APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10311-F

LOUIS ROBINSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Louis Robinson moves for a certificate of appealability ("COA"), in order to appeal the denial of his counseled 28 U.S.C. § 2255 motion to vacate sentence. To merit a COA, Robinson must demonstrate 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). Because Circuit precedent forecloses Robinson's claim, he has not met this standard, and his motion for a COA is DENIED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22836-CIV-ALTONAGA/White

LOUIS ROBINSON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

On May 10, 2016, Movant, Louis Robinson, filed a letter re-characterized pursuant to *Castro v. United States*, 540 U.S. 375, 383 (2003), as a Motion Under 28 U.S.C. Section 2255 to Vacate, Set Aside, or Correct Sentence [ECF No. 1]. The Clerk referred the case to Magistrate Judge Patrick A. White for a ruling on all pre-trial, non-dispositive matters and for a report and recommendation on dispositive matters. (*See* [ECF No. 3]). On July 8, 2016, Judge White appointed the Federal Public Defender to represent Movant. (*See* Order 2). Movant's appointed counsel filed a Reply in Support of Motion to Vacate, Correct, or Set Aside Sentence [ECF No. 12] on November 2, 2016.

On October 3, 2017, Judge White filed his Report of Magistrate Judge [ECF No. 13], recommending the Court deny the Motion. Movant, through counsel, timely filed Objections [ECF No. 14] on October 17, 2017; the Government filed a Response in Opposition [ECF No. 17] on November 1, 2017.

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) ("It does not appear that Congress intended to require district court review of a magistrate[] [judge]'s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings." (alterations added)); *Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1169 (N.D. Iowa 1999) (quoting 28 U.S.C. § 636(b)(1)). Since Movant filed timely objections (*see* Objs.), the Court reviews the record *de novo*.

I. BACKGROUND

Movant was found guilty by a jury of conspiracy to obstruct interstate commerce via robbery, in violation of 18 U.S.C. section 1951(a) ("Count 1"); substantive Hobbs Act robbery of ABC Jewelry Store, in violation of 18 U.S.C. section 1951(a)(1) ("Count 2"); possessing (discharging) a firearm during a crime of violence (robbery of ABC Jewelry Store), in violation of 18 U.S.C. section 924(c)(1)(A)(iii) ("Count 3"); and substantive Hobbs Act robbery of a Saks Fifth Avenue in violation of 18 U.S.C. section 1951(a)(1). (*See* Report 2; *see also* Reply 1). One of the Hobbs Act robbery counts was used as the predicate violent crime to charge Count 3 under section 924(c). (*See* Report 2). On October 28, 2013, the Court sentenced Movant to a sentence of life imprisonment on Count 3, as well as concurrent terms of 240 months on Counts 1 and 2, and a consecutive term of 120 months on Count 4. (*See id.*; Reply 2). The Eleventh Circuit affirmed the conviction and sentence on January 21, 2015. *See United States v. Rodriguez*[1], 591 F. App'x 897, 906 (11th Cir. 2015) (per curiam). The judgment became final on April 25, 2015, when the time for filing a petition for writ of certiorari with the Supreme Court expired. (*See* Report 2).

[1] Louis Robinson was convicted along with co-defendant, Daniel Rodriguez. Robinson and Rodriguez appealed *pro se* to the Eleventh Circuit.

Movant now brings his Motion seeking to vacate his section 924(c) conviction and sentence, arguing (1) his conviction under the residual clause of 18 U.S.C. section 924(c) is unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015); and (2) Count 2, a Hobbs Act robbery offense in violation of 18 U.S.C. section 1951, does not qualify as a predicate offense under section 924(c)'s elements clause. (*See generally* Reply). In the alternative, Movant requests the Court hold his Motion in abeyance pending resolution of *Sessions v. Dimaya*, U.S. Supreme Court No. 15-1498. (*See* Objs. 17).

II. ANALYSIS

A. *Johnson* and Section 924(c)

In *Johnson*, the United States Supreme Court struck down a portion of the Armed Career Criminal Act as unconstitutionally vague. 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 "violent felony" includes any crime punishable by more than a one-year term that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B)(ii) (alteration added).[2] *Johnson* held the second part of this definition, the so-called residual clause, was void for vagueness. *See* 135 S. Ct. at 2557–60, 2563.

Distinct from the ACCA, section 924(c) imposes a seven-year mandatory consecutive sentence for any defendant who brandishes a firearm during a "crime of violence" or a "drug trafficking crime." 18 U.S.C. § 924(c)(1)(A)(ii). Under section 924(c)(3), a "crime of violence" means a felony offense that:

[2] A violent felony also encompasses any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

> (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). Subsection (A) of section 924(c)(3) is known as the "use-of-force" or "elements" clause; subsection (B) is known as the "risk-of-force" clause. *See, e.g.*, *In re Sams*, 830 F.3d 1234, 1237 (11th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 138 & n.4 (2d Cir. 2016).

Johnson was made retroactively applicable to cases on collateral review by *Welch v. United States*, 136 S. Ct. 1257 (2016). In the aftermath of *Johnson* and *Welch*, the nation's courts experienced a flood of habeas applications from inmates who believe not just ACCA convictions, but also convictions under section 924(c), might no longer be valid. *See In re Leonard*, 655 F. App'x 765, 771 (11th Cir. 2016) (Martin, J., concurring in result); *In re Pinder*, 824 F.3d 977, 978–79 (11th Cir. 2016) (citing circuit court cases granting second or successive habeas petitions challenging section 924(c) convictions after *Johnson*). *Johnson*'s applicability to section 924(c) was, until recently, an "open question" in the Eleventh Circuit. *In re Sams*, 830 F.3d at 1237. On June 30, 2017, the Eleventh Circuit held *Johnson* does not apply to or invalidate section 924(c)'s risk-of-force clause. *See Ovalles v. United States*, 861 F.3d 1257, 1267 (11th Cir. 2017).

B. Time Bar

A motion brought under section 2255 must be brought within one year of the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such government action;

> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §§ 2255(f)(1)–(4).

Movant argues his Motion is timely under section 2255(f)(3) because it was filed within one year of *Johnson*. (*See* Reply 35). But *Johnson* does not "newly recognize[]" the "right asserted" by Movant. 28 U.S.C. § 2255(f)(3) (alteration added). As clarified by the Eleventh Circuit in *Ovalles*, *Johnson* is irrelevant to the argument that Movant's section 924(c) conviction is unconstitutional. *See Ovalles*, 861 F.3d at 1267. As Movant does not argue section 2255(f)(2) or (f)(4) applies here, the Motion must comply with section 2255(f)(1). The Motion is brought more than a year after the conviction became final on April 21, 2015 (*see* Report 2; *see also* Reply 35), and is therefore untimely.

While untimeliness alone is a sufficient ground for the Court to deny the Motion, the Court nonetheless examines whether Movant procedurally defaulted his claim.

C. Procedural Default

Ordinarily, incarcerated persons are procedurally barred from challenging a conviction or sentence in a section 2255 proceeding if they have not first asserted available challenges on direct appeal. *See Greene v. United States*, 880 F.2d 1299, 1305 (11th Cir. 1989) (citing *Parks v. United States*, 832 F.2d 1244, 1245 (11th Cir. 1987)). There are, however, exceptions to the rule. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause

and actual prejudice . . . or that he is actually innocent." *Bousley v. United States*, 523 U.S. 614, 622 (1998) (alteration added; internal quotation marks and citations omitted).

Movant correctly states that procedural default is excused when a defendant is actually innocent of the offense. (*See* Reply 36 (citing *Bousley*, 523 U.S. at 623)). Movant claims "[b]ecause the predicate offense is not a crime of violence, it is impossible for the government to prove one of the required elements of the section 924(c) offense," thus making him legally innocent of the offense. (Reply 36 (alteration added) (citing *United States v. Adams*, 814 F.3d 178, 183 (4th Cir. 2016)). However, the Eleventh Circuit has found that for the innocence exception to apply, a movant "must show that he is factually innocent of the conduct or underlying crime that serves as the predicate for the enhanced sentence." *McKay v. United States*, 657 F.3d 1190, 1199 (11th Cir. 2011) (emphasis removed) (determining the innocence exception does not apply to movant's claim he was erroneously sentenced as a career offender under the Sentencing Guidelines because a prior conviction was not a "crime of violence"). Here, Movant does not attempt to prove factual innocence, instead stating "procedural default rises and falls with the merits of the argument that the predicate offense is not a crime of violence." (Reply 37).

A movant can also avoid application of the procedural default doctrine by establishing cause for failing to raise the claim and showing prejudice to his case. *See Murray v. Carrier*, 477 U.S. 478, 485–86 (1986)). Both the cause and the prejudice prongs must be satisfied to overcome procedural default. *See Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004). Cause can be shown by pointing to "a claim that 'is so novel that its legal basis is not reasonably available to counsel.'" *Bousley*, 523 U.S. at 622 (quoting *Reed v. Ross*, 468 U.S. 1, 16 (1984)). A movant can establish prejudice by showing "a reasonable probability that the result of the

proceeding would have been different." *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (citations omitted).

Movant's claim fails because he does not show prejudice. Movant argues (1) section 924(c)'s risk-of-force or residual clause should be found unconstitutionally vague after *Johnson*, and should not be relied on to classify the predicate offense as a crime of violence (*see* Reply 3–16); and (2) his conviction for Hobbs Act robbery does not qualify as a crime of violence under section 924(c)'s use-of-force clause or elements clause, and thus cannot be considered a predicate offense for purposes of Count 3. (*See id.* 17–34). These arguments fail based on binding Eleventh Circuit precedent.

First, the decision in *Ovalles* is binding. The Eleventh Circuit recently confirmed section 924(c)'s risk-of-force or residual clause "remains valid" because "*Johnson's* void-for-vagueness ruling does not extend to . . . [section] 924(c)(3)(B)." *Ovalles*, 861 F.3d at 1267 (alterations added). Movant makes no argument his Count 3 conviction does not satisfy the elements of the risk-of-force clause as written; he argues only that the risk-of-force clause is constitutionally invalid. (*See* Objs. 2–11). In light of *Ovalles*, the Court cannot find Movant has established prejudice.

As the Government highlights in its Response, Movant also fails to offer any authority that a pending case before the Supreme Court pertaining to a facially similar statute would give this Court the authority to overlook binding Eleventh Circuit precedent. (*See* Resp. 7). Thus, the Court declines to abate this case while the Supreme Court considers a constitutional challenge to 18 U.S.C. section 16(b) in *Sessions v. Dimaya*, despite the facial similarity between section 16(b) and section 924(c)(3)(B).

Second, the Court is bound by the Eleventh Circuit, which has already considered whether *Johnson* impacts a robbery charge under the Hobbs Act. (*See* Report 9). The Eleventh Circuit found Hobbs Act robbery under 18 U.S.C. section 1951(a) "clearly qualifies as a crime of violence under the use-of-force clause in [section] 924(c)(3)(A)." *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016) (alteration added).

Movant argues *Saint Fleur* is not binding because the decision was made in the context of an application for leave to file a second or successive section 2255 motion. (*See* Reply 20–21). Movant does not cite to case law adopting this proposed rule. (*See* Resp. 9). The Government cites to *Gordon*, in which the Eleventh Circuit confirms "*Saint Fleur* controls . . . [t]his Court has held that a companion Hobbs Act robbery conviction . . . qualifies as a crime of violence under the use-of-force clause in [section] 924(c)(3)(A)." *In re Gordon*, 827 F.3d 1289, 1294 (11th Cir. 2016) (alterations added; internal quotation marks and citation omitted). In *Colon*, the Eleventh Circuit also relies on *Saint Fleur* to find aiding and abetting Hobbs Act robbery qualifies as a crime of violence. *See In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016).

Furthermore, the exceptions under which the Eleventh Circuit may grant a second or successive section 2255 motion are the same as the standard for overcoming a procedural default when claims have not first been asserted on direct appeal. *Compare Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) (finding courts may not consider second or successive habeas petitions unless the petitioner can demonstrate cause and prejudice or a miscarriage of justice in the form of actual innocence), *with Bousley*, 523 U.S. at 614 (holding the movant may overcome procedural default by showing actual innocence or demonstrating either cause and prejudice). In light of *Saint Fleur* and the Eleventh Circuit cases that have come after it, the Court cannot find Movant has established prejudice.

Since there is no reasonable probability the proceeding would be different today, the Court need not examine whether Movant has established cause. Movant's section 924(c) claims are procedurally barred.

D. 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.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Report **[ECF No. 13]** is **ACCEPTED AND ADOPTED** as follows:

1. Movant, Louis Robinson'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 29th day of November, 2017.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Patrick A. White
counsel of record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22836-CV-ALTONAGA
(13-20008-CR-ALTONAGA)
MAGISTRATE JUDGE P.A. WHITE

LOUIS ROBINSON,

Movant,

REPORT OF MAGISTRATE JUDGE

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

I. Introduction

The movant, a federal prisoner, currently confined at the Lee United States Penitentiary in Jonesville, Virginia, has filed this §2255 motion challenging his conviction and sentence entered following a guilty plea in case no. 13-20008-CR-ALTONAGA. He seeks relief in light of the Supreme Court's ruling in Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551 (2015), made retroactively applicable to cases on collateral review by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257 (2016).

This Cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B),(C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges, S.D. Fla. Admin. Order 2003-19; and, Rules 8 and 10 Governing §2255 Cases in the United States District Courts.

The court has reviewed the motion to vacate and memorandum in support thereof (Cv DE# 1,4), the amended motion to vacate (Cv DE# 8), the government's response in opposition (Cv DE# 9), Petitioner's reply thereto (Cv DE# 12) and all pertinent portions of the underlying criminal case.

II. Procedural History

The movant was charged by superseding indictment with one count of conspiracy to obstruct interstate commerce via robbery, in violation of 18 U.S.C. §1951(a); two counts of obstruction of interstate commerce via robbery ("Hobbs Act robbery"); and one count of possession of a firearm in furtherance of a crime of violence, each in violation of 18 U.S.C. §924(c)(1)(A). (CR-DE# 22). The §924(c) count expressly charged on of the two substantive Hobbs Act robberies as the predicate violent crime. After a jury trial the movant was convicted on all counts as charged. (CR-DE# 94).

Prior to sentencing, a PSI was prepared. The total offense level was set at 40. (PSI ¶75). The movant's criminal history category was VI based on a total of 14 criminal history points. (PSI ¶84). The resulting guideline sentence was 360 months to life plus a mandatory consecutive term of ten years for the firearm charge. On October 28, 2013, the court imposed a sentence of life imprisonment on the 924(c) charge, concurrent terms of 240 months on counts one and two and a consecutive term of 120 months on count four. (CR-DE# 118). The conviction and sentence were affirmed on January 21, 2015. (CR-DE# 151).

The judgment became final on **April 21, 2015**, when the time for filing a petition for certiorari with the Supreme Court expired. Thus, the movant had one year from the time his conviction became final, or no later than **April 21, 2016**, within which to timely file this federal habeas petition. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on

the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)).

From the time his conviction became final on **April 21, 2015** one year and two months passed before movant filed a letter seeking appointment of counsel to pursue a Johnson claim on **May 10, 2016.**[1] (Cv DE#1). This court issued an order appointing counsel and setting a briefing schedule. (Cv-DE# 4). The parties have complied with the court's briefing schedule and the case is now ripe for review.

III. Threshold Issues

A. Timeliness

As previously discussed, the movant's judgment of conviction became final on **April 21, 2015**. The movant had until **April 21, 2016,** to timely file his §2255 motion. Movant failed to timely file the instant petition, which he did not file until **June 24, 2016.**

However, on **June 26, 2015,** the United States Supreme Court held that the ACCA's residual clause--defining a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another"--is unconstitutionally vague. Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551, 2563 (2015). The Supreme Court, however, expressly

[1]Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing. Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

did not invalidate the ACCA's elements clause or the enumerated crimes clause. Id. ("Today's decision does 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"). Then, on **April 18, 2016**, the Supreme Court announced that Johnson announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257 (2016).

The movant takes the position that the Petition is timely as it was filed within one year of the Supreme Court's issuance of Johnson on June 26, 2015. The government has responded by arguing that Johnson does not apply in the context of a conviction under § 924(c) and therefore the motion is untimely. In order to determine whether the motion is timely, this court must determine whether Johnson applies to the movant's conviction for possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §924(c).

B. Procedural Bar

The government also contends that, even if Johnson applies to 18 U.S.C. §924(c)(3)(B), the movant is procedurally barred from raising this argument because he is raising it for the first time in the instant proceedings. According to the government, the movant cannot satisfy either the cause-and-prejudice or the actual innocence exceptions to the procedural-default rule.

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding; Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for

failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)(citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a movant "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can be shown when a claim "is so novel that its legal basis [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). To show prejudice, a movant must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96; see also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Id. at 496; see also Bousley, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992)("the miscarriage of justice exception is concerned with actual as compared to legal innocence").

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after

a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). That is precisely the circumstance here. Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. However, no actual prejudice would result from finding a procedural default here because, as set forth below, regardless of whether Johnson applies to §924(c)'s residual clause, the movant's companion charge for **substantive Hobbs Act robbery** categorically qualifies as a "crime of violence" under §924(c)'s elements clause. Accordingly, the movant cannot establish cause-and-prejudice to overcome the procedural bar.

IV. Discussion

The movant argues that Johnson is applicable to §924(c)'s residual clause. Movant claims his §924(c) conviction cannot stand because his Hobbs Act Robbery conviction is not a "crime of violence."

Although there is a split amongst the Circuits with regard to whether §924(c)(3)(B) is unconstitutionally void-for-vagueness post-Johnson, the Eleventh Circuit has recently agreed with decisions from the Second,[2] Sixth,[3] and Eighth[4] Circuits, "holding that Johnson's void-for-vagueness ruling does not apply to or invalidate the 'risk-of-force' clause in §924(c)(3)(B)." See Ovalles v. Tavarez-Alvarez, ___ F.3d ___, 2017 WL 2972460, *8 (11 Cir. July 11, 2017). In so ruling, the Eleventh Circuit observed that the "ACCA identifies 'previous convictions' for the

[2]United States v. Hill, 832 F.3d 135, 145-49 (2d Cir. 2016).

[3]United States v. Taylor, 814 F.3d 340, 375-79 (6th Cir. 2016).

[4]United States v. Prickett, 839 F.3d 697, 699-700 (8th Cir. 2016).

purpose of applying a recidivist sentencing enhancement to a defendant felon who later possesses a firearm in violation of 18 U.S.C. §922(g)," while "§924(c) creates a new and distinct offense for a person who, 'during and in relation to any crime of violence or drug trafficking crime, ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of such crime, possesses a firearm.'" Id. at *7 (quoting §924(c)(1)(A)).

In other words, the Eleventh Circuit determined that §924(c) "is not concerned with recidivism, but rather with whether the instant firearm was used 'during and in relation to' the predicate crime of violence (or drug trafficking offense) or possessed in furtherance of such predicate offenses." Id. (citing §924(c)(1)(A)(ii)-(iii)). Thus, the Eleventh Circuit concluded that the "'nexus' between the §924(c) firearm offense and the predicate crime of violence makes the crime of violence determination more precise and more predictable." Id.

The Eleventh Circuit further found that "§924(c)(3)(B) is not plagued by the same contradictory and opaque indications as the ACCA's residual clause on 'how much risk' is necessary to satisfy the statute, because the phrase 'substantial risk' is not preceded by a 'confusing list of examples.'" Id. at *8. Since movant's challenge to his §924(c) conviction is now foreclosed by binding Eleventh Circuit precedent, this claim warrants no federal habeas corpus relief.

Even assuming that Johnson extends to movant's §924(c) conviction because §924(c)'s "residual clause" is similar to the ACCA's "residual clause," the movant's argument fails on the merits.

Title 18 U.S.C. §924(c)(1)(A) provides for enhanced statutory penalties in cases where, among other things, the defendant uses or carries a firearm during and in relation to any "crime of violence or drug trafficking crime." The statute further defines "crime of violence" as any felony that

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

18 U.S.C. §924(c)(3). As such, §924(c)(3) contains a "residual clause," very similar to the residual clause declared unconstitutionally vague in Johnson.[5]

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, 559 U.S. 133, 140 (2010). 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

[5]The ACCA's residual clause that was held to be unconstitutionally vague in Johnson defines "violent felony" as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §924(e)(2)(B)(ii).

as an element the use of physical force against the person of another, "suggests a category of violent, active crimes . . .").

In addition, 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, supra). While the meaning of "physical force" 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, 599 U.S. at 138. A federal court which applies state law is bound to adhere to the 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).

In In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016), the Eleventh Circuit considered, in the context of an application for leave to file a second or successive § 2255 motion, whether Johnson impacts a robbery charge under the Hobbs Act, 18 U.S.C. §1951(a), and a separate firearm charge during and in relation to a "crime of violence" in violation of §924(c). The Eleventh Circuit denied the application, stating:

> But we need not decide, nor remand to the district court, the §924(c)(3)(B) residual clause issue in this particular case because even if Johnson's rule about the

> ACCA residual clause applies to the §924(c)(3)(B) residual clause, [defendant's] claim does not meet the statutory criteria for granting this §2255(h) application. This is because [defendant's] companion conviction for Hobbs Act robbery, which was charged in the same indictment as the §924(c) count, clearly qualifies as a "crime of violence" under the use-of-force clause in §924(c)(3)(A).

824 F.3d at 1340.

It is axiomatic that federal district courts are bound by the precedent of their circuit. See In re Hubbard, 803 F.3d 1298, 1309 (11th Cir. 2015)(citing Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir.1985)). Courts are, however, generally only bound by the holdings of cases. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129, 134 L. Ed. 2d 252 (1996). Dicta, conversely, is "not binding on anyone for any purpose." Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir.2010). As the Eleventh Circuit has noted, "dicta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us.'" United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (citations omitted). The holding of a case, on the other hand, is "comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.'" Id. Finally, under the prior panel precedent rule, the holding of a prior panel of the Eleventh Circuit is binding on all subsequent panels, unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit sitting en banc. United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008)(citations omitted).[6]

[6]"While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point." Garrett v. University of Alabama at Birmingham Bd. of Trustees, 344 F.3d 1288, 1292 (11th Cir.2003).

Here, regardless of whether the Eleventh Circuit in Saint Fleur should have undertaken a determination of whether Saint Fleur's Hobbs Act conviction qualified as a "crime of violence," the fact remains that it did. Moreover, the Court's conclusion that Saint Fleur's Hobbs Act conviction did qualify as a "crime of violence" was necessary to the result in that case, since his application for leave to file a second or successive §2255 motion was denied on that basis. As such, Saint Fleur holds that Hobbs Act robbery is a "crime of violence" for purposes of §924(c), see Kaley, 579 F.3d at 1253 n.10 (the holding of a case is comprised both of the result of the case and those portions of the opinion necessary to that result), and this Court is thus bound by it. In re Hubbard, 803 F.3d at 1309 (federal district courts in the are bound by the precedent of their circuit).

Because the movant's companion charge for substantive Hobbs Act robbery categorically qualifies as a "crime of violence" under §924(c)'s elements clause, the movant cannot establish prejudice and his claim is procedurally barred. In the alternative, because Johnson does not apply to §924(c), the claim would fail on the merits.

V. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") 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)." See Rule 11(a), Rules Governing §2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless,

a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255-Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001).

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the Chief Judge in objections.

VI. Conclusion

Based on the foregoing, it is recommended that this motion to vacate be DENIED, that no certificate of appealability issue, and the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 3rd day of October 2017.

UNITED STATES MAGISTRATE JUDGE

cc:
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61594-004
Lee-USP
United States Penitentiary
Inmate Mail/Parcels
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Miami, FL 33132

A - 4

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

LOUIS ROBINSON

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number - 1:13-20008-CR-ALTONAGA(s)-2

USM Number: 61594-004

Counsel For Defendant: Albert Z. Levin, Esq.
Counsel For The United States: Seth M. Schlessinger, Esq. and Olivia S. Choe, Esq.
Court Reporter: Stephanie McCarn

Date of Original Judgment: October 29, 2013
Reason for Amendment:

Modification of Restitution Order (18 U.S.C. § 3664)

The defendant was found guilty on Counts 1, 2, 3, and 4 of the Superseding Indictment.
The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1951(a)(1)	Conspiracy to Interfere with Interstate Commerce by Means of Robbery	December 21, 2012	1
18 U.S.C. § 1951(a)(1)	Interference With Interstate Commerce by Means of Robbery	July 30, 2012	2
18 U.S.C. § 924(c)(1)(A)(iii)	Possession of a Firearm in Furtherance of a Crime of Violence (Discharge)	July 30, 2012	3
18 U.S.C. § 1951(a)(1)	Interference with Interstate Commerce by Means of Robbery	September 20, 2012	4

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:
October 25, 2013

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

February 5, 2014

DEFENDANT: LOUIS ROBINSON
CASE NUMBER: 1:13-20008-CR-ALTONAGA(s)-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **LIFE**. This term consists of a term of Life as to Count 3; concurrent terms of 240 months as to each of Counts 1 and 2; and a consecutive term of 120 months as to Count 4.

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

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

The Defendant be held at the Miami Federal Detention Center until after his restitution hearing.

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: LOUIS ROBINSON
CASE NUMBER: 1:13-20008-CR-ALTONAGA(s)-2

SUPERVISED RELEASE

No term of supervised is imposed.

DEFENDANT: LOUIS ROBINSON
CASE NUMBER: 1:13-20008-CR-ALTONAGA(s)-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
$400.00	**0**	**$282,855.00**

Restitution with Imprisonment -

It is further ordered that the defendant shall pay restitution in the amount of **$282,855.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TO BE PROVIDED BY THE U.S. PROBATION OFFICE	$282,855.00	$282,855.00	

*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: LOUIS ROBINSON
CASE NUMBER: 1:13-20008-CR-ALTONAGA(s)-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 **$400.00** 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.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers, Total Amount, Joint and Several Amount, and corresponding payee.

Restitution in the amount of $282,855.00 is joint and several with the co-defendant in the instant offense, Daniel Rodriguez.

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.