IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 18-14449-F

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LAMAR EADY, JR.,

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:

On November 13, 2013, Lamar Eady was found guilty of possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The probation officer who prepared Eady's presentence investigation report ("PSI") determined that he was an armed career criminal, which, if the sentencing judge so found, subjected him to a minimum of 15 years' imprisonment, based on the following Florida convictions: (1) aggravated assault, (2) strongarm robbery, and (3) felony battery. The sentencing judge agreed with the PSI's findings and sentenced Eady to 188 months' imprisonment. This Court affirmed Eady's conviction and sentence.

On April 15, 2016, Eady filed the instant 28 U.S.C. § 2255 motion to vacate his sentence. In his § 2255 motion, Eady contended that he was no longer an armed career criminal because his felony battery conviction did not qualify as a violent felony or serious drug offense under the

elements clause of the Armed Career Criminal Act ("ACCA"), and the ACCA's residual clause was struck down as unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

A magistrate judge issued a report and recommendation ("R&R"), recommending that Eady's § 2255 motion be denied. The magistrate judge concluded that Eady's conviction for felony battery qualified as a crime of violence under the ACCA elements clause because, in *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc), this Court held that "Florida felony battery does categorically qualify as a crime of violence" under the identical elements clause found in the United States Sentencing Guidelines. Over Eady's objections, the district court adopted the R&R, denied Eady's § 2255 motion, and denied Eady a certificate of appealability ("COA"). Eady filed a notice of appeal and now moves this Court for COA.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

Under the ACCA, a defendant is subject to a mandatory-minimum term of imprisonment of 15 years where that defendant has been previously convicted 3 times of "a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that

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

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes clause" and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012). The Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. *Johnson*, 135 S. Ct. at 2557–58, 2563.

In *Vail-Bailon*, this Court addressed whether felony battery in Florida necessarily requires the use of physical force, and, thus, categorically qualifies as a crime of violence under the elements clause of U.S.S.G. § 2L1.2. Applying the definition of "physical force" that the Supreme Court used in *Johnson v. United States*, 559 U.S. 133 (2010) ("*Curtis Johnson*"), to assess whether Florida's simple battery statute was a crime of violence under the ACCA, this Court found that Florida felony battery was a crime of violence under the elements clause of § 2L1.2. *Vail-Bailon*, 868 F.3d at 1308.

Here, reasonable jurists would not debate the district court's determination that Eady's § 2255 motion be denied. In light of this Court's decision in *Vail-Bailon*, Florida felony battery clearly qualifies as a violent felony under the elements clause of the ACCA. *See United States v. Lockley*, 632 F.3d 1238, 1243 n.5 (11th Cir. 2011) (stating that this Court applies the same analysis for both ACCA violent felonies and crimes of violence under the Sentencing Guidelines). Thus, Eady's motion for a COA is DENIED.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

# A-2

FILED by TB D.C.
ELECTRONIC

Jul 26, 2013

STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-20551-CR-ZLOCH/HUNT

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

DEONDRE BAIN,
LAMAR EADY, JR., and
LLOYD HULSE, JR.,

Defendants.
_______________________________/

## INDICTMENT

The Grand Jury charges that:

### COUNT 1

On or about June 30, 2013, in Miami-Dade County, in the Southern District of Florida, the defendant,

**DEONDRE BAIN,**

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

### COUNT 2

On or about June 30, 2013, in Miami-Dade County, in the Southern District of Florida, the defendant,

**LAMAR EADY, JR.,**

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

## COUNT 3

On or about June 30, 2013, in Miami-Dade County, in the Southern District of Florida, the defendant,

**LLOYD HULSE, JR.,**

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

## FORFEITURE ALLEGATIONS

1. The allegations of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging criminal forfeiture to the United States of America of certain property in which the defendants, **DEONDRE BAIN**, **LAMAR EADY, JR.**, and **LLOYD HULSE, JR.**, may have an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 922(g)(1), as alleged in this Indictment, the defendant so convicted shall forfeit to the United States of America any firearm or ammunition involved in or used in the commission of such violation, pursuant to Title 18, United States Code, Section 924(d)(1).

3. The property which is subject to forfeiture includes, but is not limited to, the following:

(a) One (1) Glock Model 22 .40 caliber semi-automatic pistol;

(b) One (1) Glock Model 27 .40 caliber semi-automatic pistol;

(c) One (1) Colt AR-15 .223 caliber semi-automatic assault rifle;

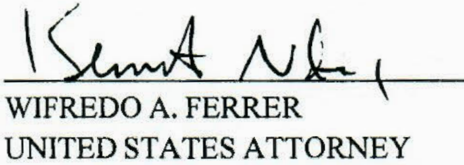
(d) Thirty-one (31) rounds of .40 caliber ammunition;

(e) Forty (1) rounds of .223 caliber rifle ammunition.

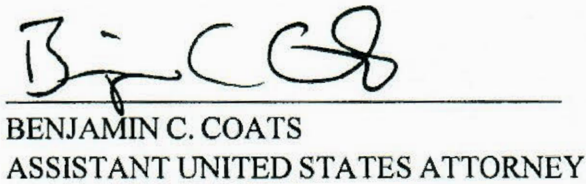
All pursuant to Title 18, United States Code, Section 924(d)(1), and the procedures set forth in Title 21, United States Code, Section 853.

A TRUE BILL

FOREPERSON



WIFREDO A. FERRER
UNITED STATES ATTORNEY



BENJAMIN C. COATS
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

**UNITED STATES OF AMERICA** **CASE NO.** ____________________

**vs.**

**DEONDRE BAIN,**
**LAMAR EADY, JR., and**
**LLOYD HULSE, JR.,**

**Defendants.** _______________/

## CERTIFICATE OF TRIAL ATTORNEY*

**Superseding Case Information:**

**Court Division:** (Select One)

X Miami ___ Key West
___ FTL ___ WPB ___ FTP

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

I do hereby certify that:

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

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

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

4. This case will take 3-4 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

| (Check only one) | | | (Check only one) | |
|---|---|---|---|---|
| I | 0 to 5 days | X | Petty | |
| II | 6 to 10 days | | Minor | |
| III | 11 to 20 days | | Misdem. | |
| IV | 21 to 60 days | | Felony | X |
| V | 61 days and over | | | |

6. Has this case been previously filed in this District Court? (Yes or No) No
If yes:
Judge: ____________ Case No. ____________
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) No
If yes:
Magistrate Case No. ____________
Related Miscellaneous numbers: ____________
Defendant(s) in federal custody as of ____________
Defendant(s) in state custody as of 06/30/2013 (Bain and Hulse only)
Rule 20 from the ____________ District of ____________

Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ___ Yes X No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? ___ Yes X No

BENJAMIN C. COATS
ASSISTANT UNITED STATES ATTORNEY
Court ID No. A5501785

*Penalty Sheet(s) attached

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

## PENALTY SHEET

**Defendant's Name:** **DEONDRE BAIN**

**Case No:** ______

Count #: 1

Possession of a Firearm by a Convicted Felon

Title 18, United States Code, Section 922(g)(1)

***Max. Penalty:** 10 Years' Imprisonment

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

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

**PENALTY SHEET**

**Defendant's Name:** LAMAR EADY, JR.

**Case No:** ______________________

Count #: 2

Possession of a Firearm by a Convicted Felon

Title 18, United States Code, Section 922(g)(1)

***Max. Penalty:** 10 Years' Imprisonment

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

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

**PENALTY SHEET**

**Defendant's Name:** **LLOYD HULSE, JR.**

**Case No:** ______

Count #: 3

Possession of a Firearm by a Convicted Felon

Title 18, United States Code, Section 922(g)(1)

***Max. Penalty:** 10 Years' Imprisonment

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

# A-3

# United States District Court

## Southern District of Florida

MIAMI DIVISION

**UNITED STATES OF AMERICA**

**v.**

**LAMAR EADY, JR.**

**JUDGMENT IN A CRIMINAL CASE**

**Case Number - 1:13-20551-CR-ZLOCH-2**

USM Number: 03743-104

Counsel For Defendant: Timothy Day, Esq., AFPD
Counsel For The United States: Benjamin Coats, Esq., AUSA
Court Reporter: Carl Schanzleh

The defendant was found guilty on Count 2 of the Indictment.
The defendant is adjudicated guilty of the following offense:

| TITLE/SECTION NUMBER | NATURE OF OFFENSE | OFFENSE ENDED | COUNT |
|---|---|---|---|
| 18 U.S.C. §§ 922(g) (1) and 924(e) | Possession of a firearm and ammunition by a convicted felon | June 30, 2013 | 2 |

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

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
February 11, 2014

WILLIAM J. ZLOCH
United States District Judge

February 11, 2014

ALL PENDING MOTIONS ARE HEREBY DENIED AS MOOT.

DEFENDANT: LAMAR EADY, JR.
CASE NUMBER: 1:13-20551-CR-ZLOCH-2

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **188 months** as to Count 2 of the Indictment. The sentence imposed herein shall run concurrent to the sentence to be imposed in Case No. F13-15207D, Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

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

The Court recommends a Federal facility in South Florida.

## RETURN

I have executed this judgment as follows:

________________________________________

________________________________________

________________________________________

________________________________________

Defendant delivered on ________________ to __________________________

at __________________________________, with a certified copy of this judgment.

____________________________
UNITED STATES MARSHAL

By:__________________________
Deputy U.S. Marshal

DEFENDANT: LAMAR EADY, JR.
CASE NUMBER: 1:13-20551-CR-ZLOCH-2

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years**. Within 72 hours of release, the defendant shall report in person to the probation office in the district where released.

While on supervised release, the defendant shall not commit any crimes, shall be prohibited from possessing a firearm or other dangerous devices, shall not possess a controlled substance, shall cooperate in the collection of DNA, and shall comply with the standard conditions of supervised release and with the special conditions listed on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: LAMAR EADY, JR.
CASE NUMBER: 1:13-20551-CR-ZLOCH-2

## SPECIAL CONDITIONS OF SUPERVISION

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

**Association Restriction** - The defendant is prohibited from associating with co-defendants, Deondre Bain and Lloyd Hulse, Jr., or any identified members of the 170 Street Boys while on supervised release.

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

**Financial Disclosure Requirement** - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

**Substance Abuse Treatment** - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

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

**Self-Employment Restriction** - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

DEFENDANT: LAMAR EADY, JR.
CASE NUMBER: 1:13-20551-CR-ZLOCH-2

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

| Total Assessment | Total Fine | Total Restitution |
| --- | --- | --- |
| $100.00 | $ | $ |

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LAMAR EADY, JR.
CASE NUMBER: 1:13-20551-CR-ZLOCH-2

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$100.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

**The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:**

**U.S. CLERK'S OFFICE**
**ATTN: FINANCIAL SECTION**
**400 NORTH MIAMI AVENUE, ROOM 8N09**
**MIAMI, FLORIDA 33128-7716**

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

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

# A-4

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

**CASE NO.**
Criminal Case No. 13-20551-CR-Zloch/Hunt

LAMAR EADY

Plaintiff,

vs.

UNITED STATES OF AMERICA

Defendant.

_______________________________/

**MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. §2255**

Defendant, LAMAR EADY, by and through his undersigned counsel and pursuant to 28 United States Code § 2255, hereby moves this Court to vacate, set aside and/or correct his sentence in this cause. As grounds for this request, Defendant states the following:

1. On July 26, 2013, a grand jury indicted Defendant along with two co-defendants in a three-count indictment alleging that they each possessed firearms and ammunition as convicted felons, in violation of 18 U.S.C. § 922(g)(1). (DE 1).

2. Generally, the allegation was that four men were observed in a vehicle parked on the side of the road in a residential community with three loaded firearms in their possession.

3. On November 13, 2013, Defendant was convicted of the charged offense after a jury trial.[1] The court set sentencing for February 11, 2014. (DE 111, 113).

4. In its Pre-Sentence Investigation report ("PSIR"), the probation office deemed Defendant to be an Armed Career Criminal under 18 U.S.C. § 924(e) because he had previously been convicted of the following offenses: (1) Aggravated Assault with a Firearm in Miami-Dade County on December 8, 2009; (2) Strongarm Robbery in Miami-Dade County on December 8,

[1] Defendant's two co-defendants were also convicted. The first co-defendant, Lloyd Hulse, Jr., pled guilty to the offense, and the second co-defendant, Deondre Bain, was convicted after the joint jury trial with Defendant. The fourth occupant of the vehicle, Andre Beach, was not arrested or charged.

2009; and (3) Felony Battery in Miami-Dade County on September 15, 2010. Based on these prior offenses, the probation office concluded that Defendant was subject to the enhanced sentence pursuant to 18 U.S.C. § 924(e) and Guideline 4B1.4(a). As a result of the enhancement, the probation office figured Defendant's Total Offense Level to be 33, with a Criminal History Category of IV, yielding a guideline range of 188 to 235 months. (DE 122).

5. On January 28, 2014, Defendant filed written objections to the PSIR where he challenged the validity of the ACCA enhancement because (1) "the enhancing facts were neither charged in the indictment nor found by the jury at trial" in violation of *Apprendi* and other cases; and (2) the Felony Battery conviction did not qualify as a predicate offense for the enhancement under either the "elements clause" or the "residual clause" of the Armed Career Criminal Act ("ACCA"). (DE 124).

6. Without the ACCA enhancement, Defendant's maximum exposure would have been 10 years, the statutory ceiling for an 18 U.S.C. § 922(g)(1) offense.

7. On January 30, 2014, the Government responded to Defendant's objections and requested the Court to overrule the objections. On February 7, 2014, Defendant filed a reply to the Government's response.[2] (DE 125, 130).

8. On February 11, 2014, at Defendant's sentencing hearing, this Court found the felony battery conviction to be "a crime of violence" and sentenced Defendant to 188 months' imprisonment followed by supervised release. (DE 135).

9. Defendant appealed his sentence to the Eleventh Circuit on the issue of his prior conviction for felony battery not being a qualifying predicate offense for the ACCA enhancement. On November 6, 2014, the Eleventh Circuit affirmed the sentence, stating that

[2] Subsequently, Defendant filed a Sentencing Memorandum where he requested that in the event the Court overruled his objections to the ACCA enhancement, that he receive a sentence at the low end of the guideline range to minimize disparities with the co-defendants' sentences of 110 and 111 months. (DE 129).

felony battery qualified Defendant for the ACCA enhancement under both the "elements" and "residual clauses" of the Act. *See* United States v. Eady, 591 Fed. Appx. 711 (11th Cir. Nov. 6, 2014).

**GROUND FOR RELIEF**

Defendant now moves this Court to revisit the sentencing issue and to vacate Defendant's ACCA classification based on two intervening occurrences that have arisen since the Eleventh Circuit's opinion in United States v. Eady, 591 Fed. Appx. 711 (11th Cir. Nov. 6, 2014). First, the U.S. Supreme Court has since determined that the "residual clause" of the Armed Career Criminal Act is unconstitutional as vague. Samuel Johnson v. United States, 135 S. Ct. 2551 (2015).[3] Second, the Eleventh Circuit has decided to revisit the issue of whether Florida's felony battery should be considered a "violent felony" or a "crime of violence." Specifically, The Eleventh Circuit has decided to hear oral arguments in the case of United States v. Eddy Vail-Bailon to determine whether Florida Statute §784.041(1) makes felony battery a "crime of violence" for purposes of Guideline § 2L1.2, an enhancement provision with language similar to the enhancement language of the Armed Career Criminal Act.

**MEMORANDUM OF LAW**

The Armed Career Criminal Act imposes an enhanced sentence on all offenses for a felon-in-possession of a firearm where the defendant has three prior convictions for a "violent felony" or a "serious drug offense." "Violent felony" is defined as 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 [elements clause]; or (ii) is

[3] A defendant may use a timely-filed first motion under 28 U.S.C. § 2255 to pursue a previously decided issue when an intervening case from the Supreme Court validates his argument and the decision applies retroactively. Spencer v. United States, 727 F.3d 1076 (11th Cir. 2013).

burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another [residual clause]."

Since the time that the Eleventh Circuit held Defendant's felony battery conviction to be a "violent felony" under both the "elements" and "residual clauses" of ACCA, the U.S. Supreme Court has ruled that the "residual clause" of the Armed Career Criminal Act is unconstitutional as vague. Samuel Johnson v. United States, 135 S. Ct. 2551 (2015). However, the Eleventh Circuit is still considering whether felony battery is a "violent felony" or a "crime of violence" under other enhancement provisions that require predicate crimes to include the element of physical force. On November 30, 2015, the Eleventh Circuit granted oral argument in the case of United States v. Eddy Vail-Bailon, 15-10351 (11th Cir. 2015), to determine whether Florida Statute §784.041(1) makes felony battery a "crime of violence" for purposes of Guideline § 2L1.2, an enhancement provision with language similar to the enhancement language of the Armed Career Criminal Act. Therefore, on the heels of *Johnson*, supra, the state of the law still appears to be in flux concerning how to define a "violent felony" or a "crime of violence" for purposes of enhanced sentencing. Because the definitions of "violent felony" under ACCA and "crime of violence" under the sentencing guidelines are virtually identical, the Eleventh Circuit considers cases interpreting one as authority in cases interpreting the other. *See* United States v. Alexander, 609 F.3d 1250, 1253 (11th Cir. 2010).

Defendant asserts that his felony battery conviction did not qualify as a predicate offense for the ACCA enhancement under the "elements clause" of the Act. In 2008, the State of Florida charged Defendant with Lewd and Lascivious Battery on a Child Less than 16 Years of Age under Florida Statute §800.04, a second degree felony. The allegation was that when Defendant was just 16 years old, he caused a 13-year old girl to perform fellatio on him. If Defendant had been convicted of this offense as originally charged, he would not be classified as an Armed

Career Criminal because in Harris v. United States, 608 F.3d 1222 (11th Cir. 2010), the Eleventh Circuit held that sexual battery under Florida Statute §800.04 is not a "violent felony" under either the "elements" or the "residual clause." *See also* United States v. Owens, 672 F.3d 966 (11th Cir. 2012) and Spencer v. United States, 727 F.3d 1076 (11th Cir. 2013). However, as part of a plea negotiation, the State of Florida reduced Defendant's charge to felony battery, a third degree felony, to account for the weaknesses in the evidence. Ironically, that charge reduction ultimately inured to Defendant's detriment because he has now been unjustly labelled as an Armed Career Criminal. Florida Statute 784.041 provides:

> (1) A person commits felony battery if he or she:
>
> (a) Actually and intentionally touches or strikes another person against the will of the other; and
>
> (b) Causes great bodily harm, permanent disability, or permanent disfigurement.
>
> (2) A person who commits felony battery commits a felony of the third degree. . .

This felony battery statute does not require that the bodily harm, disability or disfigurement be intentionally or knowingly caused, only that the act itself be intentional. In this sense, felony battery is a strict liability offense as to the harm caused because it does not require mens rea regarding the harm, disability or disfigurement. This is also known as a "general intent" crime as opposed to a "specific intent" crime because it only requires that the perpetrator intend to do the act but does not require the perpetrator to intend the consequences of the action. In contrast, Florida's aggravated battery statute under Florida Statute §784.045(1)(a)1 is a higher level felony, a second degree felony, because it requires that same degree of harm to be intentionally and knowingly caused.

In Curtis Johnson v. United States, 559 U.S. 133 (2010), the U.S. Supreme Court struck down an ACCA enhancement against a defendant because his prior battery conviction in Florida under the felony version of simple battery did not qualify as a "violent felony." The Court noted that the definition of simple battery under Florida Statute §784.03(1)(a) (2003), did not require the use of "physical force" in every case because one of the ways simple battery can be accomplished under the Florida statute is by the mere touching of a person against the person's will. Since a battery in Florida can be accomplished by a mere touching, and the "great bodily harm" element under Florida Statute §784.041 does not require that the harm be intended, felony battery is not categorically a "violent felony" under the "elements clause" of ACCA. Moreover, the felony battery statute does not require the use of "physical force" because the harm inflicted could be as a result of a mere touching which causes a permanent disability because of what the victim does as a reaction to the touching. For example, in order to get away from the person who is touching, the victim might run into a vehicle and be seriously injured. No matter how unlikely such a scenario might be, "physical force" cannot be said to be an integral part of the felony battery offense. As in a tort case, under the felony battery statute, a defendant's conviction could be due to a mere touching as the proximate cause of the victim's injury but without being the direct, cause-in fact. This possibility explains why Florida has distinguished felony battery from aggravated battery and has covered those offenses in two separate statutes.

Prior to the Eleventh Circuit's decision to affirm Eady's sentence and to classify felony battery as a "violent felony" under ACCA, the Court had considered the issue in three other unpublished, non-precedential cases. In United States v. Eugene, 423 F. Appx. 908 (11th Cir. 2011)(unpublished), the Court decided that Florida's felony battery qualified as a "crime of violence" under the "elements clause" of Guideline 4B1.2(a). However, the Court apparently did not have much confidence in that decision because eight months later, in United States v. Smith,

448 F. Appx. 936 (11th Cir. 2011)(unpublished), a different panel of the Court stated that it did not need to address whether felony battery also qualified under the "elements clause", while finding that it did qualify under the now-defunct "residual clause" of ACCA. Id. at n. 3. In another unpublished decision, United States v. Crawford, 568 F. Appx. 725 (11th Cir. 2014), the Court again found that Florida's felony battery qualified as a "violent felony" under ACCA. Finally, in the instant case, the Eleventh Circuit came to the conclusion that felony battery qualifies as a "violent felony" under ACCA. In these cases, the Court reasoned that the term "physical force" is necessarily used in a felony battery offense because a conviction under the statute requires that the victim suffer "great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. §784.041. Once again, however, the Eleventh Circuit is not settled on the question. On November 30, 2015, the Eleventh Circuit decided to set oral argument in the case of United States v. Eddy Vail-Bailon to discuss whether Florida's felony battery is a "crime of violence" for purposes of Guideline § 2L1.2. That oral argument is currently set for the week of May 16, 2016.

United States Supreme Court decisions and the *published* case law in the Eleventh Circuit support Defendant's argument that felony battery in Florida should not be classified as a "violent felony" or a "crime of violence." In United States v. Castleman, 134 S. Ct. 1405 (2014), the United States Supreme Court specifically declined to decide whether or not the causation of bodily injury necessarily entails violent force. Id. at 1413. In its opinion, the Court pondered examples of battery where bodily injury occurs but without the use of force, such as where a person infects the victim with a deadly disease, or where one person poisons another's drink. This shows that the status of felony battery as a "violent felony" is still an open question in the Supreme Court, but Defendant submits that felony battery cannot be a "violent felony" because the harm need not be intended and physical force need not be used. In Spencer v. United States,

727 F.3d 1076 (11th Cir. 2013), the defendant had a prior conviction in Florida for third degree felony child abuse under Florida Statute 827.03(1), where he was accused of placing his sexual organ in or upon the sexual organ of a minor girl. Much like the instant case, the State had originally charged the defendant with lewd or lascivious battery but later reduced the charge, and the defendant pled guilty to the lesser offense. The Government agreed that the defendant's conviction for third degree felony child abuse was not a "crime of violence" under the "elements clause" of the career offender guideline (§4B1.1). The Eleventh Circuit agreed with the Government's concession because the offense could result in a conviction without the use or threat of physical force. Id. at 1083. The court determined that under the Florida Statute, even though defendant Spencer had to intend the sexual intercourse, under the statute he did not need to intend or foresee injury of any kind or know that the victim was a minor. Id. at 1099. Defendant admits that the child abuse statute is a little different from the felony battery statute because the child abuse statute is divisible into two alternatives, where one of the possibilities is "mental injury." Yet the reasoning is the same because the injury need not be intended under either statute and physical force need not be used. The Fifth Circuit has agreed with this rationale. In United States v. Andino-Ortega, 608 F.3d 305 (5th Cir. 2010), the Fifth Circuit held that a defendant's prior conviction for injury to a child in Texas was not a "crime of violence" under Guideline § 2L1.2 although he had intentionally and knowingly caused bodily injury to a child by striking her with a weedeater. Id. at 310. The Court gave the same example as the Court in Castleman, *supra*, that the crime could be accomplished by poisoning the child. Id. at 311. The Fifth Circuit stated" "Because the offense of injury to a child, even where committed by an intentional act, does not require the use or attempted use of physical force, the offense does not meet the definition of 'crime of violence' . . ." Id. at 311. That same Circuit Court has also opined that even the Florida statute of manslaughter does not qualify as a "crime of violence"

because the statute "simply does not require proof of force." United States v. Garcia-Perez, 779 F.3d 278, 283 (5th Cir. 2015). In Garcia-Perez, the Fifth Circuit recognized "a line of cases [in Florida] stretching back over one hundred years which have held that unexpected deaths caused by intended acts can be enough to prove manslaughter." Id. at 285-286. In the same way, since felony battery in Florida can be an intentional touching which results in an unintentional harm, felony battery cannot be a "violent felony."

The Government bears the burden of "proving that a sentencing enhancement under the ACCA is warranted." United States v. Lee, 586 F.3d 859, 866 (11th Cir. 2009). *See also*, United States v. Cataldo, 171 F.3d 1316, 1321 (11th Cir. 1999) and United States v. Shriver, 967 F.2d 572, 575 (11th Cir. 1992). In light of recent caselaw, the Government cannot show that Defendant is subject to the ACCA enhancement.

## CONCLUSION

WHEREFORE, because felony battery is a general intent crime in that it does not require the intent to inflict harm, and because the offense can be committed without the use of physical force, it should not be classified as a "violent felony" under ACCA. Therefore, Defendant LAMAR EADY requests this Court to grant his Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255, to resentence him without the Armed Career Criminal enhancement, and to grant any other relief that this Court deems just and proper.

Respectfully submitted,

s/Robyn Blake
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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that I electronically filed the foregoing document with the Clerk of the Court using CM/ECF on April 15, 2016. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

s/Robyn Blake

ROBYN M. BLAKE

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 16-21369-CIV-ZLOCH/HUNT

LAMAR EADY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_______________________________/

**REPORT AND RECOMMENDATION**

This matter is before this Court on Lamar Eady's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255, filed on April 16, 2016. ECF No. 1. The Honorable William J. Zloch referred this case to the undersigned United States Magistrate Judge for disposition of all pretrial non-dispositive motions and a report and recommendation concerning disposition of all dispositive motions. ECF No. 10; *see also* 28 U.S.C. § 636(b); S.D. Fla. Mag. R. 1. Having carefully reviewed the § 2255 motion, the response, the Petitioner's supplemental filings, the entire case file, and applicable law, and being otherwise fully advised in the premises, the undersigned hereby RECOMMENDS that Eady's § 2255 motion be DENIED.

## I. Background

On July 26, 2013, in Case No. 13-20551-CR-ZLOCH, a grand jury indicted Petitioner along with two co-defendants in a three-count indictment alleging that each possessed firearms and ammunition as convicted felons, in violation of 18 U.S.C. § 922(g)(1). Crim. ECF No. 1. On November 13, 2013, Petitioner was convicted of the charged offense after a jury trial. Crim. ECF No. 111. Normally, this offense carries a maximum penalty of ten years' incarceration. 18 U.S.C. § 924(a)(2). However, if the defendant has previously been convicted of three or more "violent felon[ies]" or "serious drug offense[s]," or both, the Armed Career Criminal Act (ACCA) increases the defendant's penalty to a minimum of fifteen years and a maximum of life imprisonment. *Id.* § 924(e)(1).

The ACCA defines the term "violent felony" to mean a felony that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*" *Id.* § 924(e)(2)(B) (emphasis added). Section 924(e)(2)(B)(i) is known as the "elements clause." The non-italicized portion of § 924(e)(2)(B)(ii) is known as the "enumerated offenses clause," and the italicized portion is known as the "residual clause."

In this case, to assist the Court at sentencing, the United States Probation Department prepared a presentence investigation report (PSR) that discussed the Court's sentencing options based on Eady's offense conduct, criminal history, and personal characteristics, among other things. The PSR stated that Eady was an armed career criminal based upon the following [Florida] convictions:

1. Docket # F07-20738 – Aggravated Assault with a Firearm in Miami-Dade County on December 8, 2009 (PSI ¶26);
2. Docket # F08-6241—Strongarm Robbery in Miami-Dade County on December 8, 2009 (PSI ¶27); and
3. Docket F07-29364B—Felony Battery in Miami-Dade County on September 15, 2010 (PSI ¶28).

The Honorable William J. Zloch accepted those findings and sentenced Eady to 188 months' imprisonment as an armed career criminal. Crim. ECF No. 135. On November 6, 2014, Eady's conviction and sentence were affirmed on direct appeal by the Eleventh Circuit Court of Appeals. Crim. ECF No. 162.

In his first, timely-filed § 2255 motion, Eady now argues that he is entitled to relief in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court struck down the residual clause of the ACCA as unconstitutionally vague. *Id.* at 2563. Eady argues that he is no longer an armed career criminal because he does not have three or more convictions that qualify as violent felonies or serious drug offenses under the elements or the enumerated offenses clauses of the ACCA. If true, this would make his § 922(g) sentence illegal.

## II. Analysis

Eady's § 2255 motion should be denied. Eady necessarily concedes that two of his prior convictions qualify as "violent felonies" under the ACCA since the only prior conviction he is challenging is the felony battery conviction. ECF No. 1; ECF No. 18 at 2, Fn. 1.

While the petition was pending, the Eleventh Circuit was deciding the very issue that Petitioner presented – that he was no longer eligible to be sentenced under the ACCA because his prior conviction for felony battery no longer qualified as an ACCA predicate in *United States v. Vail-Bailon*, Case No. 15-10351. The parties in the instant case sought a stay that was granted by this Court since the Eleventh Circuit decided to conduct an en banc review of its prior panel decision. On August 25, 2017, the Eleventh Circuit issued its en banc decision, holding "that Florida felony battery does categorically qualify as a crime of violence" under the identical elements clause found in the United States Sentencing Guidelines. *United States v. Vail-Bailon*, 2017 WL 3667647 at *1 (11th Cir. August 25, 2017) (en banc).[1] Thus, it is clear that Petitioner's felony battery conviction qualifies as an ACCA predicate.

Therefore, Eady has at least three ACCA predicate convictions. Accordingly, his § 922(g) sentence is not illegal.

## III. Recommendation

Based upon the foregoing, the undersigned hereby RECOMMENDS that Eady's § 2255 motion be DENIED.

Within fourteen days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to any of the above findings and recommendations as provided by the Local Rules for this district. 28 U.S.C. § 636(b)(1); S.D. Fla. Mag. R. 4(b). The parties are hereby notified that a failure

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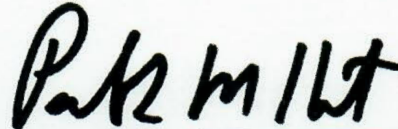
[1] Defendant Vail-Bailon is seeking to have the Supreme Court review the Eleventh Circuit's en banc decision, however his proceedings are at the preliminary phase. Even if certiorari is granted, "a grant of certiorari does not constitute new law." *See Ritter v. Thigpen*, 828 F.2d 662, 665-66 (11th Cir. 1987). Thus, this en banc ruling is binding upon this Court.

to timely object waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions contained in this Report and Recommendation. 11th Cir. R. 3–1 (2016); *see Thomas v. Arn*, 474 U.S. 140 (1985).

DONE and SUBMITTED at Fort Lauderdale, Florida, this 19th day of December, 2017.



PATRICK M. HUNT
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Honorable William J. Zloch

All Counsel of Record

# A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-21369-CIV-ZLOCH
(13-20551-CR-WJZ)

LAMAR EADY,

Movant,

vs. **O R D E R**

UNITED STATES OF AMERICA,

Respondent.
_______________________________/

THIS MATTER is before the Court upon the Report And Recommendation (DE 21) filed herein by United States Magistrate Judge Patrick M. Hunt and Movant's Motion To Vacate Sentence Pursuant To 28 U.S.C. § 2255 (DE 1). The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

Accordingly, after due consideration, it is

**ORDERED AND ADJUDGED** as follows:

1. Movant's Written Objections To Magistrate's Report And Recommendation (DE 26) be and the same are hereby **OVERRULED**;

2. The Report And Recommendation (DE 21) filed herein by United States Magistrate Judge Patrick M. Hunt be and the same is hereby approved, adopted, and ratified by the Court;

3. Movant's Motion To Vacate Sentence Pursuant To 28 U.S.C. § 2255 (DE 1) be and the same is hereby **DENIED**; and

4. Final Judgment will be entered by separate Order.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida, this 20th day of August, 2018.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

The Honorable Patrick M. Hunt
United States Magistrate Judge

All Counsel of Record

# A-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-21369-CIV-ZLOCH

LAMAR EADY

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
______________________________/

**ORDER DENYING**
**CERTIFICATE OF APPEALABILITY**

THIS MATTER is before the Court sua sponte and the Court having carefully reviewed the entire court file herein and after due consideration, it is

**ORDERED AND ADJUDGED** that the Court having denied the Movant's Motion To Vacate Sentence Pursuant To 28 U.S.C. § 2255 (DE 1), finds that the Movant Lamar Eady has failed to demonstrate the deprivation of a Federal constitutional right, and that the issues are not taken in good faith. Accordingly, the issuance of a Certificate Of Appealability be and the same is hereby **DENIED** for the reasons set forth above.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida, this 20th day of August, 2018.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

The Honorable Patrick M. Hunt
United States Magistrate Judge

All Counsel of Record