APPENDIX

APPENDIX

A-1

911 F.3d 1356
United States Court of Appeals, Eleventh Circuit.

Curtis SOLOMON, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 17-14830
|
Non-Argument Calendar
|
(January 8, 2019)

Synopsis

Background: Following affirmance of his convictions for Hobbs Act conspiracy, carrying firearm during and in relation to crime of violence and related offenses, 433 Fed.Appx. 844, federal inmate filed successive motion to vacate, set aside, or correct sentence. The United States District Court for the Southern District of Florida, Nos. 0:16-cv-61410-DMM, 0:08-cr-60090-DMM-1, Donald M. Middlebrooks, J., denied motion, and inmate appealed.

[Holding:] The Court of Appeals held that district court lacked jurisdiction over inmate's successive § 2255 motion.

Affirmed.

West Headnotes (3)

[1] **Criminal Law**
⇨ Proceedings

Once Court of Appeals has authorized federal prisoner to file second or successive § 2255 motion, district court has jurisdiction to determine for itself if motion relies on new rule of constitutional law, made retroactive to cases on collateral review by Supreme Court, that was previously unavailable, and if motion meets those requirements, district court has jurisdiction to decide whether any relief is due under motion; if motion does not meet those requirements, it lacks jurisdiction to decide whether motion has any merit. 28 U.S.C.A. § 2255(h).

Cases that cite this headnote

[2] **Criminal Law**
⇨ Proceedings

In determining whether to grant successive § 2255 motion to vacate, district court owes no deference to Court of Appeals' order authorizing movant to file successive § 2255 motion, but instead must decide issues de novo. 28 U.S.C.A. § 2255(h).

Cases that cite this headnote

[3] **Criminal Law**
⇨ Particular issues and cases

Residual clause defining "crime of violence" in statute creating offense of using or carrying firearm in furtherance of crime of violence was not unconstitutionally vague, and thus district court lacked jurisdiction over federal inmate's successive § 2255 motion to vacate alleging that Supreme Court's decision in *Johnson v. United States*, invalidating Armed Career Criminal Act's (ACCA) residual clause, also invalidated his conviction for carrying firearm during and in relation to crime of violence. 18 U.S.C.A. § 924(c)(3)(B), (e)(1); 28 U.S.C.A. § 2255(h).

Cases that cite this headnote

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Appeal from the United States District Court for the Southern District of Florida, D.C. Docket Nos. 0:16-cv-61410-DMM, 0:08-cr-60090-DMM-1

Before WILLIAM PRYOR, GRANT and HULL, Circuit Judges.

Opinion

PER CURIAM:

***1357** Curtis Solomon appeals following the district court's denial of his authorized successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Back in 2017, the district court granted Solomon a certificate of appealability ("COA") on the issue of whether the Supreme Court's decision in Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), applies to 18 U.S.C. § 924(c)(3)(B). Subsequently, the Supreme Court decided Sessions v. Dimaya, 584 U.S. ——, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), and we held this appeal pending our en banc decision in Ovalles v. United States ("Ovalles II"), 905 F.3d 1231 (11th Cir. 2018) (en banc). After review, we affirm.

I. PROCEDURAL HISTORY

A. Convictions, Direct Appeal, and First § 2255 Motion

In 2008, a federal grand jury charged Solomon with: (1) one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); (2) one count of conspiracy to use and carry a firearm during and in relation to, and to possess a firearm in furtherance of, the Hobbs Act conspiracy charged in Count 1, in violation of 18 U.S.C. § 924(c)(1)(A) and (o) (Count 2); (3) 17 substantive counts of Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35); and (4) 17 substantive counts of carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1) and 2 (Counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, and 36). Each of the substantive § 924(c) counts was predicated on the preceding substantive Hobbs Act robbery count. For example, Count 3 charged Solomon with the December 11, 2007 robbery of a Papa John's Pizza employee, and Count 4 correspondingly charged him with carrying a firearm during and in relation to that robbery. All in all, the indictment charged that from December 2007 through late March 2008, Solomon used a firearm to rob a variety of restaurants, including several pizza places and Chinese food restaurants and multiple Subway locations.

Solomon pled not guilty and proceeded to trial. In 2009, following a 10-day trial, the jury found Solomon guilty on all but two of the charged counts, Counts 23 and 24. Thus, Solomon was convicted of: (1) one count of conspiracy to commit Hobbs Act robbery; (2) one count of conspiracy to carry a firearm during and in relation to, and to possess a firearm in furtherance of, the Hobbs Act conspiracy; (3) 16 substantive counts of Hobbs Act robbery; and (4) 16 substantive § 924(c) counts.

At Solomon's sentencing in 2009, the district court imposed a total sentence of 4,641 months' imprisonment. This sentence consisted of: (1) 57 months each as to Counts 1 (Hobbs Act conspiracy), 2 (§ 924(c) conspiracy), and 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 25, 27, 29, 31, 33, and 35 (substantive Hobbs Act robberies), to be served concurrently with each other; (2) a consecutive sentence of 84 months as to Count 4 (first substantive § 924(c) conviction); and (3) 300 months each as to Counts 6, 8, 10, 12, 14, 16, 18, 20, 22, 26, 28, 30, 32, 34, and 36 (additional § 924(c) convictions), to be served consecutive to each other and to all of the other counts.

Solomon appealed, raising several conviction issues and challenging the imposition of consecutive sentences on his substantive § 924(c) convictions. See United States v. Lewis, 433 F. App'x 844, 845-46 (11th Cir. 2011) (unpublished). In 2011, this Court affirmed Solomon's convictions and sentences. Id. at 847. In 2012, Solomon filed his first 28 U.S.C. § 2255 motion to ***1358** vacate, set aside, or correct his sentence, raising two claims of ineffective assistance of trial counsel. In 2013, the district court denied Solomon's original § 2255 motion and denied him a COA. In 2014, this Court also denied Solomon a COA.

B. June 2016 Successive § 2255 Motion

On June 10, 2016, Solomon filed an application for leave to file a successive § 2255 motion with this Court. In relevant part, Solomon's June 2016 application sought to challenge his § 924(c) convictions and sentences in light of the Supreme Court's decision in Johnson, which

invalidated the residual clause of the Armed Career Criminal Act ("ACCA") as unconstitutionally vague.

On July 8, 2016, this Court denied in part and granted in part Solomon's application. This Court denied Solomon's application as to his substantive § 924(c) convictions in Counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 26, 28, 30, 32, 34, and 36. Each of those convictions corresponded to a companion substantive Hobbs Act robbery conviction. Following our precedent in In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016), this Court held that substantive Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s elements clause. [1]

1 Subsequent to Saint Fleur, five other circuits have held that Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. See United States v. Barrett, 903 F.3d 166, 174 (2d Cir. 2018), pet. for cert. filed, No. 18-6985 (U.S. Dec. 11, 2018); United States v. Melgar-Cabrera, 892 F.3d 1053, 1064-66 (10th Cir.), cert. denied, — U.S. ——, 139 S.Ct. 494, — L.Ed.2d ——, 2018 WL 5017618 (Nov. 13, 2018); Diaz v. United States, 863 F.3d 781, 783-84 (8th Cir. 2017); United States v. Gooch, 850 F.3d 285, 291-92 (6th Cir.), cert. denied, — U.S. ——, 137 S.Ct. 2230, 198 L.Ed.2d 670 (2017); United States v. Rivera, 847 F.3d 847, 848-49 (7th Cir.), cert. denied, — U.S. ——, 137 S.Ct. 2228, 198 L.Ed.2d 669 (2017). This Court also held again in a direct appeal case that Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A). United States v. St. Hubert, 909 F.3d 335, 345-51 (11th Cir. 2018).

This Court, however, granted Solomon's application as to his § 924(c) conspiracy conviction in Count 2 because that conviction corresponded to his Hobbs Act conspiracy conviction in Count 1. This Court explained that "an applicant has made a prima facie case, for purposes of second or successive review, when seeking to challenge a conviction for conspiracy to commit Hobbs Act robbery based on an argument that such a conviction meets only the residual clause of § 924(c)." (citing In re Pinder, 824 F.3d 977 (11th Cir. 2016)). Accordingly, as a threshold determination, this Court granted in part Solomon's application to file a successive § 2255 motion, but only with respect to his challenge to his § 924(c) conspiracy-related conviction in Count 2.

C. District Court Proceedings on Successive § 2255 Motion

Following this Court's order, Solomon's case was returned to the district court for adjudication of his authorized successive § 2255 motion. Solomon was represented by counsel in the district court. In July 2017, a magistrate judge issued a report and recommendation ("R&R") recommending that Solomon's successive § 2255 motion be denied. As to the merits of Solomon's claim, the magistrate judge determined, based on our then-recent decision in Ovalles v. United States ("Ovalles I"), 861 F.3d 1257 (11th Cir. 2017), vacated on reh'g en banc, 905 F.3d 1231 (11th Cir. 2018), that Johnson's vagueness holding did not apply to or invalidate § 924(c)(3)(B)'s residual clause. The magistrate judge noted that Solomon did not dispute that his Hobbs Act conspiracy conviction satisfied § 924(c)(3)(B)'s residual ***1359** clause, but rather argued only that the residual clause was unconstitutional. Because that argument lacked merit in light of Ovalles I, the magistrate judge concluded that Solomon's successive § 2255 motion should be denied. [2]

2 In the interest of completeness, the magistrate judge went on to address whether, if Johnson did apply, Hobbs Act conspiracy would qualify under § 924(c)(3)(A)'s elements clause. The magistrate judge determined that it would not. The district court, however, did not adopt that portion of the magistrate judge's R&R, as it was unnecessary to the resolution of Solomon's successive § 2255 motion.

Solomon objected to the R&R. Solomon argued that the district court should not rely on Ovalles I because (1) this Court had withheld the mandate in that case, indicating that it might be reheard en banc, and (2) Sessions v. Dimaya was then pending in the Supreme Court and might impact the reasoning applied in Ovalles I to distinguish § 924(c) from the ACCA. Solomon also contended that, even if Ovalles I correctly held that § 924(c)(3)(B)'s residual clause was constitutional, his § 924(c) conspiracy conviction was still invalid because Hobbs Act conspiracy did not qualify as a crime of violence under § 924(c)(3)(B)'s residual clause. Specifically, Solomon argued that any risk of injury that may occur in the context of a Hobbs Act conspiracy "arises from the object of the conspiracy, which is a separate and distinct offense that is temporally removed from the scope-of-the-risk analysis under § 924(c)(3)(B)." In other words, Solomon contended that the Hobbs Act conspiracy itself does not require proof of any overt act and thus a conspiracy poses no risk of injury.

The government responded that Ovalles I was binding precedent regardless of whether the mandate had issued and should be applied in Solomon's case. The government further asserted that Solomon's alternative argument—that Hobbs Act conspiracy did not qualify under the residual clause—was not cognizable in the context of a successive § 2255 motion. The government explained that this Court's grant of leave for Solomon to file a successive § 2255 motion was limited to his claim that his § 924(c) conviction in Count 2 was invalid in light of Johnson and did not encompass other challenges to the validity of that conviction.

Over Solomon's objections, the district court adopted the R&R's recommendation that Solomon's motion be denied "because Johnson does not apply to § 924(c)(3)(B)." However, the district court granted Solomon a COA "as to whether Johnson applies to § 924(c)(3)(B)." Solomon now appeals.

II. LEGAL BACKGROUND

The legal landscape in this case has developed since the district court ruled on Solomon's authorized successive § 2255 motion. We therefore detail those legal developments below before turning to the merits of Solomon's case.

Following the Supreme Court's decision in Johnson and this Court's decision in Ovalles I, the Supreme Court decided Sessions v. Dimaya. In Dimaya, the Supreme Court addressed whether Johnson's vagueness holding as to the ACCA's residual clause applied to and invalidated the residual clause in 18 U.S.C. § 16(b)'s crime of violence definition. 584 U.S. at ——, 138 S.Ct. at 1210-12. Section 16(b) defined a crime of violence as "any other offense that is a felony and 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. § 16(b). Strictly applying the ordinary case or categorical ***1360** approach, the Supreme Court in Dimaya held that § 16(b)'s residual clause, as incorporated into the Immigration and Nationality Act, like the ACCA's residual clause in Johnson, was void for vagueness and thus unconstitutional. Id. at 1210-11, 1213-16, 1218-23.

After the Supreme Court issued its decision in Dimaya, this Court vacated the opinion in Ovalles I and granted rehearing en banc. Ovalles v. United States, 889 F.3d 1259 (11th Cir. 2018). On rehearing en banc, this Court expressly considered the effect, if any, of Johnson and Dimaya on § 924(c)(3)(B)'s residual clause which, like § 16(b), defines a crime of violence as "an offense that is a felony" and 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." Ovalles II, 905 F.3d at 1233-34, 1236-40; 18 U.S.C. § 924(c)(3)(B).

In Ovalles II, the en banc Court determined that § 924(c)(3)(B)'s residual clause can plausibly be interpreted to incorporate either a categorical or a conduct-based approach. See Ovalles II, 905 F.3d at 1251. The en banc Court explained that, for the reasons outlined in Johnson and Dimaya, application of the categorical approach would render § 924(c)(3)(B)'s residual clause unconstitutionally vague. Id. at 1233, 1239-40. By contrast, the en banc Court explained, if § 924(c)(3)(B)'s residual clause is interpreted to incorporate the conduct-based approach, it is not unconstitutionally vague. Id. at 1233-34, 1240. As such, the en banc Court determined that the canon of constitutional doubt required us to adopt the statute-saving conduct-based interpretation. See id. at 1240, 1251-52. Given that the conduct-based approach applied to § 924(c)(3)(B)'s residual clause, the en banc Court held that the residual clause was not unconstitutionally vague in light of Johnson and Dimaya. Id. at 1252.

Relying on Ovalles II, this Court has since held that a federal prisoner's proposed vagueness challenge to § 924(c)(3)(B)'s residual clause under Johnson and Dimaya could not satisfy the statutory requirements of § 2255(h). In re Garrett, 908 F.3d 686, 687-89 (11th Cir. 2018). The Garrett Court explained that, given Ovalles II 's holding that § 924(c)(3)(B) is not unconstitutionally vague, "neither Johnson nor Dimaya supplies any 'rule of constitutional law'—'new' or old, 'retroactive' or nonretroactive, 'previously unavailable' or otherwise—that can support a vagueness-based challenge to the residual clause of section 924(c)." Id. at 689. This Court added that, even though Garrett was sentenced prior to Ovalles II, during a time when this Court interpreted § 924(c) to require a categorical approach, construing his claim to challenge the use of the categorical approach would "make no difference" because the substitution of

one statutory interpretation for another did not amount to a new rule of constitutional law. Id.

III. DISCUSSION

[1] As a preliminary matter, we note that when this Court authorizes a federal prisoner to file a successive § 2255 motion in the district court, that authorization is a threshold determination and narrowly circumscribed. The successive motion does not stand in the place of a first § 2255 motion, allowing the movant to raise any claim that would have been cognizable in an original § 2255 proceeding. Rather, the claims raised in the successive § 2255 motion must still meet the requirements of § 2255(h). See Randolph v. United States, 904 F.3d 962, 964 (11th Cir. 2018). That is, "[o]nce we have authorized a movant to file a second or successive § 2255 motion, the district court has jurisdiction to determine for itself if the motion relies on 'a new rule ***1361** of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.' " Id. (quoting 28 U.S.C. § 2255(h)(2)). "If the motion meets those requirements, the district court has jurisdiction to decide whether any relief is due under the motion; if the motion does not meet the § 2255(h) requirements, the court lacks jurisdiction to decide whether the motion has any merit." Id.

[2] Furthermore, in making the § 2255(h) determination, the district court owes no deference to our order authorizing the movant to file a successive § 2255 motion. Id. at 965. Our threshold determination that the movant made a prima facie showing that he satisfied § 2255(h)'s criteria does not conclusively resolve the issue. In re Moore, 830 F.3d 1268, 1271 (11th Cir. 2016); see also Jordan v. Sec'y, Dep't of Corrs., 485 F.3d 1351, 1357-58 (11th Cir. 2007). Instead, "[w]hen we issue an order authorizing a habeas petitioner to file a second or successive § 2255 motion, the district court is to decide the § 2255(h) issues fresh, or in the legal vernacular, de novo." Randolph, 904 F.3d at 965 (quotation marks omitted). Our "first hard look" at whether the § 2255(h) requirements have been met then comes, if at all, on appeal from the district court's decision. Moore, 830 F.3d at 1271 (quoting Jordan, 485 F.3d at 1358).

[3] Here, the district court denied Solomon's authorized successive § 2255 motion because it concluded, based on our then-applicable precedent in Ovalles I, that Johnson's vagueness holding did not apply to or invalidate § 924(c)(3)(B)'s residual clause. The district court framed this as a determination on the merits of Solomon's successive § 2255 motion. In essence, however, in concluding that Johnson did not apply to § 924(c)(3)(B), the district court effectively determined that Solomon's successive § 2255 motion failed to satisfy § 2255(h)'s requirements because, in light of Ovalles I, Johnson did not supply a new rule of constitutional law that could support Solomon's challenge to his § 924(c) conviction and sentence in Count 2. See Garrett, 908 F.3d at 689. Though Ovalles I has since been vacated, the district court's conclusion remains correct in light of our en banc decision in Ovalles II. As this Court explained in Garrett, given Ovalles II 's holding that § 924(c)(3)(B)'s residual clause is not unconstitutionally vague, a Johnson- or Dimaya-based vagueness challenge to § 924(c)'s residual clause cannot satisfy § 2255(h)(2)'s "new rule of constitutional law" requirement. Id. Likewise, any challenge Solomon might raise to the district court's use of the categorical approach and its application of § 924(c)(3)(B)'s residual clause in his case would not satisfy § 2255(h) either, as such a claim would be statutory in nature. See id. Ovalles II and Garrett foreclose even the most generous reading of Solomon's challenges, both constitutional and statutory, to his § 924(c) conviction in Count 2. See United States v. St. Hubert, 909 F.3d 335, 346 (11th Cir. 2018) ("[L]aw established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on all subsequent panels of this Court, including those reviewing direct appeals and collateral attacks ....").

IV. CONCLUSION

For the foregoing reasons, the district court did not err in denying Solomon's authorized successive § 2255 motion, and we affirm.

AFFIRMED.

All Citations

911 F.3d 1356, 27 Fla. L. Weekly Fed. C 1633

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-60090 CR - MIDDLEBROOKS(s)
18 U.S.C. § 1951(a)
18 U.S.C. § 924(o)
18 U.S.C. § 924(c)(1)(A)
18 U.S.C. § 924(d)(1)

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S.D. OF FLA.

UNITED STATES OF AMERICA

vs.

CURTIS SOLOMON and
DEVON CHANCE,

Defendants.
_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

From at least as early as December, 2007, the exact date being unknown to the Grand Jury, to as late as on or about March 27, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly and intentionally combine, conspire, confederate, and agree with each other and persons known and unknown to the Grand Jury, to obstruct, delay, and affect interstate commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b)(1) and (b)(3), in that the defendants did unlawfully plan to take money and property from various businesses

by means of actual and threatened force, violence, and fear of injury to said individuals; in violation of Title 18, United States Code, Section 1951(a).

COUNT 2

From at least as early as December, 2007, the exact date being unknown to the Grand Jury, to as late as on or about March 27, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly and intentionally combine, conspire, confederate, and agree with each other and persons known and unknown to the Grand Jury, to use and carry a firearm during and in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 1 of this Indictment, which is a felony prosecutable in a court of the United States, and to possess said firearm in furtherance of such crimes, in violation of Title 18, United States Code, Section 924(c)(1)(A); all in violation of Title 18, United States Code, Section 924(o).

COUNT 3

On or about December 20, 2007, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly and intentionally obstruct, delay, and affect interstate commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did take property belonging to Ming Kong Restaurant from an individual employed by

Ming Kong Restaurant, who at the time of the robbery had said property in their custody or possession, by means of actual and threatened force, violence, and fear of injury to said individual; in violation of Title 18, United States Code, Section 1951(a).

COUNT 4

On or about December 20, 2007, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly carry a firearm during and in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 3 of this Indictment, which is a felony prosecutable in a court of the United States, and did possess said firearm in furtherance of such crime; all in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT 5

On or about January 17, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly and intentionally obstruct, delay, and affect interstate commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did take property belonging to Subway Restaurant from an individual employed by Subway Restaurant, who at the time of the robbery had said property in their custody or possession, by means of actual and threatened force, violence, and fear of injury to said individual; in violation

of Title 18, United States Code, Section 1951(a).

COUNT 6

On or about January 17, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly carry a firearm during and in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 5 of this Indictment, which is a felony prosecutable in a court of the United States, and did possess said firearm in furtherance of such crime; all in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT 7

On or about February 15, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly and intentionally obstruct, delay, and affect interstate commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did take property belonging to Dogma Grill Restaurant from an individual employed by Dogma Grill Restaurant, who at the time of the robbery had said property in their custody or possession, by means of actual and threatened force, violence, and fear of injury to said individual; in violation of Title 18, United States Code, Section 1951(a).

COUNT 8

On or about February 15, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly carry a firearm during and in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 7 of this Indictment, which is a felony prosecutable in a court of the United States, and did possess said firearm in furtherance of such crime; all in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT 9

On or about February 26, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly and intentionally obstruct, delay, and affect interstate commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did take property belonging to Papa John's Restaurant from an individual employed by Papa John's Restaurant, who at the time of the robbery had said property in their custody or possession, by means of actual and threatened force, violence, and fear of injury to said individual; in violation of Title 18, United States Code, Section 1951(a).

COUNT 10

On or about February 26, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly carry a firearm during and in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 9 of this Indictment, which is a felony prosecutable in a court of the United States, and did possess said firearm in furtherance of such crime; all in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT 11

On or about March 2, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly and intentionally obstruct, delay, and affect interstate commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did take property belonging to King's Super Buffet Restaurant from an individual employed by King's Super Buffet Restaurant, who at the time of the robbery had said property in their custody or possession, by means of actual and threatened force, violence, and fear of injury to said individual; in violation of Title 18, United States Code, Section 1951(a).

COUNT 12

On or about March 2, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly carry a firearm during and in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 11 of this Indictment, which is a felony prosecutable in a court of the United States, and did possess said firearm in furtherance of such crime; all in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT 13

On or about March 7, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly and intentionally obstruct, delay, and affect interstate commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did take property belonging to Subway Restaurant from an individual employed by Subway Restaurant, who at the time of the robbery had said property in their custody or possession, by means of actual and threatened force, violence, and fear of injury to said individual; in violation of Title 18, United States Code, Section 1951(a).

COUNT 14

On or about March 7, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly carry a firearm during and in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 13 of this Indictment, which is

a felony prosecutable in a court of the United States, and did possess said firearm in furtherance of such crime; all in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT 15

On or about March 10, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly and intentionally obstruct, delay, and affect interstate commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did take property belonging to Doughboy's Pizzeria & Italian Restaurant from an individual employed by Doughboy's Pizzeria & Italian Restaurant, who at the time of the robbery had said property in their custody or possession, by means of actual and threatened force, violence, and fear of injury to said individual; in violation of Title 18, United States Code, Section 1951(a).

COUNT 16

On or about March 10, 2008, in Broward County, in the Southern District of Florida, the defendants,

CURTIS SOLOMON
and
DEVON CHANCE,

did knowingly carry a firearm during and in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 15 of this Indictment, which is a felony prosecutable in a court of the United States, and did possess said firearm in furtherance of such crime; all in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

FORFEITURE

1. The allegations of Counts 1 through 16 of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeitures to the United States of America of property in which the defendants have an interest pursuant to the provisions of Title 28, United States Code, Section 2461, Title 18, United States Code, Section 924(d)(1), and the procedures outlined at Title 21, United States Code, Section 853.

2. Upon the conviction of any violation of Title 18, United States Code, Sections 1951(a) or 924(c)(1), the defendants shall forfeit to the United States any firearm or ammunition involved in or used in the commission of said violation.

3. The property subject to forfeiture includes, but is not limited to:

(a) a Ruger, model Blackhawk, .357 revolver bearing serial number 3072365; and

(b)approximately five (5) rounds of S & P .357 ammunition.

All pursuant to Title 28, United States Code, Section 2461, Title 18, United States Code, Section 924(d)(1), and Title 21, United States Code, Section 853.

A TRUE BILL

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

BRUCE O. BROWN
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

CURTIS SOLOMON and
DEVON CHANCE

Defendants.
_____/

CASE NO. 08-60090-CR-MIDDLEBROOKS(s)

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

___ Miami ___ Key West
_X_ FTL ___ WPB ___ FTP

New Defendant(s) Yes _X_ No ___
Number of New Defendants 1
Total number of counts 16

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
List language and/or dialect English

4. This case will take 6-10 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	___	Petty	___
II	6 to 10 days	X	Minor	___
III	11 to 20 days	___	Misdem.	___
IV	21 to 60 days	___	Felony	X
V	61 days and over	___		

6. Has this case been previously filed in this District Court? (Yes or No) No
If yes:
Judge: _____ Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) Yes
If yes:
Magistrate Case No. 08-6113-Rosenbaum
Related Miscellaneous numbers:
Defendant(s) in federal custody as of Solomon: March 27,2008
Defendant(s) in state custody as of
Rule 20 from the _____ District of _____

Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ___ Yes _X_ No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? ___ Yes _X_ No

BRUCE O. BROWN
ASSISTANT UNITED STATES ATTORNEY
Florida Bar No./Court No.999490

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: Curtis Solomon

Case No: 08-60090-CR-MIDDLEBROOKS(s)

Counts #: 1, 3, 5, 7, 9, 11,13, and15

Conspiracy to commit Hobbs Act Robbery and Hobbs Act Robbery; in violation of 18 U.S.C. § 1951(a)

* **Max. Penalty:** 20 years' imprisonment; $250,000 fine; 3 years' supervised release

Count #: 2

Conspiracy to possess a firearm during and in relation to a crime of violence;

in violation of 18 U.S.C. § 924(o)

* **Max. Penalty:** 20 years' imprisonment; $250,000 fine; 3 years' supervised release

Count #: 4

Possession of a firearm during and in relation to a crime of violence;

in violation of 18 U.S.C. § 924(c)(1)

***Max. Penalty:** Life imprisonment with 7 years' mandatory minimum imprisonment; $250,000 fine; 5 years' supervised release

Counts #: 6, 8, 10, 12, 14, and 16

Possession of a firearm during and in relation to a crime of violence;

in violation of 18 U.S.C. § 924(c)(1)

***Max. Penalty:** Life imprisonment with 25 years' mandatory minimum imprisonment; $250,000 fine; 5 years' supervised release

Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: **Devon Chance**

Case No: 08-60090-CR-MIDDLEBROOKS(s)

Counts #: 1, 3, 5, 7, 9, 11,13, and15

Conspiracy to commit Hobbs Act Robbery and Hobbs Act Robbery; in violation of 18 U.S.C. § 1951(a)

* **Max. Penalty**: 20 years' imprisonment; $250,000 fine; 3 years' supervised release

Count #: 2

Conspiracy to possess a firearm during and in relation to a crime of violence;

in violation of 18 U.S.C. § 924(o)

* **Max. Penalty**: 20 years' imprisonment; $250,000 fine; 3 years' supervised release

Count #: 4

Possession of a firearm during and in relation to a crime of violence;

in violation of 18 U.S.C. § 924(c)(1)

***Max. Penalty:** Life imprisonment with 7 years' mandatory minimum imprisonment; $250,000 fine; 5 years' supervised release

Counts #: 6, 8, 10, 12, 14, and 16

Possession of a firearm during and in relation to a crime of violence;

in violation of 18 U.S.C. § 924(c)(1)

***Max. Penalty:** Life imprisonment with 25 years' mandatory minimum imprisonment; $250,000 fine; 5 years' supervised release

Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.

A-3

United States District Court

Southern District of Florida

FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

CURTIS SOLOMON

JUDGMENT IN A CRIMINAL CASE

Case Number - 0:08-60090-CR-1

USM Number: 77623-004

Counsel For Defendant: Curtis Solomon
Counsel For The United States: Bruce Brown
Court Reporter: Karl Shires

REC'D by _____ D.C.
JUL 14 2009
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

The defendant was found guilty on Count(s) 1-21, 22, 25-36 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1951(a)	Conspiracy To Commit Hobbs Act Robery	3/27/2008	1
18 U.S.C. § 924(0)	Conspiracy To Possess/Carry A Firearm During and In Relation To A Crime of Violence	3/27/2008	2
18 U.S.C. § 924(c)(1)	Brandish of Firearm During and In Relation To A Crime Of Violence	12/11/2008	4
18 U.S.C. § 924(c)(1)	Possess/Carry Of A Firearm During and In Relation To A Crime Of Violence	3/21/2008	6,8,10,12,14,16,18,20,22, 26,28,30,32,34,36
18 U.S.C. § 1951(a)	Hobbs Act Robbery	12/11/2007	3
18 U.S.C. § 1951(a)	Hobbs Act Robbery	12/20/2007	5
18 U.S.C. § 1951(a)	Hobbs Act Robbery	1/16/2008	7
18 U.S.C. § 1951(a)	Hobbs Act Robbery	1/17/2008	9
18 U.S.C. § 1951(a)	Hobbs Act Robbery	1/24/2008	11
18 U.S.C. § 1951(a)	Hobbs Act Robbery	1/29/2008	13
18 U.S.C. § 1951(a)	Hobbs Act Robbery	1/31/2008	15
18 U.S.C. § 1951(a)	Hobbs Act Robbery	2/9/2008	17
18 U.S.C. § 1951(a)	Hobbs Act Robbery	2/9/2008	19
18 U.S.C. § 1951(a)	Hobbs Act Robbery	2/15/2008	21
18 U.S.C. § 1951(a)	Hobbs Act Robbery	2/26/2008	25

18 U.S.C. § 1951(a)	Hobbs Act Robbery	3/2/2008	27
18 U.S.C. § 1951(a)	Hobbs Act Robbery	3/7/2008	29
18 U.S.C. § 1951(a)	Hobbs Act Robbery	3/10/2008	31
18 U.S.C. § 1951(a)	Hobbs Act Robbery	3/17/08	33
18 U.S.C. § 1951(a)	Hobbs Act Robbery	3/21/2008	35

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.

The defendant has been found not guilty on count(s) 23 and 24.

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:
7/13/2009

DONALD M. MIDDLEBROOKS
United States District Judge

July 14, 2009

DEFENDANT: CURTIS SOLOMON
CASE NUMBER: 0:08-60090-CR-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **4641 MONTHS**. This term consists of 57 months as to counts 1,2,3,5,7,9,11,13,15,17,19,21,25,27,29,31,33,35 and a term of 84 months as to count 4, consecutive to counts 1,2,3,5,7,9,11,13,15,17,19,21,25,27,29,31,33,35 and 300 months as to each of counts 6,8,10,12,14,16,18,20,22,26,28,30,32,34,36, all to be served consecutive to all other counts.

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

The Court recommends that defendant be designated to a facility in or near South Florida.

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: CURTIS SOLOMON
CASE NUMBER: 0:08-60090-CR-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 YEARS**. This term consists of three years as to counts 1,2,3,5,7,9,11,13,15,17,19,21,25,27,29,31,33,35, and five years as to counts 4,6,8,10,12,14,16,18,20,22,26,28,30,32,34,36. All such terms to run concurrently

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the 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, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, 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 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; and
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: CURTIS SOLOMON
CASE NUMBER: 0:08-60090-CR-1

SPECIAL CONDITIONS OF SUPERVISION

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

DEFENDANT: CURTIS SOLOMON
CASE NUMBER: 0:08-60090-CR-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$3,400.00	$0.00	$TBD

Restitution with Imprisonment -
It is further ordered that the defendant shall pay restitution in the amount of $ TBD . During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

*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: CURTIS SOLOMON
CASE NUMBER: 0:08-60090-CR-1

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 **$3,400.00** due immediately, balance due

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

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

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

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

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

Joint and Several

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution,(7) penalties, and (8) costs, including cost of prosecution and court costs.

A-4

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-13456-J

IN RE: CURTIS SOLOMON,

Petitioner.

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

Before MARCUS, JULIE CARNES, and JILL PRYOR, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Curtis Solomon has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In his *pro se* application, Solomon seeks to raise two claims in a second or successive § 2255 motion. Solomon asserts that his first claim relies upon the new rule of constitutional law announced in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), in which the U.S. Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), is unconstitutionally vague. Solomon contends that his 18 U.S.C. § 924(c) convictions were imposed under a similarly-worded residual clause that is also unconstitutionally vague. Thus, he argues that his § 924(c) convictions under that residual clause violated his due process rights.

As to his second claim, Solomon argues that he is actually innocent as to the robbery of the Dogma Grill as charged in Counts 21 and 22. He asserts that his claim relies on newly discovered evidence—an affidavit of a forensic expert dated February 2016, which concluded that the Dogma Grill robber wore his hair in "cornrows" in security footage of the robbery. Solomon contends that this evidence proves his innocence because his former girlfriend's testimony at trial and mugshots taken only five days after the robbery support that he wore his hair in "dreds," not cornrows, at the time of the robbery.

In *Johnson*, the Supreme Court held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. *Johnson*, 576 U.S. at ___, 135 S. Ct. at 2557–58, 2563. The Supreme Court made clear, however, that its ruling on the residual clause did not call into question the validity of the elements clause or the enumerated crimes clause of the ACCA's definition of a violent felony. *Id.* at ___, 135 S. Ct. at 2563. In *Welch v. United States*, 578 U.S. __, __, 136 S. Ct. 1257, 1264–65, 1268 (2016), the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review.

In light of the Supreme Court's holdings in *Johnson* and *Welch*, federal prisoners who make a *prima facie* showing that they previously were sentenced in reliance on the ACCA's now-voided residual clause are entitled to file a second or successive § 2255 motion in the district court. However, merely asserting, in the abstract, a ground that purportedly meets § 2255(h)'s requirements only "represent[s] the minimum showing" necessary to file a successive § 2255 motion. *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (granting a state death-row inmate's successive application because he had proffered detailed evidence, in satisfaction of § 2244(b)(3)(C), that showed "a reasonable likelihood that [he] is mentally retarded" to support his proposed *Atkins* claim). Rather, § 2244(b)(3)(C) requires the applicant to make "a *prima facie* showing that the application satisfies the requirements of this subsection." *Id.* Accordingly, it is not enough for a federal prisoner to merely cite *Johnson* as the basis for the claim he seeks to raise in a second or successive § 2255 motion. Instead, the prisoner must also make a *prima facie* showing that he falls within the scope of the new substantive rule announced in *Johnson*. *See, e.g., id.*; 28 U.S.C. § 2244(b)(3)(C).

BACKGROUND

Here, a jury convicted Solomon of the following offenses: (1) Count 1—conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951;

(2) Count 2—conspiracy to carry a firearm during and in relation to and possess a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 924(o); (3) Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 25, 27, 29, 31, 33, and 35—Hobbs Act robbery, in violation of 18 U.S.C. § 1951; (4) Counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 26, 28, 30, 32, 34, and 36—carrying a firearm during and in relation to a crime of violence, in violation of § 924(c). Specifically, Counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 26, 28, 30, 32, 34, and 36—the § 924(c) counts at issue here—charged Solomon with carrying a firearm during the conspiracy to commit Hobbs Act robbery charged in Count 1 and Hobbs Act robberies charged in Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 25, 27, 29, 31, 33, and 35.

Solomon was sentenced in 2009. As to Counts 1, 2, 3, 5, 7, 8, 11, 13, 15, 17, 19, 21, 25, 27, 29, 31, 33, and 35 (conspiracy to commit Hobbs Act robbery, conspiracy to carry a firearm during and in relation to a crime of violence, and Hobbs Act robbery), the district court sentenced Solomon to 57 months' imprisonment as to each count, to be served consecutively to each other. As to Count 4—one of the § 924(c) convictions at issue here—the district court sentenced Solomon to 84 months' imprisonment, to be served consecutively to his other terms. As to Counts 6, 8, 10, 12, 14, 16, 18, 20, 22, 26, 28, 30, 32, 34, and 26—the remaining § 924(c) convictions at issue here—the district court sentenced Solomon

to 300 months' imprisonment as to each count, to be served consecutively to his other sentences. In other words, the district court sentenced Solomon to a total of 4,641 months' imprisonment.

DISCUSSION

Claim One – § 924(c) counts

As to Solomon's claim challenging the validity of his § 924(c) convictions, as noted, *Johnson* rendered the residual clause of § 924(e) invalid. It spoke not at all about the validity of the definition of a crime of violence found in § 924(c)(3)(B).[1] Nevertheless, for purposes of this order, we will assume that we should extrapolate from the *Johnson* holding a conclusion that § 924(c)(3)(B) is also unconstitutional.

Even so, that conclusion does not assist Solomon as to his § 924(c) convictions on Counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 26, 28, 30, 32, 34, and 36 because those counts were based on his convictions for Hobbs Act robbery in Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 25, 27, 29, 31, 33, and 35. The superseding indictment makes clear that the elements of Hobbs Act robbery meet § 924(c)(3)(A)'s requirement that an underlying offense must have "as an element

[1] The language in § 924(c)(3)(B) is similar, but not identical, to the language of the ACCA residual clause invalidated by the Supreme Court in *Johnson*. The residual clause specifies a crime that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The substantial risk clause of § 924(c)(3)(B) specifies a crime "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."

the use, attempted use, or threatened use of physical force against the property of another." Indeed, the indictment alleged that Solomon took property from the victims "by means of actual and threatened force, violence, and fear of injury." Moreover, we have held that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s use-of-force clause. *In re Saint Fleur*, No. 16-12299, manuscript op. at 5–7 (11th Cir. June 8, 2016). As a result, Solomon's § 924(c) convictions on the above-referenced counts qualify as crimes of violence, without respect to § 924(c)(3)(B)'s residual clause. We therefore deny this portion of Solomon's application.

To that end, we have also held that armed bank robbery and aiding and abetting Hobbs Act robbery clearly meet the requirements of § 924(c)(3)(A)'s use-of-force clause, and therefore have found no *prima facie* showing by an applicant who seeks to make a *Johnson* challenge as to those convictions in a successive motion. *See In re Colon*, No. 16-13021, manuscript order at 6–7 (11th Cir. June 24, 2016); *In re Hines*, No. 16-12454, manuscript order at 6–7 (11th Cir. June 8, 2016). We have held, however, that an applicant has made a *prima facie* case, for purposes of second or successive review, when seeking to challenge a conviction for conspiracy to commit Hobbs Act robbery based on an argument that

such a conviction meets only the residual clause of § 924(c). *See In re Pinder*, No. 16-12084, manuscript order at 4 n.1 (11th Cir. June 1, 2016).

Here, Solomon's § 924(c) conviction on Count 2 charged him with conspiring to carry a firearm during and in relation to the conspiracy to commit Hobbs Act robbery, as alleged in Count 1 of the indictment. Accordingly, viewed as a threshold determination, we conclude that Solomon has made a *prima facie* showing that his claim based on this particular § 924(c) conviction falls within *Johnson*. As a result, we grant this portion of Solomon's application seeking to challenge his § 924(c) conviction related to Count 2.

Claim 2 – Newly Discovered Evidence

As to Solomon's claim challenging his convictions on Counts 21 and 22 based on newly discovered evidence, he has failed to meet the statutory criteria for successive applications. Solomon asserts that the forensic expert's affidavit stating that the individual who robbed the Dogma Grill (the location of the robbery charged in Counts 21 and 22) had cornrows and not "dreds" establishes his actual innocence. However, Solomon has not shown that the forensic expert's affidavit would establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the offense. *In re Dean*, 341 F.3d 1247, 1248–49 (11th Cir. 2003); *see also* 28 U.S.C. § 2255(h)(1). While the affidavit supports that the

individual who robbed Dogma Grill wore his hair in cornrows, it does not establish Solomon's innocence, as he presents no evidence to conclusively show he wore his hair in "dreds" at the time of the robbery. Accordingly, we deny this portion of Solomon's application.

Finally, it is important to note that our threshold determination that an applicant has made a *prima facie* showing that he has met the statutory criteria of § 2255(h), thus warranting our authorization to file a second or successive § 2255 motion, does not conclusively resolve the question whether the prisoner has actually satisfied the requirements of § 2255(h). It will be the district court's job to decide that question in the first instance. *See Jordan*, 485 F.3d at 1357 (involving the functionally equivalent § 2244(b)(2) successive application standard applicable to state prisoners). In *Jordan*, we emphasized that, once the prisoner files his authorized § 2255 motion in the district court, "the district court not only can, but must, determine for itself whether those [§ 2255(h)] requirements are met." *Id.* Notably, the statutory language of § 2244, which is cross referenced in § 2255(h), expressly provides that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." *Id.* (quoting 28 U.S.C. § 2244(b)(4)). We rejected the assertion that the district

court owes "some deference to a court of appeals' prima facie finding that the requirements have been met." *Id.* at 1357. We explained that, after the district court looks at the § 2255(h) requirements *de novo*, "[o]ur first hard look at whether the § [2255(h)] requirements actually have been met will come, if at all, on appeal from the district court's decision . . . ." *Id.* at 1358; *see also In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (reiterating that our threshold conclusion in granting a successive application that a *prima facie* showing has been made is necessarily a "limited determination," as the district court then must also decide "fresh" the issue of whether § 2255(h)'s criteria are met, and, if so, proceed to considering the merits of the § 2255 motion).

Stated another way, this grant is a limited determination on our part, and, as we have explained before, "[t]he district court is to decide the [§ 2255(h)] issues fresh, or in the legal vernacular, *de novo*." *Jordan*, 485 F.3d at 1358. Only then should the district court "proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise." *Id.* We repeat what we have said before:

> Any determination that the district court makes about whether [the § 2255(h) applicant] has satisfied the requirements for filing a second or successive motion, and any determination it makes on the merits, if it reaches the merits, is subject to review on appeal from a final judgment or order if an appeal is filed. Should an appeal be filed from the

> district court's determination, nothing in this order shall bind the merits panel in that appeal.

Id.

In light of the foregoing, Solomon's application is GRANTED IN PART and DENIED IN PART. The application is granted as to the portion of the first claim challenging Solomon's conviction and sentence under § 924(c) on Count 2 based on his conviction for conspiracy to commit Hobbs Act Robbery, and Solomon may file a successive § 2255 motion in district court challenging that count. The application is denied as to the portion of the first claim pertaining to Solomon's remaining § 924(c) convictions based on his convictions for Hobbs Act robbery and to his second claim which relies on new evidence to support his actual innocence. Solomon is therefore not granted permission to challenge any convictions other than the conviction on Count 2.

JS 44 (Rev. 11/15) Revised 03/16

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)* **NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.**

I. (a) PLAINTIFFS CURTIS SOLOMON

DEFENDANTS UNITED STATES OF AMERICA

(b) County of Residence of First Listed Plaintiff Broward
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Paul D. Lazarus
1 Financial Plaza, Ste 2510, Ft. Lauderdale, FL 33394

Attorneys *(If Known)*

United States Attorneys Office
99 NE Fourth Street, Miami, FL 33132

(d) Check County Where Action Arose: ☐ MIAMI-DADE ☐ MONROE ☑ BROWARD ☐ PALM BEACH ☐ MARTIN ☐ ST. LUCIE ☐ INDIAN RIVER ☐ OKEECHOBEE ☐ HIGHLANDS

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☑ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff) and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☑ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Med. Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence

Other:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee – Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729 (a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Re-filed (See VI below) ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district *(specify)* ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment ☐ 8 Remanded from Appellate Court

VI. RELATED/ RE-FILED CASE(S)

(See instructions): a) Re-filed Case ☐YES ☐NO b) Related Cases ☐YES ☐NO

JUDGE DOCKET NUMBER

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause *(Do not cite jurisdictional statutes unless diversity)*:

22 U.S.C. § 2255 Motion to Vacate Sentence

LENGTH OF TRIAL via days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE

DATE June 24, 2016

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT IFP JUDGE MAG JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:
(Underlying Criminal Case No. 08-60090-CR-Middlebrooks)

CURTIS SOLOMON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____ /

MOTION TO CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND MEMORANDUM OF LAW IN SUPPORT

CURTIS SOLOMON, through undersigned counsel, respectfully moves this Court to correct his sentence, pursuant to 28 U.S.C. § 2255, and states:

1. On April 29, 2009, SOLOMON was convicted of Conspiracy to commit HOBBS ACT Robbery, Conspiracy to use and carry a firearm during and in relation to a "crime of violence" (Hobbs Act Robbery), sixteen substantive counts of Hobbs Act Robbery, and sixteen counts of carrying a firearm during and in relation to a "crime of violence" (Hobbs Act Robbery), in violation of 18 USC §§1951(a) and 2, and 18 USC §924(c)(1)(A) and 2. More specifically, Count 1 charged conspiracy to commit Hobbs Act Robbery in violation of 18 USC §1951(a); Count 2 charged conspiracy to use and carry a firearm during and in relation to a crime of violence in violation of 18 USC §924(c); odd numbered Counts 3 thru 35 charged substantive Hobbs Act Robbery, in violation of 18 USC §§1951(a) and 2; even numbered Counts 4 thru 34 charged carrying a

firearm during and in relation to a "crime of violence" (the substantive Hobbs Act Robberies), in violation of 18 USC §§924(c)(1) and 2.

2. On July 15, 2009, the Court sentenced SOLOMON to a total term of imprisonment of 4,641 months (386 $^{3}/_{4}$ years). The term consists of 57 months as to Counts 1, 2, 3, 5, 7, 9, 11, 13, 15, 17, 19,21, 25, 27, 29, 31, 33 and 35, to be served concurrently, 84 months as to Count 4, to be served consecutively as to all other counts of conviction, and 300 months each as to Counts 6, 8, 10, 12, 14, 16, 18, 20, 22, 26,28, 30, 32, 34 and 36, to be served consecutively to all other counts of conviction.

3. SOLOMON now requests relief in light of the Supreme Court's decision in Johnson v. United States, 576 U.S. __, 135 S. Ct. 2551 (June 26, 2015), which held that the ACCA's "residual clause" in 18 USC §924(e)(2)(B)(ii) is unconstitutionally vague.

4. Application of Johnson to this case demonstrates that SOLOMON'S convictions and sentences on the firearms counts with the underlying "crime of violence" (Hobbs Act Robbery) (1) violates due process; (2) violates the laws of the United States and results in a fundamental miscarriage of justice; and (3) was entered in an excess of this Court's jurisdiction because these crimes no longer qualify as a predicate "crimes of violence."

Accordingly, SOLOMON is entitled to relief under 28 USC §2255.

5.

PROCEDURAL HISTORY

The judgment of conviction under attack occurred in the Southern District of Florida, Palm Beach Division.

The criminal case number is 08-60090-CR-MIDDLEBROOKS.

The date of judgment of conviction is July 15, 2009.

The defendant was sentenced to 1,794 months by the Honorable Donald M. Middlebrooks.

The defendant was convicted after a jury trial. He did not testify at trial, or in any pre trial or post trial hearing.

The defendant appealed his judgment of conviction and sentence to the 11th Circuit Court of Appeals .The Case No. is 09-13660. The Court of Appeals Affirmed on July 12, 2011. Numerous grounds were raised, including juror error; insufficient evidence; error in admission of lay testimony; error in admission of hearsay; error in admission of recordings; error in admission of expert testimony, failure to grant severance; sentencing error.

A Petition For Writ of Certiorari was filed with the Supreme Court and denied on November 28, 2011.

The defendant has filed previous Motions To Vacate under 28 USC §255 in the Southern District of Florida under cases No. 12-62312-CIV-MIDDLEBROOKS and 12-62358-CIV-MIDDLEBROOKS. There were no evidentiary hearings. The defendant has not raised the issues contained in this Motion previously. Defendant's previous Motions under §2255 were respectively denied on December 30, 2012, and November 25, 2013. Defendant did not appeal.

The issues raised in this Motion to vacate under 28 USC §2255 have not been raised previously by the defendant as U.S. v. Johnson creates new law.

There is presently an Application For Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence under 28 USC §2255 pending before the U.S. Court of Appeals for the Eleventh Circuit. The basis of the Application is the same grounds argued in this Motion.

Attorney Paul D. Lazarus,Esq., represented SOLOMON at arraignment, trial, and sentencing.

GROUNDS FOR RELIEF

As an initial matter: defendant's claim is cognizable on collateral review; Johnson applies retroactively to this case; and client's claim is timely.

I. Defendant's Claim is Cognizable Under § 2255

Section 2255(a) authorizes a federal prisoner claiming "that [his] sentence was imposed in violation of the Constitution . . . or that the sentence was in excess of the maximum authorized by law . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). By statute, 18 U.S.C. § 924(c) mandates a minimum consecutive sentence to any other sentence imposed that varies form 5 years to life, depending on the type of firearm and whether it was possessed, brandished "during and in relation to a crime of violence." § 924(c)(1)(A)-(C). The statutory maximum sentence for being a felon in possession of a firearm, in violation of § 922(g)(1), is ordinarily ten years' imprisonment. 18 U.S.C. § 924(a)(2). Thus, this Court "can collaterally review the misapplication of § 924(c) because . . . that misapplication results in a sentence that exceeds the statutory maximum." Spencer v. United States, 773 F.3d 1132, 1143 (11th Cir. 2014) (en banc).

Defendant's Motion is Timely

As relevant here, §2255 imposes a one-year statute of limitations that runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. §2255(f)(3). That date runs from the date the Supreme Court recognizes the new right. Dodd v. United States, 545 U.S. 343, 360 (2005).

Defendant's motion is timely under §2255(f)(3). In declaring the ACCA's residual clause unconstitutionally vague, Johnson recognized a new right because that result was not "dictated by precedent" at the time defendant's conviction became final. See Howard v. United States, 374 F.3d 1068, 1073–74 (11th Cir. 2004). To the contrary, the Supreme Court itself, as well as the Eleventh Circuit, had repeatedly rejected vagueness challenges to the residual clause. Sykes v. United States, 564 U.S. 1 (2011); James v. United States, 550 U.S. 192, 210 n. 6 (2007); United States v. Gandy, 710 F.3d 1234, 1239 (11th Cir. 2013). And, as explained above, Johnson applies retroactively because it is a substantive rule.

Therefore, defendant has one year from the date Johnson was decided—June 26, 2016—to seek relief. See Dodd v. United States, 545 U.S. 343, 360 (2005). Thus, this motion is timely under §2255(f)(3). [1]

[1] In order to ensure compliance with the statute of limitations, defendant, in an ~~abundance of caution, has~~ filed this §2255 motion while his application for authorization remains pending in the Eleventh Circuit.

II. Johnson Applies Retroactively to this Case

In Welch v. United States, the Supreme Court squarely held that "Johnson announced a substantive rule that has retroactive effect in cases on collateral review." 578 U.S. at __, 136 S. Ct. 1257, 1268 (2016); see id. at 1265 ("the rule announced in Johnson is substantive"); Mays v. United States, 817 F.3d 728, 736 (11th Cir. 2016) (concluding even before Welch that "Johnson is retroactive because it qualifies as a substantive rule . . . since it narrows the class of people that may be eligible for a heightened sentence under the ACCA."). Thus, there can be no dispute that Johnson applies retroactively to this case.

III. The categorical and modified categorical approach

Before explaining why defendant is entitled to relief, it is necessary to briefly set out the governing analytical framework. That framework, summarized below, was refined most recently in Descamps v. United States, 133 S. Ct. 2275 (2013), which is "the law of the land" and "must be . . . followed." United States v. Howard, 73 F.3d 1334, 1344 n.2 (11th Cir. 2014).

In determining whether the predicate offense qualifies as a "crime of violence" for purposes of a conviction under 18 U.S.C. §924(c), this Court must apply the "categorical approach." Under that approach, "courts may 'look only to the statutory definitions'—i.e., the elements—of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" Descamps, 133 S. Ct. at 2283 (quoting Taylor v. United States, 495 U.S. 575, 600 (1990)). In adopting this approach, the Court emphasized both Sixth Amendment concerns (explained below) and the

need to avert "'the practical difficulties and potential unfairness of a [daunting] factual approach.'" Id. at 2287 (quoting Taylor, 495 U.S. at 601). As a result, courts "look no further than the statute and judgment of conviction." United States v. Estrella, 758 F.3d 1239, 1244 (11th Cir. 2014) (citation omitted). And, in doing so, they "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2011) (quoting Johnson v. United States, 559 U.S. 133, 137 (2010)).

A prior conviction may also qualify as a "crime of violence" if it satisfies § 924(c)'s Elements Clause, which some Circuits refer to as the Force Clause. The categorical approach applies equally in that context. Again looking no further than the statute and judgment of conviction, a conviction will qualify as a predicate for a § 924(c) conviction "only if the statute on its face requires the government to establish, beyond a reasonable doubt and without exception, an element involving the use, attempted use, or threatened use of physical force against a person for every charge brought under the statute." Estrella, 758 F.3d at 1244 (citation omitted). "Whether, in fact, the person suffering under this particular conviction actually used, attempted to use, or threatened to use physical force against a person is quite irrelevant. Instead, the categorical approach focuses on whether in every case a conviction under the statute necessarily involves proof of the element." Id. (citations omitted).

To implement the categorical approach, the Supreme Court has "recognized a narrow range of cases in which sentencing courts" may look beyond the statute and

judgment of conviction and employ what it is referred to as the "modified categorical approach." Descamps, 133 S. Ct. at 2283–84. Those cases arise where the statute of conviction contains alternative elements, some constituting a violent felony and some not. In that scenario, "the statute is 'divisible,'" in that it "comprises multiple, alternative versions of the crime." Id. at 2284. As a result, "a later sentencing court cannot tell, without reviewing something more [than the statute and judgment of conviction], if the defendant's conviction" qualifies as violent felony. Id.

Two key points must be made about the modified categorical approach. First, Descamps made clear that "the modified categorical approach can be applied only when dealing with a divisible statute." Howard, 742 F.3d at 1344. Thus, where the statute of conviction "does not concern any list of alternative elements" that must be found by a jury, there is no ambiguity requiring clarification, and therefore the "modified approach . . . has no role to play." Descamps, 133 S. Ct. at 2285–86; see Estrella, 758 F.3d at 1245–46; Howard, 742 F.3d at 1345–46. "[I]f the modified categorical approach is inapplicable," then the court must limit its review to the statute and judgment of conviction. Howard, 742 F.3d at 1345. And, even if a statute is divisible, the court need not employ the modified categorical approach if none of the alternatives would qualify. Id. at 1346–47.

Second, even where the modified categorical approach does apply, it does not permit courts to consider the defendant's underlying conduct. Rather, "the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an

exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." Descamps, 133 S. Ct. at 2285. And, in order to ensure that the focus remains on the statutory elements rather than the defendant's underlying conduct, the court is restricted in what documents it may consider.

In Shepard v. United States, 544 U.S. 13, 15 (2005), the Supreme Court held that courts are "limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." What these Shepard documents have in common is that they are "conclusive records made or used in adjudicating guilt." Id. at 21; see id. at 23 ("confin[ing]" the class of permissible documents "to records of the convicting court approaching the certainty of the record of conviction"). That accords with their function in the modified categorical approach— namely, to permit the court to identify the elements for which the defendant was convicted. Descamps, 133 S. Ct. at 2284.

Importantly, and as the Supreme Court explained in Descamps, that inexorable focus on the elements derives in large part from "the categorical approach's Sixth Amendment underpinnings." Id. at 2287–88. Other than the fact of a prior conviction, a jury must find beyond a reasonable doubt any fact that increases a de-fendant's sentence beyond the prescribed statutory maximum. Id. at 2288 (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)). The reason for the "prior convic-

tion" exception is that, during the earlier criminal proceeding, the defendant either had a jury or waived his constitutional right to one. See Apprendi, 530 U.S. at 488.

As the Supreme Court made clear in Descamps, the use of Shepard documents "merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits." 133 S. Ct. at 2288. This is so because "the only facts the court can be sure the jury . . . found [beyond a reasonable doubt] are those constituting elements of the offense;" and, similarly, "when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements." Id. But where a court relies on non-Shepard documents to increase a defendant's sentence, it "extend[s] judicial factfinding" "beyond merely identifying a prior conviction," violating the Sixth Amendment. Id.

In sum, in determining whether a conviction qualifies as a "crime of violence," a court must generally consider only the statute and judgment of conviction. Only if the statute is divisible may the court consider Shepard documents, and it may do so only for the sole purpose of ascertaining the statutory elements for which the defendant was convicted. Once those elements are identified, the court must determine whether the least of the acts prohibited thereby constitutes a generic offense enumerated in the ACCA or necessarily requires the use, attempted use, or threatened use of violent, physical force against another. In no case may a court rely on non-Shepard documents or analyze whether the defendant's underlying conduct constituted a "crime of violence."

IV. HOBBS ACT ROBBERY

1. Pertinent Statute

The Hobbs Act statute, 18 U.S.C. §1951, in pertinent part, provides:

> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining [shall be punished in accordance with the remainder of the statute].

The Eleventh Circuit's pattern jury instructions make clear that Hobbs Act robbery is an indivisible offense. See 11th Cir. Pattern Jury Instr. 70.3 (2010) (stating "the Defendant took the property against the victim's will by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future" as a single unified element of Hobbs Act robbery).

As further detailed below, under these terms, defendant's offense of Hobbs Act robbery categorically fails to qualify as a §924 "crime of violence" under the Elements Clause.

2. Putting Someone in Fear of Injury Does Not Require the Use, Attempted, or Threatened Use of "Violent Force"

Hobbs Act robbery can be committed without actual or threatened violent force, but instead by merely placing another in fear of injury to person or property. See §1951 (" . . . by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . ."). But, as discussed in greater de-

said below, injury may be inflicted by the property and by a threat without any physical force at all, let alone the violent physical force that is required under the Elements Clause.

First, Hobbs Act robbery can be accomplished by placing somebody in fear of injury to his property—an act which does not require the use of violent physical force. "The concept of 'property' under the Hobbs Act is an expansive one" that includes "intangible assets such as rights to solicit customers and to conduct a lawful business." United States v. Arena, 180 F.3d 380, 392 (2d Cir. 1999) (emphasis added), abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 401 n.8 (2003); see also 11th Cir. Pattern Jury Instr. 70.3 ("'Property includes . . . intangible rights that are a source or element of income or wealth."); United States v. Iozzi, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction when boss threatened "to slow down or stop construction projects unless his demands were met"); United States v. Local 560 of the International Brotherhood of Teamsters, 780 F.2d 267, 281 (3d Cir. 1986) (noting that the Circuits "are unanimous in extending Hobbs Act to protect intangible, as well as tangible, property"). So, for example, Hobbs Act robbery can be committed via threats to cause a devaluation of some economic interest, like a stock holding. Such threats to economic interests are certainly not threats of "violent force." Even injury to tangible property does not require the threat of violent force. One can threaten to injure another's property by throwing paint on someone's house, pouring chocolate syrup on one's passport, or spray painting someone's car. It goes without saying that these actions do not require violent force. And even when Hobbs Act robbery is committed by "causing the victim to fear harm, either immediately or in the future," the Eleventh Circuit has

explained in its pattern instruction that the term "fear" "includes the fear of financial loss as well as fear of physical violence."

Finally, even a threat of physical injury to the person of another does not require the use of physical force, let alone violent physical force. See, e.g., United States v. Torres-Miguel, 701 F.3d 165, 168-69 (4th Cir. 2012) (evaluating Cal. Penal Code § 422(a) and reasoning that "[o]f course, a crime may result in death or serious injury without involving use of physical force"); United States v. Cruz-Rodriguez, 625 F.3d 274, 276 (5th Cir. 2010) (holding that statute that criminalizes threatening to commit a crime which will result in death or great bodily injury to another person is not a crime of violence for purposes of the U.S. Sentencing Guidelines because it does not necessarily involve the use of force); United States v. Perez-Vargas, 414 F.3d 1282, 1287 (10th Cir. 2005) (explaining that although Colorado assault statute required causation of bodily injury, imposing injury does not "necessarily include the use or threatened use of 'physical force' as required by the Guidelines"); Chrza-noski v. Ashcroft, 327 F.3d 188, 194 (2d Cir. 2003) (noting that "there is a difference between the causation of an injury and an injury's causation by the use of physical force") (internal quotation marks omitted). As the Second Circuit has explained, "human experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient" or someone who causes physical impairment by plac-

ing a tranquilizer in the victim's drink. Chrzanoski, 327 F.3d. at 195-96. Likewise, the Tenth Circuit has reasoned that "several examples [exist] of third degree assault that would not use or threaten the use of physical force: . . . intentionally placing a barrier

chemicals." Perez-Vargas, 414 F.3d at 1286. The same is true of Hobbs Act robbery. It, too, can be accomplished without using or threatening to use physical force.

One district court has already found that "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" and therefore "conspiracy to commit Hobbs Act robbery . . . does not fall within the § 924(c) [Elements Clause]." United States v. Edmunson, Case No. 13-cr-00015-PWG, D.E. 67 at 5 (D. Md. Dec. 29, 2015). This Court should reach the same conclusion. Because "the full range of conduct" covered by the Hobbs Act robbery statute does not require "violent force" against a person, it simply cannot qualify as a "crime of violence" under the Elements Clause. And it makes no difference whether the odds are slim of violating the Hobbs Act robbery statute without violent physical force. Because the possibility exists, see, e.g., Iozzi, 420 F.2d 512 (Hobbs Act robbery by economic extortion), Hobbs Act robbery is not a "crime of violence" under the Elements Clause.

3. Putting Somebody In Fear of Injury Does Not Require the Intentional Threat of Violent Force

The "fear of injury" element under the Hobbs Act statute does not require a defendant to intentionally place another in fear of injury. And as the Fourth Circuit has held, an offense can only constitute a "crime of violence" under the [Elements] Clause if it has an element that requires an "intentional employment of physical force [or threat of physical force]." Garcia v. Gonzalez, 455 F.3d 465, 468 (4th Cir. 2006) (analyzing 18 U.S.C. §16(a)'s identical elements clause).

Federal cases interpreting the "intimidation" element in the federal bank robbery statute (18 U.S.C. §2113(a)) are instructive here. Federal bank robbery may be accomplished by "intimidation," which means placing someone in fear of bodily harm – the same action required under the Hobbs Act robbery statute. See United States v. Woodrop, 86 F.3d 359, 364 (4th Cir. 1996) ("intimidation" under federal bank robbery statute means "an ordinary person in the [victim's position] reasonably could infer a threat of bodily harm from the defendant's acts") (emphasis added); see also United States v. Pickar, 616 F.3d 821, 825 (2010) (same); United States v. Kelley, 412 F.3d 1240, 1244 (11th Cir. 2005) (same); United States v. Yockel, 320 F.3d 818, 824 (8th Cir. 2003) (same); United States v. Higdon, 832 F.2d 312, 315 (5th Cir. 1987) (same).

"Intimidation" is satisfied under the bank robbery statute "whether or not the defendant actually intended the intimidation," as long as "an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defend-

ant's acts." Woodrup, 86 F.3d at 36. Indeed, "[w]hether a particular act constitutes

intimidation is viewed objectively, and a defendant's conviction [for federal bank robbery statute] even if he did not intend for an act to be intimidating." Kelley, 412 F.3d at 1244 (internal citation omitted). See also United States v. Yock-el, 320 F.3d 818, 821 (8th Cir. 2003) (upholding bank robbery conviction even though there was no evidence that defendant intended to put teller in fear of injury: defendant did not make any sort of physical movement toward the teller and never presented her with a note demanding money, never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon); United States v. Foppe, 993 F.2d 1444, 1451 (9th Cir. 1993) (same). In other words, a defendant may be found guilty of federal bank robbery even though he did not intend to put another in fear of injury. It is enough that the victim reasonably fears injury from the defendant's actions – whether or not the defendant actually intended to create that fear. Due to the lack of this intent, federal bank robbery criminalizes conduct that does not require an intentional threat of physical force. Therefore, bank robbery squarely fails to qualify as a "crime of violence" under Garcia. Because the federal bank robbery "intimidation" element is defined the same as the Hobbs Act robbery "fear of injury" element, it follows that Hobbs Act robbery also fails to qualify as a "crime of violence" under Garcia.

In sum, Hobbs Act robbery is not a "crime of violence" under the §924(c)(3)(A) Elements Clause for two independent reasons. First, the statute does not require a

threat of violent force, or even any physical force at all. Second, the statute does not require the intentional threat of the same.

In Light of Johnson, defendant's Convictions and Sentences Under 18

V.
U.S.C. §924(c) Cannot Be Sustained Because They Were Not Predicated on a "Crime of Violence" Under Either the Elements Clause or Residual Clause

Defendant's §924(c) convictions for using a firearm in relation to a "crime of violence" are void because the "crime of violence" element cannot be satisfied here. The predicate Hobbs Act offenses do not qualify as a "crime of violence" as a matter of law.

Defendant was convicted of several violations of 18 U.S.C. §924(c). At the time of conviction, §924(c)(1) provided:

> Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence . . .[be sentenced to imprisonment of not less than five years] [if the firearm is brandished, be sentenced to a term of imprisonment of not less than seven years] [if the firearm is discharged, be sentenced to a term of imprisonment of not less than ten years] . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty five years .

Under §924(c)(3), the term "crime of violence" as used therein was (and still is) defined in §924(c)(3) to mean 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.

The first clause – §924(c)(3)(A) – is commonly referred to as the Elements Clause, with some Circuits also referring to it as the Force Clause. The other – § 924(c)(3)(B) – is commonly referred to as the Residual Clause.

Under either clause, HOBBS ACT ROBBERY categorically fails to qualify as a "crime of violence."

First, under the Residual Clause, Hobbs Act Robbery also categorically fails to qualify as a "crime of violence" because it is void for vagueness under Johnson. In Johnson, the Supreme Court struck down the Armed Career Criminal Act's (AC-CA) residual clause (18 U.S.C. §924(e)(2)(B)(ii)) as unconstitutionally vague. 135 S. Ct. 2551, 2557 (2015). Under Johnson, §924(c)'s materially indistinguishable Residual Clause (§924(c)(3)(B)) must similarly be stricken as unconstitutional.

Second, under the Elements Clause, Hobbs Act Robbery does not qualify as a "crime of violence" because it (1) does not require threat of violent physical force, and (2) does not require the intentional threat of the same. Therefore, the "crime of violence" element of §924(c) cannot be sustained here, and a conviction cannot be constitutionally sustained under the statute.

Section 924(c)'s Residual Clause is Unconstitutionally Vague in Light of Johnson

Johnson held the residual clause in the ACCA, 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 in-

vites 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.

The same "ordinary case" inquiry that in Johnson led the Supreme Court to conclude that the ACCA residual clause is unconstitutionally was previously applied to § 924(c)(3). United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir. 2013). That is, like the ACCA, the Residual Clause of § 924(c)(3) requires courts to picture the "ordinary" case embodied by a felony, and then assess the risk posed by that "ordinary" case. See id.

Notably, the definition of "crime of violence" in the Residual Clause in §924(c) is identical to that in 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").

The Eleventh Circuit has previously held that the same "ordinary risk" analysis applied in ACCA cases and §924(c)(3) (the Residual Clause at issue in defend-

ant's case), also applied in the §16(b) context. See United States v. Keelan, 786 F.3d 865, 871 n.7(11th Cir. 2015) (describing the ACCA otherwise clause and §16(b) as "analogous" for analysis purposes).

This is consistent with the concession made during litigation of the Johnson case by the Government, through the Solicitor General, who agreed that the phrases at issue in Johnson and here pose the same problem. Upon recognizing that the definitions of a "crime of violence" in both §924(c)(3)(B) and §16(b) are identical, the Solicitor General stated:

> Although Section 16 refers to the risk that force will be used rather than that injury will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the ACCA, Section 16 requires 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 v. United States, S. Ct. No. 13-7120, Supp. Br. of Resp. United States at 22-23, available at 2015 WL 1284964 at *22-*23) (Mar. 30, 2015).

The Solicitor General was right: §924(c)(3)(B) and the ACCA are essentially the same and contain the same flaws. This Court should hold the Government to that concession.

Indeed, courts regularly equate these three clauses—18 U.S.C. §924(c)(3)(B), 18 U.S.C. §16(b), and the ACCA residual clause—for purposes of analysis. See, e.g., Chambers v. United States, 555 U.S. 122, 133, n.2 (2009) (citing both ACCA and § 16(b) cases and noting that §16(b) "closely resembles ACCA's residual clause") (Alito, J., concurring); 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)"); 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. 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)); 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).

Post-Johnson, three circuits have extended the reasoning in Johnson and concluded that the statutory language and ordinary risk analysis applicable to § 16(b) is sufficiently similar to that applicable to the ACCA's residual clause that it suffers from the same defects of being unconstitutionally vague. See United States v. Gonzalez-Longoria, 813 F.3d 225 (5th Cir. 2016); United States v. Vivas-Ceja, 808 F.3d 719, 720 (7th Cir. 2015) ("Section 16(b) is materially indistinguishable from the ACCA's residual clause" and "it too is unconstitutionally vague"). And that logically suggests that the same must also be true of §924(c)(2)(B)—with language identical to §16(b), and to which the same "ordinary risk" analysis applies.

Likewise, several district courts have already found that the §924(c) residual clause is unconstitutionally vague. See United States v. Thongsouk Theng Lat-taphom, ___ F.Supp.3d ___, 2016 WL 393545 (E.D. Cal. Feb. 2, 2016); United States v. Bell, ___ F.Supp.3d ___, 2016 WL 344749 (N.D. Ca. Jan. 28, 2016) ("I agree with

defendants that the section 924(c)(3) residual clause cannot stand under Johnson II."); United States v. Edmunson, Case No. 13-cr-00015-PWG, D.E. 67 at 11 (D. Md. Dec. 29, 2015) (finding that the 924(c) residual clause is unconstitutionally vague in context where Bank robbery Conspiracy was the qualifying "crime of violence"); United States v. Lattanaphom, Case No. 2:99-00433, D.E. 1659, (E.D. Cal. Feb. 1, 2016) (dismissing Bank robbery Conspiracy counts charged as crimes of violence under the residual clause of 924(c) because that clause is unconstitutionally vague); United States v. Bell, -- F. Supp. 3d ---, 2016 WL 344749, *13 (N.D. Cal. Jan. 28, 2016) (finding that the 924(c) residual clause is unconstitutionally vague and may not be used to establish that robbery of government property under 18 U.S.C. 2112 is a crime of violence). This is because, in determining whether an offense falls under §924(c)'s Residual Clause, a court would have to engage in the very analysis deemed constitutionally problematic by the Supreme Court in Johnson.

Section 924(c)(3)(B), like the ACCA residual clause, thus requires the "ordinary case" analysis to assess the risk involved in a predicate offense, and how risky that ordinary case is. Fuertes, 805 F.3d at 500 n.6; Avila, 770 F.3d at 1107; Ayala, 601 F.3d at 267; Van Don Nguyen, 571 F.3d at 530; Sanchez-Garcia, 501 F.3d at 1213. Because these are the identical analytical steps that brought down the ACCA residual clause, §924(c)(3)(B) 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).

CONCLUSION

The Court should vacate defendant's sentence, because the predicate Hobbs Act Offenses do not qualify as a "crime of violence" as a matter of law.

For the reasons set forth above, the defendant's convictions fail to qualify as a "crime of violence" under §924(c)'s Elements Clause because it may be committed by putting one in fear of future injury to his person or property, which (1) does not require the threat of violent physical force against persons or property, and (2) does not require an intentional threat of the same. Hobbs Act Robbery fails to qualify as a "crime of violence" under §924(c)'s Residual Clause, post-Johnson, because it suffers from the same constitutional infirmity of being void for vagueness.

Accordingly, defendant respectfully asks this Court to grant this §2255 motion and re-sentence him.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on June 24, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Respectfully Submitted,

By: _____
PAUL D. LAZARUS, ESQ.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-61410-Civ-Middlebrooks/Brannon

CURTIS SOLOMON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION

Before the Court is Movant Curtis Solomon's ("Movant") Motion to Vacate Sentence Under 28 U.S.C. § 2255 [DE 1], which has been referred to the undersigned for a report and recommendation. The Government answered in opposition [DE 12], and Movant has replied [DE 19]. For the reasons set forth below, the undersigned **RECOMMENDS** that the Motion be **DENIED.**

I. BACKGROUND

Movant and two co-defendants were charged in a 36-count Superseding Indictment with multiple counts of Hobbs Act robbery, carrying a firearm during each of the robberies, and conspiracy to commit the same, all in violation of 18 U.S.C. §§ 1951(a), 924(c), and 924(o) respectively. *U.S. v. Solomon et al.*, No. 08-60090-Cr-Middlebrooks, DE 94 (S.D. Fla. Dec. 4, 2008) (hereinafter cited as "CR").

On April 29, 2009, after a trial, a jury found Movant guilty of (1) conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951(a) (Count 1); (2) conspiracy to use and carry a firearm during and in relation to a crime of violence under 18 U.S.C. §§ 924(c)(1)(A) and 924(o)

(Count 2); (3) substantive Hobbs Act Robbery under 18 U.S.C. §§ 1951(a) and 2 (Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 25, 27, 29, 31, 33, 35); and (4) carrying a firearm during and in relation to a crime of violence under 18 U.S.C. §§ 924(c)(1) and 2 (Counts 6, 8, 10, 12, 14, 16, 18, 20, 22, 26, 28, 30, 32, 34, 36). CR DE 236 at 1-2. These convictions stem from Movant's participation in 16 armed robberies of various local restaurants and convenience stores during a three-month period in late 2007 through early 2008.

On July 13, 2009, Movant was sentenced to 4,641 months in prison as follows: 57 months for Counts 1, 2, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 25, 27, 29, 31, 33, and 35, to be served concurrently; 84 months for Count 4, to be served consecutively, followed by 300 months as to each of Counts 6, 8, 10, 12, 14, 16, 18, 20, 22, 26, 28, 30, 32, 34, and 36, to be served consecutively as to all other counts [CR DE 236]. Movant appealed [CR DE 242].

On July 12, 2011, the Eleventh Circuit affirmed Movant's convictions and sentences [CR DE 294]; *U.S. v. Lewis*, 433 Fed. Appx. 844, 845 (11th Cir. 2011). On November 28, 2011, the U.S. Supreme Court denied Movant's petition for writ of certiorari. *Solomon v. U.S.*, 565 U.S. 1069 (2011).

On November 26, 2012, Movant filed an initial *pro se* § 2255 motion to vacate, which was denied on December 30, 2013. *Solomon v. U.S.*, No.12-62312-Civ-Middlebrooks/White (S.D. Fla. 2013). Movant appealed this denial, to no avail.

On June 26, 2015, the U.S. Supreme Court decided *Johnson v. U.S.*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court found the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), to be void for vagueness and a violation of the Constitution's guarantee of due process. *Johnson*, 135 S. Ct. at 2563. On April 18, 2016, the U.S. Supreme Court decided *Welch v. U.S.*, 136 S. Ct. 1257, 1265 (2016) and held that the

substantive decision in *Johnson* is retroactive in cases on collateral review.

On June 24, 2016, Movant, now represented by counsel, filed the instant § 2255 Motion seeking to have his multiple § 924(c) convictions and sentences vacated in light of *Johnson* and *Welch* (DE 1). On July 8, 2016, the Eleventh Circuit issued an order partially granting Movant's request for leave to file this successive § 2255 Motion (DE 6). Specifically, the Eleventh Circuit granted Movant permission to challenge only his "conviction and sentence under § 924(c) on Count 2 based on his conviction for conspiracy to commit Hobbs Act Robbery." (*Id.*). Movant was expressly "not granted permission to challenge any convictions other than the conviction on Count 2." (*Id.*).

II. LEGAL STANDARD

To prevail on a § 2255 motion, a movant must demonstrate that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the Court was without jurisdiction to impose such a sentence; (3) the sentence exceeded the maximum sentence authorized by law; or (4) the sentence is otherwise subject to collateral attack, *i.e.*, there is a fundamental defect that results in a complete miscarriage of justice. 28 U.S.C. § 2255(a). If a movant makes this showing, a court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). The movant bears a substantial burden in that he "must clear a significantly higher hurdle than would exist on direct appeal." *U.S. v. Frady*, 456 U.S. 152, 153 (1982).

III. ANALYSIS

In light of the Eleventh Circuit's order allowing Movant to proceed only as to Count 2, the Court limits its analysis accordingly. Movant argues that in light of *Johnson's* holding that

the ACCA's "residual clause" in § 924(e)(2)(B)(ii) is unconstitutionally vague, his Count 2 conviction and sentence under § 924(c) violates due process because conspiracy to commit Hobbs Act robbery does not qualify as a predicate "crime of violence." The Government counters that the Motion is (1) procedurally barred; and (2) fails on the merits. The Court will address each argument in turn.

A. ***Procedural Default***

As a threshold issue, the Government argues that the Court should not reach the Motion's merits because Movant did not raise his arguments on direct appeal. Generally, the procedural default rule requires that a defendant "advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn v. U.S.*, 365 F.3d 1225, 1234 (11th Cir. 2004). A defendant, however, can avoid the procedural default bar (1) by demonstrating good cause for not raising the arguments on appeal and that he suffered actual prejudice from the alleged error; or (2) if the constitutional violation has probably resulted in the conviction of a defendant who is "actually innocent." *Id.*

Here, the Court finds that Movant meets the first exception to the procedural default rule: cause and prejudice. A movant meets the "cause" requirement by "showing that the legal basis for a claim was not reasonably available to counsel" at the time of appeal. *Ward*, 592 F.3d at 1157. A movant makes this showing if "his situation is one where a court has articulated a constitutional principle that has not been previously recognized but which has been held to have retroactive application." *Howard v. U.S.*, 374 F.3d 1068, 1072 (11th Cir. 2004). That decision must be "a sufficiently clear break with the past," so that counsel would not reasonably have had the tools for presenting the claim. *Id.* The quintessential example of such a scenario is when the U.S. Supreme Court explicitly overrules one of its precedents because "there will almost

certainly have been no reasonable basis upon which an attorney previously could have urged a [] court to adopt the position that [the Supreme Court] has ultimately adopted." *Reed v. Ross*, 468 U.S. 1, 17 (1984).

Applying the above principles here, the Supreme Court's *Johnson* decision clearly broke with the past by explicitly overruling established precedent and holding that the ACCA's residual clause is unconstitutionally vague. The Supreme Court had previously rejected vagueness challenges to the ACCA's residual clause. *See e.g.*, *Sykes v. U.S.*, 564 U.S. 1, 15 (2011); *James v. U.S.*, 550 U.S. 192, 202 (2007). In light of Movant's reliance on *Johnson*, which clearly broke with past precedent and raised serious debate about the constitutionality of similarly-worded statutes such as § 924(c), there exists quintessential "cause" under the first exception to the procedural default rule.

Movant has also established the required "prejudice" under the exception. Movant argues that he was convicted and sentenced under a constitutionally defective statute. Receiving an illegal sentence certainly satisfies the prejudice prong. *See Chatfield v. U.S.*, 2017 WL 1066776, at *5 (S.D. Fla. Mar. 2, 2017) (Torres, J.), *report & recommendation adopted* 2017 WL 1066779 (S.D. Fla. Mar. 21, 2017) (Cooke, J.) ("if the Petitioner has suffered an 'illegal sentence' on any count of conviction, he has sufficiently alleged actual prejudice as a matter of law and habeas relief may be warranted."). Thus, the Court finds that Movant meets the cause and prejudice exception to the procedural default rule.[1]

[1] Because Movant meets the cause and prejudice exception, the Court need not address the actual innocence exception. *See Chatfield*, 2017 WL 1066776, at *5 ("Because Petitioner has met the first exception to the procedural default rule, the Court need not consider the second exception").

B. *The Merits*

Movant argues that his Count 2 conviction and sentence under § 924(c) should be vacated after *Johnson* because his companion offense of conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence." Specifically, he argues that § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson* and that conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A).

i. Johnson's Application to § 924(c)(3)(B)

Johnson analyzed the ACCA, which provides for a 15-year minimum mandatory sentence for a defendant convicted of being a felon in possession of a firearm if he has at least three convictions for a "violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e). The ACCA defines a "violent felony" as one 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....*

Id. § 924(e)(2)(B) (emphasis added). *Johnson* held that the so-called "residual clause" of subsection (ii), italicized above, is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. The Supreme Court focused on "two features" of the clause. First, it requires courts to estimate the potential risk of physical injury posed by "a judicially imagined 'ordinary case' of [the] crime," and then to consider how that risk compares to the risk posed by the four enumerated crimes preceding the clause, which are themselves "far from clear in respect to the degree of risk each poses." *Id.* at 2557-58 (quotations omitted). It is these two ambiguities *in conjunction* that render the clause unconstitutionally vague. *Id.* at 2560 (explaining that "each of the uncertainties in the residual clause may be tolerable in isolation, but their sum makes a task for us which at

best could be only guesswork") (quotations omitted).

This case, unlike *Johnson*, involves § 924(c). Section 924(c)(1)(A) provides for a separate consecutive sentence if a person uses or carries a firearm during and in relation to a "crime of violence." A "crime of violence" under § 924(c) is one that:

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

18 U.S.C. § 924(c)(3)(A), (B). Noting the differing language and statutory purpose of the ACCA and § 924(c), *see In re Colon*, 826 F.3d 1301, 1303-04 & n.2 (11th Cir. 2016), the Eleventh Circuit previously considered the issue of whether *Johnson* applies to § 924(c)(3)(B) an open issue. *See In re Hines*, 824 F.3d 1334, 1336-37 (11th Cir. 2016); *In re Pinder*, 824 F.3d 977, 978-79 (11th Cir. 2016). Meanwhile, the Second, Sixth, and Eighth Circuits upheld § 924(c)(3)(B) against *Johnson* vagueness challenges. *See U.S. v. Hill*, 832 F.3d 135, 145 (2d Cir. 2016); *U.S. v. Taylor*, 814 F.3d 340, 375 (6th Cir. 2016); *U.S. v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016); *but see U.S. v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016).

Just recently, the Eleventh Circuit resolved this issue in *Ovalles v. U.S.*, --- F.3d ---, 2017 WL 28209371 (11th Cir. June 30, 2017) by agreeing "with the above Second, Sixth, and Eighth Circuits' decisions and hold[ing] that *Johnson* does not apply to, or invalidate, the risk-of-force clause in § 924(c)(3)(B)." *Id.* at *8. The Eleventh Circuit agreed with the reasoning of the Second, Sixth, and Eighth Circuits, but made additional observations. Specifically, the Eleventh Circuit observed that unlike the ACCA's concern with prior convictions, § 924(c)'s required nexus between the firearm offense and the predicate crime of violence "makes the crime of violence determination more precise and more predictable." *Id.* at *7. The Eleventh Circuit

observed further that three textual features of § 924(c) also makes the analysis "substantially more precise, predictable, and judicially administrable"—a more focused statutory standard requiring a risk of physical force in the course of committing the offense, a temporal requirement that the risk arise in the course of committing the offense, and the lack of a confusing list of exemplar crimes. *Id.* at *8. Thus, the ACCA analysis in *Johnson* simply does not apply to § 924(c).

Notably, Movant does not dispute that his conviction for conspiracy to commit Hobbs Act robbery satisfies the definition in § 924(c)(3)(B). He argues only that the statute is unconstitutional. Under *Ovalles*, this argument lacks merit. Thus, the Motion should be denied and the analysis may stop here. Nonetheless, in the interest of completeness, the Court will next determine if conspiracy to commit Hobbs Act robbery is independently a crime of violence under § 924(c)(3)(A). In this Court's view, it is not.

ii. Conspiracy to Commit Hobbs Act Robbery Under § 924(c)(3)(A)

As stated, § 924(c)(3)(A) defines a crime of violence as one that "has an element the use, attempted use, or threatened use of physical force against the person or property of another." In determining whether an offense meets that definition, courts must apply the "categorical approach," which requires looking only to the elements of the companion crime, not to the underlying facts on how that crime was committed. *U.S. v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013).[2] Instead of focusing on facts, the inquiry focuses on the statutory elements of the predicate crime alone. *See Descamps v. U.S.*, 133 S. Ct. 2276, 2283 (2013) (courts applying the "categorical approach" look only to "the statutory definitions—*i.e.*, the elements—of a

[2] Although *McGuire* was decided before *Johnson*, the Eleventh Circuit has relied on *McGuire* in applying the categorical approach in § 924(c) cases after *Johnson*. *See Morton v. U.S.*, No. 16-22522-CIV, 2017 WL 1041568, at *3 n.4 (S.D. Fla. Mar. 2, 2017) (Altonaga, J.) (collecting cases).

defendant's prior offenses, and *not* to the particular facts underlying those convictions.") (quotations omitted) (emphasis in original); *U.S. v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014) (whether the defendant *actually* used, attempted to use, or threatened to use physical force is "quite irrelevant.") (quotations omitted). Thus, a conviction will qualify as a crime of violence under § 924(c)(3)(A) only if all applications of the predicate statute require the government to prove "the use, attempted use, or threatened use of physical force." *McGuire*, 706 F.3d at 1337.[3]

Here, Movant's predicate § 924(c) conviction is conspiracy to commit Hobbs Act robbery. The Hobbs Act criminalizes conduct of a person who "in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section . . . ." 18 U.S.C. § 1951(a). "Robbery" is defined as an "unlawful taking . . . by means of actual or threatened force, or violence, or fear of injury. . . ." 18 U.S.C. § 1951(b)(1).

Attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A), *see Myrthil v. U.S.*, No. 16-22647-CIV, 2016 WL 8542856, at *14 (S.D. Fla. Dec. 29, 2016) (Torres, J.), report & recommendation adopted, 2017 WL 1066782 (S.D. Fla. Mar. 21, 2017) (Cooke, J.). However, *conspiracy* to commit Hobbs Act robbery is a tougher question. To establish such a conspiracy, the Government must show: (1) an agreement between two or more people to

[3] Though not relevant here, there are a "narrow range of cases" in which sentencing courts may look beyond the statute and judgment of conviction and employ what is referred to as the "modified categorical approach." *Descamps*, 133 S. Ct. at 2283-84. That approach applies when a statute is considered "divisible," *i.e.*, when it concerns a list of "alternative elements." *Id.* at 2285-86. Under those circumstances, in order to determine which element was relevant to the defendant's conviction, the court may review *Shepard* documents, which are limited to "the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. U.S.*, 544 U.S. 13, 16 (2005). The focus of the "modified categorical approach" remains the same: a focus on the elements of the crime rather than on the defendant's underlying conduct.

commit a Hobbs Act robbery or extortion; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering the conspiratorial goal. *U.S. v. Pringle*, 350 F.3d 1172, 1176 (11th Cir. 2003). Notably, under the Hobbs Act, the Government need not prove an overt act in furtherance of the conspiracy. *Duhart v. U.S.*, No. 16-61499-CIV, 2016 WL 4720424, at *6 (S.D. Fla. Sept. 9, 2016) (Marra, J.) (citing *U.S. v. Pistone*, 177 F.3d 957, 959-960 (11th Cir. 1999)). Nor must the Government show that a particular conspirator personally agreed to commit, or was even capable of committing, the underlying robbery or extortion. *See Ocasio v. U.S.*, 136 S. Ct. 1423, 1432 (2016).

As such, courts in this District hold that under the categorical approach conspiracy to commit Hobbs Act robbery does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another" as required by § 924(c)(3)(A). *See Benitez v. U.S.*, No. 16-23974-CIV, 2017 WL 2271504, at *4 (S.D. Fla. Apr. 6, 2017) (Ungaro, J.) ("conspiracy to commit Hobbs Act robbery conviction does not qualify as a crime of violence under [§ 924(c)(3)(A)]); *Mobley v. U.S.*, No. 16-61388-CIV, 2016 WL 7188296, at *4 (S.D. Fla. Dec. 9, 2016) (Bloom, J.) ("conspiracy to commit Hobbs Act robbery does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another required to qualify as a crime of violence under § 924(c)(3)(A)."); *Duhart*, 2016 WL 4720424, at *6 (Marra, J.) ("a conspiracy to commit a Hobbs Act robbery does not qualify as a crime of violence under [§ 924(c)(3)(A)]"). The Court finds this authority persuasive and determines that conspiracy to commit Hobbs Act robbery does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another required to qualify as a crime of violence under § 924(c)(3)(A).

Nonetheless, as explained above, Movant does not dispute that his conviction for conspiracy to commit Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(B), which is not unconstitutionally vague under binding precedent. *See Ovalles v. U.S.*, -- F.3d ---, 2017 WL 28209371 (11th Cir. June 30, 2017). Thus, Movant's conviction should stand notwithstanding the Court's finding that a conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A). *See Mobley*, 2016 WL 7188296, at *1 (holding that conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A), but denying motion to vacate because § 924(c)(3)(B) is not unconstitutionally vague under *Johnson*).

IV. RECOMMENDATION

Johnson is of no help to Movant. His conviction for conspiracy to commit Hobbs Act robbery qualifies as a predicate § 924(c) offense as set forth above. While the Court has previously recommended that a certificate of appealability should issue in cases similar to this one, the Eleventh Circuit's very recent opinion in *Ovalles v. U.S.*, -- F.3d ---, 2017 WL 28209371 (11th Cir. June 30, 2017) forecloses the possibility of success by Movant on appeal. Thus, the Court now finds no issues presented that are deserving of encouragement to proceed further. Accordingly, a certificate of appealability should not be issued in this case. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (for a certificate of appealability to issue, an applicant must show "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.").

As such, it is **RECOMMENDED** that the Motion to Vacate Sentence Under 28 U.S.C. § 2255 [DE 1] be **DENIED.** It is further **RECOMMENDED** that a certificate of appealability be **DENIED** and that the Clerk of Court **CLOSE THIS CASE.**

V. NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with U.S. District Judge Donald M. Middlebrooks within 14 days after being served with a copy. 28 U.S.C. § 636(b)(1)(C). Failure to file timely objections may limit the scope of appellate review of factual findings contained herein. *U.S. v. Warren*, 687 F.2d 347, 348 (11th Cir. 1982), *cert. denied*, 460 U.S. 1087 (1983).

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 10th day of July, 2017.

DAVE LEE BRANNON
U.S. MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:16-CV-61410-MIDDLEBROOKS/BRANNON
(08-CR-60090)

CURTIS SOLOMON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT IN PART AND DENYING MOTION TO VACATE SENTENCE UNDER § 2255

THIS CAUSE comes before the Court upon the Report and Recommendation issued by Magistrate Judge Dave Lee Brannon on July 10, 2017 (DE 22). Movant filed a Motion to Vacate pursuant to § 2255 (DE 1, "Motion"), seeking relief in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Report recommends denying Movant's Motion to Vacate and recommends that a certificate of appealability should not be issued. Movant filed Objections to the Report. (DE 23). The Government also filed Objections to the Report. (DE 24). The Government separately filed a response to Movant's Objections. (DE 25).

Movant challenges his 18 U.S.C. § 924(c) conviction based on *Johnson*. The Report finds that, pursuant to In *Ovalles v. United States*, __ F.3d __, 2017 WL 2829371 (11th Cir. June 30, 2017), *Johnson* does not apply to the so-called residual clause (or "risk-of-force" clause) found in § 924(c)(3)(B). In *Ovalles*, the Eleventh Circuit held that *Johnson* does not apply to § 924(c)(3)(B) and thus the risk-of-force clause of § 924(c)(3)(B) "remains valid." Thus, Movant is not entitled to relief.[1]

[1] The Report also finds that Movant's § 924(c) conviction – which is based on his conviction for conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951(a) – is not a crime of violence

Upon a careful, *de novo* review of the record, the Court agrees with the Report's recommendation to deny the Motion to Vacate. I disagree with the Report's recommendation to deny a certificate of appealability. In light of the Eleventh Circuit's withholding of the mandate in *Ovalles*, I find that a certificate of appealability should be issued.

Accordingly,

It is **ORDERED AND ADJUDGED**:

(1) The Report (DE 22) is **ADOPTED IN PART**. I adopt the portion of the Report that recommends denying Movant's Motion because *Johnson* does not apply to § 924(c)(3)(B). I do not adopt the portion of the Report which analyzes whether a conviction for conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951(a) is a crime of violence under § 924(c)(3)(A) as it is unnecessary to resolve Movant's Motion. I also do not adopt the Report to the extent it recommends denying a certificate of appealability.

(2) The Motion to Vacate (DE 1) is **DENIED**.

(3) A Certificate of Appealability is **GRANTED** as to whether *Johnson* applies to § 924(c)(3)(B).

(4) The Clerk of Court shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 29 day of August, 2017.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

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under § 924(c)(3)(A). This ruling is not necessary to resolve Movant's Motion and thus I decline to adopt it.