

No.

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX

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APPENDIX A

Indictment

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

v.

INDICTMENT

3:02cr20 RV

SHAUN P. THOMAS,
MARCO D. DUNCAN,
WILLIE J. BERRY,
WILLIAM S. MULLIN,
SAMENIA PALMER,
TERRENCE B. ROBERTS,
CARLOS S. DAILEY
and
ROBERT W. MIMS

THE GRAND JURY CHARGES:

COUNT ONE

That on or about January 1, 2000, up until the date of the return of this indictment, in the
Northern District of Florida and elsewhere, the defendants,

SHAUN P. THOMAS,
MARCO D. DUNCAN,
WILLIE J. BERRY,
WILLIAM S. MULLIN,
SAMENIA PALMER,
TERRENCE B. ROBERTS,
CARLOS S. DAILEY
and
ROBERT W. MIMS,

did knowingly and willfully combine, conspire, confederate, agree and have a tacit understanding

FILED IN OPEN COURT THIS

2/20/02

COURT REPORTER

1

with each other and with other persons to possess with intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine and fifty (50) grams or more of a mixture or substance containing cocaine base, commonly known as "crack cocaine," controlled substances, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)(ii) and (iii).

All in violation of Title 21, United States Code, Section 846.

(CRIMINAL FORFEITURE)

The allegations contained in Count One of this Indictment are hereby re-alleged and incorporated by reference for the purpose of alleging forfeitures pursuant to the provisions of Title 21, United States Code, Section 853.

From their engagement in the violations alleged in Count One of this Indictment, punishable by imprisonment for more than one year, which count is re-alleged and incorporated as if more fully set forth herein, the defendants,

**SHAUN P. THOMAS,
MARCO D. DUNCAN,
WILLIE J. BERRY,
WILLIAM S. MULLIN,
SAMENIA PALMER,
TERRENCE B. ROBERTS,
CARLOS S. DAILEY
and
ROBERT W. MIMS,**

shall forfeit to the United States, pursuant to Title 21, United States Code, Section 853(a)(1) and (2), all of their interests in:

A. Property constituting or derived from any proceeds the defendants obtained directly or indirectly as the result of such violations;

B. Property used in any manner or part to commit or to facilitate the commission of such violations;

If any of the property subject to forfeiture as a result of any act or omission of the defendants:

- A. cannot be located upon the exercise of due diligence;
- B. has been transferred or sold to or deposited with a third person;
- C. has been placed beyond the jurisdiction of this Court;
- D. has been substantially diminished in value; or
- E. has been co-mingled with other property which cannot be subdivided without difficulty;

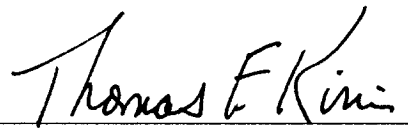
it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendants up to the value of the above forfeitable property.

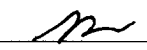
All in violation of Title 21, United States Code, Section 853.

A TRUE BILL:


FOREPERSON

2-19-2002
DATE


THOMAS F. KIRWIN
United States Attorney


STEPHEN P. PREISSER
Assistant United States Attorney

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
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UNITED STATES OF AMERICA,
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APPENDIX B

Notice of Enhancement Information

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

UNITED STATES OF AMERICA

v.

CASE NO.: 3:02cr20-RV

MARCO DUNCAN

NOTICE OF ENHANCEMENT INFORMATION

The United States of America, by and through the undersigned Assistant United States Attorney, files this enhancement information pursuant to Title 21, United States Code, Section 851, and informs the Court that the defendant is subject to the increased penalty provisions under Title 21, United States Code, Sections 846 and 841(b)(1)(A)(ii) and (iii), because of a previous conviction. In support of this information, the United States alleges the following:

1. On or about March 31, 1992, the defendant was convicted of possession of a cocaine base, in the Superior Court of California, County of Santa Clara, case number 154862 (see attached).

2003 JUL 15 PM 4:15

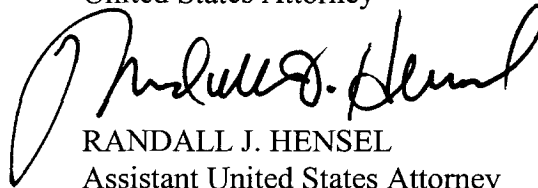
[Signature]

The United States intends to invoke the increased penalty provisions under Title 21, United States Code, Sections 846 and 841(b)(1)(A)(ii) and (iii), against this defendant because of his prior felony conviction.

I HEREBY CERTIFY that the foregoing is true and correct to the best of my knowledge and belief.

Respectfully submitted,

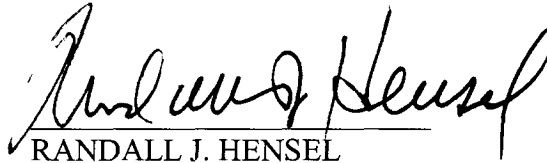
GREGORY R. MILLER
United States Attorney

A handwritten signature in black ink, appearing to read "Randall J. Hensel", is written over the typed name and title of the Assistant United States Attorney.

RANDALL J. HENSEL
Assistant United States Attorney
Northern District of Florida
FL Bar No. 301604
21 East Garden Street, Suite 400
Pensacola, Florida 32501-5603
(850)444-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing notice has been delivered via United States mail to, Dennis Corder, Esq., counsel for the defendant, 103 W. Intendencia Street, Pensacola, FL 32501, and to the United States Probation Office, on this the 16th day of July 2003.

A handwritten signature in black ink, appearing to read "Randall J. Hensel", is written over a horizontal line.

RANDALL J. HENSEL

Assistant United States Attorney

STATE'S
EXHIBIT
18

DO NOT TRANSPORT UNTIL AUGUST 2, 1993

ABSTRACT OF JUDGMENT - PRISON COMMITMENT

FORM DSL 29C

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

COURT I.D.

BRANCH

CASE NUMBER (S)

PEOPLE OF THE STATE OF CALIFORNIA versus

☒ PRESENT

154862

- A

DEFENDANT: MARCO DAMAN DUNCAN

☐ NOT PRESENT

- B

AKA:

- C

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENTAMENDED
ABSTRACT☐

- D

- E

DATE OF HEARING (MO) (DAY) (YR)

7-16-93

DEPT. NO

27 HOJ

JUDGE

JAMES H. CHANG

CLERK

BARBARA SWEENEY

PORTER

COUNSEL FOR PEOPLE

COUNSEL FOR DEFENDANT

PROBATION NO. OR PROBATION OFFICER

JOAN SCHAEFER

D. SOARES

R. BURNS

J. MANGANELLO

DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES (OR ALTERNATE FELONY/MISDEMEANORS):

SENTENCE RELATION

☐ ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT

(NUMBER OF PAGES)

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION			CONVICTED BY			TERM (L./M./D)	CONCURRENT	CONSECUTIVE 1/3 VIOLENT	CONSECUTIVE 1/3 NON-VIO	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCES (CS-REFER #)	64 DAY	PRINCIPAL OF CONSECUTIVE TIME IMPOSED	
					MO	DAY	YEAR	JURY TRIAL	COURT TRIAL	PLEA								YEARS	MONTHS
01	HS	11350(a)	Possession of Cocaine Base	92	03	31	92			X	U							3	0

ENHANCEMENTS charged and found true TIED TO SPECIFIC COUNTS (mainly in the § 12022-series) including WEAPONS, INJURY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, BAIL STATUS, ETC.:

For each count list enhancements horizontally. Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add up time for enhancements on each line and enter line total in right-hand column.

Count	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

ENHANCEMENTS charged and found true FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS (mainly § 667-series) and OTHER.

List all enhancements based on prior convictions or prior prison terms charged and found true. If 2 or more under the same section, repeat it for each enhancement (e.g., if 2 non-violent prior prison terms under § 667.5(b) list § 667.5(b) 2 times). Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add time for these enhancements and enter total in right-hand column. Also enter here any other enhancement not provided for in space 2.

The foregoing instrument is a correct copy of
the original on file in this office
ATTEST:

JUN 23 2000

STEPHEN V. LOVE

Chief Executive Officer
Superior Court of CA County of Santa Clara
in and for the County of Santa Clara

By

DEPUTY

W. JONES



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
COUNTY CLERK'S OFFICE---CRIMINAL DIVISIONSTATE'S
EXHIBIT
19

Case # 154862

JAMES H. CHANG

Clerk BARBARA SWEENEY

JOAN SCHAFER

Deputy HARRY SORENSEN

THE PEOPLE OF THE STATE OF CALIFORNIA

Date 7-16-93

vs.

Present Not Present

Defendant MARCO DAMAN DUNCAN

X

sel

by Public Defender

R. BURNS

X

by District Attorney

D. SOARES

X

file

by Probation Officer

C. PRINCE- sworn and examined

X

preter:

This being the time regularly set for:

___ Probation and Sentencing

___ Trial Setting

___ Probation Violation Hearing

___ Receipt of Doctors Report ()

___ Motion to Continue Trial

___ Motion for SCR Release/Bail
Reduction (Granted---Denied)___ Motion to Vacate Bail Forfeiture and
Exonerate/Reinstate Bond (Granted
---Denied)

___ Identification of Counsel

___ Other (state):

ments: Stipulation recited by the D.A. that the court may consider the testimony in #162064.

Co. recites stipulation that the court was present throughout the trial, heard the testimony
stipulates that the court may review any testimony that occurred at trial. Submitted. The court

s that the defendant was arrested and that the 1st Degree Burglary was committed by him and that

t finds the VOP to be true. Def. is sentenced. Prob. Denied. CDC 3 yrs. aggr. term.

430 (actual) + 215 (4013) = 645 total days. Parole advisements given.

Whereupon, on a motion of the _____, the Court makes its order continuing

matter to _____ at _____ M, for _____ Trial _____ Probation and

___ Probation Violation Hearing ___ Receipt of Doctors Report ()

___ Trial Setting ___ Identification of Counsel ___ Motion to Vacate Forfeiture and

erate/Reinstate Bond ___ Motion for SCR Release/Bail Reduction ___ Motion to Continue

___ Other (state): DEFENDANT NOT TO BE TRANSPORTED UNTIL AUGUST 2, 1993.

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
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On Petition For a Writ of Certiorari to the
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APPENDIX C

Judgment

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

UNITED STATES OF AMERICA

-vs-

Case # 3:02CR20-002 RV

MARCO D. DUNCAN

**Defendant's Attorney (Appointed)
Dennis J. Corder, Esq.
103 W. Intendencia Street
Pensacola, FL 32501**

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty of Count One of the Indictment on July 23, 2003. Accordingly, **IT IS ORDERED** that the defendant is adjudged guilty of such count which involves the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii), and 846	Conspiracy to Distribute and Possess with Intent to Distribute 5 Kilograms or More of Cocaine	February 19, 2002	One

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, including amendments effective subsequent to 1984, and the Sentencing Guidelines promulgated by the U.S. Sentencing Commission.

IT IS FURTHER ORDERED that the defendant shall 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.

Defendant's Soc. Sec. No: 548-25-2782

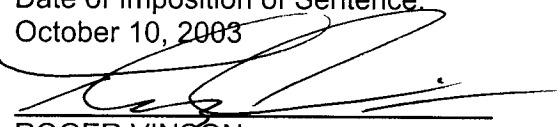
Defendant's Date of Birth: 09/08/1971

Deft's U.S. Marshal No: 37679-048

Defendant's Address:

No known legal address

Date of Imposition of Sentence:
October 10, 2003


**ROGER VINSON
CHIEF U.S. DISTRICT JUDGE**

ENTERED ON DOCKET 10/15/03 BY [Signature]
(Rules 58 & 79 (a) FRCP or 32 (d) (1) & 55 FRCP)

Copies sent to: Hensel, Corder,
Marshal, Probation, Finance

U.S. DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA
October 15, 2003

03 OCT 15 AM 11:22

2
FILED
213

IMPRISONMENT

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

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **10 years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, destructive device, or any other dangerous weapon

For offenses committed on or after September 13, 1994: 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 directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the following standard conditions that have been adopted by this court.

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 10 days prior** to any change in residence or employment, unless otherwise directed by the probation officer;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. 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 **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.
14. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

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

1. As deemed necessary by the probation officer, the defendant shall participate in a program of drug treatment which may include testing to determine if the defendant is using drugs or alcohol to excess.

CRIMINAL MONETARY PENALTIES

All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court. Payments shall be made payable to the Clerk, U.S. District Court, and mailed to that office at 111 North Adams Street, Tallahassee, Florida 32301. Payments may be in the form of cash if paid in person.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. Unless otherwise ordered below, the defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

SPECIAL MONETARY ASSESSMENT

A special monetary assessment of **\$100.00** is imposed.

FINE

No fine is imposed.

RESTITUTION

No restitution is imposed.

CRIMINAL FORFEITURE

The Court ordered criminal forfeiture of \$340,000.00 in U.S. currency.

SCHEDULE OF PAYMENTS**SUMMARY**

<u>Special Monetary Assessment</u>	<u>Fine</u>	<u>Restitution</u>
\$100.00	-0-	-0-

Payments shall be applied in the following order: (1) special monetary assessment; (2) non-federal victim restitution; (3) federal victim restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties.

The \$100.00 monetary assessment shall be paid immediately. Any payments of the monetary assessment made while the defendant is incarcerated shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant must notify the court of any material changes in the defendant's economic circumstances, in accordance with 18 U.S.C. §§ 3572(d), 3664(k) and 3664(n). Upon notice of a change in the defendant's economic condition, the Court may adjust the installment payment schedule as the interests of justice require.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. 3664(f)(3)(A):

Unless the court has expressly ordered otherwise above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the event the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
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UNITED STATES OF AMERICA,
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On Petition For a Writ of Certiorari to the
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APPENDIX D

Sentencing Transcript

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 02-00020 CR-3-RV

MARCO D. DUNCAN

Defendant.

ORIGINAL

SENTENCING

Before the Honorable Roger Vinson, Chief Judge, in the Fifth Floor
Courtroom, United States Courthouse, 1 North Palafox Street, Pensacola,
Florida, on October 10, 2003, commencing at 9:00 a.m., before Terry
Hoffman, Court Reporter.

TERRY HOFFMAN - COURT REPORTER
SEVILLE TOWER
226 SOUTH PALAFOX STREET, SUITE 401
PENSACOLA, FLORIDA 32501
(850) 436-6670

U.S. DISTRICT CT.
NORTHERN DIST. FLA.
PENSACOLA, FLA.

2004 JAN 16 PM 3: 54

DB

FILED

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1 THE COURT: We begin this morning
2 with sentencing in Case No. 02CR20-02 for
3 Marco Duncan. So Mr. Corder, Mr. Hensel,
4 will you come up.

5 Marco D. Duncan, pursuant to the
6 jury's verdict of guilty with respect to
7 the charge in the indictment, I hereby
8 adjudge you guilty as charged. Now,
9 before I impose sentence this morning, I
10 think you know that you will have an
11 opportunity to speak both personally and
12 through your attorney. Before we get to
13 that, let me ask you about some other
14 things, however.

15 First, with respect to the
16 presentence investigation report, have
17 you received a copy of that report as
18 prepared by the probation office and have
19 you carefully read it and gone over it
20 with Mr. Corder?

21 THE DEFENDANT: Yes, I carefully read
22 it, but I didn't go over it with
23 Mr. Corder.

24 THE COURT: Are there any errors in
25 that report?

1 THE DEFENDANT: Yes, I found quite a
2 few.

3 THE COURT: Tell me what they are.

4 THE DEFENDANT: I don't have the
5 paper right here in front of me, but what
6 I remember --

7 THE COURT: Mr. Corder, can you show
8 him a report?

9 MR. CORDER: Your Honor, I have a
10 copy of the PSI, which I, of course, will
11 give to Mr. Duncan, but it doesn't have
12 his notes on it because it's my copy.

13 THE DEFENDANT: Like I had past
14 charges and stuff like that and they
15 weren't accurate. They put in the
16 reports that I had snatched gold chains
17 off a female's neck, which is not true.
18 I never done anything like that before.
19 I mean, just a lot of discrepancies and
20 things that people testified about. I
21 mean, they said that me and Terrence
22 Roberts had been stopped in Oklahoma
23 somewhere, I believe it was Oklahoma, I
24 don't remember, but it wasn't -- no, it
25 was Louisiana -- but it wasn't me and

1 Mr. Roberts, it was Shawn Thomas and
2 Mr. Roberts.

3 THE COURT: Well, let's take them one
4 at a time. With respect to the offense
5 description in the criminal history
6 category, that information was taken from
7 the arrest reports.

8 THE DEFENDANT: I mean, there was no
9 female involved. It also says that I had
10 been arrested, the police had raided my
11 house, and me and McGowan --

12 THE COURT: What paragraph are you
13 looking at?

14 Well, first of all, with respect to
15 the two necklaces, that is a juvenile
16 offense identified in paragraph 59.
17 That's what the police records reflect,
18 and it shows that one of the victims was
19 male and the other one is indicated as
20 female. But that's immaterial as to the
21 gender. It's not a countable offense,
22 anyway, so it makes no differences for
23 our purposes. What's the next one?

24 MR. HENSEL: Judge, based on his
25 description, I think he's talking about

1 what's reflected on page 87, a search of
2 his home when McGowan was present.

3 THE COURT: A patrol search was
4 conducted at the home of Duncan; Duncan
5 taken into custody for possession and
6 intent to sell; door was forced open and
7 Duncan and William McGowan were present.
8 Item C-5, rocks of cocaine, cocaine base,
9 money. Duncan remained in custody until
10 November 1. This day a preliminary
11 examination was held and charges were
12 dismissed.

13 And what do you say is incorrect
14 about that?

15 MS. LANSER: William McGowan was not
16 involved. It was Melvarina, I believe
17 it's spelled in the record as
18 M-e-l-v-a-r-i-n-a, McGowan. It's his
19 niece.

20 THE COURT: Melvarina McGowan?

21 MS. LANSER: Yes.

22 THE COURT: Let me ask Ms. Lanser to
23 check --

24 MS. LANSER: I found the records
25 regarding that arrest. Let me look

1 through it real quick.

2 MR. HENSEL: Judge, while she's doing
3 that, I did file an enhancement
4 information and it's based on the
5 conviction reflected in paragraph 63.
6 I've got no indication of any objection.

7 THE COURT: I'll get to that in just
8 a minute, sir.

9 MR. HENSEL: All right, sir.

10 MS. LANSER: Judge, what I have is
11 the arrest report, and it appears Marco
12 Duncan was the first defendant, and it
13 appears that it is not William, that the
14 defendant is correct. I can provide this
15 document.

16 THE COURT: I'll make that
17 correction.

18 MS. LANSER: It was Melvarina,
19 M-e-l-v-a-r-i-n-a. This is a black
20 female, date of birth 11-13-75.

21 THE COURT: M-e-l-v-a-r-i-n-a?

22 MS. LANSER: Yes, Your Honor.

23 THE COURT: I've made that
24 correction. Subject to that, Mr. Duncan,
25 is it accurate as far as you can tell?

1 THE DEFENDANT: I mean, I'm sure
2 there's a couple more discrepancies. I'm
3 reading as fast as I can. I don't really
4 know --

5 THE COURT: But you don't recall
6 anything else at this time?

7 THE DEFENDANT: No, right offhand
8 I don't.

9 THE COURT: If there are, they're
10 minor and not material as far as
11 sentencing is concerned. Anything else
12 you can recall at this time? We don't
13 have time for you to read each one.

14 THE DEFENDANT: No.

15 THE COURT: Subject to that then, it
16 appears that it's accurate then subject
17 to these matters we've talked about?

18 THE DEFENDANT: For the most part,
19 I mean, yes.

20 THE COURT: I think you have some
21 objections, Mr. Corder, so I'll hear
22 those now.

23 MR. CORDER: Yes, Your Honor. The
24 first objection we have is to the drug
25 weights. Specifically, defense contends

1 it was unproven that, as the PSI report
2 indicates, most of the cocaine powder was
3 converted into cocaine base, and further,
4 that if that was indeed the case, that
5 Mr. Marco Duncan should be held
6 accountable for that in his sentencing.

7 THE COURT: Well, the evidence
8 indicates that somewhere in the magnitude
9 of 30 kilograms of cocaine powder was
10 transported to this area by Mr. Duncan
11 and his associates, and most of that was
12 converted into cocaine base, and a lot of
13 it was converted with Mr. Duncan's
14 knowledge or in his presence. And the
15 fact that the jury found a conspiracy
16 involving Mr. Duncan, it involved
17 5 kilograms or more of cocaine powder, is
18 strictly for purposes of determining the
19 maximum statutory punishment, which is
20 the same regardless of whether it's
21 50 grams or more of crack or 5 grams or
22 more of cocaine powder.

23 So the only question this morning
24 that is relevant for conduct purposes is
25 determining the guideline offense levels,

1 which is a matter for me to determine
2 based upon preponderance of the evidence.
3 And, of course, I sat through and took
4 very careful notes throughout the trial,
5 and my notes reflect that it was
6 overwhelmingly foreseeable for Mr. Duncan
7 that most of this was going to be
8 ultimately sold as crack cocaine. Under
9 the law of the circuit, if it is
10 foreseeable, it is proper to utilize for
11 relevant conduct purposes the crack
12 cocaine offense levels. Specifically,
13 United States v. Chisholm, an Eleventh
14 Circuit case, says, and I quote, "It is
15 proper to sentence a defendant under the
16 drug quantity table for crack cocaine if
17 the conversion of powder cocaine into
18 crack cocaine is foreseeable to him."

19 There were a number of other cases
20 from this circuit and other circuits that
21 tell the same thing.

22 MR. CORDER: If I could make a
23 further brief argument on that point,
24 Your Honor.

25 THE COURT: You may.

1 MR. CORDER: I'd like to review a
2 little bit of the evidence. I know the
3 court has heard the evidence, so I'll be
4 as brief as possible. Specifically,
5 Somaria Palmer, who is one of the
6 co-conspirators, said that she, if I
7 recall -- and I'm going by my notes and
8 the court will obviously go by its own
9 record.

10 THE COURT: Just a minute, let me
11 find my notes. Ms. Palmer was the first
12 witness?

13 MR. CORDER: Yes, sir. And I'm
14 trying to go through these in the order
15 that they testified to help us get
16 through it. While she did indicate they
17 cooked crack in her house, she said she
18 sold powder, or at least that was the
19 implication that I got from the notes
20 that I took. She said that Mr. Duncan
21 showed them how to cook it, but that
22 Rodney Lee cooked the crack and the
23 powder, but I don't recall her ever
24 saying that most of it was cooked into
25 crack.

1 Mr. Shawn Thomas, the second
2 co-conspirator --

3 THE COURT: Just a moment, let me
4 just see what my notes said.

5 She was asked, "Did you see crack
6 being made?"

7 She said, "Yes, a lot of times at our
8 apartment."

9 "Was the defendant there?"

10 "I recall him being there at least
11 once to show them a different way to cook
12 the crack."

13 "Three packages of cocaine were sent
14 to your apartment by Mr. Duncan?"

15 "Yes."

16 That's what my notes reflect. Go
17 ahead.

18 MR. CORDER: The second
19 co-conspirator to testify was Mr. Shawn
20 Thomas. And according to my notes, he
21 said that they cut the cocaine with
22 baking soda and another substance before
23 they shipped it to Florida. He indicated
24 that Mr. Duncan knew how to cook and knew
25 it was being cooked, admittedly. And at

1 the time of his arrest, he was found
2 primarily with powder. I believe he had
3 a kilo or a kilo and half of powder, and
4 100 and some grams, maybe 150 grams of
5 crack. He said that Mr. Roberts was the
6 one who cooked the cocaine into cocaine
7 base.

8 THE COURT: Well, he described in
9 detail how they wrapped the cocaine two
10 or three kilograms at a time, and they
11 put it sometimes in the mail, and in the
12 spare tire of the car after putting
13 grease on the outside, taping it, and
14 airing the spare tire. Once the cocaine
15 got here, he says they cut it with
16 methacol or baking soda. He said they
17 used about 4 ounces of cut per kilogram,
18 which would convert to 36 ounces to 40
19 ounces.

20 He said, "The defendant and I knew
21 how to cook cocaine and crack, and the
22 defendant knew it was to be sold as
23 crack," he said specifically according to
24 my notes.

25 MR. CORDER: The third government

1 co-conspirator was Will Mullins, who I
2 believe was a roommate of Somaria Palmer
3 at one time, and he indicates that
4 Mr. Robert Mims was the one that cooked
5 it into crack; Mr. Robert Mims was the
6 one that showed them how to cook it into
7 crack. And, once again, he was arrested
8 primarily with powder, if I recall, not
9 with crack.

10 And, by the way, so I don't repeat
11 myself, all of the co-conspirators
12 indicated this was being brought into
13 Florida in the form of powder. I don't
14 recall anyone who suggested that this was
15 being brought into Florida in the form of
16 base or crack.

17 THE COURT: I think that's correct.
18 I do have Mr. Mullins saying in my notes,
19 he was asked, "You cooked some of the
20 cocaine into crack?"

21 "Yes."

22 Then the question was asked, "Did the
23 defendant know you were doing this?"

24 "Yes. He was there during the
25 cooking."

1 And he was asked, "Do you make more
2 money converting it into crack?"

3 He said, "Yes, about \$500 or \$600
4 more than if it was sold just as powder
5 cocaine." So obviously it was
6 advantageous to sell it as crack.

7 MR. CORDER: The fourth government
8 co-conspirator witness was Mr. Rodney
9 Lee, I believe. He admitted he knew how
10 to cook it. He said that it would not --

11 THE COURT: Excuse me. Mr. Mullins
12 did say, "Who cooked the cocaine into
13 crack?" And he said "Robert Mims."

14 Then he was asked, "Was the defendant
15 there?" And Mr. Mullins said, "Yes,
16 along with Somaria P.," whoever that is.

17 MR. HENSEL: Somaria Palmer, Judge.

18 THE COURT: Go ahead.

19 MR. CORDER: On Mr. Rodney Lee, my
20 notes reflect that he admitted he knew
21 how to cook crack. He said it would not
22 cook properly if it had been cut.
23 Mr. Shawn Thomas said they had cut the
24 cocaine. He said, "Mr. Duncan was
25 usually gone when the cocaine was cooked

1 into crack." He admitted that he did
2 cook cocaine into crack for the defendant
3 on one occasion. And, again, he was
4 arrested with powder in his possession,
5 not crack. And that was what I thought
6 was relevant about Mr. Rodney Lee's case.

7 THE COURT: Well, let me again
8 amplify what my notes indicate on
9 Mr. Rodney Lee. He said he preferred the
10 powder cocaine because he wanted to cook
11 it into crack. He got an ounce and he
12 made 2 one-ounce cookies from that, and
13 he sold them for \$800 each, so he made
14 \$1,600 on cocaine that he paid \$900 for
15 an ounce.

16 The next time he got a half kilogram
17 and he said their cocaine cooked up good.
18 "I cooked up mine into crack." The next
19 one, he got a kilogram through UPS. Then
20 he was there at the arrival, needed a
21 hammer to break it up, then we bagged it
22 into four-ounce baggies. I distributed
23 several others, Bailey, Howard, David,
24 then I moved in with Albert Howard and we
25 got one and a half kilograms sent there.

1 He was asked, "Was the defendant
2 present when the cocaine was cooked into
3 crack?"

4 He said, "Yes, at the apartment.
5 Mims cooked it up and cooked up a half
6 kilogram for the defendant to sell in
7 Fort Walton Beach."

8 Then finally Mr. Lee was asked, "Does
9 Bobby Mims have a good reputation as a
10 cooker of crack cocaine?"

11 And the answer was, "Yes, in all
12 Pensacola, one of the best I've ever
13 seen."

14 Go ahead, Mr. Corder.

15 MR. CORDER: But I would reiterate
16 that he was arrested with powder cocaine,
17 and if I recall, he was arrested in a
18 sting with an undercover buy of powder
19 cocaine.

20 The next government co-conspirator
21 witness is Mr. Terrence Roberts. Again,
22 I believe he was arrested primarily with
23 powder on his person. He testified,
24 according to my notes, that Mr. Duncan
25 did not know how to cook cocaine powder

1 into crack. And my notes don't reflect
2 that he ever mentions Mr. Duncan cooking
3 in front of him. I think Mr. Roberts was
4 important because he indicated that he
5 acted kind of as a chauffeur and drove
6 Mr. Duncan around a lot and he was
7 present with Mr. Duncan a lot. His
8 testimony is quite inconsistent with the
9 prior witnesses'.

10 THE COURT: Well, Mr. Roberts
11 testified about a lot of things. He
12 testified how he got started and then
13 that they started sending packages to his
14 home. First delivered one kilogram of
15 cocaine wrapped in plastic, then was
16 asked about more deliveries: "Yes, about
17 three or four at my house and then to
18 vacant addresses sent with a waiver of
19 signing." Started out as one kilogram at
20 first, then more than two kilograms at a
21 time. "They trusted me to get the
22 package and take it out of the box and
23 wait for them to arrive. I mailed the
24 money back to California."

25 Then after 9-11-2001 they stopped

1 sending cocaine through the mail and
2 started driving it cross-country.
3 Mr. Thrower drove it. And in other
4 vehicles they had it in the armrest of
5 the Impala. The defendant had two
6 different women drive in Thomas' car.

7 He was asked, "Was the defendant
8 present when you cooked it?"

9 "Yes, once, at my residence."

10 Mr. Roberts said he sold crack mostly
11 because he got two cookies of crack from
12 each ounce of powder. That's what my
13 notes reflect.

14 MR. CORDER: The sixth government
15 co-conspirator witness was Mr. Albert
16 Perrin, and although he did say he was
17 selling crack, I don't have any notes
18 indicating that Mr. Duncan had anything
19 to do with his conversion of the cocaine
20 into crack.

21 THE COURT: Well, Mr. Perrin sold
22 small cookies apparently. He says he got
23 four cookies for each ounce, and he sold
24 his cookies for \$350 each, so he got
25 essentially \$1,400 for each ounce of

1 powder cocaine after cooking it into
2 crack. He said he dealt with the
3 defendant at least 30 times, and got at
4 least 10 kilograms, maybe 12. He still
5 owes him for one and a half kilos.

6 That's all I see about the crack.

7 MR. CORDER: The last government
8 co-conspirator witness was Mr. Lavell
9 Thrower. He again said the cocaine was
10 cut, and I don't recall whether he said
11 it was cut in Florida or California. He
12 said he didn't know how to cook it, but
13 at one point Mr. Duncan said he knew how.
14 But I don't have any notes indicating
15 that he ever saw Mr. Duncan cooking crack
16 or had anything to do with crack. He was
17 primarily delivering the cocaine with
18 Mr. Duncan from California to Florida, if
19 I recall.

20 THE COURT: Well, Mr. Thrower
21 testified about bringing seven and a half
22 kilos in the spare tire of the Kia
23 Sportage from California on one trip.
24 That was seven and a half kilograms.
25 Then another trip, the day of the arrest,

1 Thomas and Roberts had about two
2 kilograms in the spare tire of the
3 defendant's Camaro. The tire was at
4 Roberts' house, but police missed it and
5 did not discover the cocaine. He said he
6 was paid \$9,000 per trip, \$15,000 for the
7 third trip, and nothing for the final
8 trip, he says. He said he had a bag of
9 money, \$250,000, to buy 10 kilos of
10 cocaine from Armondo.

11 He does talk about guns. He said,
12 "We all had guns." The defendant had a
13 Maxwell Silencer .380 and a Mac .90 rifle
14 and a Tech .9 rifle and a number of
15 others, and about the defendant giving
16 the gun to Roberts in the car when I
17 drove him here. But he doesn't have
18 anything that I see in my notes about
19 conversion.

20 MR. CORDER: The last government
21 witness I would point out is Special
22 Agent Cravatt, who testified from his
23 knowledge that it's no secret how to cook
24 cocaine into crack, that's readily
25 available knowledge on the street, there

1 may be some art to it, but in terms of
2 telling somebody how to do it, that's not
3 really a very complicated operation, a
4 great number of people know how to do it,
5 which would be consistent with the
6 co-conspirators' testimony that lots of
7 people knew how to do this.

8 My overall argument, Your Honor, is
9 that although it's been proven, or
10 there's evidence that a substantial
11 amount of cocaine in powder form was
12 brought into Florida, I don't believe
13 it's ever been proven that whatever --
14 any particular quantity of it was
15 converted into crack, and, in fact, all
16 the arrests were primarily powder. What
17 we have is testimony that's inconsistent
18 with that. And then we have testimony
19 that's inconsistent with itself, where
20 some of the defendants say he cooked it,
21 and some of them say somebody else cooked
22 it, and some of them say that they never
23 saw it cooked. So it's impossible to
24 tell at this point what quantity was
25 cooked into crack.

1 THE COURT: Mr. Hensel.

2 MR. HENSEL: Well, Judge, as the
3 court has noted from the testimony, the
4 government will concede that Duncan and
5 Shawn Thomas were transporting powder
6 from California here, but once it was
7 here, as soon as they weighed it up into
8 ounces, it was being cooked into crack.
9 The defendant was present and
10 participated in cooks and told people how
11 to cook. And I think the probation
12 officer has been conservative in her
13 estimate of only giving him basically
14 half of the 30 kilograms they bought into
15 and scoring him for crack cocaine for
16 those, and I think that's clearly
17 supported by the testimony and the
18 evidence that the court heard and the
19 jury heard as well.

20 MR. CORDER: I would just object to
21 one statement, Your Honor, that it was
22 cooked as soon as it was here. That's
23 clearly inconsistent with the arrests
24 that were made. The cocaine was
25 primarily in the form of powder,

1 indicating it wasn't cooked as soon as
2 it was here. It may have been cooked
3 later, we don't know.

4 THE COURT: Well, as a matter of
5 fact, I think I can find a certain amount
6 of positive evidence that most of the
7 cocaine was converted into crack, and I
8 think it was well-known that it was being
9 converted into crack. The evidence
10 certainly establishes that.

11 Testimony is not whether Mr. Duncan
12 converted it into crack, but whether
13 it was reasonably foreseeable that was
14 what was happening. And it certainly was
15 reasonably foreseeable in light of the
16 conspiracy responsibility that Mr. Duncan
17 knew that it was being converted and sold
18 as crack. And for that reason, I
19 certainly find from the evidence, by a
20 preponderance at least, and actually more
21 than that, that Mr. Duncan knew and
22 it was reasonably foreseeable to him that
23 it was being converted into crack
24 cocaine, most of it converted, and sold
25 in that form. The objection is

1 overruled.

2 MR. CORDER: Your Honor, our next
3 objection goes to the dangerous weapon,
4 specifically a firearm. Our objection to
5 that is that while Mr. Lavell Thrower and
6 Mr. Shawn Thomas -- Mr. Shawn Thomas on
7 rebuttal, I believe -- indicated that
8 Mr. Duncan had a firearm during the
9 course of this conspiracy, none of the
10 other witnesses who dealt with him on a
11 pretty regular basis ever described a
12 firearm or saw a firearm, and we would
13 ask that you find that there is no
14 firearm involved in this. Now, I realize
15 that he was arrested with a firearm in
16 the vehicle of which he was in
17 possession, but that was after the date
18 of the offense and is not proof of
19 whether or not he had a firearm during
20 the course of the conspiracy.

21 MR. HENSEL: Well, Judge, as the
22 court will recall, there was testimony
23 during the course of the trial that a
24 firearm was transported by the defendant
25 from California and it was left at the

1 house in Fort Walton Beach for a while,
2 and that Lavell Thrower or Shawn Thomas,
3 I can't remember which, took that firearm
4 back to California and gave it back to
5 the defendant.

6 In addition, as defense counsel has
7 conceded, when he was arrested in Reno he
8 had a .9 millimeter, and Lavell Thrower
9 and Shawn Thomas -- Lavell Thrower
10 recited a litany of all the weapons that
11 the defendant owned and possessed. And
12 Shawn Thomas, his co-conspirator and
13 partner in this conspiracy, testified to
14 his frequent possession of firearms
15 during the course of the conspiracy. So
16 I think the enhancement -- the two-level
17 enhancement for the firearm is clearly
18 supported by the evidence.

19 And the other thing, Judge, is the
20 co-conspirator, as you recall, whenever
21 they did the search of the house in
22 Fort Walton Beach, Shawn Thomas, the
23 co-conspirator, where Terrence Roberts
24 lived, they found an additional firearm
25 there, the .25 caliber semi-automatic.

1 So that goes further to support the
2 enhancement.

3 MR. CORDER: Briefly on the
4 .25 caliber weapon, I don't believe from
5 my notes that Mr. Roberts indicated he
6 ever knew that gun was present, and
7 there's no evidence that Mr. Duncan knew
8 that that weapon was present.

9 THE COURT: Well, dealing with the
10 .25 caliber handgun found at Mr. Roberts'
11 residence, it was found inside the drawer
12 of the rear bedroom along with all the
13 drugs and money. They have been held
14 accountable for the firearm under the
15 material line of cases.

16 And the presentence investigation
17 report notes that Mr. Duncan, as a
18 co-conspirator, can be held responsible
19 for that firearm if the firearm was
20 possessed by a co-conspirator and
21 Mr. Duncan was a member of the conspiracy
22 and it was reasonably foreseeable that a
23 firearm would be involved. So under the
24 material line of cases alone, Mr. Duncan
25 can be held responsible.

1 And even more important, the evidence
2 overwhelmingly indicates, a number of
3 witnesses said, that Mr. Duncan was known
4 to possess a firearm and transported the
5 firearm to Pensacola. So on the basis of
6 that, the evidence certainly establishes
7 that Mr. Duncan possessed a firearm in
8 furtherance of his conspiracy.

9 And finally, at the time of his
10 arrest in Nevada, the firearm was found
11 in the vehicle. And although Mr. Duncan
12 claims it wasn't his, certainly the
13 burden is upon him. It was found, with
14 scales, in the front seat of the vehicle.
15 And even though that was not a part of
16 the drug activity here in Pensacola,
17 certainly it's indicative of ongoing drug
18 trafficking, unless the defendant
19 establishes the fact that it's clearly
20 improbable that that firearm was
21 connected to the drug traffic activity.

22 So for all three of those reasons,
23 any one of which would be sufficient, the
24 firearm objection is not appropriate.

25 Any other objections?

1 MR. CORDER: No, sir. As I noted in
2 my objection to the presentence report,
3 Mr. Duncan maintains his innocence.
4 You've already made a ruling and I don't
5 think we need to discuss that.

6 THE COURT: The government has filed
7 a notice of enhancement, Mr. Duncan,
8 which is Document 187 filed on July 16,
9 2003. It identifies a prior felony drug
10 conviction. I am required to advise you
11 that any challenge to the validity of
12 this conviction must be made now or you
13 will be hereafter prohibited and barred
14 from challenging that conviction for
15 purposes of its application to this
16 sentencing. And it's the same conviction
17 that is identified at paragraph 63 in
18 the PSI.

19 The enhancement indicates the
20 conviction was on or about March 31,
21 1992, in Case No. 154862 in the Superior
22 Court of Santa Clara County, California.
23 The actual conviction, according to the
24 presentence investigation report and
25 records, was on April 24, 1992, in that

1 case. The felony conviction from the
2 court records indicate that a plea was
3 entered on March 31 of 1992, and the
4 defendant was ordered to appear on
5 April 24 for sentencing. So conviction
6 was actually the April 24 date, the plea
7 of guilty was the March 31 date.

8 Mr. Duncan, I'm required to ask you
9 if you affirm this conviction as
10 identified in the notice of enhancement
11 which is the one described at paragraph
12 63 of the PSI report. Do you?

13 THE DEFENDANT: Do I affirm?

14 THE COURT: Yes. Is that a
15 conviction that you have received?

16 THE DEFENDANT: Yes, it's a
17 conviction I received. But I thought it
18 couldn't be applied for a charge over
19 10 years old.

20 THE COURT: The conspiracy offense
21 was alleged to have begun about
22 January 1, 2000, and up until the return
23 of the indictment, which is within the
24 10-year period.

25 MR. HENSEL: Judge, I think what he's

1 confusing is the use of a prior felony
2 conviction when you testify. This is
3 an 851 enhancement. There's no time
4 limitation on an 851 enhancement for a
5 prior felony drug conviction.

6 THE COURT: You are correct,
7 Mr. Hensel, that's true. Do you affirm
8 that then, Mr. Duncan?

9 THE DEFENDANT: Do I have a choice?

10 THE COURT: Well, if there's some
11 valid basis for challenging it you may do
12 so. If it was an unconstitutional
13 conviction. But I have received no
14 information, and Mr. Corder, you don't
15 have any information?

16 MR. CORDER: I don't have any
17 information and I believe Mr. Duncan
18 testified at trial that he had been
19 convicted on that offense.

20 THE COURT: On that basis,
21 Mr. Duncan, is that a valid conviction?

22 THE DEFENDANT: No. I'm going to
23 have to deny it.

24 THE COURT: Well, you may deny it,
25 but I find that it is a valid conviction

1 unless you can show me otherwise, and you
2 have not done so.

3 Anything else on this conviction,
4 Mr. Hensel?

5 MR. HENSEL: No, sir, Judge.

6 THE COURT: Anything, Mr. Corder, in
7 the way of convictions?

8 MR. CORDER: No, Your Honor.

9 THE COURT: Mr. Duncan has an offense
10 level of 42 and the sentencing guidelines
11 provide that this carries a life
12 sentence. So, Mr. Corder, would you like
13 to speak on his behalf?

14 MR. CORDER: No, sir. I'm not sure
15 that there's anything I could say or
16 anyone could say. I defer to Mr. Duncan
17 if he wishes to speak at this time.

18 THE COURT: Mr. Duncan, would you
19 like to speak personally?

20 THE DEFENDANT: Yes. Just like he
21 said, there's not much anybody can say
22 that's going to change the outcome of the
23 sentence. I mean, there's mandatory
24 minimal guidelines that have to be
25 followed and I can't do nothing about

1 that. Throughout the course of my trial,
2 throughout the course of the whole case,
3 you know, I've talked to my attorney on
4 numerous occasions, and, you know, before
5 I even went to trial I wasn't happy with
6 his performance and I wasn't happy with
7 our relationship as an attorney and a
8 defendant. You know, there's a lot --
9 well, I didn't call this witness and,
10 you know, that witness and so on and so
11 forth. Well, I mean, I thought that was
12 the responsibility, so to speak, of my
13 attorney. The people that could have
14 cleared a lot of situations, I mean, a
15 lot of the discrepancy in testimony up,
16 you know, my attorney was aware of who
17 they were and he could have subpoenaed
18 them to come and testify for me. Nobody
19 subpoenaed anybody to testify for me.
20 And I'm not an attorney, I don't know how
21 to subpoena people. All I can do is ask,
22 and that's what I did. So I guess I have
23 to accept the outcome of the trial. I
24 mean, I don't feel I was defended
25 properly, but I can't change it.

1 THE COURT: Let me just note for the
2 record that it is my practice when the
3 defendant testifies in a criminal case to
4 note when I think the defendant is lying
5 under oath and testifying falsely. For
6 Mr. Duncan's testimony, I have five pages
7 of notes on a legal-size legal pad. And
8 I have not attempted to count up how many
9 times I wrote instructions on my notes,
10 but let me do so now.

11 I have seven on the first page,
12 eleven on the second page, ten on the
13 third page, eleven on the fourth page,
14 and four on the fifth page. I think the
15 jury's verdict corroborates my
16 determination that Mr. Duncan testified
17 falsely. So, therefore, the obstruction
18 of justice enhancement is appropriate.

19 Mr. Hensel, would you like to say
20 anything for the government?

21 MR. HENSEL: No, Judge. I'm
22 confident based on the representations by
23 Mr. Duncan this morning that we'll be
24 seeing a 22-55 petition at some point
25 down the road when the appeals are

1 exhausted. I'm confident Mr. Duncan is
2 displeased with the result of the jury's
3 verdict, but I concur with the court's
4 assessment that Mr. Duncan got on the
5 stand and lied considerably. And the
6 fact that Mr. Corder didn't call
7 witnesses that couldn't support those
8 lies is not surprising to me based on my
9 experience. But I think clearly the life
10 sentence required under the sentencing
11 guidelines is appropriate in this case,
12 and based on Mr. Duncan's record and what
13 we heard during the course of the trial,
14 it's well deserved.

15 THE COURT: Mr. Corder, anything
16 else?

17 MR. CORDER: Your Honor, prior to
18 this trial I visited Mr. Duncan at the
19 Escambia County Jail on eleven separate
20 occasions, where we discussed all the
21 government's evidence, we discussed the
22 defendants who were probably going
23 testify. Obviously we didn't know
24 exactly who they were, but we identified
25 the people who could testify at this

1 trial. And we also identified the people
2 who could have testified on his behalf;
3 specifically, Ms. Angela Green, his
4 girlfriend, and Mr. Charles Hooks, who is
5 described as one person who might have
6 been employed here locally. We discussed
7 having those people testify at trial and
8 it was Mr. Duncan's decision not to have
9 those people testify at trial and I
10 respected his decision. In terms of him
11 not knowing how to subpoena people, he
12 certainly knew how to have a discussion
13 with me. He could have told me and I
14 would have used the power of subpoena to
15 bring them in.

16 THE COURT: Mr. Duncan, I sat through
17 your trial and I took very careful notes
18 and I think I am familiar with your case
19 and all the facts and circumstances
20 because I have sentenced a number of your
21 co-defendants. I have also carefully
22 reviewed everything in your presentence
23 investigation report, and subject to any
24 corrections that we made on the record I
25 find that your report is accurate and

1 it's incorporated into and made a part of
2 your sentence.

3 Now, under the authority of the
4 sentencing format of 1984 and the
5 amendments to that act that have become
6 effective since 1984, as well as the
7 guidelines promulgated by the United
8 States Sentencing Commission, it is the
9 judgment of the court that you are hereby
10 to be imprisoned for a term of life. The
11 sentence is the guideline range
12 established by the U. S. Sentencing
13 Commission Guidelines Manual based upon
14 the conduct involved in this offense.

15 I have fully considered all the
16 statutes set out in Title 18, 3553(a),
17 as well as the Sentencing Commission's
18 policy statements and the applicable
19 guidelines as promulgated by the
20 Sentencing Commission.

21 The jury returned a special verdict
22 of forfeiture in the amount of \$340,000
23 in this case, and based upon my review of
24 all the circumstances, even though I do
25 not have specific financial information

1 about the defendant, which was not
2 provided by him, I find that it is highly
3 unlikely that Mr. Duncan will be able to
4 pay the forfeiture verdict as well as any
5 fines; therefore, I am waiving the
6 payment of any fine in this case. But as
7 the law requires, a special monetary
8 assessment of \$100 is due and payable
9 immediately.

10 Mr. Duncan, upon release from prison
11 you will be placed on supervised release,
12 if you are released, for a term of 10
13 years, under the standard supervision
14 adopted by this court. First, as deemed
15 necessary at the discretion of your
16 probation officer, you may be required to
17 participate in a program of drug
18 treatment, and that may include testing
19 to determine whether you have converted
20 to the use of drugs or controlled
21 substances.

22 In accordance with the jury's verdict
23 of forfeiture, Mr. Hensel, do you have an
24 order for me?

25 MR. HENSEL: Judge, I left that at

1 the office, I'll bring that, but I would
2 ask that the court order incorporate a
3 \$340,000 forfeiture.

4 THE COURT: As part of the sentence
5 and judgment imposed, I am ordering
6 forfeiture in the amount of \$340,000 as
7 determined by the jury's verdict.

8 Now, Counsel, under the Eleventh
9 Circuit's procedure, do either of you
10 have any objections to either my findings
11 of fact or conclusions of law?

12 MR. CORDER: No. We maintain our
13 earlier objections, Your Honor.

14 MR. HENSEL: Nothing further from the
15 government, no, sir.

16 THE COURT: Mr. Duncan, you are
17 advised that you have the right to appeal
18 the jury's verdict and the sentence and
19 judgment that have been imposed in this
20 case, specifically, grounds for appeal of
21 the guideline sentence is set out by
22 statute in Title 18, U. S. Code. Any
23 appeal must be filed within 10 days. If
24 you are unable to afford the cost of an
25 appeal you may apply for and and the

1 court will allow you to take an appeal
2 without any cost to you. Mr. Corder is
3 your appointed attorney and I'm sure you
4 will discuss the matter of an appeal with
5 him today. Upon request, the clerk will
6 immediately file a notice of appeal on
7 your behalf. Again, I remind you that
8 any appeal must be filed within 10 days.

9 I believe that concludes everything
10 regarding Mr. Duncan's sentencing.
11 Anything else?

12 MR. HENSEL: No, sir, Judge.

13 MR. CORDER: No, Your Honor.

14 THE COURT: We're adjourned for the
15 morning.

16
17 WHEREUPON, THE PROCEEDINGS WERE
18 CONCLUDED.

19
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CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF ESCAMBIA

I, TERRY RUSHING HOFFMAN, Court Reporter,
certify that I was authorized to and did
stenographically report the foregoing proceedings
at the time and place heretofore stated, and that
the transcript is a true and complete record of my
stenographic notes.

I further certify that I am neither counsel
for nor related to any party to said action, nor
am I financially interested in this proceeding.

DATED this 16th day of January, 2004.


TERRY RUSHING HOFFMAN
Court Reporter and Notary Public
State of Florida at Large



Terry Rushing Hoffman
Commission # CC 959107
Expires Aug. 7, 2004
Bonded Thru
Atlantic Bonding Co., Inc.

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX E

Motion to Vacate, Set Aside, or Correct Sentence

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION BY A PERSON IN FEDERAL CUSTODY
TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255(F)(4)

UNITED STATES DISTRICT COURT		Division <u>Pensacola</u>
Name of Movant/Defendant <u>Marco Duncan</u>	Prisoner No. <u>37679-048</u>	Case No. <u>3:02 CR 20-RV</u>
Place of Confinement (including address) <u>USP POLLOCK P.O. Box 2099 Pollock, LA 71467</u>		
UNITED STATES OF AMERICA v. <u>Marco D. Duncan</u> (name under which convicted)		

MOTION

1. Name and location of court which entered the judgment of conviction under attack: U.S. District Court for the Northern District of Florida, Pensacola

2. Date of judgment of conviction: July 23, 2003

3. Length of sentence: Life

4. Nature of offense involved (all counts): Conspiracy to possess with intent to distribute five kilograms or more of cocaine powder and fifty grams or more of cocaine base.

5. What was your plea? (Check one)

- (a) Not Guilty ☒
 (b) Guilty ☐
 (c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details: _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

- (a) Jury ☒
 (b) Judge only ☐

7. Did you testify at the trial? Yes ☒ No ☐

8. Did you appeal from the judgment of conviction to the Eleventh Circuit Court of Appeal?

Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Result: Conviction and Sentence affirmed

(b) Date of result and mandate: May 2, 2005

10. Did you file a petition for rehearing?

Yes ☒ No ☐

11. If you did file a petition for rehearing, provide the date and result of the petition: _____

en banc was denied April 21, 2005

12. Did you file a petition for certiorari review?

Yes ☒ No ☐

13. If you did file a petition for certiorari review, provide the date and result of the petition: Certiorari

review was denied in 2005

14. Have you previously filed any post-conviction petitions, applications or motions, including previous § 2255 motions, with respect to this judgment in any federal court?

Yes ☒ No ☐

15. If your answer to 14 was "yes," give the following information:

(a) (1) Name of court: U.S. District Court, Pensacola Florida Division

(2) Nature of proceeding: First motion under 28 USC 2255

(3) Grounds raised: Ineffective assistance of counsel and

other grounds I don't recall.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result: Denied

(6) Date of result: September 17, 2007

(b) If you filed more than one such petition, please include the same information requested in 11(a) on a separate sheet of paper.

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

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☐ No ☒

(d) If you did *not* appeal from the adverse action of any petition, application or motion, explain briefly why you did not: There were no proper basis to appeal.

16. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting the same.

Caution: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

A. Ground one: Petitioner now, seek "collateral attack on his federal sentence on the ground that a state conviction used to enhance that sentence has since been vacated." ^{Johnson v. US 544 U.S. 295}

Supporting FACTS (state *briefly* without citing cases or law): On November 4, 2014, the voters of California passed Proposition 47. The law redesignated California Health and safety code section 11350(a), possession of controlled substance from a felony offense to misdemeanor. Petitioner was enhanced under 21 USC section 851 for his prior state 11350(a) conviction. This conviction is now a misdemeanor and does not qualify for the enhanced penalties under title 21 section 851.

B. Ground two: _____

Supporting FACTS (state *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (state *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (state *briefly* without citing cases or law): _____

17. As to the grounds listed in 16A, B, C, and D, explain whether any grounds were previously presented, and for those that were not previously presented, state *briefly* your reasons for not presenting them: _____

18. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ☒

19. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

20. What relief do you request from this Court? Petitioner moves this honorable court to vacate his sentence, consider thoroughly the factors set forth in 18 U.S.C. 3553 (a) and others, including disparity of sentences among the defendants. Resentence under the now advisory sentencing to a more fair sentence.

Wherefore, movant prays that the Court grant the relief to which he or she may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on:

Aug. 13, 2015
(Date)

Marco Duncan
Signature of Movant/Defendant

IF MAILED BY PRISONER:

I declare or state under penalty of perjury that this petition was (check one):

☐ delivered to prison officials for mailing, or ☒ deposited in the prison's internal mail system on:

Aug. 13, 2015 (date).

Marco Duncan
Signature of Movant/Defendant

FILED

FEB 25 2015

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY [Signature] DEPUTY

ANNIE YIP

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff / Respondent,

vs.

MARCO DUNCAN,
Defendant / Petitioner.

CASE NO. 154862

ORDER ON PETITION FOR
REDESIGNATION OF OFFENSES
(Penal Code §1170.18)

The petition for redesignation of the following felony offense is GRANTED:

Count 1 - Health & Safety Code §11350(a)

The conviction is hereby designated a misdemeanor for all purposes, except that such redesignation shall not permit Petitioner to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

DATED: FEB 25 2015



[Signature]
LINDA R. CLARK
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

FILED
FEB 18 2015
(COURT USE ONLY)

PLAINTIFF

PEOPLE OF THE STATE OF CALIFORNIA

DEFENDANT

MARCO DUNCAN

DAVID H. YAMASAKI
CLERK
Superior Court of California, County of Santa Clara
9280639
154862

DISTRICT ATTORNEY RESPONSE TO PETITION

☐ FOR RESENTENCING
(Penal Code §1170.18(a))☒ FOR REDESIGNATION AS MISDEMEANOR
(Penal Code §1170.18(f))

HAVING RECEIVED NOTICE OF DEFENDANT'S PETITION,

THE DISTRICT ATTORNEY REQUESTS THAT IT BE ☒ GRANTED ☐ DENIEDThe District Attorney ☒ waives ☐ does not waive the right to have this petition decided by the original sentencing judge.

PETITION FOR REDESIGNATION AS MISDEMEANOR:

☒ Petitioner is eligible for the requested relief and there is no objection.

HS 11350 (a)

☐ Petitioner is ineligible for the requested relief because:☐ The following offenses are not eligible under Penal Code §1170.18 (Indicate count and code section):

Those offenses do not qualify as misdemeanors because (provide a brief explanation):

☐ The Petitioner has the following prior offenses under Penal Code §667(e)(2)(C)(2)(iv) or requiring registration under PC §290(c) (Indicate docket, code section and jurisdiction):

PETITION FOR RESENTENCING

☐ Petitioner is eligible for the requested relief and there is no objection.☐ Petitioner is ineligible for the requested relief because:☐ The following offenses are not eligible under Penal Code §1170.18 (Indicate count and code section):

Those offenses do not qualify as misdemeanors because (provide a brief explanation):

☐ The Petitioner has a prior conviction under Penal Code §667(e)(2)(C)(2)(iv) or requiring registration under PC §290(c) (Indicate docket, code section and jurisdiction):☐ Petitioner poses an unreasonable risk to public safety as defined in Penal Code §1170.18(c)

Date:

2/10/15

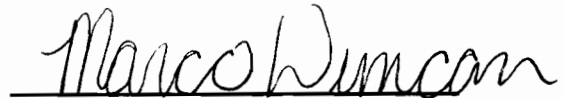
marco duncan

(Signature of Attorney)

CERTIFICATE OF SERVICE

Petitioner, Marco D. Duncan, hereby certifies that a true and correct copy of the foregoing petition has been mailed via United States Mail, from the United States Penitentiary, this 13th day of AUG., 2015

The envelope was addressed to: United States Attorney's office, Northern District of Florida, 21 East Garden Street, Suite 400, Pensacola, Florida 32502-5675

A handwritten signature in cursive script that reads "Marco Duncan". The signature is written in black ink and is positioned above a horizontal line.

Marco D. Duncan, Petitioner

Marco Duncan
37679-048
United States Penitentiary Pollock
P.O. Box 2099
Pollock, LA. 71467

Court Clerk
US District Court
1 North Palafox Street
Pensacola, FL. 32502

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX F

Order

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

Case Nos.: 3:02cr20/RV/EMT
3:15cv377/RV/EMT

MARCO D. DUNCAN

ORDER

This cause comes for consideration on the magistrate judge's Report and Recommendation (Report), dated September 21, 2015 (doc. 375). The Report recommends that Marco D. Duncan's Section 2255 petition for habeas corpus --- his second one --- be dismissed as successive, and that a certificate of appealability be denied. The parties have been furnished a copy of the Report and have been afforded the opportunity to file (and Duncan has filed) objections under Title 28, United States Code, Section 636(b)(1) (doc. 377). I have made a de novo determination of all timely filed objections. Having considered the Report, and Duncan's objections thereto, I have determined the Report should be adopted, with the following additional analysis.

In 2002, Duncan and several others were charged with conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1); 841(b)(1)(A)(ii), and (iii); and 846. Under the statute, Duncan was originally subject to a term of imprisonment of not less than 10 years or more than life. 21 U.S.C. § 841(b)(1)(A). Before trial, however, the government filed a notice of enhancement information (doc. 187), asserting that Duncan was subject to an increased minimum sentence based on a previous felony conviction for possession of cocaine base in California in 1992. Under the statute's increased penalty provision, a defendant shall be imprisoned for not less than 20 years and not more than life if he had a prior felony drug conviction. Id. After Duncan was convicted by the jury in this case, I sentenced him to life imprisonment. He filed a direct appeal (which was denied), after which he filed his first Section 2255 collateral attack (which was also denied). He has now brought a second Section 2255 motion. As noted, the magistrate judge has recommended that the petition be dismissed as successive.

Duncan's second petition is based on his claim, made pursuant to Johnson v. United States, 544 U.S. 295, 125 S. Ct. 1571 (2005), that his previous conviction no longer qualifies as a predicate conviction for enhancement purposes due to a recent change in California law which converted the earlier conviction from a felony to a misdemeanor. In Johnson, which involved a "career offender" designation under the federal sentencing guidelines (and not, as here, a statutory enhancement), the Supreme Court held that the state court vacatur of a predicate conviction is a new "fact" that triggers a "fresh" one-year statute of limitations pursuant to Section 2255(f)(4). And, in Stewart v. United States, 646 F.3d 856 (11th Cir. 2011), which likewise involved a career offender designation under the sentencing guidelines, the Eleventh Circuit held that if a petitioner succeeds in having his prior conviction vacated, a second petition will not be dismissed as successive. Duncan has relied on both Johnson and Stewart in his objections to the Report.¹

The Eleventh Circuit's decision in Spencer v. United States, 773 F.3d 1132 (11th Cir. 2014) (en banc) is instructive. The petitioner in that case was sentenced as a career offender based, in part, on a prior conviction for felony child abuse that --- due to an intervening Supreme Court decision --- had been erroneously classified as involving a "crime of violence." He filed a Section 2255 petition and sought to be resentenced without the enhancement. The Spencer majority began its analysis by stating:

¹ It appears that Stewart implicitly held that Johnson is retroactively applicable to collateral proceedings. As at least one court in this circuit has observed:

While some say that neither the Eleventh Circuit nor the Supreme Court has held Johnson to be retroactive to cases on collateral attack, Smith v. United States, 2012 WL 2505309 at * 2 (M.D. Fla. Jun. 28, 2012), Stewart is reduced to a mere advisory opinion unless Johnson is retroactive, so it is fair to conclude that Stewart implicitly held that Johnson is retroactively applicable to collateral proceedings (the government conceded retroactivity in Smith).

Futch v. United States, 2012 WL 4009710, at *1 n.2 (S.D. Ga. 2012). For this order, I assume that the 2005 Johnson decision (not to be confused with other more recent Supreme Court sentencing enhancement decisions that share the same name, see Johnson v. United States, — U.S. —, 135 S. Ct. 2551 (2015), and Johnson v. United States, 559 U.S. 133, 130 S. Ct. 1265 (2010)) is indeed retroactive. But, as will be seen, that does not entitle Duncan to relief.

Section 2255 does not provide a remedy for every alleged error in conviction and sentencing. When a prisoner, like Spencer, alleges that his “sentence was imposed in violation of the . . . laws of the United States . . . or is otherwise subject to collateral attack,” 28 U.S.C. § 2255(a), a district court lacks the authority to review the alleged error “unless the claimed error constitute[s] ‘a fundamental defect which inherently results in a complete miscarriage of justice.’”

Id. at 1138 (citation omitted). An error in applying a sentencing enhancement, the court explained, is not “‘a fundamental defect which inherently results in a complete miscarriage of justice’” unless the petitioner can establish that he is “either actually innocent of his crime or that a prior conviction used to enhance his sentence has been vacated[.]” Id. at 1139 (emphasis supplied). The court ruled that a sentencing enhancement error --- when the same sentence could be legally imposed on remand --- does not justify habeas relief. See id. at 1140-43. In distinguishing both Johnson and Stewart, the Spencer majority stated:

Spencer . . . likens his alleged sentencing error to Johnson and Stewart, in which the movants’ prior convictions, used to enhance their sentences, had been vacated. And Judge Jordan’s dissenting opinion argues that there is no meaningful distinction between the vacated convictions in Johnson and Stewart and Spencer’s conviction for felony child abuse. We disagree.

Spencer’s prior conviction has not been vacated, and that distinction matters.^[2] When a conviction is vacated, that vacatur constitutes a “new ‘fact’” with which the petitioner can challenge his sentence. Stewart, 646 F.3d at 858 [citing and quoting Johnson]. But here, Spencer argues no new factual basis for reversing his sentence. He presents instead an argument of legal innocence. Even if we were to agree with Spencer that he is “innocent” as a career offender, that legal innocence falls far short of factual innocence, the kind of innocence involved in Johnson and Stewart. See McKay v. United States, 657 F.3d 1190, 1199 (11th Cir. 2011) (“[A]ctual innocence means factual innocence, not mere legal insufficiency.” (internal quotation marks omitted)). If we were to conclude that felony child abuse was not a “crime of violence,” that legal conclusion would not

² Other courts have drawn this distinction as well. See Hirman v. United States, 613 F.3d 773, 776 (8th Cir. 2010) (considering this issue in the “career offender” context and distinguishing Johnson on the ground that “Hirman’s state felony convictions have not been vacated. Instead, his felony convictions are merely [now classified as misdemeanors] by the Minnesota courts.”).

negate the fact that Spencer committed a serious crime. The sentencing judge would consider his prior conviction for felony child abuse anew during resentencing [and “would be free to impose the same sentence on remand.”]. Johnson and Stewart cannot stand for the proposition that a prisoner sentenced under advisory guidelines whose prior convictions remain valid can establish that an error in sentencing is a complete miscarriage of justice.

Id. at 1143 & 1141 (emphasis supplied).

Here, like Spencer and Hirman (and unlike Johnson and Stewart), the petitioner’s previous conviction has not been vacated. There does not appear to be any suggestion that he was factually innocent, but, rather, his conviction was just reclassified. And because the life sentence I originally imposed does not exceed the statutory maximum even in the absence of the challenged enhancement --- and the same exact sentence could be reimposed without it --- he cannot show a “‘fundamental defect which inherently results in a complete miscarriage of justice.’” Spencer, 773 F.3d at 1132.

Accordingly, it is now **ORDERED** as follows:

1. The magistrate judge’s Report is adopted and incorporated by reference in this order.
2. Defendant’s motion to vacate pursuant to Title 28, United States Code, Section 2255 (doc. 373), is **SUMMARILY DISMISSED**.
3. A certificate of appealability is **DENIED**.

DONE AND ORDERED this 22nd day of October, 2015.

/s/ Roger Vinson

ROGER VINSON

SENIOR UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX G

Notice of Appeal

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

MARCO D. DUNCAN,

*

Petitioner,

*

v.

*

3:02cr20/RV/EMT

UNITED STATES OF AMERICA,

*

3:15cv377/RV/EMT

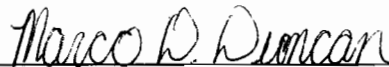
Respondent.

*

NOTICE OF APPEAL

Now respectfully comes the Petitioner, MARCO D. DUNCAN, *pro se*, and hereby notifies this Court of his desire and intention to appeal these matters to the United States Court of Appeals for the Eleventh Circuit. In particular, petitioner seeks appeals of this Court's Orders and Judgments of October 22, 2015 (Docs. 378 and 379), as well as the Order of December 3, 2015 (Doc. 381).

Respectfully submitted,



MARCO D. DUNCAN, Petitioner, pro se

Register Number - 37679-048

UNITED STATES PENITENTIARY

Post Office Box 2099

Pollock, Louisiana 71467-2099

Executed this 8th day of December, 2015.

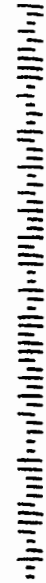
Marco Duncan
37679-048
United States Penitentiary Pollock
PO Box 2099
Pollock, LA. 71467

SAVED FOR THE
FBI



U.S. District Court
100 North Palafox Street
Pensacola, FL. 32502

3250234838 0003



IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX H

Initial Brief

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-15665
DC DKT NO.: 3:02-cr-20-RV-EMT

MARCO D. DUNCAN,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

SECOND AMENDED INITIAL BRIEF

Valarie Linnen, Esq.
Florida Bar No. 63291
P.O. Box 330339
Atlantic Beach, FL 32233
888.608.8814
vlinnen@live.com
Attorney for Appellant

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I. The district court reversibly erred by denying Mr. Duncan’s Section
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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this federal habeas action pursuant to Title 28, Section 2255(f)(4), United States Code (2015). This Court has jurisdiction to review a final order dismissing a habeas corpus petition. 28 U.S.C. 1291 (2017). Appellant timely filed a notice of appeal on December 8, 2015. (Dkt.3821)

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument as such will assist the Court in considering the argument presented.

STATEMENT OF THE ISSUES

- I. In light of Spencer v. United States, 773 F.3d 1132 (11th Cir. 2014), whether an inmate may use a 28 U.S.C. § 2255(f)(4) motion to challenge a sentence that was based on a recidivist enhancement when the predicate state felony conviction was later “redesignated” by judicial order to a misdemeanor conviction.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1 (2017), counsel for Appellant, MARCO DUNCAN, hereby files this Certificate of Interested Persons:

- 1) BERRY, Willie—Co-defendant
- 2) CANOVA, Christopher—U.S. Attorney on Appeal
- 3) CORDER, Dennis—Trial Counsel for Appellant
- 4) DAILEY, Carlos—Co-defendant
- 5) DAVIES, Robert O.—Office of the U.S. Attorney
- 6) DAVIS, Miles—U.S. Magistrate Judge
- 7) HARPER, Robert Augustus—Trial Counsel for Appellant
- 8) HESS, Nancy—Assistant U.S. Attorney
- 9) HENSEL, Randall—Former Assistant U.S. Attorney
- 10) LINNEN, Valarie—CJA Appellate Counsel for Appellant
- 11) PREISSER, Stephen—Former Assistant U.S. Attorney
- 12) MIMS, Robert—Co-defendant
- 13) MULLIN, William—Co-defendant
- 14) MURRELL, Randolph—Federal Public Defender
- 15) NOVOTNY, Susan—U.S. Magistrate Judge
- 16) PALMER, Samenia—Co-defendant
- 17) ROBERTS, Terrance—Co-defendant
- 18) ROGERS, M. Casey—U.S. Magistrate Judge
- 19) TIMOTHY, Elizabeth—Chief U.S. Magistrate Judge
- 20) UFFERMAN, Michael—Appellate Counsel on Direct Appeal
- 21) THOMAS, Shaun—Co-defendant
- 22) VINSON, Roger—Senior U.S. District Court Judge
- 23) WILSON, E. Bryan—Assistant U.S. Attorney

STATEMENT OF THE CASE

This appeal arises from the district court's order denying the *Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255(f)(4)* filed by Appellant, MARCO DUNCAN. Mr. Duncan petitioned to vacate his sentence on the basis that the state felony conviction used to enhance his sentence had been reduced via legislative action and court order from a felony to a misdemeanor. (Dkt.373)

Previously, Appellee, UNITED STATES OF AMERICA, charged Mr. Duncan with one count of conspiracy to possess with intent to distribute five kilograms or more of cocaine powder and fifty grams or more of cocaine base. (Dkt.1 p.1) Mr. Duncan was initially subject to a sentencing range of 10-years to life imprisonment. But the government gave notice of its intent to seek an enhanced penalty on the basis that he had previously been convicted of felony possession of cocaine base in California state court. (Dkt.187 p.1-5) This enhancement increased Appellant's range of punishment to 20-years to life imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A) (2002). (Dkt.187)

Following a jury trial, Mr. Duncan was convicted as charged. (Dkt.191 p.1-2) Relying on the enhancement provided by the California felony conviction, the district court sentenced him to life imprisonment. (Dkt.213) This Court affirmed the judgment and sentence on direct appeal. See United States v. Duncan, 381 F.3d

1070 (11th Cir. 2004).

Mr. Duncan petitioned for federal habeas corpus relief in 2006. (Dkt.268) The district court denied the petition without issuing a certificate of appealability. (Dkt.288, 316)

In November 2014, California voters approved Proposition 47, which reduced certain drug possession felonies to misdemeanors. (Dkt.373) Proposition 47 also created a process for people serving sentences related to those offenses to petition for resentencing. (Dkt.373) Immediately thereafter, the California court rendered an order reducing Mr. Duncan's conviction from a felony to a misdemeanor as follows:

The conviction is hereby redesignated a misdemeanor for all purposes, except that such redesignation shall not permit Petitioner to own, possess, or have in his custody or control any firearm...

(Dkt.373 p.6) Upon receipt of the order of the California court, Mr. Duncan promptly petitioned the district court to vacate his sentence on the basis that the state felony conviction used to enhance his sentence had been reduced from a felony to a misdemeanor. (Dkt.373)

The magistrate judge recommended that the district court "be SUMMARILY DISMISSED, as this court lacks jurisdiction to consider Defendant's second § 2255 motion absent authorization from the Eleventh Circuit." (Dkt.375) Mr. Duncan objected on the basis that the reduction of his felony conviction to a misdemeanor

conviction was a fact that formed the basis of a new challenge and triggered a fresh one-year statute of limitations. (Dkt.377) Thus, Mr. Duncan argued that the petition was not successive under Section 2255. (Dkt.377)

In its *Order*, the district court “adopted” the Report and Recommendations, but added its own analysis that the redesignation of Appellant’s prior conviction from a felony to a misdemeanor did not constitute a vacatur of the prior conviction used for enhancement. (Dkt.378) The district court added, “And because the life sentence I originally imposed does not exceed the statutory maximum even in the absence of the challenged enhancement – and the same exact sentence could be reimposed without it – he cannot show a ‘fundamental defect which inherently results in a complete miscarriage of justice.’” (Dkt.378 p.4)

This appeal now follows.

SUMMARY OF THE ARGUMENT

The district court reversibly erred by denying Mr. Duncan's Section 2255(f)(4) petition where the petition was not successive and the imposition of the recidivist sentencing enhancement, in the absence of a predicate felony conviction, results in a complete miscarriage of justice.

Procedurally, the district court erred by dismissing the petition on the basis that the claim was successive, because the California court's order redesignating Mr. Duncan's predicate conviction (used to enhance his sentence) from a felony to a misdemeanor was a new fact and thus triggered a new one-year statute of limitations.

Substantively, Mr. Duncan asks the Court to reconsider the circuit precedent announced in Spencer v. United States, 773 F.3d 1132 (11th Cir. 2014). Mr. Duncan submits that Spencer was wrongly decided and urges this Court to now hold that a sentence may be collaterally attacked where the predicate felony conviction used to enhance the sentence is later redesignated to a misdemeanor, resulting in a complete miscarriage of justice. Spencer ignores the impact that the career offender designation places upon the offender, which labels him as one subject to particularly severe punishment, and thus the impact that such a label imparts upon the considerable discretion of the district court when fashioning a sentence.

ARGUMENT

I. The district court reversibly erred by denying Mr. Duncan’s Section 2255(f)(4) petition where the petition was not successive and the imposition of the recidivist sentencing enhancement, in the absence of a predicate felony conviction, results in a complete miscarriage of justice.

The question presented in this appeal is whether Appellant, MARCO DUNCAN, may use a 28 U.S.C. § 2255(f)(4) motion to challenge a sentence that was based on a recidivist enhancement when the predicate state felony conviction was later “redesignated” by judicial order to a misdemeanor conviction.

Mr. Duncan recognizes this Court’s en banc opinion answering the aforementioned question in the negative. See Spencer v. United States, 773 F.3d 1132 (11th Cir. 2014).¹ In Spencer, this Court held that an inmate may only use Section 2255 to collaterally attack a sentencing error resulting in an unlawful sentence and may not seek relief when the sentence was erroneously imposed but nonetheless lawful.

But the Supreme Court has never announced such a rule. See Spencer, 773 F.3d at 1146 (Wilson, J., dissenting). In McNeill v. United States, the Court specifically left undecided the issue of whether federal courts should consider the effect of state action upon recidivist enhancement statutes where “a State

¹ See also Whiteside v. United States, 748 F.3d 541 (4th Cir. 2014), rev. en banc on procedural grounds 775 F.3d 180 (4th Cir. 2014); Hawkins v. United States, 706 F.3d 820, 823 (7th Cir. 2013), supplemented on denial of reh’g, 724 F.3d 915 (7th Cir. 2013); Sun Bear v. United States, 644 F.3d 700 (8th Cir. 2011) (en banc).

subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense.” See 563 U.S. 816, 825 (2011).

Indeed, the circuit precedent announced in Spencer ignores the impact that the recidivist status places upon the offender, which labels him as one subject to particularly severe punishment, and thus the impact that such a label imparts upon the considerable discretion of the district court when fashioning a sentence. Accordingly, Mr. Duncan submits that Spencer was wrongly decided and urges this Court to now hold that a sentence may be collaterally attacked where the predicate felony conviction used to enhance the sentence is later redesignated to a misdemeanor, resulting in a complete miscarriage of justice.

Law

In the context of federal habeas corpus review, mixed questions of law and fact are reviewed de novo. Strickland v. Washington, 466 U.S. 668, 686, 698 (1984).

The plain language of Section 2255 dictates that the statute is a vehicle to correct sentences “imposed in violation of...the laws of the United States.” 28 U.S.C. § 2255(a) (2107). While not limited to constitutional errors alone, a non-constitutional error may serve as a basis for collateral attack when it involves “a fundamental defect which inherently results in a complete miscarriage of justice.” United States v. Addonizio, 442 U.S. 178, 185 (1979) (internal quotation marks

omitted). Further, a post-conviction change in the law rendering a defendant's conduct no longer criminal is cognizable on collateral review because "[t]here can be no doubt that such a circumstance inherently results in a complete miscarriage of justice..." Davis v. United States, 417 U.S. 333, 346 (1979) (internal quotation marks omitted); see also Hill v. United States, 368 U.S. 424, 428 (1962) (holding that collateral relief is permitted where there is a "fundamental defect which inherently results in a complete miscarriage of justice," "an omission inconsistent with the rudimentary demands of fair procedure," or "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent").

While ordinary errors in guideline application do not amount to a complete miscarriage of justice, the Supreme Court permitted an inmate to use Section 2255 to challenge his career offender designation after his state court predicate conviction was vacated. Johnson v. United States, 544 U.S. 295, 311 (2005); see also Stewart v. United States, 646 U.S. 856, 858-59 (11th Cir. 2011). Indeed, "a defendant who successfully attacked his state conviction in state court or on federal habeas review could then apply for reopening of any federal sentence enhanced by the state sentences." Johnson, 544 U.S. at 303 (internal quotation marks omitted).

While Section 2255 does not permit correction of every error in sentencing, a statutory recidivist sentencing enhancement puts the defendant in a "category of offender subject to particularly severe punishment." Buford v. United States, 532

U.S. 59, 60 (2001).

Argument

Procedurally, the district court erroneously concluded that Mr. Duncan's habeas corpus motion was barred as successive. See Dkt. 378. The redesignation of Mr. Duncan's predicate offense from felony to misdemeanor "for all purposes", see Cal. Penal Code § 1170.18(k), constitutes a new "fact" forming the basis of the challenge that was not previously available or known to Mr. Duncan. See 28 U.S.C. § 2255(f)(4) (2017); see also Johnson, 544 U.S. at 303. Mr. Duncan timely sought relief in the California state court following Proposition 47, then promptly filed his Section 2255(f)(4) motion. Because the redesignation of his predicate conviction from felony to misdemeanor constituted a new fact and started a fresh one-year statute of limitations, his motion to correct sentence was not procedurally barred as successive.

Substantively, Mr. Duncan is entitled to relief from the recidivist sentencing enhancement. It is clear that Mr. Duncan's enhancement under 28 U.S.C. § 841(b)(1)(A) was "imposed in violation of...the laws of the United States". See 28 U.S.C. § 2255(a). The California conviction for possession of cocaine base was the only predicate conviction used to qualify him as a career offender pursuant to 21 U.S.C. § 841(b)(1)(a). See Dkt.187. Because the California court and legislature ordered that his conviction be "redesignated a misdemeanor **for all purposes**"

(emphasis added), he is not, and never has been, a recidivist offender. See United States v. Norwood, 2016 U.S. Dist. LEXIS 9230 *7 (C.D. Cal. 2016) (holding that “once the felony is indeed reclassified as a misdemeanor, it becomes a misdemeanor even for backward looking laws...”); see also People v. Park, 200 P.3d 1263, 1270 (Cal. 2013) (holding that once a conviction has been reduced to a misdemeanor, the conviction can no longer be used as a prior felony to enhance a sentence). Stated differently, Proposition 47 operates to vacate Mr. Duncan’s felony conviction in favor of a misdemeanor conviction, viewing the felony conviction as if it never happened. See Dkt.373 p.6; see Park, 200 P.3d at 1270.

All that Johnson requires is that Mr. Duncan “successfully attack[] his state conviction in state court” in order to “then apply for reopening of any federal sentence enhanced by the state sentences.” Johnson, 544 U.S. at 303. Mr. Duncan “successfully attacked” his state court felony conviction. To distinguish between a *vacatur* of conviction and a *redesignation* of conviction is a specious play on semantics with no basis in law or reality.

To that end, denying Mr. Duncan relief on the basis that his sentence is nonetheless lawful ignores the realities of federal sentencing. See Spencer, *supra*. It is true that Mr. Duncan, without the career offender enhancement, would still face the same statutory maximum sentence of life imprisonment, while his mandatory

minimum sentence would drop from 20 years to 10 years.² Applying the circuit precedent announced in Spencer ignores the realities of the impact that the recidivist designation places upon the offender, which brands him as “one subject to particularly severe punishment”, see Buford, 532 U.S. at 60, and thus ignores the influence that such a label imparts upon the considerable discretion of the district court when fashioning a sentence.

Basic notions of procedural fairness and fundamental justice, see Hill, 368 U.S. at 428, especially in light of the realities of federal sentencing, require that Mr. Duncan be resentenced without the recidivist sentencing enhancement. Allowing to stand the sentence enhanced by a felony conviction that does not exist, when California law views the predicate felony conviction as if it never happened, amounts to “a fundamental defect which inherently results in a complete miscarriage of justice.” See Addonizio, 442 U.S. at 185.

The finality of a conviction can never outweigh the fact that “fundamental

² When viewing this distinction in terms of months, the sentencing range jumps down from 240–470 months to 120–470 months. This distinction vastly increases the range of available sentences for the district court to consider when fashioning a sentence. The United States Sentencing Commission defines a life sentence as 470 months based on the average life expectancy of federal offenders. See United States Sentencing Commission, “Preliminary Quarterly Data Report Through September 30, 2015”, p.8. Available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2015 4th Quarterly Report.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2015%204th%20Quarterly%20Report.pdf)

fairness is the central concern of the writ of habeas corpus...” See Strickland, 466 U.S. at 697. This central requirement dictates that Mr. Duncan’s motion to vacate is not procedurally barred and that he is entitled to resentencing without the recidivist enhancement. Accordingly, Mr. Duncan requests that this Court vacate its opinion in Spencer, reverse the order of the district court denying relief, and order that he be resentenced.

CONCLUSION

WHEREFORE, Mr. Duncan requests that this Court vacate its opinion in Spencer, reverse the order of the district court denying relief, and order that he be resentenced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to CHRISTIPHER CANOVA, United States Attorney's Office, Appellate Division, via electronic case mail delivery on this 7th day of July 2017.

CERTIFICATE OF TYPEFACE COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 2,296 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX I

Answer Brief

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

15-15665-AA

MARCO DUNCAN,
Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF OF RESPONDENT-APPELLEE
UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

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D.C. No. 3:02cr20/RV

Duncan v. United States

CERTIFICATE OF INTERESTED PERSONS

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VINSON, ROGER, SENIOR U.S. DISTRICT JUDGE

WILSON, E. BRYAN, ASSISTANT U.S. ATTORNEY

I HEREBY CERTIFY that the above constitutes a complete list of interested persons to this appeal as described in the Rules of the United States Court of Appeals for the Eleventh Circuit Rev. (4/03/17), 11th Cir. R. 28-1(b) and 11th Cir. R. 26.1-1.

/s Robert G. Davies
ROBERT G. DAVIES
Assistant U.S. Attorney

STATEMENT REGARDING ORAL ARGUMENT

The government believes the issues and arguments are adequately addressed in the briefs, and therefore, does not request oral argument.

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STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1291, the Court of Appeals has jurisdiction of appeals from all final decisions of the district courts of the United States except where a direct review may be had in the Supreme Court.

Pursuant to 18 U.S.C. § 3231, the district court had jurisdiction to preside over this case.

STATEMENT OF THE ISSUE

**WHETHER THE DISTRICT COURT PROPERLY DISMISSED
DUNCAN'S AUGUST 17, 2015, 28 U.S.C. § 2255 PETITION?**

STATEMENT OF THE CASE

(i) Course of Proceedings and Dispositions in the Court Below

On February 20, 2002, a federal grand jury, sitting in the Northern District of Florida, returned a one-count indictment charging appellant Duncan and seven co-defendants with conspiracy to possess with the intent to distribute controlled substances, specified as five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(ii) and (iii). (Doc. 1). Prior to trial, the government filed a notice of enhancement information which stated Duncan was subject to increased penalty provisions under 21 U.S.C. §§ 846 and 841(b)(1)(A)(ii) and (iii) because Duncan had previously been convicted of possession of cocaine base, “in the Superior Court of California, County of Santa Clara, case number 154862....” (Doc. 187). After a trial, a jury found Duncan guilty as charged, and by special verdict found that the conspiracy involved five kilograms or more of cocaine. (Doc. 191).

Because of Duncan’s prior conviction in the Superior Court of California, County of Santa Clara, case number 154862 (“Duncan’s California conviction”), Duncan faced a mandatory minimum 20-year sentence. (Presentence investigation report (“PSR”), ¶ 116). Duncan’s total offense level was 46. (Doc. 243-1 - Pgs. 7,

23-24, 27, 31, 35-36; PSR, ¶¶ 54, 117; Statement of Reasons).¹ Duncan's criminal history category was IV. (PSR, ¶¶ 81, 117). At total offense level 46 and criminal history category IV, Duncan's Sentencing Guidelines range was life imprisonment. (PSR, ¶ 117; Doc. 243-1 - Pgs. 31, 35-36; Statement of Reasons). The district court sentenced Duncan to life imprisonment. (Doc. 213 - Pg. 2; Doc. 243-1 - Pg. 36; Statement of Reasons).

Duncan filed a direct appeal. (Doc. 214). This Court issued an opinion that affirmed the district court's judgment and sentence, vacated that opinion, and issued a final opinion that affirmed the district court's judgment and sentence.

United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005).

On October 12, 2006, Duncan filed a 28 U.S.C. § 2255 petition. (Doc. 268). On October 24, 2007, the district court denied Duncan's October 12, 2006, § 2255 petition. (Doc. 288). Duncan appealed and this Court denied Duncan's motions for a certificate of appealability. (Doc. 316).

On August 17, 2015, Duncan filed the § 2255 petition at issue in this appeal. (Doc. 373). The basis for Duncan's motion was that Duncan's California conviction was now a misdemeanor; therefore, Duncan had been improperly

¹ During the sentencing hearing, specifically at Doc. 243-1 - Pg. 31, the district court stated that Duncan's total offense level was 42. However, a review of the record shows that that was a misstatement and that Duncan's total offense level was 46. (Doc. 243-1 - Pgs. 7, 23-24, 27, 31, 35-36; PSR, ¶¶ 54, 117; Statement of Reasons).

subjected to the 20-year mandatory minimum sentence. (Doc. 373 - Pg. 3).

Specifically, Duncan argued:

On November 4, 2014, the voters of California passed proposition 47. The law redesignated [sic] California Health and safety code section 11350(a), possession of a controlled substance from a felony offense to a misdemeanor. Petitioner was enhanced under 21 U.S.C. section 851 for his prior state 11350(a) conviction. This conviction is now a misdemeanor and does not qualify for the enhanced penalties under title 21 section 851.

(Doc. 373 - Pg. 3). Duncan filed an order from the Superior Court of California, County of Santa Clara, in case number 154862, which redesignated Duncan's California conviction from a felony to a misdemeanor, except that the redesignation did not permit Duncan to possess a firearm. (Doc. 373 - Pg. 6).

A magistrate judge issued a report and recommendation ("R&R") which recommended that the district court dismiss Duncan's August 17, 2015, § 2255 petition as successive and not authorized by this Court. (Doc. 375). Duncan filed an objection to the R&R. (Doc. 377). On October 22, 2015, the district court dismissed Duncan's August 17, 2015, § 2255 petition as successive and not authorized by this Court. (Doc. 378; Doc. 379).²

On November 23, 2015, Duncan filed a motion, under Fed. R. Civ. P. 59(e), for the district court to alter or amend its October 22, 2015, order dismissing Duncan's August 17, 2015, § 2255 petition. (Doc. 380). In his motion to alter or

² A copy of the magistrate judge's R&R and a copy of the district court's order is attached to this brief as composite attachment "A".

amend the order, Duncan argued the order was erroneous and the district court should not have dismissed his § 2255 petition as successive. (Id.). On December 3, 2015, the district court denied Duncan's motion to alter or amend judgment. (Doc. 381). On December 21, 2015, Duncan appealed the district court's October 22, 2015, orders dismissing his § 2255 motion and the district court's December 3, 2015, order denying his motion to alter or amend judgment. (Doc. 382). Duncan is currently incarcerated. (Doc. 213 - Pg. 2).

(ii) Statement of the Facts

The government submits that no facts other than those set forth in subsection (i) above are necessary to decide this appeal.

(iii) Standard of Review

Whether the district court properly dismissed Duncan's § 2255 petition because it was a second or successive petition is a question of law that this Court reviews de novo. Stewart v. United States, 646 F.3d 856, 858 (11th Cir. 2011).

SUMMARY OF THE ARGUMENT

Pursuant to Johnson v. United States and Stewart v. United States, when a state conviction used to enhance a defendant's sentence is vacated, 28 U.S.C. § 2255(f)'s limitations period runs from the date when the defendant receives notice of the order vacating his sentence. However, Duncan's California conviction has not been vacated. In Spencer v. United States this Court, sitting en banc, declined to extend Johnson and Stewart to a situation where the defendant's conviction had not been vacated, but instead had been ruled by case law to no longer constitute a "crime of violence" under the career offender guideline. The district court correctly ruled that the present case is more in accord with Spencer than it is with Johnson and Stewart, and this Court should affirm the district court.

Furthermore, there are two additional reasons that the district court should be affirmed. First, a California Proposition 47 reclassification does not invalidate imposition of a 21 U.S.C. § 841 sentencing enhancement. Therefore, not only has Duncan's California conviction not been vacated, as far as his § 841 enhancement is concerned, there has been no material change to Duncan's California conviction. Second, the district court sentenced Duncan not to the 20-year mandatory minimum, but to life imprisonment, and the 20-year mandatory minimum sentence had no effect on Duncan's ultimate sentence. Based on the entire record, and all of the above reasons, this Court should affirm the district court.

ARGUMENT AND CITATIONS OF AUTHORITY

**THE DISTRICT COURT PROPERLY DISMISSED DUNCAN'S
AUGUST 17, 2015, 28 U.S.C. § 2255 PETITION BECAUSE IT WAS A
SECOND AND SUCCESSIVE PETITION.**

As the district court recognized, when a state conviction used to enhance a defendant's sentence is vacated, the one-year limitations period in 28 U.S.C. § 2255(f) starts to run when the defendant receives notice of the order vacating his prior conviction. (Doc. 378 - Pgs. 2-4). Johnson v. United States, 544 U.S. 295, 298, 302, 310-11 (2005); Stewart, 646 F.3d at 858, 863-65. However, in the present case, Duncan's California conviction was not vacated; rather, it was reclassified. (Doc. 373 - Pgs. 3, 6). For the reasons set forth in the district court's order, and some additional reasons, the district court correctly held that this case is distinguishable from Johnson and Stewart and correctly dismissed Duncan's § 2255 petition.

As the district court held, this Court's opinion in Spencer v. United States, 773 F.3d 1132 (11th Cir. 2014)(en banc) is instructive and supports the district court's order. (Doc. 378 - Pgs. 2-4). Petitioner Spencer was sentenced as a career offender based, in part, on a prior conviction for felony child abuse that -- due to an intervening Supreme Court opinion -- had been erroneously classified as involving a "crime of violence." Spencer, 773 F.3d at 1135. Spencer filed a

§ 2255 petition and sought to be resentenced without the enhancement. Id. at 1136-37. The Spencer Court began its analysis by stating:

Section 2255 does not provide a remedy for every alleged error in conviction and sentencing. When a prisoner, like Spencer, alleges that his “sentence was imposed in violation of the . . . laws of the United States . . . or is otherwise subject to collateral attack,” 28 U.S.C. § 2255(a), a district court lacks the authority to review the alleged error “unless the claimed error constitute[s] ‘a fundamental defect which inherently results in a complete miscarriage of justice.’”

Id. at 1138 (citation omitted).

An error in applying a sentencing enhancement, the Spencer Court explained, is not “‘a fundamental defect which inherently results in a complete miscarriage of justice’” unless the petitioner can establish that he is “either actually innocent of his crime or that a prior conviction used to enhance his sentence has been vacated[.]” Id. at 1138-39 (citation omitted, emphasis added). The Spencer Court held that a sentencing enhancement error -- when the same sentence could be legally imposed on remand -- does not justify habeas relief. Id. at 1140-44. In distinguishing both Johnson and Stewart, the Spencer Court stated:

Spencer also likens his alleged sentencing error to Johnson and Stewart, in which the movants’ prior convictions, used to enhance their sentences, had been vacated. And Judge Jordan’s dissenting opinion argues that there is no meaningful distinction between the vacated convictions in Johnson and Stewart and Spencer’s conviction for felony child abuse. We disagree.

Spencer's prior conviction has not been vacated, and that distinction matters.³ When a conviction is vacated, that vacatur constitutes a "new 'fact'" with which the petitioner can challenge his sentence. Stewart, 646 F.3d at 858. But here, Spencer argues no new factual basis for reversing his sentence. He presents instead an argument of legal innocence. Even if we were to agree with Spencer that he is "innocent" as a career offender, that legal innocence falls far short of factual innocence, the kind of innocence involved in Johnson and Stewart. See McKay v. United States, 657 F.3d 1190, 1199 (11th Cir. 2011)("[A]ctual innocence means factual innocence, not mere legal insufficiency." (internal quotation marks omitted)). If we were to conclude that felony child abuse was not a "crime of violence," that legal conclusion would not negate the fact that Spencer committed a serious crime. The sentencing judge would consider his prior conviction for felony child abuse anew during resentencing [and would be free to impose the same sentence on remand]. Johnson and Stewart cannot stand for the proposition that a prisoner sentenced under advisory guidelines whose prior convictions remain valid can establish that an error in sentencing is a complete miscarriage of justice.

Id. at 1143 (emphasis in original).

In the present case, like Spencer and Hirman, and unlike Johnson and Stewart, Duncan's California conviction has not been vacated. Duncan is not factually innocent of possessing cocaine base as shown by Duncan's California conviction; rather, Duncan's conviction was just reclassified. (Doc. 187; Doc. 243-1 - Pgs. 35-36; Doc. 373 - Pgs. 3, 6; PSR, ¶ 63; Statement of Reasons). The life sentence the district court originally imposed does not exceed the statutory

³ Other courts have drawn this distinction as well. See Hirman v. United States, 613 F.3d 773, 776 (8th Cir. 2010)(considering this issue in the "career offender" context and distinguishing Johnson on the ground that "Hirman's state felony convictions have not been vacated. Instead, his felony convictions are merely [now classified as misdemeanors] by the Minnesota courts.").

maximum even in the absence of the challenged enhancement, and the district court could reimpose the same life sentence without the challenged enhancement. 21 U.S.C. § 841(b)(1)(A)(ii). As such, Duncan cannot show a “fundamental defect which inherently results in a complete miscarriage of justice.” Spencer, 773 F.3d at 1135. Based on the above, the present case is more in accord with Spencer than it is with Johnson and Stewart, and this Court should affirm the district court.

There are two additional reasons why the district court should be affirmed. First, a California Proposition 47 reclassification does not invalidate imposition of a 21 U.S.C. § 841 sentencing enhancement. United States v. Diaz, 838 F.3d 968, 971-75 (9th Cir. 2016), cert. denied sub nom., Vasquez v. United States, 137 S.Ct. 840 (2017).⁴ “California’s actions ---taken long after [Duncan’s California] conviction became ‘final’---have no bearing on whether § 841’s requirements are satisfied. Id. at 972. “California’s Proposition 47, offering post-conviction relief by reclassifying certain past felony convictions as misdemeanors, does not undermine a prior conviction’s felony-status for purposes of § 841. Id. at 975; see

⁴ At pages 12-13 of his brief, Duncan relies on United States v. Norwood, 2016 WL 26971 (C.D. Cal. 2106), which reached a different holding than did the Diaz Court. Norwood is no longer good law after Diaz. At page 13 of his brief, Duncan cites a California Supreme Court opinion, People v. Park, 299 P.3d 1263 (Cal. 2013), regarding how Proposition 47 affects a California criminal statute. However, Diaz controls with regard to how Proposition 47 affects 21 U.S.C. § 841 convictions. To be sure, this Court is not bound by the Ninth Circuit’s opinion in Diaz; however, for the reasons set forth by the Diaz Court, Diaz was correctly decided and this Court should follow it.

also United States v. Johnson, 114 F.3d 435, 444-45 (4th Cir. 1997) (Defendant's state conviction, which carried a two-year maximum sentence when defendant was convicted, constituted a prior felony conviction under the career offender guideline, even though the state legislature later reclassified the offense as a misdemeanor); United States v. McGlory, 968 F.2d 309, 349-51 (3d Cir. 1992) (for the purposes of 21 U.S.C. § 841, a prior state conviction constitutes a "prior conviction for a felony drug offense" if it was a felony at the time the defendant was convicted -- the district court properly enhanced the defendant's sentence under § 841 based on the defendant's conviction that was classified as a felony when the defendant was convicted, but that had been reclassified to a misdemeanor by the time the defendant was sentenced for his § 841 offense).

Accordingly, not only has Duncan's California conviction not been vacated, as far as his § 841 enhancement is concerned, there has been no material change to Duncan's California conviction. Prior to California's Proposition 47, Duncan faced a mandatory minimum 20-year sentence, and after California's Proposition 47, that has not changed. For this further reason, this Court should affirm the district court.

Second, the fact that Duncan faced a 20-year mandatory minimum sentence had no effect on his ultimate sentence. (Doc. 243-1 - Pgs. 7, 23-24, 27, 31, 35-36; PSR, ¶¶ 54, 117; Statement of Reasons). Duncan's total offense level was 46, that

is, it was three-levels higher than level 43, the level that corresponds with a Guidelines range of life imprisonment. (Doc. 243-1 - Pgs. 7, 23-24, 27, 31, 35-36; PSR, ¶¶ 54, 117; Statement of Reasons). U.S.S.G. Sentencing Table. The district court sentenced Duncan not to the 20-year mandatory minimum, but to life imprisonment. (Doc. 213 - Pg. 2; Doc. 243-1 - Pgs. 35-36).⁵ Therefore, not only has Duncan's California conviction not been vacated, and not only has there been no material change to Duncan's California conviction for the purposes of § 841, but Duncan's California conviction and his § 841 enhancement had no effect on his sentence. For this further reason, this Court should affirm the district court.⁶

⁵ At pages 8-9, 11-13, of his brief, Duncan argues that the district court sentenced him as a career offender. That contention is incorrect. Duncan was sentenced under the drug guideline, U.S.S.G. § 2D1.1(c), and also received a § 2D1.1(b)(1) firearm enhancement, a § 3B1.1(a) aggravating role enhancement, and a § 3C1.1 obstruction of justice enhancement. (Doc. 243-1 - Pgs. 35-36; PSR, ¶¶ 45-54; Statement of Reasons).

⁶ At pages 10-12 above, the government has argued two additional reasons support the district court's order and show why this Court should affirm the district court (Diaz was decided after the district court issued its orders at issue in this appeal). To the extent that Duncan argues in his reply brief that the district court did not rely on those reasons, the government notes that this Court "may affirm for any reason supported by the record, even if not relied upon by the district court." United States v. Hall, 714 F.3d 1270, 1271 (11th Cir. 2013); accord Castillo v. United States, 816 F.3d 1300, 1303 (11th Cir. 2016); Williams v. Bureau of Prisons, 713 F.3d 1332, 1341, n. 2 (11th Cir. 2013).

CONCLUSION

For the above-stated reasons, the United States respectfully requests that this Court affirm the district court's orders dismissing Duncan's § 2255 petition and denying Duncan's Fed. R. Civ. P. 59(e) motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing has been mailed to Valarie Linnen, P.O. Box 330339, Atlantic Beach, FL 32233, this the 30th day of June, 2017. On that same date this brief was electronically filed with the Court.

/s Robert G. Davies
ROBERT G. DAVIES
Assistant U.S. Attorney

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

Case Nos.: 3:02cr20/RV/EMT
3:15cv377/RV/EMT

MARCO D. DUNCAN

REPORT AND RECOMMENDATION

This matter is before the court upon Defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (doc. 373). Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides in part that "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party." After a review of the record, it is the opinion of the undersigned that the court is without jurisdiction to entertain Defendant's motion and that it should be summarily dismissed.

BACKGROUND and ANALYSIS

Defendant was sentenced to a term of life imprisonment after his conviction of conspiracy to possess with intent to distribute cocaine base (doc. 213). His conviction and sentence were affirmed on appeal in May of 2005 (doc. 258). He then challenged his conviction by means of a motion to vacate pursuant to 28 U.S.C. § 2255, raising seven grounds for relief (doc. 268). This motion was denied in 2010 over Defendant's objection (*see* docs. 285, 286, 288). Defendant's request for a certificate of appealability was denied by both the district court and the Eleventh Circuit Court of Appeals in 2008 (docs. 300, 316, 323). Defendant has now filed another motion to vacate in which he contends that he is entitled to relief pursuant to Johnson v. United States, 544 U.S. 295 (2005) because one of his prior state convictions no longer qualifies as a predicate

conviction under 21 U.S.C. § 851, due to a change in California law which converted the conviction from a felony to a misdemeanor (doc. 373 at 3, 6–7).

This court does not have jurisdiction to entertain Defendant's motion. Before a second or successive application for § 2255 relief is filed in the district court, the litigant must typically move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3) and § 2255(h); Felker v. Turpin, 518 U.S. 651 (1996); United States v. Holt, 417 F.3d 1172, 1175 (11th Cir. 2005); Carter v. United States, 405 F. App'x 409 (11th Cir. 2010). Defendant's successive motion falls within the larger subset of cases for which such authorization is required, as he is challenging the same judgment he challenged in his initial motion, even though the ground asserted was not previously available. Defendant has not obtained authorization from the Eleventh Circuit Court of Appeals to file a successive motion, and therefore, the instant motion to vacate must be dismissed without prejudice.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Court ("§ 2255 Rules") provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), § 2255 Rules.

After review of the record, the court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483–84 (2000) (explaining how to satisfy this showing) (citation omitted). Defendant is not foreclosed from re-applying for relief once he obtains the appropriate certification from the appellate court. Therefore, it is also recommended that the court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

Accordingly, it is respectfully **RECOMMENDED**:

1. Defendant's motion to vacate pursuant to 28 U.S.C. § 2255 (doc. 373), be **SUMMARILY DISMISSED**, as this court lacks jurisdiction to consider Defendant's second § 2255 motion absent authorization from the Eleventh Circuit.

2. A certificate of appealability be **DENIED**.

At Pensacola, Florida, this 21st day of September 2015.

/s/ Elizabeth M. Timothy

ELIZABETH M. TIMOTHY

CHIEF UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen (14) days after being served a copy thereof. Any different deadline that may appear on the electronic docket is for the court's internal use only, and does not control. A copy of objections shall be served upon all other parties. If a party fails to object to the magistrate judge's findings or recommendations as to any particular claim or issue contained in a report and recommendation, that party waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

Case Nos.: 3:02cr20/RV/EMT
3:15cv377/RV/EMT

MARCO D. DUNCAN

ORDER

This cause comes for consideration on the magistrate judge's Report and Recommendation (Report), dated September 21, 2015 (doc. 375). The Report recommends that Marco D. Duncan's Section 2255 petition for habeas corpus --- his second one --- be dismissed as successive, and that a certificate of appealability be denied. The parties have been furnished a copy of the Report and have been afforded the opportunity to file (and Duncan has filed) objections under Title 28, United States Code, Section 636(b)(1) (doc. 377). I have made a de novo determination of all timely filed objections. Having considered the Report, and Duncan's objections thereto, I have determined the Report should be adopted, with the following additional analysis.

In 2002, Duncan and several others were charged with conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1); 841(b)(1)(A)(ii), and (iii); and 846. Under the statute, Duncan was originally subject to a term of imprisonment of not less than 10 years or more than life. 21 U.S.C. § 841(b)(1)(A). Before trial, however, the government filed a notice of enhancement information (doc. 187), asserting that Duncan was subject to an increased minimum sentence based on a previous felony conviction for possession of cocaine base in California in 1992. Under the statute's increased penalty provision, a defendant shall be imprisoned for not less than 20 years and not more than life if he had a prior felony drug conviction. Id. After Duncan was convicted by the jury in this case, I sentenced him to life imprisonment. He filed a direct appeal (which was denied), after which he filed his first Section 2255 collateral attack (which was also denied). He has now brought a second Section 2255 motion. As noted, the magistrate judge has recommended that the petition be dismissed as successive.

Duncan's second petition is based on his claim, made pursuant to Johnson v. United States, 544 U.S. 295, 125 S. Ct. 1571 (2005), that his previous conviction no longer qualifies as a predicate conviction for enhancement purposes due to a recent change in California law which converted the earlier conviction from a felony to a misdemeanor. In Johnson, which involved a "career offender" designation under the federal sentencing guidelines (and not, as here, a statutory enhancement), the Supreme Court held that the state court vacatur of a predicate conviction is a new "fact" that triggers a "fresh" one-year statute of limitations pursuant to Section 2255(f)(4). And, in Stewart v. United States, 646 F.3d 856 (11th Cir. 2011), which likewise involved a career offender designation under the sentencing guidelines, the Eleventh Circuit held that if a petitioner succeeds in having his prior conviction vacated, a second petition will not be dismissed as successive. Duncan has relied on both Johnson and Stewart in his objections to the Report.¹

The Eleventh Circuit's decision in Spencer v. United States, 773 F.3d 1132 (11th Cir. 2014) (en banc) is instructive. The petitioner in that case was sentenced as a career offender based, in part, on a prior conviction for felony child abuse that --- due to an intervening Supreme Court decision --- had been erroneously classified as involving a "crime of violence." He filed a Section 2255 petition and sought to be resentenced without the enhancement. The Spencer majority began its analysis by stating:

¹ It appears that Stewart implicitly held that Johnson is retroactively applicable to collateral proceedings. As at least one court in this circuit has observed:

While some say that neither the Eleventh Circuit nor the Supreme Court has held Johnson to be retroactive to cases on collateral attack, Smith v. United States, 2012 WL 2505309 at * 2 (M.D. Fla. Jun. 28, 2012), Stewart is reduced to a mere advisory opinion unless Johnson is retroactive, so it is fair to conclude that Stewart implicitly held that Johnson is retroactively applicable to collateral proceedings (the government conceded retroactivity in Smith).

Futch v. United States, 2012 WL 4009710, at *1 n.2 (S.D. Ga. 2012). For this order, I assume that the 2005 Johnson decision (not to be confused with other more recent Supreme Court sentencing enhancement decisions that share the same name, see Johnson v. United States, — U.S. —, 135 S. Ct. 2551 (2015), and Johnson v. United States, 559 U.S. 133, 130 S. Ct. 1265 (2010)) is indeed retroactive. But, as will be seen, that does not entitle Duncan to relief.

Section 2255 does not provide a remedy for every alleged error in conviction and sentencing. When a prisoner, like Spencer, alleges that his “sentence was imposed in violation of the . . . laws of the United States . . . or is otherwise subject to collateral attack,” 28 U.S.C. § 2255(a), a district court lacks the authority to review the alleged error “unless the claimed error constitute[s] ‘a fundamental defect which inherently results in a complete miscarriage of justice.’”

Id. at 1138 (citation omitted). An error in applying a sentencing enhancement, the court explained, is not “‘a fundamental defect which inherently results in a complete miscarriage of justice’” unless the petitioner can establish that he is “either actually innocent of his crime or that a prior conviction used to enhance his sentence has been vacated[.]” Id. at 1139 (emphasis supplied). The court ruled that a sentencing enhancement error --- when the same sentence could be legally imposed on remand --- does not justify habeas relief. See id. at 1140-43. In distinguishing both Johnson and Stewart, the Spencer majority stated:

Spencer . . . likens his alleged sentencing error to Johnson and Stewart, in which the movants’ prior convictions, used to enhance their sentences, had been vacated. And Judge Jordan’s dissenting opinion argues that there is no meaningful distinction between the vacated convictions in Johnson and Stewart and Spencer’s conviction for felony child abuse. We disagree.

Spencer’s prior conviction has not been vacated, and that distinction matters.^[2] When a conviction is vacated, that vacatur constitutes a “new ‘fact’” with which the petitioner can challenge his sentence. Stewart, 646 F.3d at 858 [citing and quoting Johnson]. But here, Spencer argues no new factual basis for reversing his sentence. He presents instead an argument of legal innocence. Even if we were to agree with Spencer that he is “innocent” as a career offender, that legal innocence falls far short of factual innocence, the kind of innocence involved in Johnson and Stewart. See McKay v. United States, 657 F.3d 1190, 1199 (11th Cir. 2011) (“[A]ctual innocence means factual innocence, not mere legal insufficiency.” (internal quotation marks omitted)). If we were to conclude that felony child abuse was not a “crime of violence,” that legal conclusion would not

² Other courts have drawn this distinction as well. See Hirman v. United States, 613 F.3d 773, 776 (8th Cir. 2010) (considering this issue in the “career offender” context and distinguishing Johnson on the ground that “Hirman’s state felony convictions have not been vacated. Instead, his felony convictions are merely [now classified as misdemeanors] by the Minnesota courts.”).

negate the fact that Spencer committed a serious crime. The sentencing judge would consider his prior conviction for felony child abuse anew during resentencing [and “would be free to impose the same sentence on remand.”]. Johnson and Stewart cannot stand for the proposition that a prisoner sentenced under advisory guidelines whose prior convictions remain valid can establish that an error in sentencing is a complete miscarriage of justice.

Id. at 1143 & 1141 (emphasis supplied).

Here, like Spencer and Hirman (and unlike Johnson and Stewart), the petitioner’s previous conviction has not been vacated. There does not appear to be any suggestion that he was factually innocent, but, rather, his conviction was just reclassified. And because the life sentence I originally imposed does not exceed the statutory maximum even in the absence of the challenged enhancement --- and the same exact sentence could be reimposed without it --- he cannot show a “fundamental defect which inherently results in a complete miscarriage of justice.” Spencer, 773 F.3d at 1132.

Accordingly, it is now **ORDERED** as follows:

1. The magistrate judge’s Report is adopted and incorporated by reference in this order.
2. Defendant’s motion to vacate pursuant to Title 28, United States Code, Section 2255 (doc. 373), is **SUMMARILY DISMISSED**.
3. A certificate of appealability is **DENIED**.

DONE AND ORDERED this 22nd day of October, 2015.

/s/ Roger Vinson

ROGER VINSON

SENIOR UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX J

Reply Brief

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-15665
DC DKT NO.: 3:02-cr-20-RV-EMT

MARCO D. DUNCAN,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this federal habeas action pursuant to Title 28, Section 2255(f)(4), United States Code (2015). This Court has jurisdiction to review a final order dismissing a habeas corpus petition. 28 U.S.C. 1291 (2017). Appellant timely filed a notice of appeal on December 8, 2015. (Dkt.3821)

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument as such will assist the Court in considering the argument presented.

STATEMENT OF THE ISSUES

- I. In light of Spencer v. United States, 773 F.3d 1132 (11th Cir. 2014), whether an inmate may use a 28 U.S.C. § 2255(f)(4) motion to challenge a sentence that was based on a recidivist enhancement when the predicate state felony conviction was later “redesignated” by judicial order to a misdemeanor conviction.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1 (2017), counsel for Appellant, MARCO DUNCAN, hereby files this Certificate of Interested Persons:

- 1) BERRY, Willie—Co-defendant
- 2) CANOVA, Christopher—U.S. Attorney on Appeal
- 3) CORDER, Dennis—Trial Counsel for Appellant
- 4) DAILEY, Carlos—Co-defendant
- 5) DAVIES, Robert O.—Office of the U.S. Attorney
- 6) DAVIS, Miles—U.S. Magistrate Judge
- 7) HARPER, Robert Augustus—Trial Counsel for Appellant
- 8) HESS, Nancy—Assistant U.S. Attorney
- 9) HENSEL, Randall—Former Assistant U.S. Attorney
- 10) LINNEN, Valarie—CJA Appellate Counsel for Appellant
- 11) PREISSER, Stephen—Former Assistant U.S. Attorney
- 12) MIMS, Robert—Co-defendant
- 13) MULLIN, William—Co-defendant
- 14) MURRELL, Randolph—Federal Public Defender
- 15) NOVOTNY, Susan—U.S. Magistrate Judge
- 16) PALMER, Samenia—Co-defendant
- 17) ROBERTS, Terrance—Co-defendant
- 18) ROGERS, M. Casey—U.S. Magistrate Judge
- 19) TIMOTHY, Elizabeth—Chief U.S. Magistrate Judge
- 20) UFFERMAN, Michael—Appellate Counsel on Direct Appeal
- 21) THOMAS, Shaun—Co-defendant
- 22) VINSON, Roger—Senior U.S. District Court Judge
- 23) WILSON, E. Bryan—Assistant U.S. Attorney

ARGUMENT

- I. The district court reversibly erred by denying Mr. Duncan's Section 2255(f)(4) petition where the petition was not successive and the imposition of the recidivist sentencing enhancement, in the absence of a predicate felony conviction, results in a complete miscarriage of justice.**

In the *Answer Brief*, the government argues that the district court properly denied the second Section 2255(f)(4) petition of Appellant, MARCO DUNCAN, because: (A) Mr. Duncan is not factually innocent of the prior state cocaine conviction, see AB.9-10; (B) California's reclassification of his prior conviction from felony to misdemeanor does not affect his recidivist sentencing enhancement under 21 U.S.C. § 841, see AB.10-11; and (C) the existing sentence is lawful as the district court could have imposed the same sentence with or without the recidivist enhancement. See AB.11-12.

As to the government's first argument, the United States Supreme Court has never held that a petitioner must be factually innocent in order to receive relief under a subsequent Section 2255(f)(4) petition. Indeed, the Supreme Court has left open the possibility that a petitioner could be entitled to relief from a recidivist-enhanced sentence where "a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." See IB.9-10 (citing McNeill v. United States, 563 U.S. 816, 825 (2011)).

Second, the government argues that California's redesignation of Mr.

Duncan's prior conviction from felony to misdemeanor "does not invalidate imposition of a 21 U.S.C. § 841 sentencing enhancement." See AB.10. This argument would be more compelling if the plain language of Section 841(b)(1)(A) listed specific enumerated offenses as qualifying offenses for the recidivist enhancement, or if it stated that any prior felony conviction at the time of the instant offense qualified for the sentencing enhancement; however, such language was not included in the statute. As such, Mr. Duncan does not qualify for the recidivist sentence enhancement as he has not—nor has he ever been—convicted of a "prior conviction for a felony drug offense" pursuant to Proposition 47. See 21 U.S.C. § 841(1)(b)(A).

Finally, the government argues that the existing sentence of life imprisonment is lawful as the district court could have imposed the same sentence with or without the recidivist enhancement. See AB.11-12. As the en banc opinion of this Court in Spencer v. United States, 773 F.3d 1132 (11th Cir.), this argument ignores the impact of the recidivist designation upon a district court when fashioning sentence—a label that brands him as "one subject to particularly severe punishment", see Buford v. United States, 532 U.S. 59, 60 (2001), and ignores the impact of that label upon the considerable discretion of the district court when fashioning sentence.

It is to be noted that the same predicate conduct of possession of cocaine (a misdemeanor under California law) used to enhance Mr. Duncan's conviction under

Section 841(b)(1)(A) would also be a misdemeanor if he were prosecuted federally for the same conduct. See 21 U.S.C. § 844 (2017). This glaring inconsistency in the application of Section 841's sentencing enhancement solidifies that allowing Mr. Duncan's enhanced sentence to stand, when he does not have the qualifying prior felony state drug conviction, and would not have had the qualifying prior felony drug conviction if prosecuted for the same conduct under federal law, amounts to "a fundamental defect which inherently results in a complete miscarriage of justice." See United States v. Addonizio, 442 U.S. 178, 185 (1979).

This central requirement dictates that Mr. Duncan's motion to vacate is not procedurally barred and that he is entitled to resentencing without the recidivist enhancement. Accordingly, Mr. Duncan requests that this Court vacate its opinion in Spencer, reverse the order of the district court denying relief, and order that he be resentenced.

CONCLUSION

WHEREFORE, Mr. Duncan requests that this Court vacate its opinion in Spencer, reverse the order of the district court denying relief, and order that he be resentenced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to CHRISTOPHER CANOVA, United States Attorney's Office, Appellate Division, via electronic case mail delivery on this 18th day of July 2017.

CERTIFICATE OF TYPEFACE COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 1,331 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX K

Opinion

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-15665
Non-Argument Calendar

D.C. Docket Nos. 3:15-cv-00377-RV-EMT; 3:02-cr-00020-RV-EMT-2

MARCO D. DUNCAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(November 27, 2017)

Before MARCUS, WILSON, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Marco Duncan appeals the dismissal of his motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. He argues that, under *Johnson*

v. United States, 544 U.S. 295, 125 S. Ct. 1571 (2005), his motion was not second or successive because a prior state conviction was reclassified from a felony to a misdemeanor.

We review de novo a district court's dismissal of a § 2255 motion as second or successive. *McIver v. United States*, 307 F.3d 1327, 1329 (11th Cir. 2002).

Before a prisoner may file a second or successive motion to vacate, he must first obtain an order from this court authorizing the district court to consider the motion. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). Without our authorization, the district court lacks jurisdiction to consider a second or successive § 2255 motion to vacate. *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) (per curiam).

When a movant, in a numerically second § 2255 motion, collaterally attacks his federal sentence on the basis that a state conviction used to enhance his federal sentence was subsequently vacated, the motion is not "second or successive," as it is based on a fact that did not exist when he filed his first § 2255 motion. *Stewart v. United States*, 646 F.3d 856, 865 (11th Cir. 2011).

However, a district court does not have the authority to review an alleged sentencing error under § 2255 unless the error "constituted a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 186, 99 S. Ct. 2235, 2240 (1979) (internal quotation marks omitted). To meet this standard, a federal prisoner must show either "actual

innocence of his crime or the vacatur of a prior conviction.” *Spencer v. United States*, 773 F.3d 1132, 1139 (11th Cir. 2014) (en banc).

Here, Duncan was originally convicted of conspiring to possess with intent to distribute cocaine. This crime is punishable by a term of imprisonment “which may not be less than ten years or more than life.” 21 U.S.C. § 841(b)(1)(A). However, because he was previously convicted of felony possession of cocaine base in California, his minimum sentence raised to twenty years by statute. *Id.* The district court sentenced him to life in prison. Duncan appealed and brought a § 2255 petition, but did not gain relief. Subsequently, California reclassified Duncan’s state conviction to a misdemeanor. He brought this numerically second § 2255 motion seeking to vacate his sentence due to California’s reclassification.

Given our binding precedent of *Spencer*, we are obligated to affirm.¹ Duncan’s sentence of life imprisonment “was and is lawful,” both before and after California reclassified his offense—the statutory maximum at all times remained life imprisonment. *See Spencer*, 773 F.3d at 1144. Additionally, Duncan has shown neither “actual innocence of his crime” nor “the vacatur of a prior conviction.” *See id.* at 1139.

AFFIRMED.

¹ Appellant Duncan appears to concede as much. Second Amended Initial Brief at 9.