INDEX TO APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-13508
Non-Argument Calendar

D.C. Docket Nos. 0:16-cv-60929-WPD,
0:14-cr-30277-WPD-2

DANNY HERRERA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(January 10, 2019)

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

PER CURIAM:

Danny Herrera pleaded guilty to possession of a firearm during a crime of violence or drug-trafficking crime under 18 U.S.C. § 924(c), which was premised

on conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951. He now appeals the district court's denial of his motion to vacate his 60-month sentence under 28 U.S.C. § 2255. Herrera argues that the district court erred in concluding that the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), did not affect Herrera's conviction under 18 U.S.C. § 924(c). The government responds that Herrera's appeal is barred by the sentence-appeal waiver in Herrera's plea agreement, and alternatively, that Herrera's conviction is unaffected by *Johnson*. After careful review, we affirm.

I.

We review the validity of a sentence-appeal waiver de novo. *United States v. Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008). Plea agreements "are like contracts," and "[a]bsent some indication that the parties intended otherwise," the language of the agreement is given its "ordinary and natural meaning." *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005). Any ambiguities in the agreement are resolved in favor of the defendant. *United States v. Jeffries*, 908 F.2d 1520, 1523 (11th Cir. 1990). The plain language of Herrera's sentence-appeal waiver did not include his right to collaterally attack his conviction and sentence using 28 U.S.C. § 2255. As a result, the waiver does not foreclose this collateral challenge to his conviction or sentence. *Cf. Williams v. United States*,

396 F.3d 1340, 1341–42 (11th Cir. 2005) (holding that sentence-appeal waiver applied to the defendant's § 2255 claim at sentencing because the waiver expressly included the defendant's right to collaterally attack his sentence).

II.

In an appeal challenging the district court's resolution of a § 2255 motion, we review factual findings for clear error and legal issues de novo. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (per curiam). Herrera argues that the district court erred in concluding that his conviction under 18 U.S.C. § 924(c) is unaffected by the Supreme Court's ruling in *Johnson*. *Johnson* involved the Armed Career Criminal Act (ACCA), which imposes a heightened sentence on a defendant with three prior convictions for either "a violent felony or serious drug offense." *See Johnson*, 135 S. Ct. at 2557–58; 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" 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 the 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 is the "elements clause." *See United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012). The second prong contains the "enumerated crimes" clause and the "residual clause." *See id.*

In *Johnson*, the Supreme Court held that the residual clause of the ACCA was unconstitutionally vague. *See* 135 S. Ct. at 2557–58, 2563. Separate from § 924(e)'s residual clause at issue in *Johnson*, Herrera was convicted under § 924(c), which imposes a mandatory consecutive sentence for a defendant who uses a firearm during a "crime of violence" or "drug trafficking crime." 18 U.S.C. § 924(c)(1). Section 924(c)(3) defines a "crime of violence" as any crime, punishable by a term of imprisonment exceeding one year, that:

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

In this Court's recent en banc decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc), we held that § 924(c)(3)(B)'s residual clause is not unconstitutionally vague so long as the statute is interpreted to embody a conduct-based approach that accounts for the actual, real-world facts of the companion offense's commission, as opposed to the categorical approach. *Id.* at 1253. Herrera concedes that conspiracy to commit Hobbs Act robbery is a crime

of violence under § 924(c)(3)(B). *See United States v. St. Hubert*, 883 F.3d 1319, 1327–28 (11th Cir. 2018).

Moreover, under *Ovalles*' conduct-based approach, Herrera committed a crime of violence. Herrera signed a written factual proffer in which he admitted to conspiring to commit a home invasion robbery. The factual proffer also contained details of the items uncovered after a search of the defendants and their vehicle, including two loaded guns, ammunition, a ski mask, and zip ties. Like in *Ovalles*, "[e]specially when layered on top of [Herrera's] own admission to the overtly violent charge" of conspiracy to commit Hobbs Act robbery and his concession on appeal, the government's factual proffer leads to the conclusion that Herrera committed a "crime of violence" within the meaning of § 924(c)(3)(B). Herrera's argument that *Johnson* affects his conviction is thus foreclosed by *Ovalles*.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DANNY HERRERA,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

CASE NO. 16-60929-CIV-DIMITROULEAS
(14-60277-CR-DIMITROULEAS)

AMENDED[1]**FINAL JUDGMENT AND ORDER DENYING MOTION TO VACATE**

THIS CAUSE is before the Court upon Movant's April 19, 2016 Motion to Vacate. (Johnson Issues). [DE-1]. The Court deferred ruling and has received a May 9, 2016 Response from the Government [DE-3] and a May 16, 2016 Reply from Herrera. [DE-8].

The Court having reviewed the Court file and Pre-Sentence Investigation Report (PSIR) and having presided over this cause, finds as follows:

1. On November 16, 2014, Herrera, along with two co-defendants, was indicted and charged with Conspiracy to Commit Hobbs Act Robbery, Conspiracy to Possess with Intent to Distribute Five (5) kilograms or more of Cocaine, Attempted Possession with Intent to Distribute Five (5) kilograms or more of Cocaine, Conspiracy to Use a Firearm in Relation to a Crime of Violence, Carrying a Firearm in Relation to a Crime of Violence or Drug Trafficking Crime, and Possession of a Firearm by a Convicted Felon. [CR-DE-27].

2. On January 16, 2015, Herrera pled guilty to the Hobbs Act Conspiracy and Carrying a Firearm in Relation to a Crime of Violence or Drug Trafficking Crime [CR-DE-62] pursuant to a plea agreement.[2] [CR-DE-63]. He waived his right to take an appeal.

[1] The Court has now considered Herrera's May 16, 2016 Motion for Rehearing [DE-8], construed as a reply.

3. On March 23, 2015, Herrera was sentenced to 41 months on the Hobbs Act Conspiracy and a consecutive 60 months on the gun charge for a total of 101 months in prison. [CR-DE-83]. On November 17, 2015, the Eleventh Circuit Court of Appeal dismissed Herrera's appeal. [CR-DE-124].

4. In this timely Motion to Vacate, Herrera complains that Hobbs Act Robbery is not a predicate crime for an 18 U.S.C. 924(c) conviction. However, Herrera's indictment charged alternative predicate crimes: Hobbs Act Conspiracy and a Drug Trafficking crime. *See Polanco v. U.S.*, 2016 WL 1357535 (S.D. Fl. 2016). Moreover, Herrera need not have pled guilty to a substantive drug trafficking crime for it to be a predicate for the 924(c) conviction. Additionally, it does not appear that *Johnson v. U.S.*, 135 s. Ct. 2551 (2015) has been extended beyond the Armed Career Criminal Statute. *U.S. v. Matchett*, 802 F. 3d 1185 (11th Cir. 2015); *U.S. v. McDaniels*, 2015 WL 7455539 (E.D. Va. 2015). This Court agrees with the rationale of *U.S. v. Taylor*, 814 F. 3d 340, 375-379 (6th Cir. 2016). *See also*, *U.S. v. Fox*, 2016 WL 3033067 (11th Cir. 2016). Moreover, Hobbs Act Conspiracy appears to also qualify as a crime of violence under 924(c)(3)A).

5. Finally, 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.

Wherefore, Herrera's Motion to Vacate [DE-1] is Denied. The Request for a Rehearing [DE-8] is Denied. The Clerk shall close this case and deny any pending motions as Moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 31st day of May, 2016.

WILLIAM P. DIMITROULEAS
United States District Judge

[2] Although the plea agreement referenced both 924(c) predicate crimes, the Court only referenced the crime of violence during the plea colloquy. [CR-DE-120].

Copies furnished to:

Bruce Brown, AUSA

Danny Herrera, #06962-104
c/o FCC – USP 1
PO Box 1033
Coleman, FL 33521-1033

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 14-60277-CR-DIMITROULEAS

UNITED STATES OF AMERICA

vs.

DANNY HERRERA,

Defendant.
_____/

FACTUAL PROFFER FOR CHANGE OF PLEA

Should this matter have proceeded to trial, the Government's evidence would establish beyond a reasonable doubt the following:

1. On October 10, 2014, a confidential informant ("CI") introduced defendants Neil Navarro and Danny Herrera to Bureau of Alcohol, Tobacco, Firearms, and Explosives Special Agent Michael Connors, who was acting in an undercover capacity ("UC"). This meeting took place at the Oakwood Plaza parking lot in Hollywood, Broward County, Florida. During this meeting, which was recorded, the UC told NAVARRO and HERRERA he was a disgruntled narcotics courier seeking someone to rob at least 15 kilograms of cocaine stored at a stash house protected by two armed guards employed by the same Mexican drug trafficking organization ("DTO") that employed the UC as a courier to transport 1 – 2 kilograms of cocaine monthly. According to the UC, he would learn the location of the house the day of the pickup. The DTO utilized various vacant homes to avoid detection. NAVARRO and HERRERA expressed their

willingness to and interest in performing the home invasion robbery. NAVARRO told the UC, "this is what we do." HERRERA advised the UC it was important for the UC not to do anything different with the DTO. NAVARRO indicated the crew would wear clothing marked "police" to make the stash house guards believe they were law enforcement. NAVARRO told the UC once they were inside the stash house they would take total control and assured the UC they had the guns necessary to commit the robbery. NAVARRO told the UC they would split the kilograms evenly between the UC and the members of the crew. HERRERA then cautioned the UC not to sell his share of the cocaine without breaking down the kilograms because the DTO would most likely have the kilograms marked to identify where it came from. The meeting between NAVARRO, HERRERA, the CI, and the UC concluded after the parties agreed to meet at a later date with NAVARRO, HERRERA, and the person NAVARRO and HERRERA wanted to use to help commit the robbery.

2. On October 14, 2014, another recorded meeting occurred between NAVARRO, HERRERA, the CI, and the UC at a parking lot located at the corner of State Road 7 and Hollywood Boulevard in Hollywood, Broward County, Florida. The purpose of this meeting was for NAVARRO and HERRERA to introduce the UC to the other person who would be committing the robbery with them. Defendant Adrian Gonzalez was introduced to the UC as the final member of the robbery crew. The UC then explained to GONZALEZ (and reiterated to NAVARRO and HERRERA) the UC was a disgruntled narcotics courier seeking someone to rob the DTO for which he worked of at least 15 kilograms of cocaine stored at a stash house occupied by two armed guards. The UC explained to GONZALEZ that NAVARRO and HERRERA had previously agreed to an even split between them and the UC. GONZALEZ had

no objection to an even split. GONZALEZ asked the UC if the guards locked the door when the UC walked into the stash house. The UC indicated they did not lock the door but that he closed the door behind him after entering the stash house. NAVARRO asked the UC if he had ever seen the guards possess anything other than handguns. The UC advised although he had only seen handguns he could not guarantee there were not additional firearms inside the stash house. GONZALEZ told the UC it was important for the UC not to act nervous upon entering the stash house and advised the UC to count to 60 upon entering the stash house as they would be entering right behind him. GONZALEZ and HERRERA cautioned the UC not to sell any of his cocaine right away and not to sell it in kilogram quantities. The meeting was concluded, and the parties agreed to meet again at a later date.

3. On October 17, 2014, a recorded meeting occurred in a Publix parking lot located in Dania Beach, Broward County, Florida between the UC, the CI, NAVARRO, HERRERA, and GONZALEZ to further discuss the planned cocaine stash house robbery. During the meeting, NAVARRO, HERRERA, and GONZALEZ indicated they were ready to commit the robbery. NAVARRO indicated he, HERRERA, and GONZALEZ would be going inside the stash house and that the CI would serve as the getaway driver. GONZALEZ indicated he would be the first to enter the stash house and that he would be dressed like law enforcement. HERRERA and GONZALEZ instructed the UC to drop to the ground and comply with their orders once they came through the door. GONZALEZ told the UC to make sure he stayed on the ground in case they had to shoot the guards. NAVARRO indicated they were going to tie up the UC and either tie up or shoot the guards.

4. On October 21, 2014, a recorded meeting took place in a parking lot at the corner of

State Road & and Griffin Road in Dania Beach, Broward County, Florida between the UC, the CI, NAVARRO, HERRERA, and GONZALEZ. The UC told NAVARRO, HERRERA, and GONZALEZ the shipment of cocaine was scheduled to arrive the following day. NAVARRO, HERRERA, and GONZALEZ all indicated they were ready to commit the armed stash house robbery. GONZALEZ indicated they would be getting a clean phone to use during the armed robbery that the UC would call and "leave open" when he went into the stash house.

5. On October 22, 2014, NAVARRO, HERRERA, GONZALEZ, and the CI arrived at a gas station and followed the UC to an undercover facility in Broward County, Florida. The purpose of meeting the UC at the undercover facility was to await the location of the stash house. Once inside the undercover facility, NAVARRO, HERRERA, and GONZALEZ had further recorded discussions with the UC regarding how they planned to rob the cocaine stash house. HERRERA asked the UC if the stash house would be in the vicinity of the undercover facility and where the nearest highway was. After answering HERRERA's question, the UC asked NAVARRO, HERRERA, and GONZALEZ if they would go over the plan, so the UC would know exactly what they wanted him to do. HERRERA responded, "Yeah, that's what I want to do." NAVARRO said, "The most important thing is for you to leave the door open." HERRERA reiterated, "That has to happen. You have to leave the door open." NAVARRO instructed the UC to call both of the guards' names, so they would know both of them are in the room. Once the CI left the room, the UC asked NAVARRO, HERRERA, and GONZALEZ if they wanted to go through everything again. NAVARRO said they could go over the entire scenario then because the CI was not going inside the stash house. The UC asked how long it would be before they entered the stash house once he (the UC) went inside. GONZALEZ

responded, "That's what I'm going to show you right now." NAVARRO, HERRERA, and GONZALEZ then conducted several "dry runs" during which they demonstrated how they were going to enter the stash house. HERRERA said, "We are going to give you between 30 – 45 seconds. By the time you get to the room, by the time you count to 5, we should already be inside." A "drop phone" was purchased as NAVARRO, HERRERA, and GONZALEZ were on their way to meet the UC. HERRERA told the UC to leave his phone on (and connected to the "drop phone"), so GONZALEZ could hear everything that was happening inside the stash house. GONZALEZ was wearing a blue tooth device in his right ear, so he would be able to listen to the UC's phone. GONZALEZ then demonstrated again how he would burst through the door of the stash house with his gun in his hand yelling, "hands up; get down!" HERRERA added that while GONZALEZ was yelling "hands up," he and NAVARRO would be running towards the Mexicans and securing them. HERRERA said once they hear the UC call out both of the guards' names, they would be coming through the door of the stash house. GONZALEZ said he would be the first one through the door, and, since he was not wearing a bullet proof vest, he would shoot the guards if necessary. NAVARRO indicated they were going to check all of the rooms in the stash house and any vehicles for additional cocaine. NAVARRO, HERRERA, and GONZALEZ all assured the UC they would give his proceeds from the robbery to the CI. After the arrest signal was given, NAVARRO, HERRERA, and GONZALEZ were arrested without incident.

6. A search of the defendants and the vehicle in which they were traveling revealed a loaded Glock, 9mm semi-automatic pistol recovered from the driver's seat of the vehicle, a loaded Glock, 9mm semi-automatic pistol recovered from GONZALEZ' waistband,

approximately 27 rounds of ammunition, 8 pairs of gloves, a ski mask, several articles of dark clothing, a receipt for the "drop phone" and blue tooth device, and 9 zip ties.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

Date: 1/16/15

By: _____ FOR
BRUCE O. BROWN
ASSISTANTUNITEDSTATES ATTORNEY

Date: 1-16-15

By: _____
JEFFREY FEILER
ATTORNEY FOR DEFENDANT

Date: 1-16-15

By: _____
DANNY HERRERA
DEFENDANT