APPENDIX

APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15099-G

MANUEL REYES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Manuel Reyes is a federal prisoner serving a total 322-month sentence for conspiracy to possess cocaine with intent to distribute, conspiracy to use a firearm in relation to a crime of violence or drug-trafficking crime, and carrying a firearm in relation to a crime of violence or drug-trafficking crime, in violation of 18 U.S.C. § 924(c). He seeks a certificate of appealability ("COA") in his appeal of the district court's denial of his amended 28 U.S.C. § 2255 motion to vacate, in which he argued that he was actually innocent of his conviction under § 924(c), in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding that the residual clause of the Armed Career Criminal Act, which defined violent felony as a crime that "involves conduct that presents a serious potential risk of physical injury to another" was unconstitutionally vague).

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). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). "[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted).

Section 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a crime of violence or a drug-trafficking crime. 18 U.S.C. § 924(c)(1). For the purposes of § 924(c), "crime of violence" means an offense that is a felony and

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

18 U.S.C. § 924(c)(3)(A), (B). We have referred to § 924(c)(3)(A) as the "elements clause," while § 924(c)(3)(B) is referred to as the "residual clause." *Ovalles v. United States*, 905 F.3d 1231, 1234 n.1 (11th Cir. 2018) (*en banc*).

In *Ovalles*, we held that § 924(c)(3)(B)'s residual clause was not unconstitutionally vague because it embodies a conduct-based approach that accounts for the actual, real-world facts of the companion offense's commission. *Id.* at 1253. Thereafter, in *In re Garrett*, we held that a vagueness challenge to § 924(c)(3)(B)'s residual clause under *Johnson* and *Sessions v. Dimaya*,

138 S. Ct. 1204 (2018),[1] cannot satisfy the statutory requirements of § 2255(h). 908 F.3d 686, 688-90 (11th Cir. 2018) (emphasis in original). We are bound by *Garrett*.

So reasonable jurists would not debate the district court's denial of Reyes's vagueness-based constitutional challenge to his § 924(c) conviction. *See Hamilton*, 793 F.3d at 1266. And for the purposes of obtaining a COA, Reyes's vagueness challenge to § 924(c)(3)(B) fails to state a constitutional claim. His motion for a COA is DENIED.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

[1] In *Dimaya*, the Supreme Court applied *Johnson* to strike down, as unconstitutionally vague, the residual clause in an immigration statute, 18 U.S.C. § 16(b), which defined a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 138 S. Ct. at 1211.

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-20149 CR-LENARD / KLEIN

21 U.S.C. § 846
21 U.S.C. § 841(a)(1)
18 U.S.C. § 1951(a)
18 U.S.C. § 924(o)
18 U.S.C. § 924(c)(1)(A)
18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

OMAR ORTEGA,
MANUEL REYES,
JOSE GAMEZ,
ANGEL BOMBINO,
JOEL GOENAGA, and
JIMMY FELICIANO,

Defendants.
_____/

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INDICTMENT

The Grand Jury charges that:

COUNT 1

From on or about July 27, 2005, and continuing through on or about February 23, 2006, in Miami-Dade County, in the Southern District of Florida, the defendants,

OMAR ORTEGA,
MANUEL REYES,
JOSE GAMEZ,
ANGEL BOMBINO,
JOEL GOENAGA,
and
JIMMY FELICIANO,

did knowingly and intentionally combine, conspire, confederate, and agree with each other, and with

28

others known and unknown to the Grand Jury, to possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

Pursuant to Title 21, United States Code, Section 841(b)(1)(A), it is further alleged that this violation involved five kilograms or more of a mixture and substance containing a detectable amount of cocaine.

COUNT 2

On or about February 23, 2006, in Miami-Dade County, in the Southern District of Florida, the defendants,

OMAR ORTEGA,
MANUEL REYES,
JOSE GAMEZ,
ANGEL BOMBINO,
JOEL GOENAGA,
and
JIMMY FELICIANO,

did knowingly and intentionally attempt to possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 2.

Pursuant to Title 21, United States Code, Section 841(b)(1)(A), it is further alleged that this violation involved five kilograms or more of a mixture and substance containing a detectable amount of cocaine.

COUNT 3

From on or about July 27, 2005, and continuing through on or about February 23, 2006, in Miami-Dade County, in the Southern District of Florida, the defendants,

OMAR ORTEGA,
MANUEL REYES,
JOSE GAMEZ,
ANGEL BOMBINO,
JOEL GOENAGA,
and
JIMMY FELICIANO,

did knowingly and willfully combine, conspire, confederate, and agree with each other, and others known and unknown to the Grand Jury, to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did plan to take cocaine from individuals they believed to be engaged in narcotics trafficking by means of actual and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Section 1951(a).

COUNT 4

On or about February 23, 2006, in Miami-Dade County, in the Southern District of Florida, the defendants,

OMAR ORTEGA,
MANUEL REYES,
JOSE GAMEZ,
ANGEL BOMBINO,
JOEL GOENAGA,
and
JIMMY FELICIANO,

did knowingly attempt to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did attempt to take cocaine from individuals they believed to be engaged in narcotics trafficking by means of actual and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 5

From on or about July 27, 2005, and continuing through on or about February 23, 2006, in Miami-Dade County, in the Southern District of Florida, the defendants,

OMAR ORTEGA,
MANUEL REYES,
JOSE GAMEZ,
ANGEL BOMBINO,
JOEL GOENAGA,
and
JIMMY FELICIANO,

did knowingly and intentionally combine, conspire, confederate, and agree with each other to use and carry a firearm during and in relation to a crime of violence and a drug trafficking crime, and to possess a firearm in furtherance of a crime of violence and a drug trafficking crime, which are felonies prosecutable in a court of the United States, specifically, violations of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 1951(a), as set forth in Counts 1, 2, 3, and 4 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A); all in violation of Title 18, United States Code, Section 924(o).

It is further alleged that the firearm is:

(a) a Kel Tec 9mm semi-automatic pistol;

(b) a Smith & Wesson .357 caliber revolver;

(c) ten (10) rounds of ammunition; and

(d) six (6) rounds of ammunition.

COUNT 6

On or about February 23, 2006, in Miami-Dade County, in the Southern District of Florida, the defendants,

OMAR ORTEGA,
MANUEL REYES,
and
ANGEL BOMBINO,

did knowingly carry firearms during and in relation to a crime of violence and a drug trafficking crime, and did possess said firearm in furtherance of a crime of violence and a drug trafficking crime, which are felonies prosecutable in a court of the United States, specifically, violations of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 1951(a), as set forth in Counts 1, 2, 3, and 4 of this Indictment; all in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

It is further alleged that the firearm is:

(a) a Kel Tec 9mm semi-automatic pistol;

(b) a Smith & Wesson .357 caliber revolver;

(c) ten (10) rounds of ammunition; and

(d) six (6) rounds of ammunition.

COUNT 7

On or about February 23, 2006, in Miami-Dade County, in the Southern District of Florida, the defendant,

OMAR ORTEGA,
MANUEL REYES,
and
ANGEL BOMBINO,

having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess firearms and ammunition in and affecting interstate and foreign commerce in violation of Title 18, United States Code, Section 922(g)(1).

It is further alleged that the firearm is:

(a) a Smith & Wesson .357 caliber revolver;

(b) ten (10) rounds of ammunition; and

(c) six (6) rounds of ammunition.

FORFEITURE

1. The allegations of Counts 1 through 7 of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeitures to the United States of America of property in which the defendants have an interest pursuant to the provisions of Title 21, United States Code, Section 853, pursuant to the provisions of Title 18, United States Code, Section 981(a)(1)(C) and Title 18, United States Code, Section 924(d)(1), as incorporated by Title 28, United States Code, Section 2461, and the procedures outlined at Title 21, United States Code, Section 853.

2. Upon conviction of any violation of Title 21, United States Code, Section 846, as alleged in Count 1 and Count 2 of this Indictment, the defendants shall forfeit to the United States any property constituting or derived from any proceeds which the defendants obtained, directly or indirectly, and any property which the defendants used or intended to be used in any manner or part to commit or to facilitate the commission of said violations.

3. Upon conviction of any violation of Title 18, United States Code, Section 1951, as alleged in Count 3 and Count 4 of this Indictment, the defendants shall forfeit to the United States any property, real or personal, derived from proceeds traceable to such violations.

4. Upon conviction of any violation of Title 18, United States Code, Section 924, as alleged in Count 5 of this Indictment, and upon any violation of any criminal law of the United States, as alleged in Counts 1 through 5 of this Indictment, the defendants shall forfeit to the United States any firearm or ammunition involved in or used in the commission of said violation.

5. Upon conviction of any violation of Title 18 United States Code, Sections 924 and 922, as alleged in Counts 6 and 7 of this Indictment, the defendants shall forfeit to the United States

any firearm or ammunition involved in or used in the commission of said violation.

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

(a) a Kel Tec 9mm semi-automatic pistol;

(b) a Smith & Wesson .357 caliber revolver;

(c) ten (10) rounds of ammunition; and

(d) six (6) rounds of ammunition.

All pursuant to Title 21, United States Code, Section 853, Title 18, United States Code, Section 981(a)(1)(C), Title 18, United States Code, Section 924(d)(1) as incorporated by Title 28, United States Code, Section 2461, and Title 21, United States Code, Section 853.

A TRUE BILL

FOREPERSON

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

JAMES M. KOUKIOS
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

06-20149 CR-LENARD / KLEIN

UNITED STATES OF AMERICA

vs.

OMAR ORTEGA, et. al.,

Defendants. /

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

New Defendant(s) Yes ___ No ___
Number of New Defendants ____
Total number of counts ____

Court Division: (Select One)

X Miami ___ Key West
___ FTL ___ WPB ___ FTP

I do hereby certify that:

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

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

3. Interpreter: (Yes or No) Yes

   List language and/or dialect Spanish

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

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

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

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6. Has this case been previously filed in this District Court? (Yes or No) No
   If yes:
   Judge: _____ Case No. _____
   (Attach copy of dispositive order)
   Has a complaint been filed in this matter? (Yes or No) Yes
   If yes:
   Magistrate Case No. 06-2199-RLD
   Related Miscellaneous numbers: _____
   Defendant(s) in federal custody as of February 23, 2006
   Defendant(s) in state custody as of _____
   Rule 20 from the _____ District of _____

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

7. Does this case originate from a matter pending in the U.S. Attorney's Office prior to April 1, 2003? ___ Yes X No

8. Does this case originate from a matter pending in the U. S. Attorney's Office prior to April 1, 1999? ___ Yes X No
   If yes, was it pending in the Central Region? ___ Yes ___ No

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

10. Does this case originate from a matter pending in the Narcotics Section (Miami) prior to May 18, 2003 ? ___ Yes X No

JAMES M. KOUKIOS
ASSISTANT UNITED STATES ATTORNEY
COURT NO. A5500915

Penalty Sheet(s) attached

REV.1/14/04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

06-20149 CR-LENARD/KLEIN

Defendant's Name: OMAR ORTEGA **Case No:** _____

Count #: 5

Conspiracy to carry a firearm during a drug trafficking crime/crime of violence

Title 18, United States Code, Section 924(o)

***Max. Penalty:** Twenty (20) years' imprisonment

Count #: 6

Carrying a firearm during a drug trafficking crime/crime of violence

Title 18, United States Code, Section 924(c)(1)(A)(i)

***Max. Penalty:** Life imprisonment

Count #: 7

Felon in possession of a firearm

Title 18, United States Code, Section 922(g)(1)

***Max. Penalty:** Ten (10) Years' imprisonment

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

06 -20149 CR - LENARD / KLEIN

~~PENALTY SHEET~~

Defendant's Name: MANUEL REYES **Case No:** _____

Count #: 1

Conspiracy to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

*** Max.Penalty:** Life imprisonment

Count #: 2

Attempt to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

***Max. Penalty:** Life imprisonment

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Count #: 3

Conspiracy to interfere with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

Count #: 4

Attempted interference with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

06-20149CR-LENARD/KLEIN

PENALTY SHEET

Defendant's Name: OMAR ORTEGA **Case No:** _____

Count #: 1

Conspiracy to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

*** Max.Penalty:** Life imprisonment

Count #: 2

Attempt to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

***Max. Penalty:** Life imprisonment

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Count #: 3

Conspiracy to interfere with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

Count #: 4

Attempted interference with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

06-20149CR-LENARD/KLEIN

Defendant's Name: MANUEL REYES **Case No:** _____

Count #: 5

Conspiracy to carry a firearm during a drug trafficking crime/crime of violence

Title 18, United States Code, Section 924(o)

***Max. Penalty:** Twenty (20) years' imprisonment

Count #: 6

Carrying a firearm during a drug trafficking crime/crime of violence

Title 18, United States Code, Section 924(c)(1)(A)(i)

***Max. Penalty:** Life imprisonment

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Count #: 7

Felon in possession of a firearm

Title 18, United States Code, Section 922(g)(1)

***Max. Penalty:** Ten (10) Years' imprisonment

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

06-20149CR-LENARD/KLEIN

Defendant's Name: JOSE GAMEZ **Case No:**

Count #: 1

Conspiracy to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

*** Max.Penalty:** Life imprisonment

Count #: 2

Attempt to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

***Max. Penalty:** Life imprisonment

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Count #: 3

Conspiracy to interfere with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

Count #: 4

Attempted interference with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

06-20149CR-LENARD/KLEIN

Defendant's Name: JOSE GAMEZ **Case No:** _____

Count #: 5

Conspiracy to carry a firearm during a drug trafficking crime/crime of violence

Title 18, United States Code, Section 924(o)

***Max. Penalty:** Twenty (20) years' imprisonment

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET 06-20149CR-LENARD/KLEIN

Defendant's Name: ANGEL BOMBINO **Case No:** _____

Count #: 1

Conspiracy to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

*** Max.Penalty:** Life imprisonment

Count #: 2

Attempt to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

***Max. Penalty:** Life imprisonment

Count #: 3

Conspiracy to interfere with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

Count #: 4

Attempted interference with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

06-20149 CR-LENARD/KLEIN

Defendant's Name: ANGEL BOMBINO **Case No:**

Count #: 5

Conspiracy to carry a firearm during a drug trafficking crime/crime of violence

Title 18, United States Code, Section 924(o)

***Max. Penalty:** Twenty (20) years' imprisonment

Count #: 6

Carrying a firearm during a drug trafficking crime/crime of violence

Title 18, United States Code, Section 924(c)(1)(A)(i)

***Max. Penalty:** Life imprisonment

Count #: 7

Felon in possession of a firearm

Title 18, United States Code, Section 922(g)(1)

***Max. Penalty:** Ten (10) Years' imprisonment

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

06-20149 CR-LENARD/KLEIN

Defendant's Name: JIMMY FELICIANO **Case No:**

Count #: 1

Conspiracy to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

*** Max.Penalty:** Life imprisonment

Count #: 2

Attempt to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

***Max. Penalty:** Life imprisonment

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Count #: 3

Conspiracy to interfere with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

Count #: 4

Attempted interference with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

06-20149 CR-LENARD / KLEIN

Defendant's Name: JIMMY FELICIANO **Case No:** _____

Count #: 5

Conspiracy to carry a firearm during a drug trafficking crime/crime of violence

Title 18, United States Code, Section 924(o)

***Max. Penalty:** Twenty (20) years' imprisonment

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

06-20149CR-LENARD/KLEIN

Defendant's Name: JOEL GOENAGA **Case No:**

Count #: 1

Conspiracy to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

*** Max.Penalty:** Life imprisonment

Count #: 2

Attempt to possess with intent to distribute cocaine

Title 21, United States Code, Section 846

***Max. Penalty:** Life imprisonment

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CLERK U.S. DIST. CT.
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Count #: 3

Conspiracy to interfere with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

Count #: 4

Attempted interference with commerce by threats or violence (Robbery)

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

*** Max.Penalty:** Twenty (20) years' imprisonment

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

~~PENALTY SHEET~~ 06-20149-CR-LENARD/KLEIN

Defendant's Name: JOEL GOENAGA **Case No:** _____

Count #: 5

Conspiracy to carry a firearm during a drug trafficking crime/crime of violence

Title 18, United States Code, Section 924(o)

***Max. Penalty:** Twenty (20) years' imprisonment

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

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Case 1:06-cr-20149-JAL Document 28 Entered on FLSD Docket 03/13/2006 Page 23 of 23

FORM DBD-34
Marc. 04

No. 06-20149 CR-LENARD / KLEIN

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

THE UNITED STATES OF AMERICA

vs.

OMAR ORTEGA, MANUEL REYES, JOSE GAMEZ ANGEL BOMBINO, JOEL GOENAGA,and JIMMY FELICIANO,

Defendants.

INDICTMENT

21 U.S.C. § 846
21 U.S.C. § 841(a)(1)
18 U.S.C. § 1951(a)
18 U.S.C. § 924(o)
18 U.S.C. § 924(c)(1)(A)
18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(d)(1)

A true bill.

FGJ 05-403(MIA) Foreman

Filed in open court this 9 day,

of March A.D. 2006

Clerk

Bail, $ ----------

A-3

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

MANUEL REYES

JUDGMENT IN A CRIMINAL CASE

Case Number: 06-20149-CR-LENARD

USM Number: 01338-004

Counsel For Defendant: Lance Armstrong
Counsel For The United States: James Koukios
Court Reporter: Lisa Edwards

FILED by _____ D.C.
JUL 25 2006
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

The defendant pleaded guilty to Counts 1,5,6 of the Indictment.
The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
21 U.S.C. § 846	Conspiracy to Possess With Intent to Distribute Cocaine	February 23, 2006	1
18 U.S.C. § 924(o)	Conspiracy to Use a Firearm During a Crime of Violence and Drug Trafficking	February 23, 2006	5
18 U.S.C. § 924(c)(1)(A) and 2	Carrying a Firearm During Crime of Violence and Drug Trafficking	February 23, 2006	6

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

Count(s) 2,3,4 and 7 are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
July 21, 2006

JOAN A. LENARD
United States District Judge

July 25, 2006

112

DEFENDANT: MANUEL REYES
CASE NUMBER: 06-20149-CR-LENARD

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **322 months total; 262 months as to count 1, 240 months as to count 5, both to run concurrently and 60 months as to count 6 to run consecutive to counts 1 and 5.**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: MANUEL REYES
CASE NUMBER: 06-20149-CR-LENARD

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years** as to counts 1,5 and 6 to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 48 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MANUEL REYES
CASE NUMBER: 06-20149-CR-LENARD

SPECIAL CONDITIONS OF SUPERVISION

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

If removed, or the defendant voluntarily leaves the United States, he shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 48 hours of the defendant's arrival.

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

DEFENDANT: MANUEL REYES
CASE NUMBER: 06-20149-CR-LENARD

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$300.00	$	$

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

DEFENDANT: MANUEL REYES
CASE NUMBER: 06-20149-CR-LENARD

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of **$300.00** due immediately.

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

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

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

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

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

The defendant shall forfeit the defendant's interest in the following property to the United States:

Items listed in the indictment

The defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

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

A-4

16cv22877- JAL

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Southern District of Florida
Name (under which you were convicted): Manuel Reyes	Docket or Case No.:
Place of Confinement: Oakdale, LA	Prisoner No.: 01338-004
UNITED STATES OF AMERICA v.	Movant (include name under which you were convicted) Manuel Reyes

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

Southern District of Florida
Miami Division

FILED by # D.C.
JUL 05 2016
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. – MIAMI

(b) Criminal docket or case number (if you know): 06:20149-CR-LENARD

2. (a) Date of the judgment of conviction (if you know): 2-23-2006

(b) Date of sentencing: 2-23-2006

3. Length of sentence: 322 months

4. Nature of crime (all counts): 21: U.S.C. 846 Count 1
18: U.S.C. 924(o) Count 5
18: U.S.C. 924(c)(1)(a) and Count 6

cat/div 510/2255/Miami
Case # 06 cr 20149
Judge Lenard Mag White
Motn Ifp no Fee pd $ 0
Receipt # N/A

5. (a) What was your plea? (Check one)

(1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? N/A

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐ N/A

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒
8. Did you appeal from the judgment of conviction? Yes ☐ No ☒
9. If you did appeal, answer the following: N/A
   (a) Name of court: N/A
   (b) Docket or case number (if you know): N/A
   (c) Result: N/A
   (d) Date of result (if you know): N/A
   (e) Citation to the case (if you know): N/A
   (f) Grounds raised: N/A

   (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒
   If "Yes," answer the following:
   (1) Docket or case number (if you know): N/A
   (2) Result: N/A

   (3) Date of result (if you know): N/A
   (4) Citation to the case (if you know): N/A
   (5) Grounds raised: N/A

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?
    Yes ☐ No ☒
11. If your answer to Question 10 was "Yes," give the following information:
    (a) (1) Name of court: N/A
    (2) Docket or case number (if you know): N/A
    (3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised:N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☒

(7) Result: N/A

(8) Date of result (if you know): N/A

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐ N/A

(7) Result: N/A

(8) Date of result (if you know): N/A

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐ N/A

(2) Second petition: Yes ☐ No ☐ N/A

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

I pleaded guilty.

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE:

18: U.S.C. 924(c)(1)(A) and 924(o).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The residual clause mention in JOHNSON vs. U.S., is completely "Vague and Unconstitutional."
WELCH vs. U.S. made JOHNSON retroactive in 2255.

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Is a new decision from the Supreme Court.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐ N/A

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

I don't appeal.

GROUND TWO: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): N/A

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND THREE: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): N/A

(b) **Direct Appeal of Ground Three:** N/A

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐ N/A

(2) If your answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐ N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐ N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐ N/A

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): N/A

(b) **Direct Appeal of Ground Four:** N/A

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) **Post-Conviction Proceedings:** N/A

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐ N/A

(2) If your answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐ N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐ N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐ N/A

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

21: U.S.C. 846
18: U.S.C. 924(c)(1)(A)
18: U.S.C. 924(o)
JOHNSON became retroactive in WELCH vs. U.S. in 2016.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:
(a) At preliminary hearing: N/A

(b) At arraignment and plea: Lance Armstrong

(c) At trial: N/A

(d) At sentencing: Lance Armstrong

(e) On appeal: N/A

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☒

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

I sent a Second or Successive 2255 to the Appeal Court and the Court returned back to make a Direct to the District Court my 2255.

---

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

924(c)(1)(A) and 924(o) is vague and delcare my relief sought.

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on (month, date, year).

Executed (signed) on June 27, 2016 (date).

Manuel Reyes

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

Welch vs. United States, No. 15-6418, 4/18/2016 page 79, made Johnson vs. U.S., 576 U.S. retroactive. The Supreme Court said in that case "violent felony" or serious drug offense for use in 924(C)(1)(a). The 5 years sentence for a case without serious drug offense. In Johnson vs. U.S., 576 U.S., this Court held that clause unconstitutional under the void-for-vagueness doctrine. This Court have to sentence Manuel Reyes to 322 months total; 262 months as to count 1, 240 months as to count 5, both to run concurrently and 60 months as to count 6 to run consecutive to 841(a)(1). This Court have to consider Manuel Reyes case remanded to the district court and resentenced based in Johnson, 576 U.S., Welch vs. U.S., April 18, 2016, made retroactive.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

June 17, 2016

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 16-12805-J
Case Style: In re: Manuel Reyes
District Court Docket No: 1:06-cr-20149-JAL-5

The enclosed order has been entered. No further action will be taken in this matter.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Davina C. Burney-Smith, J/lt
Phone #: (404) 335-6183

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-12805-J

IN RE:

MANUEL REYES,

Petitioner.

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

Before: HULL, MARCUS and JULIE CARNES, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Manuel Reyes has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. However, Reyes has not filed a prior § 2255 motion, and, therefore, his proposed § 2255 motion is not second or successive within the meaning of the statute. Accordingly, Reyes's application for leave to file a second or successive motion is DENIED AS UNNECESSARY.

Manuel Reyes
Reg. No. 01333-004
Federal Correctional Institution
P.O. Box 5000
Oakdale, LA 71463-5000

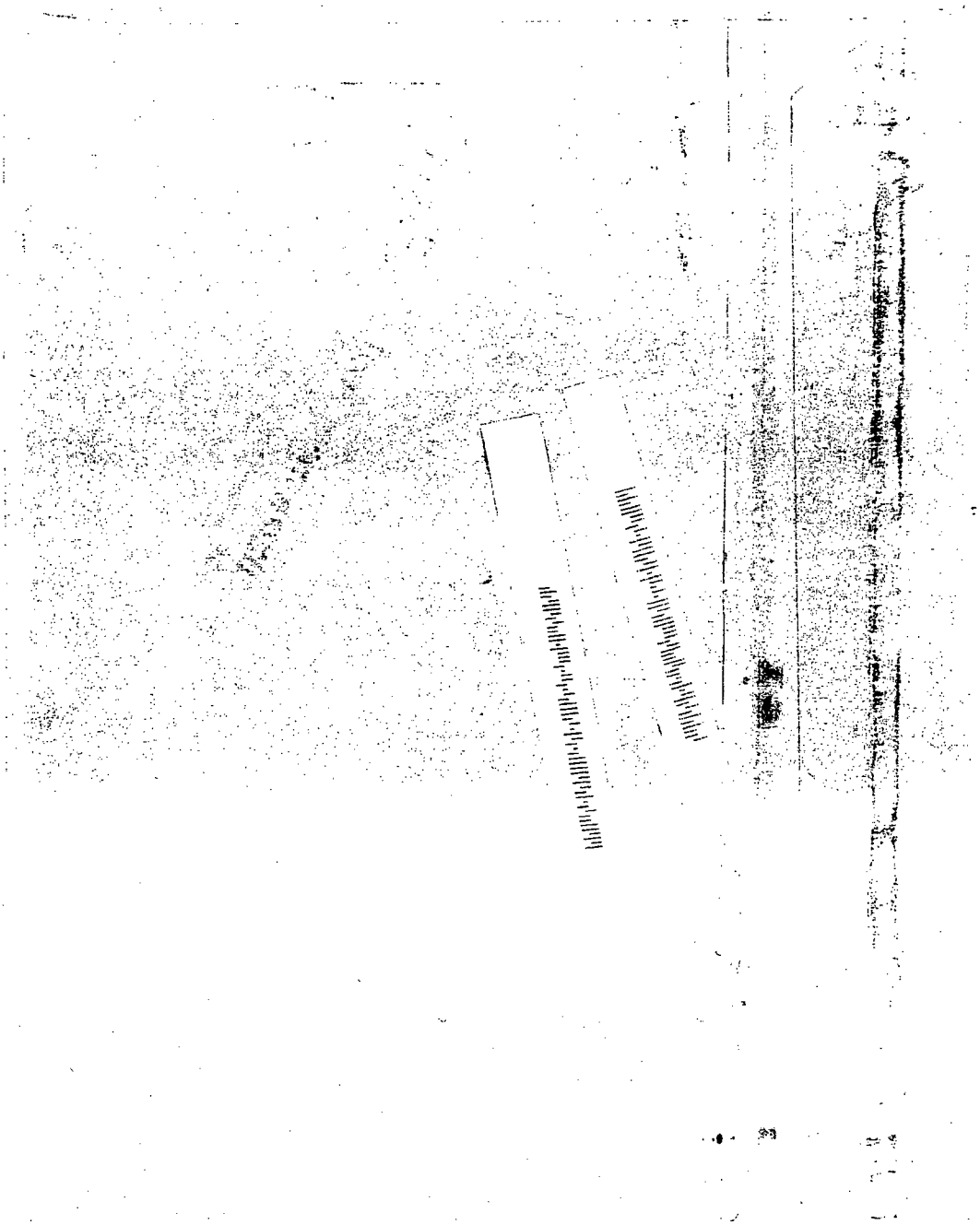
[2016] [JUN 28]

[2016

SHREVEPORT LA 711
WED 29 JUN 2016 AM

*****LEGAL MAIL*****

OFFICE OF THE CLERK
WILKIE D. FERGUSON, JR., UNITED STATES COURTHOUSE
400 NORTH MIAMI AVE., ROOM 8N09
MIAMI, FL 33128-7716



A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-CV-22877-LENARD
(06-CR-20149-LENARD)
MAGISTRATE JUDGE PATRICK A. WHITE

MANUEL REYES,

Movant,

v.

REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA,

Respondent.
_____/

I. Introduction

The movant has filed this motion to vacate with supporting memorandum, pursuant to 28 U.S.C. §2255, challenging the constitutionality of his §924(c) conviction in light of the Supreme Court's decision in Johnson v. United States,[1] 576 U.S. ____, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), made retroactively applicable to cases on collateral review by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). The movant argues that his predicate crime of conspiracy to commit Hobbs Act robbery is not a "crime of violence" post-Johnson, and he is thus entitled to vacatur of his §924(c) conviction.

This Cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B),(C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges, S.D. Fla.

[1]In Johnson, the Supreme Court held that the Armed Career Criminal Act's (ACCA) residual clause was unconstitutionally vague, and that imposing an enhanced sentence pursuant to that clause thus violates the Constitution's guarantee of due process. In Welch v. United States, 578 U.S. __, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), the Supreme Court held that Johnson announced a substantive rule that applied retroactively on collateral review.

Admin. Order 2003-19; and, Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the movant's motion and amended motion (Cv-DE# 1, 11), the government's response (Cv-DE#14) thereto, the movant's traverse (Cv-DE#16), together with the Presentence Investigation Report ("PSI"), Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file under attack here.[2]

II. Claim

The movant claims that Johnson invalidates §924(c)'s residual clause, because his prior conspiracy to commit Hobbs Act robbery conviction is no longer a qualifying predicate "crime of violence" offense. (Cv DE# 11:2).

III. Procedural History

Reyes was charged in a seven-count indictment with the following offenses: conspiracy possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(A), 846 (Count 1); attempted possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(A), 846 (Count 2); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. §1951(a) (Count 3); attempted Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2; (Count 4); conspiracy to use and carry a firearm during and in relation to the crimes of violence and drug

[2]The undersigned takes judicial notice of its own records as contained on CM/ECF in those proceedings. See Fed.R.Evid. 201.

trafficking crimes set forth in Counts 1, 2, 3, and 4 of the indictment, and to possess a firearm in furtherance of those crimes of violence and drug trafficking crimes, in violation of 18 U.S.C. §§924(c)(1)(A) and 924(o) (Count 5); carrying firearms during and in relation to the crimes of violence and drug trafficking crimes set forth in Counts 1, 2, 3, and 4 of the indictment and possessing firearms in furtherance of those crimes of violence and drug trafficking crimes, in violation of 18 U.S.C. §924(c)(1)(A) and 2 (Count 6); and possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. §922(g)(1) (Count 7) (CR-DE# 28).

Reyes entered into a written agreement with the government in which he agreed to plead guilty to Counts 1, 5, and 6 of the indictment (CR-DE# 77). The plea agreement specifically described the charges to which Reyes was pleading guilty. Although Count 6 of the indictment charged Reyes with both carrying and possessing firearms, the plea agreement stated that Reyes "also agrees to plead guilty to Count 6 of the Indictment, which count charges him with possession of a firearm in furtherance of a crime of violence and a drug trafficking crime, which is a felony prosecutable in a court of the United States, as set forth in Counts 1, 2, 3, and 4 of the Indictment," in violation 18 U.S.C. §§924(c)(1)(A and 2 (CR-DE# 77:1).

In exchange for Reyes's guilty plea, the United States agreed to dismiss Counts 2, 3, 4, and 7 of the indictment at sentencing (Id.:2). The parties also agreed to various recommendations regarding the sentencing guidelines (Id.:4-5).

At Reyes's change of plea hearing on May 3, 2006, the Court read the charges to which Reyes was pleading guilty (CR-DE

462:7-8). The Court made it clear, both when reviewing the indictment and the terms of the plea agreement, that Reyes was pleading guilty to Count 6, which charged Reyes with possession of a firearm in furtherance of a crime of violence and a drug trafficking crime, as set forth in Counts 1, 2, 3, and 4 of the indictment (Id.:8, 18).

Reyes agreed that he was part of a crew who planned to execute an armed robbery of between 35 to 45 kilograms of cocaine (Id.:9-11). Unbeknownst to Reyes, the "disgruntled drug courier" who claimed to be looking for people to steal the cocaine from his employer was really an undercover detective ("UC") (Id.:9). Omar Ortega asked Reyes to participate in the armed robbery of cocaine and Reyes agreed (Id.). Reyes attended a meeting where the details of the robbery were discussed (Id.). During that meeting, Reyes was told that the UC should be ready to deliver 35 to 40 kilograms of cocaine on February 23, 2006 and the robbery crew were to "take him down" as he was going into the stash house (Id.). The meeting concluded with Reyes assuring the confidential source ("CS") that "he and his people were ready" (Id.).

On February 22, 2006, the CS called Ortega and told him the cocaine had arrived and Ortega said "he was ready" (Id.:9-10). The next morning, Ortega and the CS finalized the timing and location of the robbery during a series of phone conversations (Id.:10).

Ortega and co-conspirator Jose Gamez drove to a trailer park and picked up Reyes and Angel Bombino (Id.). While at the trailer park, they prepared two firearms for use during the robbery and put them in the car occupied by Reyes and Bombino (Id.). The four conspirators then drove to a gas station where they waited while Ortega and the CS met nearby and discussed the plan (Id.). Ortega

told the CS that "his crew was with him in two separate vehicles and that the firearms for the robbery were in the vehicle with his crew" (Id.). Ortega explained that three of his crew members planned to "jump out" on the UC while the rest of the crew would serve as lookouts (Id.).

Ortega and the CS drove in separate vehicles to the gas station parking lot where Reyes and the other crew members were waiting (Id.). After speaking with his crew, Ortega walked to the CS's vehicle and said, "Let's go." (Id.:10-11). Ortega's crew followed the CS to "what they believed would be the robbery location" (Id.:11). When they arrived, Reyes and Bombino were arrested in their vehicle, which contained "one Smith & Wesson Model 66 .357 Magnum revolver loaded with six rounds of ammunition and one Kel Tec 9-millimeter semiautomatic pistol loaded with ten rounds of ammunition, both of which were intended to be used to commit the robbery" (Id.). The two loaded firearms recovered from that vehicle "were intended to be used to facilitate Count 1 of the offense" (Id.).

While under oath, Reyes admitted the facts summarized above and pled guilty to Counts 1, 5, and 6 of the indictment (Id.:2, 11-22). The Court found that Reyes's guilty pleas were knowing and voluntary and supported by facts as to each of the essential elements of the offenses (Id.:29). The Court accepted Reyes' guilty pleas and adjudicated him guilty of Counts 1, 5, and 6 of the indictment (Id.).

Reyes, who qualified as a career offender, had a guideline sentencing range of 262 to 327 months' imprisonment on Counts 1 and 5, plus a mandatory consecutive 60 months for Count 6, for a total guideline range of 322 to 387 months' imprisonment (PSI ¶¶51, 54,

69, 106). On July 21, 2006, the Court sentenced Reyes to a total of 322 months, comprised of 262 months as to Count 1 and 240 months as to Count 5, both to run concurrently, and 60 months as to Count 6, to run consecutively to Counts 1 and 5 (CR-DE# 112). The clerk entered the final judgment on **July 25, 2006**. (Id.). Reyes did not file an appeal.

Thus, the Judgment became final on **August 8, 2006**, ten days after the entry of the judgment, when time expired for filing a notice of appeal.[3] The movant had one year from the time his conviction became final, or no later than **August 8, 2007,**[4] within which to timely file this federal habeas petition. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005,

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[3]Where, as here, a defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a direct appeal expires. Adams v. United States, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999). On December 1, 2009, the time for filing a direct appeal was increased from 10 to 14 days days after the judgment or order being appealed is entered. Fed.R.App.P. 4(b)(1)(A)(i). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). Moreover, now every day, including intermediate Saturdays, Sundays, and legal holidays are included in the computation. See Fed.R.App.P. 26(a)(1). The movant was sentenced before the effective date of the amendment, thus he had ten days, excluding Saturdays and Sundays, within which to file his notice of appeal. See Fed.R.App.P. 26(a)(1)(B).

[4]See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)(this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)); see also, 28 U.S.C. §2255.

1008-09 (7th Cir. 2000)).

From the time his conviction became final on **August 8, 2006,** approximately **ten years** passed before movant filed the instant petition under 28 U.S.C. §2255 on **June 27, 2016.** (DE#1:12).[5]

This court issued an order appointing counsel and setting a briefing schedule. (Cv-DE# 5). The Federal Public Defender filed an amended petition. (Cv DE# 11). The government filed a response in opposition to the motion to vacate and the petitioner filed a reply thereto. (Cv DE# 14, 16). The case is now ripe for review.

IV. Threshold Issues

A. Timeliness

The government argues that the movant's motion was not timely filed under §2255(f)(1) because it was filed more than one year after the movant's conviction became final on **August 8, 2006.** As previously noted, under §2255(f)(1), the movant had until **August 8, 2007** within which to timely file this §2255 motion. His initial §2255 motion was not filed until **June 27, 2016.** Thus, it was not filed within one year of the time his conviction became final under §2255(f)(1). Therefore, this motion is not timely under

[5]"Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1) ("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

§2255(f)(1).

That, however, does not end the inquiry. It appears the movant means to argue that the **June 27, 2016** filing of this §2255 motion is timely because it was filed within one year of the Supreme Court's **June 26, 2015** Johnson decision, made retroactively applicable to cases on collateral review by Welch v. United States, ___ U.S. ___, ___, 136 S.Ct. 1257, 1264-65 (2016). The movant's attempt to circumvent the AEDPA's one-year limitations period under §2255(f)(3) fails because Johnson's new rule of constitutional law applies retroactively only to ACCA cases involving the ACCA's residual clause. As explained by the Supreme Court in Welch v. United States:

> [T]he rule announced in Johnson is substantive. By striking down the residual clause as void for vagueness, Johnson changed the substantive reach of the Armed Career Criminal Act, altering "the range of conduct or the class of persons that the [Act] punishes." Schriro, supra, at 353, 124 S.Ct. 2519. Before Johnson, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After Johnson, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under Johnson, so it can no longer mandate or authorize any sentence. Johnson establishes, in other words, that "even the use of impeccable factfinding procedures could not legitimate" a sentence based on that clause. United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971). It follows that Johnson is a substantive decision ... Johnson is thus a substantive decision and so has retroactive effect under Teague in cases

on collateral review.

136 S. Ct. 1257, 1265 (2016). As applied here, since the movant was not sentenced under the ACCA, Johnson did not restart the AEDPA one-year clock under §2255(f)(3) and his §924(c) claims is also time-barred under 2255(f)(3).

If, as here, the movant was not sentenced under the ACCA residual clause found unconstitutional in Johnson, then the movant cannot utilize Johnson to circumvent the AEDPA's one-year limitations period. Consequently, this federal petition is time-barred.

B. Procedural Default

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding. Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010); Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004).

To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can

be shown when a claim "is so novel that its legal basis was not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998); see also, Reed v. Ross, 468 U.S. 1, 16 (1984).

Further, a meritorious claim of ineffective assistance of counsel can constitute cause. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000). Ineffective assistance of counsel claims, however, are generally not cognizable on direct appeal and are properly raised by a §2255 motion regardless of whether they could have been brought on direct appeal. Massaro v. United States, 538 U.S. 500, 503, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); see also United States v. Patterson, 595 F.3d, 1324, 1328 (11th Cir. 2010). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

If a petitioner is unable to show cause and prejudice, another avenue may exist for obtaining review of the merits of a procedurally defaulted claim. Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96; see also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Id. at 496; see also Bousley,

523 U.S. at 623. ("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992)("the miscarriage of justice exception is concerned with actual as compared to legal innocence").

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). In other words, the Supreme Court has found cause to excuse the procedural default in situations where a claim is not "reasonably available to counsel" at the time of appeal because of the Supreme Court's subsequent articulation of a previously unrecognized constitutional principle that is held to have retroactive application. See Reed, 468 U.S. at 16. The Supreme Court in Johnson overruled precedent, announced a new rule, and then gave retroactive application to that new rule. Thus, Johnson constitutes a new rule unavailable to defendants convicted before it was handed down by the Supreme Court on June 26, 2015.

Here, the government argues that the movant is unable to demonstrate actual prejudice to excuse the procedural default because, regardless of Johnson's applicability on the residual clause of §924(c), the companion charges for **conspiracy to commit Hobbs Act robbery** and **attempt to commit Hobbs Act robbery** both qualify as a "crimes of violence," as discussed in detail below. (Cv DE# 14:7-11).

Where the merits of the claims may be reached and readily disposed of, judicial economy has dictated reaching the merits of the claim while acknowledging the procedural default and bar in the

alternative. See Lambrix v. Singletary, 520 U.S. 518 (1997). See also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999)(stating that judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 528 U.S. 846 (1999); Chambers v. Bowersox, 157 F.3d 560, 564 n. 4 (8th Cir. 1998)(stating that "[t]he simplest way to decide a case is often the best.").

V. General Legal Principles

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to §2255 are extremely limited. A prisoner is entitled to relief under §2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28 U.S.C. §2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004)(citations omitted). The "fundamental miscarriage of justice" exception recognized in Murray v. Carrier, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent ...."

The law is well established that a district court need not reconsider issues raised in a section 2255 motion which have been

resolved on direct appeal. Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Mills v. United States, 36 F.3d 1052, 1056 (11th Cir. 1994); United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981). Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255. Nyhuis, 211 F.3d at 1343 (quotation omitted). Broad discretion is afforded to a court's determination of whether a particular claim has been previously raised. Sanders v. United States, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) ("identical grounds may often be proved by different factual allegations ... or supported by different legal arguments ... or couched in different language ... or vary in immaterial respects").

Post-conviction relief is available to a federal prisoner under §2255 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." 28 U.S.C. §2255(a); see Hill v. United States, 368 U.S. 424, 426-27 (1962). A sentence is "otherwise subject to collateral attack" if there is an error constituting a "fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979); Hill v. United States, 368 U.S. at 428.

A. Applicable Law re 18 U.S.C. §924(c)

Title 18 U.S.C. § 924(c)(1)(A) provides for enhanced statutory penalties in cases where, among other things, the defendant uses or carries a firearm during and in relation to any "crime of violence or drug trafficking crime." The statute further defines "crime of

violence" as any 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) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §924(c)(3)(A)-(B). Under §924(c), subsection (A) is known as the "use-of-force" or "elements" clause; and, subsection (B) is frequently referred to as the "residual clause." See e.g., In re Sams, 830 F.3d 1234, 1237 (11 Cir. 2016); In re Gordon, 827 F.3d 1289, 1293 (11 Cir. 2016). As such, §924(c)(3) contains a "residual clause," very similar to the residual clause declared unconstitutionally vague in Johnson.[6] However, unlike the ACCA, which requires a 15-year mandatory minimum sentence for a defendant convicted of being a felon in possession of a firearm who also has three previous convictions for a "violent felony" or "serious drug offense", §924(c) imposes a 5-year mandatory consecutive sentence for any defendant who uses a firearm during a "crime of violence" or "drug trafficking crime." 18 U.S.C. §924(c)(1)(A)(i).

In Johnson, the Supreme Court struck down a portion of the Armed Career Criminal Act's definition of "violent felony," finding part of 18 U.S.C. §924(e)(2)(B)(ii), the so-called "residual clause," to be void for vagueness. See Johnson, __ U.S. ___, ____,

[6]The ACCA's residual clause that was held to be unconstitutionally vague in Johnson defines "violent felony" as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

135 S.Ct. at 2557-2560. In so ruling, the Supreme Court found the phrase "physical force" in paragraph (i) "means *violent* force--that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010) ("Johnson I"); see also, 18 U.S.C. §924(e)(2)(B)(ii). The Supreme Court in Johnson limited its holding to the ACCA's residual clause, holding that it "does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." Johnson, ___ U.S. at ___, ___, 135 S.Ct. 2551, 2563. (2015).

As the Supreme Court noted, the term "violent felony" has been defined as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a deadly weapon, [and] calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." Id. (internal quotations and citations omitted); see also Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 383, 160 L. Ed. 2d 271 (2004) (stating that the statutory definition of "crime of violence," in 18 U.S.C. §16, is similar to §924(e)(2)(B)(i) because it includes any felony offense which has as an element the use of physical force against the person of another, and as such, "suggests a category of violent, active crimes...").

In addition, the Supreme Court has stated that the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" and, the phrase "use...of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9-10; see also United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because

Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force;" citing Leocal).

While the meaning of "physical force" is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the (statutory) elements of state crimes. Johnson I, 599 U.S. at 138. Further, a federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise. See Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir.1983).

To determine whether a prior conviction is for a "violent felony" under the ACCA (and thus whether a conviction qualifies as a "crime of violence" for purposes of §924(c), assuming Johnson extends to §924(c)), courts use, what has become known as, the "categorical approach." Descamps v. United States, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013); see also United States v. Estrella, 758 F.3d 1239 (11th Cir. 2014). To determine if an offense "categorically" qualifies as a "crime of violence" under the "elements" or "use-of-force" clause in §924(c)(3)(A) then, the court would have to determine if conspiracy to commit Hobbs Act robbery has an element of "force capable of causing physical pain or injury to another person," as contemplated by Johnson I and its progeny. See Johnson, 559 U.S. at 140; Leocal, 543 U.S. at 11.

The Supreme Court has also approved a variant of the categorical approach, labeled the "modified categorical approach," for use when a prior conviction is for violating a so-called "divisible statute." Id. That kind of statute sets out one or more

elements of the offense in the alternative. Id. If one alternative matches an element in the generic offense, but another does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, known as Shepard documents,[7] to determine which alternative formed the basis of the defendant's prior conviction. Id. The modified categorical approach then permits the court to "do what the he categorical approach demands: [analyze] the elements of the crime of conviction...." Id.

However, the modified categorical approach does not apply when the crime of which the defendant was convicted has a single, indivisible set of elements. Id. at 2282. Thus, when a defendant is convicted of a so-called "'indivisible' statute' - *i.e.*, one not containing alternative elements– that criminalizes a broader swath of conduct than the relevant generic offense," that conviction cannot serve as a qualifying offense. Id. at 2281-82.

In sum, when determining whether a conviction qualifies as a predicate offense, the courts can only look to the elements of the statute of conviction, whether assisted by Shepard documents or not, and not to the facts underlying the defendant's prior conviction. See Descamps, 133 S.Ct. 2283-85. In so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, ___ U.S. ___, 133 S.Ct. 1678, 1684 (2011)(quoting Johnson I, 559 U.S. at 137).

More recently, the Supreme Court in Mathis v. United States,

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[7]In Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court held that a sentencing court could examine only a limited category of documents in determining whether a prior guilty plea constituted a "burglary," and thus a "violent felony," under the Armed Career Criminal Act ("ACCA"). See id. at 16, 125 S.Ct. 1254.

___ U.S. ___, 136 S. Ct. 2243 (2016), the Supreme Court was called upon to determine whether federal courts may use the modified categorical approach to determine if a conviction qualifies as a predicate offense when a defendant is convicted under an indivisible statute that lists multiple, alternative means of satisfying one (or more) of its elements. Mathis, __ U.S. at ___, 136 S. Ct. at 2247-48. The Mathis Court declined to find any such exception and, in so doing, addressed how federal courts are to make the threshold determination of whether an alternatively-phrased statute sets forth alternative elements (in which case the statute would be divisible and the modified categorical approach would apply to determine which version of the statute the defendant was convicted of violating), or merely lists alternative means of satisfying one element of an indivisible statute (in which case the categorical approach would apply). Id. at 2256-57.

VI. Discussion

Given the foregoing standards, it must first be determined whether movant's convictions for **conspiracy to commit Hobbs Act robbery** or **attempt to commit Hobbs Act robbery** may be used as companion felonies for purposes of 18 U.S.C. §924(c) or §924(o), because the language of §924(c) is similar to the residual clause of the Armed Career Criminal Act ("ACCA"), which was declared unconstitutionally vague in Johnson v. United States, 576 U.S. ____, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), and made retroactively applicable to cases on collateral review by Welch v. United States, 578 U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). (Id.).

To begin with, the movant's §924(c) challenge is now foreclosed by the Eleventh Circuit's binding decision in Ovalles v.

United States, 861 F.3d 1257 (11th Cir. 2017). In that case, the Court held that "Johnson's void-for-vagueness ruling does not apply to or invalidate the 'risk-of-force' clause in §924(c)(3)(B)." Id. at 1265. Although a mandate has not yet issued in Ovalles, and the appellant in that case has recently filed a petition for rehearing *en banc*, Ovalles nonetheless remains the law in this circuit. See Martin v. Singletary, 965 F.2d 944, 945 (11th Cir. 1992) (noting that even where a mandate has not issued, an order issued by the Eleventh Circuit "is the law in this circuit unless and until it is reversed, overruled, vacated, or otherwise modified by the Supreme Court of the United States or by this court sitting en banc.").

Briefly, however, Hobbs Act robbery, under 18 U.S.C. §1951(a), criminalizes the conduct of a person who "in any way or degree obstructs, delays, or affects commerce...by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section...." Id. §1951(a)(alteration added). To convict on a Hobbs Act conspiracy, the government must show that: (1) two or more people agreed to commit a Hobbs Act robbery or extortion; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal. See United States v. Ransfer, 749 F.3d 914, 930 (11th Cir. 2014); United States v. Verbitskaya, 406 F.3d 1324, 1335 (11 Cir. 2005)(quoting United States v. Pringle, 350 F.3d 1172, 1176 (11 Cir. 2003). The Hobbs Act, defines "robbery" as:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or

> property, or property in his custody or possession....

18 U.S.C. §1951(b)(1) (Emphasis Added).

The movant argues that Johnson is applicable to §924(c)'s residual clause. Because conspiracy to commit Hobbs Act robbery is not a "crime of violence," movant claims his §924(c) convictions cannot stand. (Cv DE# 11:2).

Although there is a split amongst the Circuits with regard to whether §924(c)(3)(B) is unconstitutionally void-for-vagueness post-Johnson, as noted previously, the Eleventh Circuit has recently agreed with decisions from the Second,[8] Sixth,[9] and Eighth[10] Circuits, "holding that Johnson's void-for-vagueness ruling does not apply to or invalidate the 'risk-of-force' clause in §924(c)(3)(B)." See Ovalles v. Tavarez-Alvarez, supra.; see also, United States v. Sneed, ___ Fed.Appx. ___, 2017 WL 3263502, *3 (11 Cir. Aug. 1, 2017)(relying on Ovalles and reiterating that §924(c) is not unconstitutionally vague under Johnson).

In Ovalles, the Eleventh Circuit observed that the "ACCA identifies 'previous convictions' for the purpose of applying a recidivist sentencing enhancement to a defendant felon who later possesses a firearm in violation of 18 U.S.C. §922(g)," while "§924(c) creates a new and distinct offense for a person who, 'during and in relation to any crime of violence or drug trafficking crime, ... for which the person may be prosecuted in a

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[8]United States v. Hill, 832 F.3d 135, 145-49 (2d Cir. 2016).

[9]United States v. Taylor, 814 F.3d 340, 375-79 (6 Cir. 2016).

[10]United States v. Prickett, 839 F.3d 697, 699-700 (8 Cir. 2016).

court of the United States, uses or carries a firearm, or who, in furtherance of such crime, possesses a firearm.'" Ovalles, supra. (quoting §924(c)(1)(A)).

In other words, the Eleventh Circuit determined that §924(c) "is not concerned with recidivism, but rather with whether the instant firearm was used 'during and in relation to' the predicate crime of violence (or drug trafficking offense) or possessed in furtherance of such predicate offenses. See id. §924(c)(1)(A)(ii)-(iii). Thus, the Eleventh Circuit concluded that the "'nexus' between the §924(c) firearm offense and the predicate crime of violence makes the crime of violence determination more precise and more predictable." Id.

The Eleventh Circuit further found that "§924(c)(3)(B) is not plagued by the same contradictory and opaque indications as the ACCA's residual clause on 'how much risk' is necessary to satisfy the statute, because the phrase 'substantial risk' is not preceded by a 'confusing list of examples.'" Ovalles v. United States, supra. Since movant's challenge to his §924(c) convictions are now foreclosed by binding Eleventh Circuit precedent, this claim warrants no federal habeas corpus relief.

Movant suggests that Johnson extends to his §924(c) convictions because §924(c)'s "residual clause" is almost identical to the ACCA's "residual clause." However, the movant's argument fails on the merits. The Eleventh Circuit recently commented that "[N]either the Supreme Court or this Court has concluded that conspiracy to commit Hobbs Act robbery cannot categorically qualify as a crime of violence under §924(c)'s use-of-force clause. See United States v. Langston, 662 Fed.Appx. 787, 794 (11 Cir. 2016) (unpublished) (quoting In re Pinder, 824 F.3d 977, 979 & n.1 (11

Cir. 2016).

But, the Eleventh Circuit did make clear that a substantive Hobbs Act robbery offense does, in fact, qualify as a crime of violence under the use-of-force clause post-Johnson. See United States v. Langston, 662 Fed.Appx. at 794 (citations omitted) (unpublished). Thus, "any analysis of Johnson's applicability must therefore be postponed unless and until the Court makes the determination the companion convictions [i.e., conspiracy to commit Hobbs Act robbery] are not crimes of violence under section 924(c)'s use-of-force clause." Morton v. United States, 2017 WL 1041568 (S.D. Fla. Mar. 2, 2017), (appeal filed, 11th Cir. May 2, 2017)(citing United States v. Albertini, 472 U.S. 675, 680 (1985)(stating courts must generally exercise judicial restraint and construe statutes in order to avoid constitutional questions)). Therefore, the movant here is entitled to no relief on the merits.

Regardless, whether the movant's §924(c) convictions were predicated on movant's conspiracy to commit Hobbs Act robbery or his attempt to commit Hobbs Act robbery, in violation of 18 U.S.C. §1951(a), both still qualify as crimes of violence for purposes of the §924(c) conviction(s). Under that statute, robbery "has as an element the use, attempted use, or threatened use of force against the person or property of another." 18 U.S.C. §924(c)(3)(A); see also In re Fleur, 824 F.3d 1337, 1340 (11 Cir. 2016); United States v. Anglin, 846 F.3d 954, 965 (7 Cir. 2017).

In that regard, courts within and outside this court have determined that conspiracy to commit Hobbs Act robbery qualifies as a crime of violence and thus remains a valid predicate offense for purposes of a §924(c) conviction. See Morton v. United States, 2017 WL 104158 at *6; see also, States v. Turner, 501 F.3d 59, 67-8 (1st

Cir. 2007) (taking into account "the great weight of authority from other circuits" and concluding that "conspiracy under the Hobbs Act constitutes a 'crime of violence' for purposes of 18 U.S.C. §924(c)"); United States v. Phan, 121 F.3d 149, 152-53 & n.7 (4th Cir. 1997) (citing United States v. Elder, 88 F.3d 127, 128-29 (2d Cir. 1996) (*per curiam*) (finding that conspiracy to commit Hobbs Act robbery is a felony involving substantial risk that physical force and thus can be used as a predicate offense to support a §924(c)(1) conviction)); see also United States v. Hernandez, 2017 WL 111730, at *9-11 (D. Me. Jan. 11, 2017) (concluding while Hobbs Act conspiracy is not a crime of violence under the force clause, it is a crime of violence under the residual clause, which the court held constitutional in light of the Supreme Court's Johnson decision); Hernandez v. United States, 2016 WL 7250676, at *3-4 (S.D. Cal. Nov. 7, 2016) (denying the defendant's §2255 motion and finding that "conspiracy to commit Hobbs Act robbery qualifies as a crime of violence under §924(c)(3)(B)"); United States v. Williams, 179 F. Supp. 3d 141, 154-55 (D. Me. 2016) (quoting 18 U.S.C. §1951(a))("[T]he Hobbs Act itself includes a conspiracy as an element ... Under the statute, interference with commerce by robbery is not a distinct offense from conspiracy to interfere with commerce by robbery. Therefore, the categorical analysis does not differ with respect to a charge of Hobbs Act robbery or a charge of conspiracy to commit a Hobbs Act robbery."). Thus, the movant's conspiracy to commit Hobbs Act robbery constitutes a crime of violence and was properly used to support his §924(c) convictions.[11]

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[11]But see United States v. Baires-Reyes, 191 F. Supp. 3d 1046, 1049-51 (N.D. Cal. 2016) (finding that the force clause does not apply in an analysis of whether conspiracy to commit Hobbs Act robbery is a crime of violence because the elements of the conspiracy do not require "actual, attempted, or threatened physical force" and §924(c)'s residual clause is unconstitutional under the Ninth Circuit's decision in Dimaya v. Lynch, 803 F.3d 1110, 1117 (9th Cir. 2015), appeal docketed, 85 U.S.L.W. 3114 (U.S. Sept. 29, 2016) (No. 15-1498)); Benitez v. United States, 2017 WL 2271504 (S.D. Fla. Apr. 6, 2017)(granting §2255 motion, finding conspiracy to commit Hobbs Act robbery is not a predicate violent felony

Turning to the attempted Hobbs Act Robbery, similar to the applicant in In re Fleur, the movant here was also charged with attempted Hobbs Act Robbery in accordance with the statutory language. To be convicted of Hobbs Act robbery requires "[T]he unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. §1951(b)(1). Thus, the employment of actual or threatened force or violence, or the creation of fear of injury, to take another's property against his will, by its terms, involves a use, attempted use, or threatened use of physical force. See United States v. Pena, 161 F.Supp.3d 268, 275 (S.D.N.Y. Feb. 11, 2016)(observing that "[t]he most sound interpretation of the Hobbs Act is that the word 'force' means 'power, violence or pressure directed against a person or thing,' just as it does in Section 924(c)(3)"). He pled guilty to the §924(c) offense and the attempted Hobbs Act robbery, as charged.

The attempted Hobbs Act robbery count contains the element of actual or threatened force, violence, and fear. Like the defendant in In re Fleur, the Movant's conviction for that offense remains valid even if Johnson is found to invalidate §924(c)'s residual clause. In re Fleur, 824 F.3d at 1341; see also United States v. Rosales-Acosta, 2017 WL 562439 (11th Cir. Feb. 13, 2017) (holding that a Section 924(c) conviction based on Hobbs Act Robbery was not plain error because there is no precedent directly on point from the Supreme Court or Eleventh Circuit holding that Hobbs Act Robberies are *not* crimes of violence under Section 924(c)(3)(A)); United States v. Baires-Reyes, 191 F.Supp.3d 1046, 1050-51 (N.D. Cal. 2016)("Attempted Hobbs Act robbery would in fact qualify as a

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under §924(c)'s residual or use-of-force clauses).

crime of violence because the force clause explicitly encompasses *attempted* use of physical force")(emphasis in original); United States v. Wheeler, 2016 WL 783412, at *4 (E.D. Wis. Jan. 6, 2016), *report and recommendation adopted by* 2016 WL 799250 (E.D. Wis. Feb. 29, 2016)("[A]n offender who takes (or attempts to take) property from a victim against his will by fear of injury must, at minimum, attempt or threaten to use force capable of causing physical pain or injury."). Thus, Hobbs Act robbery and attempted Hobbs Act robbery are categorically crimes of violence. See Chatfield v. United States, 2017 WL 1066776 (S.D. Fla. Mar. 2, 2017), *report and recommendations adopted by* 2017 WL 1066779 (S.D. Fla. Mar. 21, 2017).

Although In re Fleur was decided on Section 2255(h) review, this is not to say that the Eleventh Circuit's determination in that case is without precedential value. See generally Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351, 1358 (11th Cir. 2007). Published panel decisions issued in the Section 2255(h) context are subject to the prior-panel-precedent rule and, therefore, are binding on all subsequent panels unless and until they are overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit sitting *en banc*. In re Provenzano, 215 F.3d 1233, 1235 (11th Cir. 2000); In re Holsey, 589 Fed. Appx. 462, 466 (11th Cir. 2014). In re Fleur's holding that Hobbs Act robbery remains categorically a crime of violence under Section 924(c) after Johnson is factually on point, resolves the issue at hand, and is binding on this Court. See In re Gordon, 827 F.3d 1289, 1294 (11th Cir. 2016). Therefore, as applied here, the Court need not resolve the difficult question of whether Johnson has invalidated Section 924(c)'s residual clause. Id.

Regardless, the plain language of the force clause indicates

that a violent felony is a crime of violence that "has as an element the use, attempted use, or threatened use of physical force..." 18 U.S.C. §924(c)(3)(A)(emphasis added). See also 18 U.S.C. §924(e)(2)(B)(i) (analogous ACCA provision). Therefore, it follows that attempted Hobbs act robbery is also a crime of violence and qualifies as a predicate offense to support the §924(c) conviction. See e.g., United States v. Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011)(attempt to commit an offense under Florida law generally qualifies as a predicate if the substantive offense would be a predicate); United States v. Moore, 43 F.3d 568, 572-73 (11 Cir. 1994)(concluding that federal carjacking statute, 18 U.S.C. §2119, which is worded similarly to the statute at issue here--"[t]aking or attempting to take by force and violence or by intimidation...encompasses the use, attempted use, or threatened use of physical force.") (emphasis added).

Since the substantive Hobbs Act robbery categorically qualifies as a "crime of violence" under the use-of-force clause of §924(c)(3), regardless of the applicability of Johnson's to §924(c)(3)'s residual clause, "[B]y extension, attempted Hobbs Act robbery also qualifies as a crime of violence, as the use-of-force clause encompasses attempted and threatened use of force. See 18 U.S.C. §924(c)(3)(A)." United States v. Morton, 2017 WL 1041568 (S.D. Fla. Mar. 2, 2017), appeal filed by, Morton v. United States, 11th Cir. May 2, 2017; Myrthil v. United States, 2016 WL 8542856 (S.D. Fla. Dec. 29, 2016).

Further, there is also persuasive, although non-binding authority from this circuit and other district courts that Hobbs Act robbery, and thus by extension, attempted Hobbs Act robbery, qualify as a crime of violence under the use-of-force clause of §924(c), and that Johnson does not invalidate §924(c)'s residual

clause. See In re Rogers, 825 F.3d 1335, 1340 (11 Cir. June 17, 2016); United States v. Hill, 832 F.3d 135, 145 (2d Cir. 2016)(holding Hobbs Act robbery qualifies as a crime of violence under §924(c)); United States v. Collins, 2016 WL 1639960, at *31 (N.D. Ga. Feb. 9, 2016), report and recommendation adopted, 2016 WL 1623910 (N.D. Ga. Apr. 25, 2016) ("reference to §1951(a) is all that is necessary to determine that the charges here do indeed satisfy §924(c)(3)(A)'s 'force' clause."); United States v. Taylor, 814 F.3d 340, 375-76 (6th Cir. 2016); United States v. Prickett, 839 F.3d 697, 699 (8 Cir. 2016); United States v. Brownlow, 2015 WL 6452620, at *4 (N.D. Ala. Oct. 26, 2015) ("The law is firmly established that a Hobbs Act robbery is a crime of violence under §924(c)(3)(A)" (citing out-of-circuit authority)); United States v. Howard, 650 Fed.Appx. 446 (9 Cir. 2016)(holding Hobbs Act robbery constitutes a "crime of violence" under §924(c)'s force clause and declining to consider whether it also qualifies under residual clause); United States v. Farmer, 73 F.3d 836, 842 (8 Cir. 1996)(concluding that Hobbs Act robbery constitutes a "serious violent felony" under 18 U.S.C. §3559(c)(2) because, among other things, "it has an element the use, attempted use, or threatened use of physical force against the person of another"). But see, United States v. Cardena, 842 F.3d 959, 996 (7 Cir. 2016)(holding §924(c)(3)(B) is unconstitutional before considering whether conviction qualified under the use-of-force clause).

The Movant did not argue at the trial level or on appeal that Hobbs Act robbery fails to support a §924(c) conviction. He appears to argue that this claim is nevertheless cognizable on Section 2255 review because, post-Johnson, Count 6 is no longer lawful. (Cv DE# 11:24). His arguments here are not one of factual innocence, but rather legal innocence. Under the totality of the circumstances present here, because conspiracy to commit and attempted Hobbs Act

robbery are also a crimes of violence under §924(c)'s use-of-force clause, as such, the movant cannot demonstrate that he is entitled to §2255(h) relief. It follows that the instant petition is untimely and procedurally barred.

Additionally, the movant is again reminded that he may not raise for the first time in objections to the undersigned's Report any new arguments or affidavits to support these claims. Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009)(citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009). To the extent the movant attempts to do so, the court should exercise its discretion and decline to consider the argument. See Daniel, supra; See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). This is so because "[P]arties must take before the magistrate, 'not only their best shot but all of the shots.'" See Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)(quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

VII. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and that if a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule

11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where a §2255 movant's constitutional claims have been adjudicated and denied on the merits by the district court, the movant must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

But, where a §2255 movant's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the movant can demonstrate both "(1) 'that jurists of reason would find it debatable whether the [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Movant is not entitled to relief on the merits, the court considers whether Movant is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find the court's

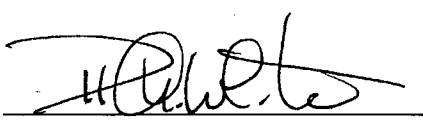
treatment of any of Movant's claims debatable and that none of the issues are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is not warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84.

VIII. Conclusion

Based on the foregoing, it is recommended that this motion to vacate be DISMISSED as time-barred, and alternatively DENIED on the merits, that no certificate of appealability issue, and the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 15th day of November, 2017.



UNITED STATES MAGISTRATE JUDGE

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A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22877-CIV-LENARD/WHITE
(Criminal Case No. 06-20149-Cr-Lenard)

MANUEL REYES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER VACATING ORDER OF REFERRAL TO THE MAGISTRATE JUDGE (D.E. 3), DENYING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE (D.E. 1, 11), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on a sua sponte review of the record. On June 27, 2016, Movant Manuel Reyes filed a pro se Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. ("Motion," D.E. 1.) Thereafter, this case was referred to Magistrate Judge Patrick A. White for all pretrial non-dispositive matters and a report and recommendation on all dispositive matters. ("Referral Order," D.E. 3.) On October 25, 2016, Movant, through appointed counsel, filed an Amended 2255 Motion. ("Amended Motion," D.E. 11.) The Government filed a Response on November 23, 2016, ("Response," D.E. 17), to which Movant filed a Rely on December 5, 2016, ("Reply," D.E. 16).

On November 15, 2017, Judge White issued a Report recommending that the Court dismiss the Motion as time-barred or procedurally defaulted, or, alternatively, deny

it on the merits. (D.E. 17.) On December 5, 2017, Movant filed Objections, (D.E. 19), to which the Government filed a Response on December 11, 2017, (D.E. 22).

On October 3, 2018, the Court entered an Order holding Movant's Section 2255 Motion in abeyance pending the issuance of the Eleventh Circuit's mandate in Ovalles v. United States. (D.E. 25.) On October 4, 2018, the Eleventh Circuit rendered its en banc opinion in Ovalles. However, because the Court finds that Movant is not entitled to relief irrespective of the Ovalles opinion, and for reasons not discussed in Judge White's Report, the Court **LIFTS** the stay, **VACATES** the Referral Order and, upon review of the Motion, Response, Reply, and the record in this case and the underlying criminal action, the Court finds as follows.

I. Background

a. Criminal case

On February 26, 2009, Movant, along with several co-defendants, was charged by Indictment with the following offenses:

- Count 1: conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 and 841(a)(1);
- Count 2: attempt to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846;;
- Count 3: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a);
- Count 4: attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a);

- Count 5: conspiracy to carry a firearm during a drug trafficking crime or a crime of violence, as set forth in Counts 1, 2, 3, and 4, in violation of 18 U.S.C. § 924(o);
- Count 6: carrying a firearm during and in relation to a crime of violence and a drug trafficking crime, and possessing said firearm in furtherance of a crime of violence and a drug trafficking crime, as set forth in Counts 1, 2, 3, and 4, in violation of 18 U.S.C. § 924(c)(1)(A) and 2; and
- Count 7: being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

(Cr-D.E. 28.) The Indictment also contained forfeiture allegations. (Id. at 8-9.)

On May 3, 2006, pursuant to a written plea agreement, Movant pleaded guilty to Counts 1, 5, and 6 of the Indictment. (Cr-D.E. 77.) On July 25, 2006, the Court entered Judgment sentencing Movant to a total of 322 months' imprisonment, consisting of concurrent terms of 262 months' imprisonment as to Count 1 and 240 months' imprisonment as to Count 5, and a term of sixty months' imprisonment as to Count 6, to run consecutive to the sentences imposed in Counts 1 and 5. (Cr-D.E. 112.) The Court further imposed a total term of five years' supervised release, consisting of five years as to each offense of conviction, to run concurrently. (Id.) Movant did not appeal his convictions or sentences.

b. 2255 Motion

On June 27, 2016, Movant, filed a pro se Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct his sentence. (D.E. 1.) On October 25, 2016, Movant, through appointed counsel, filed an Amended 2255 Motion arguing that the Supreme

Court's decision in Johnson v. United States, __ U.S. __, 135 S. Ct. 2551 (2015)—which held that the "residual clause" in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague—invalidates his conviction under 18 U.S.C. § 924(c). (D.E. 11 at 1-2.) Specifically, Movant argues that conspiracy to commit Hobbs Act robbery no longer qualifies as a crime of violence under Section 924(c) and therefore he is actually innocent of Count 6. (Id. at 2.)

c. Report and recommendations

On November 15, 2017, Judge White issued a Report recommending that the Court: (1) dismiss the Motion as time-barred; or (2) dismiss the Motion on the grounds that his claim is procedurally defaulted; or (3) deny the Motion on the merits. (D.E. 17.) Specifically, Judge White found that Movant's predicate offenses of conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery still qualify as crimes of violence under Section 924(c)(3)(A)'s use-of-force/elements clause, and therefore Movant cannot establish prejudice for failing to raise the argument previously. (Id. at 27-28.)

d. Objections

On December 5, 2017, Movant filed Objections to Judge White's Report. (D.E. 19.) Therein, he argues that his Motion is not untimely because it was filed within one year of the Johnson opinion which it invokes. (Id. at 1-2.) He further argues that his claim is not procedurally barred because the Court must presume that his conviction rests upon the least of the acts criminalized, i.e., conspiracy to commit Hobbs Act robbery, and conspiracy to commit Hobbs Act robbery no longer constitutes a crime of violence under

Section 924(c). (Id. at 2-10.) Movant also argues that if the Court disagrees with any of his arguments it should issue a certificate of appealability. (Id. at 10.)

e. Ovalles v. United States

On October 4, 2018, the Eleventh Circuit issued its en banc opinion in Ovalles v. United States, upholding the constitutionality of the residual clause in 18 U.S.C. § 924(c)(3)(B). __ F.3d __, 2018 WL 4830079, at *2 (11th Cir. Oct. 4, 2018). Specifically, the Eleventh Circuit held "that § 924(c)(3)(B) prescribes a conduct-based approach, pursuant to which the crime-of-violence determination should be made by reference to the actual facts and circumstances underlying a defendant's offense."[1] Id. at 4.

II. Legal Standard

Pursuant to 28 U.S.C. § 2255, a prisoner in federal custody may move the court which imposed the sentence to vacate, set aside, or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. See United States v. Jordan, 915 F.2d 622, 625 (11th Cir. 1990). If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). To obtain relief

[1] In doing so, the Eleventh Circuit explicitly overruled its prior decision in United States v. McGuire, to the extent it held that the question of whether a predicate offense qualifies as a "crime of violence" under Section 924(c)(3)(B) is one that a court "must answer 'categorically'—that is, by reference to the elements of the offense, and not the actual facts of [the defendant's] conduct." 706 F.3d 1333, 1336 (11th Cir. 2013).

on collateral review, however, the movant must "must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 167 (1982).

III. Discussion

Although it is questionable whether Movant's 2255 Motion—which relies on the premise that Johnson invalidated the residual clause in Section 924(c)(3)(B)—survives the Ovalles opinion—which upheld the constitutionality of Section 924(c)(3)(B)—the Court finds that it fails on the merits because his conviction under Section 924(c) is supported by the drug trafficking crime charged in Count 1 of the Indictment.

Section 924(c) provides, in relevant part:

> **(c)(1)(A)** . . . any person who, during and in relation to any crime of violence or drug trafficking crime . . . 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; . . .

18 U.S.C. § 924(c) (emphasis added).

Here, Count 6 of the Indictment charged Movant with using and carrying a firearm during and in relation to a drug trafficking crime and during and in relation to a crime of violence. Specifically, it charged that:

> On or about February 23, 2006, in Miami-Dade County, in the Southern District of Florida, the defendants . . . did knowingly carry firearms during and in relation to a crime of violence and a drug trafficking crime, and did possess said firearm in furtherance of a crime of violence and a drug trafficking crime, which are felonies prosecutable in a court of the United States, specifically, violations of 21, United States Code, Section 846, and Title 18, United States Code, Section 1951(a), as set forth in

> Counts 1, 2, 3, and 4 of this Indictment; all in violation of Title 18, United States Code, Section 924(c)(1)(A) and 2.

(Cr-D.E. 28 at 6 (emphasis added).)[2] Count 1 of the Indictment charged Defendant with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. (Id. at 1-2.) The Eleventh Circuit has held that conspiracy to possess with intent to distribute cocaine qualifies as a predicate drug trafficking crime under Section 924(c)(1)(A)'s use-of-force/elements clause. See United States v. Isnadin, 742 F.3d 1278, 1307-08 (11th Cir. 2014) (holding that the defendant's conviction under 18 U.S.C. § 924(c)(1)(A) was supported by the drug trafficking crime of conspiracy to possess cocaine with the intent to distribute); United States v. Molina, 443 F.3d 824, 829-30 (11th Cir. 2006) (same).

Accordingly, even assuming arguendo that conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery no longer qualify as crimes of violence under Section 924(c), Movant is not entitled to relief because his 924(c) conviction in Count 6 is supported by the drug trafficking crime charged in Count 1 (to which he pleaded guilty). And because the Court finds that reasonable jurists would not debate the issue,

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[2] The Court notes that Movant has never argued—in his criminal case or in this 2255 action—that Count 6 is duplicitous. However, even if he had argued in his 2255 Motion that Count 6 was duplicitous, the Court would have found that Movant waived the argument by pleading guilty to Count 6. United States v. Fairchild, 803 F.2d 1121, 1124 (11th Cir. 1986) (holding that the defendant's guilty plea waived all non-jurisdictional defects, including any argument that the indictment was duplicitous); see also United States v. Cotton, 535 U.S. 625, 630-31 (2002) (holding that a defect in an indictment is not jurisdictional and does not deprive a court of the power to adjudicate a case); United States v. Barrington, 618 F.3d 1178, 1189-90 (11th Cir. 2011) ("Generally, a defendant must object before trial to defects in an indictment and the failure to do so waives any claimed defects.") (citing Fed. R. Cr. P. 12(b)(3)(B)(e); United States v . Ramirez, 324 F.3d 1225, 1227-28 (11th Cir. 2003)).

the Court denies a Certificate of Appealability. See Miller-El v. Cockrell, 537 U.S. 322, 353 (2003).

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Movant's Motion/Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (D.E. 1, 11) is **DENIED**;
2. A Certificate of Appealability **SHALL NOT ISSUE**;
3. All pending motions are **DENIED AS MOOT**; and
4. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 10th day of October, 2018.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

A-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22877-CIV-LENARD/WHITE
(Criminal Case No. 06-20149-Cr-Lenard)

MANUEL REYES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

THIS CAUSE is before the Court following the Court's Order Denying Movant Manuel Reyes's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. Pursuant to Rule 58(a) of the Federal Rules of Civil Procedure, it is hereby **ORDERED AND ADJUDGED** that:

1. **FINAL JUDGMENT** shall be entered in favor of Respondent United States of America; and
2. This case is now **CLOSED.**

DONE AND ORDERED in Chambers at Miami, Florida this 10th day of October, 2018.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE