APPENDIX

APPENDIX

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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

March 04, 2019

Jorge Baez
FCI Talladega - Inmate Legal Mail
PO BOX 1000
TALLADEGA, AL 35160-4811

Appeal Number: 18-15174-F
Case Style: Jorge Baez v. USA
District Court Docket No: 0:16-cv-61559-JAL
Secondary Case Number: 0:09-cr-60052-JAL-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Dionne S. Young, F
Phone #: (404) 335-6224

Enclosure(s)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15174-F

JORGE BAEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Jorge Baez moves for a certificate of appealability in order to appeal the denial of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2255. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

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09-60052

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. CR-LENARD MAGISTRATE JUDGE - GARBER

21 U.S.C. § 846
18 U.S.C. § 1951(a)
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

v.

JORGE BAEZ and
ORLANDO HERNANDEZ,

Defendants.
_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

From on or about January 1, 2009, through on or about February 11, 2009, in Broward County, in the Southern District of Florida, the defendants,

JORGE BAEZ and
ORLANDO HERNANDEZ,

did knowingly and intentionally combine, conspire, confederate, and agree with each other, and with persons 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 846.

Pursuant to Title 21, United States Code, Section 841(b)(1)(A), it is further alleged that the controlled substance, in fact, consisted of five (5) kilograms or more of a mixture and substance containing a detectable amount of cocaine.

COUNT 2

From on or about January 1, 2009, through on or about February 11, 2009, in Broward County, in the Southern District of Florida, the defendants,

JORGE BAEZ and
ORLANDO HERNANDEZ,

did knowingly and intentionally combine, conspire, confederate, and agree with each other and with persons known and unknown to the Grand Jury, to obstruct, delay , and affect interstate 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 unlawfully 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 3

On or about February 11, 2009, in Broward County, in the Southern District of Florida, the defendants,

JORGE BAEZ and
ORLANDO HERNANDEZ,

did knowingly use and carry a firearm, that is, a SWD, model M-11/Nine mm semi-automatic pistol bearing serial number 84-0001106, during and in relation to a drug trafficking offense, that is, a

violation of Title 21, United States Code, Section 846, as set forth in Count 1 of this Indictment, and during and in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 2 of this Indictment and did possess said firearm, in furtherance of such crime; all in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

COUNT 4

On or about February 11, 2009, in Broward County, in the Southern District of Florida, the defendants,

JORGE BAEZ and
ORLANDO HERNANDEZ,

having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm in and affecting interstate commerce, that is, a SWD, model M-11/Nine mm semi-automatic pistol bearing serial number 84-0001106; in violation of Title 18, United States Code, Section 922(g)(1).

FORFEITURE

1. The allegations of Counts 1 through 4 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 28, United States Code, Section 2461, Title 18, United States Code, Section 924(d)(1), and the procedures outlined at Title 21, United States Code, Section 853.

2. Upon the conviction of any violation of Title 18, United States Code, Sections 924(c)(1)(A) and 922 (g)(1), the defendants shall forfeit to the United States any firearm or ammunition involved

in or used in the commission of said violation.

3. The property subject to forfeiture includes, but is not limited to, a SWD, model M-11/Nine mm semi-automatic pistol bearing serial number 84-0001106, and 33 rounds of 9mm ammunition.

A TRUE BILL

FO

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

TERRY L. LINDSEY
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

JORGE BAEZ, and
ORLANDO HERNANDEZ,

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)

____ Miami ____ Key West
__X__ 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) No
List language and/or dialect _____

4. This case will take 5 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	X	Petty	
II	6 to 10 days		Minor	
III	11 to 20 days		Misdem.	
IV	21 to 60 days		Felony	X
V	61 days and over			

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. 09-6049-RSR
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of February 11, 2009
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 Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ____ Yes No No

8. Does this case originate from a matter pending in the Narcotics Section (Miami) prior to September 1, 2007? ____ Yes No No

/s/
TERRY L. LINDSEY
ASSISTANT UNITED STATES ATTORNEY
Court I.D. No. A5500037

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: JORGE BAEZ **Case No:** 09-6049-RSR

Count #: 1

Conspiracy to Possess with Intent to Distribute Cocaine

21 U.S.C. § 846 and 841(a)(1)

*** Max.Penalty:** Ten (10) years' mandatory minimum up to life imprisonment; $4,000,000 fine; At least Five (5) years of supervised release.

Count #: 2

Conspiracy to Interfere with Commerce by Robbery

18 U.S.C. § 1951(a)

*** Max.Penalty:** Twenty (20) years' imprisonment; $250,000 fine; Five (5) years of supervised release.

Count #: 3

Carrying and Using a Firearm during and in relation to a drug trafficking offense

18 U.S.C. § 924(c)(1)(A)

***Max. Penalty:** Five (5) years' consecutive mandatory minimum up to life imprisonment; $250,000 fine;

Five (5) years of supervised release.

Count #: 4

Possession of a Firearm by a Convicted Felon

18 U.S.C. § 922(g)(1)

***Max. Penalty:** Ten (10) years' imprisonment; $250,000 fine; Three (3) years of supervised release.

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: ORLANDO HERNANDEZ **Case No:** 09-6049-RSR

Count #: 1

Conspiracy to Possess with Intent to Distribute Cocaine

21 U.S.C. § 846 and 841(a)(1)

*** Max.Penalty:** Ten (10) years' mandatory minimum up to life imprisonment; $4,000,000 fine; At least Five (5) years of supervised release.

Count #: 2

Conspiracy to Interfere with Commerce by Robbery

18 U.S.C. § 1951(a)

*** Max.Penalty:** Twenty (20) years' imprisonment; $250,000 fine; Five (5) years of supervised release.

Count #: 3

Carrying and Using a Firearm during and in relation to a drug trafficking offense

18 U.S.C. § 924(c)(1)(A)

***Max. Penalty:** Five (5) years' consecutive mandatory minimum up to life imprisonment; $250,000 fine;

Five (5) years of supervised release.

Count #: 4

Possession of a Firearm by a Convicted Felon

18 U.S.C. § 922(g)(1)

***Max. Penalty:** Ten (10) years' imprisonment; $250,000 fine; Three (3) years of supervised release.

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

A-3

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

JORGE BAEZ

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:09-60052-CR-LENARD-

USM Number: 77971-004

Counsel For Defendant: Kenneth White
Counsel For The United States: Terry Lindsley
Court Reporter: Lisa Edwards

The defendant pleaded guilty to Count(s) 1-4 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
21 U.S.C. § 846 and 841(a)(1)	Conspiracy to Possess With Intent to Distribute Cocaine	February 11, 2009	1
18 U.S.C. § 1951(a)	Conspiracy to Interfere with Commerce by Robbery	February 11, 2009	2
18 U.S.C. § 924(c)(1)(A)	Carrying and Using a Firearm during a Drug Traffic Offense	February 11, 2009	3
18 U.S.C. § 922(g)(1)	Felon in Possession of Firearm	February 11, 2009	4

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.

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:
September 14, 2009

JOAN A. LENARD
United States District Judge

September 18, 2009

DEFENDANT: JORGE BAEZ
CASE NUMBER: 1:09-60052-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 **120 months as to counts 1,2,4, to run concurrently, and 60 months as to count 3 to run consecutive to counts 1,2 and 4.**

The Court makes the following recommendations to the Bureau of Prisons:

Defendant be placed in a facility in South Florida or as close to Florida as possible.

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: JORGE BAEZ
CASE NUMBER: 1:09-60052-CR-LENARD-

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years as to counts 1,3 and 3 years as to counts 2,4, all to run 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 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 **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: JORGE BAEZ
CASE NUMBER: 1:09-60052-CR-LENARD-

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.

Removal After Imprisonment - 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.

DEFENDANT: JORGE BAEZ
CASE NUMBER: 1:09-60052-CR-LENARD-

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
$400	**$**	**$**

*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: JORGE BAEZ
CASE NUMBER: 1:09-60052-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 **$400** 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.

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.

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-61559-LENARD
(Underlying Criminal Case No. 09-CR-60052-LENARD)

JORGE BAEZ,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

SUPPLEMENTAL MOTION TO CORRECT, SET ASIDE, OR VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND MEMORANDUM OF LAW IN SUPPORT

Jorge Baez, through undersigned counsel, respectfully moves this Court to correct his sentence, pursuant to 28 U.S.C. § 2255, and states:

1. On September 18, 2009, Mr. Baez was found guilty of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (Count 1); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 2); carrying or using a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 3) and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

2. This Court sentenced Mr. Baez to 120 months as to Counts 1, 2, and 4 to run concurrently with each other and 60 months as to Count 3 (the § 924(c)(1) count) to be served consecutively to the other counts for a total sentence of 180 months.

3. Mr. Baez now requests relief in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (June 26, 2015), which held that the ACCA's "residual clause" in § 924(e)(2)(B)(ii) is unconstitutionally vague. This is his first motion under § 2255.

4. Application of *Johnson* to this case demonstrates that Mr. Baez is actually innocent of Count 3, the § 924(c) count, because conspiracy to commit Hobbs Act robbery (Count 2) no longer qualifies as a predicate "crime of violence."

5. Accordingly, Mr. Baez is entitled to relief under § 2255.

GROUNDS FOR RELIEF

For the reasons stated below, Mr. Baez is actually innocent of his § 924(c) conviction and sentence. Therefore his conviction on Count 4 should be vacated and his case remanded for resentencing.

I. The categorical and modified categorical approach

Before explaining why Mr. Baez is actually innocent of his § 924(c) conviction and sentence, it is necessary to briefly set out the governing analytical framework. That framework, summarized below, was refined most recently in *Descamps v. United States*, 133 S. Ct. 2275 (2013), which is "the law of the land" and "must be . . . followed." *United States v. Howard*, 73 F.3d 1334, 1344 n.2 (11th Cir. 2014).

As is the case in determining whether a predicate offense qualifies as a "violent felony" under the ACCA, in determining whether a predicate offense qualifies as a "crime of violence" for purposes of a conviction under 18 U.S.C. §

924(c), this Court must apply the "categorical approach." Under that approach, "courts may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Descamps*, 133 S. Ct. at 2283 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). In adopting this approach, the Supreme Court emphasized both Sixth Amendment concerns (explained below) and the need to avert "'the practical difficulties and potential unfairness of a [daunting] factual approach.'" *Id.* at 2287 (quoting *Taylor*, 495 U.S. at 601). As a result, courts must "look no further than the statute and judgment of conviction." *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014) (citation omitted). And, in doing so, they "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2011) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

Because *Johnson* has voided the residual clause in 18 U.S.C. § 924(c)(3)(B) for the reasons detailed below, a predicate conviction will continue to qualify as a "crime of violence" after *Johnson* only if it satisfies the elements clause in § 924(c)(3)(A). The Eleventh Circuit has extended *Descamps'* methodology beyond the enumerated offenses provision at issue in that case, to the elements clause in both the ACCA and Sentencing Guidelines – which are worded identically to each other, and almost identically to §924(c)(3)(A). Looking no further than the statute and judgment of conviction, the Eleventh Circuit has held, a conviction will therefore qualify as a predicate within the elements clause "only if the statute on its face

requires the government to establish, beyond a reasonable doubt and without exception, an element involving the use, attempted use, or threatened use of physical force against a person for every charge brought under the statute." *Estrella*, 758 F.3d at 1244 (citation omitted). "Whether, in fact, the person suffering under this particular conviction actually used, attempted to use, or threatened to use physical force against a person is quite irrelevant. Instead, the categorical approach focuses on whether *in every case* a conviction under the statute *necessarily* involves proof of the element." *Id.* (citations omitted; emphasis added).

To implement the categorical approach, the Supreme Court has "recognized a narrow range of cases in which sentencing courts" may look beyond the statute and judgment of conviction and employ what it is referred to as the "modified categorical approach." *Descamps*, 133 S. Ct. at 2283–84. Those cases arise where the statute of conviction contains alternative elements, some constituting a violent felony and some not. In that scenario, "the statute is 'divisible,'" in that it "comprises multiple, alternative versions of the crime." *Id.* at 2284. As a result, "a later sentencing court cannot tell, without reviewing something more [than the statute and judgment of conviction], if the defendant's conviction" qualifies as violent felony. *Id.*

Two key points must be made about the modified categorical approach. First, *Descamps* made clear that "the modified categorical approach can be applied only when dealing with a divisible statute." *Howard*, 742 F.3d at 1344. Thus, where the statute of conviction "does not concern any list of alternative elements" that must be found by a jury, there is no ambiguity requiring clarification, and therefore the

"modified approach . . . has no role to play." *Descamps*, 133 S. Ct. at 2285–86; *see Estrella*, 758 F.3d at 1245–46; *Howard*, 742 F.3d at 1345–46. "[I]f the modified categorical approach is inapplicable," then the court must limit its review to the statute and judgment of conviction. *Howard*, 742 F.3d at 1345. And, even if a statute is divisible, the court need not employ the modified categorical approach if none of the alternatives would qualify. *Id.* at 1346–47.

Second, even where the modified categorical approach does apply, it does not permit courts to consider the defendant's underlying conduct. Rather, "the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *Descamps*, 133 S. Ct. at 2285. And, in order to ensure that the focus remains on the statutory elements rather than the defendant's underlying conduct, the court is restricted in what documents it may consider.

In *Shepard v. United States*, 544 U.S. 13, 15 (2005), the Supreme Court held that courts are "limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." What these *Shepard* documents have in common is that they are "conclusive records made or used in adjudicating guilt." *Id.* at 21; *see id.* at 23 ("confin[ing]" the class of permissible documents "to records of the convicting court approaching the certainty of the record of

conviction"). That accords with their function in the modified categorical approach—namely, to permit the court to identify the elements for which the defendant was convicted. *Descamps*, 133 S. Ct. at 2284.

Importantly, and as the Supreme Court explained in *Descamps*, that inexorable focus on the elements derives in large part from "the categorical approach's Sixth Amendment underpinnings." *Id.* at 2287–88. Other than the fact of a prior conviction, a jury must find beyond a reasonable doubt any fact that increases a defendant's sentence beyond the prescribed statutory maximum. *Id.* at 2288 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). The reason for the "prior conviction" exception is that, during the earlier criminal proceeding, the defendant either had a jury or waived his constitutional right to one. *See Apprendi*, 530 U.S. at 488.

As the Supreme Court made clear in *Descamps*, the use of *Shepard* documents "merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits." 133 S. Ct. at 2288. This is so because "the only facts the court can be sure the jury . . . found [beyond a reasonable doubt] are those constituting elements of the offense;" and, similarly, "when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements." *Id.* But where a court relies on non-*Shepard* documents to increase a defendant's sentence, it "extend[s] judicial factfinding" "beyond merely identifying a prior conviction," violating the Sixth Amendment. *Id.*

In sum, in determining whether a conviction qualifies as a "crime of violence," a court must generally consider only the statute and judgment of conviction. Only if the statute is divisible may the court consider *Shepard* documents, and it may do so only for the sole purpose of ascertaining the statutory elements for which the defendant was convicted. Once those elements are identified, the court must determine whether the least of the acts prohibited *necessarily* requires the use, attempted use, or threatened use of violent, physical force against another. In no case may a court rely on non-*Shepard* documents or analyze whether the defendant's underlying conduct constituted a "crime of violence."

II. In Light of *Johnson*, Mr. Baez's Conviction Under 18 U.S.C. § 924(c) Cannot Be Sustained Because It Was Not Predicated on a "Crime of Violence" Under Either the Elements Clause or Residual Clause

Mr. Baez was convicted of a violation of 18 U.S.C. § 924(c) in Count 3. At the time of conviction, § 924(c)(1) provided:

> Whoever, during and in relation to any crime of violence . . . 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 . . .be sentenced to imprisonment of not less than five years. . .

The term "crime of violence" as used therein was (and still is) defined in §924(c)(3) to mean 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.

For the reasons detailed below, Mr. Baez's § 924(c) conviction for possessing a firearm in furtherance of a "crime of violence" is void because the "crime of violence" element cannot be satisfied here and the 924(c) count is unconstitutionally mutliplicitous. The predicate offense of conspiracy to commit Hobbs Act robbery (Count 2) does not qualify as a "crime of violence and drug trafficking crime" as a matter of law because (A) the residual clause in § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson*, and (B) Mr. Baez's conviction for conspiracy to commit Hobbs Act robbery is categorically overbroad vis-à-vis offense within §924(c)(3)(A)'s elements.

Therefore, the "crime of violence" element of § 924(c) cannot be sustained, and it is now clear that Mr. Baez's conviction and consecutive sentence were unconstitutional and must be vacated. Mr. Baez is actually innocent of Count 3 at this time.

A. Section 924(c)'s Residual Clause is Unconstitutionally Vague in Light of *Johnson*

Johnson held the residual clause in the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii) ("otherwise involves conduct that presents a serious risk of physical injury to another"), to be unconstitutionally vague because the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges." 135 S. Ct. at 2557. In the Supreme Court's view, the process espoused by *James v. United States*, 550 U.S. 192 (2007), of determining what is embodied in the "ordinary case" of an offense, and then of quantifying the "risk" posed by that ordinary case, was constitutionally problematic:

"[t]he residual clause offers no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Id*. at 2558. As a result, "[g]rave uncertainty" as to how to determine the risk posed by the "judicially imagined ordinary case" led the Court to conclude that the residual clause was void for vagueness. *Id*. at 2557.

The same "ordinary case" inquiry that in *Johnson* led the Supreme Court to conclude that the ACCA residual clause is unconstitutionally was previously applied to § 924(c)(3). *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013). That is, like the ACCA, the residual clause of § 924(c)(3)(B) requires courts to picture the "ordinary" case embodied by a felony, and then assess the risk posed by that "ordinary" case. *See id*.

Notably, the definition of "crime of violence" in the residual clause in § 924(c) is identical to that in 18 U.S.C. § 16(b). *Compare* § 924(c)(3)(B) (offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense") *with* § 16(b) (offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used on the course of committing the offense").

The Eleventh Circuit has previously held that the same "ordinary risk" analysis applied in ACCA cases and § 924(c)(3) (the residual clause at issue in Mr. Baez's case), also applied in the § 16(b) context. *See United States v. Keelan*, 786

F.3d 865, 871 n.7(11th Cir. 2015) (describing the ACCA otherwise clause and § 16(b) as "analogous" for analysis purposes).

This is consistent with the concession made during litigation of the *Johnson* case by the Government, through the Solicitor General, who agreed that the phrases at issue in *Johnson* and here pose the same problem. Upon recognizing that the definitions of a "crime of violence" in both § 924(c)(3)(B) and § 16(b) are identical, the Solicitor General stated:

> Although Section 16 refers to the risk that force will be used rather than that injury will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters.

Johnson v. United States, S. Ct. No. 13-7120, Supp. Br. of Resp. United States at 22-23, *available at* 2015 WL 1284964 at *22-*23) (Mar. 30, 2015).

The Solicitor General was right: section 924(c)(3)(B) and § 924(e)(2)(B)(ii) the ACCA are essentially the same and contain the same flaws. This Court should hold the Government to that concession.

Indeed, courts regularly equate these three clauses—18 U.S.C. § 924(c)(3)(B), 18 U.S.C. § 16(b), and the ACCA residual clause—for purposes of analysis. *See, e.g., Chambers v. United States*, 555 U.S. 122, 133, n.2 (2009) (citing both ACCA and § 16(b) cases and noting that § 16(b) "closely resembles ACCA's residual clause") (Alito, J., concurring); *United States v. Sanchez-Espinal*, 762 F.3d 425, 432 (5th Cir. 2014) (despite the fact that the ACCA talks of risk of injury and § 16(b) talks of risk of force, "we have previously looked to the ACCA in deciding whether offenses are

crimes of violence under § 16(b)"); *Roberts v. Holder*, 745 F.3d 928, 930-31 (8th Cir. 2014) (using both ACCA cases and § 16(b) cases to define the same "ordinary case" analysis); *United States v. Ayala*, 601 F.3d 256, 267 (4th Cir. 2010) (relying on an ACCA case to interpret the definition of a crime of violence under § 924(c)(3)(B)); *Jimenez-Gonzales v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008) (noting that, "[d]espite the slightly different definitions," the Supreme Court's respective analyses of the ACCA and § 16(b) "perfectly mirrored" each other).

Post-*Johnson*, three circuits have extended the reasoning in *Johnson* and concluded that the statutory language and ordinary risk analysis applicable to § 16(b) is sufficiently similar to that applicable to the ACCA's residual clause that it suffers from the same defects of being unconstitutionally vague. *See United States v. Gonzalez-Longoria*, 813 F.3d 225 (5th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719, 720 (7th Cir. 2015) ("Section 16(b) is materially indistinguishable from the ACCA's residual clause" and "it too is unconstitutionally vague"). And that logically suggests that the same must also be true of § 924(c)(2)(B)—**with language identical to § 16(b), and to which the same "ordinary risk" analysis applies**.

Notably, in explicit recognition of the "similarity between § 924(c) and § 924(e)," the Eleventh Circuit – like several of its sister courts – has authorized the filing of a second or successive § 2255 motion asserting that *Johnson* renders § 924(c)(3)(B) unconstitutionally vague. *In re Pinder*, ___ F.3d ___, 2016 WL 3081954 (11th Cir. June 1, 2016) (citing cases). And indeed, several district courts have already found that the § 924(c) residual clause is unconstitutionally vague after

Johnson. *See United States v. Thongsouk Theng Lattaphom*, ___ F.Supp.3d ___, 2016 WL 393545 (E.D. Cal. Feb. 2, 2016)*; United States v. Bell,* ___ F.Supp.3d ___, 2016 WL 344749 (N.D. Ca. Jan. 28, 2016) ("I agree with defendants that the section 924(c)(3) residual clause cannot stand under *Johnson II*."); *United States v. Edmunson*, Case No. 13-cr-00015-PWG, D.E. 67 at 11 (D. Md. Dec. 29, 2015) (finding that the 924(c) residual clause is unconstitutionally vague in context where Bank robbery Conspiracy was the qualifying "crime of violence"); *United States v. Lattanaphom*, Case No. 2:99-00433, D.E. 1659, (E.D. Cal. Feb. 1, 2016) (dismissing Bank robbery Conspiracy counts charged as crimes of violence under the residual clause of 924(c) because that clause is unconstitutionally vague); *United States v. Bell*, ___ F. Supp. 3d ___, 2016 WL 344749, *13 (N.D. Cal. Jan. 28, 2016) (finding that the 924(c) residual clause is unconstitutionally vague and may not be used to establish that robbery of government property under 18 U.S.C. 2112 is a crime of violence). This is because, in determining whether an offense falls under § 924(c)'s residual clause, a court would have to engage in the very analysis deemed constitutionally problematic by the Supreme Court in *Johnson*.

Section 924(c)(3)(B), like the materially indistinguishable residual clause in the ACCA, thus requires the "ordinary case" analysis to assess the risk involved in a predicate offense, and how risky that ordinary case is. *Fuertes*, 805 F.3d at 500 n.6; *Avila*, 770 F.3d at 1107; *Ayala*, 601 F.3d at 267; *Van Don Nguyen*, 571 F.3d at 530; *Sanchez-Garcia*, 501 F.3d at 1213. Because these are the identical analytical steps that brought down the ACCA residual clause, § 924(c)(3)(B) cannot survive

constitutional scrutiny under the due process principles reaffirmed in *Johnson*. As a consequence, the residual clause cannot be used to support a conviction under § 924(c).

B. Multiplicity

To find that the § 924(c) count was in violation of the drug trafficking offense at this stage would require judicial fact-finding that is not permitted by the Supreme Court's decision in *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013). On July 25, 2016, the Eleventh Circuit issued its decision in *In re Gomez* that granted authorization for a successive § 2255 in a case in which the movant was convicted of **one** § 924(c) count (Count 5), which set out as "possible and alternative predicate offenses" two drug trafficking crimes (Counts 1 and 2), and two "crimes of violence" conspiracy to commit Hobbs Act robbery (Count 3), and attempted Hobbs Act robbery (Count 4). *See In re Gomez,* No. 16-14104, 2016 WL 3971720 (11th Cir. July 25, 2016)).

The Eleventh Circuit noted that the "[movant]'s indictment, which lists "a crime of violence and a drug trafficking crime" as the companion convictions for his § 924(c) offense, suffers from th[e] infirmity" of duplicity because it "charges two or more separate and distinct offenses." *Id.* The three dangers posed by a duplicitous count are "(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.*

After discussing the general problems inherent in a duplicitous or multiplicitous count, the *Gomez* court admonished that "[t]his lack of specificity has added significance because § 924(c) 'increases [the] mandatory minimum' based on a finding that the defendant 'used or carried a firearm' (mandatory minimum of five years), 'brandished' a firearm (seven years), or 'discharged' a firearm (ten years)." *Id*. The resulting problem is that"[a]n indictment that lists multiple predicates in a single § 924(c) count allows for a defendant's mandatory minimum to be increased without the unanimity *Alleyne* requires." *Id.* at 5 (citing *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013)).

The *Gomez* court acknowledged that "[t]he way [movant]'s indictment is written, we can only guess which predicate the jury relied on." *Id*. Critical to the *Gomez*'s court grant of authorization was the possibility that "the jury may have found that [movant] only 'possessed' a firearm during his Hobbs Act conspiracy offense"—a predicate that no longer qualifies as a crime of violence. *Id*.

The *Gomez* court then clarified that it "reach[ed] this decision because another one of [movant]'s potential predicate offenses—attempt to commit Hobbs Act robbery—may not 'categorically' qualify as a crime of violence for purposes of § 924(c)'s elements clause." *Id*. (internal citation omitted). The *Gomez* court went on to note that

> it is unsettled in our precedents whether a defendant can be convicted of attempted Hobbs Act robbery even if he did not take substantial steps towards using or threatening the use of force. In other words, "the plausible applications of attempted Hobbs Act robbery might not "all require the [attempted] use or threatened use of force." Hence, that type of conviction may not categorically qualify as an elements-

> clause predicate. It follows that [movant]'s conviction for attempted Hobbs Act robbery implicates § 924(c)'s residual clause and *Johnson*.

Id. (internal citations omitted).

Accordingly, this Court should follow the *Gomez* court in finding that "[t]he way [Mr. Baez's] indictment is written, [this Court] can only guess which predicate [was] relied on" and that it may have been the predicate offense of conspiracy to commit Hobbs Act robbery (Count 2), which no longer qualifies as a crime of violence, as discussed below, and vacate the § 924(c) conviction on that ground.

C. Conspiracy to Commit Hobbs Act Robbery

Conspiracy to commit Hobbs Act robbery, the offense of conviction in Count 2, is not a crime of violence under the elements clause of § 924(c). This Court should follow the reasoning of the *Gomez* court, which reasoned that *attempted* Hobbs Act robbery "may not 'categorically' qualify as a crime of violence for purposes of § 924(c)'s elements clause." *Id*. at 6 (internal citation omitted).

In this case, Mr. Baez was convicted of *conspiracy* to commit Hobbs Act robbery. "To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal." *United States v. Ransfer*, 749 F.3d 914, 929 (11th Cir. 2014). Critically, however, there is no requirement that the defendant engage in an overt act in furtherance of the conspiracy. *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999). Nor is there any requirement that the defendant was "even capable of committing" the underlying Hobbs Act offense. *Ocasio v. United States*,

136 S. Ct. 1423, 1432 (2016). Rather, "[i]t is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it." *Id.* (emphasis omitted).

Thus, a verbal or written agreement to commit Hobbs Act robbery is the least culpable way of committing the offense. *See, e.g.*, *Pistone*, 177 F.3d at 959 (upholding conviction for conspiracy to commit Hobbs Act robbery where defendant did no more than agree and plan to commit robbery, but took no overt act). That way of committing the offense clearly lacks the use, attempted use, or threatened use of violent, physical force. As a result, conspiracy to commit Hobbs Act robbery is categorically overbroad and cannot qualify as a "crime of violence."

Several courts around the country have already persuasively so held. *See, e.g.*, *United States v. Edmundson*, __ F. Supp. 3d __, 2015 WL 9311983, at *2 (D. Md. Dec. 23, 2015) ("The parties have not cited, nor has my own research revealed, any authority that Hobbs Act Conspiracy . . . constitutes a crime of violence under the § 924(c) force clause, which is unsurprising considering the fact that this clause only focuses on the elements of an offense to determine whether it meets the definition of a crime of violence, and it is undisputed that Hobbs Act Conspiracy can be committed even without the use, attempted use, or threatened use of physical force against the person or property of another."); *United States v. Ledbetter*, 2016 WL 3180872, at *6 (S.D. Ohio June 8, 2016) ("this Court agrees" that conspiracy to commit Hobbs Act robbery "qualifie[d] *only* under the 'residual clause' from § 924(c)(3)(B)"); *United States v. Luong*, 2016 WL 1588495, at *3 (E.D. Cal. Apr. 20,

2016) ("The court therefore finds that conspiracy to commit Hobbs Act robbery does not have as an element the use or attempted use of physical force and is not a crime of violence under the force clause."). These decisions are persuasive, as reflected by the Eleventh Circuit's favorable citation to them in *In re Pinder*, __ F.3d __, 2016 WL 3081954, at *2 n.1 (11th Cir. June 1, 2016). Further, in *In re Burke,* Case No. 16-12735 (11th Cir. June 17, 2016), the Eleventh Circuit granted another applicant's request to file a successive § 2255 motion challenging a § 924(c) conviction predicated upon convictions for conspiracy and attempt to commit Hobbs Act robbery – "in light of *Pinder*." *Id.* at 4.

In sum, it appears that every court to have decided the issue after *Johnson*, and applying the legal analysis required by binding Supreme Court precedent, has concluded that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under § 924(c)'s elements/force clause. This Court should reach the same conclusion here.

CONCLUSION

For the reasons set forth above, the residual clause in 18 U.S.C. § 924(c)(3)(B) is void for vagueness in light of *Johnson*. Conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) does not qualify as a "crime of violence" under § 924(c)(3)(A) and the indictment was charged duplicitously, such that Mr. Baez therefore respectfully requests that the Court grant this § 2255 motion, vacate his conviction pursuant to 18 U.S.C. § 924(c) and resultant 60-month consecutive sentence.

Respectfully Submitted,

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By: */s/ Aimee Ferrer*

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CERTIFICATE OF SERVICE

I HEREBY certify that on **August 15, 2016**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/ Aimee Ferrer*

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-CV-61559-LENARD
(09-CR-60552-LENARD)
MAGISTRATE JUDGE PATRICK A. WHITE

JORGE BAEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

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 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 (Cv-DE#1), the government's response (Cv-DE#10) thereto, the movant's traverse (Cv-DE#11), 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.

III. Procedural History

On February 26, 2009, a federal grand jury in the Southern District of Florida returned a four-count indictment charging movant with conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §846 (Count 1); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. §1951 (Count 2); and use and carry a firearm both during and in relation to a drug trafficking offense, in violation of 21 U.S.C. §846, as set forth in Count 1 of the indictment, and during and in relation to a crime of violence, as set forth in count 2 of the indictment in violation of 18 U.S.C. §924(c)(1)(A) (Count 3); and with being a felon in possession of a firearm in violation of

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

18 U.S.C. §922(g)(1) (Count 4). (CR DE# 12).

On May 20, 2009, movant entered guilty pleas to each count of the indictment. (Cr DE# 36). On **September 18, 2009,** the court sentenced the movant to 120 months' imprisonment as to each of counts 1, 2 and 4; as to count 3 he was sentenced to 60 months' to run consecutive to counts 1, 2, and 4. (CR DE# 66).

The movant appealed and on **April 13, 2011,** the Eleventh Circuit affirmed the movant's sentences in a written, but unpublished opinion. (Cr-DE# 84). No petition for certiorari review appears to have been filed with the United States Supreme Court. Therefore, the movant's judgment became **final** on **July 12, 2011,** when the 90-day period for seeking certiorari review with the U.S. Supreme Court expired upon conclusion of the movant's direct appeal.[3]

The movant had one year from the time his conviction became final, or no later than **July 12, 2012,**[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

[3]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufmann, 282 F.3d 1336 (11th Cir. 2002).

[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.

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)). Applying the anniversary method to this case means petitioner's limitations period expired on **July 12, 2012.**

Next, over one year after the movant's conviction became final, the movant returned to this court on **June 22, 2016,** after he signed and handed a petition to prison authorities for mailing, in accordance with the mailbox rule, in which he requested a reduction in his term of imprisonment pursuant to the Supreme Court's decision in Johnson. (Cv-DE#1). Absent evidence to the contrary, the petition is deemed filed on **June 22, 2016,** as reflected by the petitioner's signature on the petition.[5] (See Cv-DE#1:15).

This court issued an order appointing counsel and setting a briefing schedule. (Cv-DE# 6). The Federal Public Defender filed a supplement to the petition. (Cv DE# 9). The government filed a response in opposition to the motion to vacate and the petitioner filed a reply thereto. (Cv DE# 10, 11). The case is now ripe for review.

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[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).

IV. Threshold Issues

A. Timeliness

The government argues that the movant's motion (Cv-DE#1) was not timely filed under §2255(f)(1) because it was filed more than one year after the movant's conviction became final on **July 12, 2011**. As previously noted, under §2255(f)(1), the movant had until **July 12, 2012** within which to timely file this §2255 motion. His initial §2255 motion was not filed until **June 22, 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 §2255(f)(1).

That, however, does not end the inquiry. It appears the movant means to argue that the **June 16, 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 government, however, argues that 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, the Government argues that 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). The government's argument is well taken.

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 charge for **conspiracy to commit Hobbs Act robbery** qualifies as a "crime of violence," as discussed in detail below.

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.

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,

[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."

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. ___, ____, 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

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18 U.S.C. § 924(e)(2)(B)(ii).

(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 attempted 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

[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.

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, ___ 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 framework, the movant argues that his

conviction for **conspiracy to commit Hobbs Act robbery** is not a "crime of violence" post-Johnson, and therefore could not be used as a predicate offense to support his §924(c)(3) conviction. (Cv-DE#9). 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 his conspiracy to commit Hobbs Act robbery conviction is not a "crime of violence," movant claims his §924(c) conviction cannot stand.

Although there is a split amongst the Circuits with regard to whether §924(c)(3)(B) is unconstitutionally void-for-vagueness post-Johnson, 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, ___ F.3d ___, 2017 WL 2972460 (11 Cir. July 11, 2017). In so ruling, 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 court of the United States, uses or carries a firearm, or who, in furtherance of such crime, possesses a firearm.'" Id. (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.

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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).

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) conviction is now foreclosed by binding Eleventh Circuit precedent, this claim warrants no federal habeas corpus relief.

Movant suggests that Johnson extends to his §924(c) conviction 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, the movant's §924(c) conviction was predicated on his conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. §1951(a). 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) conviction.[11] He is therefore not entitled to post-Johnson relief. Consequently, this §2255 motion is not timely, and alternatively, fails on the merits. Given the foregoing, the movant cannot demonstrate actual prejudice arising from any constitutional errors alleged herein in order to excuse or otherwise overcome the procedural default doctrine. See generally Bousley, 523 U.S. at 622; see, e.g., Chasse v. United States, 2016 WL 4926154 (D. New Hampshire Sept. 15, 2016) (the two convictions underlying the movant's Section 924(c) convictions, federal bank robbery and pharmacy robbery, both qualify as crimes of violence under Section 924(c)'s use of force clause, therefore, he cannot establish prejudice to excuse his procedural default even if Johnson renders Section 924(c)'s residual clause unconstitutional). His contention that he is "actually innocent" are thus conclusively refuted by the record. See Blackledge, 431 U.S. at 74.

Additionally, the movant is again reminded that he may not

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

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)).

For the foregoing reasons, the movant's §2255 motion is not timely filed; and, in the alternative, the motion fails on the merits because his Johnson claim is unmeritorious.

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.

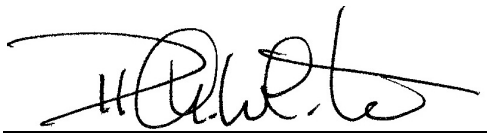
Accordingly, a certificate of appealability is not warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84.

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 29th day of August, 2017.



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A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61559-CIV-LENARD/WHITE
(Criminal Case No. 09-60052-Cr-Lenard)

JORGE BAEZ,

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, 9), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on a sua sponte review of the record. On June 24, 2016, Movant Jorge Baez 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 July 7, 2016, Movant, through appointed counsel, filed a Supplemental 2255 Motion. ("Supplemental Motion," D.E. 9.) The Government filed a Response on September 7, 2016, ("Response," D.E. 10), to which Movant filed a Reply on September 16, 2016, ("Reply," D.E. 7).

On August 29, 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. 12.) On September 20, 2017, Movant filed Objections. (D.E. 13.)

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. 16.) 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 a co-defendant, 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: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a);
- Count 3: carrying a firearm during and in relation to a drug trafficking offense, as set forth in Count 1, and carrying a firearm during and in relation to a crime of violence, as set forth in Count 2, in violation of 18 U.S.C. § 924(c)(1)(A); and

- Count 4: being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

(Cr-D.E. 12.) The Indictment also contained forfeiture allegations. (Id. at 3-4.)

On May 20, 2009, Movant pleaded guilty as charged to Counts 1 through 4 of the Indictment. (Cr-D.E. 36.) On September 18, 2009, the Court entered Judgment sentencing Movant to a total of 180 months' imprisonment, consisting of concurrent terms of 120 months' imprisonment as to Counts 1, 2, and 4, respectively, and a term of sixty months' imprisonment as to Count 3, to run consecutive to the sentences imposed in Counts 1, 2, and 4. (Cr-D.E. 66.) The Court further imposed a total term of five years' supervised release, consisting of five years as to Counts 1 and 3, respectively, and three years as to Counts 2 and 4, respectively, all to run concurrently. (Id.)

Movant appealed his sentences, but the Eleventh Circuit affirmed in an unpublished opinion dated March 9, 2011. United States v. Baez, 517 F. App'x 852 (11th Cir. 2011).

b. 2255 Motion

On June 22, 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 August 15, 2016, Movant, through appointed counsel, filed a Supplemental 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. 9 at 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 3. (Id.)

c. Report and recommendations

On August 29, 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. 12.) Specifically, Judge White found that Movant's predicate offense of conspiracy to commit Hobbs Act robbery still qualifies as a crime 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 20.)

d. Objections

On September 20, 2017, Movant filed Objections to Judge White's Report. (D.E. 13.) Therein, he argues that his claim is neither untimely nor procedurally barred. (Id. at 1-4.) He further argues that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)'s use-of-force clause. (Id. at 4-8.) Finally, Movant argues that if the Court disagrees with any of his arguments, it should issue a certificate of appealability. (Id. at 8-10.)

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 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

[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).

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 3 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 11, 2009, in Broward County, in the Southern District of Florida, the defendants . . . did knowingly use and carry a firearm . . . during and in relation to a drug trafficking offense, that is, a violation of Title 21, United States Code, Section 846, as set forth in Count 1 of this Indictment, and during and in relation to a crime of violence, that is a violation of Title 18 United States Code, Section 1951(a), as set forth in Count 2 of this Indictment and did possess said firearm, in furtherance of such crime[.]

(Cr-D.E. 12 at 2-3 (emphasis added).)[2] Accordingly, even assuming arguendo that Hobbs Act conspiracy no longer qualifies as a crime of violence under Section 924(c),

[2] The Court notes that Movant has never argued—in his criminal case, on direct appeal to the Eleventh Circuit, or in this 2255 action—that Count 3 is duplicitous. However, even if he had argued in his 2255 Motion that Count 3 was duplicitous, the Court would have found that Movant waived the argument by pleading guilty to Count 3. 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

Movant is not entitled to relief because his 924(c) conviction in Count 3 is supported by the drug trafficking crime charged in Count 1 (to which he pleaded guilty).[3] 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).

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. Movant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (D.E. 1, 9) is **DENIED**;

2. A Certificate of Appealability **SHALL NOT ISSUE**;

3. All pending motions are **DENIED AS MOOT**; and

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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)).

[3] In fact, the Eleventh Circuit's opinion affirming Movant's sentences on direct appeal only identifies a drug trafficking crime, not a "crime of violence," as the predicate offense underlying the 924(c) conviction in Count 3. Baez, 417 F. App'x at 853 ("Jorge Baez appeals his sentences for . . . (3) carrying and using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); . . . .").

4. This case is now **CLOSED**.

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

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

A-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61559-CIV-LENARD/WHITE
(Criminal Case No. 09-60052-Cr-Lenard)

JORGE BAEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

THIS CAUSE is before the Court following the Court's Order Denying Movant Jorge Baez'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
UNITED STATES DISTRICT JUDGE