APPENDIX

APPENDIX

A - 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15027-H

JASON ROSADO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Jason Rosado, a federal prisoner, seeks a certificate of appealability ("COA") to appeal the district court's denial of his authorized successive 28 U.S.C. § 2255 motion to vacate. In his motion, Rosado argued that his conviction under 18 U.S.C. § 924(c) was unlawful following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

As background, a federal grand jury indicted Rosado for, in relevant part, (1) conspiracy to commit hostage taking, in violation of 18 U.S.C. § 1203(a) (Count 1), and (2) possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Count 5). Relevant here, the § 924(c) charge in Count 5 was tied to the charge in Count 1.

Rosado pled guilty to Counts 1 and 5. At his change-of-plea hearing, Rosado stipulated that he and his codefendants planned to steal a car, drugs, and money from the victim. Rosado and his codefendants gathered firearms, kidnapped the victim at gunpoint, and beat, cut, waterboarded,

and burned him. Several weeks later, police searched Rosado's home and found firearms that were used during the kidnapping. The district court sentenced Rosado to a total sentence of 444 months' imprisonment. Rosado did not directly appeal. However, he filed the instant § 2255 motion, which the district court denied as meritless.

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).

In *Johnson*, the Supreme Court struck down as unconstitutionally vague the Armed Career Criminal Act's ("ACCA") "residual clause," which defined a violent felony as a crime that "involves conduct that presents a serious potential risk of physical injury to another." 135 S. Ct. at 2555-58, 2563; 18 U.S.C. § 924(e)(2)(B)(ii). More recently, in *Sessions v. Dimaya*, the Supreme Court applied the rule in *Johnson* and struck down the residual clause in 18 U.S.C. § 16(b), which defined a "crime of violence" as a felony 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. 1204, 1211 (2018) (quoting 18 U.S.C. § 16(b)).

Distinct from the ACCA and § 16(b), § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a "crime of violence," which is a felony that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "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). Section 924(c)(3)(A) is the "elements clause," and § 924(c)(3)(B)

is 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 as long as courts applied a conduct-based approach that accounts for the actual facts of the companion offense's commission. *Id.* at 4, 17-19, 27-28, 43-45.

Following *Ovalles*, this Court denied a federal prisoner's application for leave to file a second or successive § 2255 motion in *In re Garrett*, holding that his proposed vagueness challenge to § 924(c)(3)(B)'s residual clause under *Johnson* and *Dimaya*, "like *any* identical challenge by *any* federal prisoner," could not satisfy the statutory requirements of § 2255(h). 908 F.3d 686, 688-90 (11th Cir. 2018) (emphasis in original). The Court said that "neither *Johnson* nor *Dimaya* supplies any 'rule of constitutional law'—'new' or old, 'retroactive' or nonretroactive, 'previously unavailable' or otherwise—that can support a vagueness-based challenge to the residual clause of section 924(c)." *Id.* at 689. In *United States v. St. Hubert*, the Court held that the conduct-based approach is "a rule of statutory interpretation, not a rule of constitutional law." 909 F.3d 335, 344-45 (11th Cir. 2018). We are bound by these holdings.

So reasonable jurists would not debate the district court's denial of Rosado's vagueness-based constitutional challenge to his § 924(c) conviction. Under *Garrett*, neither *Johnson* nor *Dimaya* supplies a rule of constitutional law that supports a vagueness challenge to § 924(c)(3)(B). Accordingly, because Rosado cannot make a "substantial showing of the denial of a *constitutional* right," his motion for a COA is DENIED. 28 U.S.C. § 2253(c)(2) (emphasis added); *see Slack*, 529 U.S. at 484.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

A - 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-23503-CIV-LENARD/WHITE
(Criminal Case No. 12-20152-Cr-Lenard)

JASON ROSADO

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT OF THE MAGISTRATE JUDGE (D.E. 13), DENYING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE (D.E. 1), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on the Report of Magistrate Judge Patrick A. White issued June 26 2017, ("Report," D.E. 13), recommending that the Court deny Movant Jason Rosado's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, ("Motion," D.E. 1). Movant filed Objections on June 30, 2017, ("Objections," D.E. 14), to which the Government filed a Response on July 5, 2017, ("Response," D.E. 15). Upon review of the Report, Objections, Response, and the record, the Court finds as follows.

I. Background

a. Criminal case

On April 10, 2012, Movant was charged by Second Superseding Indicment with the following offenses:

Count 1: conspiracy to commit hostage taking in violation of 18 U.S.C. § 1203(a);

Count 2: hostage taking in violation of 18 U.S.C. § 1203(a);

Count 3: kidnapping in violation of 18 U.S.C. § 1201(a);

Count 4: carjacking in violation of 18 U.S.C. § 1203(a); and

Count 5: possession of a firearm during and in relation to a crime of violence as described in Counts 1, 2, 3, and 4 in violation of 18 U.S.C. § 924(c).

(Cr-D.E. 50.) On November 30, 2012, pursuant to a written plea agreement, Movant pleaded guilty to Counts 1 and 5 of the Second Superseding Indictment. (Cr-D.E. 183.)

On February 14, 2013, the Court entered Judgment sentencing Movant to a total of 444 months' imprisonment, consisting of a term of 360 months as to Count 1 and a term of 84 months as to Count 5, to run consecutive to the sentence imposed in Count 1. (Cr-D.E. 232.) The Court further imposed a total term of five years' supervised release (five years for each offense of conviction, to run concurrently), and required Movant to pay $8,350 in restitution. (Id.) Movant did not appeal his convictions or sentences.

b. 2255 Motion

On August 15, 2016, the Eleventh Circuit granted Movant's Petition to file a second or successive Motion under 28 U.S.C. § 2255.[1] (D.E. 1.) On October 3, 2016, Movant, through appointed counsel, filed the instant 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

[1] On March 30, 2015, the Court dismissed Movant's first Section 2255 Motion as time-barred. See Rosado v. United States, Case No. 15-20284-Civ-Lenard, D.E. 9 (S.D. Fla. Mar. 30, 2015).

U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague—invalidates his conviction under 18 U.S.C. § 924(c). (D.E. 7 at 1-2.) Specifically, he argued that conspiracy to commit hostage taking no longer qualifies as a crime of violence under Section 924(c).

c. Report and recommendation

In his Report, Judge White found that Movant's claim is procedurally defaulted, and, in any event, the claim fails on the merits because under binding Eleventh Circuit precedent, carjacking is categorically a crime of violence under Section 924(c)'s "use-of-force" clause. (Report at 12 (citing In re Smith, 829 F.3d 1276 (11th Cir. 2016)).) Thus, Judge White recommends denying the Motion and denying a Certificate of Appealability. (Id. at 15.)

d. Objections

In his Objections, Movant argues that the predicate offense for his 924(c) conviction was conspiracy to commit hostage taking, as charged in Count 1 of the Second Superseding Indictment, and therefore Judge White erred by analyzing whether carjacking constitutes a crime of violence under Section 924(c). (D.E. 14 at 1-6.) Movant further argues his claim is excepted from procedural default because he is actually innocent of his conviction under Section 924(c); conspiracy to commit hostage taking is not a crime of violence under Section 924(c); carjacking is not a crime of violence under Section 924(c); Judge White erred by failing to address whether Johnson applies to Section 924(c); and if the Court disagrees with all of these arguments, it should issue a Certificate of Appealability. (Id. at 7-14.)

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 __, Case No. 17-10172 (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."[2] Id. at 4.

II. Legal Standard

Upon receipt of Objections to a Magistrate Judge's Report, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); accord Fed. R. Civ. P. 72(b)(3). The court must conduct a de novo review of any part of the Report that has been "properly objected to." Fed. R. Civ. P. 72(b)(3); see 28 U.S.C. § 636(b)(1) (providing that the district court "shall make a de novo determination of those portions of the [R & R] to which objection is made"). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988). The Court "may accept, reject,

[2] 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).

or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

III. Discussion

Upon de novo review, and for the reasons that follow, the Court adopts Judge White's Report.

Movant's primary objection is that the predicate offense for his 924(c) conviction was conspiracy to commit hostage taking, as charged in Count 1 of the Second Superseding Indictment, and therefore Judge White erroneously analyzed whether carjacking qualifies as a crime of violence under Section 924(c)'s "use of force" clause.[3] (Obj. at 1-7.)

---

[3] Section 924(c) provides, in relevant part:

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> **(i)** be sentenced to a term of imprisonment of not less than 5 years; . . .

Under Section 924(c)(3)(B),

> the term 'crime of violence' means an offense that is a felony and—
>
> **(A)** has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(B)** that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Movant pled guilty to Count 1 of the Second Superseding Indictment, which charged Movant with conspiracy to commit hostage taking, and Count 5 of the Second Superseding Indictment, which charged Movant with possession of a firearm during and in relation to a crime of violence as described in Counts 1, 2, 3, and 4 in violation of 18 U.S.C. § 924(c). (Cr-D.E. 50.) Thus, the carjacking offense charged in Count 4 of the Second Superseding Indictment was specifically identified as a predicate crime of violence in Count 5, to which Movant pled guilty without limitation. (See id.) Additionally, during the plea colloquy the Court specifically identified the carjacking offense charged in Count 4 as a predicate crime of violence in Count 5. (Change of Plea Tr. (D.E. 12-1) at 7:9-20.) Finally, Movant stipulated to the facts underlying the carjacking offense during the factual proffer submitted by the Parties in support of Movant's guilty plea. (Id. at 7:25 – 12:3.)

Nevertheless, Movant argues that by offering four separate offenses as possible predicates for the Section 924(c) charge, Count 5 constitutes an impermissible duplicitous indictment.[4] (Obj. at 4 (citing In re Gomez, 830 F.3d 1225, 1227-28 (11th Cir. 2016)

Subsection (A) is referred to as the "elements clause," see In re Chance, 831 F.3d 1335, 1337 (11th Cir. 2016), or the "use-of-force clause," see In re Saint Fleur, 824 F.3d 1337, 1339 (11th Cir. 2016), while subsection (B) is referred to as the "residual clause," see In re Sams, 830 F.3d 1234, 1237 (11th Cir. 2016).

[4] "A count in an indictment is duplicitous if it charges two or more 'separate and distinct' offenses." United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997) (quoting United States v. Burton, 871 F.2d 1566, 1573 (11th Cir. 1989)). "A duplicitous count poses three dangers: '(1) A jury may convict a defendant without unanimously agreeing on the same offense; (2) A defendant may be prejudiced in a subsequent double jeopardy defense; and (3) A court may have difficulty determining the admissibility of evidence.'" Id. (quoting United States v. Wiles, 102 F.3d 1043, 1061 (10th Cir. 1996), modified, 106 F.3d 1516 (10th Cir. 1997)).

(citing United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997))).) However, Movant never presented this argument to Judge White, and the Court declines to consider it for the first time in his Objections. Williams v. McNeil, 557 F.3d 1287, 1292 (11th Cir. 2009) ("[A] district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge.").

Regardless, the Court further finds that Movant waived the duplicity argument by pleading guilty to Count 5. United States v. Fairchild, 803 F.2d 1121, 1124 (11th Cir. 1986). In Fairchild, the defendant pleaded guilty to engaging in a continuing criminal enterprise. Id. at 1122. He appealed his conviction seeking to withdraw his guilty plea and proceed to trial. Id. On appeal he argued, inter alia, that the indictment was duplicitous. Id. at 1124. The Eleventh Circuit found that by pleading guilty he had waived all non-jurisdictional claims, including that the indictment was duplicitous:

> "A guilty plea, since it admits all the elements of a formal criminal charge, waives all nonjurisdictional defects in the proceedings against a defendant." United States v. Jackson, 659 F.2d 73, 74 (11th Cir. 1981), cert. denied, 445 U.S. 1003, 102 S. Ct. 1637, 71 L. Ed. 2d 870 (1982) quoting United States v. Saldana, 505 F.2d 628, 629 (5th Cir. 1974) (summary calendar). These claims are all nonjurisdictional, and, as such, are waived by Fairchild's knowing and voluntary guilty plea.

Id. 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)). Here, Movant pled

guilty to Count 5 and therefore waived all non-jurisdictional defects, including that Count 5 is duplicitous. Fairchild, 803 F.2d at 1124. For these reasons, the Court finds that Judge White properly determined that carjacking was a predicate offense for Movant's 924(c) conviction.

Next, the Court finds that Movant's claim fails on the merits because carjacking qualifies as a crime of violence under Section 924(c)(3)'s "use-of-force" clause.[5] See In re Smith, 829 F.3d at 1280 ("Even assuming that Johnson invalidated § 924(c)'s residual clause, that conclusion would not assist [the movant] because the elements of the underlying conviction on which his § 924(c) conviction was based—carjacking, in violation of 18 U.S.C. § 2119—meet the requirements that the force clause in § 924(c)(3)(A) sets out for a qualifying underlying offense."). In Smith, the Eleventh Circuit relied on its prior decision in United States v. Moore, which held that "[t]he term 'crime of violence' as Congress defined it in 18 U.S.C § 924(c)(3) clearly includes carjacking. 'Tak[ing] or attempt[ing] to take by force and violence or by intimidation,' 18 U.S.C. § 2119, encompasses 'the use, attempted use, or threatened use of physical force. . . .' 18 U.S.C. § 924(c)(3)(A)." 43 F.3d 568, 572-73 (11th Cir. 1994).

> Stated another way, an element requiring that one take or attempt to take by force and violence or by intimidation, which is what the federal carjacking statute does, satisfies the force clause of § 924(c), which requires the use, attempted use, or threatened use of physical force. In short, our precedent holds that carjacking in violation of § 2119 satisfies § 924(c)'s force clause, and that ends the discussion.

---

[5] Because Movant's predicate carjacking offense constitutes a crime of violence under Section 924(c)(3)(A)'s use-of-force clause, the Court need not apply the "conduct based" approach to determine whether Movant's predicate offenses qualify as crimes of violence under Section 924(c)(3)(B)'s residual clause, as prescribed by the en banc decision in Ovalles.

Smith, 829 F.3d at 1280-81.

The holding in Smith is binding on this Court. See Morton v. United States, CASE NO. 2:16-CV-8114-SLB, 2017 WL 345551, at *3 (N.D. Ala. Jan. 24, 2017). Although Smith was decided in the context of an application to file a second or successive Section 2255 Motion, it is axiomatic that this Court is bound by the holdings of prior cases rendered by Eleventh Circuit Court of Appeals. In re Hubbard, 803 F.3d 1298, 1309 (11th Cir. 2015) (citing Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir. 1985)). This "rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions." In re Lambrix, 776 F.3d 789, 794 (11th Cir. 2015). The holding of a case is "comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.'" United States v. Kaley, 579 F.3d 1249, 1249 n.10 (11th Cir. 2009) (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66-67 (1996)). The Eleventh Circuit's conclusion that Smith's carjacking conviction qualified as a "crime of violence" was necessary to the result in that case, as his application for leave to file a second or successive Section 2255 motion was denied on that basis. Smith, 829 F.3d at 1280-81. As such, Smith holds that carjacking is a "crime of violence" for purposes of Section 924(c), and that holding is binding precedent unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit Court of Appeals sitting en banc. United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008).

Because the Court is bound by the Eleventh Circuit's prior holdings that carjacking qualifies as a crime of violence under Section 924(c)(3)(A), Movant cannot establish that he is actually innocent of his Section 924(c) conviction. See Gordon v. United States, CASE NO. 7:16-CV-8122-SLB, 2017 WL 514182, at *3 (N.D. Ala. Feb. 8, 2017) (finding that Smith is binding and therefore the movant's carjacking conviction qualifies as a crime of violence under the use-of-force clause). Consequently, Movant is not entitled to relief under Section 2255. And because the Court finds that reasonable jurists would not debate the issue, 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. The Report of the Magistrate Judge issued June 26, 2017 (D.E. 13) is **ADOPTED**;
2. Movant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (D.E. 1) is **DENIED**;
3. A Certificate of Appealability **SHALL NOT ISSUE**;
4. All pending motions are **DENIED AS MOOT**; and

5. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 5th day of October, 2018.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

A - 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-23503-Civ-LENARD
(12-20152-Cr-LENARD)
MAGISTRATE JUDGE PATRICK A. WHITE

JASON ROSADO,

Movant,

REPORT OF MAGISTRATE JUDGE

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

I. Introduction

The movant, a federal prisoner, currently confined at Coleman II-United States Penitentiary, in Coleman, Florida, has filed this motion to vacate, after obtaining authorization from the Eleventh Circuit to file a second or successive Section 2255 motion to vacate, pursuant to 28 U.S.C. §2255. See In re Jason Rosado, Eleventh Circuit Court of Appeals, Case No. 16-14989-J, Order entered August 15, 2016. (Cv DE# 1). He seeks relief in light of the Supreme Court's ruling in Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551 (2015) (hereinafter, "Samuel Johnson"), made retroactively applicable to cases on collateral review by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257, ____, L.Ed.2d ___ (2016).

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

Presently before the court is the Petitioner's motion to

vacate (Cv DE# 7), and the government's response in opposition (Cv DE# 12).

II. Claims

Construing the §2255 motion liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U.S. 519 (1972), the movant argues that his conviction for possession of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §924(c)(1)(A) is no longer lawful in light of Samuel Johnson v. United States, 135 S.Ct. 2551 (2015) which the United States Supreme Court held to apply retroactively to cases on collateral review in Welch v. United States, 136 S.Ct. 1257 (2016).

III. Procedural History

On April 12, 2012, Petitioner was charged with conspiracy to commit hostage taking in violation of 18 U.S.C. §1203(a) (count 1); hostage taking in violation of 18 U.S.C. §1203(a) (count 2); kidnaping in violation of 18 U.S.C. §1203(a) (count 3); carjacking in violation of 18 U.S.C. §1201(a)(1) (count 4); and possession of a firearm during and in relation to a crime of violence as described under counts 1, 2, 3, and 4 in violation of 18 U.S.C. §924(c)(1)(A). (Cr DE# 50). On November 14, 2012, Petitioner pleaded guilty to Count 1 and Count 5 of the Second Superseding Indictment. (Cr DE# 183).

Prior to sentencing, a PSI was prepared which reveals as follows. The base offense level was set at 32 because the offense involved kidnaping, abduction or unlawful restraint, §2A4.1(a). (PSI ¶37). Since a ransom demand was made, the offense level was increased by six levels, §2A4.1(b)(1). (PSI ¶38). Because the victim sustained serious bodily injury, the offense level was increased by two levels, §2A4.1(b)(2)(B). (PSI ¶39). Because the

defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive, the offense level was increased by four levels, §3B1.1(a). (PSI ¶41). After a 3-level reduction to the base offense level for acceptance of responsibility, the total adjusted offense level was set at a level 41. (PSI ¶¶45-47).

The PSI next determined that the movant had four criminal history points and a criminal history category of III. (PSI ¶51).

Statutorily, as to Count One, the term of imprisonment was any term of years to life imprisonment, 18 U.S.C. §1203(a); as to Count Five, the minimum term of imprisonment was seven years and the maximum term was life (consecutive to any other term of imprisonment), 18 U.S.C. §924(c)(1)(A)(ii) and (D)(ii). (PSI ¶81). Based on a total offense level of 41 and a criminal history category of III, the guideline imprisonment range was 360 months to life. As to Count Five, a consecutive term of imprisonment of not less than seven years was required, §5G1.2(a). (PSI ¶82).

On **February 14, 2013,** Petitioner was sentenced to 447 months' imprisonment: 360 months' imprisonment as to Count 1 and 84 consecutive months as to Count 5. (Cr DE# 232).

Petitioner did not file a direct appeal. Thus, the judgment became final on **February 28, 2013,** when the 14-day period for prosecuting a direct appeal expired.[1]

---

[1]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); Murphy v. United States, 634 F.3d 1303, 1307 (11th Cir. 2011). 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.

Therefore, for purposes of the federal limitations period, the movant had one year from the time his conviction became final on **February 28, 2013**, or no later than **February 28, 2014**, 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, 1008-09 (7th Cir. 2000)).

After the statute of limitations expired, Petitioner filed his first §2255 petition on January 26, 2015 in case no. 15-Cv-20284-Lenard. This court dismissed the petition as untimely and the Eleventh Circuit affirmed on appeal. (15-CV-20284, DE# 4, 9, 24).

On **June 15, 2016**, the Eleventh Circuit granted movant's application for authorization to file a successive §2255 motion, finding the movant had made a *prima facie* showing under 28 U.S.C. §2255(h) that he was entitled to relief under Samuel Johnson. (Cv-DE#1). The application was transferred to this court, and opened by the Clerk as a §2255 motion to vacate. (Cv-DE#1). This court issued an order appointing counsel and setting a briefing schedule. (Cv-DE# 6). The parties have complied with the court's briefing schedule and the case is now ripe for review. (Cv DE# 9, 12, 13).

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).

IV. Threshold Issues

A. Timeliness

On **June 26, 2015,** the United States Supreme Court held that the ACCA's residual clause--defining a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another"--is unconstitutionally vague. Samuel Johnson v. United States, ___ U.S. ____, 135 S.Ct. 2551, 2563 (2015). The Supreme Court, however, expressly did not invalidate the ACCA's elements clause or the enumerated crimes clause. Id. ("Today's decision 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"). Then, on **April 18, 2016,** the Supreme Court held that Samuel Johnson announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257 (2016).

In order to determine whether the petition is timely, this court must determine whether Samuel Johnson applies to Petitioner's conviction for possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §924(c).

B. Procedural Bar

The government contends that, even if Samuel Johnson applies to 18 U.S.C. §924(c)(3)(B), Petitioner is procedurally barred from raising this argument because he is raising this claim for the first time in the instant proceedings. (CR DE# 12:15-20). According to the government, Petitioner cannot satisfy either the cause-and-prejudice or the actual innocence exceptions to the procedural-default rule. (Id.).

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). 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 [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). 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).

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). That is precisely the circumstance here. Samuel Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. However, no actual prejudice would result from finding a procedural default here because, as set forth below, regardless of whether Samuel Johnson applies to §924(c)'s residual clause, Petitioner's companion charge for **carjacking** categorically qualifies as a "crimes of violence" under §924(c)'s elements clause. Accordingly, Movant cannot establish cause-and-prejudice to overcome the procedural bar.

V. Discussion

Because, this Court's conclusion that Movant's claims are procedurally barred turns on whether Movant's companion charge for carjacking still categorically qualifies as a "crime of violence" after Samuel Johnson, the Court must address this issue. However, since the Court concludes that it does, the Court need not address the unsettled question of whether Samuel Johnson invalidates §924(c)'s residual clause. See United States v. Mottaz, 476 U.S. 834, 848, n.11, 106 S. Ct. 2224, 2233, 90 L. Ed. 2d 841 (1986)("In light of our conclusion that the District Court's jurisdiction . . . rested on §1346(f) . . . , we need not reach the difficult and

unsettled question of how an appeal raising both issues committed to the Federal Circuit's jurisdiction and issues outside its jurisdiction is to be treated."); see also Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

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). As such, §924(c)(3) contains a "residual clause," very similar to the residual clause declared unconstitutionally vague in Samuel Johnson.[2]

In the context of the ACCA's definition of "violent felony," the phrase "physical force" in paragraph (i) "means *violent* force--that is, force capable of causing physical pain or injury to another person." Samuel Johnson, 559 U.S. 133, 140 (2010). As the Supreme Court has noted, the term "violent felony" has been defined

[2]The ACCA's residual clause that was held to be unconstitutionally vague in Samuel 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).

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, which is very similar to §924(e)(2)(B)(i) in that it includes any felony offense which has as an element the use of physical force against the person of another, "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;" 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, supra). 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. Samuel Johnson, 599 U.S. at 138. A federal court which applies state law is bound to adhere to the 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 past 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 Samuel 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), the court would have to determine if **carjacking** has an element of "force capable of causing physical pain or injury to another person" as contemplated by Samuel Johnson and its progeny. See Samuel 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,[3] 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 categorical approach demands: [analyze] the elements of the crime of conviction." Id.

The modified categorical approach does not apply, however, when the crime of which the defendant was convicted has a single,

[3]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.

indivisible set of elements. Id. at 2282. When a defendant was 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 the 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 Samuel Johnson, 559 U.S. at 137).

Finally, in Mathis v. United States, — U.S. —, 136 S. Ct. 2243 (2016), the Court was most recently called upon to determine whether federal courts may use the modified categorical approach to determine if a conviction qualifies when a defendant is convicted under an indivisible statute that lists multiple, alternative means of satisfying one (or more) of its elements. 136 S. Ct. at 2247-48. The 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.

Here, the Court need not conduct the above analysis to

determine whether, as a threshold matter, the carjacking statute is divisible or indivisible. Similarly, the Court need not conduct the above analysis, regardless of whether it may employ a modified categorical approach or is limited to the categorical approach, to determine whether Movant's companion charge for carjacking still qualifies as a "crime of violence" for purposes of §924(c) after Samuel Johnson. That is because the Eleventh Circuit has already resolved this issue.

Specifically, in In re Smith, 829 F.3d 1276 (11th Cir. 2016), in the context of an application for leave to file a second or successive motion under §2255, the Court considered whether Samuel Johnson impacts a carjacking charge, 18 U.S.C. §2119, and a separate firearm charge during and in relation to a "crime of violence" in violation of §924(c). The Eleventh Circuit denied the application, stating that in United States v. Moore, 43 F.3d 568 (11th Cir. 1994), the Court had held:

> The term "crime of violence" as Congress defined it in 18 U.S.C. §924(c)(3) clearly includes carjacking. "Tak[ing] or attempt[ing] to take by force and violence or by intimidation," 18 U.S.C. §2119, encompasses "the use, attempted use, or threatened use of physical force...." 18 U.S.C. §924(c)(3)(A). Stated another way, an element requiring that one take or attempt to take by force and violence or by intimidation, which is what the federal carjacking statute does, satisfies the force clause of §924(c), which requires the use, attempted use, or threatened use of physical force. In short, our precedent holds that carjacking in violation of §2119 satisfies §924(c)'s force clause, and that ends the discussion.

In re Smith, 829 F.3d 1280-81 (internal citations omitted)

The Court notes, as does the dissent in Smith, that the majority wholly fails to conduct the requisite analysis under Taylor and its progeny for determining whether carjacking in fact

still qualifies after Samuel Johnson. See Scalia, Antonin, J., The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1177 (1989) (lower courts are not only bound by the narrow "holdings" of higher court decisions, but also by their "mode of analysis").

As set forth above, in Smith and Moore, the Eleventh Circuit determined that §2119 carjacking does categorically qualify.

It is axiomatic that federal district courts in the are bound by the precedent of their circuit. See In re Hubbard, 803 F.3d 1298, 1309 (11th Cir. 2015), citing Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir.1985). Courts are, however, generally only bound by the holdings of cases. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129, 134 L. Ed. 2d 252 (1996). Dicta, conversely, is "not binding on anyone for any purpose." Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir.2010). As the Eleventh Circuit has noted, "dicta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us.'" United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (citations omitted). The holding of a case, on the other hand, is "comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.'" Id.

Here, regardless of whether the Eleventh Circuit in Smith should have undertaken a determination of whether Smith's carjacking conviction qualified as a "crime of violence," the fact remains that it did. Moreover, the Court's conclusion that Smith's conviction did qualify as a "crime of violence" was necessary to the result in that case, since his application for leave to file a second or successive §2255 motion was denied on that basis. As such, Smith holds that §2119 carjacking is a "crime of violence" for purposes of §924(c), see Kaley, 579 F.3d at 1253 n.10 (the

holding of a case is comprised both of the result of the case and those portions of the opinion necessary to that result), and this Court is thus bound by it, as well as by the Eleventh Circuit's prior holding in Moore. In re Hubbard, 803 F.3d at 1309 (federal district courts in the are bound by the precedent of their circuit).

Because Petitioner is not entitled to relief under Samuel Johnson, this petition is untimely and procedurally barred.

VI. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and 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)." See Rule 11(a), Rules Governing §2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255-Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented

were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001).

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the Chief Judge in objections.

VII. Conclusion

Based on the foregoing, it is recommended that this motion to vacate be DENIED, 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 26th day of June, 2017.

UNITED STATES MAGISTRATE JUDGE

cc: Jason Rosado
Reg. No. 80079-053
Coleman II-USP
United States Penitentiary
Inmate Mail/Parcels
Post Office Box 1034
Coleman, FL 33521

Aimee Allegra Ferrer
Federal Public Defender's Office
150 W Flagler Street
Suite 1700
Miami, FL 33130-1555
305-536-6900
Fax: 305-530-7120
Email: aimee_ferrer@fd.org

Anthony W. Lacosta
United States Attorney's Office
99 NE 4th Street
8th Floor
Miami, FL 33132
305-961-9280
Fax: 305-536-4676
Email: anthony.lacosta@usdoj.gov

A - 4

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

JASON ROSADO

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:12-20152-CR-LENARD-6(s(s)

USM Number: 80079-053

Counsel For Defendant: Richard Houlihan
Counsel For The United States: Anthony Lacosta
Court Reporter: Lisa Edwards

The defendant pleaded guilty to Count(s) 1,5 of the Second Superseding Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1203(a)	Conspiracy to Commit Hostage Taking	February 21, 2012	1
18 U.S.C. § 924(c)(1)(A)	Possession of a Firearm in Furtherance of a Crime of Violence	February 20, 2012	5

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) remaining 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:
February 11, 2013

JOAN A. LENARD
United States District Judge

February 14, 2013

DEFENDANT: JASON ROSADO
CASE NUMBER: 1:12-20152-CR-LENARD-6(s(s)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **444 months total: 360 months as to count 1 and 84 months as to count 5, to run consecutively to count 1**. The defendant shall receive credit for time served from date of arrest in New York, 3/29/12.

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: JASON ROSADO
CASE NUMBER: 1:12-20152-CR-LENARD-6(s(s)

SUPERVISED RELEASE

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

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
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 **forty-eight (48) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JASON ROSADO
CASE NUMBER: 1:12-20152-CR-LENARD-6(s(s)

SPECIAL CONDITIONS OF SUPERVISION

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

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

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

DEFENDANT: JASON ROSADO
CASE NUMBER: 1:12-20152-CR-LENARD-6(s(s)

CRIMINAL MONETARY PENALTIES

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

Total Assessment	Total Fine	Total Restitution
$200	$	$8,350

Restitution with Imprisonment -
It is further ordered that the defendant shall pay restitution in the amount of $8,350. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

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

DEFENDANT: JASON ROSADO
CASE NUMBER: 1:12-20152-CR-LENARD-6(s(s)

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 **$200** due immediately, balance due

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

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

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

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

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

Joint and Several

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

Total amount joint and several with co-defendants in this case.

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) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.