APPENDIX

APPENDIX

APPENDIX A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10450-C

TRAVIS HORNE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Travis Horne 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, Horne 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 Horne's claims, he has not met this standard, and his motion for a COA is DENIED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX A-2

No. 18-10450-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TRAVIS HORNE
***Petitioner/appellant*,**

v.

UNITED STATES OF AMERICA,
***Respondent/appellee*.**

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

MOTION FOR CERTIFICATE OF APPEALABILITY BY PETITIONER TRAVIS HORNE

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

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Travis Horne v. United States of America
Case No. 18-10450-C

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

Acosta, R. Alexander, Attorney

Adelstein, Stuart, Attorney

Adley, Cornel, Co-defendant

Altonaga, Cecilia M., United States District Judge

Banstra, Ted. E., United States Magistrate Judge

Batista, Jose Rafael Esteban, Attorney

Becker, Abigail E., Assistant Federal Public Defender

Benjamin, James Scott, Attorney

Berger, Michael N., Assistant United States Attorney

Brown, Jaborie, Co-defendant

Bushey, Rachael Elizabeth, Attorney

Cariglio, Jr., Gennaro, Attorney

Caruso, Michael, Federal Public Defender

Cooke, Marcia G., United States District Judge

Daley, Jennifer E., Attorney

Diaz, Natalie, Assistant United States Attorney

Dube, Robert L., United States Magistrate Judge

Ferrer, Wifredo A., Former United States Attorney

Glee, Kiandree, Co-defendant

Greenberg, Benjamin G., United States Attorney

Handfield, Larry Robert, Attorney

Herron, Derrick, Co-defendant

Hodge, David Paul, Attorney

Hoffman, Andrea G., Assistant United States Attorney

Horne, Travis, Defendant

Houlihan, Richard Kevin, Attorney

Jimenez, Marcos Daniel., Attorney

Kassebaum, Kristi Flynn, Attorney

Kaufman, Allen Stewart, Attorney

Klein, Theodore, United States Magistrate Judge

Lagoa, Barbara, Assistant United States Attorney

Lazarus, Paul David, Attorney

Lowenthal, Sheryl Joyce, Attorney

Lunkenheimer, Kurt K., Defendant

Manto, Ronald Joseph, Attorney

Markus, David Oscar, Attorney

Maxwell, Cristina V., Assistant United States Attorney

McComb, Brian R., Attorney

Rodriguez, Hugo A., Attorney

Simonton, Andrea M., United States Magistrate Judge

Smachetti, Emily M., Assistant United States Attorney

Turnoff, William C., United States Magistrate Judge

White, Patrick A., United States Magistrate Judge

Williams, Anthony, Co-defendant

MOTION FOR CERTIFICATE OF APPEALABILITY

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

1. Whether the district court erred by denying Mr. Horne's motion to vacate, set aside, or correct his sentence, brought pursuant to 28 U.S.C. § 2255, on grounds that his claims were procedurally defaulted.

I. PROCEDURAL HISTORY

On October 22, 2004, Mr. Horne was found guilty by a jury of Counts 1, 2, 3, 7, and 8 of a superseding indictment; he was acquitted of Counts 12 and 13. (Cr. DE338.) Mr. Horne was sentenced to a total term of 450 months, consisting of concurrent terms of 210 months as to Counts 1, 2, and 3, and 180 months as to Count 7, to run consecutive to the 240 months imposed as to Count 8. (Cr. DE487.)

In his § 2255 filings, following the decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Horne challenged his conviction and sentence on Counts 3 and 8, conspiracy to possess a firearm in relation to a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(o); and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). (DE1, 11, 12.) Mr. Horne's motion was referred to Magistrate Judge Patrick A. White, who, on October 24, 2017, issued a Report and Recommendation, in which he recommended that the § 2255 motion be denied and that no certificate of appealability be issued. (DE17.)

On December 7, 2017, the district court adopted the magistrate judge's report and recommendation. (DE22.) Mr. Horne filed a timely notice of appeal. (DE24.)

This motion for a COA follows.

II. LEGAL STANDARD

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

When the district court denies a claim on procedural grounds without reaching the underlying claim, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

As the Supreme Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537

U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

The Supreme Court recently applied this standard in *Welch v. United States*, 136 S. Ct. 1257 (2016), which arose from the denial of a COA. *Id.* at 1263-64. In that case, the Court broadly held that *Johnson* announced a substantive rule that applied retroactively in cases on collateral review. *Id.* at 1268. But, in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA, because "reasonable jurists could at least debate whether Welch

should obtain relief in his collateral challenge to his sentence." *Id.* at 1264, 1268. In that case, the parties disputed whether his robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. *See id.* at 1263-64, 1268. Accordingly, the Court held that a COA should issue.

As explained below, Mr. Horne has satisfied this standard.

III. REASONABLE JURISTS COULD DEBATE WHETHER MR. HORNE'S CLAIMS WERE PROCEDURALLY DEFAULTED

"[R]easonable jurists could at least debate" whether the district court erred in its procedural ruling, finding that Mr. Horne procedurally defaulted the claims he raised in his § 2255 petition and supporting briefing. Specifically, reasonable jurists could debate whether his claims establish that he is "factually innocent" of the § 924(c) and § 924(o) convictions, which convictions he challenged in his petition.

A. The Proceedings Below

In support of his § 2255 petition, Mr. Horne argued that he is actually innocent of his § 924(c) and 924(o) convictions, because the predicate offenses on which they are based are not "crimes of violence" under either the residual clause or the elements clause of § 924(c). First, he argued that the residual clause in 18 U.S.C. § 924(c), like the residual clause in 18 U.S.C. § 924(e), is void for vagueness, following the Supreme Court's holding in *Johnson*.[1] Second, he argued that

[1] Mr. Horne initially advanced this argument prior to this Court's holding to the contrary in *Ovalles v. Tavarez-Alvarez*, __ F.3d __, 2017 WL 2972460 (11th Cir. July 11, 2017). Following that decision, he acknowledged in his pleadings the Court's holding, but argued it should not be relied upon in light of the Court's *sua sponte* decision to withhold the mandate in that case and the anticipated decision in

carjacking is not a crime of violence under the elements clause of § 924(c), because it can be committed by mere intimidation. Third, he argued that he is actually innocent of his conviction under § 924(o), because that conviction is impermissibly predicated upon multiple convictions, the least of which is Hobbs Act conspiracy, which no longer qualifies as a crime of violence. (DE11, 12.)

Relying on *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011), the district court held that Mr. Horne had procedurally defaulted his claims by failing to establish that he is factually innocent of the conduct or underlying crime that serves as a predicate for the enhanced sentence. The court found that Mr. Horne's claims of innocence were based on legal innocence, rather than factual innocence. And on that basis alone, the district court found that Mr. Horne's claims were procedurally barred. (DE22.)

The court did not reach the substance of Mr. Horne's arguments concerning the application of the holding in *Johnson* to the residual clause of § 924(c), whether carjacking constitutes a crime of violence

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Sessions v. Dimaya (U.S. No. 15-1498), which decision could abrogate the holding in *Ovalles*.

under that section's elements clause, or the multiplicity arguments related to his § 924(o) conviction.[2] (DE 22.)

B. Reasonable jurists could debate whether Mr. Horne's claims were procedurally defaulted for the reasons upon which the district court based its ruling.

Reasonable jurists could disagree about whether Mr. Horne's claims were procedurally defaulted on the grounds cited by the district court. Specifically, reasonable jurists could disagree as to whether Mr. Horne's claims of actual innocence as to his § 924(c) and 924(o) convictions were claims of factual innocence, rather than mere legal innocence.

In *Bousley v. United States*, 523 U.S. 614 (1998), the Supreme Court held that held that, "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*, 523 U.S. at 622 (quotations and internal citations omitted). In other words,

[2] Because the district court did not reach the merits of Mr. Horne's substantive arguments, he does not address those arguments here. He maintains, however, that the residual clause of 18 U.S.C. § 924(c) is void for vagueness, following the holding in *Johnson*, that carjacking does not qualify as a qualifying predicate offense under the elements clause, and that his § 924(o) conviction was impermissibly based on multiple predicates, the least of which no longer qualifies as a crime of violence.

a petitioner "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* (quotations omitted). Reasonable jurists could disagree as to whether Mr. Horne has met this standard, and in fact, reasonable jurists have held that petitioners have met this standard in circumstances similar to Mr. Horne's.

In *United States v. Adams*, the Court of Appeals for the Fourth Circuit held that the petitioner, who challenged his conviction for being a felon in possession of a firearm, met the requisite showing of "actual innocence," as required by *Bousley*, after his predicate North Carolina convictions were no longer considered felonies. *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016). There, the defendant was convicted under 18 U.S.C. § 922(g), one element of which requires proof that the defendant was previously convicted of a felony offense. After the defendant's conviction, in *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011), the Court of Appeals for the Fourth Circuit clarified which predicate offenses were to be considered felony offenses. Following the holding in *Simmons*, the defendant moved to vacate his conviction under § 922(g), on the grounds that his prior convictions no longer were

considered felony offenses, and, accordingly, he was innocent of being a felon in possession of a firearm. *Id.* at 181.

The Court of Appeals for the Fourth Circuit held that the petitioner met the required showing of actual innocence. Recognizing that *Bousley* requires a showing of factual innocence, the Court held that Adams had made that showing "because he has shown that it is impossible for the government to prove one of the required elements of a § 922(g)(1) charge—that the defendant was a convicted felon at the time of the offense." *Id.* at 183.

Mr. Horne's claim of actual innocence is analogous to the petitioner's in *Adams*. Here, too, Mr. Horne is actually innocent of the challenged convictions because it is impossible for the government to prove one of the required elements of a § 924(c) offense—that he used or carried a firearm during and in connection to a crime of violence, because § 924(c)'s residual clause is void and carjacking does not qualify as a crime of violence under the elements clause. Likewise, it is impossible for the government to prove one of the required elements of a § 924(o) offense—that he conspired to carry a firearm in connection with a crime of violence.

The district court based its denial of Mr. Horne's petition solely on the basis that his claims were claims of legal innocence, rather than factual innocence, and so did not satisfy the dictates of *McKay* and *Bousley*. Reasonable jurists, however, could certainly disagree as to whether Mr. Horne's claims are claims of factual innocence. As in *Adams*, his claims rest on the notion that the government cannot prove an essential element of the challenged offenses. And as evidenced by the holding in *Adams*, reasonable jurists could debate whether those claims amount to claims of factual, rather than mere legal innocence.

For these reasons, reasonable jurists could debate whether Mr. Horne's claims were procedurally defaulted.

CONCLUSION

For the foregoing reasons, Mr. Horne respectfully requests that this Court grant a COA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with 11th Cir. R. 22-2, I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 1,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Abigail E. Becker

CERTIFICATE OF SERVICE

I certify that on this 16th day of February, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and it is being served this day via CM/ECF on Emily M. Smachetti, Chief, Appellate Division, U.S. Attorneys' Office, 99 N.E. 4th Street, Miami, FL 33132-2111.

/s/ Abigail E. Becker

APPENDIX A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22796-CIV-ALTONAGA/White

TRAVIS HORNE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER

On June 24, 2016, Movant, Travis Horne, filed 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 6, 2016, Judge White appointed the Federal Public Defender to represent Movant. (*See* Order [ECF No. 6] 2).

The Government filed a Response in Opposition [ECF No. 10] to the Motion, to which Movant's appointed counsel filed a Reply in Support of Motion to Vacate, Correct, or Set Aside Sentence [ECF No. 11]. Thereafter, Movant filed a Supplement to Reply in Support of Motion to Vacate, Correct, or Set Aside Sentence [ECF No. 12]. The briefing was concluded when the Government filed its Surreply to Movant's Reply and Supplement [ECF No. 14].

On October 24, 2017, Judge White filed an Amended Report of Magistrate Judge [ECF No. 17], recommending the Court deny the Motion and not issue a certificate of appealability. (*See id.* 32). Movant, through counsel, filed timely Objections [ECF No. 19], and the Government filed a Response in Opposition to Movant's Objections [ECF No. 21].

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 objections (*see* Objs.), the Court reviews the record *de novo*.

I. BACKGROUND

On October 22, 2004, a jury found Movant guilty of conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. section 846 ("Count 1"); conspiracy to obstruct, delay and affect interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. section 1951(a) ("Count 2"); conspiracy to use and carry a firearm in relation to a crime of violence and a drug trafficking crime and to possess a firearm in furtherance of a crime of violence or drug trafficking crime, in violation of 18 U.S.C. section 924(o) ("Count 3"); carjacking, in violation of 18 U.S.C. section 2119 ("Count 7"); and possession of a firearm in furtherance of a crime of violence or drug trafficking crime, in violation of 18 U.S.C. section 924(c) ("Count 8"). (*See* Resp. to Mot. 2; *see also* Mot. 1).

The Government and Movant agree the predicate offense or underlying crime of violence used to charge Count 8 under section 924(c) was Count 7 for carjacking. (*See* Reply 1–2; *see also* Surreply 1). But the Government and Movant do not agree as to the predicate offense for Movant's conviction under section 924(o), with the Government stating the predicate offense is Count 1 or Count 7 (*see* Resp. 1 n.1; *see also* Surreply 3–5); while Movant claims the predicate

offense was not specified and thus the predicate offense may also be conspiracy to commit Hobbs Act Robbery (*see* Suppl. Reply 3–4). Movant was acquitted of Counts 12 and 13 for Hobbs Act robbery (*see* Objs. 1 & n.1); as such, the Court does not address the discussion of Counts 12 and 13 in Judge White's Amended Report (*see* Am. Report 23–25).

The undersigned sentenced Movant to a total term of 450 months, including concurrent terms of 210 months as to Counts 1, 2, and 3, and 180 months as to Count 7; and a consecutive term of 240 months on Count 8. (*See* Objs. 2). On April 10, 2007, the Eleventh Circuit affirmed the conviction and sentence on direct appeal. *See United States v. Brown, et al.*, 227 F. App'x 795 (11th Cir. 2007) (per curiam).[1] The judgment became final on July 9, 2007, when the time for filing a petition for writ of certiorari with the Supreme Court expired. (*See* Am. Report 5).

Movant now brings his Motion seeking to vacate his section 924(c) and section 924(o) convictions and sentences. He argues his conviction on Count 3 is impermissible (1) under the residual clause of section 924(c), which is unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*see* Objs. 2–16); and (2) under section 924(c)'s elements clause, because carjacking in violation of section 2119 does not qualify as a predicate offense (*see id*. 16–19). Movant also argues his conviction under section 924(o) is impermissible because it suffers from the infirmity of multiplicitous predicates and should be vacated (*see id*. 19–23). In the alternative, he requests the Court issue a certificate of appealability. (*See id*. 27).

The Government does not contest Horne's Motion is timely filed under section 2255(f)(3), because it was filed within one year of *Johnson*. (*See* Am. Report 6–8). As a result the Court does not address timeliness. *See Wood v. Milyard*, 566 U.S. 463, 471–73 & n.5 (2012)

[1] Movant, Travis Horne was convicted along with co-defendants, Jaborie Brown, Cornell Adley, Derrick Herron and Anthony Williams. Brown, Adley, Herron, Williams, and Movant appealed their convictions to the Eleventh Circuit. Movant also challenged his sentence.

(holding a district court abuses its discretion by considering a statute of limitation defense that has been affirmatively waived).

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:

> (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.

[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).

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. Procedural Default

The Court proceeds to examine whether Movant procedurally defaulted his claims. 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). Throughout his briefing and Objections (*see generally* Objs.), Movant "does not argue . . . the cause and prejudice exception applies," and so the Court only considers "whether the actual innocence exception applies to excuse [his] procedural default." *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011) (alterations added).

Movant correctly states procedural default is excused when a defendant is actually innocent of the offense. (*See* Reply 17 (citing *Bousley*, 523 U.S. at 623)). 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").

Movant argues innocence of the section 924(c) and section 924(o) charges based on legal innocence, not factual innocence. (*See* Reply 1; *see also* Suppl. Reply 1). For example, in asserting his innocence of the charge in Count 8, Movant states "procedural default rises and falls with the merits of the argument that the predicate offense is not a crime of violence." (Reply 17). In the section of his briefing titled "Mr. Horne is Actually Innocent of 18 U.S.C. [section] 924(o)" (Suppl. Reply 1 (alterations added)), Movant maintains he is innocent of the charge in Count 3 because "the predicate offense of Hobbs Act conspiracy . . . no longer qualifies as a crime of violence." (*Id.* 3 (alterations added)). As Movant does not show he is

factually innocent of the conduct or underlying crimes charged, the Court finds Movant is procedurally barred and does not consider the merits of his arguments.

C. 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 Amended Report of Magistrate Judge **[ECF No. 17]** is **ACCEPTED AND ADOPTED** as follows:

1. Movant, Travis Horne'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 7th day of December, 2017**.**

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Patrick A. White
counsel of record

APPENDIX A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-22796-Civ-ALTONAGA
(03-20678-Cr-ALTONAGA)
MAGISTRATE JUDGE PATRICK A. WHITE

TRAVIS HORNE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

***AMENDED**[1]
REPORT OF
MAGISTRATE JUDGE

I. Introduction

Initially, the *pro se* movant, **Travis Horne**, filed this motion to vacate (Cv-DE#1), pursuant to 28 U.S.C. §2255, raising as a sole ground for relief that his 18 U.S.C. §924(c) conviction and enhanced sentence for knowingly using or carrying a firearm during and in relation to a crime of violence, as charged in Count 8 of the Superseding Indictment, entered following a jury verdict in **case no. 03-20678-Cr-Altonaga**, is no longer valid in light of the Supreme Court's decision in Johnson v. United States,[2] 576 U.S. ____, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), made retroactively applicable to cases on collateral review by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). (Cv-DE#1; see also Cv-DE#12).

[1]The Report has been Amended to replace the previously filed version, which was docketed in error.

[2]As everyone is well-aware, in Johnson, the Supreme Court held that the Armed Career Criminal Act's (ACCA) residual clause was unconstitutionally vague, and that imposing an enhanced sentence pursuant to that clause thus violates the Constitution's guarantee of due process. In Welch v. United States, 578 U.S. __, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), the Supreme Court held that Johnson announced a substantive rule that applied retroactively on collateral review.

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 Section 2255 Cases in the United States District Courts.

The Court has reviewed the movant's operative motion (Cv-DE#1), the government's response (Cv-DE#10) to this court's order appointing counsel and setting briefing schedule (Cv-DE#6), the movant's reply thereto and compliance with the court's order (Cv-DE#11) and supplement thereto (Cv-DE#12), the government's sur-reply (Cv-DE#13), together with the Presentence Investigation Report ("PSI"), Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file under attack here, including the sentencing transcript (Cr-DE#554).[3]

II. Claims

Initially, the movant raised as a sole ground for relief that he is actually innocent of his §924(c) conviction because carjacking, the predicate offense to support the §924(c) conviction, as charged in Count 8 of the Superseding Indictment, is not a "crime of violence," under either the residual or the elements clause of §924(c) in light of Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). (Cv-DE#s1,11-12). In a supplemental reply, the movant also raises an additional claim that his §924(o) conviction, as charged in Count 3 of the Superseding Indictment, is also unlawful post-Johnson. (Cv-DE#12).

[3]The undersigned takes judicial notice of its own records as contained on CM/ECF in those proceedings. See Fed.R.Evid. 201.

III. Procedural History

By way of background, the movant was charged with and found guilty, following a jury verdict, in relevant part of knowingly using and carrying a firearm during and in relation to a crime of violence, carjacking, in violation of 18 U.S.C. §2119, a felony offense, as set forth in Count 7[4] of the Superseding Indictment, all in violation of 18 U.S.C. §924(c)(1) and 18 U.S.C. §2 (Count 8). (Cr-DE#s232,338). He was also charged with and found guilty, following a jury verdict, of conspiracy to use and carry a firearm in furtherance of "a crime of violence and a drug trafficking crime," which are felonies prosecutable in a court of the United States, that is, violations of Title 18, U.S.C. §1951(a) (Hobbs Act robbery), Title 18 U.S.C. §2119 (carjacking), and 21 U.S.C. §§841(a)(1) and 846 (drug trafficking offenses), in violation of 18 U.S.C. §924(c), all in violation of 18 U.S.C. §924(o). (Cr-DE#232)(emphasis added).

Prior to sentencing, a PSI was prepared which set the combined adjusted offense level at a level 32, based on grouping of the offenses of conviction. (PSI ¶¶52-85). However, pursuant to U.S.S.G. §4B1.1, the movant's guideline sentence was enhanced as a career offender, because he was at least 18 years old at the time of the instant offenses, the offenses in Counts 2, 3, 7 and 8 constitute crimes of violence and Count 1 constitutes a controlled substance offense, and he has one prior conviction for a crime of violence, case no. F97-1917, and one prior controlled substance

[4]Specifically, Count 7 charged movant with "knowingly and intentionally, and with intent to cause death and serious bodily harm, take a motor vehicle, that had been transported, shipped, and received in interstate and foreign commerce, that is, a 1983 Chevrolet Caprice, from the person and presence of another, by force, violence, and intimidation, in violation of Title 18, United States Code, Sections 2119(1) and 2." (Cr-DE#232).

offense, case no. F98-12329. (PSI ¶86). Since the offense level for a career criminal from the table is 34, and it is higher than the otherwise adjusted offense level, the greater offense level applies. (PSI ¶86). Consequently, the total adjusted offense level was set at a level 34. (PSI ¶88). The probation officer next determined that the movant had a total of 7 criminal history points, resulting in a criminal history category IV. (PSI ¶98).

Because the movant qualified for an enhanced sentence as a career offender, under U.S.S.G. §4B1.1, and a career offender's criminal history category is always a category VI, the movant's criminal history category was increased to a category VI. (PSI ¶98). Based on a total offense level 34 and a criminal history category VI, the movant faced a guideline range of 262 months imprisonment at the low end and 327 months imprisonment at the high end. (PSI ¶140). Statutorily, and pertinent to the Count 8, under attack here, the movant faced a term of 28 years imprisonment, to run consecutive to any other term of imprisonment, for violation of §924(c). (PSI ¶139).

Movant was sentenced to a total term of 450 months imprisonment, consisting of: concurrent terms of 210 months imprisonment as to Counts 1, 2 and 3; a concurrent term of 180 months imprisonment on Count 7; and a 240-month term of imprisonment as to Count 8, to run consecutively to the other terms of imprisonment. (Cr-DE#522; Cv-DE#10-1).[5]

Movant prosecuted a direct appeal, raising a single claim of trial court error in failing to conduct jury inquiry following

[5]A complete copy of the transcript has been filed in this §2255 proceeding, and is not readily available in the underlying criminal case, as only the first page has been scanned.

prosecutorial misconduct during closing argument. See United States v. Brown, et al., 227 Fed.Appx. 795, 800 at n.2 (11 Cir. 2007)(unpublished); (Cr-DE#593). On **April 10, 2007**, the movant's judgment was affirmed on direct appeal, in a decision without written opinion. See United States v. Brown, et al., 227 Fed.Appx. 795, 800 at n.2 (11 Cir. 2007)(unpublished); (Cr-DE#593). Movant did not, however, challenge the constitutionality of his enhanced sentence on appeal. He also did not seek certiorari review with the United States Supreme Court. Therefore, his conviction became **final** on **Monday, July 9, 2007,**[6] when the 90-day period for seeking certiorari review expired upon conclusion of the movant's direct appeal.[7]

The movant had one year from the time his conviction became final, or no later than **Wednesday, July 9, 2008,**[8] 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

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[6]Under Fed.R.Civ.P. 6(a)(1), "in computing any time period specified in ... any statute that does not specify a method of computing time ... [the court must] exclude the day of the event that triggers the period[,] count every day, including intermediate Saturdays, Sundays, and legal holidays[, and] include the last day of the period," unless the last day is a Saturday, Sunday, or legal holiday. Where the dates falls on a weekend, the Undersigned has excluded that day from its computation.

[7]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufmann, 282 F.3d 1336 (11th Cir. 2002).

[8]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)); see also, 28 U.S.C. §2255.

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)). Applying the anniversary method to this case means petitioner's limitations period expired on **July 9, 2008.**

The movant has now come to this court, filing this, his first §2255 motion on **June 24, 2016,** after he signed and then handed his initial motion to prison authorities for mailing in accordance with the mailbox rule. (Cv-DE#4:2). Absent evidence to the contrary, the motion is deemed filed, for purposes of the mailbox rule on June 24, 2016, as evidenced by the U.S. prepaid postage stamp. (Cv-DE#4:2).[9]

IV. Threshold Issues

A. Timeliness

The government does not contest that the movant's initial §2255 motion (Cv-DE#1), together with his supplements thereto (Cv-DE#s11,12), were timely filed, because the initial motion was filed on **June 24, 2016,** within one year of the Supreme Court's **June 26,**

[9]"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/she 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).

2015 Johnson decision, made retroactively applicable to initially filed §2255 cases on collateral review by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). As explained by the Supreme Court in Welch v. United States:

> [T]he rule announced in Johnson is substantive. By striking down the residual clause as void for vagueness, Johnson changed the substantive reach of the Armed Career Criminal Act, altering "the range of conduct or the class of persons that the [Act] punishes." Schriro, supra, at 353, 124 S.Ct. 2519. Before Johnson, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After Johnson, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under Johnson, so it can no longer mandate or authorize any sentence. Johnson establishes, in other words, that "even the use of impeccable factfinding procedures could not legitimate" a sentence based on that clause. United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971). It follows that Johnson is a substantive decision ... Johnson is thus a substantive decision and so has retroactive effect under Teague in cases on collateral review.

136 S. Ct. 1257, 1265 (2016).

Moreover, although the reply (Cv-DE#11) was also timely filed as it related relate back to the argument raised in the movant's initial filing, the movant's supplemental reply (Cv-DE#12), filed on October 20, 2016, does not appear to be timely. Therein, the movant raised new facts and arguments and challenged a new count of conviction, previously raised. Consequently, pursuant to Davenport

v. United States, 217 F.3d 1341 (11 Cir. 2000) it does not relate back to the timely filed §2255 motion. The movant had, at the latest, one year from the time June 2015 Johnson decision to timely file any challenges to the constitutionality of his convictions and sentences. The supplement was filed in October 2016, over one year after the Johnson decision was decided. Therefore, it appears that the supplement is time-barred.

Since the Government waived the timeliness issue, the court need not decide whether Johnson restarted the AEDPA one-year clock under §2255(f)(3) as it pertains to his §924(c) claim; or, whether this proceeding is time-barred because the movant is not entitled to Johnson relief.[10] Because the government does not challenge the timeliness of this proceeding, it has waived the statute of limitations defense from consideration by the court under United States v. Frady, 456 U.S. 162, 162, 167-68 (1982). See Wood v. Milyard, 132 S.Ct. 1826, 1833 n.5, 1835 (2012). In Wood, the Supreme Court held that a district court abuses its discretion by considering a statute of limitation defense that has been affirmatively waived, as opposed to merely forfeited. (Id.). See also In Re Jackson, 826 F.3d 1343, 1347 (11 Cir. 2016)(citing Day v. McDonough, 547 U.S. 198, 210, 126 S.Ct. 1675, 1684, 164 L.Ed.2d 376 (2006) and Wood v. Milyard, 132 S.Ct. 1826 (2012)).

[10]However, it is undisputed that the movant was not sentenced under the ACCA, but rather as a career offender since it carried the higher offense level. Therefore, the issue becomes here whether Johnson's retroactivity applies given the procedural posture and facts of this case. In all likelihood, when considered as a challenge to his §924(c) conviction, the ACCA determination, the §3559(c) enhancement, or his career offender enhancement, this proceeding is likely time-barred because Johnson has no bearing on the "use of force" clause and the arguments raised herein fail on the merits so that he cannot circumvent the timeliness issue here. However, because the government has waived the limitations issue in its response, the court will determine whether movant is entitled to habeas relief on the merits.

B. Procedural Default

Next, the government argues that the challenge to the §924(c) conviction and resulting sentence is procedurally defaulted because it could have been, but was not raised on direct appeal. (DE#10). 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); Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004).

To show cause, a petitioner "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 was not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998); see also, Reed v. Ross, 468 U.S. 1, 16 (1984).

Further, a meritorious claim of ineffective assistance of counsel can constitute cause. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000). Ineffective assistance of counsel claims, however, are generally not cognizable on direct appeal and are properly raised by a §2255 motion regardless of whether they

could have been brought on direct appeal. Massaro v. United States, 538 U.S. 500, 503, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); see also United States v. Patterson, 595 F.3d, 1324, 1328 (11th Cir. 2010). To show prejudice, a petitioner 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).

If a petitioner is unable to show cause and prejudice, another avenue may exist for obtaining review of the merits of a procedurally defaulted claim. 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). In other words, the Supreme Court has found cause to excuse the procedural default in situations where a claim is not "reasonably available to counsel" at the time of appeal because of the Supreme Court's subsequent articulation of a previously unrecognized constitutional principle that is held to have retroactive application. See Reed, 468 U.S. at 16. The Supreme Court in Johnson overruled precedent, announced a new rule, and then gave retroactive application to that new rule. Thus, Johnson constitutes a new rule unavailable to defendants convicted before it was handed down by the Supreme Court on June 26, 2015.

Here, the movant is also unable to demonstrate actual prejudice to excuse the procedural default, regardless of Johnson's applicability, as will be discussed in detail below. Where the merits of the claims may be reached and readily disposed of, judicial economy has dictated reaching the merits of the claim while acknowledging the procedural default and bar in the alternative. See Lambrix v. Singletary, 520 U.S. 518 (1997). See also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999)(stating that judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 528 U.S. 846 (1999); Chambers v. Bowersox, 157 F.3d 560, 564 n. 4 (8th Cir. 1998)(stating that "[t]he simplest way to decide a case is often the best.").

V. General Legal Principles

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to §2255 are extremely limited. A prisoner is entitled to relief under §2255 if the court imposed a sentence that

(1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28 U.S.C. §2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004)(citations omitted). The "fundamental miscarriage of justice" exception recognized in Murray v. Carrier, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent ...."

Post-conviction relief is available to a federal prisoner under §2255 where "the sentence was imposed in violation of the Constitution or laws of the United States, or ... the court was without jurisdiction to impose such sentence, or ... the sentence was in excess of the maximum authorized by law." 28 U.S.C. §2255(a); see Hill v. United States, 368 U.S. 424, 426-27 (1962). A sentence is "otherwise subject to collateral attack" if there is an error constituting a "fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979); Hill v. United States, 368 U.S. at 428.

Applicable Law re 18 U.S.C. §924(c)

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)(A)-(B). Under §924(c), subsection (A) is known as the "use-of-force" or "elements" clause; and, subsection (B) is frequently referred to as the "residual clause." See e.g., In re Sams, 830 F.3d 1234, 1237 (11 Cir. 2016); In re Gordon, 827 F.3d 1289, 1293 (11 Cir. 2016). As such, §924(c)(3) contains a "residual clause," very similar to the residual clause declared unconstitutionally vague in Johnson.[11] However, unlike the ACCA, which 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", §924(c) imposes a 5-year mandatory consecutive sentence for any defendant who uses a firearm during a "crime of violence" or "drug trafficking crime." 18 U.S.C. §924(c)(1)(A)(i).

In Johnson, the Supreme Court struck down a portion of the Armed Career Criminal Act's definition of "violent felony," finding part of 18 U.S.C. §924(e)(2)(B)(ii), the so-called "residual clause," to be void for vagueness. See Johnson, __ U.S. ___, ____,

[11]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).

135 S.Ct. at 2557-2560. In so ruling, the Supreme Court found the phrase "physical force" in paragraph (i) "means *violent* force--that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010) ("Johnson I"); see also, 18 U.S.C. §924(e)(2)(B)(ii). The Supreme Court in Johnson limited its holding to the ACCA's residual clause, holding that it "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." Johnson, ___ U.S. at ___, ___, 135 S.Ct. 2551, 2563. (2015).

As the Supreme Court 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, is similar to §924(e)(2)(B)(i) because it includes any felony offense which has as an element the use of physical force against the person of another, and as such, "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;" and, the phrase "use...of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9-10; see also United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because

Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force;" citing Leocal).

While the meaning of "physical force" is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the (statutory) elements of state crimes. Johnson I, 599 U.S. at 138. Further, a federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise. See Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir.1983).

To determine whether a prior conviction is for a "violent felony" under the ACCA (and thus whether a conviction qualifies as a "crime of violence" for purposes of §924(c), assuming Johnson extends to § 924(c)), courts use, what has become known as, the "categorical approach." Descamps v. United States, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013); see also United States v. Estrella, 758 F.3d 1239 (11th Cir. 2014). To determine if an offense "categorically" qualifies as a "crime of violence" under the "elements" or "use-of-force" clause in §924(c)(3)(A) then, the court would have to determine if attempted Hobbs Act robbery has an element of "force capable of causing physical pain or injury to another person," as contemplated by Johnson I and its progeny. See Johnson, 559 U.S. at 140; Leocal, 543 U.S. at 11.

The Supreme Court has also approved a variant of the categorical approach, labeled the "modified categorical approach," for use when a prior conviction is for violating a so-called "divisible statute." Id. That kind of statute sets out one or more

elements of the offense in the alternative. Id. If one alternative matches an element in the generic offense, but another does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, known as Shepard documents,[12] to determine which alternative formed the basis of the defendant's prior conviction. Id. The modified categorical approach then permits the court to "do what the he categorical approach demands: [analyze] the elements of the crime of conviction...." Id.

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

In sum, when determining whether a conviction qualifies as a predicate offense, the courts can only look to the elements of the statute of conviction, whether assisted by Shepard documents or not, and not to the facts underlying the defendant's prior conviction. See Descamps, 133 S.Ct. 2283-85. In so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, ___ U.S. ___, 133 S.Ct. 1678, 1684 (2011)(quoting Johnson I, 559 U.S. at 137).

More recently, the Supreme Court in Mathis v. United States,

[12]In Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court held that a sentencing court could examine only a limited category of documents in determining whether a prior guilty plea constituted a "burglary," and thus a "violent felony," under the Armed Career Criminal Act ("ACCA"). See id. at 16, 125 S.Ct. 1254.

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

VI. Discussion

A. Void for Vagueness Challenge to 18 U.S.C. §924(c)

The movant argues that Johnson is applicable to §924(c)'s residual clause because the language is virtually identical to that found void for vagueness in Johnson.

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,[13] Sixth,[14] and Eighth[15] Circuits, "holding

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

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

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

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 (11 Cir. July 11, 2017); see also, United States v. Sneed, ___ Fed.Appx. ___, 2017 WL 3263502, *3 (11 Cir. Aug. 1, 2017)(relying on Ovalles and reiterating that §924(c) is not unconstitutionally vague under Johnson). In Ovalles, the Eleventh Circuit observed that the "ACCA identifies 'previous convictions' for the 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.'" Ovalles, supra. (quoting §924(c)(1)(A)).

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. See id. §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.

Although there is a split amongst the Circuits with regard to whether §924(c)(3)(B) is unconstitutionally void-for-vagueness post-Johnson, as noted previously, the Eleventh Circuit has

recently agreed with decisions from the Second,[16] Sixth,[17] and Eighth[18] 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, supra.; see also, United States v. Sneed, ___ Fed.Appx. ___, 2017 WL 3263502, *3 (11 Cir. Aug. 1, 2017)(relying on Ovalles and reiterating that §924(c) is not unconstitutionally vague under Johnson).

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. See id. §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.

In Ovalles, the Eleventh Circuit observed that the "ACCA identifies 'previous convictions' for the 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.'" Ovalles, supra. (quoting §924(c)(1)(A)).

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

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

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

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.'" Ovalles v. United States, supra. Since movant's void-for-vagueness challenge to his §924(c) convictions are now foreclosed by binding Eleventh Circuit precedent, this argument warrants no federal habeas corpus relief.

B. Challenge to Count 8-(18 U.S.C. §924(c) Based on Federal Carjacking Statute)

Next, the movant alleges his conviction and resulting sentence as to Count 8 of the Superseding Indictment, for carrying and using a firearm during and in relation to a crime of violence, pursuant to 18 U.S.C. §924(c), is unconstitutional under the Supreme Court's decision in Johnson v. United States, __ U.S. ___, 135 S.Ct. 2557 (June 26, 2015). (Cv-DE#8).

The government argues, however, that this §2255 motion should be denied, in pertinent part, because: (1) the movant procedurally defaulted the claim since he failed to raise it on direct appeal; (2) the Johnson decision does not apply to convictions under 18 U.S.C. §924(c); and, (3) the movant's Johnson claim warrants no relief on the merits, since his §924(c) conviction was predicated upon his carjacking offense, a violation of 18 U.S.C. §2119(1) and (2), as charged in Count 7, because it qualifies as a crime of violence under §924(c)'s use-of-force clause.

Whether an offense is a "crime of violence" under Section 924(c) requires a categorical analysis of the offense's elements and not the actual facts of the Movant's conduct. United States v. McGuire, 706 F.3d 1333, 1336-37 (11th Cir. 2013). Thus, at issue is

whether the movant's conviction under 18 U.S.C. §924(c) remains lawful post-Johnson. An individual violates §924(c) by using or carrying a firearm during and in relation to, or by possessing a firearm in furtherance of, a drug trafficking crime or a crime of violence. See 18 U.S.C. §924(c)(1)(A). The sentence imposed for violation of §924(c) must be served consecutively to any other term of imprisonment imposed. 18 U.S.C. §924(c)(1)(A), (c)(1)(D)(i).

Here, the relevant inquiry, therefore, requires a determination whether carjacking, a violation of 18 U.S.C. §2119, "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or that "by its nature, involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. §924(c)(3)(A)-(B). The federal carjacking statute provides, in pertinent part, that whoever "with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so," is guilty of a federal offense. See 18 U.S.C. §2119.

Under §924(c), "crime of violence" is defined as "an offense that is a felony and either 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another' or '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.'" See Grant v. United States, ___ Fed.Appx. ___, 2017 WL 3278877, at *1 (11 Cir. Aug. 2, 2017) (citing 18 U.S.C. §924(c)(3)). The former clause is often referred to as the "use-of-force" clause or the "elements clause," while the latter clause is referred to as the "risk-of-

force or the "residual clause." See In re Smith, 829 F.3d 1276, 1279-1280 (11 Cir. 2016; In re Saint Fleur, 824 F.3d 1337, 1339 (11 cir. 2016).

Relying on In Re Smith decision, the Eleventh Circuit has held that a federal carjacking conviction, in violation of 18 U.S.C. §2119, "satisfies §924(c)'s use-of-force clause." See Grant v. United States, ___ Fed.Appx. at ___, 2017 WL 3278877, at *2 (11 Cir. Aug. 2, 2017)(citing In re Smith, 829 F.3d 1276, 1277-1281 (11 Cir. 2016));[19] see also McKinley v. United States, ___ Fed.Appx. ___, 2017 WL 4511360 (11 Cir. Oct. 10, 2017)(finding Johnson decision does not apply to or invalidate the risk of force clause under §924(c)(3)(B))(citing Ovalles v. United States, 861 F.3d 1257, 1263-65 (11 Cir. 2017)); see also, In re Sams, 830 F.3d 1234, 1238 (11 Cir. 2016); In re Saint Fleur, 824 F.3d 1337, 1340 (11 Cir. June 8, 2016). Thus, the movant's challenge to his conviction as to Count 8, on the basis that the carjacking offense, as charged in Count 7, is no longer a crime of violence under the residual clause is of no consequence since the Eleventh Circuit has held post-Johnson that it still qualifies under §924(c)'s use-of-force clause.[20]

Other courts have similarly held that a prior conviction under the federal carjacking statute, 18 U.S.C. §2119, qualifies as a crime of violence under §924(c)'s use-of-force clause. See United States v. Jones, 854 F.3d 737, 740-41 (5 Cir. 2017); United States v. Evans, 848 F.3d 242, 246-48 (4 Cir. 2017); see also United

[19]The Eleventh Circuit's In re Smith decision found that the carjacking statute satisfies §924(c)'s use of force clause.

[20]See In re James, 2016 WL 4608125, *3 (11th Cir. 2016) (citing Welch as instructing "that even if a defendant's prior conviction was counted under the residual clause, courts can now consider whether that conviction counted under another clause of the ACCA even without the residual clause.").

States v. Mohammed, 27 F.3d 815, 819 (2d Cir. 1994).

Moreover, the Movant did not argue at the trial level or on appeal that the §2119 carjacking offense failed to support his §924(c) firearm conviction. He appears to argue that this claim is nevertheless cognizable on Section 2255 review because, post-Johnson, his §924(c) offense is non-existent and he is thus actually innocent in that his conviction as to that offense resulted in a manifest injustice. This argument should be rejected.

Under the totality of the circumstances present here, because the movant's convictions for §2119 carjacking offense constitutes a crime of violence under §924(c)'s use-of-force clause, he cannot demonstrate actual prejudice arising from any constitutional error in order to excuse or otherwise overcome the procedural default doctrine. See generally Bousley, 523 U.S. at 622. Further, the movant has not demonstrated that he is "actually innocent," or is otherwise entitled to vacatur of his conviction and sentence in Count 8 of the Superseding Indictment. Therefore, no relief is warranted on this clam.

C. Challenge to Count 13-(18 U.S.C. §924(c) Based on Hobbs Act Robbery)

Although not mentioned in either the original or his supplemental briefing, to the extent the movant suggests that his §924(c) conviction, as charged in Count 13, is unlawful, because it too suffers from the same infirmity as the §924(c) conviction charged in Count 8, that claim also warrants no relief.

As will be recalled, movant was charged in Count 13 with knowingly using and carrying "a firearm during and in relation to a crime of violence, and did possess a firearm in furtherance of a

crime of violence, which is a felony prosecutable in a court of the United States, that is, a violation of Title 18, United States Code, Section 1951(a) [Hobbs Act robbery], as set forth in Count 12 of the Superseding Indictment, all in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2. (Cr-DE#232:7). In turn, Count 12 of the Superseding Indictment charged movant with Hobbs Act robbery, a violation of 18 U.S.C. §1951(a) and 2, in that the movant did "unlawfully take and obtain property consisting of United States currency belonging to R.P. and R.D.P. Company, and N.R., and by means of actual and threatened force, and fear of injury to the person of J.S., R.S., and N.R. (Cr-DE#232:7).

Hobbs Act robbery, under 18 U.S.C. §1951(a), criminalizes the conduct of a person who "in any way or degree obstructs, delays, or affects commerce...by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section...." Id. §1951(a)(alteration added). The Hobbs Act, defines "robbery" as:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession....

18 U.S.C. §1951(b)(1) (Emphasis Added).

The Eleventh Circuit has made clear, post-Johnson, that a substantive Hobbs Act robbery offense does, in fact, qualify as a crime of violence under the use-of-force clause. See United States v. Langston, 662 Fed.Appx. 787, 794 (11 Cir. Oct. 27, 2016)(citations omitted) (unpublished); see also, Brown v. United

States, 2016 W. 5439718, *4 (E.D. Tenn 2016)(collecting cases). Thus, any argument that he is entitled to vacatur of his conviction and resulting sentence as to Count 8 fails.

D. Challenge to Count 2-Conspiracy to Commit Hobbs Act Robbery

If he means to argue that, as to Count 2, that conviction no longer stands post-Johnson, that claim also warrants no relief. In Count 2, the movant was charged with and convicted of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. §1951(a). (Cr-DE#232:2).

To convict on a Hobbs Act conspiracy, the government must show that: (1) two or more people agreed to commit a Hobbs Act robbery or extortion; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal. See United States v. Ransfer, 749 F.3d 914, 930 (11th Cir. 2014); United States v. Verbitskaya, 406 F.3d 1324, 1335 (11 Cir. 2005)(quoting United States v. Pringle, 350 F.3d 1172, 1176 (11 Cir. 2003).

The Eleventh Circuit recently commented that "[N]either the Supreme Court or this Court has concluded that conspiracy to commit Hobbs Act robbery cannot categorically qualify as a crime of violence under §924(c)'s use-of-force clause. See United States v. Langston, 662 Fed.Appx. 787, 794 (11 Cir. 2016) (unpublished) (quoting In re Pinder, 824 F.3d 977, 979 & n.1 (11 Cir. 2016). However, the Eleventh Circuit has made clear that a substantive Hobbs Act robbery offense does, in fact, qualify as a crime of violence under the use-of-force clause post-Johnson. See United States v. Langston, 662 Fed.Appx. at 794 (citations omitted) (unpublished). Thus, "any analysis of Johnson's applicability must

therefore be postponed unless and until the Court makes the determination the companion convictions [i.e., conspiracy to commit Hobbs Act robbery] are not crimes of violence under section 924(c)'s use-of-force clause." Morton v. United States, 2017 WL 1041568 (S.D. Fla. Mar. 2, 2017), (appeal filed, 11th Cir. May 2, 2017)(citing United States v. Albertini, 472 U.S. 675, 680 (1985)(stating courts must generally exercise judicial restraint and construe statutes in order to avoid constitutional questions)). On this basis alone, the movant, is entitled to no relief on the merits.

However, as will be recalled, the Movant was charged with Hobbs Act Robbery in Count 2 of the Superseding Indictment. (Cr-DE#232). He was convicted following a special verdict, in which the jury found that a controlled substance was not taken, but that the movant did cause a victim to sustain bodily injury, the offense involved carjacking, and a firearm was possessed, brandished, or discharged during the commission of the jointly undertaken criminal agreement. (Cr-DE#339). Thus, the conviction at issue contains, and the jury found, the element of actual or threatened force, violence, and fear.

In that regard, courts within and outside this court have determined that conspiracy to commit Hobbs Act robbery qualifies as a crime of violence and thus remains a valid predicate offense for purposes of a §924(c) conviction. See Morton v. United States, 2017 WL 104158 at *6; see also, States v. Turner, 501 F.3d 59, 67-8 (1st Cir. 2007) (taking into account "the great weight of authority from other circuits" and concluding that "conspiracy under the Hobbs Act constitutes a 'crime of violence' for purposes of 18 U.S.C. §924(c)"); United States v. Phan, 121 F.3d 149, 152-53 & n.7 (4th Cir. 1997) (citing United States v. Elder, 88 F.3d 127, 128-29 (2d

Cir. 1996) (*per curiam*) (finding that conspiracy to commit Hobbs Act robbery is a felony involving substantial risk that physical force and thus can be used as a predicate offense to support a §924(c)(1) conviction)); see also United States v. Hernandez, 2017 WL 111730, at *9-11 (D. Me. Jan. 11, 2017) (concluding while Hobbs Act conspiracy is not a crime of violence under the force clause, it is a crime of violence under the residual clause, which the court held constitutional in light of the Supreme Court's Johnson decision); Hernandez v. United States, 2016 WL 7250676, at *3-4 (S.D. Cal. Nov. 7, 2016) (denying the defendant's §2255 motion and finding that "conspiracy to commit Hobbs Act robbery qualifies as a crime of violence under §924(c)(3)(B)"); United States v. Williams, 179 F. Supp. 3d 141, 154-55 (D. Me. 2016) (quoting 18 U.S.C. §1951(a))("[T]he Hobbs Act itself includes a conspiracy as an element ... Under the statute, interference with commerce by robbery is not a distinct offense from conspiracy to interfere with commerce by robbery. Therefore, the categorical analysis does not differ with respect to a charge of Hobbs Act robbery or a charge of conspiracy to commit a Hobbs Act robbery."). Thus, the movant's conspiracy to commit Hobbs Act robbery constitutes a crime of violence.[21]

The plain language of the force clause indicates that a violent felony is a crime of violence that "has as an element the use, attempted use, or threatened use of physical force..." 18

[21]But see United States v. Baires-Reyes, 191 F. Supp. 3d 1046, 1049-51 (N.D. Cal. 2016) (finding that the force clause does not apply in an analysis of whether conspiracy to commit Hobbs Act robbery is a crime of violence because the elements of the conspiracy do not require "actual, attempted, or threatened physical force" and §924(c)'s residual clause is unconstitutional under the Ninth Circuit's decision in Dimaya v. Lynch, 803 F.3d 1110, 1117 (9th Cir. 2015), appeal docketed, 85 U.S.L.W. 3114 (U.S. Sept. 29, 2016) (No. 15-1498)); Benitez v. United States, 2017 WL 2271504 (S.D. Fla. Apr. 6, 2017)(granting §2255 motion, finding conspiracy to commit Hobbs Act robbery is not a predicate violent felony under §924(c)'s residual or use-of-force clauses).

U.S.C. §924(c)(3)(A)(emphasis added). See also 18 U.S.C. §924(e)(2)(B)(i) (analogous ACCA provision). Therefore, it follows that conspiracy to commit Hobbs act robbery is also a crime of violence. Consequently, the movant is entitled to no relief, to the extent he means to argue his conviction as to Count 2 is unlawful.

E. Challenge to 18 U.S.C. §924(o)

The movant also asserts in his supplement (Cv-DE#12) to the his reply to the government's response that he is actually innocent of his conviction as to Count 3 of the Superseding Indictment, a violation of 18 U.S.C. §924(o). (Cv-DE#12). Movant recognizes that the §924(o) offense did not increase the applicable mandatory minimum sentence, but argues that it suffers from the same problems of multiplicity at issue in the Eleventh Circuit's In Re Gomez opinion. See In re Gomez, 83 F.3d 1225 (11 Cir. 2016).

In Count 3, the movant was charged with conspiracy to use and carry a firearm in furtherance of "**a crime of violence and a drug trafficking crime**," which are felonies prosecutable in a court of the United States, that is, violations of Title 18, U.S.C. §1951(a) (Hobbs Act robbery), Title 18 U.S.C. §2119 (carjacking), and 21 U.S.C. §§841(a)(1) and 846 (drug offense), **in violation of 18 U.S.C. §924(c)**, all in violation of **18 U.S.C. §924(o)**. (Cr-DE#232)(emphasis added).

Title 18 U.S.C. §924(o) provides that "[A] person who conspires to **commit an offense under subsection (c)** shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisonment for any term of years or life." 18 U.S.C. §924(o);

(emphasis added). In other words, §924(o) requires that the defendant conspire to violate §924(c). As applied here, the movant was charged in Count 8 of the Superseding Indictment with a §924(c) violation, and the predicate offense used to support that conviction was the offense charged in Count 7, federal carjacking, a violation of 18 U.S.C. §2119, that has been held to constitute a crime of violence under the use-of-force clause of §924(c). (Cr-DE#232:5). In Count 13, movant was charged with another §924(c) violation, and the predicate offense used to support that conviction was Hobbs Act robbery, a violation of 18 U.S.C. §1951(a), as set forth in Counts 12 of the Superseding Indictment. (Cr-DE#232:7).

Movant asserts that his conviction as to Count 3 is unlawful because it is impermissibly based on more than one predicate offense--both carjacking and conspiracy to commit Hobbs Act robbery. (Cv-DE#12). Movant argues that where an indictment lists multiple predicate offenses for a single §924(c) violation, it can no longer stand in light of the Eleventh Circuit's In re Gomez opinion. (Cv-DE#12:4-6). There, the Eleventh Circuit granted the movant's second or successive §2255 application based, in part, on the fact that his §924(c) conviction referred to two prior drug trafficking crimes--conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery. In re Gomez, 830 F.3d 1225, 1226-27 (11 Cir. 2016). Because the Gomez jurors had to consider four separate crimes in the single §924(c) count, the Eleventh Circuit concluded "they could have convicted [the movant] of the [§]924(c) offense without reaching unanimous agreement on which crime it was that [he] possessed the firearm." Id. at 1227. (alterations added).

A conviction for violation of 18 U.S.C. §924(o) requires proof that (1) a conspiracy existed to commit a substantive offense, that

is a violation of §924(c); (2) the defendant knew of the conspiracy; and, (3) the defendant with knowledge, voluntarily joined the conspiracy. See United States v. Isnadin, 742 F.3d 1278, 1307 (11 Cir. 2014)(citing United States v. Thompson, 422 F.3d 1285, 1290 (11 Cir. 2005); see also, United States v. Payne, 148 Fed.Appx. 804, 806 (11 Cir. 2005)(To sustain a conviction for violation of 18 U.S.C. §924(o), the government must prove that (1) defendant agreed to carry or use a firearm, (2) during and in relation to the commission of a crime of violence, and further, committed an overt act in furtherance of the conspiracy.).

Notwithstanding the foregoing, however, as previously discussed in this Report, carjacking and Hobbs Act robbery are crimes of violence. These prior convictions were proper predicate offenses that supported movant's §924(c) conviction(s). Therefore, any "multiplicity" issue as alleged is not present here. This is so because the jury necessarily had to find that the movant violated §924(c) in order to support the §924(o) conviction charged in Count 3. See 18 U.S.C. §924(o). The two §924(c) convictions are based on predicate offenses that constitute crimes of violence.

But even if we were to assume, without deciding, that Count 3 suffers from a duplicitous or multiplicitous count, the movant is nonetheless entitled to no relief. First, the offense of conviction did not increase the movant's mandatory minimum term of imprisonment. Second, as previously noted, both prior predicates have been found to constitute crimes of violence so that the movant's §924(c) conspiracy properly formed the basis for the movant's §924(0) conviction. Regardless, each§924(c) conviction had one predicate offense to support his §924(o) conviction. Consequently, where one of the predicates challenged herein constitutes a crime of violence post-Johnson, the challenge to the

§924(o) conviction must stand.

Finally, the movant is again reminded that he may not raise for the first time in objections to the undersigned's Report any new arguments or affidavits to support this claim. Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009)(citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009). To the extent the movant attempts to do so, the court should exercise its discretion and decline to consider the argument. See Daniel, supra; See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). This is so because "[P]arties must take before the magistrate, 'not only their best shot but all of the shots.'" See Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)(quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

For the foregoing reasons, the movant's Johnson related claims are not only procedurally defaulted from review, because the arguments were not, but could have been raised on direct appeal, but on the merits, he is also entitled to no relief.

VII. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA"). See 28 U.S.C. §2253(c)(1); Harbison v. Bell, 556 U.S. 180, 129 S.Ct. 1481 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner

must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if petitioner does not agree, he may bring this argument to the attention of the district judge in objections.

VIII. Conclusion

Based on the foregoing, it is recommended that this motion to vacate be DENIED on the merits, 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 24th day of October, 2017.

UNITED STATES MAGISTRATE JUDGE

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APPENDIX A-5

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CRIMINAL CASE

vs.

Case Number: 03-20678-CR-ALTONAGA

TRAVIS HORNE

USM Number: 60435-004

Counsel For Defendant: Hugo Rodriguez, Esq.
Counsel For The United States: Cristina V. Maxwell, Esq. and Barbara Lagoa, Esq.
Court Reporter: Barbara Medina

The defendant was found guilty of Count(s) 1, 2, 3, 7, and 8 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
21 U.S.C. § 846	Conspiracy to Possess With Intent to Distribute Less than 25 Grams of Cocaine	November, 1999	1
18 U.S.C. § 1951(a)	Conspiracy to Commit Hobbs Act Robbery	November, 1999	2
18 U.S.C. § 924(o)	Conspiracy to Use and Carry a Firearm in Relation to a Crime of Violence and a Drug Trafficking Crime and to Possess a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime	November, 1999	3
18 U.S.C. § 2119	Carjacking	November 28, 1998	7
18 U.S.C. § 924(c)(1)	Possession of a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime	November 28, 1998	8

The defendant is sentenced as provided in the following pages of this judgment.

The defendant has been found not guilty of Counts 12 and 13.

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:
March 28, 2005

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

April 29, 2005

DEFENDANT: TRAVIS HORNE
CASE NUMBER: 03-20678-CR-ALTONAGA

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **450 months**. This term consists of 210 months as to Counts 1, 2, and 3; and 180 months as to Count 7, all such terms to be served concurrently with each other, and with the sentence imposed in Case No. 00-34-CR-JORDAN; and 240 months as to count 8, and shall be served consecutive to all of the other terms of imprisonment imposed.

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: TRAVIS HORNE
CASE NUMBER: 03-20678-CR-ALTONAGA

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **6 years**. This term consists of 6 years as to Count 1, and 3 years as to Counts 2, 3, 7, and 8, with all terms to run concurrent to each other, and concurrent to the term imposed in Case No. 00-34-CR-JORDAN.

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

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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

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SPECIAL CONDITIONS OF SUPERVISION

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

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

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

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

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

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$500.00	$10,000.00	0

*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.

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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 **$500.00** 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 U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/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) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.