APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14176-K

QUINTON BANNISTER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

On Supreme Court Remand

ORDER:

Quinton Bannister is a federal prisoner currently serving a total term of 946 months' imprisonment after he was convicted of three counts of conspiracy to commit armed bank robbery, in violation of 18 U.S.C. § 371; armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d); three counts of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); and three counts of using, carrying, and brandishing a firearm during and in relation to a crime of violence, in

violation of 18 U.S.C. § 924(c)(1)(A)(ii). At sentencing, the district court identified the armed-bank-robbery offense as the predicate for the § 924(c) charge. Bannister sought a direct appeal of his conviction and sentence, and this Court affirmed in July 2008. *See United States v. Bannister*, 285 F. App'x 621 (11th Cir. 2008).

In July 2016, Bannister filed the instant motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255, in which he claimed that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which eliminated the Armed Career Criminal Act's ("ACCA") residual clause as unconstitutionally vague," his § 924 (c) firearm conviction was no longer lawful, as § 924(c) contained a residual clause provision similar to the one declared unconstitutional in *Johnson*. He premised his § 2255 motion's timeliness on *Johnson*'s retroactivity and its applicability to his case. The district court denied his § 2255 motion, finding that the motion was untimely, as *Johnson* did not apply to Bannister's case, and denied a certificate of appealability ("COA").

Bannister filed a notice of appeal, appealing the district court's denial of his § 2255 motion. He then filed a motion for a COA in this Court. Bannister's motion for a COA was denied by this Court, based on then-binding precedent in the form of *Ovalles v. United States*, 861 F.3d 1257, 1263-65 (11th Cir. 2017), *vacated by* 889 F.3d 1259 (11th Cir. 2018).

Bannister petitioned the U.S. Supreme Court for a writ of certiorari. The Supreme Court granted Bannister's writ of certiorari, vacated our judgment denying the motion for a COA, and remanded the matter to us for further consideration in light of *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018).

We have further reviewed and considered Bannister's petition in light of *Dimaya*. Yet the COA must once again be denied.

In order to obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The prisoner 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).

Reasonable jurists would not find the district court's conclusions debatable or wrong. The district court denied Bannister's § 2255 motion because it found that the coordinate crime in this case—armed bank robbery under 18 U.S.C. § 2113—is a "crime of violence" for purposes of 18 U.S.C. § 924(c) under the elements clause, based on *In re Sams*, 830 F.3d 1234 (11th Cir. 2016). *Dimaya* did not affect the elements clause, so *Sams* remains binding precedent in this Circuit. Because Bannister's sole argument in his § 2255 motion is refuted by binding precedent, his motion for a COA is DENIED. *See Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1661 (2016)

(holding that no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law).

/s/Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

Supreme Court of the United States

No. 17-8876

QUINTON BANNISTER,

Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the above court in this cause is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Sessions* v. *Dimaya*, 584 U. S. __ (2018).

October 1, 2018

A True Copy SCOTT S. HARRIS
Clerk of the Supreme Court of the United States

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14176-K

QUINTON BANNISTER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

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Appeal from the United States District Court
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ORDER:

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In July 2016, Bannister filed the instant motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255, in which he claimed that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which eliminated the Armed Career Criminal Act's ("ACCA") residual clause as unconstitutionally vague," his § 924(c) firearm conviction was no longer lawful, as § 924(c) contained a residual clause provision similar to the one declared unconstitutional in *Johnson v. United States,* 135 S. Ct. 2551 (2015). He premised his § 2255 motion's timeliness on *Johnson*'s retroactivity and its applicability to his case. The district court denied his § 2255, finding that the motion was untimely, as *Johnson* did not apply to Bannister's case, and denied a certificate of appealability ("COA").

Bannister filed a notice of appeal, appealing the district court's denial of his § 2255 motion. He then filed a motion for a COA in this Court.

In order to obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The prisoner 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).

Reasonable jurists would not find the district court's conclusions debatable or wrong. To the extent that Bannister argues his § 924(c) offense is invalid in light of *Johnson*, this argument fails under our binding precedent. *See Ovalles v. United States*,861 F.3d. 1257, 1263-65 (11th Cir. 2016) (holding that *Johnson* does not apply to or invalidate the statutory scheme in § 924(c)). Because Bannister's sole argument in his § 2255 motion is refuted by binding precedent, his § 2255 motion was untimely, and his motion for a COA is DENIED. *See* 28 U.S.C. § 2244(d)(1); *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted), cert. denied, 136 S. Ct. 1661 (2016) (holding that no COA should

issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law).

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CIV-81345-HURLEY
(CASE NO. 05-CR-80063-HURLEY)

QUINTON BANNISTER,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION AND DENYING MOVANT'S MOTION TO VACATE, SET ASIDE AND CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

THIS CAUSE is before the court upon the Movant's motion to vacate, set aside and correct sentence pursuant to 28 U.S.C. §2255 [DE 1], which matter was previously referred to Magistrate Judge Patrick White for proposed findings and a recommended disposition.

On June 20, 2017, Magistrate Judge White filed his Report and Recommendation recommending that the Movant's motion to vacate, set aside and correct sentence be denied [DE 15]. The time for filing objections has now expired and no objections to the report have been filed by either party.

Absent objections, the court "need only satisfy itself that there is no clear error on the face of the record." Fed. R. Civ. P. 72(b) Advisory Committee Notes. *See Macort v. Prem, Inc.*, 208 Fed. App'x 781, 784 (11th Cir. 2006), and cases cited *infra*. Having undertaken this review, the Court finds that the Magistrate Judge's findings and recommendations to be sound and well-reasoned, and accordingly approves and adopts them in full.

It is therefore **ORDERED** and **ADJUDGED**:

1. Magistrate Judge Patrick White's June 20, 2017 Report and Recommendation [DE 15] is hereby **APPROVED AND ADOPTED** in full.

2. The Movant's motion to vacate, set aside and correct sentencing pursuant to 28 U.S.C. § 2255 [DE 1] is **DENIED.**

3. Pursuant to Fed. R. App. 22(b), Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States District Court, and 28 U. S. C. c 2253(c),the Court **DECLINES** to issue a certificate of appealability as the Movant has not made a substantial showing of a denial of a constitutional right.[1] However, Movant may seek a certificate from the Court of Appeals under Federal Rules of Appellate Procedure 22. See Rule 11, Federal Rules Governing Section 2255 Proceedings.

4. Pursuant to Rule 58, the Court will enter Final Judgment by separate order.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 17 day of July, 2017.

Daniel T. K. Hurley
United States District Judge

Copies furnished to:

all parties

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Miller-el v. Cockrell, 537 U.S. 322, 336-38, 123 S. Ct. 1029, 154 L. Ed.2d 931 (2003)(to satisfy § 2253(c), a petitioner must show that reasonable jurists would find district court's assessment of constitutional claims debatable or wrong); *Slack v McDaniel*, 529 U.S. 473, 484 (2000) (when relief is denied on procedural grounds, petitioner must establish both that the dispositive procedural ruling is debatable and that the petition states a debatable claim for denial of a constitutional right).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-81345-Civ-HURLEY
(05-80063-Cr-HURLEY)
MAGISTRATE JUDGE PATRICK A. WHITE

QUINTON BANNISTER,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The movant, a federal prisoner, currently confined at the Lee United States Penitentiary in Jonesville, Virginia, has filed this motion to vacate, after obtaining authorization from the Eleventh Circuit to file a second or successive Section 2255 motion to vacate, pursuant to 28 U.S.C. §2255. See In re Quinton Bannister, Eleventh Circuit Court of Appeals, Case No. 16-14383-J, Order entered July 27, 2016. (Cv DE# 1). He seeks relief in light of the Supreme Court's ruling in Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551 (2015) (hereinafter, "Samuel Johnson"), made retroactively applicable to cases on collateral review by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257, ____, L.Ed.2d ___ (2016).

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

Presently before the court is the Petitioner's motion to

vacate (Cv DE# 10), the government's response in opposition (Cv DE# 13), and Petitioner's reply thereto (Cv DE# 14).

II. Claims

Construing the §2255 motion liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U.S. 519 (1972), the movant argues that his conviction for possession of a firearm in furtherance of a crime of violence, namely, **armed bank robbery under 18 U.S.C. §2113,** in violation of 18 U.S.C. §924(c) is no longer lawful in light of Samuel Johnson v. United States, 135 S.Ct. 2551 (2015) which the United States Supreme Court held to apply retroactively to cases on collateral review in Welch v. United States, 136 S.Ct. 1257 (2016).

III. Procedural History

On June 16, 2005, a federal grand jury in West Palm Beach, Florida returned a ten-count superseding indictment charging Bannister with various crimes related to a series of armed bank robberies committed in Palm Beach County and elsewhere. (Cr DE# 32). Specifically, Bannister was charged with three counts of conspiracy to commit armed bank robbery, in violation of 18 U.S.C. §371 (Counts One, Five, and Eight); one count of armed bank robbery, in violation of 18 U.S.C. §2113(a) and (d) (Count Two); three counts of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. §1951(a) (Counts Three, Six, and Nine); and three counts of using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §924(c)(1)(A)(ii) (Counts Four, Seven, and Ten). (Id.). Importantly, count four identified the crime of violence as the crimes contained under count two, which charged Petitioner with armed bank robbery under 18 U.S.C. §2113(a) and (d). (Id.:4).

On February 9, 2006, a jury convicted Petitioner as charged in the indictment. (Cr DE# 123).

Prior to sentencing, a PSI was prepared which reveals as follows. The offense level computation section of the PSI separated the charges into three groups which each related to a different robbery.

Group One: First National Bank and Trust. The base offense level was set at 20 because the offense involved robbery, §2B3.1(a). (PSI ¶37). Pursuant to §2B3.1(b)(1), since the property of a financial institution was taken, the base offense level was increased by two levels. (PSI ¶38). Because the victim sustained bodily injury, the offense level was increased by two levels, §2B3.1(b)(3)(A). (PSI ¶39). Because the amount of loss exceeded $50,000, specifically, $94,100, the offense level was increased by two, §2B3.1(b)(7)(C). (PSI ¶40).

Group two: Colonial Bank. The base offense level was set at 20 because the offense involved robbery, §2B3.1(a). (PSI ¶45). Pursuant to §2B3.1(b)(1), since the property of a financial institution was taken, the base offense level was increased by two levels. (PSI ¶43). Because the Petitioner was an organizer or leader of a criminal activity that involved five or more participants, the offense level was increased by four levels, §3B1.1(a). (PSI ¶48).

Group Three: Harbor Federal. The base offense level was set at 20 because the offense involved robbery, §2B3.1(a). (PSI ¶51). Pursuant to §2B3.1(b)(1), since the property of a financial institution was taken, the base offense level was increased by two levels. (PSI ¶52). Because the victim sustained bodily injury, the offense level was increased by two levels, §2B3.1(b)(3)(A). (PSI

¶53). Because the amount of loss exceeded $10,000, but was not more than $50,000, specifically, $47,500, the offense level was increased by one, §2B3.1(b)(7)(B). (PSI ¶54).

The Petitioner was classified as a career offender based the following state court convictions: battery on a detention staff member in case no. 02-5383CFA02 and battery on a law enforcement officer in case no. 03-497CF. (PSI ¶66, 79, 80). The total offense level was set at 34. (PSI ¶68).

The PSI next determined that the movant had 19 criminal history points and a criminal history category of VI. (PSI ¶84).

Statutorily, as to counts one, five, and eight, the term of imprisonment was zero to five years under 18 U.S.C. §871; as to count two, the term of imprisonment was zero to 25 years under 18 U.S.C. §2113(d); as to counts three, six, and nine, the term of imprisonment was zero to 20 years under 18 U.S.C. §1951(a); as to count four, a term of imprisonment of seven years was to run consecutive to any other term of imprisonment under 18 U.S.C. §924(c)(1)(A)(ii); as to count seven and ten, a term of imprisonment of 25 years per count was to run consecutive to any other term of imprisonment under 18 U.S.C. §924(c)(1)(A) and (c)(1)(C). (PSI ¶121). Based on a total offense level of 34 and a criminal history category of VI, the guideline imprisonment range was 262 to 327 months' imprisonment. (PSI ¶122). However, pursuant to §4B1.1(c)(2)(A), the guideline imprisonment range was 946 to 1011 months. Under counts four, seven, and ten, a total term of 684 months was to run consecutive to any term of imprisonment. (PSI ¶122).

On May 12, 2016, the Court sentenced Bannister to a total term of imprisonment of 946 months, followed by a term of supervised

release of five years. (CR-DE 136, 137.)

Petitioner filed a direct appeal. (Cr DE# 138). The Eleventh Circuit affirmed on **July 16, 2008** in United States v. Bannister, 285 Fed. Appx. 621 (11th Cir. 2008). Petitioner did not seek certiorari review.

Thus, the judgment of conviction became final on **October 14, 2008**, when the 90-day period in which to file a timely petition for writ of certiorari in the Supreme Court came to an end.[1] The movant had one year from the time his judgment became final, or no later than **October 14, 2009**,[2] within which to timely file his federal habeas petition, challenging the judgment of conviction. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, 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,

[1]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. Kaufman, 282 F.3d 1336 (11th Cir. 2002); Wainwright v. Sec'y Dep't of Corr's, 537 F.3d 1282, 1283 (11th Cir. 2007)(conviction final under AEDPA the day U.S. Supreme Court denies certiorari, and thus limitations period begins running the next day). Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry. The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir. 2003).

[2]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.

1008-09 (7th Cir. 2000)).

Before the statute of limitations came to an end, Petitioner filed his first §2255 petition on **July 14, 2009** in case no. 09-Cv-81070-Hurley. On May 9, 2012, this court denied the petition and on June 13, 2012, the court denied Petitioner's motion for reconsideration. (09-Cv-81070-Hurley, DE# 58, 61).

On **July 27, 2016**, the Eleventh Circuit granted movant's application for authorization to file a successive §2255 motion, finding the movant had made a *prima facie* showing under 28 U.S.C. §2255(h) that he was entitled to relief under Samuel Johnson. (Cv-DE#1). The application was transferred to this court, and opened by the Clerk as a §2255 motion to vacate. (Cv-DE#1). This court issued an order appointing counsel and setting a briefing schedule. (Cv-DE# 5). The parties have complied with the court's briefing schedule and the case is now ripe for review. (Cv DE# 10,11,14).

IV. Threshold Issues

A. Timeliness

On **June 26, 2015**, the United States Supreme Court held that the ACCA's residual clause--defining a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another"--is unconstitutionally vague. Samuel Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551, 2563 (2015). The Supreme Court, however, expressly did not invalidate the ACCA's elements clause or the enumerated crimes clause. Id. ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony"). Then, on **April 18, 2016**, the Supreme Court held that Samuel Johnson announced a new substantive

rule of constitutional law that is retroactively applicable to cases on collateral review. Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257 (2016).

Petitioner correctly takes the position that the Petition is timely as it was filed within one year of the Supreme Court's issuance of Samuel Johnson on June 26, 2015. The government does not dispute this argument.

B. Procedural Bar

The government contends that, even if Samuel Johnson applies to 18 U.S.C. §924(c)(3)(B), Petitioner is procedurally barred from raising this argument because he is raising it for the first time in the instant proceedings. (CV DE# 13:5-10). According to the government, Petitioner cannot satisfy either the cause-and-prejudice or the actual innocence exceptions to the procedural-default rule. (Id.).

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding; Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)(citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a 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 [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). 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).

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

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). That is precisely the circumstance here. Samuel Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. However, no actual prejudice would result from finding a procedural default

here because, as set forth below, regardless of whether Samuel Johnson applies to §924(c)'s residual clause, Petitioner's companion charge for **armed bank robbery under 18 U.S.C. §2113** categorically qualifies as a "crime of violence" under §924(c)'s elements clause. Accordingly, Movant cannot establish cause-and-prejudice to overcome the procedural bar.

V. Discussion

Because, this Court's conclusion that Movant's claims are procedurally barred turns on whether Movant's companion charge for armed bank robbery under 18 U.S.C. §2113 still categorically qualifies as a "crime of violence" after Samuel Johnson, the Court must address this issue. However, since the Court concludes that it does, the Court need not address the unsettled question of whether Samuel Johnson invalidates §924(c)'s residual clause. See United States v. Mottaz, 476 U.S. 834, 848, n.11, 106 S. Ct. 2224, 2233, 90 L. Ed. 2d 841 (1986)("In light of our conclusion that the District Court's jurisdiction . . . rested on §1346(f) . . . , we need not reach the difficult and unsettled question of how an appeal raising both issues committed to the Federal Circuit's jurisdiction and issues outside its jurisdiction is to be treated."); see also Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

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

violence" as any felony that

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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

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

In addition, the Supreme Court has stated that the term "use"

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[3]The ACCA's residual clause that was held to be unconstitutionally vague in Samuel 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).

in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" the phrase "use . . . of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9-10; see also United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force;") (citing Leocal, supra). While the meaning of "physical force" is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the statutory elements of state crimes. Samuel Johnson, 599 U.S. at 138. A federal court which applies state law is bound to adhere to the decisions of the state's intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise. See Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir.1983).

To determine whether a past 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 Samuel 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), the court would have to determine if aiding and abetting carjacking has an element of "force capable of causing physical pain or injury to another person" as contemplated by Samuel Johnson and its progeny. See Samuel 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,[4] to determine which alternative formed the basis of the defendant's prior conviction. Id. The modified categorical approach then permits the court to "do what the categorical approach demands: [analyze] the elements of the crime of conviction." Id.

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

[4]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. ___, 133 S.Ct. 1678, 1684 (2011)(quoting Samuel Johnson, 559 U.S. at 137).

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

Here, the Court need not conduct the above analysis to determine whether, as a threshold matter, armed bank robbery under 18 U.S.C. §2113 is divisible or indivisible. Similarly, the Court need not conduct the above analysis, regardless of whether it may employ a modified categorical approach or is limited to the categorical approach, to determine whether Movant's companion charge for armed bank robbery still qualifies as a "crimes of violence" for purposes of §924(c) after Samuel Johnson. That is because the Eleventh Circuit has resolved this issue. Specifically, in In re James Howard Sams, 830 F.3d 1234 (11th Cir. 2016), in the context of an application for leave to file a second or successive motion under §2255, the Court considered whether Samuel Johnson impacts a bank robbery charged under 18 U.S.C. §2113, and a separate firearm charge during and in relation to a

"crime of violence" in violation of §924(c). The Eleventh Circuit denied the application, stating:

> Sams has not made a prima facie showing for relief under Johnson as to his conviction pursuant to §924(c). Sams's §924(c) conviction was based on his companion conviction for bank robbery, in violation of §2113(a), which requires that the defendant take the property of a bank "by force and violence, or by intimidation." See 18 U.S.C. §2113(a). We have concluded that an armed bank robbery conviction pursuant to §2113(a) and (d) qualifies as a crime of violence because it requires as an element, "the use, attempted use, or threatened use of physical force against the person or property of another," as set out in § 924(c)(3)(A). Hines, 2016 WL 3189822, at *3, 824 F.3d at 1337. Additionally, as to the "by intimidation" language contained in §2113(a), this Court has held that similar language still satisfies the §924(c)(3)(A) use-of-force clause. See United States v. Moore, 43 F.3d 568, 572-73 (11th Cir. 1994) (concluding, in the context of the federal carjacking statute, 18 U.S.C. §2119, that "[t]aking or attempting to take by force and violence or by intimidation ... encompasses the use, attempted use, or threatened use of physical force." (emphasis added) (quotation marks and alterations omitted)).

830 F.3d at 1238-29.

It is axiomatic that federal district courts are bound by the precedent of their circuit. See In re Hubbard, 803 F.3d 1298, 1309 (11th Cir. 2015)(citing Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir.1985)). Courts are, however, generally only bound by the holdings of cases. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129, 134 L. Ed. 2d 252 (1996). Dicta, conversely, is "not binding on anyone for any purpose." Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir.2010). As the Eleventh Circuit has noted, "dicta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us.'" United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (citations omitted). The holding of a case, on the other hand, is "comprised both of the result of the case and

'those portions of the opinion necessary to that result by which we are bound.'" Id. Finally, under the prior panel precedent rule, the holding of a prior panel of the Eleventh Circuit is binding on all subsequent panels, unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit sitting en banc. United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008)(citations omitted).[5]

In re James Howard Sams holds that armed bank robbery under 18 U.S.C. §2113 is a "crime of violence" for purposes of §924(c), see Kaley, 579 F.3d at 1253 n.10 (the holding of a case is comprised both of the result of the case and those portions of the opinion necessary to that result), and this Court is thus bound by it. In re Hubbard, 803 F.3d at 1309 (federal district courts in the are bound by the precedent of their circuit).

Because Petitioner's companion charge for armed bank robbery under 18 U.S.C. §2113 categorically qualifies as a "crime of violence" under §924(c)'s elements clause, his petition is not timely and is procedurally barred.

To the extent Petitioner argues that his career offender enhancement is invalid under Samuel Johnson, he is not entitled to relief. On March 6, 2017, the United States Supreme Court decided Beckles v. United States, ___ U.S. ___, No. 15-8544, 2017 WL 855781, at *1 (U.S. Mar. 6, 2017). In Beckles, the Supreme Court held that "the [Sentencing] Guidelines are not subject to a vagueness challenge under the Due Process Clause. The residual clause in §4B1.2(a)(2) therefore is not void for vagueness." Id. at

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

*6. Given the foregoing, the movant here cannot challenge his career offender enhancement under Samuel Johnson, because the Supreme Court has held that, unlike the residual clause of the ACCA, the Federal Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause. See Beckles v. United States, ___ U.S. ___, No. 15-8544, 2017 WL 855781 (U.S. Mar. 6, 2017).

VI. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing §2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255-Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and

quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001).

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

VII. Conclusion

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

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

Signed this 20th day of June, 2017.

UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-14383-J

IN RE: QUINTON BANNISTER,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before WILLIAM PRYOR, MARTIN, JORDAN, Circuit Judges.

ORDER:

Quinton Bannister seeks permission to file a 28 U.S.C. § 2255 motion based on Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015). Because Bannister already filed one § 2255 motion, his new motion must be "certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). "The court of appeals may authorize the filing of a second or successive

application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." Id. § 2244(b)(3)(C). Bannister says he will raise two claims in his § 2255 motion. First, he will claim that his 18 U.S.C. § 924(c) sentences are invalid because the predicate offenses for them are no longer crimes of violence. Second, Bannister says his USSG § 4B1.2 also violates Johnson.

18 U.S.C. § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a crime of violence or a drug-trafficking crime. The statute then 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.

Id. § 924(c)(3). We recently ruled that Johnson might invalidate the "very similar" § 924(c)(3)(B) language. See In re Pinder, __ F.3d __, __, 2016 WL 3081954, at *2 (11th Cir. June 1, 2016). At the same time, we recognized that the "law is unsettled" on this question and left it to the district court to decide in the first instance. Id. We also observed that we have not yet decided whether the "crime of violence" on which Pinder's § 924(c) sentence was based—conspiracy to commit

Hobbs Act robbery—categorically qualified as a crime of violence for § 924(c) purposes. Id. at *4 n.1.

Bannister's indictment charged: conspiracy to commit bank robbery in violation of 18 U.S.C. § 2113 (Count 1); armed bank robbery in violation of 18 U.S.C 2113 (Count 2); conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Count 3); possession of a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (Count 4); conspiracy to commit bank robbery in violation of 18 U.S.C. § 2113 (Count 5); conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Count 6); using a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (Count 7); conspiracy to commit bank robbery in violation of 18 U.S.C. § 2113 (Count 8); conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Count 9); and using a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (Count 10). The indictment stated that Count 4's predicate offenses were Counts 1, 2, and 3 (conspiracy to commit bank robbery, armed bank robbery, and conspiracy to commit Hobbs Act robbery), Count 7's predicate offenses were Counts 5 and 6 (conspiracy to commit bank robbery and conspiracy to commit Hobbs Act robbery), and Count 10's predicate offenses were Counts 8 and 9 (conspiracy to commit bank robbery and conspiracy to commit Hobbs Act robbery).

Although Counts 7 and 10 only list conspiracy offenses (conspiracy to commit bank robbery and conspiracy to commit Hobbs Act robbery) as potential § 924(c) predicates, Count 4 also lists armed bank robbery. However, because Count 4 lists more than one predicate offense, we have no way to know which predicate offense the jury relied on for Bannister's § 924(c) conviction. For example, jurors could have unanimously agreed that Bannister carried a firearm at some point during the ongoing Hobbs Act conspiracy or the bank robbery conspiracy. We have held in a published (therefore binding) opinion that a defendant may challenge a § 924(c) conviction based on conspiracy to commit Hobbs Act robbery. Pinder, 2016 WL 3081954 at *2. For the reasons outlined in Pinder, a defendant may also challenge a conviction based on conspiracy to commit bank robbery under § 2113. Since it is an open question whether conspiracy to commit Hobbs Act robbery and conspiracy to commit bank robbery under § 2113 qualify as crimes of violence under § 924(c)'s elements clause, we grant Bannister's application as to Counts 4, 7, 10.

Bannister also seeks to claim that Johnson invalidates his USSG § 4B1.1 sentence. That claim is barred by our court's precedent holding that Johnson doesn't affect § USSG 4B1.1 sentences. See In re Griffin, No. 16-12012, 2016 WL 3002293 (11th Cir. May 25, 2016). However, if the Supreme Court's decision next

term in Beckles v. United States, __ S. Ct. __, 2016 WL 1029080 (2016), overrules our precedent while Bannister's § 2255 case is still pending, Bannister may file another certification motion in our court. Bannister may also be able to ask the district court to amend his § 2255 motion to include his Guideline claim, but we express no view on whether the district court would be able to grant Bannister such relief.

APPLICATION GRANTED.