NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

DEVON CHANCE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in light of this Court's most recent decision, in *United States v. Davis*, 139 S. Ct. 2319 (2019), which abrogated the Eleventh Circuit Court of Appeal's en banc decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc), the decision of the Eleventh Circuit affirming denying of petitioner's 28 U.S.C. § 2255 motion because of reliance upon the now-abrogated *Ovalles* opinion, should be vacated?

INTERESTED PARTIES

The are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

DEVON CHANCE respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-15192 in that Court on April 26, 2019, unpublished, in which the Eleventh Circuit affirmed the denial of petitioner's motion for 28 U.S.C. § 2255 relief.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, unpublished, in which the Eleventh Circuit affirmed denial of petitioner's 28 U.S.C. § 2255 motion, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on April 26, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction pursuant to 28 U.S.C. § 2255. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

U.S. Const., amend. V (due process clause)

No person shall…be deprived of life, liberty, or property, without due process of law.

28 U.S.C. § 2255(a)

Subsection (a) of section 2255 of Title 28, United States Code states:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

18 U.S.C. § 924(c)(1)(A)

Subsection (c)(1)(A) of section 924 of Title 18, United States Code states:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . 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 . . . [be subject to increased mandatory minimum penalties to be served consecutive to the punishment provided for such crime of violence or drug trafficking crime].

18 U.S.C. § 924(c)(3)

Subsection (c)(3) of section 924 of Title 18, United States Code states:

For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

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

STATEMENT OF THE CASE

The statement of proceedings and facts are taken from the Eleventh Circuit's unpublished Opinion. *See* App. 1-4. A federal jury found petitioner guilty of Hobbs Act Robbery, 18 U.S.C. §1951(a); six counts of possession of a firearm during and in relation to a crime of violence (predicated on the Hobbs Act robbery offenses), 18 U.S.C. §924(c)(1); one count of conspiracy to commit Hobbs Act robbery, 18 U.S.C. §1951(a); and one count of conspiracy to possess a firearm during and in relation to a crime of violence (predicated on the conspiracy to commit Hobbs Act robbery offense), 18 U.S.C. §924(c). The district court sentenced petitioner to a total of 1,794 months imprisonment, 60 months supervised release, and fines totaling $1,400.00. Petitioner's convictions and sentence were affirmed on direct appeal, *United States v. Lewis,* 422 Fed. Appx. 844 (11th Cir. 2011) (unpublished), and the district court subsequently denied his first §2255 motion.

On petitioner's application, the Eleventh Circuit authorized him to file a second §2255 motion, arguing that conspiracy to commit Hobbs Act robbery could no longer serve as a predicate crime of violence for his §924(c) conviction because this Court's decision in *Johnson v. United States,* 576 U.S.___, 135 S.Ct. 2551 (2015) had rendered §924(c)'s residual clause definition of that term invalid, and the offense did not otherwise meet the statutory definition of "crime of violence."

The district court found that *Johnson* did not affect §924(c)(3)'s residual clause, based on the Eleventh Circuit decision in *Ovalles v. United States ("Ovalles I),* 861 F.3d 1257 (11th Cir. 2017); *vacated on reh'g en banc,* 889 F.3d 1259 (11th Cir. 2018). The

district court denied petitioner's §2255 motion but granted him a COA, and petitioner appealed.

While petitioner's appeal was pending, the Eleventh Circuit held *en banc* in *Ovalles v. United States,* 905 F.3d 1231 (11th Cir. 2018) (*"Ovalles II"*) that §924(c)(3)'s residual clause is not unconstitutionally vague under *Johnson* and *Sessions v. Dimaya,* 584 U.S. ___, 138 S.Ct. 1204 (2018), because §924(c)(3)(B) could be plausibly interpreted to incorporate an approach that "focuses...on the real-world facts of the defendant's offense – *i.e.,* how the defendant actually went about committing the crime in question." 905 F.3d 1233, 1252. Thus, the Eleventh Circuit held that *Johnson* does not support a vagueness-based challenge to the residual clause of §924(c). *See In re Garrett,* 908 F.3d 686, 687 (11th Cir. 2019)("[We] have held *en banc* that §924(c)(3)(B) is not unconstitutionally vague because it requires a conduct-based instead of a categorical approach."). Relying on its decisions in *Solomon v. United States,* 911 F.3d 1356 (11th Cir. 2019) and *Garrett,* the Eleventh Circuit denied all relief to petitioner.

REASON FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION BELOW, AFFIRMING DENIAL OF RELIEF TO PETITIONER ON HIS 28 U.S.C. § 2255 MOTION, RESTS SOLELY ON AN OPINION THAT HAS NOW BEEN ABROGATED BY THIS COURT'S DECISION IN *UNITED STATES v. DAVIS*, 139 S.CT. 2319 (2019) AND, THEREFORE, IS BASED ON AN UNCONSTITUTIONAL APPLICATION OF 18 U.S.C. § 924(c)(3).

In *United States v. Davis*, 139 S.Ct. 2319 (2019), this Court held that 18 U.S.C. § 924(c)(3)(B) is void for vagueness because, like the residual clause in the Armed Career Criminal Act ("ACCA") at issue in *Johnson v. United States*, 135 S.Ct. 2551 (2015), it required a "categorical approach" in which courts must imagine an "ordinary case" and apply it against an uncertain level of risk. *Id.* at 2336. *Davis* abrogated the Eleventh Circuit's *en banc* decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (*en banc*).

Petitioner herein submits that the Eleventh Circuit's judgment is based on reasoning which has squarely been rejected by this Court in *Davis*.

In *Ovalles II*, the Eleventh Circuit *en banc* held that: (1) 18 U.S.C. § 924(c)(3)(B)'s residual clause was not unconstitutionally vague; (2) the court determines whether a predicate offense qualifies under the residual clause by using a conduct-based approach; and (3) given the admitted conduct, Ovalles' attempted carjacking conviction qualified under 18 U.S.C. § 924(c)(3)(B)'s residual clause. *Ovalles v. United States*, 905 F.3d 1231, 1233-35, 1244-54 (11th Cir. October 4, 2018) (*Ovalles II*).

The Eleventh Circuit has applied *Ovalles II* in numerous cases which resulted in the denial of relief to defendants who otherwise deserved to have their convictions under § 924(c)'s residual clause vacated and their sentences substantially reduced. *Solomon v. United States*, 911 F.3d 1356, 1360 (11th Cir. 2019) ("Relying on *Ovalles II*, this Court has since held that a federal prisoner's proposed vagueness challenge to § 924(c)(3)(B)'s residual clause under *Johnson and Dimaya* could not satisfy the statutory requirement of § 2255(h)."); *In Re Garrett*, 908 F.3d 686 (11th Cir. 2019) (denying relief based on *Ovalles*); *United States v. St. Hubert*, 909 F.3d 335, 345 (11th Cir. 2019) ("We follow *Ovalles II* and conclude that *St. Hubert*'s constitutional challenge to § 924(c)(3)(B) lacks merit."); *Chance v. United States*, 769 Fed. Appx. 893 (11th Cir. 2019); *Exposito v. United States*, 762 Fed. Appx. 936 (11th Cir. 2019); *United States v. Lewis*, 762 Fed. Appx. 786 (11th Cir. 2019); *McKnight v. United States*, 753 Fed. Appx. 873 (11th Cir. 2019); *Herrera v. United States*, 760 Fed. Appx. (11th Cir. 2019).

The Eleventh Circuit's judgment in this case, based solely on *Ovalles II*, cannot stand and must be vacated. In the aftermath of this Court's decision in *Davis* and the abrogation of *Ovalles II*, petitioner is entitled to relief - a certificate of appealability (COA) challenging the district court's denial of his § 2255 motion. At a minimum, petitioner is entitled to a reexamination of his request for a COA in light of this Court's *Davis* decision.

Given the important nature of this issue, petitioner respectfully seeks this

Court's review. The Court should therefore grant the petition and remand to the Eleventh Circuit in light of the *Davis* decision.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

/s/ Michael G. Smith, Esq.
MICHAEL G. SMITH, ESQ.
Counsel for Petitioner

Fort Lauderdale, Florida
July 25, 2019

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15192
Non-Argument Calendar

D.C. Docket Nos. 0:16-cv-61354-DMM; 0:08-cr-60090-DMM-2

DEVON CHANCE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(April 26, 2019)

Before WILLIAM PRYOR, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

Devon Chance appeals from the district court's denial of his authorized successive 28 U.S.C. § 2255 motion to vacate his sentence. The district court granted a certificate of appealability ("COA") on one issue: whether 18 U.S.C. § 924(c)(3)(B) is unconstitutional in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). Because this question has been answered in the negative by this Court's recent precedents, we affirm.

A federal jury found Chance guilty of six counts of Hobbs Act robbery, 18 U.S.C. § 1951(a); six counts of possession of a firearm during and in relation to a crime of violence (predicated on the Hobbs Act robbery offenses), 18 U.S.C. § 924(c)(1); one count of conspiracy to commit Hobbs Act robbery, 18 U.S.C. § 1951(a); and one count of conspiracy to possess a firearm during and in relation to a crime of violence (predicated on the conspiracy to commit Hobbs Act robbery offense), 18 U.S.C. § 924(o). The district court sentenced Chance to a total of 1,794 months' imprisonment, 60 months' supervised release, and fines totaling $1400. Chance's convictions and sentence were affirmed on direct appeal, *United States v. Lewis*, 433 F. App'x 844 (11th Cir. 2011) (unpublished), and the district court subsequently denied his first § 2255 motion.

In *Johnson*, the Supreme Court held that the definition of "violent felony" in § 924(e)(2)(B)(ii) of the Armed Career Criminal Act—commonly called the

"residual clause"—was unconstitutionally vague. 135 S. Ct. at 2557. The Supreme Court later held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264-65, 1268 (2016). More recently, in *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018), the Court extended *Johnson* to invalidate the residual-clause definition of "crime of violence" in 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act.

Relying on *Johnson* and *Welch*, Chance filed an application for leave to file a second or successive § 2255 motion on the ground that the definition of "crime of violence" in § 924(c)(3)'s residual clause[1] had the same constitutional failings as the ACCA's residual clause, and that all seven of his convictions under §§ 924(c)(1) and 924(o) were therefore invalid. We granted Chance leave to file a second § 2255 motion on the limited issue of whether his conviction for conspiracy to possess a firearm during and in relation to a crime of violence, predicated on conspiracy to commit Hobbs Act robbery, was affected by *Johnson*.

Once given leave to do so, Chance filed a second § 2255 motion in the district court, arguing (as relevant here) that conspiracy to commit Hobbs Act robbery could

[1] Section 924(c)(3) defines a "crime of violence" as a felony offense that either "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the "elements clause"), 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" (the "residual clause"). 18 U.S.C. § 924(c)(3)(A)–(B); *see Ovalles v. United States*, 905 F.3d 1231, 1234 (11th Cir. 2018) (*en banc*).

no longer serve as a predicate crime of violence for his § 924(o) conviction because *Johnson* had rendered § 924(c)'s residual-clause definition of that term invalid, and the offense did not otherwise meet the statutory definition of "crime of violence." Notably, Chance did not dispute that his conspiracy offense met the definition in the residual clause; he argued only that the residual clause was constitutionally invalid.

The district court, adopting in part the magistrate judge's report and recommendation, found that *Johnson* did not affect § 924(c)(3)'s residual clause, based on our decision in *Ovalles v. United States* ("*Ovalles I*"), 861 F.3d 1257 (11th Cir. 2017), *vacated on reh'g en banc*, 889 F.3d 1259 (11th Cir. 2018). The court denied Chance's § 2255 motion but granted him a COA, and Chance appealed.

In reviewing the district court's denial of a § 2255 motion to vacate, we review the court's legal conclusions *de novo* and its findings of fact for clear error. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014). Although the decisions on which we now rely were issued after the district court denied Chance's § 2255 motion, they support the court's analysis and decision.

While Chance's appeal was pending, we held *en banc* in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) ("*Ovalles II*") that § 924(c)(3)'s residual clause is not unconstitutionally vague under *Johnson* and *Dimaya* because, unlike the similarly-worded residual clauses in the ACCA and § 16(b), § 924(c)(3)(B) could be plausibly interpreted to incorporate an approach that "focuses . . . on the

real-world facts of the defendant's offense—*i.e.*, how the defendant actually went about committing the crime in question." 905 F.3d at 1233, 1252. We pointed out that the Supreme Court in both *Johnson* and *Dimaya* emphasized that there was no basis to "doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Id.* at 1233–34 (quoting *Johnson*, 135 S. Ct. at 2561 and *Dimaya*, 138 S. Ct. at 1214).

Because *Johnson* and *Dimaya* did not affect § 924(c)(3)'s residual clause, federal prisoners challenging their § 924(c) convictions and sentences in a second or successive § 2255 motion cannot rely on those decisions to meet the requirements of § 2255(h). *In re Garrett*, 908 F.3d 686, 688–89 (11th Cir. 2018) (denying a federal prisoner's successive § 2255 application and holding that "neither *Johnson* nor *Dimaya* supplies any 'rule of constitutional law'—'new' or old, 'retroactive' or nonretroactive, 'previously unavailable' or otherwise—that can support a vagueness-based challenge to the residual clause of section 924(c)"); *see United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018) (holding that three-judge orders ruling on successive § 2255 applications are "binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks" (emphasis in the original)). And to the extent that Chance might argue that the trial court erred in his case by applying a "categorical approach" to § 924(c)(3)'s residual clause, rather than the conduct-based approach

mandated by *Ovalles II*, such a claim would not meet the requirements of § 2255(h) either, because it is statutory rather than constitutional. *See Solomon v. United States*, 911 F.3d 1356, 1361 (11th Cir. 2019); *Garrett*, 908 F.3d at 689.

The failure to satisfy § 2255(h) is fatal to Chance's authorized successive § 2255 motion. *See Solomon*, 911 F.3d at 1360–61; *Randolph v. United States*, 904 F.3d 962, 964–65 (11th Cir. 2018). The district court did not err in denying the motion, and we therefore affirm.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:16-CV-61354-MIDDLEBROOKS/BRANNON
(08-CR-60090)

DEVON CHANCE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT IN PART AND DENYING MOTION TO VACATE SENTENCE UNDER § 2255

THIS CAUSE comes before the Court upon the Report and Recommendation issued by Magistrate Judge Dave Lee Brannon on July 31, 2017 (DE 25). Movant filed a Motion to Vacate pursuant to 28 U.S.C. § 2255 (DE 1, "Motion"), seeking relief in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Report recommends denying Movant's Motion to Vacate and recommends that a certificate of appealability should not be issued. Movant filed Objections to the Report. (DE 28).

Movant challenges his 18 U.S.C. § 924(c) conviction based on *Johnson*. Relying on *Ovalles v. United States*, __ F.3d __, 2017 WL 2829371 (11th Cir. June 30, 2017), the Report finds that *Johnson* does not apply to the so-called residual clause (or "risk-of-force" clause) found in § 924(c)(3)(B). In *Ovalles*, the Eleventh Circuit held that *Johnson* does not apply to § 924(c)(3)(B) and thus the risk-of-force clause of § 924(c)(3)(B) "remains valid." Thus, Movant is not entitled to relief.

The Report also addresses whether Movant's conviction for Hobbs Act robbery and conspiracy to commit Hobbs Act robbery qualify as crimes of violence under § 924(c)(3)(A). The Report finds that Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A),

but that conspiracy to commit Hobbs Act robbery does not.

Upon a careful, *de novo* review of the record, the Court agrees with the Report's recommendation to deny the Motion to Vacate. I disagree, however, with the Report's recommendation to deny a certificate of appealability. In light of the Eleventh Circuit's withholding of the mandate in *Ovalles*, I find that a certificate of appealability should be issued.

Accordingly,

It is **ORDERED AND ADJUDGED**:

(1) The Report (DE 25) is **ADOPTED IN PART**. I adopt the Report except to the extent it recommends denying a certificate of appealability.

(2) The Motion to Vacate (DE 1) is **DENIED**.

(3) A Certificate of Appealability is **GRANTED** as to whether *Johnson* applies to § 924(c)(3)(B).

(4) The Clerk of Court shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 27 day of September, 2017.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-61354-Civ-Middlebrooks/Brannon

DEVON CHANCE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION

Before the Court is Movant Devon Chance's ("Movant") Motion to Vacate Sentence Under 28 U.S.C. § 2255 [DE 1], which has been referred to the undersigned for a report and recommendation. The Government answered in opposition [DE 17], and Movant has replied [DE 20]. For the reasons set forth below, the undersigned **RECOMMENDS** that the Motion be **DENIED.**

I. BACKGROUND

Movant and two co-defendants were charged in a 36-count Second Superseding Indictment with multiple counts of Hobbs Act robbery, carrying a firearm during each of the robberies, and conspiracy to commit the same, all in violation of 18 U.S.C. §§ 1951(a), 924(c), and 924(o) respectively. *U.S. v. Solomon et al.*, No. 08-60090-Cr-Middlebrooks, DE 94 (S.D. Fla. Dec. 4, 2008) (hereinafter cited as "CR").

On April 29, 2009, after a trial, a jury found Movant guilty of (1) conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951(a) (Count 1); (2) conspiracy to possess a firearm during and in relation to a crime of violence under 18 U.S.C. §§ 924(c)(1)(A) and 924(o) (Count

2); (3) substantive Hobbs Act Robbery under 18 U.S.C. §§ 1951(a) (Counts 25, 27, 29, 31, 33, 35); and (4) possession of a firearm during and in relation to a crime of violence under 18 U.S.C. §§ 924(c)(1) and 2 (Counts 26, 28, 30, 32, 34, 36). [CR DE 217]. These convictions stem from Movant's participation in 16 armed robberies of various local restaurants and convenience stores during a three-month period in late 2007 through early 2008.

On July 13, 2009, Movant was sentenced to 1,794 months in prison as follows: 210 months for Counts 1, 2, 25, 27, 29, 31, 33, and 35, to be served concurrently; 84 months for Count 26, to be served consecutively, followed by 300 months as to each of Counts 28, 30, 32, 34, and 36, to be served consecutively as to all other counts [CR DE 240]. Movant appealed [CR DE 244].

On July 12, 2011, the Eleventh Circuit affirmed Movant's convictions and sentences [CR DE 294]; *U.S. v. Lewis*, 433 Fed. Appx. 844, 845 (11th Cir. 2011). Movant did not file a petition for writ of certiorari with the U.S. Supreme Court.

On November 26, 2012, Movant filed an initial *pro se* § 2255 motion to vacate, which was denied on January 2, 2014. *Chance v. U.S.*, No.12-62311-Civ-Middlebrooks/White (S.D. Fla. 2014).

On June 26, 2015, the U.S. Supreme Court decided *Johnson v. U.S.*, 135 S. Ct. 2551 (2015). In *Johnson,* the Supreme Court found the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), to be void for vagueness and a violation of the Constitution's guarantee of due process. *Johnson,* 135 S. Ct. at 2563. On April 18, 2016, the U.S. Supreme Court decided *Welch v. U.S.*, 136 S. Ct. 1257, 1265 (2016) and held that the substantive decision in *Johnson* is retroactive in cases on collateral review.

On June 22, 2016, Movant, now represented by counsel, filed the instant § 2255 Motion

seeking to have his multiple § 924(c) convictions and sentences vacated in light of *Johnson* and *Welch* (DE 1). On August 4, 2016, the Eleventh Circuit issued a corrected order granting Movant's request for leave to file this successive § 2255 Motion (DE 11).

II. LEGAL STANDARD

To prevail on a § 2255 motion, a movant must demonstrate that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the Court was without jurisdiction to impose such a sentence; (3) the sentence exceeded the maximum sentence authorized by law; or (4) the sentence is otherwise subject to collateral attack, *i.e.*, there is a fundamental defect that results in a complete miscarriage of justice. 28 U.S.C. § 2255(a). If a movant makes this showing, a 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). The movant bears a substantial burden in that he "must clear a significantly higher hurdle than would exist on direct appeal." *U.S. v. Frady*, 456 U.S. 152, 153 (1982).

III. ANALYSIS

Movant argues that in light of *Johnson's* holding that the ACCA's "residual clause" in § 924(e)(2)(B)(ii) is unconstitutionally vague, his § 924(c) convictions and sentences violate due process because neither the substantive Hobbs Act robberies nor the conspiracy to commit Hobbs Act robbery qualify as predicate "crimes of violence." The Government counters that the Motion is (1) procedurally barred; and (2) fails on the merits. The Court will address each argument in turn.

A. *Procedural Default*

As a threshold issue, the Government argues that the Court should not reach the Motion's merits because Movant did not raise his arguments on direct appeal. Generally, the procedural default rule requires that a defendant "advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn v. U.S.*, 365 F.3d 1225, 1234 (11th Cir. 2004). A defendant, however, can avoid the procedural default bar (1) by demonstrating good cause for not raising the arguments on appeal and that he suffered actual prejudice from the alleged error; or (2) if the constitutional violation has probably resulted in the conviction of a defendant who is "actually innocent." *Id.*

Here, the Court finds that Movant meets the first exception to the procedural default rule: cause and prejudice. A movant meets the "cause" requirement by "showing that the legal basis for a claim was not reasonably available to counsel" at the time of appeal. *Ward*, 592 F.3d at 1157. A movant makes this showing if "his situation is one where a court has articulated a constitutional principle that has not been previously recognized but which has been held to have retroactive application." *Howard v. U.S.*, 374 F.3d 1068, 1072 (11th Cir. 2004). That decision must be "a sufficiently clear break with the past," so that counsel would not reasonably have had the tools for presenting the claim. *Id.* The quintessential example of such a scenario is when the U.S. Supreme Court explicitly overrules one of its precedents because "there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a [] court to adopt the position that [the Supreme Court] has ultimately adopted." *Reed v. Ross*, 468 U.S. 1, 17 (1984).

Applying the above principles here, the Supreme Court's *Johnson* decision clearly broke with the past by explicitly overruling established precedent and holding that the ACCA's

residual clause is unconstitutionally vague. The Supreme Court had previously rejected vagueness challenges to the ACCA's residual clause. *See e.g.*, *Sykes v. U.S.*, 564 U.S. 1, 15 (2011); *James v. U.S.*, 550 U.S. 192, 202 (2007). In light of Movant's reliance on *Johnson*, which clearly broke with past precedent and raised serious debate about the constitutionality of similarly-worded statutes such as § 924(c), there exists quintessential "cause" under the first exception to the procedural default rule.

Movant has also established the required "prejudice" under the exception. Movant argues that he was convicted and sentenced under a constitutionally defective statute. Receiving an illegal sentence certainly satisfies the prejudice prong. *See Chatfield v. U.S.*, 2017 WL 1066776, at *5 (S.D. Fla. Mar. 2, 2017) (Torres, J.), *report & recommendation adopted* 2017 WL 1066779 (S.D. Fla. Mar. 21, 2017) (Cooke, J.) ("if the Petitioner has suffered an 'illegal sentence' on any count of conviction, he has sufficiently alleged actual prejudice as a matter of law and habeas relief may be warranted."). Thus, the Court finds that Movant meets the cause and prejudice exception to the procedural default rule.[1]

B. ***The Merits***

Movant argues that his § 924(c) convictions and sentences should be vacated after *Johnson* because his companion offenses of substantive Hobbs Act robbery and conspiracy to commit Hobbs Act robbery do not qualify as "crimes of violence." Specifically, he argues that § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson* and that neither Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery are crimes of violence under § 924(c)(3)(A).

[1] Because Movant meets the cause and prejudice exception, the Court need not address the actual innocence exception. *See Chatfield*, 2017 WL 1066776, at *5 ("Because Petitioner has met the first exception to the procedural default rule, the Court need not consider the second exception").

i. Johnson's Application to § 924(c)(3)(B)

Johnson analyzed the ACCA, which provides for a 15-year minimum mandatory sentence for a defendant convicted of being a felon in possession of a firearm if he has at least three convictions for a "violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e). The ACCA defines a "violent felony" as one that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another....*

Id. § 924(e)(2)(B) (emphasis added). *Johnson* held that the so-called "residual clause" of subsection (ii), italicized above, is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. The Supreme Court focused on "two features" of the clause. First, it requires courts to estimate the potential risk of physical injury posed by "a judicially imagined 'ordinary case' of [the] crime," and then to consider how that risk compares to the risk posed by the four enumerated crimes preceding the clause, which are themselves "far from clear in respect to the degree of risk each poses." *Id.* at 2557-58 (quotations omitted). It is these two ambiguities *in conjunction* that render the clause unconstitutionally vague. *Id.* at 2560 (explaining that "each of the uncertainties in the residual clause may be tolerable in isolation, but their sum makes a task for us which at best could be only guesswork") (quotations omitted).

This case, unlike *Johnson*, involves § 924(c). Section 924(c)(1)(A) provides for a separate consecutive sentence if a person uses or carries a firearm during and in relation to a "crime of violence." A "crime of violence" under § 924(c) is one that:

> (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> (B) 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). Noting the differing language and statutory purpose of the ACCA and § 924(c), *see In re Colon*, 826 F.3d 1301, 1303-04 & n.2 (11th Cir. 2016), the Eleventh Circuit previously considered the issue of whether *Johnson* applies to § 924(c)(3)(B) an open issue. *See In re Hines*, 824 F.3d 1334, 1336-37 (11th Cir. 2016); *In re Pinder*, 824 F.3d 977, 978-79 (11th Cir. 2016). Meanwhile, the Second, Sixth, and Eighth Circuits upheld § 924(c)(3)(B) against *Johnson* vagueness challenges. *See U.S. v. Hill*, 832 F.3d 135, 145 (2d Cir. 2016); *U.S. v. Taylor*, 814 F.3d 340, 375 (6th Cir. 2016); *U.S. v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016); *but see U.S. v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016).

Just recently, the Eleventh Circuit resolved this issue in *Ovalles v. U.S.*, 861 F.3d 1257 (11th Cir. June 30, 2017) by agreeing "with the above Second, Sixth, and Eighth Circuits' decisions and hold[ing] that *Johnson* does not apply to, or invalidate, the risk-of-force clause in § 924(c)(3)(B)." *Id.* at 1266. The Eleventh Circuit agreed with the reasoning of the Second, Sixth, and Eighth Circuits, but made additional observations. Specifically, the Eleventh Circuit observed that unlike the ACCA's concern with prior convictions, § 924(c)'s required nexus between the firearm offense and the predicate crime of violence "makes the crime of violence determination more precise and more predictable." *Id.* at 1267. The Eleventh Circuit observed further that three textual features of § 924(c) also makes the analysis "more precise, predictable, and judicially administrable"—a more focused statutory standard requiring a risk of physical force in the course of committing the offense, a temporal requirement that the risk arise in the course of committing the offense, and the lack of a confusing list of exemplar crimes. *Id.* at 1267. Thus, the ACCA analysis in *Johnson* simply does not apply to § 924(c).

Notably, Movant does not dispute that his convictions for Hobbs Act robbery and conspiracy to commit Hobbs Act robbery satisfy the definition in § 924(c)(3)(B). He argues only that the statute is unconstitutional. Under *Ovalles*, this argument lacks merit. Thus, the Motion should be denied and the analysis may stop here. Nonetheless, in the interest of completeness, the Court will next determine if substantive Hobbs Act robbery and conspiracy to commit Hobbs Act robbery are independently crimes of violence under § 924(c)(3)(A).

ii. Hobbs Act Robbery and Conspiracy to Commit Hobbs Act Robbery Under § 924(c)(3)(A)

As stated, § 924(c)(3)(A) defines a crime of violence as one that "has an element the use, attempted use, or threatened use of physical force against the person or property of another." In determining whether an offense meets that definition, courts must apply the "categorical approach," which requires looking only to the elements of the companion crime, not to the underlying facts on how that crime was committed. *U.S. v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013).[2] Instead of focusing on facts, the inquiry focuses on the statutory elements of the predicate crime alone. *See Descamps v. U.S.*, 133 S. Ct. 2276, 2283 (2013) (courts applying the "categorical approach" 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.") (quotations omitted) (emphasis in original); *U.S. v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014) (whether the defendant *actually* used, attempted to use, or threatened to use physical force is "quite irrelevant.") (quotations omitted). Thus, a conviction will qualify as a crime of violence

[2] Although *McGuire* was decided before *Johnson*, the Eleventh Circuit has relied on *McGuire* in applying the categorical approach in § 924(c) cases after *Johnson*. *See Morton v. U.S.*, No. 16-22522-CIV, 2017 WL 1041568, at *3 n.4 (S.D. Fla. Mar. 2, 2017) (Altonaga, J.) (collecting cases).

under § 924(c)(3)(A) only if all applications of the predicate statute require the government to prove "the use, attempted use, or threatened use of physical force." *McGuire*, 706 F.3d at 1337.[3]

Here, Movant's predicate § 924(c) convictions are for Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. The Hobbs Act criminalizes 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 . . . ." 18 U.S.C. § 1951(a). "Robbery" is defined as an "unlawful taking . . . by means of actual or threatened force, or violence, or fear of injury. . . ." 18 U.S.C. § 1951(b)(1).

It is well-settled that substantive Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A) because the robbery definition clearly "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See In re Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016) (holding that a "companion conviction for Hobbs Act robbery . . . clearly qualifies as a 'crime of violence'" under § 924(c)(3)(A)); see also U.S. v. Anglin, 846 F.3d 954, 965 (7th Cir. 2017) (holding that "Hobbs Act robbery is a 'crime of violence' within the meaning of § 923(c)(3)(A)" and joining the "unbroken consensus of other circuits to have resolved this question.") (collecting cases).

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[3] Though not relevant here, there are a "narrow range of cases" in which sentencing courts may look beyond the statute and judgment of conviction and employ what is referred to as the "modified categorical approach." *Descamps*, 133 S. Ct. at 2283-84. That approach applies when a statute is considered "divisible," *i.e.*, when it concerns a list of "alternative elements." *Id.* at 2285-86. Under those circumstances, in order to determine which element was relevant to the defendant's conviction, the court may review *Shepard* documents, which are limited to "the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. U.S.*, 544 U.S. 13, 16 (2005). The focus of the "modified categorical approach" remains the same: a focus on the elements of the crime rather than on the defendant's underlying conduct.

While it is clear that substantive Hobbs Act robbery is a crime of violence under § 924(c)(3)(A), *conspiracy* to commit Hobbs Act robbery is a tougher question. To establish such a conspiracy, the Government must show: (1) an agreement between two or more people 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 the conspiratorial goal. *U.S. v. Pringle*, 350 F.3d 1172, 1176 (11th Cir. 2003). Notably, under the Hobbs Act, the Government need not prove an overt act in furtherance of the conspiracy. *Duhart v. U.S.*, No. 16-61499-CIV, 2016 WL 4720424, at *6 (S.D. Fla. Sept. 9, 2016) (Marra, J.) (citing *U.S. v. Pistone*, 177 F.3d 957, 959-960 (11th Cir. 1999)). Nor must the Government show that a particular conspirator personally agreed to commit, or was even capable of committing, the underlying robbery or extortion. *See Ocasio v. U.S.*, 136 S. Ct. 1423, 1432 (2016).

As such, courts in this District hold that under the categorical approach conspiracy to commit Hobbs Act robbery does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another" as required by § 924(c)(3)(A). *See Benitez v. U.S.*, No. 16-23974-CIV, 2017 WL 2271504, at *4 (S.D. Fla. Apr. 6, 2017) (Ungaro, J.) ("conspiracy to commit Hobbs Act robbery conviction does not qualify as a crime of violence under [§ 924(c)(3)(A)]); *Mobley v. U.S.*, No. 16-61388-CIV, 2016 WL 7188296, at *4 (S.D. Fla. Dec. 9, 2016) (Bloom, J.) ("conspiracy to commit Hobbs Act robbery does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another required to qualify as a crime of violence under § 924(c)(3)(A)."); *Duhart*, 2016 WL 4720424, at *6 (Marra, J.) ("a conspiracy to commit a Hobbs Act robbery does not qualify as a crime of violence under [§ 924(c)(3)(A)]"). The Court finds this authority persuasive and determines that conspiracy to commit Hobbs Act robbery does not have as an

element the use, attempted use, or threatened use of physical force against the person or property of another required to qualify as a crime of violence under § 924(c)(3)(A).

Nonetheless, as explained above, Movant does not dispute that his companion convictions for substantive Hobbs Act robbery and conspiracy to commit Hobbs Act robbery qualify as crimes of violence under § 924(c)(3)(B), which is not unconstitutionally vague under binding precedent. *See Ovalles v. U.S.*, 861 F.3d 1257 (11th Cir. June 30, 2017). Thus, Movant's convictions should stand notwithstanding the Court's finding that a conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A). *See Mobley*, 2016 WL 7188296, at *1 (holding that conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A), but denying motion to vacate because § 924(c)(3)(B) is not unconstitutionally vague under *Johnson*).

IV. RECOMMENDATION

Johnson is of no help to Movant. His convictions for substantive Hobbs Act robbery and conspiracy to commit Hobbs Act robbery continue to qualify as a predicate § 924(c) offenses as set forth above. While the Court has previously recommended that a certificate of appealability should issue in cases similar to this one, the Eleventh Circuit's very recent opinion in *Ovalles v. U.S.*, 861 F.3d 1257 (11th Cir. June 30, 2017) forecloses the possibility of success by Movant on appeal. Thus, the Court now finds no issues presented that are deserving of encouragement to proceed further. Accordingly, a certificate of appealability should not be issued in this case. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (for a certificate of appealability to issue, an applicant must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.").

As such, it is **RECOMMENDED** that the Motion to Vacate Sentence Under 28 U.S.C. § 2255 [DE 1] be **DENIED.** It is further **RECOMMENDED** that a certificate of appealability be **DENIED** and that the Clerk of Court **CLOSE THIS CASE.**

V. NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with U.S. District Judge Donald M. Middlebrooks within 14 days after being served with a copy. 28 U.S.C. § 636(b)(1)(C). Failure to file timely objections may limit the scope of appellate review of factual findings contained herein. *U.S. v. Warren*, 687 F.2d 347, 348 (11th Cir. 1982), *cert. denied*, 460 U.S. 1087 (1983).

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 31st day of July, 2017.

DAVE LEE BRANNON
U.S. MAGISTRATE JUDGE

United States District Court

Southern District of Florida

FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

DEVON CHANCE

JUDGMENT IN A CRIMINAL CASE

Case Number - 0:08-60090-CR-2

USM Number: 73167-004

Counsel For Defendant: Michael G. Smith
Counsel For The United States: Bruce Brown
Court Reporter: Karl Shires

The defendant was found guilty on Count(s) 1,2,25-36 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1951(A)	Conspiracy To Commit Hobbs Act Robbery	3/27/2008	1
18 U.S.C. § 924(o)	Conspiracy To Possess A Firearm During And In Relation To A Crime Of Violence	3/27/2008	2
18 U.S.C. § 924(c)(1)	Possession Of A Firearm During And In Relation To A Crime Of Violence	3/21/2008	26
18 U.S.C. § 924(c)(1)	Possession Of A Firearm During And In Relation To A Crime Of Violence	3/21/2008	28,30,32,34,36
18 U.S.C. § 1951(a)	Hobbs Act Robbery	2/26/2008	25
18 U.S.C. § 1951(a)	Hobbs Act Robbery	3/2/2008	27
18 U.S.C. § 1951(a)	Hobbs Act Robbery	3/7/2008	29
18 U.S.C. § 1951(a)	Hobbs Act Robbery	3/10/2008	31
18 U.S.C. § 1951(a)	Hobbs Act Robbery	3/17/2008	33
18 U.S.C. § 1951(a)	Hobbs Act Robbery	3/21/2008	35

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.

The defendant has been found not guilty on count(s) counts 23 and 24.

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:
7/13/2009

DONALD M. MIDDLEBROOKS
United States District Judge

July 15, 2009

DEFENDANT: DEVON CHANCE
CASE NUMBER: 0:08-60090-CR-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **1,794 MONTHS**. This term consists of 210 months as to counts 1,2,25,27,29,31,33,and 35, to be served concurrently with each other, and a term of 84 months as to counts 26 to be served consecutive to counts 1,2,25,27,29,31,33 and 35, and a term of 300 months as to each of counts 28,30,32,34, and 36 to be served consecutive to counts 1,2,25,26,27,29,31,33,and 35.

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

he Court recommends that defendant be designated to a facility in or near South Florida. The Court further recommends that defendant receive drug treatment while incarcerated.

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: DEVON CHANCE
CASE NUMBER: 0:08-60090-CR-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 YEARS**. This term consists of three years as to counts 1,2,25,27,29,31,33, and 35, and five years as to counts 26,28,30,32,34, and 36. All such terms shall run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 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 **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; 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: DEVON CHANCE
CASE NUMBER: 0:08-60090-CR-2

SPECIAL CONDITIONS OF SUPERVISION

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

DEFENDANT: DEVON CHANCE
CASE NUMBER: 0:08-60090-CR-2

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
$1,400.00	$0.00	$TBD

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

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

DEFENDANT: DEVON CHANCE
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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 **$1,400.00** due immediately, balance due

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

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

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

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

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

Joint and Several

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

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.