IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **16-13508-DD**

Danny Herrera,

Appellant,

- versus -

United States of America,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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Certificate of Interested Persons

In compliance with Fed. R. App. P. 26.1 and 11th Circuit Rules 26.1 and 28-1, the undersigned certifies that the list set forth below is a complete list of the persons and entities previously included in the CIP included in the appellant's initial brief, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case and were omitted from the appellant's CIP.

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Herrera v. United States, Case No. 16-13508-DD

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Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

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Statement of Jurisdiction

This is an appeal from a final order of the United States District Court for the Southern District of Florida denying a motion filed pursuant to 28 U.S.C. § 2255. The district court issued orders denying the motion on May 11, 2016 (DE:6, 7) and amended orders to the same effect on May 31, 2016 (DE:9, 10).[1] The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and remedial authority pursuant to 28 U.S.C. § 2255. Herrera filed his timely notice of appeal on June 13, 2016 (DE:11); see Fed. R. App. P. 4(a)(1)(B) (in a civil case, allowing notice of appeal to be filed within 60 days from the judgment or order appealed from when the United States is a party). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and remedial authority pursuant to 28 U.S.C. §§ 2253(c)(1) and 2255.

[1] Throughout this brief, "DE" will refer to the Civil Docket Entries in 16-60929-CV-WPD, whereas "CRDE" will refer to the Criminal Docket Entries in the underlying criminal case of 14-60277-CR-WPD.

Statement of the Issue

As framed by this Court in granting its certificate of appealability, the only issue is "[w]hether the district court erred in concluding that Mr. Herrera's conviction under 18 U.S.C. § 924(c) was unaffected by the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015)."

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

A Southern District of Florida grand jury returned a six-count indictment against Danny Herrera and his co-defendants, specifically charging: (1) conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); (2) conspiracy and attempt to distribute or possess with the intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) (Counts 2 and 3); (3) possession of a firearm in furtherance of, or use or carrying of a firearm during and in relation to, a crime of violence or drug trafficking crime, as outlined in Counts 1-3, and conspiracy to do so, in violation of 18 U.S.C. §§ 924(c)(1)(A), 2, and 924(o) (Counts 4 and 5); and (4) possession of a firearm or ammunition by a convicted felon (Count 6) (CRDE:27).

Thereafter, pursuant to a plea agreement that contained an appellate waiver, Herrera pled guilty to Counts 1 and 5, conspiracy to commit Hobbs Act robbery

and the substantive § 924(c) count[2] (CRDE:62-64, 120). The district court then sentenced Herrera to 41 months' imprisonment as to Count 1, followed by the consecutive statutory mandatory minimum 60 months' term of imprisonment as to Count 5 (CRDE:83).

On April 23, 2015, Herrera filed a notice of appeal (CRDE:94; Case No. 15-11765-EE). Herrera subsequently filed a brief in this Court, in which he argued his trial counsel was ineffective for permitting him to plead guilty to Count 5, failing to move for a downward departure, and failing to move to dismiss the indictment on the basis of entrapment. On November 17, 2015, pursuant to a motion for voluntary dismissal, this Court dismissed Herrera's appeal.

On April 26, 2016, Herrera filed a motion to vacate his conviction pursuant to 28 U.S.C. § 2255, arguing essentially that conspiracy to commit Hobbs Act robbery did not constitute a crime of violence and that the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015) invalidated 18 U.S.C. § 924(c) as void for vagueness (DE:1, 3). The government responded, arguing that Herrera procedurally defaulted his claim by failing to raise it in his initial appeal, that

[2] As to the § 924(c) count, the plea agreement explicitly stated that Herrera was pleading to this count as to both the crime of violence and drug trafficking predicates, specifically stating, "knowingly using and carrying a firearm during and in relation to a crime of violence and a drug trafficking crime and possessing a firearm in furtherance of such crimes" (CRDE:63 ¶ 1).

Johnson did not affect Herrera's 18 U.S.C. § 924(c)(1)(A) conviction, and that the holding of *Johnson* did not extend to invalidate § 924(c) (DE:5). The district court denied Herrera's motion primarily because, although he did not plead guilty to the alternative § 924(c) predicate drug trafficking count, he agreed to the facts supporting the drug trafficking crime in the factual basis at the plea colloquy (DE:7, 9). Moreover, the district court agreed with the Sixth Circuit that *Johnson* does not apply to the residual clause of § 924(c)(3) and suggested that "Hobbs Act Conspiracy appears to also qualify as a crime of violence under [§] 924(c)(3)A)" (*id*.). Finally, the district court noted that "Herrera does not seek a withdrawal of his plea and a trial on all six counts. He seeks the benefit of his plea, without the responsibility" (*id*.). The district court declined to grant Herrera a certificate of appealability ("COA") (DE:10).

Herrera then filed a notice of appeal (DE:11) and sought a COA in this Court. On November 30, 2016, this Court granted Herrera a COA solely as to "[w]hether the district court erred in concluding that [his] conviction under 18 U.S.C. § 924(c) was unaffected by the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015)," citing *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016) and *In re Pinder*, 824 F.3d 977 (11th Cir. 2016).

2. Statement of the Facts

The following facts are taken from the factual proffer signed by Herrera (CRDE:64):

In October 2014, a confidential informant (CI) introduced co-defendants Danny Herrera and Neil Navarro to an undercover (UC) agent working for the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) (CRDE:64:1). During this recorded meeting, which occurred at a parking lot in Broward County, Florida, the UC told the co-defendants that he was a disgruntled drug courier working for a Mexican drug trafficking organization (DTO) transporting 1 to 2 kilograms of cocaine per month (CRDE:64:1). The UC said he was looking for someone to rob at least 15 kilograms of cocaine from a stash house protected by two armed guards working for the same DTO (CRDE:64:1). The UC told them that he would know the location of the stash house the day of the pickup and that the DTO used vacant homes to avoid detection (CRDE:64:1). The co-defendants were willing and interested in doing the home invasion robbery (CRDE:64:1-2). Navarro told the UC "this is what we do" and said the crew would disguise themselves as law enforcement and once inside they would take over (CRDE:64:2). Navarro told the UC they had the guns needed to commit the robbery and they would split the cocaine evenly (CRDE:64:2). Herrera told the UC not to do anything differently with the DTO and to break down

the kilograms of cocaine before selling it because it would probably be marked by the DTO (CRDE:64:2). At the end of the meeting, everyone agreed to meet again to introduce the additional person who was going to help the co-defendants commit the robbery (Gonzalez) (CRDE:64:2).

Four days later, a second recorded meeting occurred with everyone in Broward County, during which time the co-defendants introduced Adrian Gonzalez to the UC as the final member of the robbery crew (CRDE:64:2). The UC explained to Gonzalez (and reiterated to his co-defendants) that he was a disgruntled drug courier who wanted someone to rob his DTO of at least 15 kilograms of cocaine in a stash house protected by two armed guards, so they could then split the drugs (CRDE:64:2). Gonzalez agreed to an even split (CRDE:64:2-3). Gonzalez then asked the UC if the armed guards lock the door after the UC goes in, and the UC responded that they do not but that he closes the door behind him (CRDE:64:3). The UC knew there were handguns in the stash house but could not guarantee that there would not be other firearms inside (CRDE:64:3). Gonzalez told the UC not to be nervous when he went into the stash house and to count to 60, at which point the crew would enter the stash house (CRDE:64:3). Gonzalez and Herrera advised the UC not to sell his cocaine in large quantities immediately (CRDE:64:3). Everyone agreed to meet again later (CRDE:64:3).

Everyone met again on October 17, 2014 (CRDE:64:3). During this recorded conversation, Herrera and his co-defendants said they were ready to commit the robbery (CRDE:64:3). Navarro said that they would go inside the stash house while the CI would be the getaway driver (CRDE:64:3). Gonzalez would go into the stash house first dressed as law enforcement (CRDE:64:3). Gonzalez and Herrera told the UC he should drop to the ground and comply with their orders (CRDE:64:3). Gonzalez told the UC to stay down in case they had to shoot the guards (CRDE:64:3). Navarro said they would tie up the UC and the guards (CRDE:64:3).

Four days later, in another recorded meeting, the UC told everyone that the shipment of cocaine was scheduled to arrive the next day (CRDE:64:3-4). Everyone, including Herrera, indicated they were ready to commit the armed drug stash house robbery (CRDE:64:4). Gonzalez said they would get a clean phone to use during the armed robbery so the UC could call and "leave open" when he entered the stash house (CRDE:64:4).

On October 22, 2014, all three defendants and the CI went to a gas station and followed the UC to an undercover facility in Broward County to await the location of the stash house (CRDE:64:4). Inside, they went over the plan for the armed drug robbery again (CRDE:64:4). Navarro and Herrera reiterated that the UC had to leave the door open (CRDE:64:4). The UC asked how long it would be before they entered

the stash house (CRDE:64:4). Gonzalez responded "That's what I'm going to show you right now" (CRDE:64:4-5). Gonzalez and his co-defendants then went through several "dry runs" of the robbery plan to show how they were going to enter the stash house (CRDE:64:5). Herrera told the UC they would give him 30 to 45 seconds before they entered (CRDE:64:5). A "drop phone" had been purchased, and Herrera told the UC to leave his phone on and connected to the drop phone so Gonzalez could hear everything going on inside the stash house through his Bluetooth device in his ear (CRDE:64:5). Gonzalez then showed how he would burst through the door again with his gun in his hand yelling "hands up; get down!" (CRDE:64:5). Herrera said that simultaneously, he and Navarro would run to the Mexican guards and secure them (CRDE:64:5). Gonzalez said he would be the first one through the door and he would shoot the guards if necessary because he would not be wearing a bullet proof vest (CRDE:64:5). After further discussion of the manner in which they would commit the robbery, Herrera, Gonzalez, and Navarro were arrested (CRDE:64:5).

On their persons, and in the vehicle in which Herrera, Gonzalez, and Navarro were riding, were two guns, approximately 27 rounds of ammunition, eight pairs of gloves, a ski mask, several pieces of dark clothing, a receipt for the "drop phone" and Bluetooth device, and nine zip ties (CRDE:64:5-6). *See also* PSI ¶¶6-14.

3. Standard of Review

As to a district court's denial of a motion to vacate under 28 U.S.C. § 2255, this Court reviews legal conclusions *de novo* and factual findings for clear error. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). Whether a statute is void for vagueness is reviewed *de novo*. *United States v. Biro*, 143 F.3d 1421, 1426 (11th Cir. 1998).

Summary of the Argument

Herrera's collateral attack on his 18 U.S.C. § 924(c) conviction fails for multiple reasons. As a threshold matter, this Court need not reach the issue set forth in the COA. First, Herrera has waived the ability to challenge the constitutionality of the § 924(c)(3)(B) statute as void for vagueness per *Johnson* because he entered into a knowing and valid appeal waiver which precludes such challenges.

Second, whether *Johnson* invalidated § 924(c)(3)(B) is irrelevant for purposes of resolving Herrera's case. In addition to the crime of violence predicate, Herrera was also charged with the drug trafficking predicate for the § 924(c) count. Although Herrera did not plead to the specific underlying drug trafficking count, he explicitly agreed to the facts supporting that underlying drug trafficking crime in his signed factual proffer. Therefore, whether *Johnson* applies to § 924(c)'s definition

of crime of violence is irrelevant here because Herrera would nevertheless be guilty of the § 924(c) count based on the drug trafficking predicate.

Third, Herrera's claim was procedurally barred because he failed to raise that claim on direct appeal, there was no cause and prejudice to excuse that failure, and he is not "actually innocent."

Finally, even if Herrera's claim were cognizable and not procedurally barred, his attack on his § 924(c) conviction is without merit. Herrera argues that the Supreme Court's decision in *Johnson* implicitly invalidated the definition of crime of violence contained in 18 U.S.C. § 924(c)(3)(B). Although this Court need not reach the issue as framed in the COA, it nevertheless fails for multiple reasons. First, *Johnson* does not apply to § 924(c). Although the Supreme Court's decision in *Johnson* invalidated the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), it said nothing about § 924(c)(3)(B). Furthermore, the reasoning in *Johnson* is not applicable to § 924(c)(3)(B)'s residual clause for multiple, independent reasons. Unlike the ACCA, § 924(c)(3)(B) has been limited to a narrow risk of force occurring during the commission of the offense, does not contain a confusing list of enumerated offenses, and has not been the subject of continued confusion and failed attempts at construction by the Supreme Court and other courts. The Sixth, Second, Eighth, and Fifth Circuits have

ruled, as this Court should, that *Johnson* did not invalidate § 924(c)(3)(B)'s residual clause. Thus, the district court's denial of Herrera's motion to vacate should be affirmed for any of the above reasons.

Argument

I. Herrera Waived His Constitutional Challenge To 18 U.S.C.§ 924(c)(3)(B) Because He Entered Into A Knowing And Valid Appeal Waiver Which Precludes Such Challenges.

This Court's COA solely encompasses "[w]hether the district court erred in concluding that Mr. Herrera's conviction under 18 U.S.C. § 924(c) was unaffected by the Supreme Court's ruling in *Johnson*." But because Herrera knowingly and voluntarily waived his right to appeal[3] (CRDE:63), he is precluded from raising such a challenge.

The constitutionality of a statute under which a defendant is convicted

[3] The plea agreement specifically stated, in part, "The defendant is aware that Title 18, United States Code, Section 3742 and Title 28, United States Code, Section 1291 afford the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Sections 3742 and 1291 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court establishes at sentencing. . . . if the United States appeals the defendant's sentence pursuant to Sections 3742(b) and 1291, the defendant shall be released from the above waiver of appellate rights" (CRDE:63 ¶ 9). Herrera does not question the validity of his appeal waiver and therefore has waived any such arguments. *See, e.g.*, *United States v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004).

> presents a jurisdictional issue that the defendant does not waive by pleading guilty. It appears, however, that a valid appeal waiver would nonetheless bar such a claim. *See United States v. Diveroli*, 512 F. App'x 896, 901-02 (11th Cir. 2013) (holding that challenge to statute as vague was barred by valid appeal waiver); *United States v. Maillet*, 440 F. App'x 292, 294 (5th Cir. 2011) ("Maillet's constitutional challenge to the statute of conviction, however, is barred by his knowing and voluntary appeal waiver.")

Sylvester v. United States, 2014 WL 1608503, at *4 (N.D. Ga. 2014) (some internal citations omitted); *see also United States v. Bascomb*, 451 F.3d 1292, 1297 (11th Cir. 2006) ("In negotiating a [plea] agreement [which included a valid appeal waiver], Bascomb was free to bargain away his right to raise constitutional issues as well as non-constitutional ones, and he did so."). Here, Herrera entered into a valid and knowing appeal waiver (CRDE:63 ¶ 9) and therefore is barred from challenging the constitutionality of § 924(c)(3)(B).

II. Herrera Pled Guilty to 18 U.S.C. § 924(c), Which Contained the Alternative Predicate of a Drug Trafficking Crime, the Facts of Which He Agreed to in His Factual Proffer, and Therefore This Court Need Not Reach the Merits of His Claim.

This Court likewise need not consider whether *Johnson* applies to 18 U.S.C. § 924(c) because it has no bearing on Herrera's conviction. Herrera pled guilty to Count 5, which charged a violation of § 924(c) with alternative predicates of a crime of violence *or a drug trafficking crime* (CRDE:27; CRDE:63). Although Herrera did not plead guilty to the substantive count charging the drug trafficking crime,

"conviction under section 924(c) does not require either that the defendant be convicted of or charged with the predicate offense." *See United States v. Frye*, 402 F.3d 1123, 1127 (11th Cir. 2005) (also noting Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits concluding the same); *see also Johnson v. United States*, 779 F.3d 125, 129 (2d Cir. 2015) ("plain language of § 924(c) requires only that the predicate crime of violence (or drug trafficking) have been committed; the wording does not suggest that the defendant must be separately charged with that predicate crime and be convicted of it"); *United States v. Treffinger*, 464 F. App'x 777, 781 n.1 (11th Cir. 2012) (for purposes of § 924(c) "to the extent that [the appellant] is arguing that he must be convicted of the predicate drug trafficking crime or that the crime must be charged in the indictment, he is wrong").

In the context of a guilty plea, proffered facts are sufficient evidence to prove that the defendant committed a predicate § 924(c) crime of violence or drug trafficking crime. *Frye*, 402 F.3d at 1128-29. Herrera pleaded guilty, via written plea agreement and factual proffer, to Counts 1 and 5 (CRDE:63-64). For Herrera's § 924(c) conviction (Count 5), the listed predicate crime of violence was Count 1, conspiracy to commit Hobbs Act robbery (CRDE:27). Although at the time of this brief's filing it remains an open question in the Eleventh Circuit as to whether conspiracy to commit Hobbs Act robbery qualifies as a crime of violence under §

924(c),[4] this Court need not reach that issue because it is irrelevant here[5] since, for Herrera's § 924(c) conviction, the drug trafficking crimes of Counts 2 and 3 were also listed as alternative predicate offenses (CRDE:27). As noted above, there is no requirement that Herrera be separately convicted of a listed predicate offense for purposes of § 924(c). *See Frye*, 402 F.3d at 1127. All that § 924(c) requires is that at least one of the predicate offenses qualify as a crime of violence or drug trafficking crime and that the government prove that the defendant committed it. *See id.* at 1127-28; *United States v. Hunter*, 887 F.2d 1001, 1003 (9th Cir. 1989) ("a defendant charged with violating section 924(c)(1) must be proven to have committed the underlying crime, but nothing in the statute or the legislative history suggests he must be separately charged with and convicted of the underlying offense"). Here, the government proved that Herrera committed at least one of the alternative predicate drug trafficking offenses.

District courts must determine that there is a factual basis before accepting a defendant's guilty plea. *See* Fed. R. Crim. P. 11(b)(3). This requirement protects

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[4] *See In re Pinder*, 824 F.3d 977 (11th Cir. 2016) and *In re Gordon*, -- F.3d --, 2016 WL 3648472, at *3-4 (11th Cir. July 8, 2016).

[5] As outlined *infra*, because *Johnson* did not invalidate the residual clause of § 924(c)(3)(B), conspiracy to commit Hobbs Act robbery constitutes a crime of violence under that provision.

defendants that want to plead guilty and might mistakenly believe that their offense conduct constitutes a crime. *See Frye*, 402 F.3d at 1128. In the context of a guilty plea, a signed, written factual proffer constitutes sufficient proof that the defendant committed a § 924(c) predicate offense. *See id.* at 1128-29.[6]

Assuming, for purposes of argument, that conspiracy to commit Hobbs Act robbery does not constitute a crime of violence, the government established Herrera's guilt as to Count 5's § 924(c) charge because the written and signed factual proffer demonstrated that he also committed Counts 2 and 3 (conspiracy and attempt to distribute or possess with the intent to distribute at least 5 kilograms of cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1)) (CRDE:27; CRDE:64). As outlined in detail above, Herrera was involved in a conspiracy and attempt to commit an armed robbery of at least 15 kilograms of cocaine from what he thought to be a stash house for a Mexican DTO, the details of which were captured in recordings (CRDE:64).

[6] Although the district court did not explicitly discuss the drug trafficking predicate during the plea colloquy (CRDE:120), the plea agreement explicitly outlined the alternative drug trafficking predicate for Count 5 (CRDE:63), as did the signed and written factual proffer (CRDE64) and the oral factual proffer provided at the colloquy (CRDE:120). *See, e.g.*, *United States v. Bascomb*, 451 F.3d 1292, 1295 (11th Cir. 2006) (district court's comments at colloquy cannot modify the terms of the plea agreement).

Herrera argues that the indictment here "make[s] it difficult to determine which of the two offenses served as a predicate" for Herrera's conviction, relying on this Court's opinion in *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016) (Br. at 19). In *Gomez*, the defendant was charged with violating § 924(c) with both a crime of violence predicate (Hobbs Act conspiracy) and a drug trafficking conspiracy predicate. *Id.* at 1226. This Court granted leave for the defendant to file a second/successive application, concluding that the count was "duplicitous" because of the two alternative predicates and that, because he was convicted by a jury, it was unclear upon which of the two predicates the jury may have convicted him. *Id.* at 1227. This opinion, however, is inapposite here. First, it was based on a *prima facie* showing only; *In re Gomez* did not consider application of the procedural bar, an affirmative defense which, as discussed *infra*, the government asserts here. In the context of procedural default, the movant bears the burden to demonstrate that he is actually innocent to overcome the default. Where the defendant's conviction rests upon a subsequently invalidated prong of a criminal statute, the defendant will remain guilty if the evidence is sufficient to convict him under any remaining untouched prongs of the statute. *See Tannebaum v. United States*, 148 F.3d 1262, 1263-64 (11th Cir. 1998).[7] Second, in this case, Herrera pled guilty, in contrast to

[7] In *Tannebaum*, the petitioner had pled guilty to an indictment charging him with

Gomez who had proceeded to trial (CRDE:62-64). The factual proffer here explicitly establishes that Herrera was guilty of the drug trafficking conspiracy since the entire robbery conspiracy was predicated on stealing drugs (see CRDE:64). *See United States v. Vasquez*, 2016 WL 7030112, at *3 (2d Cir. 2016) (where, in a trial for a drug robbery case, Court found that "there was no possibility that the jury's § 924(c) verdict rested *only* on a Hobbs Act robbery predicate because (1) the robbery was an act inextricably intertwined with and, indeed, in furtherance of the charged narcotics conspiracy, *and* (2) the jury found that narcotics conspiracy proved beyond a reasonable doubt"); *Davila v. United States*, 843 F.3d 729, 731 (7th Cir. 2016) (finding that, where the defendant did not plead to an underlying drug

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carrying or using a firearm in furtherance of a crime of violence. 148 F.3d at 1263. After he had pled guilty, the Supreme Court issued its decision in *Bailey v. United States*, 516 U.S. 137 (1995), in which it narrowed the scope of the statute's "use" prong. *See id.* The petitioner then filed his § 2255 claiming that he was now actually innocent. *See id.* But this Court rejected this argument, noting that *Bailey* did not affect the analysis as to the "carry" prong of the § 924(c) statute. *See id.* Because the stipulated facts of the plea colloquy contained facts sufficient to convict the petitioner under the untouched "carry" prong, his actual innocence claim was rejected, and the district court's application of the procedural bar to dismiss the case was affirmed. *See id.; see also DeJesus v. United States*, 161 F.3d 99, 103-04 (2d Cir. 1998) (petitioner could not establish actual innocence of § 924(c) charge because it was not more likely than not that no reasonable juror would have convicted him of carrying a firearm during and relation to a drug trafficking crime in light of the evidence at trial). Similarly, here, Herrera cannot establish actual innocence because the stipulated facts contain sufficient evidence to convict him of the untouched "drug trafficking" prong.

conviction, but admitted to its facts, that made him eligible for a § 924(c) conviction based on the drug count, which had an alternative underlying crime of violence predicate).

Moreover, this Court's reasoning in *United States v. Navarro*, 2017 WL 765772 (11th Cir. Feb. 28, 2017), is instructive. There, the panel affirmed the district court's denial of the § 2255 petition of Herrera's co-defendant Navarro (which, like Herrera's own petition, pressed the argument that *Johnson* invalidated § 924(c)'s residual clause) on the threshold basis that "Navarro's § 924(c) conviction was alternatively premised on drug trafficking crimes." *Id.* at *1. In so doing, the panel reasoned that, "[a]lthough Navarro did not plead guilty to the drug trafficking crimes in counts two and three, the factual proffer, signed by Navarro, established that he had conspired with his codefendants to steal 15 kilograms of cocaine and then distribute that cocaine, while armed. Navarro did not need to be convicted of those crimes in order for them to count as predicates for the § 924(c) conviction." *Id*.

Consistent with the reasoning in Navarro, this Court need not reach the COA issue here. *See United States v. Siegelman*, 786 F.3d 1322, 1327 (11th Cir. 2015) (holding law-of-the-case doctrine "applies to those issues decided on a co-defendant's earlier but closely related appeal"). Even if *Johnson* invalidated

§ 924(c)(3)(B), which it does not, Herrera's conviction, like Navarro's, therefore should still be affirmed based on the drug trafficking predicate crimes which the government proved he committed through his signed factual proffer.

III. Herrera's Claim Is Procedurally Barred.

Herrera's arguments are procedurally barred because he failed to raise them on direct appeal. It is well settled that a defendant must raise a claim on direct appeal or the claim will be subject to the procedural default rule. *See Massaro v. United States*, 538 U.S. 500, 504 (2003); *Murray v. Carrier*, 477 U.S. 478, 490-92 (1986). A defendant can overcome his procedural default by demonstrating both cause for his failure to raise the claim earlier and actual prejudice resulting from the alleged error. *See United States v. Frady*, 456 U.S. 152, 167-68 (1982). The "cause and prejudice" standard requires a prisoner to show not only that "some objective factor external to the defense impeded" his efforts to raise the issue earlier, *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (quoting *Murray*, 477 U.S. at 488), but also that the error he alleges "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170 (emphasis in original). If a prisoner cannot show both cause for his procedural default and actual prejudice, a court should not consider his challenge to his sentence unless he can demonstrate "actual innocence." *Bousley v. United States*, 523 U.S.

614, 621-24 (1998).

Here, Herrera procedurally defaulted his claim because he did not raise it on direct appeal and cannot establish either exception to the procedural bar rule. Specifically, Herrera cannot demonstrate any cause for failing to assert his current attack on his § 924(c) conviction on direct appeal. Although the novelty of a claim can constitute cause to excuse procedural default, *see Reed v. Ross*, 468 U.S. 1, 16 (1984),[8] a claim is not "novel" where "others were recognizing and raising the same or similar claims" before or during the same period of time when a petitioner failed to raise the defaulted claim. *Pitts v. Cook*, 923 F.2d 1568, 1572 (11th Cir. 1991) (citing *Smith v. Murray*, 477 U.S. 527, 536-37 (1986) and *Pelmer v. White*, 877 F.2d 1518, 1522-23 (11th Cir. 1989)). As this Court has found

> [t]hat an argument might have less than a high likelihood of success has little to do with whether the argument is available or not. An argument is available if there is a reasonable basis in law and fact for it. *Cf. Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (complaint which fails to state claim under current precedent may still have basis in law). Not all reasonable arguments can prevail. "Even those decisions rejecting the defendant's claim, of course, show that the issue had been perceived by other defendants and that it was a live one in the courts at the time." *Engle* [*v. Issac*], 456 U.S. [107,] 131 n.41, 102 S.Ct. [1558,] 1574 n.41 [(1982)].

[8] But even in *Reed*, the Court held that the basis of the constitutional claim had to be "*so* novel that its legal basis is not reasonably available to counsel." *Id.* at 16 (emphasis added).

> Even if others have not been raising a claim, the claim may still be unnovel if a review of the historical roots and the development of the general issue involved indicate that petitioners did not "lack[] the tools to construct their constitutional claim." *Engle*, 456 U.S. at 133, 102 S.Ct. at 1574.

Pitts, 923 F.2d at 1572 n.6.

Herrera's vagueness claim is not novel. The tools necessary to construct the vagueness argument that carried the day in *Johnson* existed long before *Johnson* applied them to the ACCA. *See Howard v. United States*, 374 F.3d 1068, 1073 (11th Cir. 2004) (where the "legal basis" for a claim existed, "[t]he claim was not sufficiently unheard [of] to be novel for cause purposes"). In 2007, eight years before Herrera was sentenced, Justice Scalia warned in his dissent that the "shoddy draftsmanship" of the ACCA's residual clause might require the Court to "recognize the statute for the drafting failure it is and hold it void for vagueness." *James v. United States*, 550 U.S. 192, 229-30 (2007) (J. Scalia dissent) (citations omitted). *See also United States v. Rush*, 551 F.3d 749, 750-51 (8th Cir. 2008) (rejecting constitutional vagueness challenge to the ACCA's residual clause). Indeed, the Supreme Court issued three opinions between 2007 and Herrera's March 2015 sentencing, in which the Court attempted to clarify how lower courts should determine what constitutes a violent felony under the residual clause of the ACCA. *See James*, 550 U.S. 192; *Begay v. United States*, 553 U.S. 137 (2008); and

Chambers v. United States, 555 U.S. 122 (2009). Therefore, because the legal basis of vagueness for the *Johnson* case existed well before the case itself was decided, Herrera's claim is not novel.

Moreover, the perceived futility of raising an objection when existing precedent had already rejected a claim does not rise to the level of legal "cause" to excuse a default. *See Bousley*, 523 U.S. at 623. In any event, no such precedent exists here because the Supreme Court has not found that § 924(c)(3)(B) is vague.

Nor can Herrera excuse his default by alleging that his trial counsel was constitutionally ineffective for failing to pursue a Johnson-type challenge to his § 924(c) conviction. Although constitutionally ineffective assistance of counsel can constitute "cause" to excuse a default, see *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000), the failure of Herrera's counsel to have anticipated *Johnson's* holding is not constitutionally deficient performance. See *Jackson v. Herring*, 42 F.3d 1350, 1359 (11th Cir. 1995) ("To be effective within the bounds set by *Strickland*, an attorney need not anticipate changes in the law.").

In addition, Herrera cannot establish actual prejudice. A defendant who has been sentenced to a term of imprisonment based on a conviction for conduct that is not prohibited by the statute under which he was charged can make the required showing of prejudice. But, because, as is set forth below, Herrera's claim fails on its

merits, he was not convicted of a non-existent crime and thus cannot establish actual prejudice excusing his procedural default. Moreover, Herrera was sentenced to 101 months' imprisonment as to both counts, but the statutory maximum for the Hobbs Act robbery count is 240 months. Therefore, Herrera could have been sentenced to the same original sentence of 101 months' imprisonment solely on the Hobbs Act robbery count. Because the total sentence did not exceed the statutory maximum of the underlying substantive count, Herrera cannot show actual prejudice. *See, e.g.*, *United States v. Hester*, 287 F.3d 1355, 1357 (11th Cir. 2002); *United States v. Smith*, 240 F.3d 927, 930 (11th Cir. 2001).

Finally, Herrera cannot satisfy the actual innocence exception to the procedural default rule. "In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." *Bousley*, 523 U.S. at 624. *See also Jones v. United States*, 153 F.3d 1305, 1308 (11th Cir. 1998) (remanding for consideration of actual innocence claim and instructing that "the district court should heed the Supreme Court's instruction" that the "showing of actual innocence must also extend to" any more serious charges that the government has foregone in the course of plea bargaining) (quoting *Bousley*, 523 U.S. at 624); *United States v. Montano*, 398 F.3d 1276, 1285 (11th Cir. 2005) (requiring defendant to establish "actual innocence" of

more serious charges foregone in plea negotiations and instructing that "the Government must be permitted to introduce any admissible evidence of [petitioner's] guilt, whether or not that evidence was presented in the plea colloquy, or even would have been offered before our decision today" (citations omitted)). As the Seventh Circuit explained

> [t]he idea behind this rule is that had the government foreseen [the Supreme Court decision at issue] it would not have dropped the [equally or more serious] charge and so the petitioner, who we know wanted to plead guilty, would probably have pleaded guilty to that charge instead, and if it was a more serious charge (or we add, no less a serious charge) he would probably have incurred a lawful punishment no less severe than the one imposed on him under the count to which he pleaded guilty, the count that he was later determined to be innocent of by virtue of the Court's interpretation of section 924(c) in *Bailey*.[9]

Lewis v. Peterson, 329 F.3d 934, 936 (7th Cir. 2003).

As discussed supra, Count 5 charged Herrera with using/carrying a firearm during and in relation to the Hobbs Act robbery conspiracy (Count 1), but also alternatively the drug trafficking crime (Counts 2 and 3) (CRDE:27). As part of plea negotiations, the government allowed Herrera to plead to the § 924(c) count with only the crime of violence predicate (conspiracy to commit Hobbs Act robbery) rather than the drug predicate, which was originally also charged in the indictment (CRDE:27, 63).

[9] *Bailey v. United States*, 516 U.S. 137 (1995).

Additionally, in the factual proffer associated with his guilty plea, Herrera admitted to facts indicating that he did, in fact, use/carry a firearm during and in relation to the drug trafficking crime charged in Counts 2 and 3 (CRDE:64:5-6). *Johnson* in no way affected the underlying drug trafficking crime charged as a predicate to the § 924(c) count. The underlying drug trafficking crime charged conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846, 841(a)(1), and 841(b)(1)(A), which carries a penalty of a statutory mandatory minimum ten years' imprisonment up to life. Moreover, the § 924(c) count with the drug trafficking predicate carries a penalty of a statutory mandatory minimum five years' imprisonment up to life. *See* 18 U.S.C. § 924(c). Thus, either of these two dismissed counts is equally as, or more, serious than the § 924(c) count at issue (related to the conspiracy to commit Hobbs Act robbery). Herrera hence must show actual innocence as to both (1) the § 924(c) count with the predicate drug trafficking crime charged in Count 5; *and* (2) the actual drug trafficking conspiracy counts charged in Counts 2 and 3, both of which were dismissed by the government pursuant to the plea agreement. Herrera cannot do so. The facts to which he pled guilty outlined his guilt as to each of these dismissed counts (CRDE:64).

Accordingly, the district court correctly concluded that it lacked authority to consider Herrera's collateral attack on his § 924(c) conviction because that claim is procedurally barred.

IV. *Johnson* Did Not Render § 924(c)(3)(B) Unconstitutional.

Johnson does not apply to § 924(c)(3)(B) and therefore does not render it unconstitutional. *Johnson*, which held as unconstitutional the residual clause of the ACCA, instead turned on considerations in the ACCA that § 924(c)(3)(B) does not implicate. Unlike the ACCA residual clause, § 924(c)(3)(B) has been limited to a narrow risk of force occurring during the commission of the offense, does not contain a confusing list of enumerated offenses, and has not been the subject of continued confusion and failed attempts at construction by the Supreme Court and other courts.

The "residual clause" of § 924(c)(3)(B) defines a "crime of violence" as "an offense that is a felony and—(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 Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), held unconstitutionally vague a clause of a different statute (the ACCA residual clause in 18 U.S.C. § 924(e)(2)(B)(ii)) that not only has language that is materially different from § 924(c)(3)(B), but also serves a different

function. The "residual clause" in § 924(e)(2)(B)(ii) defines a "violent felony" as a felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

Section 924(c)(3)(B) has at least five material differences from the ACCA's residual clause. First, the ACCA's residual clause refers to offenses that "involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii); however, § 924(c)(3)(B) refers to an 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." Although both statutes require a court to examine the ordinary case of the offense[10]—*one* feature of the ACCA that the Court found contributed to its indeterminacy, *see Johnson*, 135 S.Ct. at 2557-58—that inquiry is far more targeted and straightforward in the context of § 924(c)(3)(B). By focusing on the use of physical force "in the course of

[10] *But see, e.g., In re Holmes*, No. 16-14330-J, slip op. at 11-12 (11th Cir. 2016) (noting that "many of the reasons proffered by the Supreme Court for employing a categorical approach to state court convictions in ACCA cases simply do not apply in the § 924(c) context where the § 924(c) offense and its federal companion conviction are in the same federal indictment, and both charges are before the same judge."); *In re Gordon*, 827 F.3d 1289, 1294 n.4 (11th Cir. 2016). Even if this Court declined to apply the categorical approach here, the outcome would remain the same. The evidence elicited in the factual proffer, and as outlined *supra*, made abundantly clear that the planned commission of the Hobbs Act robbery underlying Herrera's conviction was a crime of violence as defined in § 924(c)(3).

committing the offense," § 924(c)(3)(B) confines the risk assessment to only those risks that arise during the commission of the offense. That distinction eliminates a key factor that the Court found problematic in the ACCA risk analysis: the additional necessity for courts to go "beyond evaluating the chances that the physical acts that make up the crime injure someone" and to evaluate the risk of injury even "after" completion of the offense. *Id*. at 2557; *see id*. at 2559 (noting that "remote" physical injury could qualify under the ACCA, but that the clause does not indicate "how remote is too remote"); cf. *United States v. Taylor*, 814 F.3d 340, 377 (6th Cir. 2016) (noting that, unlike the concern with the ACCA in *Johnson*, § 924(c)(3)(B) "permits no similar inquiry into conduct following the completion of the offense" and "does not allow courts to consider 'physical injury [that] is remote from the criminal act'"); *United States v. Davis*, 2017 WL 436037, at *2 (5th Cir. 2017).

Second, and relatedly, § 924(c)(3)(B) focuses on the risk of the use of force, not a broader risk of injury. That restricts § 924(c)(3)(B) to a narrower category of conduct that can result in injury or property damage—*i.e.*, conduct that is the product of the use of force. *See United States v. Hill*, 832 F.3d 135, 147-48 (2d Cir. 2016) ("Both the Supreme Court and this Court have noted that the language in the [§ 924(c)(3)(B)] provision is both narrower and easier to construe" than the language of the ACCA); *Taylor*, 814 F.3d at 375-76; *Davis*, 2017 WL 436037, at *2.

Third, an additional determinative factor in *Johnson* was that the ACCA's residual clause is preceded by a list of enumerated offenses of widely differing risk levels ("burglary, arson, or extortion" or offenses "involve[ing] use of explosives"). The *Johnson* Court attributed part of the "uncertainty about how much risk it takes for a crime to qualify" under the residual clause to that list, because it "forces courts to interpret 'serious potential risk' in light of the four enumerated crimes," which are "far from clear in respect to the degree of risk each poses." 135 S.Ct. at 2558 (quotations omitted); *see id*. at 2557 (referring to "the inclusion of burglary and extortion among the enumerated offenses" and how it affected the "court's task" in evaluating risk of injury). No such list exists under § 924(c)(3)(B), and the absence of such a list significantly distinguishes it from the ACCA. *See Taylor*, 814 F.3d at 377 (noting that "[u]nlike the ACCA, § 924(c)(3)(B) does not complicate the level-of-risk inquiry by linking the 'substantial risk' standard, through the word otherwise, 'to a confusing list of examples'"); *Hill*, 832 F.3d at 146 ("First, and most obviously, the risk-of-force clause contains no mystifying list of offenses and no indeterminate 'otherwise' phraseology—a defining feature of the ACCA's residual clause that, in *Johnson II*, was understood to add an additional layer of uncertainty. . . . Indeed, the Court rejected the Government's argument that its decision in *Johnson II* would draw into question statutes that, like the one here, do not 'link[ ] a phrase such as

"substantial risk" to a confusing list of examples.' . . . Moreover, an analysis of the Court's pre-*Johnson II* precedents attempting to construe the residual clause makes clear that the presence of these enumerated offenses was, as *Johnson II* suggested, the prime cause of uncertainty in that provision, and the key obstacle to consistent judicial construction"); *see also Johnson*, 135 S.Ct. at 2561 (assuring the government and dissent that striking down the ACCA's residual clause would not affect other, similar provisions because "[a]lmost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples").

Fourth, § 924(c)(3)(B) has a different function than the ACCA. Unlike the ACCA, § 924(c)(3)(B) does not identify predicate convictions for the purpose of a recidivist enhancement. Rather, a "crime of violence" under that provision, if perpetrated with a sufficient nexus to a firearm, is a new offense. That factor narrows the type of offenses that might serve as predicate offenses to ones that could be committed with a sufficient nexus to a firearm. No such required nexus exists for the prior convictions under the ACCA, thereby already elevating the seriousness of § 924(c) at the outset.

Finally, *Johnson* emphasized the "Court's repeated attempts and repeated failures to craft a principled and objective standard" for analyzing the residual clause of the ACCA. 135 S.Ct. at 2558; *see id*. at 2559 (noting that Johnson was the

Court's "fifth [case] about the meaning of the [ACCA] residual clause"). In contrast to its ACCA jurisprudence, the Court has never had occasion to resolve a disputed question about the meaning of § 924(c)(3)(B). *See Taylor*, 814 F.3d at 376, 378 ("the Supreme Court reached its void-for-vagueness conclusion [regarding the ACCA's residual clause] only after struggling mightily for nine years to come up with a coherent interpretation of the clause, whereas no such history has occurred with respect to § 924(c)(3)(B)"); *Hill*, 832 F.3d at 148 ("there is no such troubled interpretive history [as there is with the ACCA] with respect to the risk-of-force clause" of § 924(c)(3)). Accordingly, § 924(c)(3)(B) is not void for vagueness because it does not implicate the same concerns that the ACCA did.

To date, the Sixth, Second, Eighth, and Fifth Circuits have already upheld the provision against a post-Johnson vagueness challenge. *See United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016); *but see id*. at 394-98 (White, J., dissent); *United States v. Hill*, 832 F.3d 135, 145-50 (2d Cir. 2016); *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016); *United States v. Davis*, 2017 WL 436037, at *2 (5th Cir. 2017); *cf. United States v. Cardena*, , 842 F.3d 959, 995 (7th Cir. 2016) (stating that 18 U.S.C. § 924(c)'s residual clause is unconstitutionally vague, without analysis, relying on the Court's earlier invalidation of 18 U.S.C. § 16(b), but ultimately affirming the convictions).

Johnson hence did not render the residual clause of § 924(c)(3)(B) unconstitutional, and Herrera's claim therefore fails.[11]

Conclusion

For the foregoing reasons, the district court's decision should be affirmed.

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[11] Because Herrera's claim lacks merit for all of the reasons explained *supra*, this Court need not decide whether conspiracy to commit Hobbs Act robbery alternatively qualifies as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A).

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,783 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Certificate of Service

I hereby certify that seven copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 15th day of March, 2017, and that, on the same day, the foregoing brief was filed using CM/ECF and served via CM/ECF on Sara Brewerton-Palmer, Esq., counsel for appellant.

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