APPENDIX

APPENDIX

APPENDIX

APPENDIX

A - 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12040-F

LEON ESCOURSE-WESTBROOK,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ON REMAND FROM THE UNITED STATES SUPREME COURT

ORDER:

Leon Escourse-Westbrook moves for a certificate of appealability ("COA") in order to appeal from the denial of his 28 U.S.C. § 2255 motion to vacate his sentence. In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because Escourse has not made a substantial showing of the denial of a constitutional right his motion for a COA is DENIED.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

A - 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:16-cv-22538-KMM

Leon Escourse-Westbrook,

Plaintiff,

v.

United States of America,

Defendant.
_____/

THIS CAUSE came before the Court upon Petitioner Leon Escourse-Westbrook's ("Petitioner" or "Escourse") Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 (ECF No. 1). On June 24, 2016, Petitioner filed the instant Motion to Vacate Sentence under 28 U.S.C. § 2255. This matter was referred to the Honorable Chris McAliley, United States Magistrate Judge, who issued a Report (ECF No. 8) recommending that the Court vacate Petitioner's conviction on Count 3 and resentence Petitioner to the penalties imposed for his conviction of the crime charged in Count 1. The Government timely filed objections to the Report ("Objections"). *See* (ECF No. 11).

The Court reviews *de novo* any part of the Magistrate Judge's report that has been properly objected to. Fed. R. Civ. P. 72(b)(3). The Court has undertaken a *de novo* review of the record, the Report, the Objections, and the relevant legal authority. For the reasons that follow, the Court declines to adopt Magistrate Judge McAliley's Report.

I. BACKGROUND

On September 20, 2013, Petitioner pled guilty to Counts 1 and 3 of a three-count indictment. The indictment charged Petitioner with: Count 1 – Hobbs Act conspiracy in violation of 18 U.S.C. § 1951(A); Count 2 – Hobbs Act robbery in violation of 18 U.S. C. § 1951(a); and Count 3 – brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(a)(II). The parties orally agreed that Petitioner would plead guilty to Counts 1 and 3, and that the Government would recommend a sentence on the low-end of the guidelines and dismiss the Hobbs Act robbery count.

The presentence investigation report ("PSI") calculated a guidelines range of 30-37 months of imprisonment as to Count 1, and 84 months of imprisonment as to Count 3, to run consecutively to Count 1. PSI ¶ 61 (1:13-cr-20524-KMM, ECF No. 76). The Court sentenced Petitioner to a term of 30 months of imprisonment as to Count 1, followed by 84 months of imprisonment as to Count 3, for a total sentence of 114 months of imprisonment.

On June 24, 2016, Petitioner moved to vacate his sentence pursuant to 28 U.S.C. § 2255. Petitioner argues that he is actually innocent of the charge in Count 3 in light of the Supreme Court's ruling in *Johnson v. United States*, 135 S.Ct. 2551 (2015), that the residual clause of the Armed Career Criminal Act of 1984 ("ACCA") is unconstitutionally vague, and that *Johnson* necessitates a finding that conspiracy to commit Hobbs Act robbery is no longer a crime of violence under 18 U.S.C. § 924(c)(1)(A).

II. LEGAL STANDARD

Section 2255 authorizes a prisoner to move a court to vacate, set aside, or correct his or her sentence where "the sentence was imposed in violation of the Constitution or laws of the United States, or . . . the court was without jurisdiction to impose such sentence, or . . . the

sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

III. DISCUSSION

Petitioner argues that the Supreme Court's holding in *Johnson* invalidating the ACCA's residual clause similarly invalidates the residual clause of Section 924(c). Thus, Petitioner contends that conspiracy to commit Hobbs Act robbery is not a "crime of violence" and that he is actually innocent of the charge in Count 3 for which he received a term of imprisonment of 84 months. The government argues that Petitioner is procedurally barred from raising his claim by failing to raise it either at sentencing or on direct appeal, and that Section 924(c) is not rendered unconstitutionally vague by the Supreme Court's holding in *Johnson*.

A. 18 U.S.C. § 924(c)

Title 18 U.S.C. § 924(c) (hereafter, "Section 924(c)") provides in relevant part:

> (c)(1)(a) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, 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 or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;
>
> ***
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

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

18 U.S.C. § 924(c). The first clause of Section 924(c)(3) is at times referred to as the "use-of-force" clause and the second clause is referred to as the "residual clause." *In re Gordon*, 827 F.3d 1289, 1293 (11th Cir. 2016).

B. The ACCA

The ACCA provides in relevant part that a person who violates 18 U.S.C. § 922(g), possession of a firearm by a convicted felon, and has three prior convictions for a violent felony or serious drug offense, shall be imprisoned for at least fifteen years. 18 U.S.C. § 924(e)(1). Under the ACCA, a "violent felony" is defined as any crime punishable by a term of imprisonment exceeding one year that:

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

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is referred to as the "elements clause" and the second prong contains what are known as the "enumerated crimes clause" and the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

On June 26, 2015, the Supreme Court held in *Johnson* that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a particular crime and how much risk constitutes as a violent felony. *Johnson*, 135 S. Ct. at 2557–58, 2563. The Supreme Court did not invalidate the application of the elements clause or the enumerated crimes of the ACCA's definition of a violent felony. *Id.* at 2563. The

Supreme Court subsequently held that *Johnson* created a new substantive rule and therefore must be applied retroactively. *Welch v. United States*, 136 S. Ct. 1257 (2016).

The Court of Appeals for the Eleventh Circuit has yet to decide the precise question presently before the Court, that is, whether the residual clause of 924(c) is unconstitutionally vague. However, recent decisions provide guidance and set forth the current landscape in this district, as well as other districts and Courts of Appeal. In *Mobley v. United States*, the Honorable Beth Bloom concluded that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)'s "use-of-force" clause. *Id.* at *4. No. 16-cv-61338, 2016 WL 7188296 (S.D. Fla. Dec. 9, 2016). With respect to the applicability of *Johnson* to Section 924(c), Judge Bloom agreed with the Courts of Appeals for the Second, Sixth and Eighth Circuits, which have all held that *Johnson* does not render Section 924(c)'s residual unconstitutionally vague. *Id.* at *5–7. (citing *United States v. Hill,* 832 F.3d 135 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016). The Court finds Judge Bloom's decision in *Mobley* persuasive.

In *In re Pinder*, the Court of Appeals for the Eleventh Circuit noted the similarities between Section 924(c) and Section 924(e), specifically that both are penal statutes "requir[ing] higher sentences once a court decides that an offense is a 'crime of violence.'" 824 F.3d 977, 978 (11th Cir. 2016). Although the Court of Appeals explicitly stated it had not yet decided the applicability of *Johnson* to the residual clause of Section 924(c), it stated that the "question is decided 'categorically'—that is, by reference to the elements of the offense, and not the actual facts of [the defendant's] conduct." *Id.* (quoting *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013)).

In order to convict on a conspiracy to commit a Hobbs Act robbery, "the government must show (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal." *United States v. Ransfer*, 749 F.3d 914, 930 (11th Cir. 2014). Employing the categorical approach directed by *Pinder*, the Court finds that conspiracy to commit Hobbs Act robbery is not a crime of violence under the use-of-force clause.[1] *See Mobley*, 2016 WL 7188296, *4 (collecting cases).

Turning to the residual clause of 924(c), the Court finds that *Johnson* does not render the clause unconstitutionally vague. Although the Court of Appeals for the Eleventh Circuit has not squarely addressed the issue, the analysis set forth in *Mobley* and the holdings of other Courts of Appeal are compelling. *See Mobley*, 2016 WL 7188296, at *5–7 (citing *Hill,* 832 F.3d 135; *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016)).

In *Hill*, the Court of Appeals for the Second Circuit analyzed the Supreme Court's holding in *Johnson* and the features of the ACCA residual clause which "conspire to make it unconstitutionally vague." 832 F.3d at 145. Specifically, "[i]t was these twin ambiguities—'*combining* indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony'—that offended the Constitution." *Id.* (emphasis in original) (internal citation omitted). Unlike the ACCA residual clause, Section 924(c) "contains no mystifying list of offenses and no indeterminate 'otherwise phraseology.'" *Id.* Further, the Second Circuit stated that even if the list of enumerated offenses distinction were not sufficient, "the text of the risk-of-force clause differs in additional, material

[1] The Court notes that the Government does not propound the argument that conspiracy to commit a Hobbs Act robbery is a crime of violence under Section 924(c)'s use-of-force clause.

ways." *Id.* at 147–148 (noting that the language of Section 924(c)(3)(B) is "both narrower and easier to construe"). This Court agrees.

Accordingly, under the current law, the Court "decline[s] to get ahead of the Supreme Court, invalidating duly enacted and longstanding legislation by implication" and finds that Petitioner is not "actually innocent" of his 18 U.S.C. § 924(c)(1)(A) conviction such that he may vacate or amend his sentence under 28 U.S.C. § 2255. *United States v. Gonzalez-Longoria*, 831 F.3d 670, 678 (5th Cir. 2016).

IV. CONCLUSION

UPON CONSIDERATION of Petitioner's Motion (ECF No. 1), the Report (ECF No. 8), the Objections (ECF No. 11), the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED as follows: (1) Magistrate Judge McAliley's Report is NOT ADOPTED; (2) Petitioner's Motion (ECF No. 1) is DENIED; and (3) no certificate of appealability shall issue.

It is further ORDERED AND ADJUDGED that the Clerk of the Court is instructed to CLOSE this case. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of February, 2017.

Kevin Michael Moore

Digitally signed by Kevin Michael Moore
DN: o=Administrative Office of the US Courts, email=k_michael_moore@flsd.uscourts.gov, cn=Kevin Michael Moore
Date: 2017.02.28 11:37:40 -05'00'

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record

A - 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22538-CIV/MOORE/MCALILEY

LEON ESCOURSE WESTBROOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION
ON PETITIONER'S MOTION PURSUANT TO 28 U.S.C. § 2255

Petitioner Leon Escourse Westbrook ("Escourse") filed a Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255. [DE 1]. The government filed a response, Escourse filed a reply, and the Honorable K. Michael Moore referred the matter to me for a report and recommendation. [DE 3, 6, 7]. The matter is fully briefed and ripe for decision.

I. Background[1]

On September 20, 2013, Escourse pled guilty to one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count I of the Indictment), and one count of brandishing a firearm in furtherance of a crime of violence,

[1] Escourse's criminal case is Case No. 13-20524-Cr-Moore, and citation to that docket is to "CR-DE __."

in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count III).[2] The latter statute states, in pertinent part, that:

> [A]ny person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, 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 . . .
>
> * * *
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years.

18 U.S.C. § 924(c)(1)A)(ii). A conviction carries a mandatory minimum sentence of 7 years (84 months) imprisonment. By contrast, conviction of conspiracy to commit Hobbs Act robbery, charged in Count I, carries a possible term of imprisonment of up to twenty years, but no mandatory term of incarceration. *See* 18 U.S.C. § 1951(a).

The term "crime of violence" is defined as a felony that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) . . . 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). The first definition, at subsection (A), is commonly known as the "elements clause" and the definition at subsection (B) is the "residual clause."

---

[2] Escourse pled guilty without a written plea agreement. The government did, however, agree to dismiss the remaining count of the Indictment, Count II, which charged Westbrook with the substantive offense of Hobbs Act robbery. CR-DE 58, ¶4 (*Report and Recommendation on Change of Plea "R&R"*); CR-DE 17 (*Indictment*). Although the R&R characterizes Escourse's guilty plea to Count III as acknowledging that he "knowingly possess[ed] a firearm in furtherance of a crime of violence", CR-DE 58, ¶4, the Judgment identifies Count III as "brandishing a firearm in furtherance of a crime of violence", CR-DE 84, p. 1. Both are violations of 18 U.S.C. 924(c)(1)(A), and this distinction is immaterial to the issue now before the Court. I refer here to Escourse's Count III conviction as one for brandishing a firearm in furtherance of a crime of violence.

On December 4, 2013, the Court sentenced Escourse to a term of imprisonment of 114 months: 30 months as to Count I and a consecutive term of 84 months as to Count III. The Court further ordered that upon his release, Escourse be under the supervision of the Court for 3 years as to Count I, and 5 years as to Count III, those terms to run concurrently. [DE 84]. Escourse is now serving that sentence of imprisonment.

In his Motion, Escourse asks this Court to vacate his conviction for brandishing a firearm in furtherance of a crime of violence, Count III, and to resentence him to only the terms of incarceration and supervised release the Court imposed for his conviction of Count I. Escourse urges the Court to reach this result by finding that: (1) the residual clause definition of a crime of violence found at § 924(c)(3)(B) is unconstitutionally vague, in violation of the Due Process Clause of the Constitution, and (2) conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the elements clause of § 924(c)(3)(A). If the Court reaches this conclusion it would mean that Escourse is innocent of the crime charged in Count III, and if this is so Escourse would have been convicted of that Count "in violation of the Constitution or laws of the United States" and would thus be entitled to relief pursuant to 18 U.S.C. § 2255.

II. Escourse's motion is not procedurally barred

This is the first time Escourse has claimed that he was wrongfully convicted of Count III. He did not argue at sentencing that conspiracy to commit Hobbs Act robbery was not a crime of violence under § 924(c) or that the residual clause at § 924(c)(3)(B) was unconstitutionally vague. Nor did he file a direct appeal of his conviction or sentence. The government argues that Escourse has thus waived the claim he now makes.

Criminal defendants are generally required to assert any available challenge to their conviction or sentence on direct appeal. If they do not, they are barred from making that challenge in a § 2255 proceeding. *Lynn v. U.S.*, 365 F.3d 1225, 1234 (11th Cir. 2004). There are two exceptions to this rule of procedural default. Under the first exception, a defendant must show both (1) cause for not raising this claim of error on direct appeal and (2) actual prejudice he suffered due to the alleged error. *Id.* Second, where a constitutional violation has "probably resulted in the conviction of one who is actually innocent", that defendant is also excused from his procedural default. *Id.*

For the reasons offered in this Report and Recommendation, I conclude that Escourse is actually innocent of the crime charged in Count III and that his conviction for that crime should be vacated. Escourse is therefore excused from any procedural default caused by his failure to raise his claim earlier, and I turn to the merits of his argument.

III. Conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the elements clause, § 924(c)(3)(A)

Escourse's conviction under Count III, for brandishing a firearm in furtherance of a crime of violence, can stand only if the predicate offense, conspiracy to commit Hobbs Act robbery, meets either of the definitions of a crime of violence set forth in §924(c)(3). In its memorandum, [DE 6], the government does not dispute Escourse's contention that conspiracy to commit Hobbs Act robbery is not a crime of violence under the elements clause found at § 924(c)(3)(A), and it thus appears to implicitly concede this point. Regardless, it is clear that this predicate offense does not meet the elements clause definition.

The elements clause defines an offense as a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The Court must employ what is called the "categorical approach" to determine whether a predicate offense (here, conspiracy to commit Hobbs Act robbery) meets this definition. *Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013). Under this approach, the Court does not consider the defendant's actual conduct. *United States v. Estrella*, 758 F.3d 1239, 1244-45 (11th Cir. 2014). Rather, the Court looks only to the statutory definition of the predicate offense to determine whether the offense falls within the definition of crime of violence. *Id.*

In other words, in applying the categorical approach "a court assesses whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015) (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)).

The elements of the crime of conspiracy to commit Hobbs Act robbery are the following: (1) two or more people agreed to commit a Hobbs Act robbery; (2) the defendant knew of the conspiratorial goal, and (3) the defendant voluntarily participated in furthering that goal. *United States v. Ransfer*, 749 F.3d 914, 929 (11th Cir. 2014). Significantly, the government need not prove that the defendant committed an overt act in furtherance of the conspiracy, *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999). Nor does the government have to prove that the defendant was capable of

committing Hobbs Act robbery, for the defendant to be found guilty of a conspiracy to commit that crime. *Ocasio v. United States,* 136 S.Ct. 1423, 1432 (2016).

Application of the categorical approach leads to this conclusion: because the crime of conspiracy to commit Hobbs Act robbery does not include as an element the use, attempted use, or threatened use of physical force against the person or property of another, it does not qualify as a crime of violence under the elements clause, at § 924(c)(3)(A). This being so, Escourse's conviction under Count III is valid only if conspiracy to commit Hobbs Act robbery qualifies as a crime of violence under the residual clause definition, found at § 924(c)(3)(B).

IV. Conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the residual clause, § 924(c)(3)(B)

Escourse contends that the Supreme Court's recent decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015) compels this Court to find that § 924(c)(3)(B) is unconstitutionally vague, and that the Court therefore cannot use that provision to find that conspiracy to commit Hobbs Act robbery is a crime of violence. In *Johnson*, the Supreme Court found that a similar, but not identical, residual clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague, in contravention of the Due Process Clause of the Fifth Amendment. Whether the Supreme Court's reasoning in *Johnson* applies to the residual clause at § 924(c)(3)(B) is a close question that has divided courts.[3] After carefully considering the issue, for the reasons set

[3] The question has not yet been resolved by the Eleventh Circuit Court of Appeals and the courts that have considered it are split. *For example, compare United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) *and United States v. McDaniels*, 147 F.Supp.3d 427 (E.D.Va. 2015) (finding §

forth below, I conclude that the reasoning in *Johnson* leads to the conclusion that the residual clause at § 924(c)(3)(B) is also unconstitutionally vague, and I therefore recommend that the Court grant Escourse's motion.

Under the ACCA, defendants convicted of being a felon in possession of a firearm face more severe punishment if they have three or more prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). Like the statute at issue here, the ACCA's definition of a violent felony contains both an elements clause and a residual clause.[4] The two statutes differ in that the ACCA also contains an enumerated clause. 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 [*"elements clause"*]; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, [*"enumerated clause"*] or otherwise involves conduct that presents a serious potential risk of physical injury to another [*"residual clause"*].

18 U.S.C. § 924(e)(2)(B). In *Johnson*, the Supreme Court held that the ACCA residual clause, subsection (ii), is unconstitutionally vague. 135 S.Ct. at 2557, 2563.[5]

To reach this conclusion, the *Johnson* Court began its analysis by noting that courts must follow the categorical approach described above to decide whether a prior

---

924(c)(3)(B) constitutional, the latter in dicta) *with Duhart v. United States*, Case No. 16-61499-CIV-MARRA, 2016 WL 4720424 (S.D. Fla. Sept. 9, 2016) and *Hernandez v. United States*, Case No. 16-CV-22657-HUCK, 2016 BL 321545 (S.D. Fla. Sept. 26, 2016) (finding § 924(c)(3)(B) unconstitutional).

[4] The language of these sister residual and elements clauses are very similar, although not identical; like siblings with a striking resemblance, but not identical twins.

[5] The Court later held that the *Johnson* decision is retroactive to cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016).

felony conviction qualifies as a violent felony within the meaning of the ACCA. 135 S.Ct. at 2557. As noted, the ACCA's residual clause defines a violent felony as a felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 924(e)(2)(B)(ii). The categorical approach required the *Johnson* Court to "picture the kind of conduct that the crime involves in the ordinary case, and [] judge whether that abstraction presents a serious potential risk of physical injury." 135 S.Ct. at 2557 (citation and quotation marks omitted).

In its application of the categorical approach, the *Johnson* Court identified three difficulties that led it to conclude that the ACCA residual clause is unconstitutionally vague. I consider each of these and their applicability to the statute challenged here.

A. Dual indeterminacy

The *Johnson* Court's primary reason for finding the ACCA's residual clause unconstitutionally vague is the dual speculation the categorical analysis requires.

> Two features of the residual clause combine to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by the crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?
>
> * * *
>
> At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk in light of the four enumerated crimes – burglary, arson,

> extortion, and crimes involving the use of explosives. These offenses are far from clear in respect to the degree of risk each poses.
>
> * * *
>
> By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

Id. at 2557-58 (citations omitted).

Courts must engage in the same dual speculation when they apply the categorical approach to the residual clause at 18 U.S.C. § 924(c)(3)(B). The Court must first imagine whether the "ordinary case" of the predicate crime "involves a substantial risk that physical force will be used against the person or property of another in the course of committing that crime." 18 U.S.C. § 924(c)(3)(B). And second, like the ACCA residual clause, § 924(c)(3)(B) leaves the Court with "uncertainty about how much risk it takes for a crime to qualify as a [crime of violence]." *Id.* at 2558.

The language of the two residual clauses, of course, is not identical, and the government argues that these differences are so significant that they take the residual clause before this Court beyond the application of *Johnson*. I do not agree.

First, the fact that the two residual clauses express the measure of risk somewhat differently ("substantial risk" here, versus "serious potential risk" in the ACCA) does not eliminate this dual indeterminacy. The standard "substantial risk" is no more definite than "serious potential risk." And, under both standards the Court must engage in the "judge-imagined abstraction" of conjuring up the "ordinary" conspiracy to commit Hobbs Act

robbery, and then projecting the likelihood that in the course of that "ordinary" crime, physical force will be used. *Id.*

Second, there is this difference: under the ACCA, courts must anticipate the risk that the criminal conduct may cause "physical injury to another", whereas under § 924(c)(3)(B), courts must project the risk that the offender may use physical force "in the course of committing the offense." The government contends that § 924(c)(3)(B)'s focus on force likely to be used while committing the crime narrows the speculation the court must engage in when it applies the categorical approach to § 924(c)(3)(B). The government argues that the risk that physical injury will result from the criminal conduct is broader, and more difficult to quantify, than the risk that an offender will use physical force in the course of the crime. While this may be true in some cases, courts must still speculate about the contours of the "ordinary" offense. That is, this difference in language does not eliminate the "judge-imagined abstraction" that so troubled the Supreme Court, and I am not persuaded that it saves § 924(c)(3)(B) from unconstitutional vagueness.

In sum, the primary reason expressed by the *Johnson* Court for finding the ACCA residual clause unconstitutionally vague, applies equally here.

B. The enumerated clause

The *Johnson* Court noted that the enumerated clause in the ACCA complicates the application of the ACCA residual clause to specific predicate offenses. Specifically, the ACCA residual clause is preceded by an enumerated list of violent felonies: "burglary, arson, or extortion, [or a felony that] involves use of explosives," and the ACCA residual

clause references this list ("*or otherwise* involves conduct that presents a serious potential risk of physical injury to another"). The *Johnson* Court found that this relation back to the list of enumerated felonies further complicated the effort to give meaning to the ACCA residual clause, because the extent to which those listed crimes pose a "serious potential risk of physical injury to another"[6] necessarily varies. *Id.* at 2558.

Unlike the ACCA, the residual clause in § 924(c)(3)(B) is not preceded by a list of exemplar crimes of violence (that is, an enumerated clause). This is a meaningful distinction between the two statutes. I cannot agree with the government, however, that the absence of an enumerated clause in § 924(c)(3)(B) is so significant a difference, that it removes § 924(c)(3)(B) from the realm of unconstitutional vagueness. Again, the primary problem *Johnson* identified – the combined indeterminacy in measuring risk – exists independent of an enumerated clause. I read the *Johnson* decision as identifying the role of the ACCA enumerated clause as an added, but nonessential, basis for finding the ACCA residual clause unconstitutionally vague.

C. **Supreme Court's prior efforts to craft an objective standard**

In *Johnson*, the Supreme Court also emphasized its unsuccessful earlier efforts to draft a "principled and objective standard" by which to apply the ACCA residual clause, as further proof of its "hopeless indeterminacy." *Id.*[7] The *Johnson* Court noted that lower

[6] 18 U.S.C. § 924(e)(2)(B)(ii), the ACCA residual clause.

[7] Specifically, in four earlier cases the Court decided whether a particular predicate offense met the residual clause definition of a violent felony. *Id.* at 2556, 2558-9. *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); and *Sykes v. United States*, 564 U.S. 1 (2011).

courts were also divided in their read of that residual clause. *Id.* at 2560. In contrast, the Supreme Court has not yet interpreted the application of § 924(c)(3)(B) to a particular predicate offense, and the government argues that without this history, the *Johnson* analysis cannot apply to § 924(c)(3)(B).

Again, I do not agree. I do not read this failed prior history as a prerequisite to a finding of unconstitutional vagueness. To find otherwise would set an unreasonably high hurdle for courts to resolve claims of unconstitutional vagueness. The truth is that the *Johnson* decision has cast grave doubt on the constitutionality of this sister residual clause provision. Courts can answer the question whether §924(c)(3)(B) is unconstitutionally vague without waiting for rounds of Supreme Court review.

V. Conclusion and Recommendation

In sum, I conclude that: (1) the residual clause definition of a crime of violence found at §924(c)(3)(B) is unconstitutionally vague, in violation of the Due Process Clause of the Constitution, and (2) conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the elements clause of §924(c)(3)(A). I therefore conclude that Escourse was not guilty of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), charged in Count III of the Indictment, and that he was convicted of that crime "in violation of the Constitution or laws of the United States" and is entitled to relief under 18 U.S.C. § 2255.

Accordingly, I RECOMMEND that the Court VACATE Escourse's conviction on Count III and resentence Escourse to the penalties imposed for his conviction of the crime charged in Count I of the Indictment.

VI. Objections

No later than fourteen days from the date of this Report and Recommendation the parties may file written objections to this Report and Recommendation with the Honorable K. Michael Moore, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985), *Henley v.* Johnson, 885 F.2d 790, 794 (11th Cir. 1989), 28 U.S.C. § 636(b)(1), 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in chambers at Miami, Florida this 14th day of November, 2016.

CHRIS MCALILEY
UNITED STATES MAGISTRATE JUDGE

Copies to: The Honorable K. Michael Moore
All counsel of record

A - 4

UNITED STATES DISTRICT COURT

Southern District of Florida

Miami Division

UNITED STATES OF AMERICA
v.
LEON
ESCOURSE-WESTBROOK (02)

AMENDED JUDGMENT IN A CRIMINAL CASE
(Restitution Imposed)
Case Number: **1:13CR20524**
USM Number: **01671-104**

Counsel For Defendant: **AFPD Aimee Ferrer**
Counsel For The United States: **Cristina Moreno**
Court Reporter: **Lisa Edwards**

Date of Original Judgment: 12/5/13
Reason for Amendment:
X Direct Motion to District Court Pursuant to Modification of Restitution Order (18 U.S.C. § 3664)

The defendant pleaded guilty to Counts One and Three of a Three Count Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18:1951(a)	Conspiracy to commit a Hobbs Act robbery	07/03/2013	1
18:924(c)(1)(A)(ii)	Brandishing a firearm in furtherance of a crime of violence	07/03/2013	3

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.

All remaining counts are dismissed on the motion of the government.

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 material changes in economic circumstances.

Date of Imposition of Sentence: **12/4/2013**

Kevin Michael Moore

Digitally signed by Kevin Michael Moore
DN: cn=Kevin Michael Moore, o, ou, email=k_michael_moore@flsd.uscourts.gov, c=US
Date: 2014.03.07 11:49:20 -05'00'

K. MICHAEL MOORE
United States District Judge

Date: March 7th, 2014

DEFENDANT: **LEON ESCOURSE-WESTBROOK (02)**
CASE NUMBER: **1:13CR20524**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **114 Months. This term consists of 30 Months as to Count One and a term of 84 Months as to Count Three, to be served consecutively to Count One.**

The Court makes the following recommendations to the Bureau of Prisons: Designation to a facility as close as possible to family members in South Florida; participation in the substance abuse treatment program, if and when eligible

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

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **LEON ESCOURSE-WESTBROOK (02)**
CASE NUMBER: **1:13CR20524**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 Years. This term consists of 3 years as to Count One and 5 Years as to Count Three, 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 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 with 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 fifteen 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 days prior to any change in residence or employment;
7. The defendant shall refrain from 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 of the probation officer;
11. The defendant shall notify the probation officer within seventy-two 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: **LEON ESCOURSE-WESTBROOK (02)**
CASE NUMBER: **1:13CR20524**

SPECIAL CONDITIONS OF SUPERVISION

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

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

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

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

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **LEON ESCOURSE-WESTBROOK (02)**
CASE NUMBER: **1:13CR20524**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00	$0.00	$700.00

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount to be determined. 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 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **LEON ESCOURSE-WESTBROOK (02)**
CASE NUMBER: **1:13CR20524**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $200.00 due immediately.

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

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

This 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 08N09
MIAMI, FLORIDA 33128-7716

Payment of Restitution to the victim as reflected in this Court's Order issued 2/19/2014, docket entry #93

Joint and Several Restitution:
Case No. 1:13-cr-20524

Alex Westbrook (01)	#01672-104	$700.00
Leon Escourse-Westbrook (02),	#01671-104	$700.00
Eddie Lee Thomas, IV (03)	#01673-104	$700.00

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.