APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15105-C

TREVOR RANSFER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Trevor Ransfer is a federal prisoner initially sentenced to 1,062 months in prison after a jury convicted him of one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); four counts of substantive Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); and four counts of using and carrying a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). In January 2015, the District Court vacated one Hobbs Act robbery conviction and one § 924(c) conviction, and reduced Mr. Ransfer's sentence to 741-months

imprisonment. In June 2016, Mr. Ransfer filed a pro se motion to vacate sentence under 28 U.S.C. § 2255. The District Court appointed counsel.

Mr. Ransfer argued that, after Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015), Hobbs Act robbery was no longer a crime of violence and could not support his convictions under § 924(c). He argued Johnson's holding that the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague extended to the similar residual clause of § 924(c)(3)(B). He also argued his substantive Hobbs Act robbery convictions did not qualify as crimes of violence under the use-of-force clause in § 924(c)(3)(A). Mr. Ransfer contended that he was actually innocent of the § 924(c) convictions because there were no underlying crimes of violence. He acknowledged this Court had held Hobbs Act robbery qualifies as a crime of violence, but he argued this precedent was not binding because it was made in the context of a denial of an application to file a second or successive § 2255 motion.

A Magistrate Judge issued a report and recommendation ("R&R"), recommending denial of Mr. Ransfer's motion. The Magistrate Judge found that Mr. Ransfer's claim was procedurally defaulted because he did not raise it on direct appeal and he did not establish cause and prejudice to excuse such default. The Magistrate Judge determined that, regardless of whether Johnson affected § 924(c)'s residual clause, Hobbs Act robbery qualified as a crime of violence

under § 924(c)'s elements clause. Mr. Ransfer thus could not show prejudice to excuse the procedural default. The Magistrate Judge also concluded that Mr. Ransfer's actual-innocence argument was one of legal insufficiency and thus could not excuse his procedural default.

Mr. Ransfer filed objections. The District Court overruled them and adopted the R&R, denied Mr. Ransfer's § 2255 motion, denied a certificate of appealability ("COA"), and denied leave to proceed in forma pauperis ("IFP") on appeal. Mr. Ransfer appealed, and now, proceeding pro se, moves this Court for a COA and leave to proceed IFP.

To get a COA, a § 2255 petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Courts will grant a COA if the petitioner can show 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, 120 S. Ct. 1595, 1603–04 (2000) (quotation omitted). But "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015) (per curiam) (quotation omitted).

A "crime of violence" under § 924(c) is a 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). This Court has held that substantive Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). United States v. St. Hubert, 883 F.3d 1319, 1331–33 (11th Cir. 2018).

Mr. Ransfer's § 924(c) convictions were predicated on his substantive Hobbs Act robbery convictions. Because substantive Hobbs Act robbery is a crime of violence under the use-of-force clause in § 924(c)(3)(A), Mr. Ransfer's § 924(c) convictions remain valid regardless of whether Johnson invalidated the residual clause in § 924(c)(3)(B). Thus, reasonable jurists would not debate the denial of Mr. Ransfer's § 2255 motion, and his motion for a COA is DENIED. See 28 U.S.C. § 2253(c)(2); Hamilton, 793 F.3d at 1266. Mr. Ransfer's request for leave to proceed IFP is DENIED AS MOOT.

Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15105-C

TREVOR RANSFER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: MARTIN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Trevor Ransfer has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated June 29, 2018, denying his motion for a certificate of appealability and motion for leave to proceed *in forma pauperis* in the appeal of the denial of his counseled motion to vacate sentence, 28 U.S.C. § 2255. Because Mr. Ransfer has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-22255-MOORE

TREVOR RANSFER,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

Order Adopting Report and Recommendation

THIS CAUSE is before the Court upon Petitioner Trevor Ransfer's Motion to Vacate filed pursuant to 28 U.S.C. § 2255 (ECF No. 1). The Court referred that matter to the Honorable Patrick A. White, United States Magistrate Judge, who issued a Report and Recommendation (ECF No. 12) recommending that the Motion to Vacate be dismissed as procedurally barred and that no certificate of appealability issue. Petitioner has not filed objections to the Report and Recommendation and the time in which to do so has now passed. For the reasons that follow, the Court ADOPTS the Magistrate Judge's Recommendation, and DISMISSES the Motion to Vacate.

Read liberally, Petitioner's sole claim for relief is premised upon the applicability of *Johnson v. United States*, 135 S. Ct. 2551 (2015) to a § 924(c) conviction—specifically, that a conviction under § 924(c)'s residual clause should be void for vagueness. However, as noted by Magistrate Judge White in the Report, Petitioner's companion charge for substantive Hobbs Act robbery categorically qualifies as a "crime of violence" under § 924(c)'s elements clause and Thus, Petitioner's motion is procedurally barred.

UPON CONSIDERATION of the Motion, the Government's Answer to the Complaint, Petitioner's Memorandum of Law, Petitioner's Reply, the Report, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion is DENIED. It is further ordered that Magistrate Judge White's Report and Recommendation is ADOPTED. No certificate of appealability shall issue. The Clerk of the Court is instructed to CLOSE this case. All pending motions are denied as Moot.

DONE AND ORDERED in Chambers, at Miami, Florida this 25th day of October, 2017.

Kevin Michael Moore

Digitally signed by Kevin Michael Moore
DN: o=Administrative Office of the US Courts, email=k_michael_moore@flsd.uscourts.gov, cn=Kevin Michael Moore
Date: 2017.10.25 16:24:06 -04'00'

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All Counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-22255-Civ-MOORE
(11-20678-Cr-MOORE)
MAGISTRATE JUDGE PATRICK A. WHITE

TREVOR RANSFER,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The movant, a federal prisoner, currently confined at the Coleman II-United States Penitentiary in Coleman, Florida, has filed this §2255 motion challenging his conviction and sentence entered following a jury trial in case no. **11-20678-Cr-Moore.** 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# 1, 8), the government's response in opposition (Cv-DE# 10), and Petitioner's reply thereto (Cv DE# 11).

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, Hobbs Act robbery, 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 September 29, 2011, a federal grand jury in the Southern District of Florida returned a sixteen-count indictment against Petitioner and several co-defendants (Cr DE# 3). The indictment charged Petitioner with conspiracy to commit a Hobbs Act robbery, in violation of 18 U.S.C. §1951(a) (Count 1); Hobbs Act robbery, in violation of 18 U.S.C. §1951(a) (Counts 8, 10, 12, and 14); and using and carrying a firearm in furtherance of a crime of violence, namely, Hobbs Act robbery in counts 8, 10, 12, and 14, in violation of 18 U.S.C. §924(c) (Counts 9, 11, 13, and 15). (Id.).

Beginning on January 30, 2012, Petitioner proceeded to trial and, on February 6, 2012, was found guilty of each count charged (Cr DE# 231).

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

Group 1: On-Farm Store Robbery. The base offense level was set

at 20 because the offense involved robbery, §2B3.1(a). (PSI ¶62). Group 2: CVS Hialeah Robbery. The base offense level was set at 20 because the offense involved robbery, §2B3.1(a). (PSI ¶68). Group 3: CVS Kendall Robbery. The base offense level was set at 20 because the offense involved robbery, §2B3.1(a). (PSI ¶74). Because the victim sustained bodily injury, the offense level was increased by two levels, §2B3.1(b)(3)(A). (PSI ¶75). Group 4: Wendy's Robbery. The base offense level was set at 20 because the offense involved robbery, §2B3.1(a). (PSI ¶80).

The combined adjusted offense level was set at 26. (PSI ¶93). The PSI did not include any chapter four enhancements. See (PSI ¶94). The total offense level was set at 26. (PSI ¶96).

The PSI next determined that the movant had zero criminal history points and a criminal history category of I. (PSI ¶99).

Statutorily, as to each of Counts 1, 8, 10, 12, and 14, the term of imprisonment was 0 to 20 years, 18 U.S.C. §1951(a). As to Count Nine, the minimum consecutive term of imprisonment was seven years and the maximum term was life, 18 U.S.C. §924(c)(1)(A)(ii) and (D)(ii). As to each of Counts 11, 13, and 15, the minimum consecutive term of imprisonment was 25 years and the maximum term was life, 18 U.S.C. §924(c)(1)(C)(I) and (D)(ii). (PSI ¶142). Based on a total offense level of 26 and a criminal history category of I, the guideline imprisonment range was 63 to 78 months plus a consecutive term of imprisonment of 84 months as to Count Nine, and consecutive terms of imprisonment of 300 months as to each of Counts 11, 13, and 15, §5G1.2(a). (PSI ¶143).

On May 24, 2012, Petitioner was sentenced to concurrent terms of 78 months of imprisonment as to Counts 1, 8, 10, 12, and 14; 84 months of imprisonment, to be served consecutively, as to Count 9;

and 300 months of imprisonment as to Counts 11, 13, and 15, each to be served consecutively, for a total term of imprisonment of 1,062 months of imprisonment, or eighty-eight and one half years. (Cr DE# 304).

Petitioner filed an appeal with the Eleventh Circuit, contesting various evidentiary and procedural rulings, as well as his judgment and sentence. (Cr DE# 309). On April 14, 2014, the Eleventh Circuit Court of Appeals affirmed the judgment of conviction in a written, but unpublished opinion. United States v. Ransfer, 749 F.3d 914 (11th Cir. 2014). Petitioner did not seek certiorari review.

Movant returned to this court on September 12, 2014 filing his first §2255 motion, assigned **case no. 14-cv-23541-Moore.** (14-cv-23541, DE#1). A Report issued which recommended that the motion be granted. (14-cv-23541, DE# 12). The District Court issued an order adopting the report. (14-cv-23541, DE# 14). With the agreement and concurrence of the United States, the Court vacated Petitioner's convictions as to Counts 8 and 9 of the indictment, one Hobbs Act robbery charge and one §924(c) charge, respectively. (Cr DE# 478). On March 4, 2015, Petitioner was re-sentenced to concurrent terms of 57 months of imprisonment as to Counts 1, 10, 12, and 14; 84 months of imprisonment, to be served consecutively, as to Count 11; and 300 months of imprisonment as to Counts 13 and 15, both to be served consecutively, for a total term of imprisonment of 741 months, or just under sixty-two years (Cr DE# 486). Petitioner again appealed to the Eleventh Circuit. (Cr DE# 487).

On **November 20, 2015**, the Eleventh Circuit Court of Appeals affirmed the judgment of conviction in a written but unpublished opinion. United States v. Ransfer, 622 Fed.Appx. 896 (11th Cir.

2015). Petitioner did not seek certiorari review.

Thus, the judgment of conviction became final on **February 18, 2016**, 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 **February 18, 2017,**[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, 1008-09 (7th Cir. 2000)).

The movant waited **four months** from the time his conviction became final on **February 18, 2016** until he returned to this court,

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[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.

filing the instant motion on **June 12, 2016.**[3] (Cv-DE#1:13). 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# 1, 8, 10, 11).

IV. Threshold Issues

A. Timeliness

As narrated previously, the movant's judgment of conviction became final on **February 18, 2016.** The movant had until **February 18, 2017,** to timely file his §2255 motion. Movant timely filed the instant petition on **June 12, 2016.**

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# 10:3-6). According to the government, Petitioner cannot satisfy either the cause-and-prejudice or the actual innocence exceptions to the procedural-default rule. (Id.).

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

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 **substantive Hobbs Act robbery** 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 substantive Hobbs Act Robbery 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.[4]

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

[4]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).

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" 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 substantive Hobbs Act robbery 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,[5] 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,

[5]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.

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, ___ 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, the substantive Hobbs Act statute that Movant was alleged to have violated 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 charges for substantive Hobbs Act Robbery still qualify 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 Saint Fleur, 824 F.3d 1337 (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 robbery charge under the Hobbs Act, 18 U.S.C. §1951(a), and a separate firearm charge during and in relation to a "crime of violence" in violation of §924(c). The Eleventh Circuit denied the application, stating:

> But we need not decide, nor remand to the district court, the §924(c)(3)(B) residual clause issue in this particular case because even if Johnson's rule about the ACCA residual clause applies to the §924(c)(3)(B) residual clause, [defendant's] claim does not meet the statutory criteria for granting this § 2255(h) application. This is because [defendant's] companion conviction for Hobbs Act robbery, which was charged in the same indictment as the §924(c) count, clearly qualifies as a "crime of violence" under the use-of-force clause in §924(c)(3)(A).

824 F.3d at 1340.

It is axiomatic that federal district courts are bound by the precedent of their circuit. See In re Hubbard, 803 F.3d 1298, 1309 (11th Cir. 2015)(citing Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir.1985)). Courts are, however, generally only bound by the holdings of cases. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129, 134 L. Ed. 2d 252 (1996). Dicta, conversely, is "not binding on anyone for any purpose."

Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir.2010). As the Eleventh Circuit has noted, "dicta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us.'" United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (citations omitted). The holding of a case, on the other hand, is "comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.'" Id. Finally, under the prior panel precedent rule, the holding of a prior panel of the Eleventh Circuit is binding on all subsequent panels, unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit sitting en banc. United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008)(citations omitted).[6]

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

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

Because Petitioner's companion charge for substantive Hobbs Act robbery categorically qualifies as a "crime of violence" under §924(c)'s elements clause, his petition is procedurally barred.

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 22nd day of May, 2017.

UNITED STATES MAGISTRATE JUDGE

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APPENDIX E