. United States*, 136 S.Ct. 1257 (April 18, 2016), the Supreme Court squarely recognized that it was at least "debatable" whether a strongarm robbery conviction within Florida's Fourth DCA after *McCloud v. State,* 335 So.2d 257 (Fla. 1976), but prior to *Robinson v. State,* 692 So.2d 883 (Fla. 1997), remained a "violent felony" within the ACCA's elements clause. *Id.* at 1268 (vacating and remanding since "reasonable jurists at least could debate whether Welch is entitled to relief"). Notably, not only did the Supreme Court so hold notwithstanding this Court's prior decisions in both *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2010) and *United States v. Dowd*, 41 F.3d 1244 (11th Cir. 2006); but indeed, after the remand in *Welch* (and presumably because of it) members of this Court have continued to strenuously debate whether a Florida robbery conviction after *McCloud* but prior to *Robinson*, within Florida's Fourth DCA, has *violent* force "as an element." As of this writing, there is no firm agreement – and there remains continual debate within the Court – on that issue.

The debate arises from the decision in *United States v. Welch,* 683 F.3d 1304, 1311 (11th Cir. 2012), where this Court recognized that a strongarm robbery conviction in the Fourth DCA *before* the Florida Supreme Court's 1997 decision in *Robinson* "could indeed have been predicated upon a mere sudden snatching"

without any force beyond that necessary for the snatching. Even though the government is itself now in agreement that a robbery by sudden snatching under Fla. Stat. § 812.131(1999) does not have "as an element" the use of "violent force" as defined in *Curtis Johnson,* 559 U.S. 133, 130 S. Ct. 1265 (2010), *see Dieujuste v. United States*, Case No. 15-80618-Civ-Ryskampwhite, DE 17 at 9-10, it has continued to argue contrary to *Welch* and the view of the magistrate judge and district court below, that a strongarm robbery conviction prior to the enactment of the "sudden snatching" statute, could never have been for a mere snatching. That position is highly debatable, given that the First and Fifth DCAs, as noted *Welch*, 683 F.3d 1311 at n. 29, had expressly upheld robbery convictions based upon mere snatching in the post-*McCloud*/pre-*Robinson* period. And the Fourth DCA clearly leaned in that direction, although it had "not spoken definitively." *Id.* at 1311 & n. 32.

This Court recognized in *Welch*, that the Florida legislature's enactment on October 1, 1999, of §812.131, the sudden snatching 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, so that the intermediate appellate decisions holding mere snatching to be sufficient were put in doubt." *Id.* at 1311. *Robinson* thus resolved a split among the district courts of appeals, and made clear that *after* the enactment of the "robbery by

sudden snatching" statute, a robbery conviction under Fla. Stat. §812.13(1) could *not* have been "by snatching," and required at least some "force."

But plainly, prior to *Robinson* (when both Welch and Mr. Beverly were convicted), the "latest authoritative pronouncement" as to the elements of robbery under §812.13(1) for Fourth DCA defendants was *McCloud v. State*, 335 So.2d 257 (Fla. 1976). And *McCloud* held that "any degree of force suffices" for robbery, including the minimal amount of force necessary to "extract" property from a victim's "grasp." *Id.* at 258-259. Importantly, the *Welch* Court found *Robinson*'s clarification of the law irrelevant to whether Welch's 1996 Florida robbery conviction qualified as an ACCA predicate. Instead, it followed the Supreme Court's directive in *McNeill v. United States,* 563 U.S. 816, 821 (2011), that "in determining whether a defendant was convicted of a 'violent felony,' we turn to the version of the state law the defendant was actually convicted of violating." *Welch* at 1311-1312 (quoting *McNeill*; finding "for purposes of analysis, that Welch pleaded guilty to robbery at a time when mere snatching sufficed.")

Binding precedent in both *Welch* and *McNeill* establishes that a conviction under Florida's robbery statute in 1978 did *not* require "as an element" the use of any force beyond that necessary to snatch an item from the victim's hand. And indeed, based on the "least culpable conduct" analysis in *Welch*, subsequently

validated by the Supreme Court in *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013), other reasonable jurists on this Court have debated whether Florida robbery convictions in the post-*McCloud*/pre-*Robinson* satisfy ACCA's elements clause. In *United States v. Jenkins,* 651 F. App'x 920, 927 (11th Cir. 2016), Judge Hull found that a Second DCA robbery conviction qualified as a Career Offender predicate, but only because the Second DCA had decided long before Jenkins' 1995 robbery arrest that more than a mere snatching was required to sustain a robbery conviction under §812.13(1). Judge Hull noted with significance that "***unlike the defendant in Welch,*** Jenkins could not have been convicted under §812.13(1) for a taking by sudden snatching." *Id.* at 928. (emphasis added).

And indeed, while this Court thereafter held in *United States v. Fritts,* 841 F. 3d 937 (11th Cir. 2016) that Mr. Fritts' robbery conviction under Fla. Stat. §812.13 "categorically qualifies as a violent felony under the ACCA's elements clause," *id.* at 942, Fritts – like Jenkins – was convicted in the Second DCA, at a time when it was already clear in that district that a mere snatching was *not* sufficient for robbery. *See* Initial Brief in *Fritts,* 2016 WL 1376197 at *2 (March 14, 2016). By contrast, Mr. Beverly, like the defendant in *Welch,* was convicted in the Fourth DCA at a time – post-*McCloud*, but prior to *Robinson* – when a defendant *could* have been convicted under § 812.13(1) for a mere, non-violent snatching. *See*

Santiago v. State, 497 So.2d 975, 976 (Fla. 4th DCA 1986) (reading *McCloud* to require only "a little" force).

As clarified by Judge Martin in her concurring opinion in *United States v. Seabrooks,* 839 F.3d 1326 (11th Cir. 2016), *Welch* still "binds us whenever we apply the categorical approach to analyze a Florida robbery conviction from a time before the Florida Supreme Court decided *Robinson.*" *Id.* at 1352. According to Judge Martin, the *only* point on which the three *Seabrooks* panel members agreed was that a ***post-****Robinson* armed robbery conviction under Fla. Stat. §812.13 was a violent felony within the elements clause, pursuant to *United States v. Lockley,* 632 F.3d 1238 (11th Cir. 2011). *Id.* at 1346. *Seabrooks* did *not* hold that *Lockley* controlled *any* Florida robbery convictions other than those like Seabrooks' that occurred post-*Robinson.* And for that reason, *Seabrooks* does not control this case.

Notably, Visiting Judge Baldock and Judge Martin refused to join the other reasoning in Judge Hull's decision in *Seabrooks* regarding the ACCA enhancement. They simply joined her conclusion that Seabrooks' *August 13, 1997* armed robbery convictions were "ACCA-violent felonies under *Lockley*." *Id.* at 1341 (Part III.D. of the decision by Judge Hull); *see id.* at 1346 (Baldock, J., concurring) (noting that "All members of the panel agree that [*Lockley*] answers in the affirmative the question of whether [Seabrooks] qualifies as an armed career criminal;" "But the remainder of Part III of the opinion gives me pause"); and *id.* at

1346, 1348 n.1 (Martin, J., concurring only in the judgment) (expressly declining to join Part III of Judge Hull's decision because "it reaches legal issues beyond those necessary to decide this case;" clarifying that (1) in her discussion of *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006), "Judge Hull writes for herself. Judges Baldock and I have not joined in Part III.C of her opinion;" and (2) since "[n]o two judges on this panel have joined together in Judge Hull's alternative ruling on Mr. Seabrooks' sentencing claims, [t]hat means that this panel opinion stands only for the rule that our Circuit precedent in [*Lockley*] requires Mr. Seabrooks' 1997 Florida convictions for armed robbery to be counted in support of his 2015 Armed Career Criminal Act ("ACCA") sentence. Neither my views nor those of Judge Hull create Circuit precedent beyond that.")

Admittedly, in *Fritts*, Judges Marcus and Fay did join Judge Hull in "using" the analysis in Sections III.B, C, and F of her opinion in *Seabrooks*. *See Fritts*, 841 F.3d at 940, n.3. But notably, Judges Marcus and Fay did not join – and the *Fritts* decision did not "use" or adopt – Section III.I. of Judge Hull's opinion in *Seabrooks*, which is the portion of the opinion in which she unilaterally asserted that "*Welch* contains no ruling, much less a holding, about Florida's robbery statute under the elements clause," and that the "least culpable conduct" discussion in *Welch* is "not just dicta, but wrong dicta." *Seabrooks,* 839 F.3d at 1344-1345

(Hull, J.) There was *no* agreement with that view by Judges Baldock and Martin in *Seabrooks* and *no* agreement by Judges Marcus and Fay in *Fritts*.

Notably, prior to the decisions in *Seabrooks* and *Fritts,* the very same district court judge who denied a certificate of appealability to Mr. Beverly had squarely held that a pre-1997 Florida robbery conviction within Florida's Fourth DCA did *not* meet the definition of a violent felony under ACCA; that *Welch* governed post-*McCloud*/pre-*Robinson* Fourth DCA robbery convictions; and that a pre-*Robinson* Florida robbery conviction did *not* qualify as an ACCA predicate. *See Jones v. United States,* Case No. 15-81380-Civ-Hurley, DE 40:1-2 (S.D. Fla. July 20, 2016) (Order Adopting Report and Recommendation of Magistrate Judge and Granting Motion to Correct Sentence, finding that 1995 Florida robbery conviction from Fourth DCA does not qualify as a violent felony predicate under the ACCA, and ordering Mr. Jones' immediate release). And at least one other reasonable jurist in the Southern District of Florida agreed with that analysis as well. *See Simmons v. United States,* Case No. 16-22369-Civ-Cooke, DE 14:3-5 (S.D. Fla. Aug. 31, 2016) (Order Adopting Magistrate's Report and Recommendation, granting petitioner's §2255 motion, finding that Florida Fourth DCA robbery conviction

from 1980 "rested upon nothing more than the least of the acts criminalized, a robbery-by-sudden-snatching").[4]

But contrary to the government's mistaken suggestion below, *Fritts* has not changed the "debatable" state of this Circuit's law on post-*McCloud*/pre-*Robinson* robbery convictions. Notably, just after the decision in *Fritts* – in fact, the next day – Judge Rosenbaum granted a COA on whether pre-1997 ordinary and armed robbery convictions qualify as ACCA predicate offenses under the elements clause. *See King v. United States,* Case No. 16-11082 (11th Cir. Nov. 9, 2016). And even more notably, ***the very same judge*** who denied a COA to Mr. Beverly on the Fourth DCA armed robbery issue here, thereafter granted a COA to an identically-situated movant in another case. *See Benjamin Griffin v. United States*, Case No. 16-61173-Civ-Hurley (S.D.Fla. March 14, 2017), DE 36 (order granting a COA on "Whether the movant's 1981 conviction for Florida robbery with a deadly weapon constitutes a violent felony under the Armed Career Criminal Act")(Exhibit A hereto); *see also* DE 32:16-17 (February 10, 2017 Report and Recommendation recommending that the district court find Griffin's Florida armed robbery conviction is a violent felony according to *Dowd* and *Fritts* (which followed *Dowd*); however, recommending that a certificate of appealability be granted because Judge Martin "expressed doubt" in *Seabrooks* regarding *Dowd*'s

[4] As a result of these rulings, both Simmons and Jones have been released from their illegal custody.

"continuing viability"). Griffin – just like Mr. Beverly – was convicted in the post-*McCloud*/pre-*Robinson* period in the 17th Judicial Circuit, which is Broward County, Florida, which is within Florida's Fourth DCA.

As Judge Martin has rightly recognized in granting a COA on whether a conviction for Hobbs Act robbery qualifies as a crime of violence within § 924(c)'s elements clause, this Court has "'explained time and time again: A decision can hold nothing beyond the facts of that case.'" Order, *Ashly Davenport v. United States*, Case No. 16-15939-G (11th Cir. March 28, 2017) at 4 (citing *United States v. Birge*, 830 F.3d 1229 (11th Cir. 2016)). And for that reason, as undersigned counsel argued below, *Fritts* could not have "held" anything beyond that a 1989 Florida robbery conviction within the Second DCA required proof that the defendant used sufficient force to overcome victim resistance, and that a Second DCA conviction was not for mere snatching.

But notably, even if the district court were correct in broadly reading *Fritts* to hold that any post-*McCloud*/pre-*Robinson* robbery conviction (including a conviction in the Fourth DCA) now qualifies as an ACCA "violent felony" in ***this Circuit***, the existence of circuit precedent does not mean that reasonable jurists could not debate the issue. *See, e.g.*, *Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000) ("Under *Slack*, it is thus clear that we should not deny a petitioner an opportunity to persuade us through full briefing and argument to reconsider

circuit law that apparently forecloses relief"); *United States v. Gomez-Sotelo*, 18 F. App'x 690, 692 (10th Cir. 2001) (granting COA where there was "a split among the circuits," even though the "issue has been settled in this circuit and not overturned by the Supreme Court").

The debatability of the issue is clear from the fact that the Ninth Circuit Court of Appeals has held – in considering a state robbery statute similar to Florida's (as construed by the Fourth DCA in the post-*McCloud*/pre-*Robinson* period) – that even a conviction for an *armed* robbery by sudden snatching is *not* a violent felony. *See United States v. Parnell,* 818 F.3d 974, 979-981 (9th Cir. 2016) (noting that Massachusetts armed robbery statute permitted conviction upon the use of "any force, however slight;" and since all that was required for an armed robbery conviction was the mere possession of a weapon, without using or even displaying it, such "does not bring Massachusetts' armed robbery statute within ACCA's force clause.")

And even now, months after *Fritts* was decided, jurists on this very Court continue to debate whether *Fritts* was "wrongly decided." *See United States v. Denard Stokeling,* Case No. 16-12951 (11th Cir. April 6, 2017) (Martin, J., concurring) (agreeing that a post-*Robinson* conviction qualified as a "violent felony," but writing separately to explain why the *Fritts* panel erroneously concluded that 812.13 had "never" included a robbery by mere snatching, and that

a pre-*Robinson* armed robbery conviction categorically fell within the elements clause; noting that the *Fritts* panel failed to conduct the "least culpable conduct" analysis mandated by the Supreme Court and "stretched *Lockley* well past its limits;" arguing that the *Welch* panel's determination under the categorical approach that sudden snatching was the least culpable conduct that could support a 1996 robbery conviction was necessary to its holding and therefore "[o]ur precedent therefore binds us to *Welch*'s conclusion that sudden snatching was the least culpable conduct covered by § 812.13 when *McCloud* was the controlling Florida case defining that statute").

In short, reasonable jurists within this Court and outside this Court have debated and are continuing to debate, whether state robbery convictions just like Mr. Beverly's have violent force "as an element." Accordingly, the Court should grant Mr. Beverly a Certificate of Appealability here.

2. Even if *Fritts* can be properly read – beyond its specific facts – to hold that *all* Florida robbery convictions regardless of date and DCA required victim resistance, and thus more force than a snatching, it is still debatable among reasonable jurists whether robbery convictions under similarly-worded and/or similarly-construed statutes categorically qualify as ACCA violent felonies.

Although the district court denied Mr. Beverly § 2255 relief based upon *Fritts* and *Seabrooks*, the defendants in both *Fritts* and *Seabrooks* have recently filed petitions for writ of certiorari in the Supreme Court. Both petitions have argued that there is now a circuit split on whether a state robbery conviction under

a statute (like Florida's) that requires the force to overcome victim "resistance," qualifies as a "violent felony" under the ACCA. *See* Exhibit B hereto (petition for writ of certiorari in *Fritts v. United* States, Case No. 16-7883) and Exhibit C hereto (petition for writ of certiorari in *Seabrooks v. United States*, Case No. 16-8072).

On that point, both the *Fritts* and *Seabrooks* petitions have specifically argued that there is a conflict between the view expressed in *Fritts* and that of the Fourth Circuit in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016). Specifically, the Fourth Circuit has recognized that only minimal force is required to commit robbery against a victim's resistance under a similarly-construed North Carolina statute. In *Fritts*, this Court reached the contrary conclusion, by ignoring the Florida courts' construction of § 812.13(1), and the minimal conduct sufficient for a "forceful" taking under that provision. *See, e.g.*, *Sanders v. State*, 769 So.2d 506, 507-508 (Fla. 5th DCA 2000) (affirming a strongarm robbery conviction where the defendant merely peeled back the victim's fingers before snatching money from his hand); *Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993) (finding force sufficient to tear a scab off victim's finger was enough to sustain conviction for robbery); *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001) (upholding conviction for robbery by force based upon testimony of the victim "that her assailant 'bumped' her from behind with his shoulder and probably would have caused her to fall to the ground but for the fact that she was in between rows

of cars when the robbery occurred," and did not fall); and *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011) (rejecting defendant's argument that actual "violence" was necessary for a strong arm robbery conviction in Florida, and that his act of "engaging in a tug-of-war over the victim's purse" could not constitute robbery because it "was not done with violence or the threat of violence;" holding that it was sufficient that there was "the use of force to overcome the victim's resistance"). As both Fritts and Seabrooks have argued, these Florida decisions confirm that "overcoming resistance" for a robbery conviction in Florida, as for a robbery conviction in North Carolina, does *not* necessitate *violent* force.

Notably, after the *Fritts* and *Seabrooks* petitions were filed the Fourth Circuit held in a subsequent case, *United States v. Winston*, 850 F.3d 677, 2017 WL 977031 (4th Cir. March 13, 2017), that a conviction for Virginia common law robbery – an offense which may be committed by either "*violence* or intimidation" – likewise failed to qualify as a violent felony within the ACCA's elements clause since Virginia caselaw (analogous to the Florida decisions in *Sanders*, *Johnson*, *Hayes*, and *Benitez-Saldana*) confirms that Virginia common law robbery can be committed by slight, non-violent force. *Id.* at *6 (noting that according to Virginia caselaw, "anything which calls out resistance is sufficient," "such resistance by the victim does not necessarily reflect use of 'violent force;'" holding, therefore, that

the "minimum conduct necessary to sustain a conviction for Virginia common law robbery does not necessarily include [] 'violent force'"). The government in *Winston* argued that force sufficient to overcome resistance necessarily satisfied the elements clause, but unlike this Court in *Fritts*, the Fourth Circuit squarely rejected that proposition after considering relevant Virginia caselaw. *See id.* at *4.

Plainly, if Mr. Beverly's case had been filed and heard within the Fourth Circuit, the jurists in that Circuit would have been bound to apply the reasoning in both *Gardner* and *Winston* and hold that his Florida robbery conviction – like a North Carolina robbery conviction, and a Virginia common law robbery conviction – does not categorically require the use of *violent* force.

Moreover, beyond the conflict with the Fourth Circuit on the resistance/quantum of force issue, Fritts and Seabrooks have also pointed out in seeking certiorari that *Fritts* conflicts with the Ninth Circuit's decision in *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015) on a separate issue: the *mens rea* necessary for an offense within the elements clause. Applying the Supreme Court's reasoning in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) that the term "use" in the similarly-worded 18 U.S.C. § 16(a) "most naturally suggests a higher degree of intent than negligent or merely accidental conduct," *id.* at 9, the Ninth Circuit concluded in *Dixon* that a California conviction for robbery committed by "force" does not qualify as a "violent felony" under the ACCA elements clause, since the

California Supreme Court had determined that a conviction may result from a defendant's *unintentional* use of force, and therefore, merely negligent conduct. *See Dixon*, 805 F.3d at 1197.

In both *Fritts* and *Seabrooks*, this Court ignored the *mens rea* issue under *Leocal* raised in both defendants' briefing. Specifically, both defendants pointed out that Florida decisions such as *State v. Baldwin*, 709 So.2d 636 (2nd DCA 1998) have made clear that a robbery by "putting in fear" under § 812.13(1) does not require intentionally or actually threatening conduct. *See id.* at 637-638 ("We note that the test does not require conduct that is, itself, threatening or forceful. Rather, a jury may conclude that, in context, the conduct would induce fear in the mind of a reasonable person notwithstanding that the conduct is not expressly threatening"). Because a defendant need not intend to place a victim in fear to commit a Florida robbery, the offense – like a California robbery – does not categorically have as an element the threatened "use" of physical force, as that term was interpreted by the Supreme Court in *Leocal*, and the Ninth Circuit in *Dixon*.

In light of the circuit split on both the quantum of force and *mens rea* issues, whether a robbery conviction under a statute like Florida's is a qualifying ACCA predicate is plainly a question that reasonable jurists not only "could" debate, but *are* hotly debating at this moment. And indeed, in recognition of that fact, the

Solicitor General has sought an extension of time to respond to the petitions in both *Fritts* and *Seabrooks*.

If the Supreme Court grants certiorari in *Fritts* or *Seabrooks* to resolve either of the above-described circuit splits, and rules in favor of these defendants, such a decision would plainly undermine the order below. A reversal in either *Fritts* or *Seabrooks* would mean that Mr. Beverly's Florida robbery conviction was not a qualifying "violent felony" within the ACCA's elements clause, and that his sentence was indeed based upon the unconstitutionally vague residual clause of the ACCA, as he alleged. Accordingly, based upon either or both of these circuit splits, a COA should be granted on whether Mr. Beverly was illegally sentenced as an Armed Career Criminal.

Notably, even if certiorari is not ultimately granted in *Fritts* or *Seabrooks*, the circuit conflict will simply persist and reasonable jurists will continue to debate the issues raised herein until they are definitively resolved by the Supreme Court. And indeed, the mere existence of these circuit conflicts has rightly convinced one eminently reasonable jurist on the Southern District of Florida bench to grant certificates of appealability to two movants, like Mr. Beverly, challenging ACCA enhancements predicated upon Florida strong arm robbery convictions. *See* Order, *Bobby Jo Hardy v. United States*, Case No. 16-21892-Civ-Ungaro, DE 15 (S.D.Fla. Feb. 22, 2017) (Exhibit D hereto) (recognizing that that after *Fritts*, there

is a Circuit split on whether strong arm robbery qualifies as an ACCA violent felony; citing "competing caselaw" from the Fourth Circuit in *Gardner* and the Ninth Circuit in *Dixon* as grounds for granting a COA); Order, *Dewey Hylor v. United States*, Case No. 16-21497-Civ-Ungaro, DE 25 (S.D.Fla. Feb. 28, 2017) (Exhibit E hereto) (same; holding that "Given this Circuit split, the issue of whether robbery categorically qualifies as an ACCA predicate conviction is fairly debatable among reasonable jurists. *See Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003).")

The Court should grant Mr. Beverly a COA for similar reasons here.

3. It is debatable among reasonable jurists whether in 1978 the Florida robbery statute was divisible into two separate *offenses*, ordinary and armed robbery, or whether Fla. Stat. § 812.13(2) simply authorized the judge to impose a sentencing enhancement for the single, overbroad and indivisible robbery offense under § 812.13(1) – without necessitating additional jury findings beyond a reasonable doubt as to the carrying of a dangerous weapon.

In approving and adopting the magistrate judge's Report and Recommendation "in full," the district court necessarily adopted the magistrate's reasoning "in full." And notably, although the magistrate judge agreed that an ordinary Fourth DCA robbery in 1978 did not categorically qualify as a "violent felony," he found that Mr. Beverly was convicted of the separate *offense* of *armed* robbery under § 812.13(2) which did categorically qualify as a "violent felony" under "binding precedent." Specifically, the magistrate judge – and the district

court – reasoned, the divisibility of the Florida robbery statute into these separate offenses permitted consultation of the state court information to determine the offense of conviction; the allegations about a "deadly weapon" in the state court information here confirmed that Mr. Beverly was convicted of armed robbery; and in *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006) this Court held that a 1974 conviction for Florida armed robbery was "undeniably" a "violent felony" within the ACCA's elements clause. *Id.* at 1255.

Before addressing the debatability of continued adherence to the decision in *Dowd* (which the district court even conceded was "wrong"), it is worth pointing out that reasonable jurists would likely find the district court's threshold divisibility ruling debatable as well. It is inconsistent with this Court's reasoning in *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016). It is inconsistent with the Supreme Court's ensuing decision in *Mathis v. United States*, 136 S.Ct. 2243 (June 23, 2016). And it is inconsistent with – and utterly disregards – the Sixth Amendment.

In *Lockett*, this Court 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 Court 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. The Court acknowledged that 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)), and that 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.

Mathis, plainly, validated *Lockett*'s analysis in this regard, and confirmed that the Florida robbery statute is ***indivisible***. For indeed, the Supreme Court clarified in *Mathis* 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 for two reasons. First, the language in Fla. Stat. § 812.13(1) that the robbery is committed through "the use of force, violence, assault, ***or*** putting in fear" is worded in the disjunctive, like the statutes considered in *Lockett* and *Mathis*. And it is clear from Florida's standard robbery instruction at the time of Mr. Beverly's conviction (and to this day), that "force," "violence", "assault," and "putting in fear" are simply alternative "means" of committing a single indivisible *element* of the offense since Florida juries have never been instructed to choose between and agree upon these alternatives. The magistrate judge and district court agreed with Mr. Beverly's analysis up to that point.

However, *Lockett* and *Mathis* also confirm the district court's Sixth Amendment violation in treating § 812.13(2) as a separate "armed robbery" offense under the statute. As counsel argued below, it is clear from the standard

jury instructions in 1978, that the aggravating factors in §812.13(2) could *not* have been "elements" of a separate "armed robbery" offense, when at that time the jury was not asked to make findings beyond a reasonable doubt on "carrying" of a "weapon." And therefore, under *Lockett* and *Mathis,* the Sixth Amendment precluded the district court from upholding Mr. Beverly's ACCA sentence based upon non-elemental factual allegations in the state court information that did not require a jury finding beyond a reasonable doubt.

As noted by Mr. Beverly in both DE 17 and DE 21 – and not disputed by the government, the magistrate judge, or the district court below – Florida's standard robbery instruction in 1978 was different than the instruction today. Specifically, in 1978, the judge could impose a sentence enhancement for "carrying" a "weapon" "during the course of the robbery," without having a jury find those aggravating factors *beyond a reasonable doubt.* And given that, both *Lockett* and *Mathis* compel the conclusion here, contrary to the district court, that the aggravating factors in §812.13(2) were *not* "elements" of a separate "armed robbery" offense at the time of Mr. Beverly's conviction.

The Supreme Court underscored in *Mathis* 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 id.* at 2253 (noting "Sixth Amendment problems

associated with a court's exploration of means rather than elements"). Moreover, *Mathis*' broader holding reaffirming *Descamps*' "elements-based inquiry" rested even more firmly than *Descamps* on the Sixth Amendment. Indeed, the Court explained that to comply within *Apprendi*, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Id.* at 2252. A federal judge "is prohibited from conducting such an inquiry himself; and 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" Mr. Beverly was actually convicted of – beyond a reasonable doubt – in 1978 did ***not*** include "carrying" a "weapon" "during the course of the robbery."

The magistrate judge and district court agreed that ***no*** jury finding beyond a reasonable doubt was necessary in 1978 as to the above aggravating factors ("carrying" a "weapon" "during the course of the robbery"). But for that reason, they erred under current Circuit and Supreme Court precedent in finding that the Florida robbery statute was divisible, the "modified categorical approach" was permissible, and it confirmed that Mr. Beverly was *convicted* of armed robbery

under §812.13(2). Although the magistrate judge and court claimed that *Mathis* supported the divisibility of the statute in this respect, because the Court stated in *Mathis* that "If statutory alternatives carry different punishments, then under *Apprendi* they must be elements," DE 22:34 (citing *Mathis*, 136 S.Ct. at 2256), that cannot apply to a defendant, like Mr. Beverly, who was convicted over two decades prior to *Apprendi*.

The magistrate asserted *without authority* that "[t]he fact that Florida juries were not submitting the weapons enhancement to Florida juries [in 1978] does not mean that the weapons enhancement was not an element of the crime. All it means is that ***this element*** was not being submitted to the jury in violation of *Apprendi*, which is not surprising, since *Apprendi* had of course not been decided at the time." DE 22:36-37 (emphasis added). But indeed, that is highly debatable. Even at the time of Mr. Beverly's conviction, the Supreme Court had clearly stated that the Due Process Clause required the prosecution "to prove beyond a reasonable doubt all of ***the elements*** included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 2010 (1977) (emphasis added). And in *Richardson v. United States*, 526 U.S. 813 (1999), the Court again held in unmistakably clear terms that "[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." Id. at 817 (emphasis added). The magistrate judge's relaxed definition of a statutory "***element***," adopted by the district court, is contrary to the Supreme Court's own, very strict definition in these cases.

Undoubtedly, Florida modified its standard robbery instructions after *Apprendi* to comply with the Sixth Amendment. As indicated in DE 22:35-26, Florida judges now routinely instruct juries that if they find that the defendant "carried" a weapon during the course of the robbery "***beyond a reasonable doubt***," they can "find him guilty of robbery with a weapon." But there was no such requirement prior to *Apprendi*, and specifically, at the time of conviction here, where the juries were told they only needed to find the four elements in § 812.13(1) "beyond a reasonable doubt."

For that very reason, at least one reasonable jurist on the Southern District of Florida bench granted a successor § 2255 movant relief from his ACCA sentence, noting that the court could not make a finding that the defendant was "convicted" of *armed* robbery in 1976 "without running afoul of the Supreme Court precedent." *Steven Jackson v. United States*, Case No. 16-22649-Civ-Ungaro (S.D.Fla. Sept. 9, 2016), DE 12:14 (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 Judgement 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). Specifically, 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 Judgement 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 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 Judgement 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).

Applying Judge Ungaro's reasoning in *Jackson* here, it is at the very least arguable that the *only* crime Mr. Beverly was ***provably convicted of***, in 1978, was ordinary robbery under §812.3(1). And therefore, the district court's contrary

conclusion is at the very least "debatable" among reasonable jurists. A certificate of appealability should be granted to review this determination by the district court as well.

4. It is debatable among reasonable jurists whether a conviction for armed robbery under a statute that requires less than violent force, and simply carrying – but not using – a weapon, is a violent felony under the ACCA.

While admittedly, in *Fritts* this Court cited *Dowd* as authority for holding that a pre-1997, Second DCA Florida armed robbery categorically qualified as a violent felony within the ACCA's elements clause, the Court's reasoning in that regard is certainly debatable. Both Judges Martin and Baldock refused to join Judge Hull's reasoning adhering to *Dowd* in *Seabrooks*. Both the magistrate judge and district court below conceded that under current law, the reasoning in *Dowd* is wrong. In *Griffin*, a different magistrate judge recommended granting a COA on the very issue raised herein, precisely because of the doubts Judge Martin had expressed in *Seabrooks* regarding *Dowd*'s "continuing viability." And the very same district court judge granted Griffin a COA on that basis.

Beyond the impossibility of reconciling the "mode of analysis" in *Dowd* with that thereafter mandated by the Supreme Court in *Curtis Johnson*, *Moncrieffe*, *Descamps*, and *Mathis*, even the bare holding of *Dowd* (followed in *Fritts*, and by the court below) that a Florida "armed robbery" conviction under Fla. Stat. § 812.13(2) is "undeniably" a "violent felony" within the ACCA's elements clause,

is demonstrably "debatable by reasonable jurists." For indeed, at least two other circuits have reasoned differently and reached directly conflicting results on similar issues.

Although this Court has repeatedly declined to consider the Florida Supreme Court's definitive decision in *State v. Baker*, 452 So.2d 927 (Fla. 1984), which confirms that the term "carrying" in Fla. Stat. § 812.13(2) simply requires that the offender possess a weapon – not that the victim see it, be threatened with it, or even know of its existence, *see id.* at 929 – the Ninth and D.C. Circuit have both found the distinction between "possessing" and "using" a weapon dispositive of whether an armed robbery conviction qualifies as a "violent felony" within the elements clause. *See United States v. Parnell*, 818 F.3d 974, 978-981 (9th Cir. 2016) (holding, after considering Massachusetts caselaw, that a conviction under the Massachusetts armed robbery statute was not a violent felony because the underlying offense permitted conviction upon the use of "any force, however slight," and 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, which "does not bring Massachusetts' armed robbery statute within ACCA's force clause"); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016) (reaching the opposite conclusion after reviewing the Maryland armed

robbery statute, since the Maryland statute – unlike the Massachusetts armed robbery statute in *Parnell* – required "the *use* of a dangerous or deadly weapon").

As Seabrooks pointed out in his petition for writ of certiorari, under the Ninth and D.C. Circuits' reasoning, an armed robbery conviction under Fla. Stat. § 812.13(1) and (2) would not have "undeniably" qualified as a "violent felony." To the contrary, both courts would have deferred to the Florida Supreme Court's decision in *Baker*, and held that the mere fact that a weapon was "possessed" is insufficient to bring an otherwise non-qualifying robbery conviction within the ACCA's elements clause. Thus, had Mr. Beverly challenged his sentence in either of these Circuits, these courts would have disregarded *Dowd* as clearly-abrogated and unpersuasive. The logic of this Court's continued adherence to *Dowd* in the face of contrary Florida Supreme Court and U.S. Supreme Court precedent, is demonstrably "debatable" among multiple reasonable jurists in this country at this time. *See also Lee v. United States*, 2016 WL 1464118 (W.D.N.Y. April 12, 2016) (reasoning that Fla. Stat. § 812.13 is an "indivisible" statute; it does not specify against whom or what "force" must be directed; a robbery by "putting in fear" does not necessarily require the use of the *Curtis Johnson* level of violent force; and "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.'").

Due to the conflict on this issue as well, the grant of a COA is warranted here.

5. It is debatable among reasonable jurists whether a *Carachuri-Rosendo* challenge to a drug conviction previously-counted as an ACCA "serious drug offense," is relevant in a post-*Johnson* § 2255 as proof, simply, that a concededly-erroneous "violent felony" determination is demonstrably harmful, not harmless.

The magistrate judge asserted, and the district court found, that Mr. Beverly's challenge to his 1997 possession with intent to sell heroin conviction was time-barred because his § 2255 motion was filed more than 5 years after the Supreme Court decided *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 567 (2010). *Id.* The magistrate judge's reasoning in this regard, and the district court's adoption of it, was debatably wrong for the following reasons.

The Supreme Court has recognized that "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Indeed, in the collateral-review context, federal courts have given the word "claim" its "usual meaning," which is "a set of facts giving rise to a right to a legal remedy." *Bennett v. United States*, 119 F.3d 470, 471–72 (7th Cir. 1997) (Posner, J.). In other words, "it is the underlying events, rather than the legal arguments advanced to obtain relief from those events, that demarcate a

'claim.'" *Brannigan v. United States*, 249 F.3d 584, 588 (7th Cir. 2001) (Easterbrook, J.). As a result, "new legal arguments about the same events do not amount to a new claim." *Id.*; *see Yee*, 503 U.S. at 534–35 (re-affirming this long-standing principle); *id.* at 532 ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below"); *United States v. Madera*, 528 F.3d 852, 855 n. 1 (11th Cir. 2008)(following *Yee*, and citing it for the latter principle).

Under this line of authority, it was entirely proper for Mr. Beverly to show the district court that – even if it found his 1978 robbery conviction was for "armed robbery," and that the latter somehow still qualified as an ACCA predicate under current law – without the burglary and manslaughter predicates which were indisputably eliminated by *Johnson*, he still did ***not*** have three currently-qualifying predicates. Notably, in other cases in this district, the government has candidly conceded and the same magistrate judge has found that a defendant no longer qualifies as an Armed Career Criminal after *Johnson*, if *Johnson* invalidated at least one of his previously-counted "violent felonies," and a previously-counted "serious drug offense" was erroneously counted, and no longer qualifies as such. *See, e.g.*, *Leone v. United States*, Case No. 16-22200-Civ-Leonard (S.D.Fla. June 29, 2016), DE 7 at 3-4 (concession by the government that movant's ACCA sentence should be vacated because his Florida burglary conviction is not a violent

felony, and his "remaining convictions do not qualify as either a 'serious drug offense' or a violent crime;'" in particular, his " New York drug offense does not qualify as a 'serious drug offense' because the maximum term of imprisonment for a fifth degree felony in New York is 7 years"), and DE 11 (R & R recommending that the motion be granted); *Lee v. United States*, No. 15-20854-CIV-Seitz (S.D.Fla. June 29, 2016), DE39:6 (concession by the government – after the movant argued that *Johnson* invalidated at least one of his previously-counted ACCA predicates, and that *Carachuri-Rosendo* had invalidated another – that the movant "would no longer qualify for the ACCA were he sentenced today."). The district court should have so found here.

Here, as in *Leone* and *Lee*, the only "claim" Mr. Beverly raised in his § 2255 motion was that he is no longer an Armed Career Criminal after *Johnson*. The fact that his previously-counted heroin conviction no longer counts as a "serious drug offense" after *Carachuri-Rosendo* is simply another reason why the conceded *Johnson* error in the counting of his burglary and manslaughter convictions was harmful and requires that his sentence be vacated at this time.

Notably, this Court has squarely recognized in several cases since *Johnson* that once a *Johnson* error is shown, for example, because (as here) the ACCA enhancement was expressly predicated upon a Florida burglary conviction, the Court must look to current "guiding precedent, such as *Descamps*, to ensure we

apply the correct meaning of the ACCA's [other] words." *In re Adams*, 825 F.3d 1283, 1285-1286 (11th Cir. 2016) (holding in the context of reviewing a second or successor application, that "Although *Descamps* bears on this case, it is not an independent claim that is itself subject to the gatekeeping requirements"); *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016) (cited as persuasive by the magistrate judge in DE 22:11-12; rejecting suggestion that a district judge deciding a successor § 2255 motion "can ignore decisions from the Supreme Court that were rendered since that time in favor of a foray into a stale record;" in applying the categorical approach "it would make no sense for a district court to have to ignore precedent" such as *Descamps* and *Mathis* "which are the Supreme Court's binding interpretations of that approach"); *see also Mays v. United States*, 817 F.3d 728, 730 (11th Cir. 2016) (because *Descamps* announced an "old" rule, it will always apply in resolving a first § 2255 case timely-filed within one year of *Johnson*).

Similarly, in *United States v. Ladwig*, 192 F. Supp.3d 1153 (E.D. Wash. 2016), another case the magistrate judge found persuasive in the Report and Recommendation, DE 22:12-13, the court rightly explained that in resolving whether the *Johnson* constitutional violation is harmless, *id.* at 1159-1160, it is appropriate to consider "***current case law***." *Id.* (emphasis added). The *Ladwig* court then turned to the government's second argument that "[movant]'s motion seeks, improperly, to utilize the retroactive holding in *Johnson* to obtain collateral

review of his prior convictions under *Descamps*, which is widely regarded as not retroactive." The court acknowledged the "appealing simplicity" of the government's argument, which contends that intervening decisions interpreting the ACCA and the requirements of the categorical approach should not be considered because those decisions are not retroactive. But the *Ladwig* court nonetheless rejected that argument.

The *Ladwig* court easily disposed of whether the movant's claim sounded in *Descamps* or *Johnson* and concluded that it could only rest on *Johnson* because

> [I]t is *Johnson*, and not *Descamps*, that negates Mr. Ladwig's status as an armed career criminal. Without *Johnson*, Mr. Ladwig would have no claim that he was not an armed career criminal, even if *Descamps* were never decided, because Mr. Ladwig's prior convictions would almost certainly have qualified as predicate felonies under the residual clause. Only with *Johnson*'s invalidation of the residual clause could Mr. Ladwig reasonably argue that he is no longer eligible for the ACCA enhancement.

Id. Mr. Beverly's argument was precisely that here.

In rejecting the government's argument in *Ladwig*, the court reasoned that binding Supreme Court precedent, considerations of public policy and equity, and the need for judicial consistency and uniformity of approach and result in similarly-situated cases mandated that current case law must apply during review and consideration of § 2255 claims:

> To begin, there is existing precedent for ***applying current case law*** when determining whether a constitutional error was harmless in the

context of a motion under 28 U.S.C. § 2255. *See Lockhart v. Fretwell*, 506 U.S. 364, 371–72, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (concluding that the prejudice prong of a *Strickland*-based § 2255 claim may be made with the benefit of the law at the time the claim is litigated); *see also Mosby v. Senkowski*, 470 F.3d 515, 524 (2d Cir.2006) ("[T]he Supreme Court has held that current law should be applied retroactively for purposes of determining whether a party has demonstrated prejudiced under *Strickland*'s second prong.").

Moreover, and perhaps more importantly, considerations of public policy weigh strongly in favor of applying current law. Attempting to recreate the legal landscape at the time of a defendant's conviction is difficult enough on its own.

But in the context of *Johnson* claims, the inquiry is made more difficult by the complicated nature of the legal issues involved. This area of the law has accurately been described as a "hopeless tangle," and has stymied law clerks and judges alike in a morass of inconsistent case law.

An inquiry that requires judges to ignore intervening decisions that, to some degree, clear the mire of decisional law seems to beg courts to reach inconsistent results.

Current case law has clarified the requisite analysis and applying that law should provide greater uniformity, helping to ensure that like defendants receive like relief. Indeed, when pressed at oral argument regarding these policy implications, the government acknowledged that its position required judges to ignore decisions that clarified grey areas of the law, precipitating potential inconsistency.

Because there is precedent for doing so, and in consideration of the aforementioned problems raised by applying old law, the Court will apply current case law to determine whether Mr. Ladwig's convictions qualify as predicate felonies without the residual clause.

Id. at *4-5 (citations omitted).

Notably, the Fourth Circuit has reasoned analogously in the recent *Winston* decision, expressly approving this Court's reasoning in *In re Chance* in rejecting the government's "various procedural arguments." 2017 WL 977031 at *3 n. 4 (finding that Winston's claim "relied to a sufficient degree" on *Johnson* to permit review of his claim, even where he simply argued that his convictions did not qualify as ACCA violent felonies within the elements clause).

The reasoning in these cases would allow a movant, like Mr. Beverly, who brings a § 2255 residual clause challenge under *Johnson* to argue as part of the prejudice analysis that another previously-counted conviction, fails to qualify as an ACCA predicate under other clauses of the ACCA under current law. Applying these principles and current Supreme Court law here, it is at the very least arguable and therefore debatable that the district court should have considered current Supreme Court law, which includes *Carachuri-Rosendo*, in determining whether Mr. Beverly remained an Armed Career Criminal after *Johnson*.

CONCLUSION

For all of the foregoing reasons, Mr. Beverly respectfully requests that this Court grant a COA to permit further review of his ACCA enhancement.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this pleading complies with the type-volume limitation and typeface requirements of Fed. R. App. P. 32(a)(7)(B) and 11th Cir. R. 22-2, because it contains 12,986 words, excluding the parts of the pleading exempted by Fed. R. App. P. 32(f).

This pleading also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman font.

s/Brenda G. Bryn
Brenda G. Bryn
Attorney for Appellant Nathaniel Beverly
Dated: April 10, 2017

CERTIFICATE OF SERVICE

I certify that on this 10th day of April 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and it is being served this day via CM/ECF on Emily M. Smachetti, Chief, Appellate Division, U.S. Attorneys' Office, 99 N.E. 4th Street, Miami, FL 33132-2111.

s/Brenda G. Bryn
Brenda G. Bryn

A-8

No. 17-11527

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATHANIEL BEVERLY
Petitioner/Appellant,

v.

UNITED STATES OF AMERICA,
Respondent/Appellee.

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

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PENDING MOTION FOR CERTIFICATE OF APPEALABILITY BY APPELLANT NATHANIEL BEVERLY

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THIS CASE IS ENTITLED TO PREFERENCE
(28 U.S.C. §2255 APPEAL)

CERTFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Nathaniel Beverly v. United States of America
Case No. 17-11527

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Acosta, Diana Margarita, Assistant United States Attorney

Beverly, Nathaniel, Petitioner/Appellant

Birch, Peter Vincent, Assistant Federal Public Defender

Bryn, Brenda, Assistant Federal Public Defender

Caruso, Michael, Federal Public Defender

Hurley, Hon. Daniel T.K., United States District Judge

Ferrer, Wifredo A., Former United States Attorney

Greenberg, Benjamin G., Acting United States Attorney

Hopkins, Hon. James M., United States Magistrate Judge

Hurley, Hon. Daniel T.K., United States District Judge

Lynch, Hon. Frank J. United States Magistrate Judge

Smachetti, Emily M., Assistant United States Attorney

Vitunac, Hon. Ann E., United States Magistrate Judge

Watts, Leon, Former Assistant Federal Public Defender

White, Hon. Patrick A., United States Magistrate Judge

Zloch, William T., Assistant United States Attorney

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PENDING MOTION FOR CERTIFICATE OF APPEALABILITY

Nathaniel Beverly, through undersigned counsel, respectfully advises the Court of the Ninth Circuit's recent decision in *United States v. Geozos*, ___ F.3d ___, 2017 WL 3712155 (9th Cir. Aug. 29, 2017), which confirms that reasonable jurists could debate the district court's determination that his Florida armed robbery conviction continues to qualify him as an Armed Career Criminal. In *Geozos*, notably, the Ninth Circuit considered both robbery and armed robbery convictions under the *exact* statute here at issue, Fla. Stat. § 812.13(1). And the Ninth Circuit held that neither Florida robbery nor armed robbery categorically qualified as an ACCA violent felony. Based upon the direct circuit split that now exists between this Circuit and the Ninth as to whether the precise Florida conviction here at issue qualifies as an ACCA "violent felony," a COA should issue in this case.

According to the Ninth Circuit, a Florida unarmed robbery conviction does not qualify as an ACCA violent felony since Fla. Stat. § 812.13(1) – both by its text, and as interpreted by the Florida courts – does *not* require the use of "violent force." *Id.* at *7. In reviewing the text of § 812.13(1), the Ninth Circuit found significant that the terms "force" and "violence" were used separately, which suggested "that not all 'force' that is covered by the statute is 'violent force.'" *Id.* That, in and of itself, led the Ninth Circuit to "doubt whether a conviction for

violating section 812.13 qualifies as a conviction for a 'violent felony." *Id.* But ultimately, it was Florida caselaw that made it clear to the Ninth Circuit that "one can violate section 812.13 without using violent force." *Id.* The Ninth Circuit acknowledged that according to *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997), a conviction under Fla. Stat. § 812.13(1) requires that there "be resistance by the victim that is overcome by the physical force of the offender." *Id.* at 886. However, the Ninth Circuit pointed out, Florida caselaw both prior and subsequent to *Robinson* confirmed that "the amount of resistance can be minimal." *Id.*

For instance, the Ninth Circuit noted with significance, in *Mims v. State*, 342 So.2d 883, 886 (Fla. 3rd DCA 1997), a Florida appellate court had held that "Although purse snatching is not robbery if no more force or violence is used than necessary to physically remove the property from a person who does not resist, if the victim does resist *in any degree* and this resistance is overcome by the force of the perpetrator, the crime of robbery is complete." *Geozos*, 2017 WL 3712155 at *7 & n. 9 (adding the emphasis to the words "*in any degree*" in *Mims* and noting that *Mims* was "cited with approval in *Robinson*").

After *Robinson*, the Ninth Circuit also found significant, in *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011) another Florida appellate court had held that a robbery conviction "may be based on a defendant's act of engaging in a tug-of-war over the victim's purse." And in the Ninth Circuit's view, such an

act "does not involve the use of violent force within the meaning of the ACCA;" rather, it involves "something less than violent force within the meaning of *Johnson I*." *Geozos*, 2017 WL 3712155 at *7 (citing *United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017)).

The Ninth Circuit acknowledged that its conclusion that a Florida robbery offense was not categorically an ACCA "violent felony" put it "at odds" with this Court, which held just the opposite in *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), and *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) (following *Lockley*). However, the Ninth Circuit found *Lockley* and *Fritts* unpersuasive since they overlooked the crucial point – confirmed by Florida caselaw (and emphasized by Mr. Beverly throughout these proceedings, *see, e.g.*, Motion for COA at 29-35) – that violent force is unnecessary to "overcome resistance" in Florida. The Ninth Circuit explained:

> [W]e think the Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force. *See Montsdoca v. State*, 84 Fla. 82, 93 So. 157, 159 (Fla. 1922) ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.")

Geozos, 2017 WL 3712155 at *8.

Given the Ninth Circuit's criticism of this Court in *Geozos*, it is indisputable that reasonable jurists not only can debate – but have expressly debated – the

correctness of the conclusion in *Lockley* and *Fritts* that a Florida *unarmed* robbery conviction categorically qualifies as an ACCA violent felony. The Ninth Circuit is correct that neither the *Lockley* panel nor the *Fritts* panel considered how the Florida courts interpret the "overcoming resistance" element in Fla. Stat. § 812.13(1). Moreover, the Ninth Circuit in *Geozos* has also expressly challenged the magistrate judge's additional conclusion, adopted "in full" by the district court again without consideration of Florida caselaw, that a Florida *armed* robbery conviction is "undeniably" a "violent felony." The Ninth Circuit correctly found in *Geozos* that, as Mr. Beverly has consistently argued, *see* Motion for COA at 44-47, Florida law is clear that an offender may be sentenced for "armed robbery" under Fla. Stat. § 812.13(2)(a) for merely carrying a concealed firearm or other deadly weapon during the course of a robbery, even if it is never displayed to the victim and the victim remains unware of its presence. *Geozos*, 2017 WL 3712155 at *7 (citing *State v. Baker*, 452 So.2d 927, 929 (Fla. 1984)). As such, reasonable jurists not only would debate – but have now debated – whether the "armed nature" of a Florida robbery conviction is itself sufficient to qualify the offense as an ACCA violent felony. *See Geozos*, 2017 WL 3712155 at *7 (reaffirming that as the Ninth Circuit previously recognized in *United States v. Parnell*, 818 F.3d 974, 980-81 (9th Cir. 2016), "the mere presence of a firearm or other deadly weapon that is

never revealed to a robbery victim does not constitute the 'use, attempted use, or threatened use of physical force against the victim.")

CONCLUSION

The Ninth Circuit's decision in *Geozos* confirms that reasonable jurists can debate the correctness of the decision below that Mr. Beverly remained an Armed Career Criminal even without the ACCA's residual clause. Due to the direct circuit split that now exists as to whether either a Florida armed or unarmed robbery has "violent force" "as an element," and the fact that Mr. Beverly would most definitely *not* qualify as an Armed Career Criminal in the Ninth Circuit, he has met the *Slack* standard for the granting of a COA and should be allowed to seek further review of his ACCA sentence.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this pleading complies with the type-volume limitation and typeface requirements of Fed. R. App. P. 32(a)(7)(B) and 11th Cir. R. 22-2, because it contains 1,152 words, excluding the parts of the pleading exempted by Fed. R. App. P. 32(f).

This pleading also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman font.

s/Brenda G. Bryn
Brenda G. Bryn
Attorney for Appellant Nathaniel Beverly
Dated: September 1, 2017

CERTIFICATE OF SERVICE

I certify that on this 1st day of September 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and it is being served this day via CM/ECF on Emily M. Smachetti, Chief, Appellate Division, U.S. Attorneys' Office, 99 N.E. 4th Street, Miami, FL 33132-2111.

s/Brenda G. Bryn
Brenda G. Bryn

2017 WL 3712155
Only the Westlaw citation is currently available.
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
David P. **GEOZOS**, Defendant-Appellant.

No. 17-35018
|
Argued and Submitted August 15, 2017
Anchorage, Alaska
|
Filed August 29, 2017

Appeal from the United States District Court for the District of Alaska, Ralph R. Beistline, District Judge, Presiding, D.C. Nos. 3:15-cv-00227-RRB, 3:06-cr-00082-RRB-1

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Before: Susan P. Graber, Richard R. Clifton, and Milan D. Smith, Jr., Circuit Judges.

OPINION

GRABER, Circuit Judge:

***1** Defendant David P. Geozos appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. When Defendant was sentenced in 2007, the district court determined that he was an armed career criminal under the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. 924(e), and sentenced him to 15 years in prison—the mandatory minimum sentence under ACCA. The court found that Defendant had five convictions that qualified as "violent felonies" under ACCA, but the court did not specify whether it found each of those convictions to qualify under the "residual clause" of the statute, the "force clause," or both.[1]

[1] ACCA defines a "violent felony" as follows:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B). The first part of this definition (§ 924(e)(2)(B)(i)) is called the "force clause." United States v. Strickland, 860 F.3d 1224, 1226 (9th Cir. 2017). The second part (§ 924(e)(2)(B)(ii)) has two clauses: the "enumerated felonies clause," which lists certain generic crimes that qualify as violent felonies; and the "residual clause," which provides that any felony that "involves conduct that presents a serious potential risk of physical injury to another" is a violent felony. Id.

In Johnson v. United States (Johnson II), —— U.S. ——, 135 S.Ct. 2551, 2563, 192 L.Ed.2d 569 (2015), the Supreme Court held that "imposing an increased sentence under the residual clause of [ACCA] violates the Constitution's guarantee of due process." The Court made that rule of constitutional law retroactively applicable to cases on collateral review in Welch v. United States, —— U.S. ——, 136 S.Ct. 1257, 1268, 194 L.Ed.2d 387 (2016). Before Johnson II and Welch were decided, Defendant unsuccessfully moved to vacate, set aside, or correct his sentence under § 2255. Defendant now brings a second § 2255 motion. He argues that his new motion relies on the rule announced in Johnson II and that, therefore, he may bring his motion under one of the narrow exceptions to the bar on second or successive § 2255 motions. He also argues that any reliance by the sentencing court on the now-invalidated residual clause of ACCA is not harmless, because at least three of his convictions do not qualify as "violent felonies" under any of the remaining valid ACCA clauses. We agree with Defendant on both points, and we therefore reverse.

FACTUAL AND PROCEDURAL HISTORY

In October 2006, Defendant was indicted on one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and one count of felony possession of cocaine. In January 2007, Defendant pleaded guilty to both counts, and the Government agreed that it would dismiss the drug charge at sentencing.

***2** The Presentence Investigation Report ("PSR"), prepared in advance of Defendant's sentencing hearing, stated that Defendant was "subject to an enhanced sentence" for the firearms charge under ACCA because of his criminal history. ACCA provides that "a person who violates [§] 922(g) ... and has three previous convictions by any court ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another, ... shall be fined under this title and imprisoned not less than fifteen years." 18 U.S.C. § 924(e)(1). The PSR did not specify which of Defendant's prior convictions qualified as "violent felonies" or "serious drug offenses" for ACCA purposes. There were six convictions listed in the PSR that could conceivably have qualified: (1) a 2001 conviction for assault in the third degree in Alaska, (2) a 1992 conviction for possession of cocaine in Florida, (3) a 1992 conviction for burglary in Florida, (4) a 1981 conviction for armed robbery in Florida, (5) a 1981 conviction for robbery and for using a firearm in the commission of a felony in Florida,[2] and (6) another 1981 conviction for armed robbery in Florida.

[2] Technically, these were two separate convictions, but only one may be counted for ACCA purposes because the convictions were for crimes that were "part of one criminal episode." United States v. McElyea, 158 F.3d 1016, 1021 (9th Cir. 1998). For simplicity's sake, we will refer to the two armed robbery convictions, the robbery conviction, and the conviction for using a firearm in the commission of a felony as the "Florida robbery convictions."

The sentencing court found that Defendant qualified as an armed career criminal, but it did not specify which of the prior convictions served as the three predicate convictions. It is clear from the record that the court did not rely on the conviction for possession of cocaine,[3] and it appears that the court found that all five of the other convictions qualified as convictions for "violent felonies." But the court did not say whether it found any or all of those convictions to qualify as a conviction for a violent felony under the residual clause of ACCA. On direct appeal, we affirmed Defendant's sentence, holding that the three Florida robbery convictions and the Alaska assault conviction qualified as convictions for violent felonies under ACCA and declining to decide whether the Florida burglary conviction qualified. United States v. Geozos, 286 Fed.Appx. 517, 518 n.1 (9th Cir. 2008) (unpublished).

[3] The Government concedes expressly that the conviction for possession was not a conviction for a "serious drug offense."

In late 2009, Defendant filed a motion to vacate his sentence under § 2255, claiming that his lawyers had provided ineffective assistance at sentencing. United States v. Geozos, No. 3:06-cr-082-RRB-JDR, 2010 WL 4942571, at *1 (D. Alaska Nov. 24, 2010). The district court denied Defendant's motion in early 2011.

In the meantime, the Supreme Court decided Johnson v. United States (Johnson I), 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), a case involving the interpretation of the "force clause" of ACCA. In Johnson I, the Supreme Court held that "the phrase 'physical force' " in the force clause "means violent force—that is, force capable of causing physical pain or injury to another person." Id. at 140, 130 S.Ct. 1265.

Five years later, the Supreme Court invalidated the residual clause of ACCA in Johnson II, 135 S.Ct. at 2563. Less than one year after that, in Welch, 136 S.Ct. at 1268, the Court held that the rule of Johnson II applies retroactively to cases on collateral review.

Following the Court's decision in Johnson II, Defendant sought leave of this court to file a second § 2255 motion in district court. After Welch was decided, we granted Defendant leave, and he filed his motion. The district court denied the motion. We granted a certificate of appealability, and he now brings this timely appeal.

STANDARD OF REVIEW

We review de novo a district court's decision to deny a § 2255 motion. United States v. Reves, 774 F.3d 562, 564 (9th Cir. 2014).

DISCUSSION

This case presents a question that has cropped up somewhat frequently[4] in the wake of Johnson II and Welch: When a defendant was sentenced as an armed

career criminal, but the sentencing court did not specify under which clause(s) it found the predicate "violent felony" convictions to qualify, how can the defendant show that a new claim "relies on" Johnson II, a decision that invalidated only the residual clause? We address that question first. Because we hold that Defendant's claim "relies on" Johnson II, we then address the merits of the claim and consider whether the Johnson II error at Defendant's sentencing was harmless.

[4] The question has cropped up somewhat frequently because "[n]othing in the law requires a [court] to specify which clause of [the statute]—residual or elements clause—it relied upon in imposing a sentence." In re Chance, 831 F.3d 1335, 1340 (11th Cir. 2016). Thus, at many pre-Johnson II sentencings, the court did not specify under which clause it found the ACCA predicate offenses to qualify.

A. What It Means for a Claim to "Rely On" *Johnson II*

***3** The threshold question is whether Defendant's claim relies on the rule announced in Johnson II such that he may bring that claim in a second or successive § 2255 motion. See United States v. Buenrostro, 638 F.3d 720, 721 (9th Cir. 2011) (per curiam) ("[T]he Anti-Terrorism and Effective Death Penalty Act of 1996 precludes [a movant] from filing a 'second or successive' § 2255 motion unless he can show either that he relies on a new rule of constitutional law, § 2255(h)(2), or 'that no reasonable factfinder would have found [him] guilty of the offense,' § 2255(h)(1)." (alteration in original)).[5] We hold that his claim does rely on Johnson II.

[5] Though we authorized Defendant to file a second or successive motion, that authorization required only a prima facie demonstration that Defendant's claim "relies on" Johnson II, see 28 U.S.C. § 2244(b)(3)(C); our authorization did not compel the district court to find that Defendant's claim actually relies on Johnson II, nor does it bind us now. See Bible v. Schriro, 651 F.3d 1060, 1064 n.1 (9th Cir. 2011) (per curiam) ("A prima facie showing is a sufficient showing of possible merit to warrant a fuller exploration by the district court, and we will grant an application for [a second or successive] petition if it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition." (internal quotation marks omitted)); see also United States v. Villa-Gonzalez, 208 F.3d 1160, 1165 (9th Cir. 2000) (per curiam) ("[A] district court must conduct a thorough review of all allegations and evidence presented by the prisoner to determine whether the motion meets the statutory requirements for the filing of a second or successive motion.").

The relevant exception to the bar on second or successive § 2255 motions requires a movant to show that the claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2) (emphasis added). A claim necessarily "relies on" a rule of constitutional law if the claim is that the movant was sentenced in violation of that constitutional rule. So, to show that a claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," it is sufficient for a § 2255 movant to show that (1) he or she was sentenced in violation of the Constitution and that (2) the particular constitutional rule that was violated is "new," was "previously unavailable," and was "made retroactive to cases on collateral review by the Supreme Court." Here, there is no doubt that the rule in Johnson II meets the latter requirements; the only question is whether Defendant also can show that he was sentenced in violation of the Constitution.

To answer that question, we begin by noting that a court's determination that a defendant qualifies for an ACCA enhancement is a finding. Shepard v. United States, 544 U.S. 13, 25, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). As with any finding that is necessary for a conviction—or a sentencing enhancement—it is made (or not made) based on the evidence introduced to the relevant factfinder, and it is generally improper to supplement that evidence on appeal. See Reina-Rodriguez v. United States, 655 F.3d 1182, 1193 (9th Cir. 2011) ("[I]t is not within our province to sentence the defendant based on considerations outside the sentencing decision. Appellate courts are not sentencing courts."); see also United States v. Petite, 703 F.3d 1290, 1292 n.2 (11th Cir. 2013) ("The government cannot offer for the first time on appeal a new predicate conviction in support of an enhanced ACCA sentence."), abrogated on other grounds by Johnson II. And, as with any other finding, a finding that a defendant qualifies for an ACCA enhancement may be deemed to rest on a valid or an invalid legal theory.

***4** Had the sentencing court stated that the past convictions at issue were convictions for "violent felonies" only under the residual clause, it would have been, in effect, specifying the legal theory on which its ACCA determination rested. We would know that Defendant's sentence was imposed under an invalid—indeed, unconstitutional—legal theory, and that Defendant was, therefore, sentenced in violation of the Constitution. As the Government concedes, a defendant

who shows that a sentencing court relied solely on the residual clause in imposing an ACCA enhancement has a claim that "relies on" Johnson II.

Conversely, had the sentencing court specified that a past conviction qualified as a "violent felony" only under the force clause, we would know that the sentence rested on a constitutionally valid legal theory. In that situation, the statute would preclude the filing of a second or successive petition. 28 U.S.C. § 2255(h)(2).

But when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory. Defendant argues that this situation is analogous to that of a defendant who has been convicted, in a general verdict, by a jury that was instructed on two theories of liability, one of which turns out to have been unconstitutional. The rule in such a situation is clear: "[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." Griffin v. United States, 502 U.S. 46, 53, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) (emphasis added). The case usually cited as the origin of that rule is Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), and the rule is sometimes referred to as the "Stromberg principle." United States v. Washington, 861 F.2d 350, 352 (2d Cir. 1988).

We are persuaded that a rule analogous to the Stromberg principle should apply in the sentencing context. It is true that the fact of a prior conviction need not be proved to a jury beyond a reasonable doubt in order for a defendant to be exposed to an enhanced sentence because of that conviction. Apprendi v. New Jersey, 530 U.S. 466, 488–90, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). But it does not follow that, when a judge makes a finding that a defendant qualifies for an enhanced sentence, and that finding may rest on an unconstitutional ground, the finding should be treated any differently than a finding made by a jury for the purpose of conviction. Indeed, treating those findings differently because one involves sentencing and the other involves conviction would be contrary to the principle that any "fact increasing either end of [a sentencing] range produces a new penalty and constitutes an ingredient of the offense." Alleyne v. United States, —— U.S. ——, 133 S.Ct. 2151, 2160, 186 L.Ed.2d 314 (2013). We therefore hold that, when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim "relies on" the constitutional rule announced in Johnson II.[6]

[6] The Fourth Circuit recently came to a similar conclusion, holding that, "when [a defendant's] sentence may have been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in Johnson II, the [defendant] has shown that he 'relies on' a new rule of constitutional law." United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017).

We recognize that there are differences between a jury's finding and the type of finding that a court makes when it rules that a defendant qualifies as an armed career criminal. The latter finding rests largely on legal conclusions—state offense X is categorically a "violent felony," state offense Y is not, etc. For that reason, it may be possible to determine that a sentencing court did not rely on the residual clause—even when the sentencing record alone is unclear—by looking to the relevant background legal environment at the time of sentencing. If, for instance, binding circuit precedent at the time of sentencing was that crime Z qualified as a violent felony under the force clause, then a court's failure to invoke the force clause expressly at sentencing, when there were three predicate convictions for crime Z, would not render unclear the ground on which the court's ACCA determination rested. "Even under the traditional Stromberg analysis, a verdict need not be set aside where it is possible to conclusively determine the jury relied on a valid ground...." United States v. Holly, 488 F.3d 1298, 1306 n.5 (10th Cir. 2007). By analogy, a claim does not "rely on" Johnson II if it is possible to conclude, using both the record before the sentencing court and the relevant background legal environment at the time of sentencing, that the sentencing court's ACCA determination did not rest on the residual clause.

***5** Here, however, we cannot draw such a conclusion. At the time Defendant was sentenced in 2007, neither this court nor the Supreme Court had held that either Florida robbery or armed robbery qualified as a "violent felony." (We focus only on the Florida robbery convictions because, if none of those convictions was a conviction for a "violent felony," then Defendant would not have at least three such convictions and would not qualify for an ACCA enhancement.) We had held (or suggested in dicta) that other states' robbery statutes described "violent felonies" both under the force clause, United States v. Melton, 344 F.3d 1021, 1026 (9th Cir. 2003), and under the residual clause, United States v. McDougherty, 920 F.2d 569, 574 n.5 (9th Cir. 1990). The Eleventh Circuit had decided that Florida robbery qualified under the residual clause, United States v. Wilkerson, 286 F.3d

1324, 1325 (11th Cir. 2002) (per curiam), and that Florida armed robbery qualified under the force clause, United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir. 2006). Other courts had held that various states' robbery statutes described "violent felonies" under one or both clauses. See, e.g., United States v. Tirrell, 120 F.3d 670, 680–81 (7th Cir. 1997) (holding that Michigan unarmed robbery qualified under both clauses). Given that background legal environment and the sentencing record, it is unclear whether the district court relied on the residual clause in determining that the Florida robbery convictions qualified as violent felonies. Accordingly, Defendant's claim "relies on" Johnson II.

B. Merits

The next question is whether the Johnson II error is harmless—in other words, are there three convictions that support an ACCA enhancement under one of the clauses of ACCA that survived Johnson II? If so, then the Johnson II error did not prejudice Defendant, and he is not entitled to relief. United States v. Montalvo, 331 F.3d 1052, 1057–58 (9th Cir. 2003) (per curiam). We need only consider the Florida robbery convictions because, as noted, if those convictions do not count as predicate convictions under ACCA, then the sentencing court's Johnson II error was not harmless.

1. Use of Current Law in Assessing Harmlessness

To decide whether Defendant's Florida robbery convictions qualify him as an armed career criminal, we look to the substantive law concerning the force clause as it currently stands, not the law as it was at the time of sentencing. Critically, this means that we must consider the Supreme Court's interpretation of the force clause in Johnson I. We do so for two reasons.

First, in general, judicial interpretations of substantive statutes receive retroactive effect. See, e.g., Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); see also Rivers v. Roadway Express, Inc., 511 U.S. 298, 312–13, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). Although the Supreme Court has sometimes been careful to limit that principle to cases on direct review, it has also applied the principle in collateral challenges. See, e.g., Bousley v. United States, 523 U.S. 614, 618–21, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (applying a judicial construction of a statute that post-dated the habeas petitioner's conviction to determine whether the petitioner had been "misinformed ... as to the elements of [the] offense" before pleading guilty); see also Schriro v. Summerlin, 542 U.S. 348, 351–52, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (noting that "[n]ew substantive rules generally apply retroactively," even "to convictions that are already final").

Second, if this were Defendant's first § 2255 motion, there is no doubt that we would consider the current law to assess harmlessness. In Reina-Rodriguez, we held that "a non-constitutional, substantive [judicial] decision concerning the reach of" ACCA that post-dated the time when the movant's conviction became final applied in an initial § 2255 proceeding. 655 F.3d at 1187–90. In reaching that conclusion, we rejected the Government's argument that the relevant decision could not apply "retroactively." "New substantive rules generally apply retroactively," including "decisions that narrow the scope of a criminal statute by interpreting its terms." Id. at 1188–89 (quoting Summerlin, 542 U.S. at 351, 124 S.Ct. 2519). The reason to apply substantive rules retroactively to cases on collateral review is that "decisions that narrow the scope of a criminal statute by interpreting its terms" necessarily raise the risk that people who have been convicted of violating that statute—or whose punishment has been enhanced for violating that statute—"stand[ ] convicted of an act that the law does not make criminal or face[ ] a punishment that the law cannot impose upon [them]." Summerlin, 542 U.S. at 352, 124 S.Ct. 2519 (internal quotation marks omitted).

*6 That reason applies with equal force to a second or successive petition or motion. The habeas petitioner filing a second or successive petition or motion who claims to have been convicted of a crime that was not a crime is at no less risk of being erroneously imprisoned than a habeas petitioner filing a first petition or motion. Accordingly, once the bar to considering a second or successive petition or motion has been overcome, the analysis of the merits is the same as if the petitioner were bringing a first petition or motion. Indeed, the Tenth Circuit has noted that, "if a court hears a second-or-successive § 2254 petition on its merits, the standards are no different than hearing a first § 2254 petition on its merits." Case v. Hatch, 731 F.3d 1015, 1038 n.12 (10th Cir. 2013).

2. Categorical Approach

We must determine whether robbery, armed robbery, and use of a firearm in the commission of a felony in violation of Florida law qualify as "violent felonies" under the force clause of ACCA. To do so, we employ the categorical approach.[7] E.g., United States v. Parnell, 818 F.3d 974, 978 (9th Cir. 2016). We ask whether each statute "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)—that is, whether the conduct proscribed by the statute necessarily involves "the use, attempted use, or threatened use of physical force against the person of another." In answering that question, "we look at both the text of the state statute and the state courts' interpretations of the statute's terms." United States v. Strickland, 860 F.3d 1224, 1226 (9th Cir. 2017) (internal quotation marks omitted). "State cases that examine the outer contours of the conduct criminalized by the state statute are particularly important because 'we must presume that the conviction rested upon nothing more than the least of the acts criminalized.' " Id. at 1226–27 (brackets omitted) (quoting Moncrieffe v. Holder, 569 U.S. 184, 133 S.Ct. 1678, 1684, 185 L.Ed.2d 727 (2013)).

7 The Government does not argue that any of Defendant's Florida robbery convictions might qualify as a violent felony under the modified categorical approach. See Mathis v. United States, —— U.S. ——, 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016) (describing the modified categorical approach); Mays v. Clark, 807 F.3d 968, 980 (9th Cir. 2015) (stating that, "[o]n collateral review, relief is appropriate if the prosecution cannot demonstrate harmlessness" (internal quotation marks omitted)).

"[I]n the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." Johnson I, 559 U.S. at 140, 130 S.Ct. 1265. "Even by itself, the word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force. When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer." Id. (citations omitted).

In January 1981, Defendant was convicted of armed robbery in violation of section 812.13(2)(a) of the Florida Statutes. In June of that same year, he was convicted of robbery in violation of section 812.13 of the Florida Statutes and of using a firearm in the commission of a felony in violation of section 790.07(2). And, in September 1981, Defendant was again convicted of armed robbery in violation of section 812.13(2)(a).

At the time of his convictions, section 812.13 defined robbery as "the taking of money or other property which may be the subject of larceny from the person or custody of another, by force, violence, assault, or putting in fear." Brown v. State, 397 So.2d 1153, 1154 (Fla. Dist. Ct. App. 1981) (emphasis omitted) (quoting Fla. Stat. § 812.13(1) (1979)). To convict a person under section 812.13(2)(a) at that time, the state was required to prove that, "in the course of committing the robbery," the person "carried a firearm or other deadly weapon." Fla. Stat. § 812.13(2)(a) (1981). And to convict a person under section 790.07(2), the state was required to prove that the person, "while committing or attempting to commit any felony or while under indictment[,] display[ed], use[d], threaten[ed], or attempt[ed] to use any firearm or carrie[d] a concealed firearm." Id. § 790.07(2) (1981).[8]

8 We refer to the statutes as they existed at the times of conviction because it is the "version of state law that the defendant was actually convicted of violating" that is relevant to the categorical analysis. McNeill v. United States, 563 U.S. 816, 821–22, 131 S.Ct. 2218, 180 L.Ed.2d 35 (2011). The parties disagree as to whether post-conviction judicial interpretations of state statutes should be consulted when determining the content of state law at the time of conviction. McNeill does not necessarily answer that question. See United States v. Faust, No. 14-2292, —— F.3d ——, ——, 2017 WL 3045957, at * 2 (1st Cir. July 19, 2017) (order) (Lynch, J., dissenting from denial of panel reh'g) ("It is far from clear whether McNeill should govern the analysis in a case ... in which the text of the ... statute remains unchanged and only judicial interpretations of that statute have developed over time."); see also United States v. Seabrooks, 839 F.3d 1326, 1351 (11th Cir. 2016) (Martin, J., concurring in the judgment) (arguing that post-conviction judicial decisions clarifying or refining the scope of a statute should not be considered when conducting the categorical analysis), cert. denied, —— U.S. ——, 137 S.Ct. 2265, —— L.Ed.2d —— (2017). We need not resolve that uncertainty. Although it is true that the Florida Supreme Court arguably narrowed the scope of the conduct proscribed by the Florida robbery statute in Robinson v. State, 692 So.2d 883 (Fla. 1997), see Seabrooks, 839 F.3d at 1343–44, the statute as construed post-Robinson is still too broad to qualify as a "violent felony" under the force clause. Accordingly, we look to Robinson and decisions following Robinson in our analysis, because doing so does not change the result.

*7 As an initial matter, the "armed" nature of each of Defendant's convictions does not make the conviction one for a violent felony. A person could be convicted of

violating section 812.13(2)(a) for merely carrying a firearm or other deadly weapon during the course of a robbery. Accordingly, it would have been possible for someone to be convicted of violating the statute for carrying a firearm during a robbery even if that firearm was not displayed and the victim of the robbery was unaware of its presence. State v. Baker, 452 So.2d 927, 929 (Fla. 1984). Similarly, Defendant could have been convicted of violating section 790.07(2) for simply carrying a concealed firearm while committing a robbery. The mere presence of a firearm or other deadly weapon that is never revealed to a robbery victim does not constitute the "use, attempted use, or threatened use of physical force" against the victim. See Parnell, 818 F.3d at 980–81 ("The mere fact an individual is armed, however, does not mean he or she has used the weapon, or threatened to use it, in any way.").

The crucial question, therefore, is whether robbery as defined in section 812.13(1) "has as an element the use, attempted use, or threatened use of physical force against the person of another." The text of the statute itself, together with the relevant Florida caselaw, shows that the answer is "no."

Section 812.13(1) uses the terms "force" and "violence" separately, which suggests that not all "force" that is covered by the statute is "violent force." But only violent force—that is, "strong physical force," Johnson I, 559 U.S. at 140, 130 S.Ct. 1265 (emphasis added)—qualifies under the force clause of ACCA. Before even turning to the caselaw, then, there is reason to doubt whether a conviction for violating section 812.13 qualifies as a conviction for a "violent felony."

The Florida caselaw makes it clear that one can violate section 812.13 without using violent force. "[I]n 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. Rather, there must be resistance by the victim that is overcome by the physical force of the offender." Robinson v. State, 692 So.2d 883, 886 (Fla. 1997). Crucially, the amount of resistance can be minimal. See Mims v. State, 342 So.2d 116, 117 (Fla. Dist. Ct. App. 1977) (per curiam) ("Although purse snatching is not robbery if no more force or violence is used than necessary to physically remove the property from a person who does not resist, if the victim does resist in any degree and this resistance is overcome by the physical force of the perpetrator, the crime of robbery is complete." (emphasis added)).[9] Under Florida law, then, a person who engages in a non-violent tug-of-war with a victim over the victim's purse has committed robbery. See Benitez-Saldana v. State, 67 So.3d 320, 323 (Fla. Dist. Ct. App. 2011) ("[A] conviction for robbery may be based on a defendant's act of engaging in a tug-of-war over the victim's purse."). According to our precedent, such an act does not involve the use of violent force within the meaning of ACCA. See Strickland, 860 F.3d at 1227 (citing an Oregon case in which "the victim and the thief had a tug-of-war over [a] purse" as an example of a case involving something less than violent force within the meaning of Johnson I).

9 Mims was cited with approval in Robinson, 692 So.2d at 886.

The Florida robbery statute is not as broad as the robbery statute that we considered in Parnell, which proscribed the taking of property from a victim when the victim did not resist at all, provided that the victim was aware of the force. See 818 F.3d at 979 ("The offense need not involve resistance by the victim."). But, like the statute at issue in Parnell, the Florida robbery statute proscribes the taking of property even when the force used to take that property is minimal. See id. at 979–80 ("Because the degree of force is immaterial, any force, however slight, will satisfy [the statute] so long as the victim is aware of it. Such force is insufficient under Johnson [I]." (citations and internal quotation marks omitted)). In short, the Florida statute requires that the victim resist the force and the statute at issue in Parnell required that the victim be aware of the force, but neither statute requires that the force used be violent force.

***8** We hold that neither robbery, armed robbery, nor use of a firearm in the commission of a felony under Florida law is categorically a "violent felony." We recognize that this holding puts us at odds with the Eleventh Circuit, which has held, post-Johnson I, that both Florida robbery and (necessarily) armed robbery are "violent felonies" under the force clause. See United States v. Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011) (robbery); see also United States v. Fritts, 841 F.3d 937, 942 (11th Cir. 2016) ("[W]e hold here that under Lockley ... a Florida armed robbery conviction under § 812.13(a) [sic] categorically qualifies as a violent felony under the ACCA's elements clause."), cert. denied, ——— U.S. ———, 137 S.Ct. 2264, ——— L.Ed.2d ——— (2017). But we are bound by our own precedent—including Parnell and Strickland—which may differ from the Eleventh Circuit's interpretation. Moreover, we think that the Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force. See Montsdoca v. State, 84 Fla.

82, 93 So. 157, 159 (1922) ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.").

In summary, none of the Florida robbery convictions qualifies as a "violent felony" under the force clause, so the Johnson II error at Defendant's sentencing was not harmless. Accordingly, Defendant is entitled to relief.

We reverse the district court's order denying Defendant's § 2255 motion and remand with instructions to vacate Defendant's sentence. Because Defendant has already been in prison longer than the statutory maximum sentence for a non-ACCA-enhanced conviction under 18 U.S.C. § 922(g)(1), see id. § 924(a)(2), the district court shall direct that Defendant be released from custody immediately. The mandate shall issue forthwith.

REVERSED.

All Citations

--- F.3d ----, 2017 WL 3712155

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