APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11890-H

CARLOS HERNANDEZ MACHIN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Carlos Hernandez Machin moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate. To merit a COA, he must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Hernandez Machin has failed to satisfy the *Slack* test for his claims, his motion for a COA is DENIED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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January 16, 2019

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 18-11890-H
Case Style: Carlos Machin v. USA
District Court Docket No: 1:16-cv-22680-RLR
Secondary Case Number: 1:08-cr-20287-RLR-3

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

A-2

NO. 18-11890-H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARLOS HERNANDEZ MACHIN,
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 APPEALIBILTY BY APPELLANT CARLOS HERNANDEZ MACHIN

MICHAEL CARUSO
Federal Public Defender
M. CAROLINE MCCRAE
Assistant Federal Public Defender
Attorney for Appellant Hernandez Machin
450 South Australian Avenue, Suite 500
West Palm Beach, Florida 33401
Telephone No. (561) 833-6288

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

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Carlos Hernandez Machin
Case No. 18-11890-H

Appellant Carlos Hernandez Machin 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.

Bandstra, Honorable Ted E., United States Magistrate Judge

Becker, Abigail E., Assistant Federal Public Defender

Borrego, Leonardo, Co-Defendant

Brown, Honorable Stephen T., United States Magistrate Judge

Caruso, Michael, Federal Public Defender

De La Cruz, Diego Diaz, Co-Defendant

Feiler, Jeffrey E., Defense Attorney

Flores, Rene, Co-Defendant

Garber, Honorable Barry L., United States Magistrate Judge

Gaviria, Frank J., Defense Attorney

Gold, Honorable Alan S., United States District Judge

Gonzalez, Juan D., Co-Defendant

Greenberg, Benjamin G., United States Attorney

Healy, William C., Assistant United States Attorney

Hernandez Machin, Carlos, Defendant/Appellant

Houlihan III, Raymond D., Defense Attorney

Jubiel, Alexy, Co-Defendant

Koukios, James M., Assistant United States Attorney

Klugh Jr., Richard C, Defense Attorney

Lowenthal, Sheryl J., Defense Attorney

McAliley, Honorable Chris M., United States Magistrate Judge

McCrae, M. Caroline, Assistant Federal Public Defender

Mc-Partland-Lyons, Anne Marie, Defense Attorney

Medina, Omar Silva, Co-Defendant

O'Sullivan, Honorable John J., United States Magistrate Judge

Rengel, Alexandra I., Defense Attorney

Rodriguez, Marlene, Assistant United States Attorney

Rosenberg, Honorable Robin L., United States District Judge

Shelvin, Barry T., Defense Attorney

Smachetti, Emily M., Assistant United States Attorney

Simonton, Honorable Andrea M., United States Magistrate Judge

Suri, Arnaldo Jesus, Defense Attorney

United States Attorney, Respondent/Appellee

Wear, Nancy C., Defense Attorney

White, Honorable Patrick A., United States Magistrate Judge

s/M. Caroline McCrae
M. Caroline McCrae

MOTION FOR CERTIFICATE OF APPEALABILITY

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

> Whether the district court erred by denying Mr. Hernandez Machin's motion to vacate, set aside, or correct his sentence, brought pursuant to 28 U.S.C. § 2255, alleging that he was actually innocent of violating 18 U.S.C. §§ 924(c) and 924(o) after *Johnson v. United States*, 135 S. Ct. 2551 (2015).

I. PROCEDURAL HISTORY

On April 8, 2008, Mr. Hernandez Machin was charged in a 7-count Indictment with conspiracy and attempt to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846, conspiracy and attempt to commit Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2, conspiracy to possess and possession of a firearm in furtherance of a "crime of violence and a drug trafficking crime", in violation of 18 U.S.C. § 924(o) and (c), and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). (Case No. 08-CR-20287 D.E. 37.) On

September 10, 2008, Mr. Hernandez Machin pled guilty to Count 1 conspiracy to possess with intent to distribute five kilograms or more of cocaine, Count 3 conspiracy to commit Hobbs Act robbery, and Count 6 possession of a firearm in furtherance of a crime of violence and a drug trafficking crime. (Case No. 08-CR-20287 D.E. 93.)

On January 6, 2009, Mr. Hernandez Machin was sentenced to a total term of 211 months' imprisonment, which consisted of concurrent terms of 151 months as to Counts 1 and 3 and a consecutive term of 60 months as to Count 6. (Case No. 08-CR-20287 D.E. 172.) Counts 2, 4, 5, and 7 were dismissed. (Case No. 08-CR-20287 D.E. 172.) Mr. Hernandez Machin did not file a direct appeal.

On or around April 22, 2015, Mr. Hernandez Machin filed a pro se Motion for Modification of Sentence, pursuant to 18 U.S.C. § 3582(C)(2), in which he argued that his sentence should be reduced to be consistent with amendment 782 to the United States Sentencing Guidelines. (Case No. 08-CR-20287 D.E. 257.) That motion was denied on December 18, 2015. (Case No. 08-CR-20287 D.E. 263.)

On June 21, 2016, Mr. Hernandez Machin filed a *pro se* Motion to Vacate, Set Aside, or Correct Sentence, pursuant to 28 U.S.C. § 2255, in

which he argued that his sentence was unconstitutional, based on the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2251 (2015), thus opening the instant case. (D.E. 1.)

On July 21, 2016, the Magistrate Court appointed the Federal Public Defender to represent Mr. Hernandez Machin in all further stages of this § 2255 proceeding. (16-CV-22680, D.E. 8). On January 5, 2017, Mr. Hernandez Machin, through counsel, filed a Memorandum in Support of his § 2255 Motion. (16-CV-22680, D.E. 14). The government filed a response in opposition on January 30, 2017. (16-CV-22680, D.E. 15). Mr. Hernandez Machin filed a reply to the government's response on February 9, 2017. (16-CV-22680, D.E. 16).

On January 26, 2018, the Magistrate Court entered a Report and Recommendation ("R & R") recommending that the District Court deny Mr. Hernandez Machin's motion to vacate and that no COA be issued. (16-CV-22680, D.E. 17). The Magistrate Court relied upon *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), *vacated and reh'g en banc granted* 2018 WL 2209427 (5/15/2018), to reject Mr. Hernandez Machin's claim. (16-CV-22680, D.E. 17). The Magistrate Court also found that by pleading guilty Mr. Hernandez Machin waived any

duplicity or multiplicity infirmity in Count 6. (16-CV-22680, D.E. 17).

On February 9, 2018, Mr. Hernandez Machin filed an Objection to the R & R. (16-CV-22680, D.E. 18). On March 2, 2018, the government filed a Response to Mr. Hernandez Machin's Objection. (16-CV-22680, D.E. 20).

On March 5, 2018, the District Court entered an Order Adopting the Magistrate's R & R, denied Mr. Hernandez Machin's motion, and did not issue a COA. (16-CV-22680, D.E. 21). The District Court adopted the reasons set forth in the R & R. (16-CV-22680, D.E. 21). On March 5, 2018, the District Court entered a Final Judgment in the case dismissing Mr. Hernandez Machin's motion. (16-CV-22680, D.E. 22).

On May 2, 2018, Mr. Hernandez Machin entered a Notice of Appeal. (16-CV-22680, D.E. 24). Mr. Hernandez Machin now files this Motion for Certificate of Appealability.

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. Hernandez Machin has satisfied this standard.

III. MR. HERNANDEZ MACHIN SHOULD BE GRANTED A COA, BECAUSE REASONABLE JURISTS COULD DEBATE WHETHER MR. HERNANDEZ MACHIN IS ENTITLED TO RELIEF ON HIS §§ 924(c) CLAIM

"[R]easonable jurists could at least debate whether [Mr. Hernandez Machin] is entitled to relief" on his §§ 924(c) claim following *Johnson*. *Welch*, 136 S. Ct. at 1268.

A. REASONABLE JURISTS COULD DEBATE WHETHER *JOHNSON* INVALIDATED THE § 924(C) RESIDUAL CLAUSE

On June 30, 2017 without hearing oral argument, a panel of this Court issued a published decision holding as a matter of first impression that *Johnson*'s determination that the ACCA's residual clause was unconstitutionally vague "does not apply to or invalidate" the similar residual clause in 18 U.S.C. §924(c)(3)(B). *Ovalles*, 861 F.3d at 1265. However, the correctness of the *Ovalles* panel's reasoning can be – and is being – debated among reasonable jurists both within this Circuit and across the country at this time, and a COA should issue for the following reasons.

1. Only a week after the issuance of the decision in *Ovalles*, the mandate was *sua sponte* withheld by the Court, and that non-final decision may still be reconsidered and withdrawn. On July 6, 2017 – only one week after *Ovalles* was issued – this Court *sua sponte* withheld the mandate in *Ovalles*. *See Ovalles*, 11th Cir. Case No. 17-10712 (DE of July 6, 2017)("Mandate Withheld Pursuant to Court Instructions."). This near-immediate, *sua sponte* reaction seemed to indicate that there was potentially interest on the Court in rehearing *Ovalles* en banc. Or, it could have meant that members of the Court believed *Ovalles* could be affected by the Supreme Court's decision in the then pending case of *Sessions v. Dimaya* (U.S. No. 15-1498) on the related issue of whether *Johnson* renders the identically-worded residual clause in 18 U.S.C. §16(b) unconstitutionally vague.

Notably, it appears that the Court is itself still debating the constitutional issue in *Dimaya*, since it has ordered re-argument at the beginning of the new term to definitively decide the case. *See* DEs of Jan. 17 and June 26, 2017. And plainly, because §16(b) is perfectly identical to § 924(c)(3)(B), a favorable decision in *Dimaya* could itself abrogate *Ovalles*. Notably, *Ovalles* made no mention of *Dimaya*, even

though the government in *Dimaya* is seeking to distinguish §16(b) from the ACCA's residual clause on the same bases that the *Ovalles* panel distinguished §924(c)(3)(B).

In any event, whatever the reason for the withholding of the mandate in *Ovalles*, the panel's decision was not yet final when the District Court refused to issue a COA to Mr. Hernandez Machin. And significantly, multiple judges on this Court have now granted joint motions by the defense and government to stay the briefing schedule in §924(c)/*Johnson* appeals pending issuance of the *Ovalles* mandate. *See Davenport v. United States*, Case No. 16-15939-GG (11th Cir. July 21, 2017)(Jordan, J.); *Barriera-Vera v. United States*, Case No. 17-10029 (11th Cir. July 24, 2017)(Tjoflat, J.); *Wilkes v. United States*, Case No. 16-17658 (11th Cir. July 25, 2017)(Wilson, J.); *Blackman v. United States*, Case No. 16-17294 (11th Cir. July 26, 2017)(Martin, J.); *Young v. United States*, Case No. 16-17300 (11th Cir. July 27, 2017)(Tjoflat, J.); *Paige v. United States*, Case No. 16-16043 (11th Cir. July 28, 2017)(Rosenbaum, J.); *Trubey v. United States*, Case No. 16-17663 (11th Cir. Aug. 1, 2017)(Wilson, J.). These stays would not likely have been granted if the analysis in *Ovalles* was "beyond all debate." Clearly, it is

not. The decision may well be short-lived, and indeed, as discussed further below, the opinion has been vacated and rehearing *en banc* has been granted. *Ovalles v. United States*, 2018 WL 2209427 (11th Cir. 2018).

Since the law in this area remains in tremendous flux, it would be imprudent and inefficient for the Court to rely on *Ovalles* now to deny a COA. Doing so would needlessly result in an additional round of litigation if *Ovalles* is abrogated by *Dimaya*. Even if *Ovalles* is not completely abrogated, *Dimaya* may at least require reconsideration of certain conclusions in *Ovalles* either by the panel or the en banc Court. The constitutional issue resolved by the *Ovalles* panel is now being vigorously debated among reasonable jurists throughout the country. And that debate will continue – at the very least – until *Dimaya* is decided.

2. After the district court's decision, the Supreme Court issued a favorable decision in *Dimaya* and this Court vacated the panel's opinion in *Ovalles* and granted rehearing *en banc*.

In *Sessions v. Dimaya*, 584 U.S. __, 2018 WL 1800371 (Apr. 17, 2018), the Supreme Court declared unconstitutionally vague 18

U.S.C. § 16(b). That result was compelled by a "straightforward application" of the "straightforward decision" in *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015). *Id.* at *7. The Court found § 16(b) indistinguishable from the residual clause struck down in *Johnson*. It emphasized that both provisions required courts to imagine an "ordinary case" and apply it against an uncertain level of risk. *Id.* at **7-9. And the Court rejected the government's textual and experiential attempts to distinguish the clauses, finding each "to be the proverbial distinction without a difference." *Id.* at **12-16.

Dimaya fully vindicates Mr. Hernandez Machin's argument that *Johnson* renders 18 U.S.C. § 924(c)(3)(B) void for vagueness. Indeed, that provision is perfectly identical to § 16(b). Thus, in arguing that the ACCA's residual clause was indistinguishable from § 924(c)(3)(B), Mr. Hernandez Machin made the same arguments that *Dimaya* accepted. And, in arguing the opposite, the government made the same arguments that *Dimaya* rejected. Because § 16(b) and § 924(c)(3)(B) are identical, they stand in the same relation to *Johnson*. As a result, *Dimaya* compels the conclusion that § 924(c)(3)(B) is void for vagueness as well.

For that same reason, *Dimaya* abrogates this Court's contrary precedents in *Ovalles v. United States*, 861 F.3d 1257, 1263-67 (11th Cir. 2017), *vacated and reh'g en banc granted* 2018 WL 2209427 (5/15/2018), and *United States v. St. Hubert*, 883 F.3d 1319, 1327-28 (11th Cir. 2018). Indeed, that precedent was based on the exact same purported distinctions that *Dimaya* has now rejected as immaterial. *See Ovalles*, 861 F.3d at 1263-66. And while that precedent had pre-emptively sought to distinguish § 16(b) from § 924(c)(3)(B), that was dictum. *See id.* at 1267; *St. Hubert*, 883 F.3d at 1336-37. In any event, the purported distinction was premised on the view that the categorical approach does not fully apply to § 924(c), which is directly contrary to earlier (and thus controlling) circuit precedent. *In re Gomez*, 830 F.3d 1225, 1228 (11th Cir. 2016); *United States v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013).

In addition to the favorable result in *Dimaya*, this Court has now vacated the panel decision in *Ovalles* and granted rehearing *en banc*. *Ovalles v. United States*, 2018 WL 2209427 (11th Cir. 2018). Both of these developments followed the district court's denial of a COA and support Mr. Hernandez Machin's position that reasonable jurists could

debate whether Johnson invalidated the § 924(c) residual clause.

3. Whether *Johnson*'s invalidation of the ACCA's residual clause as unconstitutionally vague has rendered §924(c)'s residual clause unconstitutional as well, is an issue that has divided the circuits and it remains debatable among reasonable jurists at this time. In *Johnson*, the Supreme Court held the *residual* clause in 18 U.S.C. §924(e)(2)(B)(ii)("otherwise involves conduct that presents a serious risk of physical injury to another") to be unconstitutionally vague because the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges." 135 S. Ct. at 2557. In the Supreme Court's view, the process espoused by *James v. United States*, 550 U.S. 192 (2007), of determining what is embodied in the "ordinary case" of an offense, and then of quantifying the "risk" posed by that ordinary case, was constitutionally problematic: "[t]he residual clause offers no reliable way to choose between ... competing accounts of what 'ordinary' ... involves." *Id.* at 2558. As a result, "[g]rave uncertainty" as to how to determine the risk posed by the "judicially imagined ordinary case" led the Court to conclude that the

residual clause was void for vagueness. *Id.* at 2557.

It is well-settled in this Circuit that the same, *categorical* "ordinary case" inquiry that led the Supreme Court to conclude that the ACCA residual clause is unconstitutionally vague applies to the similarly-worded residual clauses in 18 U.S.C. §924(c)(3)(B) and 16(b). In *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), Justice O'Connor sitting by designation held that whether an offense is a "crime of violence" "within the ambit of 18 U.S.C. §924(c)" is a question "that we must answer 'categorically' – that is, by reference to the elements of the offense, and not the actual facts of McGuire's conduct." *Id.* at 1336. And, she explained, "[w]e employ the categorical approach" under both the elements and residual clauses of §924(c),

> because of the statute's terms: It asks whether McGuire committed "an offense" that "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) (emphasis added).

Id. at 1336-1336 (emphasis in original).

Notably, the residual clause in §924(c) is identical to 18 U.S.C. §16(b). *Compare* §924(c)(3)(B) (offense "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") *with* §16(b) (offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used on the course of committing the offense"). And the law in this Circuit is clear that the same "ordinary risk" analysis this Court applied pursuant to the categorical approach in ACCA residual clause cases applies equally in the §16(b) context. *See United States v. Keelan*, 786 F.3d 865, 871 (11th Cir. May 13, 2015) (as a matter of first impression, "adopt[ing] the 'ordinary case' standard [from *James*] for analyzing §16(b);" "applying the categorical approach looking only to the ordinary case;" concluding that a violation of 18 U.S.C. §2422(b) for enticing a minor is a "crime of violence" under §16(b) since the "ordinary" violation involves a substantial risk that the defendant may use physical force in the course of committing the offense).

Because other circuits as well have employed similar approaches in analyzing these provisions, in the aftermath of *Johnson* the Third, Seventh, Ninth, and Tenth Circuits have each ruled that 18 U.S.C. §16(b) – which again, is identical to §924(c)(3)(B) – is void for vagueness

in light of *Johnson*. *See Baptiste v. Attorney General*, 841 F.3d 601 (3d Cir. 2016), *gov't pet. for cert. filed* Feb. 6, 2017 (No. 16-978); *Golikov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016), *gov't pet. for cert. filed* Feb. 2, 2017 (No. 16-966); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), *gov't pet'n for reh'g denied* (Mar. 22, 2016); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S.Ct. 31 (U.S. Sept. 29, 2016); *see also Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (same), *gov't pet. for cert filed* Feb. 13, 2017 (No. 16-991); *In re Hubbard*, 825 F.3d 225, 232 n.4 (4th Cir. 2016) (noting split); *United States v. Hernandez-Lara*, 817 F.3d 651 (9th Cir. 2016) (§16(b)'s residual clause as incorporated in U.S.S.G. §2L1.2(b)(1)(C) is void for vagueness in light of *Dimaya*), *gov't pet. for cert. filed* Nov. 7, 2016 (No. 16-617).

On November 18, 2016, in *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016), the Seventh Circuit became the first federal circuit to specifically address the constitutionally of §924(c)'s residual clause in light of *Johnson*. And notably, the Seventh Circuit held that because §924(c)'s residual clause was "virtually indistinguishable" from the ACCA's residual clause which "*Johnson* found to be unconstitutionally vague," §924(c)(3)(B) was unconstitutionally vague as well. *Id.* at 996

(noting that §924(c)'s residual clause was "the same residual clause" in §16(b) that the court had already invalidated in *Vivas-Ceja*). The panel's decision in *Ovalles* directly conflicts with that of the Seventh Circuit in *Cardena*.

Although that direct circuit split is itself sufficient to meet *Slack*'s "reasonable jurists could debate" standard and require the issuance of a COA here, *see Lambright v. Stewart*, 220 F.3d at 1028-29, the clear "debatability" of the reasoning in *Ovalles* is confirmed by the number of reasonable jurists at the district court level throughout this country who have specifically found the residual clause of §924(c)(3)(B) unconstitutionally vague in light of *Johnson*.

For decisions outside this Circuit, *see, e.g.*, *United States v. Smith*, No. 2:11-CR-058-JAD-CWH, 215 F. Supp. 1026 (D. Nev. May 18, 2016); *United States v. Lattaphom*, 159 F.Supp.3d 1157 (E.D. Cal. Feb. 2, 2016); *United States v. Bell*, 158 F.Supp.3d 906, 920 (N.D. Ca. Jan. 28, 2016); *United States v. Edmundson*, 153 F.Supp.3d 857, 859-60 (D. Md. Dec. 30, 2015).

For decisions within this Circuit, *see, e.g.*, *Mann v. United States*, Case No. 16-22605-Civ-Ungaro, DE22 & DE 27 (Orders of March 16 and

April 19, 2017); *Jardines v. United States*, Case No. 16-22604-Civ-Ungaro, DE 17 and DE 21 (Orders of March 17, and April 19, 2017); *Duhart v. United States*, Case No. 16-61499-Civ-Marra, DE 13 and DE 18 (Orders of September 9, 2016, and February 1, 2017); and *Hernandez v. United States*, Case No. 16-22657-Civ-Huck (Order of September 27, 2016).

In rejecting the views of these jurists, the *Ovalles* panel emphasized that the ACCA and §924(c) are not word-for-word identical. In particular, the panel found "significant" and "material" the fact that §924(e)(2)(B)(ii), defines a "violent felony" as an offense that "*otherwise* involves conduct that presents a serious potential risk of *physical injury* to another," while §924(c)(3)(B) defines a crime of violence as one 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*." *See Ovalles*, 861 F.3d at 1263-1265.

These are minor differences in the wording of the two provisions. They are neither significant nor material when considered against the Supreme Court's actual reasoning in *Johnson*. For the reasons detailed below, the *Ovalles* panel's conclusions to the contrary are debatable for

multiple reasons.

4. Section 924(c)'s residual clause is not "markedly narrower" than the ACCA residual clause at issue in *Johnson*. The textual differences between the residual clause of the ACCA at issue in *Johnson* and the residual clause of §924(c) (and its twin §16(b)) are not material because they do not impact the constitutional analysis in any manner. The *Ovalles* panel ignored the fact that not only in this Circuit, but in other circuits as well, these provisions have always been regarded as analogous and analyzed identically. *See United States v. Keelan*, 786 F.3d 865, 871 n.7 (11th Cir. 2015) (describing the ACCA residual clause and the residual clause of §16(b) as "analogous"); *Vivas-Ceja*, 808 F.3d at 722 ("§16(b) substitutes 'substantial risk' for the residual clause's 'serious potential risk.' Any difference between the two phrases is superficial. Just like the residual clause [in §924(c)], §16(b) offers courts no guidance to determine when the risk involved in the ordinary case of a crime qualifies as 'substantial.'"); *Jimenez-Gonzales v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008) (noting that, "[d]espite the slightly different definitions," the Supreme Court's respective analyses of the ACCA and §16(b) "perfectly mirrored" each

other). *See also United States v. Gomez-Leon,* 545 F.3d 777 (9th Cir. 2008); *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998); *United States v. Kirk*, 111 F.3d 390, 394 (5th Cir. 1997); *United States v. Bauer*, 990 F.2d 373, 374 (8th Cir. 1993) (describing the differences between the statutes as "immaterial" and holding that U.S.S.G. §4B1.2, which uses the ACCA language, "is controlled by" a decision that interprets §16(b)).

Federal courts have historically and regularly analyzed and imported decisions from one residual clause to another due to their substantial similarities.[1] Although the risk at issue in the ACCA is a risk of injury, and the risk at issue in both §16(b) and §924(c) is a risk that force will be used against person or property, this difference is

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1 Though the comparison tends to mostly address 18 U.S.C. § 16(b), that provision is identical to §924(c)(3)(B). *See, e.g., Chambers v. United States*, 555 U.S. 122, 133, n.2 (2009)(citing circuit splits on § 16(b) in the context of a residual clause case because §16(b) "closely resembles ACCA's residual clause")(Alito, J., concurring). *See also United States v. Ayala*, 601 F.3d 256, 267 (4th Cir. 2010)(relying on an ACCA case to interpret the definition of a crime of violence under §924(c)(3)(B)); *United States v. Aragon*, 983 F.2d 1306, 1314 (4th Cir. 1993)(same); *Roberts v. Holder*, 745 F.3d 928, 930-31 (8th Cir. 2014)(using both ACCA cases and § 16(b) cases to define the same "ordinary case" analysis); *United States v. Sanchez-Espinal*, 762 F.3d 425, 432 (5th Cir. 2014)(despite the fact that the ACCA talks of risk of injury and §16(b) talks of risk of force, "we have previously looked to the ACCA in deciding whether offenses are crimes of violence under §16(b)").

immaterial to the due process problem and has no impact on the applicability of *Johnson* to this case. This is because the Supreme Court's holding in *Johnson* did not turn on the type of risk, but rather how a court assesses and quantifies the risk.[2] In fact, the Solicitor General has candidly conceded that § 16(b) is "equally susceptible to ... the central objection" in *Johnson*—namely, that they both "require[d] a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters." *Johnson*, U.S. Supp. Br., 2015 WL 1284964, at 22-23.

The two-step process is the same under the ACCA and §924(c)(a twin to §16(b)). All three statutes require courts first to picture the

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2 Of course, many federal and state criminal laws include "risk" standards that employ adjectives similar to those in the ACCA and §924(c), such as "substantial," "grave," and "unreasonable." And the Supreme Court in *Johnson* said it did not mean to call most of these into question. But, as Justice Scalia's majority opinion observed, that is because the vast majority of such statutes require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion; in other words, applying such a standard to "real-world conduct." By contrast, the ACCA's residual clause, and §924(c)(3) too, require it to be applied to "an idealized ordinary case of the crime," an "abstract inquiry" that "offers significantly less predictability." *Johnson*, 135 S. Ct. at 2558.

"ordinary case" embodied by a felony, and then decide if it qualifies as a crime of violence by assessing the quantum of risk posed by the "ordinary case."[3] The *Ovalles* panel unfairly ignored this *material identity* in the way predicate crimes have always been analyzed under these statutes – not only in other circuits, but in our circuit. There is no acknowledgement of *McGuire*, *Keelan*, or the dictates of the categorical

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3 The ACCA, §924(c), and §16(b) require courts to discern what the "ordinary case" of a crime is by using the categorical approach. Courts may not consider the factual means of committing any given offense, but must consider the nature of the offense in the "ordinary case," regardless of whether the ACCA, §924(c)(3)(B), or § 16(b) is at issue. *See Keelan*, 786 F.3d at 871 (adopting "ordinary case" analysis for identical provision in §16(b)); *see also United States v. Naughton*, 621 F. App'x 170, 178 (4th Cir. Sept. 2, 2015)(applying the ordinary case inquiry to the residual clause of §924(c)); *Fuertes,* 805 F.3d at 498; *United States v. Ramos-Medina*, 706 F.3d 932, 938 (9th Cir. 2012)(citing *James* as the source of the "ordinary case" analysis required by §16(b)); *United States v. Butler*, 496 F. App'x 158, 161 n.4 (3d Cir. 2012); *Evans v. Zych*, 644 F.3d 447, 453 (6th Cir. 2011); *United States v. Serafin*, 562 F.3d 1104, 1108 (10th Cir. 2009); *Van Don Nguyen v. Holder*, 571 F.3d 524, 530 (6th Cir. 2009) (considering §16(b) and concluding that "[t]he proper inquiry is one that contemplates the risk associated with the proscribed conduct in the mainstream of prosecutions brought under the statute."); *United States v. Green*, 521 F.3d 929, 932 (8th Cir. 2008); *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1213 (10th Cir. 2007); *United States v. Acosta*, 470 F.3d 132, 134 (2d Cir. 2006); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995).

approach in the panel's entire discussion of §924(c)'s residual clause.[4]

As other courts have rightly explained, the "§924(c) residual clause suffers from exactly the same double indeterminancy as the ACC residual clause." *Edmundson*, 153 F. Supp. 3d at 862. Moreover, the Ninth and Seventh Circuits have recognized the same in invalidating §16(b), the identical twin to §924(c)(3)(B), as void for vagueness under *Johnson*. *See Vivas-Ceja,* 808 F.3d at 722; *Dimaya*, 803 F.3d at 1117.

Section 924(c)'s residual clause, like the ACCA residual clause, similarly requires the "ordinary case" analysis to assess the risk involved in a predicate offense, and how risky that ordinary case is – the identical analytical steps that brought down the ACCA residual clause – and thus §924(c)'s residual clause cannot survive constitutional scrutiny under the due process principles reaffirmed in *Johnson*. As a consequence, the residual clause cannot be used to support a conviction under §924(c).

To the extent the *Ovalles* panel characterized the residual clause

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4 The *Ovalles* panel cited *McGuire* only in its analysis of whether carjacking qualified under §924(c)'s elements clause, 861 F.3d at 1268-1269–even though *McGuire* clearly held that the categorical approach applies in analyzing predicate offenses under ***both*** the elements ***and*** the residual clauses of §924(c).

of §924(c) as "markedly narrower" than the ACCA's residual clause in two respects, it erred. The panel noted first that §924(c)'s residual clause requires a "risk of injury" to the victim and in its view that was "more definite" than a "risk of physical force" being used against the victim. Second, it argued, §924(c)'s residual clause is also temporally "narrower" than the ACCA's residual clause because it looks to the risk of force "aris[ing] during the commission of the offense." 861 F.3d 1263-1264.

But like the absence of enumerated offenses (discussed *infra*), these textual differences simply have no bearing on the threshold "ordinary case" inquiry that the Supreme Court determined is impossibly arbitrary, and that this Court held in *Keelan* applies to the precise language at issue here.[5] In focusing specifically on the risk

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5 That inquiry requires the Court to imagine the facts that typically make up the predicate crime. That inquiry involves asking whether, for example, "the ordinary instance of witness tampering involve[s] offering a witness a bribe? Or threatening a witness with violence?" *Johnson*, 135 S. Ct. at 2557. Or whether the "ordinary burglar invade[s] an occupied home by night or unoccupied by day?" *Id.* at 2558. Or "[d]oes the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information?" *Id.* Or whether the "ordinary case of vehicular flight" is "the person trying to escape from police by speeding or driving recklessly . . . [o]r is it instead the person driving normally who, for whatever reason, fails to respond immediately to a police officer's signal?" *Sykes v. United States*, 131 S. Ct. 2267, 2291 (2011)(Kagan and Ginsberg, JJ., dissenting). If a court cannot conjure the

during the predicate offense, §924(c)'s residual clause does not call for any narrower an inquiry than the ACCA's residual clause. The Supreme Court's determinations whether certain crimes were sufficiently risky under the ACCA also focused on the risk during the commission of the offense, rather than some time later after it had ended. *See, e.g., James*, 550 U.S. at 203-04, 210 (looking to conduct that typically occurs "while the crime [attempted burglary] is in progress," "while the break-in is occurring," and "during attempted burglaries"); *Sykes*, 131 S. Ct. at 2273-74 (same for crime of vehicular flight from police).

Likewise, the supposedly "typical" conduct the Supreme Court found sufficiently risky in the ACCA cases involved conduct during the predicate crime, rather than at some later time. *See, e.g., James*, 550 U.S. at 211-12 ("An armed would-be burglary may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner ... may give chase"); *Sykes*, 131 S. Ct.

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idealized "typical" scenario in which an offender embarks on the predicate crime, it cannot proceed to determine how the offense is likely to play out and, thus, cannot gauge the riskiness of the probable ensuing conduct – whether that conduct occurs during or after the commission of the crime. As the Ninth Circuit explained, "[t]his reasoning applies equally whether the inquiry considers the risk of violence posed by the commission and the aftereffects of a crime, or whether it is limited to consideration of the risk of violence posed by acts necessary to satisfy the elements of the offense." *Dimaya*, 803 F.3d at 1119.

at 2274 (driver's knowingly fleeing law enforcement officer held a violent felony given risk that, during pursuit, driver might cause accident or commit another crime to avoid capture). In *no* case did the Supreme Court actually rely on "post-offense conduct" to find a predicate crime sufficiently risky under the ACCA's residual clause. And in fact, the Court specifically questioned whether this would even be a statutorily permissible basis to qualify an offense a "crime of violence." *See Chambers v. United States*, 555 U.S. 122, 129 (2009).

Moreover, in assessing riskiness, §924(c)(3)(B) and its twin, §16(b) – just like the ACCA – looks not just at the initiation of the predicate crime (*e.g.*, the burglar's climbing through the window), but beyond that, through the entire "course" of the offense to its completion (*e.g.*, while the burglar is in the house, until he successfully flees). *See Leocal*, 543 U.S. at 10 ("[B]urglary, by its nature, involves a substantial risk that the burglary will use force against a victim in completing the crime.").

The *Ovalles* panel attempted to distinguish §924(c)(3)(B) from both §16(b) and the ACCA residual clause by pointing to "different function" of these statutes – namely, that § 924(c) is not concerned with

recidivism, and requires a "nexus" to the instant companion crime – which it claimed makes that clause "more precise and predictable." 861 F.3d 1267. But the functional difference between these statutes does not change the vagueness calculus in any manner for a simple reason the *Ovalles* panel ignored: According to *McGuire* and *Keelan* the proper analysis under §924(c)(3)(B) is *not* fact-centric, based upon the defendant's real-world conduct. Rather, due to the "*by its nature*" language used by Congress in both §924(c)(3)(B) and §16(b), it is categorical and based entirely on the elements of the offense. And the categorical approach uses the hopelessly indeterminate, impossibly vague "ordinary case" benchmark to measure risk.

In sum, neither the textual or functional distinctions identified by the *Ovalles* panel establish a material difference between the unconstitutional residual clause in the ACCA and the residual clauses in §16(b) and §924(c). All three clauses require courts to divine what the "ordinary case" of a crime is, and then decide whether that abstraction poses enough of a risk to be a qualifying offense. *See Shuti v. Lynch*, 828 F.3d 440, 448 (6th Cir. 2016)("[A] marginally narrower abstraction is an abstraction all the same."). Whatever textual

differences exist between these clauses, they are not significant enough to treat §924(c)(3)(B) differently with respect to *Johnson*'s vagueness analysis. At the very least, reasonable jurists could debate – and are debating – the materiality of the distinctions drawn in *Ovalles*.

5. The list of enumerated offenses preceding the ACCA residual clause was not dispositive in *Johnson*. Another basis upon which the *Ovalles* panel distinguished §924(c)'s residual clause from the ACCA's was the fact that the ACCA's residual clause contained a confusing prefatory list of enumerated offenses which complicated the assessment of risk, whereas §924(c) does not have such a list. 861 F.3d at 1264-1265. While the *Ovalles* panel deemed this difference "material," *id.*, analytically it is not because the Supreme Court's decision in *Johnson* did not hinge on the list of enumerated offenses that precedes the ACCA's residual clause. The Supreme Court simply noted that the enumerated offenses which precede the ACCA residual clause were an *added* problem. *Johnson*, 135 S. Ct. at 2558. The Supreme Court said the residual clause was void for vagueness based on the "two features" turning on the ordinary case – not a third feature turning on the enumerated offenses. *Id.* at 2557; *see also Vivas-*

Ceja, 808 F.3d at 723 ("The list [of enumerated offenses] itself wasn't one of the 'two features' that combined to make the clause unconstitutionally vague.") (citing *Johnson*, 135 S. Ct. at 2557).

As a matter of pure logic, *Johnson* could not have turned on the enumerated offenses. The "ordinary case" problem exists ***with or without*** enumerated offenses because a lower court must determine the idealized ordinary case of the predicate offense before it can even begin to evaluate and compare the type of risk presented by that offense. *Id.* at 2557-58. Because courts cannot answer the *threshold question* with any certainty, logic compels that the "ordinary case" analysis itself renders the residual clause unconstitutionally void. If a court cannot determine the "ordinary case" of the predicate offense, then a court cannot proceed with its risk analysis – enumerated offenses or not. The *Johnson* Court made clear that the "ordinary case" problem was really the central distinguishing and dispositive feature, by stating: "*More importantly*, almost all of the cited laws require gauging the riskiness of conduct in which an individual engages on a particular occasion. ... The residual clause, however, requires application of the 'serious potential risk' standard to an idealized

ordinary case of the crime." *Johnson*, 135 S. Ct. at 2561 (emphasis added). For this very reason, *Dimaya*, 803 F.3d at 1117-18, *Vivas-Ceja*, 808 F.3d at 723, and *Edmundson*, 153 F. Supp. 3d at 862, all flatly rejected the government's argument that *Johnson* turned on the enumerated offenses. Reasonable jurists, thus, have seriously debated the very argument the *Ovalles* panel adopted without responding to any of the above concerns.

Notably, this very issue was one that split the Fifth Circuit in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. Aug. 5, 2016)(en banc). As four reasonable jurists on that court rightly pointed out in their dissent from that decision, even without a prefatory list of examples "through judicial interpretation, §16(b) not only contains an example, it *contains the very example that most troubled the* Johnson *Court*. Specifically, the Supreme Court has previously explained that burglary is the 'classic example' of a §16(b) crime," "[a]nd 'burglary' was the most confusing of the residual clause's 'confusing examples.' If 'burglary' is a confusing example in one statute, then it is just as confusing in the other." 831 F.3d at 685 (Jolly, J. joined by Stewart, C.J., Dennis, J., and Graves, J., dissenting)("the (judicially created)

example in §16(b) is nearly as confusing as the textual examples in the residual clause;" and again, any distinction between the two statutes is not salient enough to constitutionally matter")(emphasis in original).

The lack of enumerated examples in §924(c) thus does not make its residual clause any more clear. If anything, the lack of a prefatory list makes §924(c)'s residual clause *more* capacious that the ACCA's residual clause. Indeed, because §924(c) lacks a prefatory list of examples, its residual clause covers *every* offense that involves a "substantial risk of the use of physical force against the person or property of another." *See Begay v. United States*, 553 U.S. 137, 144 (2008) ("Congress rejected a broad proposal that would have [amended the ACCA to cover] *every* offense that involved a substantial risk of the use of physical force against the person or property of another.")(internal quotation marks omitted).

In *Welch*, the Supreme Court confirmed that "[t]he residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." 136 S. Ct. at 1262. Significantly, the *Welch*

Court did not even mention the list of enumerated crimes, let alone indicate the list was relevant to its holding. Thus, contrary to the finding in *Ovalles*, the list of examples within the ACCA is not a legally "material" difference between the two clauses. At the very least, the panel's conclusion on that point could be debated by reasonable jurists.

6. The same confusion surrounds §924(c)'s residual clause (and its twin §16(b)'s residual clause) as surrounded the ACCA's and, in any event, this was not a dispositive part of the *Johnson*'s holding. A final reason given by the *Ovalles* panel for why §924(c)'s residual clause is not unconstitutionally vague is that courts have not had the same difficulty construing it as they have had with the ACCA's residual clause. 861 F.3d at 1265. But that argument simply "ignores the reality of judicial review." *Shuti*, 828 F.3d at 450. That the Supreme Court has not taken any cases regarding §924(c)'s residual clause, and therefore has not experienced "repeated failures" in interpreting §924(c)'s residual clause, is "probative only of the Court's composition of its docket – not absence of vagueness in the provision." *Baptiste v. Attorney Gen.*, 841 F.3d 601, 620 n.21 (3d Cir. 2016); *Shuti*, 828 F.3d at 450 (citing *Singleton v. Commissioner*, 439 U.S. 940, 942

(1978)(Stevens, J., respecting the denial of certiorari)("The Supreme Court's docket is almost entirely discretionary."). The *Johnson* Court's discussion of its repeated failures in crafting a "principle and objective standard" was simply additional evidence confirming the residual clause's vagueness. *Shuti*, 828 F.3d at 450 ("[T]he government mistakes a correlation for causation; conflicting judicial interpretations only provide *ex post* 'evidence of vagueness'"). The Supreme Court's failures in attempting to develop a workable standard for the ACCA's residual clause "was not a necessary condition to the Court's vagueness determination." *Vivas-Ceja*, 808 F.3d at 723.

Moreover, the *Ovalles* panel's suggestion that §924(c)(3)(B), unlike the ACCA, is not shrouded in confusion, is at the very least debatable if not demonstrably incorrect since the panel glossed over the fact that cases addressing §924(c) and §16(b) regularly rely on ACCA cases, and *vice-versa*. Confusion over the meaning of § 924(c)'s residual clause is subsumed in the confusion surrounding the ACCA because federal courts use the same body of precedent to interpret all three. Thus, confusion surrounding the ACCA reflects difficulties with §924(c)(3)(B) and §16(b), even without the same explicit chorus of criticism. And

indeed, some circuits have actually split over how to apply §16(b), which is additional evidence of the confusion surrounding the language of the residual clause of §16(b) and its twin in § 924(c)'s residual clause. *See e.g., Chambers*, 555 U.S. at 133 (Alito and Thomas, JJ., concurring)(citing some illustrative cases). There is no reasonable way to separate the level of confusion over the scope of these three residual clauses.

In any event, as the Seventh Circuit explained in *Vivas-Ceja*, "[t]hat the [ACCA] residual clause had persistently eluded stable construction, was *additional* evidence that served to 'confirm its hopeless indeterminancy.' *Johnson*, 135 S. Ct. at 2558. The chaotic state of the caselaw was not a necessary condition to the Court's vagueness determination." 808 F.3d at 723 (citation and internal quotation marks omitted) (emphasis added). Nor is it a necessary condition to strike down the §924(c) residual clause. *See also Dimaya*, 803 F.3d at 1119 ("That the Supreme Court has decided more residual clause cases than §16(b) cases, however, does not indicate that it believes the latter clause to be any more capable of consistent application.").

7. The Contrary Circuit Decisions followed in Ovalles are Unpersuasive. The *Ovalles* panel explicitly adopted the arguments advanced in *United States v. Taylor*, 814 F.3d 340, 376-79 (6th Cir. 2016), *pet. for cert. filed* Oct. 12, 2016 (No. 16-6392); *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); and *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016), *pet. for cert filed* Dec. 30, 2016 (No. 16-7373). But the reasoning in these decisions is not only debatable by jurists from other circuits who have rejected as immaterial the points of distinction upon which these decisions have relied. The reasoning *Ovalles* relied upon most extensively – that of the Sixth Circuit in *Taylor* – is highly debatable even within the Sixth Circuit itself.

As a threshold matter, the panel decision in *Taylor* upon which *Ovalles* relied, was not itself a unanimous decision. Dissenting judge, Judge Helene White, persuasively criticized the majority opinion. In doing so, Judge White reiterated the importance of the categorical approach in analyzing crimes of violence under §924(c)(3)(B), notably citing this Circuit's decision in *McGuire* for that proposition. *See id.* at 393-98 & n.19 (White, J., dissenting)("Although a fact-centric approach might make sense in the §924(j) context because th[at] statute

addresses present rather than past conduct, case law squarely holds that the ["by its nature"] language of §924(c) requires courts to use a categorical approach; citing *McGuire*, 706 F.3d at 1336-1337). The *Taylor* majority opinion, however, minimized that key point of similarity. *See id.* at 378. For the reasons set forth in Judge White's dissenting opinion, as well as those advanced by the Seventh, Ninth, and Tenth Circuits, the majority opinion in *Taylor* is unpersuasive.

Furthermore, it is noteworthy that the Sixth Circuit itself appears to have receded from, or at least substantially limited, its decision in *Taylor*. In its July 2016 decision in *Shuti v. Lynch*, a unanimous panel of that court squarely held that *Johnson* rendered §16(b) unconstitutionally vague in the immigration context, notwithstanding its earlier decision in *Taylor*. Specifically, it accepted the petitioner's argument, and expressly agreed with the Seventh and Ninth Circuits, that §16(b) "suffer[ed] from the same defects as the statute at issue in *Johnson* and, so too, runs afoul of the Fifth Amendment's prohibition of vague laws." 828 F.3d at 445. In doing so, the Sixth Circuit rejected the government's attempts to distinguish the two residual clauses. *See id.* at 446-50

Even more notable, the Sixth Circuit in *Shuti* understood its earlier decision in *Taylor* to be based on the fact that §924(c) involves "real-world conduct," and therefore did not require application of the categorical approach. *Id.* at 449-50. According to the *Shuti* court, that "ma[de] all the difference," since *Johnson* was limited only to statutes applying the categorical/ordinary-case approach. *Id.* at 450 ("We understand *Taylor*, then, as applying *Johnson*'s real-world conduct exception to upholding the constitutionality of" §924(c)'s elements clause). In that regard, the Sixth Circuit emphasized that this limitation of *Johnson* was subsequently reiterated by the Supreme Court in *Welch*, and the court in *Taylor* "did not have the benefit of the Court's guidance in that regard." *Id.*

That limited reading of *Taylor* is critical here, because, as explained above, binding precedent from this Court in *McGuire* makes clear that the same categorical approach governing the ACCA also governs §924(c)'s residual clause. Accordingly, under this Circuit's prior panel precedent rule, the *Ovalles* panel should have been legally precluded by *McGuire* from following *Taylor*, given that the Sixth Circuit has since clarified that *Taylor* rests on the premise that the

categorical approach does not apply to §924(c). And that premise is contrary to this Circuit's binding precedent in *McGuire*.

For these reasons, reasonable jurists could debate – and are still debating – whether the residual clause in §924(c)(3)(B) is void for vagueness.

B. MR. HERNANDEZ MACHIN'S § 924(C) CONVICTION ON COUNT 6 IS DUPLICITOUS BECAUSE IT CHARGES FOUR SEPARATE AND DISTINCT OFFENSES

Mr. Hernandez Machin's indictment charged more than one predicate offense – conspiracy to commit Hobbs Act robbery, attempt to commit Hobbs Act robbery, conspiracy to possess with intent to distribute five kilograms or more of cocaine, and attempt to possess with intent to distribute five kilograms or more of cocaine – in support of the §924(c) offense. (08-CR-20287, D.E. 37). Under those circumstances, *Gomez* held, the jury could have convicted on the §924(c) offense "without reaching unanimous agreement on during which crime it was that [the defendant] possessed the firearm." *In re Gomez*, 830 F.3d 1225, 1227 (11th Cir. 2016). And the "lack of specificity" in the verdict had Sixth Amendment significance under *Alleyene v. United States*, 133 S.Ct. 2151, 2155 (2013) because the jury's undifferentiated

findings increased a minimum mandatory. *Gomez*, 830 F.3d at 1228-1229.

Because it is impossible to know the true basis for the Count 6 conviction, and *Alleyne* and the Sixth Amendment preclude any further judicial fact-finding on that point, the Court must presume Count 6 rested upon the least culpable crime charged – conspiracy to commit a Hobbs Act robbery. Any other result would be tantamount to the type of judicial fact-finding prohibited by *Alleyne*. 830 F.3d at 1227-1228.

C. REASONABLE JURISTS COULD DEBATE WHETHER CONSPIRACY TO COMMIT HOBBS ACT ROBBERY QUALIFIES AS A "CRIME OF VIOLENCE" UNDER § 924(C)'S ELEMENTS CLAUSE

"To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal." *United States v. Ransfer*, 749 F.3d 914, 929 (11th Cir. 2014). Critically, however, there is no requirement that the defendant engage in an overt act in furtherance of the conspiracy. *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999). Nor is there any requirement that the defendant was "even capable of committing" the underlying Hobbs Act

offense. *Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016). Rather, "[i]t is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it." *Id.* (emphasis omitted).

Thus, for present purposes, a verbal or written agreement to commit Hobbs Act robbery is the least culpable way of committing the offense. *See, e.g.*, *Pistone*, 177 F.3d at 959 (upholding conviction for conspiracy to commit Hobbs Act robbery where defendant did no more than agree and plan to commit robbery, but took no overt act). That way of committing the offense clearly lacks the use, attempted use, or threatened use of violent, physical force. As a result, conspiracy to commit Hobbs Act robbery is categorically overbroad and cannot qualify as a "crime of violence."

Several courts around the country have already persuasively so held. *See, e.g.*, *United States v. Edmundson*, 153 F. Supp. 3d at 859 (D. Md. Dec. 23, 2015) ("The parties have not cited, nor has my own research revealed, any authority that Hobbs Act Conspiracy . . . constitutes a crime of violence under the § 924(c) force clause, which is unsurprising considering the fact that this clause only focuses on the

elements of an offense to determine whether it meets the definition of a crime of violence, and it is undisputed that Hobbs Act Conspiracy can be committed even without the use, attempted use, or threatened use of physical force against the person or property of another."); *United States v. Ledbetter*, 2016 WL 3180872, at *6 (S.D. Ohio June 8, 2016) ("this Court agrees" that conspiracy to commit Hobbs Act robbery "qualifie[d] *only* under the 'residual clause' from § 924(c)(3)(B)"); *United States v. Luong*, 2016 WL 1588495, at *3 (E.D. Cal. Apr. 20, 2016) ("The court therefore finds that conspiracy to commit Hobbs Act robbery does not have as an element the use or attempted use of physical force and is not a crime of violence under the force clause."). These decisions are persuasive, as reflected by this Court's favorable citation to them in *In re Pinder*, 824 F.3d 977, 979 n.1 (11th Cir. June 1, 2016).

And, in fact, this Court has held that a "prior conviction for non-overt act criminal conspiracy" to commit strong-arm robbery was not a crime of violence under the Sentencing Guidelines. *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010). That case focused on whether the offense satisfied the residual clause, indicating that the parties and the Court considered it obvious that conspiracy to commit a violent

offense does not satisfy the elements clause where no overt act is required. The same is true here. In sum, and in accordance with *Whitson* and every district court to address the issue after *Johnson*, it is clear that a non-overt act conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under § 924(c)'s elements clause.

CONCLUSION

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

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

/s/ M. Caroline McCrae
M. Caroline McCrae
ASSISTANT FEDERAL PUBLIC DEFENDER
Attorney for Appellant Hernandez Machin
Florida Bar No. 72164
450 S. Australian Ave, Suite 500
West Palm Beach, Florida 33401
Phone: (561) 833-6288

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 7,847 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This pleading also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook font.

/s/ M. Caroline McCrae
M. Caroline McCrae

CERTIFICATE OF SERVICE

I certify that on this 24th day of May, 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/ M. Caroline McCrae
M. Caroline McCrae

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-CV-22680-ROSENBERG/WHITE

CARLOS HERNANDEZ MACHIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

This matter is before the Court upon Movant's motion to vacate pursuant to 28 U.S.C. § 2255, DE 1, which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on any dispositive matters, DE 3. On January 26, 2018, Judge White issued a Report and Recommendation recommending that Movant's § 2255 motion be denied; that no certificate of appealability be issued; the final judgment be entered; and, that the case be closed. DE 17. Movant filed objections, DE 18, and the Government responded, DE 20. The Court has conducted a *de novo* review of Magistrate Judge White's Report and Recommendation, Movant's objections, the Government's response, and the record and is otherwise fully advised in the premises.

Upon review, the Court finds Judge White's recommendations to be well reasoned and correct. The Court agrees with the analysis in Judge White's Report and Recommendation and concludes that Movant's § 2255 motion should be denied, that no certificate of appealability should be issued; the final judgment should be entered; and, that the case should be closed for the reasons set forth within Judge White's Report and Recommendation.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Magistrate Judge White's Report and Recommendation [DE 17] is hereby **ADOPTED**;
2. No certificate of appealability is issued.
3. Final judgment will be entered in separate order;
4. The Clerk of the Court is directed to **CLOSE THIS CASE**.

DONE and ORDERED in Chambers, Fort Pierce, Florida, this 5th day of March, 2018.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to Counsel of Record

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22680-Civ-RLR
(08-20287-Cr-BLG)
MAGISTRATE JUDGE P.A. WHITE

CARLOS HERNANDEZ MACHIN,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF
MAGISTRATE JUDGE

I. INTRODUCTION

This matter is before the court on movant's *pro se* motion to vacate, filed pursuant to 28 U.S.C. § 2255, which attacks the constitutionality of his conviction and sentence for carrying a firearm in furtherance of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924©. Judgment for this offense was entered following a guilty plea in case no. **08-20287-Cr-Gold.**

This case has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B)-©; 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 Proceedings for the United States District Courts.

The court has reviewed the operative § 2255 motion (Cv-DE#1), as well as the relevant records from this case and the

underlying criminal case.[1] As discussed below, the motion should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The court takes the following facts from the stipulated factual basis underlying the indictment and the charges to which movant pleaded guilty. Cr-DE#272 at 20-23.[2]

On March 14, 2008, a confidential informant ("CI") told federal agents that codefendant Leonardo Borrego and his associates were actively committing home invasion robberies and burglaries for narcotics. Id. at 20-21. Further, the CI said that Borrego had solicited him for information that could lead to further such crimes. Id. at 21.

On March 17, 2008, the CI and an undercover detective met with Borrego and other codefendants ("conspirators"). Id. The detective stated that he was a drug courier who would be importing 40 kilograms of cocaine from Colombia and delivering it to an armed stash house in the Miami area. Id. Further, the detective stated that he was looking for a crew to rob the occupants of a stash house of the 40 kilograms of cocaine. Id.

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[1] Courts may consider "the record of prior proceedings" to rule on a § 2255 motion. See Rule 4(b), Rules Governing Section 2255 Proceedings; see also 28 U.S.C. § 2255(b) (courts must review "the files and records of the case").

[2] Unless otherwise noted, all page citations for docket entries refer to the page stamp number located at the top, right-hand corner of the page.

The conspirators indicated that they were interested in committing the robbery. Id. Further, they indicated that they would split the proceeds with the detective half and half. Id.

The conspirators told movant what the detective had told them. Id. Thereafter, movant met and spoke with the detective about the planned cocaine robbery. Id. During these conversations, the detective repeated the same information that he had told the conspirators. Id.

Movant, the conspirators, and other individuals ("robbery crew") agreed to commit the robbery of 40 kilograms of cocaine. Id. at 22. The robbery crew also gathered firearms and ammunition that they intended to use to commit the robbery. Id.

The CI told the robbery crew that the cocaine would be delivered on March 27, 2008. Id. On that day, movant and members of the robbery crew met with the CI to receive final information about the robbery. Id.

Movant and the same crew members drove to the Tamiami Airport to wait for the detective so that they could commit the robbery. Id. Their car contained the following: firearms, ammunition, masks, gloves, tie straps, and other robbery tools. Id. At no time did movant withdraw from the conspiracy. Id. at 23.

B. Procedural Background

1. The Underlying Criminal Case

On April 8, 2008, movant, along with members of the robbery crew, were indicted by a grand jury. Cr-DE#37. The indictment charged movant with the following: Count 1--conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(b)(1)(A); Count 2--attempt to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846; Count 3--conspiracy to affect commerce by means of robbery, in violation of 18. U.S.C. § 1951(a); Count 4--attempt to affect commerce by means of robbery, in violation of 18 U.S.C. § 1951(a); Count 5--conspiracy to carry a firearm in furtherance of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) and (o); Count 6--carrying a firearm in furtherance of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); and Count 7--possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Id. at 1-5.

On September 10, 2008, movant, his counsel, and the government executed a plea agreement. Cr-DE#92. The plea agreement provides that movant would plead guilty to counts 1, 3, and 6 of the indictment. Id. at 1. In exchange, the government would seek dismissal of counts 2, 4, 5, and 7. Id.

On the same day, the district court held a plea hearing. Cr-DE#272. Movant, who was represented by counsel, was sworn in. Id. at 3. Translators were present and the relevant documents (e.g., the indictment and plea agreement) were translated into Spanish.

Id. at 3-5, 8.

The district court told movant that it had to ask him questions. Id. at 5. Further, the district court informed him that, if he did not understand something, he should tell the court or ask to speak with his attorney. Id.

The district court read the plea agreement. Id. Also, the district court verified that movant had signed it. Id. at 16. Movant stated that no one forced or coerced him to sign the plea agreement or enter the guilty plea. Id. at 18. Likewise, movant stated that he signed the plea agreement and pleaded guilty as a matter of free will. Id. at 19.

Movant stated that he had a twelfth-grade education. Id. at 6. He also stated that he had not been treated for mental illness or addiction to narcotic drugs in the prior year. Id. at 6-7. Likewise, he stated that he had not taken any medication in the past twenty-four hours. Id. at 7. He added that he did not have a physical or mental condition that would prevent him from understanding what was happening in court. Id. For her part, his attorney stated that he was competent to enter a guilty plea. Id. at 7-8.

The district court discussed the indictment, which included reading it. Id. at 8-11. Movant's counsel stated that she had reviewed with him the indictment, the government's discovery, and possible defenses to the charges. Id. at 12. Movant agreed that she had done this. Id. He added that he understood the charges. Id.

The district court then discussed minimum and maximum penalties, fines, and supervised release. Id. at 12-15. Movant stated that he understood this information. Id. at 15. He further stated that he had discussed this information with his attorney. Id. The district court informed movant that it could not tell him where it would sentence him with respect to those matters. Id. at 14-15.

Likewise, the district court informed movant that pleading guilty could cause him to be deported. Id. at 15. It also said that he would not be able to withdraw his guilty plea just because the district court did not follow each provision of the plea agreement. Id. at 16. Movant stated that he understood. Id.

The district court then discussed the Federal Sentencing Guidelines. Id. Movant stated that he understood this information. Id. at 17. Further, he stated that he knew his sentence could be higher than the Guidelines range. Id. Additionally, he stated that no one had made any promise or guarantee to him about what his actual sentence would be. Id. at 16-17.

Thereafter, the district court discussed the rights that movant was waiving by pleading guilty. Id. at 19-20. Movant stated that he understood that, by pleading guilty, he was waiving these rights. Id. Likewise, the district court discussed the appeal waiver and its exceptions. Id. at 17-18. Movant stated that he understood this information. Id. at 18.

As a basis for the indictment, the government proffered the facts set forth above in Part II(A). Id. at 20-23. The government stated that it was prepared to prove these facts beyond a

reasonable doubt at trial. Id. at 20. Movant stated that these facts were correct. Id. at 23.

Movant's attorney stated that she was satisfied that he understood his rights and what he was waiving by pleading guilty. Id. at 23-24. Likewise, she stated that there was a sufficient factual basis to each count. Id. For his part, movant stated that he was satisfied with his attorney and that he had no more questions. Id. at 24. Then he pleaded guilty. Id.

Thereupon, the district court so found: (1) movant was fully competent and capable of entering an informed guilty plea; (2) movant was aware of the nature of the charges and the consequences of the plea; (3) movant's guilty plea was knowing and voluntary and supported by facts containing each essential element of the charges; (4) movant's decision to enter into the plea agreement was voluntary and not the result of force, threats, or promises; (5) movant pleaded guilty with the advice of competent counsel; and (6) movant knowingly and voluntarily waived right to appeal the sentence imposed. Id. at 24-25. Accordingly, the district court accepted his plea and adjudicated him guilty of counts 1, 3, and 6 of the indictment. Id. at 25.

Movant's sentencing hearing took place on January 6, 2009. Cr-DE#168. The district court sentenced him to a total term of 211 months in prison. Id. The total term consisted of 151 months on counts 1 and 3 to run concurrently, and 60 months on count 6 to run consecutively to the 151 term for counts 1 and 3. Id.; see also Cr-DE#172.

2. The Instant Case

a. The Initiation of the Proceedings

On June 24, 2016, movant, proceeding *pro se*, filed a § 2255 motion to vacate. Cv-DE#1. The motion purports to contain three claims. See id. at 4-5, 7. However, it contains one essential claim: his conviction under 18 U.S.C. § 924© for carrying a firearm in furtherance of a crime of violence and a drug trafficking crime is invalid in the wake of Johnson v. United States, 135 S. Ct. 2551 (2015). See id.

Contemporaneously, movant filed a motion to appoint counsel. Cv-DE#4. The court granted the motion and appointed an Assistant Federal Defender to represent movant. Cv-DE#8.

On January 5, 2017, through counsel, movant filed a memorandum in support of his motion to vacate. Cv-DE#14. To understand movant's argument, the court must provide some background regarding Johnson and 18 U.S.C. § 924©.

b. Johnson

Johnson involved the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Under the ACCA, "a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a 'violent felony[.]'" Johnson, 135 S. Ct. at 2555 (citing 18 U.S.C. § 924(e)(2)(B)). The ACCA defines "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year . . . that--

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

18 U.S.C. § 924(e)(2)(B) (emphasis added).

"The closing words of this definition, [underlined] above, have come to be known as the Act's residual clause." Johnson, 135 S. Ct. at 2556. The Johnson Court held that "imposing an increased sentence under the residual clause of the [ACCA] violates . . . due process." Id. at 2563. The Court reasoned that the "residual clause . . . [was] unconstitutionally vague." Id. at 2557.

c. 18 U.S.C. § 924©

Section 924© "provides for a mandatory consecutive sentence for any defendant who uses or carries a firearm during a crime of violence or a drug-trafficking crime." Ovalles v. United States, 861 F.3d 1257, 1263 (11th Cir. 2017) (citing 18 U.S.C. § 924(c)(1)).

For the purposes of § 924©, "crime of violence" means an offense that is a felony and:

> (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).

The former clause, § 924(c)(3)(A), is known as the "use-of-force clause." Ovalles, 861 F.3d at 1263. The latter clause, § 924(c)(3)(B), is known as the "risk-of-force clause." Id.

In Ovalles, the Eleventh Circuit considered whether Johnson rendered the risk-of-force clause unconstitutionally vague. The movant argued that § 924(c)(3)(B)'s risk-of-force clause was "nearly identical to" the ACCA's unconstitutionally vague residual clause. Id. at 1261. Thus, she reasoned that the risk-of-force clause was unconstitutionally vague. Id. In turn, she concluded that her conviction under § 924© for carrying a firearm during a "crime of violence" was invalid. See id. at 1259, 1261. That is, "she was no longer guilty of violating § 924© because her predicate offense of attempted carjacking . . . no longer qualifie[d] as a crime of violence under [the risk-of-force] clause." Id. at 1261. The Ovalles court rejected this argument, holding that "Johnson's void-for-vagueness ruling does not apply to or invalidate the 'risk-of-force' clause in § 924(c)(3)(B)." Id. at 1265.

d. Movant's Argument

Like the movant in Ovalles, movant argues that "the residual clause in 18 U.S.C. § 924(c)(3)(B) is void for vagueness in light of *Johnson*[.]" Cv-DE# at 24. Thus, movant requests the court to

vacate his conviction and 60-month consecutive sentence for carrying a firearm in furtherance of a crime of violence and a drug trafficking crime (Count 6). Id. at 24-25.

Anticipating potential counterarguments, movant further argues that: "conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) [Count 3] does not qualify as a 'crime of violence'" under § 924(c)(3)(A)[.]" Id. at 24. Further, movant argues that his "§ 924© conviction cannot be validated by his conviction for conspiracy to possess with intent to distribute five or more kilograms of cocaine [Count 1]." Id.

Problematically, movant premises these additional arguments on the incorrect assertion that Johnson invalidated § 924(c)(3)(A)(B)'s risk-of-force clause. In his defense, the Eleventh Circuit decided Ovalles after he filed both his motion and memorandum in support. But the court need not further explain these arguments because their premise is false.

Still, the court notes that movant argues that his "§ 924© conviction suffers from the infirmity of multiplicitous predicates." Id. at 18. Movant appears to make this argument to support his contention that his "conviction for conspiracy to possess with intent to distribute five kilograms or more of cocaine [count 1] is not a proper predicate offense for [his] § 924© conviction[.]" Id. That is, movant seems to make this argument to rebut the potential counterargument that his conviction on count 1 would sustain his conviction under § 924© even if Johnson invalidated the risk-of-force clause. See id. at 18-21.

However, this argument is not totally clear, and one could arguably read it for the proposition that movant's § 924© conviction is invalid solely because count 6 allegedly contains duplicitous/multiplicitous predicates.

The court also declines to explain this argument further. As explained below, assuming movant is arguing that count 6 of the indictment is deficient due to duplicity/multiplicity, he waived this argument by voluntarily pleading guilty.

III. DISCUSSION

A. Whether Johnson Invalidates Movant's § 924© Conviction

The undersigned rejects this argument summarily for the reasons stated in Part II(B)(2), *supra*. As noted, movant contends that his § 924(c) conviction for carrying a firearm in furtherance of a crime of violence and a drug trafficking crime is invalid. To support this argument, he contends that Johnson invalidated § 924(c)(3)(A)(B)'s risk-of-force clause. This clause, he continues, served as the basis for the determination that the conduct in count 6 constituted a "crime of violence" under § 924(c). To reiterate, however, the Eleventh Circuit held in Ovalles that Johnson did not invalidate the risk-of-force clause. Thus, while movant made this argument in good faith, it manifestly lacks merit. In short, movant has not shown that Johnson rendered his conviction under § 924© invalid.

B. Whether Count 6 is Deficient Due to Duplicity/Multiplicity

Again, one can arguably read movant's memorandum in support for the proposition that his § 924(c) conviction is invalid because count 6 allegedly contains duplicitous/multiplicitous predicates. But, as noted, his voluntary guilty plea would bar this argument.

"A guilty plea involves the waiver of a number of a defendant's constitutional rights, and must therefore be made knowingly and voluntarily to satisfy the requirements of due process." United States v. Moriarty, 429 F.3d 1012, 1019 (11th Cir. 2005) (per curiam) (citing, *inter alia*, Brady v. United States, 397 U.S. 742, 748 (1970)). "A court accepting a guilty plea must comply with Rule 11 and specifically address three 'core principles,' ensuring that a defendant (1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea." Id. (citation omitted).

"When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Tollett v. Henderson, 411 U.S. 258, 267 (1973). In that vein, a "guilty plea waives all nonjurisdictional defects occurring prior to the time of the plea[.]" Stano v. Dugger, 921 F.2d 1125, 1150 (11th Cir. 1991)(en banc) (citation omitted); see also Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992) (per curiam) ("A defendant who enters a plea of guilty waives all nonjurisdictional challenges to the constitutionality of the conviction, and only an attack on

the voluntary and knowing nature of the plea can be sustained." (citation omitted)).

Here, the record shows that movant knowingly and voluntarily pleaded guilty. Movant was represented by counsel at the plea hearing. Translators were present and the relevant documents were translated into Spanish. The district judge explained the purpose of the hearing and told movant that he could ask questions and consult with his attorney.

The district court reviewed the plea agreement. Movant stated that he freely entered into the agreement and that no one forced or coerced him to sign in.

Regarding competency, movant stated that he had completed twelfth grade and did not have any physical or mental condition that would prevent him from understanding the proceedings. He also stated that had not been treated for mental illness or drugs in the past year and had not taken any medication in the past twenty-four hours. His attorney stated that he was competent to enter a guilty plea, and she was "in the best position to determine whether [his] competency [was] suspect." Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996).

The district court discussed the indictment, which included reading it. Id. at 8-11. Movant's counsel stated that she had reviewed with movant the indictment, discovery, and possible defenses. Id. at 12. Movant agreed that she had done this. Id. He added that he understood the charges. Id.

The district court discussed several consequences of pleading guilty, including minimum and maximum penalties and the

risk of deportation. He stated that he understood and that he had discussed these matters with his attorney. The district court also discussed the Guidelines. Movant stated that he understood that he would not be able to withdraw his plea just because he received an adverse sentence. He added that no one had promised or guaranteed him a specific sentence.

Additionally, the district court discussed the rights that movant was waiving by pleading guilty. Movant stated that he understood that he was waiving these rights, including the right to appeal.

The government read the factual basis of the indictment and stated that it could prove these facts beyond a reasonable doubt at trial. Movant did not challenge this assertion and agreed that the facts were correct.

The district court found, *inter alia*, that: (1) movant was capable of entering an informed guilty plea; (2) movant's decision to plead guilty was voluntary and not the result of force, threats, or promises; and (3) movant knowingly and voluntarily waived right to appeal the sentence imposed.

For these reasons, movant knowingly and voluntarily pleaded guilty. He has not argued, much less shown, otherwise. The indictment was filed on April 8, 2008. This date came well before movant pleaded guilty on September 10, 2008. Furthermore, the notion that count 6 contains duplicitous/multiplicitous predicates bears no relation to the voluntariness, or lack thereof, of movant's guilty plea. Consequently, assuming he argues that count 6 of the indictment is deficient due to

duplicity/multiplicity, this argument is waived.[3]

IV. CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus must obtain a certificate of appealability. 28 U.S.C. §2253(c)(1). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." Id. § 2253(c)(2). When a district court rejects a petitioner's constitutional claims on the merits, "a petitioner must show that reasonable jurists could debate whether . . . 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 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). By contrast, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows . . . 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. In view of the entire record, the court denies a certificate of appealability. If movant disagrees, he may so argue in any objections filed with the district court.

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[3] This argument would also be procedurally defaulted because movant did not appeal his conviction and sentence. See McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001) (citing United States v. Frady, 456 U.S. 152, 167-68 (1982)). The appeal waiver would not "constitute 'cause' for failing to take a direct appeal." Garcia-Santos v. United States, 273 F.3d 506, 508 (2d Cir. 2001). Nor has movant shown that he is "actually innocent." Lynn v. United States, 365 F.3d 1225, 1234-35 (11th Cir. 2004) (per curiam).

V. RECOMMENDATIONS

Based on the foregoing, it is recommended that movant's § 2255 motion (Cv-DE#1) be DENIED; that no certificate of appealability issue; that final judgment be entered; and that this 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 26th day of January, 2018.

UNITED STATES MAGISTRATE JUDGE

cc: Carlos Hernandez Machin
Reg. No. 80369-004
Coleman Medium
Federal Correctional Institution
Inmate Mail/Parcels
Post Office Box 1032
Coleman, FL 33521

Anne Marie McPartland-Lyons, AFD
Federal Public Defender's Office
150 W Flagler Street
Miami, FL 33130-1556
Email: anne_lyons@fd.org

Marlene Rodriguez, AUSA
U.S. Attorney's Office
99 NE 4 Street
Suite 300
Miami, FL 33132
Email: marlene.rodriguez@usdoj.gov

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

CARLOS HERNANDEZ MACHIN

JUDGMENT IN A CRIMINAL CASE

Case Number: 08-20287-CR-GOLD

USM Number: 80369-004

Counsel For Defendant: AFPD Ann M. Lyons
Counsel For The United States: James Koukios
Court Reporter: Joseph Millikan

The defendant pleaded guilty to Count(s) 1, 3 and 6 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 five kilograms or more of cocaine.	3/27/2008	1
18 U.S.C. §1951(a)	Conspiracy to affect commerce by means of robbery.	3/27/2008	3
18 U.S.C. §924(c)(1)(A)	Carrying a firearm in furtherance of a crime of violence and a drug trafficking crime.	3/27/2008	6

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

Counts 2, 4, 5 and 7 are dismissed on the motion of the United States.

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:
1/6/2009

ALAN S. GOLD
United States District Judge

January 7, 2009

DEFENDANT: CARLOS HERNANDEZ MACHIN
CASE NUMBER: 113c 1:08CR20287-03-GOLD

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **211 months**. The term consists of **151 months** as to Counts 1 and 3, to be served concurrently with each other and **60 months** as to Count 6, to be served consecutively to the terms imposed in Counts 1 and 3.

The Court makes the following recommendations to the Bureau of Prisons:
The defendant be designated as close to the South Florida area as possible.

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: CARLOS HERNANDEZ MACHIN
CASE NUMBER: 113c 1:08CR20287-03-GOLD

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five years**. The term consists of **five years** as to Counts 1and 6 and **three years** as to Count 3, all such terms shall run concurrently.

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.

DEFENDANT: CARLOS HERNANDEZ MACHIN
CASE NUMBER: 113c 1:08CR20287-03-GOLD

SPECIAL CONDITIONS OF SUPERVISION

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

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

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

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

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

DEFENDANT: CARLOS HERNANDEZ MACHIN
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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
$300.00	**$**	**$**

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

DEFENDANT: CARLOS HERNANDEZ MACHIN
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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 **$300.00** due immediately.

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

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

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

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

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

The defendant shall forfeit the defendant's interest in the following property to the United States:
(a) one High Standard Model K1200 Riot shotgun;
(b) one Smith and Wesson .38 caliber revolver;
(c) one Beretta .25 caliber semi-automatic pistol;
(d) one Glock .40 caliber semi-automatic pistol; and
(e) ammunition.

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.