

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 17-14216-J

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FRANTZ CLEMENT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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ORDER:

Frantz Clement moves for a certificate of appealability and leave to proceed *in forma pauperis* in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. To merit a certificate of appealability, Clement must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because he has failed to make the requisite showing, the motion for a certificate of appealability is DENIED. Clement's motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Charles R. Wilson  
UNITED STATES CIRCUIT JUDGE

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 16-22160-CIV-ALTONAGA/White**

**FRANTZ CLEMENT,**

Movant,

v.

**UNITED STATES OF AMERICA,**

Respondent.

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**ORDER**

**THIS CAUSE** came before the Court upon *pro se* Movant, Frantz Clement's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [ECF No. 1], entered on the docket June 14, 2016. Respondent, the United States of America, filed a Response [ECF No. 14] on October 11, 2016, and a Notice of Supplemental Response [ECF No. 15] on November 16, 2016. On May 1, 2017, Magistrate Judge Patrick A. White entered a Report of Magistrate Judge [ECF No. 16], recommending the Court deny the Motion. Clement filed a Reply to the Magistrate's [sic] Report and Recommendation ("Objections") [ECF No. 18], which the Court accepted as timely (*see* May 31 Order [ECF No. 19]). The Court has reviewed the parties' written submissions, the record, and applicable law.

When a magistrate judge's "disposition" is properly objected to, district courts must review the disposition *de novo*. FED. R. CIV. P. 72(b)(3). Although Rule 72 is silent on the standard of review, the United States Supreme Court has determined Congress's intent was to require *de novo* review only when objections are properly filed, not when neither party objects. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985); *Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1169 (N.D. Iowa 1999) (quoting 28 U.S.C. § 636(b)(1)). Since Movant has filed timely objections, the Court

reviews the record *de novo*.

### I. BACKGROUND

On January 20, 2016, Movant plead guilty to possession with intent to distribute a controlled substance, in violation of 21 U.S.C. section 841(a)(1) (“Count 1”); possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. sections 922(g)(1) and 924(e) (“Count 2”); and possession of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. section 924(c)(1)(A) (“Count 3”). (See Change of Plea Hearing Transcript [CR ECF No. 79]<sup>1</sup> 6:12–22, 13:5–7; Judgment in a Criminal Case [CR ECF No. 77] 1<sup>2</sup>). According to the Presentence Investigation Report (“PSI”),<sup>3</sup> Movant qualified as an armed career criminal under the Armed Career Criminal Act, 18 U.S.C. section 924(e), which provides for enhanced sentencing where a criminal defendant violates 18 U.S.C. section 922(g) and has at least three prior convictions for a violent felony or a serious drug offense. See 18 U.S.C. § 924(e); (see also PSI ¶ 22).

The PSI identified the following state court convictions qualifying Movant for an ACCA enhancement: a conviction for aggravated assault (see PSI ¶ 27); a conviction for aggravated assault on a law enforcement officer (see *id.* ¶ 28); a conviction for “Cocaine Sell/Deliver with Intent” (*id.* ¶ 31); and two convictions for “Cannabis Sale/School” (*id.* ¶¶ 32–33). Neither the Government nor Movant filed objections to the PSI. (See Addendum to the Presentence Report).

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<sup>1</sup> References to docket entries in Movant’s criminal case, Case No. 15-20247-CR-ALTONAGA, are denoted with “CR ECF No.”

<sup>2</sup> The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

<sup>3</sup> The PSI and its Addendum are not on the public docket.

The Court adopted the findings and guideline calculation in the PSI. (*See* Sentencing Hearing Transcript [CR ECF No. 80] 8:9–9:19). The Court sentenced Movant to a 240-month term of imprisonment, consisting of 180 months’ imprisonment as to Counts 1 and 2, to run concurrently; and 60 months as to Count 3, to be served consecutively to Counts 1 and 2. (*See* Judgment 2).

On June 6, 2015, the United States Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), and held the so-called “residual clause” of the ACCA is void for vagueness. *See id.* at 2557–60, 2563. Clement timely filed this Motion seeking to vacate his sentence under the ACCA and his Count 3 conviction in light of *Johnson*.<sup>4</sup> (*See generally* Mot.).

## II. ANALYSIS

### A. The ACCA and *Johnson*

The ACCA requires a 15-year mandatory minimum sentence for a defendant convicted of being a felon in possession of a firearm who also has three previous convictions for a “violent felony” or “serious drug offense.” 18 U.S.C. § 924(e)(1).

A “serious drug offense” includes “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance [as

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<sup>4</sup> While Movant’s guilty plea and sentence occurred after *Johnson* was already decided, neither the Report nor the parties’ submissions to the Court address whether Movant’s Motion is procedurally barred. Movant appears to argue his counsel was ineffective. (*See, e.g.*, Mot. 25 (“Defense counsel was made aware of all these defenses and errors but did not pursue them.”); *id.* (stating Movant was “mislead [sic] and misadvised by court appointed counsel . . . who refused to and or failed to raise objections” (alterations added)); *id.* 27 (“[C]ounsel . . . should have advised [Movant] on *Johnson* . . . .” (alterations added))). The Court notes Movant previously affirmed to the Court he was satisfied with his counsel’s representation (*see* Change of Plea Hr’g Tr. 6:8–11), assuring the Court he would not bring a claim for ineffective assistance of counsel (*see* Sentencing Hr’g Tr. 5:13–15). Nevertheless, as the Court finds Plaintiff committed three predicate offenses sufficient to sustain his ACCA enhancement, and *Johnson* does not make Movant’s Count 3 conviction unlawful, the Court declines to examine whether Plaintiff can overcome a procedural bar through a claim of ineffective assistance of counsel.

defined by 21 U.S.C. section 802],” which carries a maximum term of at least ten years imprisonment. 18 U.S.C. § 924(e)(2)(A)(ii) (alteration added).

A “violent felony” is any crime punishable by more than a one-year term that: (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another,” *id.* § 924(e)(2)(B)(i); or (2) “is burglary, arson, or extortion, involves the use of explosives, or [(3)] otherwise involves conduct that presents a serious potential risk of physical injury to another,” *id.* § 924(e)(2)(B)(ii) (alteration added). The first part of the violent felony definition, contained in subsection (2)(B)(i), is known as the “elements clause,” while the second and third parts in subsection (2)(B)(ii) are known as the “enumerated clause” and the “residual clause,” respectively.

In *Johnson*, the Supreme Court struck down the residual clause as void for vagueness. *See* 135 S. Ct. at 2557–60, 2563. The Court explicitly stated its decision did “not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony,” that is, the elements clause. *Id.* at 2563.

#### **B. Clement’s *Johnson* Arguments**

Clement can obtain relief if: (1) it is unclear from the record which clause the Court relied on in applying the ACCA enhancement; and (2) Clement’s prior convictions no longer qualify him for the ACCA sentencing enhancement after *Johnson*’s invalidation of the residual clause. *See Leonard v. United States*, No. 16-22612-CIV, 2016 WL 4576040, at \*2 (S.D. Fla. Aug. 22, 2016) (citation omitted); *see also In re Chance*, 831 F.3d 1335, 1339–41 (11th Cir. 2016); *but see In re Moore*, 830 F.3d 1268, 1271–72 (11th Cir. 2016). As the record is not clear regarding whether Movant was sentenced under the ACCA’s residual clause (*see* PSI ¶ 22), the

Court focuses on whether Movant has three prior convictions that still qualify as predicates under the elements or enumerated clauses.

As discussed, Movant's ACCA enhancement was based upon any three of the following Florida convictions: a conviction for aggravated assault (*see* PSI ¶ 27); a conviction for aggravated assault on a law enforcement officer (*see id.* ¶ 28); a conviction for "Cocaine Sell/Deliver with Intent" (*id.* ¶ 31); and two convictions for "Cannabis Sale/School" (*id.* ¶¶ 32–33).

To determine whether an offense qualifies as a violent felony under the ACCA, courts apply the "categorical approach" or the "modified categorical approach," depending on the statute of conviction. *See, e.g., Johnson*, 135 S. Ct. at 2557; *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013).

If the statute is indivisible — that is, if it lists only one set of elements for committing the offense — courts apply the categorical approach. *See Descamps*, 133 S. Ct. at 2283. Under the categorical approach, a court is limited to looking at the statute's definition, *i.e.*, the elements of a defendant's prior convictions and not the facts underlying the prior offenses. *See id.* (citation omitted); *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) ("[T]he underlying brute facts or means of commission . . . make[] no difference; even if [the defendant's] conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence." (citation and internal quotation marks omitted; alterations added)).

The modified categorical approach is reserved for analyzing ACCA enhancements under divisible statutes that provide multiple alternative elements capable of satisfying the offense. *See Descamps*, 133 S. Ct. at 2281. A court applying the modified categorical approach may consider

a limited class of documents known as *Shepard*<sup>5</sup> documents to determine which of the possible elements of an alternatively worded statute was factually satisfied by a defendant's conduct. *See Descamps*, 133 S. Ct. at 2283–85.

The Court considers the crimes of aggravated assault; aggravated assault on a law enforcement officer; and cocaine sell/deliver with intent to determine whether they qualify as serious drug offenses or violent felonies after *Johnson*.<sup>6</sup>

*Aggravated Assault and Aggravated Assault on a Law Enforcement Officer.* In 2008, Movant pled guilty to aggravated assault. (*See* PSI ¶ 27). In 1998, he was convicted of aggravated assault on a law enforcement officer. (*See id.* ¶ 28).

The felony offense of aggravated assault on a law enforcement officer under Florida Statutes section 784.07(2)(c) requires the same conduct as the felony of aggravated assault under section 784.021, with the added element the assault is directed against a law enforcement officer. Florida defines aggravated assault as an assault “(a) [w]ith a deadly weapon without intent to kill; or (b) [w]ith an intent to commit a felony.” FLA. STAT. § 784.021(1) (alterations added). “An ‘assault’ is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.” *Id.* § 784.011(1).

The Eleventh Circuit has held aggravated assault categorically qualifies as a violent felony under the ACCA's elements clause. *See Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1338 (11th Cir. 2013) (“[A] conviction under section 784.021 will always include ‘as an element the . . . threatened use of physical force against the person of another,’ . . . and . . .

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<sup>5</sup>*Shepard v. United States*, 544 U.S. 13 (2005).

<sup>6</sup> As the Court finds all three of these offenses are categorically ACCA predicates, it declines to examine whether Defendants' convictions for cannabis sale/school also sustain his ACCA enhancement.

thus qualifies as a violent felony for purposes of the ACCA.” (first and third alterations added; footnote call number omitted) (quoting 18 U.S.C. § 924(e)(2)(B)(i))), *abrogated on other grounds by Johnson*, 135 S. Ct. 2551; *see also United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) (per curiam) (affirming *Turner* remains binding in this circuit on this issue); *United States v. Hughes*, No. 16-12297, 2017 WL 2471207, at \*1 (11th Cir. June 8, 2017) (per curiam) (same).

While Movant appears to argue because aggravated assault can be committed recklessly, it is not a crime of violence (*see* Objs. 3 (citing *United States v. Palomino-Garcia*, 606 F.3d 1317, 1334–36 (11th Cir. 2010))), the Eleventh Circuit recently rejected a similar challenge in *Golden*, *see* 854 F.3d at 1257. In light of Eleventh Circuit precedent, the Court finds Movant’s convictions for aggravated assault and aggravated assault on a law enforcement officer categorically qualify as violent felonies under the ACCA and constitute two of three prior convictions sustaining the ACCA enhancement.

*Cocaine Sell/Deliver with Intent.* In 2001, Movant was convicted of “Cocaine Sell/Deliver with Intent.” (PSI ¶ 31).

The ACCA defines a “serious drug offense,” as “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance [as defined by 21 U.S.C. section 802],” which carries a maximum term of at least ten years’ imprisonment. 18 U.S.C. § 924(e)(2)(A)(ii) (alteration added).

Cocaine is a controlled substance as defined by 21 U.S.C. section 802. *See id.* § 802(6) (“The term ‘controlled substance’ means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.”); *id.* § 812 (listing cocaine as a controlled substance in Schedule II). In Florida, sale, delivery, or possession of cocaine with

the intent to sell or deliver is a felony punishable by a maximum term of 15 years' imprisonment. *See* FLA. STAT. § 893.03(2)(a)(4) (identifying cocaine as a controlled substance); *id.* § 893.13(1)(a)(1) (prohibiting sale, delivery, or possession of controlled substances under section 893.03(2)(a) with intent to sell or deliver as a second-degree felony); *id.* § 775.082(3)(d) (providing for term of imprisonment not to exceed 15 years for second-degree felonies).

As such, the possession of cocaine with the intent to sell or deliver is unambiguously a serious drug offense. *See United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014) ("Section 893.13(1) of the Florida Statutes is . . . a 'serious drug offense.'" (alteration added) (quoting 18 U.S.C. § 924(e)(2)(A))); *see also United States v. McKenzie*, No. 16-15936, 2017 WL 2492032, at \*2 (11th Cir. June 9, 2017) (holding "the district court did not err by concluding . . . Defendant's three prior convictions in Florida for possession with intent to sell, manufacture, or deliver cocaine qualified as serious drug offenses under the ACCA" because "binding precedent" held "a conviction under Florida Statute § 893.13(1) for possession with intent to sell, manufacture, or deliver a controlled substance constitutes a serious drug offense under the ACCA" (alterations added) (citing *Smith*, 775 F.3d at 1268)); *United States v. Moss*, 592 F. App'x 914, 916 (11th Cir. 2015) ("Defendant's argument that his § 893.13(1)(a) conviction for possessing cocaine with the intent to sell or deliver is not a 'serious drug offense' under the ACCA is squarely foreclosed by this Court's recent precedent." (citing *Smith*, 775 F.3d at 1268)); *United States v. Warren*, 632 F. App'x 973, 973 (11th Cir. 2015) ("The issue in this case is whether convictions under Fla. Stat. § 893.13(1) for delivering cocaine and for possessing cocaine with intent to deliver it are 'serious drug offenses' for purposes of the federal Armed Career Criminal Act (ACCA). They are."). Movant's conviction for "Cocaine Sell/Deliver with Intent" (PSI ¶ 31) qualifies as his third prior conviction sustaining the ACCA enhancement.

As Movant has three prior convictions supporting his status as an armed career criminal, the Court need not determine whether the remainder of his prior convictions are violent felonies or serious drug offenses.

**C. Movant's Section 924(c) Conviction**

Finally, Movant contends his Count 3 conviction is invalid because 18 U.S.C. section 924(c) is void for vagueness in light of *Johnson*. (See Mot. 29–34; Objs. 5–6). Movant plead guilty to possession of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. section 924(c)(1)(A). (See Judgment 1; see generally Change of Plea Hr'g Tr.). Section 924(c)(1)(A) provides for a mandatory five-year sentence where a person possesses a firearm in furtherance of “any crime of violence or drug trafficking crime.” 18 U.S.C. § 924(c)(1)(A). A “crime of violence” is defined as a felony which:

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) . . . by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

*Id.* §§ 924(c)(3)(A)–(B) (alteration added). Movant argues section (B) of the definition is an unconstitutionally vague residual clause, as it is “identical” to the language in the ACCA struck down as unconstitutionally vague in *Johnson*. (Mot. 30; Objs. 5).

The Court need not address the constitutionality of section 924(c)(3)(B) because Movant was not convicted of possession of a firearm in furtherance of a “crime of violence.” (See generally Judgment). Instead, Movant was adjudged guilty of “Possession of a Firearm in Furtherance of *Drug Trafficking*.” (*Id.* 1 (emphasis added)). Accordingly, there is no basis to conclude *Johnson* calls into question the Count 3 conviction.

### III. CERTIFICATE OF APPEALABILITY

A certificate of appealability “may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2) (alteration added). The Supreme Court has described the limited circumstances when a certificate of appealability should properly issue after the district court denies a habeas petition:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The [Movant] must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (alteration added). Movant does not satisfy his burden, and the Court will not issue a certificate of appealability

### IV. CONCLUSION

For the foregoing reasons, it is

**ORDERED AND ADJUDGED** that the Report [ECF No. 16] is **ACCEPTED AND ADOPTED** as follows:

1. Movant, Frantz Clement’s Motion [ECF No. 1] is **DENIED**.
2. A certificate of appealability shall **NOT ISSUE**.
3. The Clerk of the Court is directed to **CLOSE** this case, and all pending motions are **DENIED as moot**.

**DONE AND ORDERED** in Miami, Florida, this 10th day of August, 2017.

  
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CECILIA M. ALTONAGA  
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Patrick A. White;  
Movant, *pro se*  
counsel of record

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CIV-22160-ALTONAGA  
(15-CR-20247-ALTONAGA)  
MAGISTRATE JUDGE P.A. WHITE

FRANTZ CLEMENT, :  
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 Movant, :  
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 v. :  
 :  
 UNITED STATES OF AMERICA, :  
 :  
 Respondent. :

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REPORT OF  
MAGISTRATE JUDGE

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence entered in Case No. 15-CR-20247-ALTONAGA. This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts. The Court has reviewed the motion (CV-DE#1), Movant's incorporated memorandum of law in support thereof (CV-DE#1), the government's response (CV-DE#14), the government's supplement (CV-DE#15), and all pertinent portions of the underlying criminal file.

Claims

Liberalizing construing his motion,<sup>1</sup> Movant claims that his enhanced sentence under the Armed Career Criminal Act and his conviction for possession of a firearm in furtherance of a drug trafficking crime are no longer lawful after the Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015).

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<sup>1</sup>See Haines v. Kerner, 404 U.S. 519, 520-521 (1972) (pro se filings should be liberally construed, and are subject to less stringent pleading requirements).

Procedural History

Movant was charged with one count of possessing with intent to distribute 28 grams of more of cocaine base in violation of 21 U.S.C. § 841(a)(1), one count of being a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 924(g)(1), and one count of possession a firearm during and in relation to a crime of violence and a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). (CR-DE#10). The indictment specifically referenced the § 841 count charged in the first count of the indictment as the predicate for Movant's § 924(c) charge. (Id.).

Movant pled guilty to all three counts. (See CR-DE#68; see also CR-DE#77). A pre-sentence investigation report was prepared in anticipation of sentencing. As the predicates qualifying Movant as an armed career criminal, the PSI listed Movant's prior Florida felony convictions included five predicate offenses: (1) aggravated assault in Florida Case No. F96-24139B; (2) aggravated assault on a law enforcement officer in Florida Case No. F97-8594; (3) cocaine sell/deliver with intent in Florida Case No. F00-33334; and (4) Cocaine Sell/School in Florida Case No. F02-3664A. (PSI, ¶¶22, 27, 28, 31, 32).

Movant did not file any objections to the PSI. On February 16, 2016, Movant appeared for sentencing. (CR-DE#77). The Court adopted the findings and guideline calculation in the PSI, found that Movant was an armed career criminal, and sentenced Movant to a total term of 240 months imprisonment (See CV-DE#15; CR-DE#77). Then, on June 9, 2016, Movant timely filed the instant motion to vacated pursuant to § 2255.<sup>2</sup>

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<sup>2</sup>Movant's judgment of conviction became final after the Supreme Court's decision in Johnson, so the limitations period runs from that date. See § 2255(f). Moreover, it is clear from the record that the motion was filed well within the limitations period, and the government has not raised any limitations defense.

#### Standard of Review

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255. If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." Id. To obtain this relief on collateral review, however, a habeas petitioner must "clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment).

#### Discussion

In general, the applicable maximum statutory penalty for being a felon in possession of a firearm and ammunition is 10 years' imprisonment. 18 U.S.C. § 924(a)(2). However, if the offender has three or more prior convictions for a "serious drug offense" or a "violent felony," the ACCA increases his or her prison term to a minimum of 15 years and a maximum of life. 18 U.S.C. § 924(e)(1).

The ACCA defines "violent felony" as follows:

any crime punishable by imprisonment for a term exceeding one year ... that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that

presents a serious potential risk of physical injury to another.

§ 924(e)(2)(B). Paragraph (i) of this definition is commonly referred to as the "elements clause." That portion of paragraph (ii) that lists several felonies by name is commonly referred to as the "enumerated offenses clause." And the closing phrase of paragraph (ii) italicized above that begins "or otherwise involves conduct that . . . ," which has come to be known as the Act's residual clause, was of course held to be unconstitutionally vague in Johnson.

In the context of the ACCA's definition of "violent felony," the phrase "physical force" in paragraph (i) "means violent force--that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010) ("Johnson I"). As the Supreme Court has noted, the term "violent felony" has been defined as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a deadly weapon, [and] calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." Id. (internal quotations and citations omitted); see also Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 383, 160 L. Ed. 2d 271 (2004) (stating that the statutory definition of "crime of violence" in 18 U.S.C. § 16, which is very similar to § 924(e)(2)(B)(i) in that it includes any felony offense which has as an element the use of physical force against the person of another, "suggests a category of violent, active crimes . . ."). As such, the Supreme Court has stated that the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" the phrase "use . . . of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct."

Leocal, 543 U.S. at 9-10; see also United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force;" citing Leocal). While the meaning of "physical force" under the ACCA is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the (statutory) elements of state crimes. Johnson I, 599 U.S. at 138. And a federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise. See Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir.1983).

To determine whether a past conviction is for a crime listed under the enumerated offenses clause is "violent felony" under the ACCA, "courts use what has become known as the 'categorical approach': They compare the elements of the statute forming the basis of the defendant's conviction with the elements of the "generic" crime---i.e., the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." Descamps v. United States, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013); see also United States v. Estrella, 758 F.3d 1239 (11<sup>th</sup> Cir. 2014). To determine whether an offense "categorically" qualifies as a "crime of violence" under the "elements" or "use-of-force" clause, then, the court would have to determine if the crime of conviction has an element of "force capable of causing physical pain or injury to another person" as contemplated by Johnson I and its progeny. See Johnson, 559 U.S. at 140; Leocal, 543 U.S. at 11.

The Supreme Court has approved a variant of the categorical approach, labeled the "modified categorical approach," for use when a prior conviction is for violating a so-called "divisible statute." Id. That kind of statute sets out one or more elements of the offense in the alternative. Id. If one alternative matches an element in the generic offense, but another does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, known as Shepard documents,<sup>3</sup> to determine which alternative formed the basis of the defendant's prior conviction. Id. The modified categorical approach then permits the court to "do what the categorical approach demands: compare the elements of the crime of conviction . . . with the elements of the generic crime. Id.

The modified categorical approach does not apply, however, when the crime of which the defendant was convicted has a single, indivisible set of elements. Id. at 2282. And when a defendant was convicted of a so-called "'indivisible' statute" - i.e., one not containing alternative elements- that criminalizes a broader swath of conduct than the relevant generic offense," that conviction cannot serve as a qualifying ACCA predicate offense. Id. at 2281-82.

In sum, when determining whether a prior conviction qualifies as an ACCA predicate "violent felony," the courts can only look to the elements of the statute of the prior conviction, whether assisted by Shepard documents or not, and not to the facts underlying the defendant's prior conviction. See Descamps, 133 S.Ct. 2283-85. And in so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts'

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<sup>3</sup>In Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court held that a sentencing court could examine only a limited category of documents when employing the modified categorical approach in determining whether a prior guilty plea was for a particular offense, and thus a violent felony under ACCA. See id. at 16, 125 S.Ct. 1254.

criminalized." Moncrieffe v. Holder, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1678, 1684 (2011) (quoting Johnson I, 559 U.S. at 137).

Finally, in Mathis v. United States, - U.S. -, 136 S. Ct. 2243 (2016), the Court was most recently called upon to determine whether federal courts may use the modified categorical approach to determine if a past conviction is for an enumerated offense under the ACCA when a defendant is convicted under an indivisible statute that lists multiple, alternative means of satisfying one (or more) of its elements. 136 S. Ct. at 2247-48. The Court declined to find any such exception and, in so doing, addressed how federal courts are to make the threshold determination of whether an alternatively-phrased statute sets forth alternative elements (in which case the statute would be divisible and the modified categorical approach would apply to determine which version of the statute the defendant was convicted of violating), or merely lists alternative means of satisfying one element of an indivisible statute (in which case the categorical approach would apply). Id. at 2256-57.

Here, any contention that Movant's two Florida convictions for aggravated assault no longer qualify as ACCA predicate offenses after Johnson is without merit. "[A] Florida conviction for aggravated assault under § 784.021 is categorically a violent felony under the ACCA's elements clause." In re Hires, No. 16-12744-J, 2016 WL 3342668, at \*4 (11th Cir. June 15, 2016) (citing Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-38 & n.6 (11th Cir. 2013), *abrogated on other grounds by Johnson*, 576 U.S. \_\_\_, 135 S.Ct. 2551, 192 L.Ed.2d 569).

In addition, any contention that Movant's two prior Florida convictions for the sale of cocaine no longer qualify as ACCA predicate offenses after Johnson is similarly without merit. Nothing in Johnson calls into question predicating an ACCA

enhancement upon a prior conviction for a "serious drug offense."<sup>4</sup> United States v. Darling, 619 F. App'x 877, 880 (11th Cir. 2015) ("The Supreme Court's recent decision in Johnson . . . has no bearing on Darling's sentence because he had more than three predicate convictions for "serious drug offenses" as defined in 18 U.S.C. § 924(e)(2)(A)(ii)"); see also In re Rogers, 825 F.3d 1335, 1338 (11th Cir. 2016) (When . . . it is clear . . . that each predicate conviction qualified under the ACCA's elements or enumerated crimes clause, or as a serious drug offense . . . then [an application for authorization to file a second or successive § 2255 motion] does not 'contain' a Johnson claim."); In re Robinson, 822 F.3d 1196, 1197 (11th Cir. 2016) ("[T]he rule announced in Johnson does not benefit Robinson. Robinson's ACCA sentence was based on convictions for two serious drug offenses, as well as convictions for armed robbery and for aggravated battery with a firearm.").

To the extent that Movant contends that his § 924(c) conviction is unlawful after Johnson, any such claim is similarly without merit. Specifically, the ACCA, which provides for the enhanced penalties for felons in possession of firearms who have three or more prior convictions for a "serious drug offense" or a "violent felony," defines "serious drug offense" as:

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)),

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<sup>4</sup>As set forth *infra*, the ACCA provides for enhanced penalties for felons in possession of firearms who have three or more prior convictions for a "serious drug offense," or a "violent felony," as those terms are defined in the Act. See 18 U.S.C. § 924(e).

for which a maximum term of imprisonment of ten years or more is prescribed by law;

18 U.S.C. § 924(e)(2)(A). Similarly, § 924(c), the portion of the ACCA that Movant pleaded guilty to violating for various weapons offenses "during and in relation to a crime of violence or drug trafficking crime," defines "drug trafficking crime" as:

any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

18 U.S.C. § 924(c)(2).

Here, as set forth above, Movant's § 924(c) conviction was specifically predicated upon his conviction for possession of a firearm in furtherance of a drug trafficking crime, more specifically the § 841 possession with intent to distribute 28 grams or more of cocaine base as charged in Count One of the indictment. But as set forth above, nothing in Johnson calls into question predicated an ACCA enhancement upon a prior conviction for a "serious drug offense."<sup>5</sup> Darling, 619 F. App'x at 880; In re Rogers, 825 F.3d at 1338; In re Robinson, 822 F.3d at 1197. There is thus similarly no basis to conclude that anything in Johnson calls into question a 924(c) conviction predicated upon a firearms offense during and in relation to a "drug trafficking crime."

#### Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the

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<sup>5</sup>The ACCA provides for enhanced penalties for felons in possession of firearms who have three or more prior convictions for a "serious drug offense," or a "violent felony," as those terms are defined in the Act. See 18 U.S.C. § 924(e).

applicant," and that 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)." Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where a §2255 movant's constitutional claims have been adjudicated and denied on the merits by the district court, the movant must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a §2255 movant's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the movant can demonstrate both "(1) 'that jurists of reason would find it debatable whether the [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4<sup>th</sup> Cir.2001) (quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Movant is not entitled to relief on the merits, the court considers whether Movant is nonetheless entitled

to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find the court's treatment of any of Movant's claims debatable and that none of the issues are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is not warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84.

Conclusion

Based upon the foregoing, it is recommended that the motion to vacate be DENIED, and that no certificate of appealability be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections with regard to the denial of a certificate of appealability.

SIGNED this 1<sup>st</sup> day of May, 2017.

  
UNITED STATES MAGISTRATE JUDGE

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