APPENDIX

APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13441-F

ERIC HANNA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Eric Hanna is a federal prisoner who was charged by indictment with: (1) one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); (2) two counts of Hobbs Act robbery, in violation of § 1951(a) and 18 U.S.C § 2; and (3) two counts of using, carrying, or possessing a firearm in furtherance of a "crime of violence"—specifically, the two Hobbs Act robbery

counts—in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2.[1] At trial, the district court instructed the jury on both actually committing Hobbs Act robbery and a theory of aiding and abetting. The jury returned a guilty verdict against Hanna on all counts charged in the indictment in a general verdict. The court sentenced Hanna to 435 months' imprisonment. On appeal, we affirmed his convictions and sentences.

In June 2016, Hanna filed a *pro se* 28 U.S.C. § 2255 motion and a memorandum in support, asserting that his conviction under § 924(c) must be vacated because, following *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding that 18 U.S.C. 924(e)(2)(B)(ii), the residual clause of the Armed Career Criminal Act ("ACCA"), was unconstitutionally vague), the residual clause of § 924(c)(3)(B) was unconstitutionally vague, and conspiracy to commit Hobbs Act robbery and substantive Hobbs Act robbery were not crimes of violence.[2] The district court appointed counsel, who filed a supplemental brief raising the same claim. Neither Hanna nor his counsel raised an argument regarding the district court's jury instruction on aiding and abetting Hobbs Act robbery.

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[1] 18 U.S.C. § 2 states that whoever "aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States is punishable as a principal. Accordingly, Hanna's indictment charged substantive Hobbs Act robbery, as well as aiding and abetting Hobbs Act robbery.

[2] Hanna argued that conspiracy to commit Hobbs Act robbery was not a crime of violence, but the indictment did not rely on the conspiracy charge as the companion offense for his § 924(c) counts.

The Government responded, arguing, in relevant part, that Hanna's motion was procedurally defaulted and meritless. Hanna replied that his claim was not procedurally barred because he was actually innocent of violating § 924(c), in that Hobbs Act robbery was not a crime of violence.

A magistrate judge issued a report and recommendation ("R&R"), recommending denying the motion and a certificate of appealability ("COA"). First, the magistrate judge noted that the indictment charged Hanna with violations of § 924(c) based on the substantive Hobbs Act offenses, not conspiracy to commit Hobbs Act robbery. Then, the magistrate judge found that Hanna's claim was procedurally barred because he had not raised it at trial or on direct appeal. Although not explicitly stating that Hanna had established cause to overcome the bar, the magistrate judge implied the same when explaining that a claim based on the new rule announced in *Johnson* was not reasonably available to counsel at the time of Hanna's direct appeal.

Nonetheless, the magistrate judge found that Hanna could not establish the existence of prejudice, which is necessary to overcome the procedural bar, because Hobbs Act robbery qualified as a crime of violence based on this Court's precedent in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016). In *Saint Fleur*, we held that Hobbs Act robbery qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). For the same reason, the magistrate judge reasoned that Hanna

could not establish his actual innocence. The magistrate judge noted that, as Hanna's claim was procedurally barred because Hobbs Act robbery constituted a crime of violence under § 924(c)(3)(A)'s elements clause, it ws unnecessary to decide whether *Johnson* invalidated § 924(c)(3)(B)'s residual clause.

Over Hanna's objections, the district court adopted the R&R and denied Hanna's motion to vacate. The district court noted Hanna's objection that a COA should issue because "reasonable jurists can and do debate" whether Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s elements clause, but found that reasonable jurists would not debate the correctness of the court's procedural rulings.

In his counseled motion for a COA, filed in this Court in August 2017, Hanna argues that it is unclear whether the jury based his § 924(c) conviction on substantive Hobbs Act robbery or aiding and abetting Hobbs Act robbery, as the court had instructed the jury on both theories of culpability, and the jury returned a general verdict. Accordingly, Hanna argues that we must presume that his § 924(c) convictions rested solely on aiding and abetting Hobbs Act robbery. Hanna acknowledged our holding in *In re Colon*, 826 F.3d 1301 (11th Cir. 2016), that aiding and abetting Hobbs Act robbery is a crime of violence under § 924(c). Nevertheless, he argued that we should instead follow the dissenting opinion in that case.

Thereafter Hanna moved to hold his COA motion in abeyance because a petition for writ of *certiorari*, seeking review of the question whether § 924(c)(3)(B)'s residual clause was unconstitutional, was then pending in the Supreme Court. While no formal ruling was issued, we did hold the motion for a COA abeyance. Since then, the Supreme Court has issued its opinion in *United States v. Davis*, 139 S. Ct. 2319, 2324-25, 2336 (2019), holding that § 924(c)(3)(B)'s residual clause is unconstitutionally vague.

DISCUSSION:

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a motion to vacate on procedural grounds, the movant must show that reasonable jurists would find debatable both: (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000) (quotations omitted). Moreover, "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted).

As is relevant to this appeal, § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a crime of violence, which is defined as an offense that is a felony and:

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

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

As noted above, in *Johnson*, the Supreme Court struck down as unconstitutionally vague a similarly worded residual clause in the ACCA. 135 S. Ct. at 2555-58, 2563; *see* 18 U.S.C. § 924(e)(2)(B)(ii). Hanna's present claim is based on his argument that *Johnson* also rendered invalid the residual clause in § 924(c)(3)(B). Since Hanna litigated his § 2255 motion in the district court and filed his appeal, the Supreme Court in *Davis* resolved a circuit split and struck down the residual clause in § 924(c)(3)(B) as unconstitutionally vague. *Davis*, 139 S. Ct. at 2324-25, 2336. However, the Supreme Court's decision in *Davis* does not undermine the district court's denial of Hanna's § 2255 motion because the magistrate judge concluded that, even assuming that the residual clause of § 924(c)(3)(B) is invalid, Hanna could not show the prejudice necessary to overcome his procedural default because, based on our precedent, Hobbs Act robbery still qualifies as a crime of violence under the elements clause of § 924(c)(3)(A).

As the magistrate judge acknowledged, collateral review under § 2255 is not a substitute for a direct appeal. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). Thus, claims that could have been raised on direct appeal are procedurally barred from review in a § 2255 proceeding, absent a showing of cause and prejudice or actual innocence. *Id.* at 1234. A defendant can overcome this procedural bar by establishing either: (1) cause for the default and actual prejudice from the alleged error or (2) that he is actually innocent of the crimes for which he was convicted. *Id.*

Here, reasonable jurists would not debate the district court's denial of Hanna's claim as procedurally barred. As Hanna did not argue on direct appeal that his § 924(c) convictions were invalid because Hobbs Act robbery was not a crime of violence under § 924(c), he must establish either cause and prejudice for his default or demonstrate his actual innocence. We will assume, as the magistrate judge did, that Hanna established cause for not raising a *Johnson* or *Davis*-based claim on appeal because the new rules announced in those opinions were not reasonably available to counsel at the time of Hanna's direct appeal. But, like the magistrate judge, we likewise conclude that Hanna cannot establish prejudice because it is clear that the companion crimes that provided the basis for his § 924(c) convictions meet the elements clause of § 924(c)(3)(A). This is so because the companion crimes charged in each § 924(c) count were Hobbs Act robberies, as well as the aiding and

abetting of such robberies. Importantly, conspiracy to commit Hobbs Act robbery was not included as a predicate crime for the § 924(c) charges, therefore, there is no possibility that this offense had any impact on Hanna's conviction for a § 924(c) violation. Our precedent makes it clear that both substantive Hobbs Act robbery and aiding and abetting Hobbs Act robbery meet the elements clause of § 924(c)(3)(A). *See, e.g.*, *St. Fleur*, 824 F.3d at 1341 (holding that Hobbs Act robbery is a crime of violence under the elements clause of § 924(c)(3)(A)); *Colon*, 826 F.3d at 1305 (holding that, because the substantive offense of Hobbs Act robbery qualifies as a crime of violence under the elements clause of § 924(c)(3)(A), aiding and abetting a Hobbs Act robbery necessarily qualifies as a crime of violence under § 924(c)(3)(A) as well). Finally, and for the same reason, Hanna did not establish that he was actually innocent of violating § 924(c), as the predicate offenses underlying the charge qualified as crimes of violence under § 924(c)(3)(A)'s elements clause.

Accordingly, because reasonable jurists would not debate the district court's conclusion that his *Johnson* challenge to his § 924(c) convictions was procedurally barred, Hanna's motion for a COA is DENIED. *Slack*, 529 U.S. at 478. Indeed, even leaving aside the issue of procedural bar, reasonable jurists would not disagree that Hanna cannot sustain his stated claim because he cannot show that the residual clause played any role in his § 924(c) conviction. *See Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017) (a § 2255 litigant bears the burden of proving his

claim). Because the Supreme Court has now issued its opinion in *Davis* regarding the constitutionality of § 924(c)(3)(B), Hanna's motion to hold the appeal in abeyance pending the Supreme Court's resolution of that issue is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-20678 CR-MOORE

18 U.S.C. § 1951(a)
18 U.S.C. § 924(c)(1)(A)(ii)
18 U.S.C. § 922(g)(1)
18 U.S.C. § 981(a)(1)(C)
21 U.S.C. § 853
18 U.S.C. § 924(d)(1)

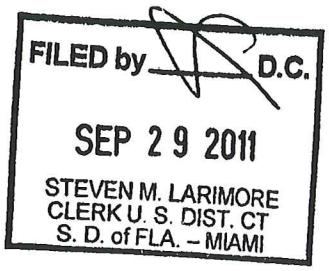
/TORRES

UNITED STATES OF AMERICA

vs.

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
KENDRICK LOWE,
FABIAN WARREN,
a/ka/ "Fay,"
TREVOR RANSFER, and
ERIC HANNA,

Defendants,
_____/



INDICTMENT

The Grand Jury charges that:

COUNT 1

Beginning in or around March 2011, and continuing through in or around June 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
KENDRICK LOWE,
FABIAN WARREN,
a/ka/ "Fay,"
TREVOR RANSFER,

and
ERIC HANNA,

did knowingly combine, conspire, confederate, and agree with each other and others known and unknown to the Grand Jury to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did plan to take United States currency and other property from the person and in the presence of persons employed by, and persons patronizing, a business and company operating in interstate and foreign commerce, against the will of those persons, 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 2

On or about April 15, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
and
FABIAN WARREN,
a/ka/ "Fay,"

did knowingly obstruct, delay, and affect commerce and the movement of articles 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 take United States currency from the person and in the presence of persons employed by, the Shell Gas Station, located at 8033 S. Dixie Highway, Miami, Florida, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force, violence, and

fear of injury to said persons, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 3

On or about April 15, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
and
FABIAN WARREN,
a/ka/ "Fay,"

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendants may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 2 of this Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2.

COUNT 4

On or about April 16, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
and
FABIAN WARREN,
a/ka/ "Fay,"

did knowingly obstruct, delay, and affect commerce and the movement of articles 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 take United States currency from the person and in the presence of persons employed by, and persons patronizing, the Family Dollar, located at 28600 SW 137th Avenue, Miami, Florida, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 5

On or about April 16, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
and
FABIAN WARREN,
a/ka/ "Fay,"

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendants may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 4 of this Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2.

COUNT 6

On or about April 26, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"

MONTAVIS MIDDLETON,
a/k/a "Tay,"
FABIAN WARREN,
a/ka/ "Fay,"
and
ERIC HANNA,

did knowingly obstruct, delay, and affect commerce and the movement of articles 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 take United States currency and other property from the person and in the presence of persons employed by the Doral Ale House, located at 3271 NW 87th Avenue, Doral, Florida, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 7

On or about April 26, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
FABIAN WARREN,
a/ka/ "Fay,"
and
ERIC HANNA,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendants may be prosecuted in a court of the United States, specifically, a violation of Title 18,

United States Code, Section 1951(a), as set forth in Count 6 of this Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2.

COUNT 8

On or about May 11, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
KENDRICK LOWE,
and
TREVOR RANSFER,

did knowingly obstruct, delay, and affect commerce and the movement of articles 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 take United States currency and other property from the person and in the presence of persons employed by, the Farm Store, located at 11190 W. Flagler Street, Sweetwater, Florida, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 9

On or about May 11, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"

KENDRICK LOWE,
and
TREVOR RANSFER,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendants may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 8 of this Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2.

COUNT 10

On or about May 15, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
KENDRICK LOWE,
and
TREVOR RANSFER,

did knowingly obstruct, delay, and affect commerce and the movement of articles 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 take United States currency and other property from the person and in the presence of persons employed by, and persons patronizing, the CVS, located at 1525 West 49th Street, Hialeah, Florida, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 11

On or about May 15, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
KENDRICK LOWE,
and
TREVOR RANSFER,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendants may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 10 of this Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2.

COUNT 12

On or about May 15, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
KENDRICK LOWE,
and
TREVOR RANSFER,

did knowingly obstruct, delay, and affect commerce and the movement of articles 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 take United States currency and

other property from the person and in the presence of persons employed by, and persons patronizing, the CVS, located at 9031 SW 107th Avenue, Miami, Florida, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 13

On or about May 15, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
KENDRICK LOWE,
and
TREVOR RANSFER,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendants may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 12 of this Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2.

COUNT 14

On or about June 1, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"

KENDRICK LOWE,
TREVOR RANSFER,
and
ERIC HANNA,

did knowingly obstruct, delay, and affect commerce and the movement of articles 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 take United States currency and other property from the person and in the presence of persons employed by, and persons patronizing, the Wendy's, located at 13901 South Dixie Highway, Miami, Florida, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 15

On or about May 15, 2011, in Miami-Dade County, in the Southern District of Florida, the defendants,

ROBERT DAVIS,
a/k/a "Rob,"
MONTAVIS MIDDLETON,
a/k/a "Tay,"
KENDRICK LOWE,
TREVOR RANSFER,
and
ERIC HANNA,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendants may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 14 of this Indictment, in violation of Title

18, United States Code, Sections 924(c)(1)(A)(ii) and 2.

COUNT 16

On or about June 1, 2011, in Miami-Dade County, in the Southern District of Florida, the defendant,

ROBERT DAVIS,
a/k/a "Rob,"

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

It is further alleged that the firearms and ammunition are:

(a) a Glock 23, .40 caliber semi-automatic pistol;

(b) eleven (11) rounds of .40 caliber ammunition;

(c) a Sig Sauer P239 9 millimeter semi-automatic pistol;

(d) nine (9) rounds of FC 9 millimeter ammunition;

(e) thirteen (13) rounds of FC 9 millimeter Luger ammunition;

(f) one (1) round of "RP .380 Auto" ammunition; and

(g) three (3) shells of shotgun ammunition.

FORFEITURE ALLEGATION

1. The allegations of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendants have an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 1951, as

alleged in this Indictment, the defendant so convicted shall forfeit all of his respective right, title and interest to the United States in any property, real or personal, which constitutes or is derived from proceeds traceable to such violation, pursuant to Title 18, United States Code, Section 981(a)(1)(C), and in any firearm or ammunition involved in or used in such violation, pursuant to Title 18, United States Code, Section 924(d)(1).

3. Upon conviction of a violation of Title 18, United States Code, Section 924 and/or 922, as alleged in this Indictment, the defendant so convicted shall forfeit all of his respective right, title and interest to the United States in any firearm or ammunition involved in or used in such violation, pursuant to Title 18, United States Code, Section 924(d)(1).

4. The property which is subject to forfeiture includes, but is not limited to, the following:

(a) one (1) Glock 23, .40 caliber semi-automatic pistol;

(b) eleven (11) rounds of .40 caliber ammunition;

(c) one (1) Sig Sauer P239 9 millimeter semi-automatic pistol;

(d) nine (9) rounds of FC 9 millimeter ammunition;

(e) thirteen (13) rounds of FC 9 millimeter Luger ammunition;

(f) one (1) round of "RP .80 Auto" ammunition; and

(g) three (3) shells of shotgun ammunition.

All pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 18, United States Code, Section 924(d)(1), both of which are made applicable by Title 28, United States Code, Section 2461(c), and the procedures outlined at Title 21, United States Code, Section 853.

A TRUE BILL

FOREPERSON

WIFREDO A. FERRER
UNITED STATES ATTORNEY

CHRISTOPHER V. PARENTE
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

ROBERT DAVIS, a/k/a "Rob," MONTAVIS MIDDLETON, a/k/a "Tay," KENDRICK LOWE, FABIAN WARREN, a/k/a "Fay," TREVOR RANSFER, and ERIC HANNA,

Defendants.
_____/

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

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

Court Division: (Select One)

__X__ Miami ____ Key West
____ FTL ____ WPB ____ FTP

I do hereby certify that:

1. I have carefully considered the allegations of the information, 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 6-10 days for the parties to try.

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

(Check only one)			(Check only one)	
I	0 to 5 days	____	Petty	____
II	6 to 10 days	____	Minor	____
III	11 to 20 days	X	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) No
If yes:
Magistrate Case No. _____
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of 6/1/2011 all defendants except FABIAN WARREN
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 __X__ No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? ____ Yes __X__ No

_____
CHRISTOPHER V. PARENTE
ASSISTANT UNITED STATES ATTORNEY
COURT ID NO. A5501260

*Penalty Sheet(s) attached

REV.9/11/07

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: **ROBERT DAVIS a/k/a "Rob"**

Case No:

Count: 1

Conspiracy to Interfere with Commerce by Threats or Violence (Robbery)

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

***Max. Penalty:** 20 Years' Imprisonment

Counts: 2, 4, 6, 8, 10, 12 and 14

Interfering with Commerce by Threats or Violence (Robbery)

Title 18, United States Code, Section 1951(a) and 2

***Max. Penalty:** 20 Years' Imprisonment

Counts: 3, 5, 7, 9, 11, 13 and 15

Possession of a Firearm in Furtherance of a Crime of Violence

Title 18, United States Code, Section 924(c)(1)(A)(ii) and 2

***Max. Penalty:** Life Imprisonment

Count: 16

Possession of a Firearm by a Convicted Felon

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

***Max. Penalty:** 10 Years' Imprisonment

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: MONTAVIS MIDDLETON a/k/a "Tay"

Case No:

Count: 1

Conspiracy to Interfere with Commerce by Threats or Violence (Robbery)

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

***Max. Penalty:** 20 Years' Imprisonment

Counts: 2, 4, 6, 8, 10, 12 and 14

Interfering with Commerce by Threats or Violence (Robbery)

Title 18, United States Code, Section 1951(a) and 2

***Max. Penalty:** 20 Years' Imprisonment

Counts: 3, 5, 7, 9, 11, 13 and 15

Possession of a Firearm in Furtherance of a Crime of Violence

Title 18, United States Code, Section 924(c)(1)(A)(ii) and 2

***Max. Penalty:** Life Imprisonment

Count :

***Max. Penalty:**

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: KENDRICK LOWE

Case No:

Count: 1

Conspiracy to Interfere with Commerce by Threats or Violence (Robbery)

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

***Max. Penalty:** 20 Years' Imprisonment

Counts: 8, 10, 12 and 14

Interfering with Commerce by Threats or Violence (Robbery)

Title 18, United States Code, Section 1951(a) and 2

***Max. Penalty:** 20 Years' Imprisonment

Counts: 9, 11, 13 and 15

Possession of a Firearm in Furtherance of a Crime of Violence

Title 18, United States Code, Section 924(c)(1)(A)(ii) and 2

***Max. Penalty:** Life Imprisonment

Count :

***Max. Penalty:**

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: **FABIAN WARREN a/k/a "Fay"**

Case No:

Count: 1

Conspiracy to Interfere with Commerce by Threats or Violence (Robbery)

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

***Max. Penalty:** 20 Years' Imprisonment

Counts: 2, 4, and 6

Interfering with Commerce by Threats or Violence (Robbery)

Title 18, United States Code, Section 1951(a) and 2

***Max. Penalty:** 20 Years' Imprisonment

Counts: 3, 5, and 7

Possession of a Firearm in Furtherance of a Crime of Violence

Title 18, United States Code, Section 924(c)(1)(A)(ii) and 2

***Max. Penalty:** Life Imprisonment

Count :

***Max. Penalty:**

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: TREVOR RANSFER

Case No:

Count: 1

Conspiracy to Interfere with Commerce by Threats or Violence (Robbery)

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

***Max. Penalty:** 20 Years' Imprisonment

Counts: 8, 10, 12, and 14

Interfering with Commerce by Threats or Violence (Robbery)

Title 18, United States Code, Section 1951(a) and 2

***Max. Penalty:** 20 Years' Imprisonment

Counts: 9, 11, 13, and 15

Possession of a Firearm in Furtherance of a Crime of Violence

Title 18, United States Code, Section 924(c)(1)(A)(ii) and 2

***Max. Penalty:** Life Imprisonment

Count :

***Max. Penalty:**

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: ERIC HANNA

Case No:

Count: 1

Conspiracy to Interfere with Commerce by Threats or Violence (Robbery)

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

***Max. Penalty:** 20 Years' Imprisonment

Counts: 6 and 14

Interfering with Commerce by Threats or Violence (Robbery)

Title 18, United States Code, Section 1951(a) and 2

***Max. Penalty:** 20 Years' Imprisonment

Counts: 7 and 15

Possession of a Firearm in Furtherance of a Crime of Violence

Title 18, United States Code, Section 924(c)(1)(A)(ii) and 2

***Max. Penalty:** Life Imprisonment

Count :

***Max. Penalty:**

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-20678-CR-MOORE/TORRES

UNITED STATES OF AMERICA

vs.

KENDRICK LOWE, TREVOR RANSFER, and ERIC HANNA,

Defendants.
_____/

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

It's my duty to instruct you on the rules of law that you must use in deciding this case. After I've completed these instructions you will go to the jury room and begin your discussions – what we call your deliberations.

You must decide whether the Government has proved the specific facts necessary to find the Defendant guilty beyond a reasonable doubt.

Your decision must be based only on the evidence presented during the trial. You must not be influenced in any way by either sympathy for or prejudice against the Defendant or the Government.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the Court's instructions on the law.

The indictment or formal charge against a Defendant isn't evidence of guilt. The law presumes every Defendant is innocent. The Defendant does not have to prove his innocence or produce any evidence at all. A Defendant does not have to testify, and if the Defendant chose not to testify, you cannot consider that in any way while making your decision. The Government must prove guilt beyond a reasonable doubt. If it fails to do so, you must find the Defendant not guilty.

The Government's burden of proof is heavy, but it doesn't have to prove a defendant's guilt beyond all possible doubt. The Government's proof only has to exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based on your reason and common sense after you've carefully and impartially considered all the evidence in the case.

"Proof beyond a reasonable doubt" is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and isn't binding on you.

You shouldn't assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reason and common sense to make deductions and reach conclusions. You shouldn't be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

- Did the witness impress you as one who was telling the truth?
- Did the witness have any particular reason not to tell the truth?
- Did the witness have a personal interest in the outcome of the case?
- Did the witness seem to have a good memory?
- Did the witness have the opportunity and ability to accurately observe the things he or she testified about?
- Did the witness appear to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from other testimony or other evidence?

And, of course, the testimony of law enforcement officers should be given no more or less weight simply by virtue of their status as law enforcement officers. In other words, you should examine the testimony of a law enforcement officer just as you would any other witness.

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

If the Government offers evidence that a Defendant made a statement or admission to someone after being arrested or detained, you must consider that evidence with caution and great care.

You must decide for yourself (1) whether the Defendant made the statement, and (2) if so, how much weight to give to it. To make these decisions, you must consider all the evidence about the statement – including the circumstances under which it was made.

Any such statement is not evidence about any other Defendant.

You have heard testimony that after the criminal conduct in this case was supposed to have been committed, the Defendants made certain statements when questioned by law enforcement, and you have also heard evidence that some of those statements were later determined to be false. If you believe that a Defendant made a statement tending to show his innocence and that statement was later shown to be false, then you may consider this conduct, along with all the other evidence in the case, in deciding whether the government has proved beyond a reasonable doubt that the Defendant committed the crimes charged. This conduct may indicate that the Defendant thought he was guilty of the crime charged and was trying to avoid punishment. On the other hand, sometimes an innocent person may make a false statement for some other reason. Whether or not this evidence causes you to find that the Defendant was conscious of his guilt of the crimes charged, and whether that indicates that he committed the crimes charged, is entirely up to you as the sole judges of the facts.

You have heard testimony that at the time of his arrest, Defendant Kendrick Lowe fled. The conduct of a person at the time of his arrest is not, of course, sufficient in itself to establish the guilt of that person, but is a fact which, if proved, you may consider along with all of the other evidence in deciding whether the government has proved beyond a reasonable doubt that the Defendant committed the crimes charged. This conduct may indicate that the Defendant thought he was guilty and was trying to avoid punishment. On the other hand, sometimes an innocent person may flee for some other reason. If you determine that the Defendant did, in fact, flee and that the Defendant's conduct reflected a consciousness of guilt, the weight, if any, to be attached to that evidence is also a matter exclusively for you as a jury to determine.

The Indictment charges the Defendant Kendrick Lowe with nine separate crimes, called "counts." Defendant Trevor Ransfer is also charged in nine counts. Defendant Eric Hanna is charged in five separate counts. You'll be given a copy of the Indictment to refer to during your deliberations.

Count 1 charges the Defendants with knowingly and willfully conspiring with others to commit robberies that affected commerce or the movement of articles and commodities in commerce, by means of actual or threatened force, violence, or fear of injury.

Defendants Lowe and Ransfer are also charged in Counts 8, 10, 12, and 14 with actually committing or aiding and abetting in the commission of four different robberies that affected commerce or the movement of articles and commodities in commerce, by means of actual or threatened force, violence, or threat of injury. Defendant Hanna is charged in Counts 6 and 14 with committing or aiding and abetting in robbery.

Defendants Lowe and Ransfer are also charged in Counts 9, 11, 13, and 15 with knowingly using or carrying a firearm during and in relation to each of those robberies, or possessing a firearm in furtherance of those robberies. Defendant Hanna is charged in Counts 7 and 15 with using, carrying, or possessing a firearm in connection with the two robberies with which he is charged.

I will explain each of those substantive offenses in a moment.

But first note that in Count 1 the Defendants are not charged with committing a substantive offense – they are charged with conspiring to commit that offense.

I will also give you specific instructions on conspiracy.

As I just explained, Count 1 of the Indictment charges the Defendants with conspiring to commit robbery. The Defendants are also charged separately with actually committing, or aiding and abetting in the actual commission of, specific robberies.

I will first instruct you on what the government must prove to establish that the Defendants committed or aided and abetted in the five robberies charged in Counts 6, 8, 10, 12, and 14. I will then instruct you on what the government must prove to establish that the Defendants conspired to commit robbery, as charged in Count 1.

It's a Federal crime to acquire someone else's property by robbery and in doing so to obstruct, delay, or affect interstate commerce.

A Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt.

(1) the Defendant knowingly acquired someone else's personal property;

(2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and

(3) the Defendant's actions obstructed, delayed, or affected

interstate commerce.

"Property" includes money, tangible things of value, and intangible rights that are a source or element of income or wealth.

"Fear" means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

"Interstate commerce" is the flow of business activities between one state and anywhere outside that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce. But it must prove that the natural consequences of the acts described in the Indictment would be to somehow delay, interrupt, or affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

As I mentioned earlier, Count 1 charges the Defendants with conspiring to commit robbery. I have instructed you on what the government must establish to prove that a Defendant actually committed the robberies charged in other counts. I will now instruct you on what the government must prove to establish that the Defendants conspired to commit robbery.

It's a separate Federal crime for anyone to conspire or agree with someone else to commit robbery that, if committed, would obstruct, delay or affect commerce.

A "conspiracy" is an agreement by two or more people to commit an unlawful act – in this case, the unlawful act is robbery. In other words, it is a kind of "partnership" for criminal purposes. Every member of a conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the Indictment were members of the plan, or that those who were members made any kind of formal agreement. The Government does not have to prove that the members planned together all the details of the plan, or that the conspirators succeeded in carrying out the plan.

A Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) two or more persons agreed to commit a robbery, against the victim's

will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future, and that robbery – if committed – would obstruct, delay, or affect interstate commerce;

(2) the Defendant knew of the conspiratorial goal; and

(3) the Defendant voluntarily participated in helping to accomplish that goal.

A person may be a conspirator without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If a Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan and willfully joined in the plan on at least one occasion, that's sufficient for you to find that Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. A person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

Proof of several separate conspiracies isn't proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies proved is the single overall conspiracy.

You must decide whether the single overall conspiracy charged existed between two or more conspirators. If not, then you find the Defendants not guilty of that charge.

But if you decide that a single overall conspiracy did exist, then you must decide who the conspirators were. And if you decide that a particular Defendant was a member of some other conspiracy - not the one charged - then you must find that Defendant not guilty.

So to find a Defendant guilty, you must all agree that the Defendant was a member of the conspiracy charged - not a member of some other separate conspiracy.

It's a separate Federal crime for anyone to use or carry a firearm during and in relation to a crime of violence, or to possess a firearm in furtherance of a crime of violence.

A Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant committed or aided and abetted in the crime of violence – that is, the robbery, charged in the specified Count of the Indictment;

(2) the Defendant knowingly used, carried, or possessed a firearm, or aided and abetted someone who did; and

(3) the Defendant, or the person he aided or abetted, used or carried the firearm "in relation to" the violent crime, or possessed the firearm "in furtherance of" the violent crime.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

To "use" a firearm means more than a mere possession and more than proximity and accessability; it requires active employment of the weapon as by brandishing or displaying it in some fashion.

To "carry" or "possess" a firearm is to have a firearm on one's person

or to transport or control a firearm in a way that makes it available for immediate use while committing the violent crime.

To use or carry a firearm "in relation to" a crime means that there must be a firm connection between the Defendant, the firearm, and the violent crime. The firearm must have helped with some important function or purpose of the crime, and not simply have been there accidentally or coincidentally.

Possessing a firearm "in furtherance of" a crime means that the firearm helped, promoted, or advanced the crime in some way.

The Indictment charges that the Defendants knowingly used and carried a firearm during and in relation to a violent crime and possessed a firearm in furtherance of a violent crime. In other words, the Defendants are charged with violating the law in these Counts in two separate ways. The Government has to prove only one of those ways, not both. But to find a Defendant guilty you must all agree on which of the two ways the Defendant violated the law.

The law recognizes several kinds of possession. A person may have actual possession, constructive possession, sole possession, or joint possession.

"Actual possession" of a thing occurs if a person knowingly has direct physical control of it.

"Constructive possession" of a thing occurs if a person doesn't have actual possession of it, but has both the power and the intention to take control over it later.

"Sole possession" of a thing occurs if a person is the only one to possess it.

"Joint possession" of a thing occurs if two or more people share possession of it.

The term "possession" includes actual, constructive, sole, and joint possession.

In Counts 6, 8, 10, 12, and 14, one or more of the Defendants are charged with committing or with aiding and abetting in the robberies described. In Counts 7, 9, 11, 13, and 15, one or more of the Defendants is charged with using or carrying a firearm in relation to a crime of violence, or possessing a firearm in furtherance of a crime of violence; the Defendants are also charged with aiding and abetting the use, carrying, or possession of a firearm as charged. I will now explain the law on aiding and abetting.

Under Federal law, it's possible to prove the Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or "agent." Or it may be done by acting with or under the direction of others.

A Defendant "aids and abets" a person if the Defendant intentionally joins with the person to commit a crime.

A Defendant is criminally responsible for the acts of another person if the Defendant aids and abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it.

In other words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

You'll see that the Indictment charges that a crime was committed "on or about" a certain date. The Government doesn't have to prove that the offense occurred on an exact date. The Government only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

The word "willfully" means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids before you can find that the person acted "willfully," the person need not be aware of the specific law or rule that his conduct may be violating.

Each count of the indictment charges a separate crime against one or more of the Defendants. You must consider each crime and the evidence relating to it separately. And you must consider the case of each Defendant separately and individually. If you find a Defendant guilty of one crime, that must not affect your verdict for any other crime or any other Defendant.

I caution you that each Defendant is on trial only for the specific crimes charged in the indictment. You're here to determine from the evidence in this case whether each Defendant is guilty or not guilty of those specific crimes.

You must never consider punishment in any way to decide whether a Defendant is guilty. If you find a Defendant guilty, the punishment is for the Judge alone to decide later.

Your verdict, whether guilty or not guilty, must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you're judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and will speak for you in court.

A verdict form has been prepared for your convenience.

[Explain verdict]

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it, date it, and carry it. Then you'll return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the marshal. The marshal will bring it to me and I'll respond as promptly as possible – either in writing or by talking to you in the courtroom. But I caution you not to tell me how many jurors have voted one way or the other at that time.

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-20678-CR-MOORE/TORRES

UNITED STATES OF AMERICA

vs.

KENDRICK LOWE, TREVOR RANSFER, and ERIC HANNA,

Defendants.
_____/

VERDICT

We, the Jury in the above-captioned case, unanimously find as follows:

As to Count 1 of the Indictment, we find the defendant, KENDRICK LOWE,

GUILTY ✓

NOT GUILTY ____

As to Count 1 of the Indictment, we find the defendant, TREVOR RANSFER,

GUILTY ✓

NOT GUILTY ____

As to Count 1 of the Indictment, we find the defendant, ERIC HANNA,

GUILTY ✓

NOT GUILTY ____

As to Count 6 of the Indictment, we find the defendant, ERIC HANNA,

GUILTY ✓

NOT GUILTY ____

As to Count 7 of the Indictment, we find the defendant, ERIC HANNA,

GUILTY ✓

NOT GUILTY ____

If you find the defendant, ERIC HANNA, guilty of Count 7, you must make a further finding as follows:

Having found the defendant, ERIC HANNA, guilty of the offense charged in Count 7, we further find with respect to that Count that:

____ A firearm was used or carried in relation to the crime of violence; or

____ A firearm was possessed in furtherance of the crime of violence; or

✓ Both

As to Count 8 of the Indictment, we find the defendant, KENDRICK LOWE,

GUILTY ✓

NOT GUILTY ____

As to Count 8 of the Indictment, we find the defendant, TREVOR RANSFER,

GUILTY ✓

NOT GUILTY ____

As to Count 9 of the Indictment, we find the defendant, KENDRICK LOWE,

GUILTY ✓

NOT GUILTY ____

If you find the defendant, KENDRICK LOWE, guilty of Count 9, you must make a further finding as follows:

Having found the defendant, KENDRICK LOWE, guilty of the offense charged in Count 9, we further find with respect to that Count that:

____ A firearm was used or carried in relation to the crime of violence; or

____ A firearm was possessed in furtherance of the crime of violence; or

✓ Both

As to Count 9 of the Indictment, we find the defendant, TREVOR RANSFER,

GUILTY ✓

NOT GUILTY ____

If you find the defendant, TREVOR RANSFER, guilty of Count 9, you must make a further finding as follows:

Having found the defendant, TREVOR RANSFER, guilty of the offense charged in Count 9, we further find with respect to that Count that:

____ A firearm was used or carried in relation to the crime of violence; or

____ A firearm was possessed in furtherance of the crime of violence; or

✓ Both

As to Count 10 of the Indictment, we find the defendant, KENDRICK LOWE,

GUILTY ✓

NOT GUILTY ____

As to Count 10 of the Indictment, we find the defendant, TREVOR RANSFER,

GUILTY ✓

NOT GUILTY ____

As to Count 11 of the Indictment, we find the defendant, KENDRICK LOWE,

GUILTY ✓

NOT GUILTY ____

If you find the defendant, KENDRICK LOWE, guilty of Count 11, you must make a further finding as follows:

Having found the defendant, KENDRICK LOWE, guilty of the offense charged in Count 11, we further find with respect to that Count that:

____ A firearm was used or carried in relation to the crime of violence; or

____ A firearm was possessed in furtherance of the crime of violence; or

✓ Both

As to Count 11 of the Indictment, we find the defendant, TREVOR RANSFER,

GUILTY ✓

NOT GUILTY ____

If you find the defendant, TREVOR RANSFER, guilty of Count 11, you must make a further finding as follows:

Having found the defendant, TREVOR RANSFER, guilty of the offense charged in Count 11, we further find with respect to that Count that:

_____ A firearm was used or carried in relation to the crime of violence; or

_____ A firearm was possessed in furtherance of the crime of violence; or

__✓__ Both

As to Count 12 of the Indictment, we find the defendant, KENDRICK LOWE,

GUILTY ✓

NOT GUILTY _____

As to Count 12 of the Indictment, we find the defendant, TREVOR RANSFER,

GUILTY ✓

NOT GUILTY _____

As to Count 13 of the Indictment, we find the defendant, KENDRICK LOWE,

GUILTY ✓

NOT GUILTY _____

If you find the defendant, KENDRICK LOWE, guilty of Count 13, you must make a further finding as follows:

Having found the defendant, KENDRICK LOWE, guilty of the offense charged in Count 13, we further find with respect to that Count that:

_____ A firearm was used or carried in relation to the crime of violence; or

_____ A firearm was possessed in furtherance of the crime of violence; or

__✓__ Both

As to Count 13 of the Indictment, we find the defendant, TREVOR RANSFER,

GUILTY ✓

NOT GUILTY _____

If you find the defendant, TREVOR RANSFER, guilty of Count 13, you must make a further finding as follows:

Having found the defendant, TREVOR RANSFER, guilty of the offense charged in Count 13, we further find with respect to that Count that:

_____ A firearm was used or carried in relation to the crime of violence; or

_____ A firearm was possessed in furtherance of the crime of violence; or

__✓__ Both

As to Count 14 of the Indictment, we find the defendant, KENDRICK LOWE,

GUILTY ✓

NOT GUILTY ____

As to Count 14 of the Indictment, we find the defendant, TREVOR RANSFER,

GUILTY ✓

NOT GUILTY ____

As to Count 14 of the Indictment, we find the defendant, ERIC HANNA,

GUILTY ✓

NOT GUILTY ____

As to Count 15 of the Indictment, we find the defendant, KENDRICK LOWE,

GUILTY ✓

NOT GUILTY ____

If you find the defendant, KENDRICK LOWE, guilty of Count 15, you must make a further finding as follows:

Having found the defendant, KENDRICK LOWE, guilty of the offense charged in Count 15, we further find with respect to that Count that:

____ A firearm was used or carried in relation to the crime of violence; or

____ A firearm was possessed in furtherance of the crime of violence; or

✓ Both

As to Count 15 of the Indictment, we find the defendant, TREVOR RANSFER,

GUILTY ✓

NOT GUILTY ____

If you find the defendant, TREVOR RANSFER, guilty of Count 15, you must make a further finding as follows:

Having found the defendant, TREVOR RANSFER, guilty of the offense charged in Count 15, we further find with respect to that Count that:

____ A firearm was used or carried in relation to the crime of violence; or

____ A firearm was possessed in furtherance of the crime of violence; or

✓ Both

As to Count 15 of the Indictment, we find the defendant, ERIC HANNA,

GUILTY ✓

NOT GUILTY ____

If you find the defendant, ERIC HANNA, guilty of Count 15, you must make a further finding as follows:

Having found the defendant, ERIC HANNA, guilty of the offense charged in Count 15, we further find with respect to that Count that:

_____ A firearm was used or carried in relation to the crime of violence; or

_____ A firearm was possessed in furtherance of the crime of violence; or

✓ Both

SO SAY WE ALL

Dated: 2/6/2012.
Miami, Florida

_____
SIGNATURE OF FOREPERSON

_____
PRINTED NAME OF FOREPERSON

A-5

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

ERIC HANNA

AMENDED JUDGMENT IN A CRIMINAL CASE
(To include Restitution)
Case Number - 1:11CR20678-06

USM Number: 97522-004

Counsel For Defendant: Gregory Samms
Counsel For The United States: Olivia Choe
Court Reporter: Judy Wolff

Date of Original Judgment: May 24, 2012
Reason for Amendment:
- ☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))
- ☐ Modification of Supervision Conditions (18 U.S.C. §3563(c) or 3583(e))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b)) 35(b)).
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- X Direct Stipulation to District Court Pursuant to 18 U.S.C. § 3663, 3663A and 3664

The defendant was found guilty as to Count(s) 1, 6, 7, 14 and 15 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18:1951(a)	Conspiracy to interfere with commerce by threats or violence (Hobbs Act)	June, 2011	1
18:1951(a) and 2	Interfering with commerce by threats or violence	April 26, 2011	6
18:924(c)(1)(A)(ii) and 2	Possession of a firearm in furtherance of a crime of violence	April 26, 2011	7
18:1951(a) and 2	Interfering with commerce by threats or violence	June 1, 2001	14
18:924(c)(1)(A)(ii) and 2	Possession of a firearm in furtherance of a crime of violence	May 15, 2011	15

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 was not named in Counts 2 through 5, 8 through 13 and 16 of the Indictment.

DEFENDANT: ERIC HANNA
CASE NUMBER: 1:11CR20678-06

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:
7/10/2012

K. Michael Moore

Digitally signed by K. Michael Moore
DN: cn=K. Michael Moore, o=USDC, ou=KMM, email=Moore@flsd.uscourts.gov, c=US
Date: 2012.07.10 19:28:28 -04'00'

K. MICHAEL MOORE
United States District Judge

July 10, 2012

DEFENDANT: ERIC HANNA
CASE NUMBER: 1:11CR20678-06

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **435 Months. This term consists of 51 months as to Counts 1, 6 and 14, to be served concurrently with each other, a consecutive term of 84 months as to Count 7, and a consecutive term of 300 months as to Count 15.**

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

1. Credit for time served from 6/1/2011
2. Designation close to South Florida, to be near family.
3. 500 Hour Intensive Substance Abuse Treatment Program, if and when eligible.

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: ERIC HANNA
CASE NUMBER: 1:11CR20678-06

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 Years. This term consists of concurrent terms of 3 years as to Counts 1, 6 and 14, and 5 years as to Counts 7 and 15.**

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 in a manner and frequency directed by the court or probation officer;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **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: ERIC HANNA
CASE NUMBER: 1:11CR20678-06

SPECIAL CONDITIONS OF SUPERVISION

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

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

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.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: ERIC HANNA
CASE NUMBER: 1:11CR20678-06

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
$500.00	N/A	$9,284.00

Restitution with Imprisonment

It is further ordered that the defendant shall pay restitution in the amount of **$9,284.00**. 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: ERIC HANNA
CASE NUMBER: 1:11CR20678-06

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 **$500.00** 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.

Doral Ale House	$ 8,534.00	Robert Davis, Montavis Middleton, Fabian Warren and Eric Hanna
Wendy's	$ 750.00	Robert Davis, Montavis Middleton, Kendrick Lowe and Trevor Ransfer and Eric Hanna

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.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-22354-MOORE/WHITE
(Underlying Criminal Case No. 11-CR-20678-MOORE)

ERIC HANNA,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

MOTION TO CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND MEMORANDUM OF LAW IN SUPPORT

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

1. On February 6, 2012, Eric Hanna was convicted of two counts of Hobbs Act Robbery and one count of conspiracy to commit Hobbs Act Robbery, in violation of 18 U.S.C. 1951(a) (Counts 1, 6 and 14), and two counts of using a firearm during and in relation to a "crime of violence," in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Counts 7 and 15).

2. On May 24, 2012, this Court sentenced Mr. Hanna to 51 months as to the Hobbs Act counts (Counts 1, 6 and 14) to run concurrently with each other, and 84 months on Count 7 and 300 months on Count 15, the § 924(c) counts, to run consecutively to each other and to the 51 months imposed on Counts 1, 6, and 14, for a total sentence of 435 months.

3. Mr. Hanna 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.

4. Application of *Johnson* to this case demonstrates that Mr. Hanna is actually innocent of Counts 7 and 15, the § 924(c) counts, because Hobbs Act Robbery no longer qualifies as a predicate "crime of violence."

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

PROCEDURAL HISTORY

On September 29, 2011, Eric Hanna was indicted with one count of conspiracy to commit Hobbs Act robbery (Count 1), two counts of Hobbs Act robbery (Counts 6 and 14) and two counts of possessing a firearm in relation to a crime of violence pursuant to 18 U.S.C. § 924(c) (Counts 7 and 15). [Cr. D.E. 3].[1] Mr. Hanna proceeded to trial and was found guilty of all five counts on February 6, 2012. [Cr. D.E. 231].

On May 24, 2012, this Court sentenced Mr. Hanna to 51 months as to the Hobbs Act Robbery counts (Counts 1, 6 and 14) to run concurrently with each other, and 84 months on Count 7 and 300 months on Count 15, the § 924(c) counts, to run consecutively to each other and to the 51 months imposed on Counts 1, 6, and 14, for a total sentence of 435 months. [Cr. D.E. 306]. The judgment was amended on July 10, 2012 to include $9,284.00 in restitution. [Cr. D.E. 330].

Mr. Hanna appealed the judgment and sentence. The mandate affirming the judgment and sentence issued on June 5, 2014. [Cr. D.E. 453]. Mr. Hanna filed his first motion to vacate, set aside or correct his sentence on June 21, 2016. [Cr. D.E. 528]. In accordance with the Court's order, this amended motion is filed on Mr. Hanna's behalf. [Civ. D.E. 6 at 6].

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[1] References to docket entries in the underlying criminal case will be denoted with the abbreviation Cr. and references to civil docket entries in this case will be denoted with the abbreviation Civ.

GROUNDS FOR RELIEF

Eric Hanna is actually innocent of his § 924(c) convictions and sentences. As an initial matter: Mr. Hanna's claim is cognizable on collateral review; *Johnson* applies retroactively to this case; and Mr. Hanna's claim is timely.

I. Mr. Hanna's Claim is Cognizable Under § 2255

Title 28 U.S.C. § 2255(a) authorizes a federal prisoner claiming "that [his] sentence was imposed in violation of the Constitution . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). Mr. Hanna claims that his § 924(c) conviction and resultant consecutive sentence violate due process. This constitutional claim is cognizable in a § 2255 motion under § 2255(a).

In addition, the Supreme Court has squarely held that, where a defendant is convicted and punished for an offense that the law does not make criminal, he has a claim that is cognizable under 28 U.S.C. § 2255. *Davis v. United States*, 417 U.S. 333, 346-47 (1974) ("If this contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and present(s) exceptional circumstances that justify collateral relief under s 2255. Therefore, although we express no view on the merits of the petitioner's claim, we hold that the issue he raises is cognizable in a s 2255 proceeding.") (quotation marks omitted).

II. Mr. Hanna's Motion is Timely

As relevant here, § 2255 imposes a one-year statute of limitations that runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). That date runs from the date the Supreme Court recognizes the new right. *Dodd v. United States*, 545 U.S. 343, 360 (2005).

Mr. Hanna's motion was timely under § 2255(f)(3). In declaring the ACCA's residual clause unconstitutionally vague, *Johnson* recognized a new right because that result was not "dictated by precedent" at the time Mr. Hanna's conviction became final. *See Howard v. United States*, 374 F.3d 1068, 1073–74 (11th Cir. 2004). To the contrary, the Supreme Court itself, as well as the Eleventh Circuit, had repeatedly rejected vagueness challenges to the residual clause. *Sykes v. United States*, 564 U.S. 1 (2011); *James v. United States*, 550 U.S. 192, 210 n. 6 (2007); *United States v. Gandy*, 710 F.3d 1234, 1239 (11th Cir. 2013). And, as explained above, *Johnson* applies retroactively because it is a substantive rule.

Therefore, Mr. Hanna had one year from the date *Johnson* was decided—June 26, 2016—to seek relief. *See Dodd v. United States*, 545 U.S. 343, 360 (2005). Thus, his motion, which was filed on June 21, 2016, was timely under § 2255(f)(3).

III. *Johnson* Applies Retroactively to this Case

In *Welch v. United States*, the Supreme Court squarely held that "*Johnson* announced a substantive rule that has retroactive effect in cases on collateral

review." 578 U.S. at __, 136 S. Ct. 1257, 1268 (2016); *see id.* at 1265 ("the rule announced in *Johnson* is substantive"); *Mays v. United States*, 817 F.3d 728, 736 (11th Cir. 2016) (concluding even before *Welch* that "*Johnson* is retroactive because it qualifies as a substantive rule . . . since it narrows the class of people that may be eligible for a heightened sentence under the ACCA."). And the Supreme Court has held that decisions narrowing the reach of § 924(c) are substantive rules that apply retroactively. *Bousley v. United States*, 523 U.S. 614, 620-21 (1998). Thus, there can be little dispute that *Johnson* applies retroactively to this case.

IV. The Categorical and Modified Categorical Approach

Before explaining why Mr. Hanna 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.

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."

V. In Light of *Johnson*, Mr. Hanna'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. Hanna was convicted of a violation of 18 U.S.C. § 924(c) in Counts 7 and 15. § 924(c)(1) provides:

> [A]ny person who, 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 . . . In the case of a second or subsequent conviction under this subsection, the person shall be sentenced to a term of imprisonment of not less than twenty 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. Hanna's § 924(c) convictions for using, carrying and possessing a "crime of violence" is void because the "crime of violence" element cannot be satisfied here. The predicate offense of Hobbs Act robbery does not qualify as a "crime of violence" 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. Hanna's convictions for Hobbs Act robbery are categorically overbroad vis-à-vis an offense within §924(c)(3)(A)'s elements clause. Therefore, the "crime of violence" element of § 924(c) cannot be sustained, and it is now clear that Mr. Hanna's conviction and consecutive sentence were unconstitutional and must be vacated. Mr. Hanna is actually innocent of Counts 7 and 15 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 vague 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. Hanna'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. Hobbs Act Robbery Categorically Fails to Qualify as a "Crime of Violence" Under the Elements Clause

The Hobbs Act statute, 18 U.S.C. § 1951, in pertinent part, defines the term "robbery" in subsection (b)(1) to mean:

> 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, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

As detailed *supra*, in determining whether an offense qualifies as a "crime of violence" under the elements clause, sentencing courts must employ the categorical approach. *Descamps*, 133 S. Ct. at 2283; *Estrella*, 758 F.3d at 1244-1245. And application of the post-*Descamps*, elements-driven categorical approach to Hobbs Act robbery yields the conclusion that it is *not* a "crime of violence" under the elements clause in § 924(c)(3)(A) for multiple reasons.

Notably, by its terms, Hobbs Act robbery under 18 U.S.C. § 1951 can be committed by putting one in fear of future injury to his person or property. And this Court's pattern jury instructions make clear that Hobbs Act robbery is an indivisible offense. *See* 11th Cir. Pattern Jury Instr. 70.3 (2010) (listing as the second, indivisible element of the offense – without any bracketed alternatives – that the government must prove beyond a reasonable doubt that "the Defendant took the property against the victim's will by using actual or threatened force, or

violence, or causing the victim to fear harm, either immediately or in the future"). For the reasons set forth below, the statute does *not* require the threat of *violent physical force* against persons or property in every case. And therefore, a conviction under § 1951 does not qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A) under current law.

As a threshold matter, because Hobbs Act robbery can be accomplished by placing somebody in fear of injury to his *property*, it does not require the use of violent physical force in every case. Notably, "[t]he concept of 'property' under the Hobbs Act is an expansive one" that includes "*intangible assets*, such as rights to solicit customers and to conduct a lawful business." *United States v. Arena*, 180 F.3d 380, 392 (2d. Cir. 1999); *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003) (emphasis added). *See also* 11th Cir. Pattern Jury Instruction 70.3 ("Property includes . . . intangible rights that are a source or element of income or wealth"); *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that the Circuits "are unanimous in extending Hobbs Act to protect intangible as well as tangible property"). For example, Hobbs Act robbery can be committed via threats to cause a devaluation of some economic interest. *United States v. Iozzi,* 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction when boss threatened "to slow down or stop construction projects unless his demands were met"). Such threats to economic interests are certainly *not* threats of "violent force." And even where a Hobbs Act robbery is committed by "causing the victim to fear

harm, either immediately or in the future," this Court has explained in its pattern instruction that the term "fear" "includes the fear of financial loss as well as fear of physical violence."

Second, even if the "fear of injury" aspect of the statute *required* placing the victim in fear of "physical violence" and therefore, bodily injury – which it certainly does *not* in every case – federal cases interpreting the analogous "intimidation" element in the federal bank robbery statute (18 U.S.C. § 2113(a)) compel the conclusion that the statute is overbroad vis-a-vis an offense within § 924(c)(3)(A)'s elements clause. Notably, federal bank robbery may be accomplished by "intimidation," which means placing someone in fear of bodily harm. And notably, the standard is an objective, "reasonable person" test. *See United States v. Woodrop*, 86 F.3d 359, 364 (4th Cir. 1996) ("intimidation" under federal bank robbery statute means "an ordinary person in the [victim's position] reasonably could infer a threat of *bodily harm* from the defendant's acts") (emphasis added); *see also United States v. Pickar*, 616 F.3d 821, 825 (2010) (same); *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (same); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (same); *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) (same).

"Intimidation" is satisfied under the bank robbery statute "whether or not the defendant actually intended the intimidation," as long as "an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts." *Woodrup*, 86 F.3d at 36. Indeed, "[w]hether a particular act

constitutes intimidation is viewed objectively, and a defendant can be convicted under [the federal bank robbery statute] even if he did not intend for an act to be intimidating." *Kelley*, 412 F.3d at 1244 (internal citation omitted). *See also United States v. Yockel*, 320 F.3d 818, 821 (8th Cir. 2003) (upholding bank robbery conviction even though there was no evidence that defendant intended to put teller in fear of injury: defendant did not make any sort of physical movement toward the teller and never presented her with a note demanding money, never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) (same). In other words, a defendant may be found guilty of federal bank robbery even though he did not intend to put another in fear of injury. It is enough that the victim reasonably fears injury from the defendant's actions – whether or not the defendant actually *intended* to create that fear.

But the elements clause in § 924(c)(3)(A) requires that a defendant *intentionally* place another in fear of injury. *See Garcia v. Gonzalez*, 455 F.3d 465, 468 (4th Cir. 2006) (analyzing 18 U.S.C. § 16(a)'s identical elements clause, and holding that an offense can only constitute a "crime of violence" under the [elements] clause if it has an element that requires an "*intentional* employment of physical force [or threat of physical force]"). Due to the lack of this intent, federal bank robbery criminalizes conduct that does not require an intentional threat of physical force. And for the same reason that federal bank robbery therefore squarely fails to qualify as a "crime of violence," *see id.*, the "fear of injury"

component of the Hobbs Act statute renders that statute as well categorically overbroad.

Finally, even if the statute required the causation or threat of physical injury to the person of another – which again, it does *not* – the statute would still not necessarily require the use or threatened us of any physical force, let alone violent physical force. *See, e.g., United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012) (evaluating Cal. Penal Code § 422(a) and reasoning that "[o]f course, a crime may *result* in death or serious injury without involving *use* of physical force"); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 194 (2d Cir. 2003) (noting that "there is a difference between the causation of an injury . . . and an injury's causation by the use of physical force"); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (holding that statute criminalizing threatening to commit a crime which will result in death or great bodily injury to another person is not a crime of violence because it does not necessarily involve the use of force); *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005) (explaining that although Colorado assault statute required causation of bodily injury, imposing injury does not "necessarily include the use or threatened use of 'physical force' as required by the Guidelines").

As the Second Circuit has explained, "human experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient" or someone who causes physical impairment by placing a tranquilizer in the victim's drink.

Chrzanoski, 327 F.3d. at 195-96. Likewise, the Tenth Circuit has reasoned that "several examples [exist] of third degree assault that would not use or threaten the use of physical force: . . . intentionally placing a barrier in front of a car causing an accident, or intentionally exposing someone to hazardous chemicals." *Perez-Vargas*, 414 F.3d at 1286. The same is true of Hobbs Act robbery. It, too, can be accomplished without using or threatening to use physical force.

In short, the full range of conduct covered by the Hobbs Act robbery statute does not require the use or threat of "violent force" in every case. Accordingly, such a conviction cannot qualify as a "crime of violence" under the elements clause in 18 U.S.C. § 924(c)(3)(A).[2] Mr. Hanna's § 924(c) convictions in Counts 7 and 15 should be vacated since the residual clause is now unconstitutionally vague and void.

If Mr. Hanna's § 924(c) convictions on Counts 7 and 15 are vacated, the Court must also: (1) vacate the 84- month consecutive sentence imposed on Count 7 and

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[2] Although the Eleventh Circuit recently held that a conviction for Hobbs Act robbery "clearly qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)," that was only in the context of a *pro se* application for leave to file a second or successive § 2255 motion. *In re Fleur*, ___ F.3d ___, 2016 WL 3190539 at *3 (11th Cir. June 8, 2016). Nevertheless, even if that holding were to apply to a different applicant's ***first*** § 2255 motion – which is unclear – the law is in flux as to the issue since the reasoning and holding in *Fleur* directly conflict with that in *In re Pinder*, ___ F.3d ___, 2016 WL 38081954 at *2 (11th Cir. June 1, 2016)(recognizing that whether a Hobbs Act robbery conviction is categorically a "crime of violence" after *Johnson* remained an open question in this Circuit that should *not* be determined at the authorization stage). A subsequent Eleventh Circuit panel has now confirmed in a published decision that the approach in *Pinder* was correct, since resolution of an issue of first impression at the authorization stage is wrong, and whenever two circuit precedents conflict or are in "tension," the earliest case controls. *In re Rogers*, ___ F.3d ___, 2016 WL 3362067 at *2 n. 6(11th Cir. June 17, 2016).

the 300-month sentence imposed on Count 15, as those sentences were mandated by the § 924(c) convictions, *see* 18 U.S.C. § 924(c)(1)(A), and (2) modify the term of supervised release, given that as to the remaining counts, Counts 1, 6 and 14, the Court may only impose a term of supervised release of up to three years. *See* 18 U.S.C. § 3583(a), (b)(2).

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*, and a Hobbs Act robbery in violation of 18 U.S.C. § 1951 does not qualify as a "crime of violence" under § 924(c)(3)(A). Mr. Hanna therefore respectfully requests that the Court grant this § 2255 motion, vacate his conviction pursuant to 18 U.S.C. § 924(c) and resultant 384-month consecutive sentence, and modify his term of supervised release to a term of less than three years.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on **September 16, 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 or *pro se* parties either 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.

/s/ Rainbow Willard

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CIV-22354-MOORE
(11-CR-20678-MOORE)
MAGISTRATE JUDGE P.A. WHITE

ERIC HANNA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT OF MAGISTRATE JUDGE

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence entered in Case No. 11-Cr-20678-Moore.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the motion (CV-DE#1), Movant's counseled memorandum of law in support thereof (CV-DE#10), the government's response (CV-DE#11), Movant's reply (CV-DE#12), and all pertinent portions of the underlying criminal file.

Claims

Movant's sole claim in this proceeding is his that his § 924(c) convictions are no longer lawful after the Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015).[1]

[1]As everyone is well-aware, 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

Procedural History

Movant Eric Hanna was charged by indictment with conspiracy to commit obstruction of interstate commerce via robbery ("Hobbs Act robbery") in violation of 18 U.S.C. § 1951(a), two substantive counts of Hobbs Act robbery, also in violation of 18 U.S.C. § 1951(a), and two counts of brandishing a firearm in furtherance of a crime of violence, specifically each of the substantive Hobbs Act robberies, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (CR-DE#3).

Movant proceeded to trial, and was found guilty of each count of the indictment for which he was charged. (CR-DE#231). On May 24, 2012, Movant was sentenced to 435 months' imprisonment, to be followed by a five-year term of supervised release. (CR-DE#306).

Movant appealed his conviction to the Eleventh Circuit Court of Appeals, and then petitioned the United States Supreme Court for a writ of certiorari, which was on October 14, 2014. (See CR-DE#477). It is undisputed that neither on direct appeal, nor at any time during the pendency of the case in the District Court, did the Movant ever assert that Hobbs Act robbery did not qualify as a "crime of violence" capable of serving as a predicate offense for a § 924(c) offense.

Then, on June 16, 2016, Movant filed a pro se motion pursuant to 28 U.S.C. § 2255 arguing that, in light of Johnson v. United States, -- U.S. --, 125 S. Ct. 2551 (2015), his § 924(c) conviction was invalid and required to be vacated. (CV-DE#1).[2]

Constitution's guarantee of due process. In Welch v. United States, 136 S.Ct. 1257 (2016), the Supreme Court held that Johnson announced a substantive rule that applied retroactively on collateral review.

[2]Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); see also Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)(setting forth the "prison mailbox rule").

Timeliness

Pursuant to § 2255(f), a one-year period of limitation applies to motions under that section. The limitations period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2255(f).

Here, Movant's claim is that his companion Hobbs Act convictions no longer qualify as "crimes of violence" for purposes of § 924(c) after the Supreme Court's decision in Johnson, supra, and that, therefore, he is actually innocent of the § 924(c) conviction. The government contends that, because Johnson allegedly does not apply to Movant's claim, the limitations period in this case runs pursuant to § 2255(f)(1) from the date on which his judgment of conviction became final, in which case the instant motion is indisputably time-barred. The Court finds this argument unpersuasive. See Swokla v. Paramo, No. C 14-2635 WHA, 2015 WL 3562574, at *2 (N.D. Cal. June 8, 2015)(limitations period runs from the date that the Supreme Court recognized the "right asserted," and does not turn on whether the claim ultimately fails on the merits). Rather, the Court concludes that, because Movant

is raising a claim under Johnson, the statute of limitations for this claim runs pursuant to § 2255(f)(3) from the date of Johnson. See Dodd v. United States, 545 U.S. 353 (2005). Johnson was of course decided on June 25, 2015, and so Movant had until June 26, 2016 to file a timely Johnson claim.[3] Here, as set forth above, Movant filed the instant motion to vacate on June 16, 2016 pursuant to the "prison mailbox rule." Therefore, Movant's challenge to his § 924(c) convictions and sentences on the basis of Johnson are timely.

Procedural Bar

The government argues that Movant's claims are procedurally barred. Specifically, the government argues that Movant failed to raise his Johnson claim either at trial or on direct appeal, and that Movant cannot satisfy either the cause-and-prejudice or the actual innocence exceptions to the procedural default rule.

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding; Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)(citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999).

[3]June 25, 2016 fell on a weekend, so the next business was June 26, 2016.

Cause for not raising a claim can be shown when a claim "is so novel that its legal basis [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

If a petitioner is unable to show cause and prejudice, yet another avenue existing 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) That is precisely the circumstance here. Johnson overruled precedent, announced a new rule, and the Supreme Court

gave retroactive application to that new rule. However, no actual prejudice that would result from finding a procedural default here because, as set forth *infra*, regardless of whether Johnson applies to § 924(c)'s residual clause, Movant's companion charges for substantive Hobbs Act robbery categorically qualify as "crimes of violence" under §924(c)'s elements clause. Accordingly, Movant cannot establish cause-and-prejudice overcome the procedural bar.[4]

Discussion[5]

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

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[4]And assuming without deciding that the rule of McKay v. United States, 657 F.3d 1190 (11th Cir. 2011) does not extend to cases where, as here, a § 2255 Movant challenges the entire sentencing scheme itself that has been deemed unconstitutional, Movant would not be able to establish actual innocence of his § 924() conviction for the same reason; that is, because his substantive Hobbs Act robbery convictions still categorically qualify as "crimes of violence" for purposes fo § 924(c). Stated another way, Movant's substantive Hobbs Act convictions still render him guilty of committing the charged § 924(c) firearms offense during and in relation to a "crime of violence."

[5]Because, as set forth above, the Court's conclusion that Movant's claims are procedurally barred turns on whether Movant's companion charges for Hobbs Act robbery still categorically qualify as "crimes of violence" after Johnson, the Court must address this issue. However, since the Court concludes that they do, the Court need not address the unsettled question of whether Johnson invalidates § 924(c)'s residual clause. See United States v. Mottaz, 476 U.S. 834, 848, n.11, 106 S. Ct. 2224, 2233, 90 L. Ed. 2d 841 (1986)("In light of our conclusion that the District Court's jurisdiction . . . rested on § 1346(f) . . . , we need not reach the difficult and unsettled question of how an appeal raising both issues committed to the Federal Circuit's jurisdiction and issues outside its jurisdiction is to be treated."); see also Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.").

property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). As such, § 924(c)(3) contains a "residual clause," very similar to the residual clause declared unconstitutionally vague in Johnson.[6]

In the context of the ACCA's definition of "violent felony," the phrase "physical force" in paragraph (i) "means *violent* force--that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010) ("Johnson I"). As the Supreme Court has noted, the term "violent felony" has been defined as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a deadly weapon, [and] calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." Id. (internal quotations and citations omitted); see also Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 383, 160 L. Ed. 2d 271 (2004) (stating that the statutory definition of "crime of violence" in 18 U.S.C. § 16, which is very similar to § 924(e)(2)(B)(i) in that it includes any felony offense which has as an element the use of physical force against the person of another, "suggests a category of violent, active crimes . . ."). In addition, the Supreme Court has stated that the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" the phrase "use . . . of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9-10; see also United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally, and could

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

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. And 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 past conviction is for a "violent felony" under the ACCA (and thus whether a conviction qualifies as a "crime of violence" for purposes of § 924(c), assuming 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 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.

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

In sum, when determining whether a conviction qualifies as a predicate offense, the courts can only look to the elements of the statute of the conviction, whether assisted by Shepard documents or not, and not to the facts underlying the defendant's prior conviction. See Descamps, 133 S.Ct. 2283-85. And 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).

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

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

doing, addressed how federal courts are to make the threshold determination of whether an alternatively-phrased statute sets forth alternative elements (in which case the statute would be divisible and the modified categorical approach would apply to determine which version of the statute the defendant was convicted of violating), or merely lists alternative means of satisfying one element of an indivisible statute (in which case the categorical approach would apply). Id. at 2256-57.

Here, the Court need not conduct the above analysis to determine whether, as a threshold matter, the substantive Hobbs Act statute that Movant was alleged to have violated is divisible or indivisible. Similarly, the Court need not conduct the above analysis, regardless of whether it may employ a modified categorical approach or is limited to the categorical approach, to determine whether Movant's companion charges for substantive Hobbs Act still qualify as a "crimes of violence" for purposes of § 924(c) after Johnson. That is because the Eleventh Circuit has resolved this issue. Specifically, in In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016), in the context of an application for leave to file a second or successive motion under § 2255, the Court considered whether Johnson impacts a robbery charge under the Hobbs Act, 18 U.S.C. § 1951(a), and a separate firearm charge during and in relation to a "crime of violence" in violation of § 924(c). The Eleventh Circuit denied the application, stating:

> But we need not decide, nor remand to the district court, the § 924(c)(3)(B) residual clause issue in this particular case because even if Johnson's rule about the ACCA residual clause applies to the § 924(c)(3)(B) residual clause, [defendant's] claim does not meet the statutory criteria for granting this § 2255(h) application. This is because [defendant's] companion conviction for Hobbs Act robbery, which was charged in the same indictment as the § 924(c) count, clearly qualifies as a "crime of violence" under the use-of-force clause in § 924(c)(3)(A).

824 F.3d at 1340.

Movant argues that Saint Fleur wholly fails to conduct the requisite analysis under Taylor and its progeny for determining whether Hobbs Act robbery in fact still qualifies after Johnson. See Scalia, Antonin, J., The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1177 (1989) (lower courts are not only bound by the narrow "holdings" of higher court decisions, but also by their "mode of analysis"). Movant also argues that if this Court conducts the proper analysis, it will conclude that substantive Hobbs Act robbery does not qualify as a crime of violence for purposes of § 924(c). That may well be true. The problem is that it would be futile for the Court to conduct any such analysis, because the Eleventh Circuit has already decided the issue in Saint Fleur, supra.

Movant argues that the only question presented in an application for leave to file a second or successive motion under § 2255 is whether the applicant has made the requisite *prima facie* showing sufficient to satisfy one of the gatekeeping provisions of the AEDPA's restrictions on such filings. It is true that these applications are indeed frequently filed by pro se litigants, the Court frequently does not have a full record, and such applications must be resolved within a tight 30-day window. Indeed, there are numerous cases where judges on the Eleventh Circuit have been troubled about how wrong many their own decisions that have gone beyond determining whether the applicant has made a *prima facie* showing have been in the deluge of Johnson-based applications.

Movant also argues that, regardless of what Saint Fleur says about Hobbs Act robbery, that this Court must follow In re Pinder, 824 F.3d 977, 978 (11th Cir. 2016) under the prior panel precedent rule. In Pinder, the Eleventh Circuit concluded that an applicant seeking authorization to file a second or successive § 2255 motion had made a *prima facie* showing that his claim contained a new rule

of constitutional law, made retroactive to cases on collateral review by the Supreme Court, in a case wherein the defendant's claim was that he was subjected to an unlawfully enhanced penalty under § 924(c) in light of Johnson. 824 F.3d at 979. In so doing, the Court explained that the law was unsettled as to whether Johnson similarly invalidated § 924(c)'s residual clause, and noted:

> Pinder's § 924(c) sentence appears to have been based on a conviction for 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." This Court "has not decided that a Hobbs Act robbery categorically qualifies as a 'crime of violence' for the purposes of § 924(c)" after Johnson. We also haven't decided this question for conspiracy to commit Hobbs Act robbery. At least two district courts have held that conspiracy to commit Hobbs Act robbery is not a "crime of violence" after Johnson. We leave the merits of Pinder's claim to the District Court to decide in the first instance.

824 F.2d at 979, n.1 (internal citations omitted).

Movant thus argues that this is the correct approach; that is, that the Eleventh Circuit should have limited itself in Saint Fleur simply to a determination of whether Saint Fleur had made a *prima facie* showing, and left it for the district court to decide in the first instance whether Saint Fleur's Hobbs Act robbery categorically qualified as "crime of violence." Again, that may be true. The problem is that the Eleventh Circuit did not do that. Rather, as set forth above, in Saint Fleur the Eleventh Circuit went further and determined that Hobbs Act robbery does qualify.

It is axiomatic that federal district courts in the are bound by the precedent of their circuit. See In re Hubbard, 803 F.3d 1298, 1309 (11th Cir. 2015), *citing* Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir.1985). Courts are, however, generally only

bound by the holdings of cases. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129, 134 L. Ed. 2d 252 (1996). Dicta, conversely, is "not binding on anyone for any purpose." Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir.2010). As the Eleventh Circuit has noted, "dicta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us.'" United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (citations omitted). The holding of a case, on the other hand, is "comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.'" Id. Finally, under the prior panel precedent rule, the holding of a prior panel of the Eleventh Circuit is binding on all subsequent panels, unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit sitting en banc. United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008)(citations omitted).[8]

Here, regardless of whether the Eleventh Circuit in Saint Fleur should have undertaken a determination of whether Saint Fleur's Hobbs Act conviction qualified as a "crime of violence," the fact remains that it did. Moreover, the Court's conclusion that Saint Fleur's Hobbs Act conviction did qualify as a "crime of violence" was necessary to the result in that case, since his application for leave to file a second or successive § 2255 motion was denied on that basis. As such, Saint Fleur holds that Hobbs Act robbery is a "crime of violence" for purposes of § 924(c), see Kaley, 579 F.3d at 1253 n.10 (the holding of a case is comprised both of the result of the case and those portions of the opinion necessary to that result), and this Court is thus bound by it. In

[8]"While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point." Garrett v. University of Alabama at Birmingham Bd. of Trustees, 344 F.3d 1288, 1292 (11th Cir.2003).

re Hubbard, 803 F.3d at 1309 (federal district courts in the are bound by the precedent of their circuit).

Finally, any reliance on Pinder and the prior panel precedent rule is unavailing. As set forth above, this rule provides that the holding of a prior panel of the Eleventh Circuit is binding on all subsequent panels, unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit sitting en banc. Archer, 531 F.3d at 1352. It does not authorize a federal district court to disregard binding precedent that is directly on point, simply because the Court concludes that the Eleventh Circuit took a better general approach in a factually inapposite case. Specifically, as set forth above, Pinder addressed *conspiracy* to commit Hobbs Act robbery, whereas here Movant had companion charges of substantive Hobbs Act robbery. Therefore, Pinder is not even in conflict with Saint Fleur in the first place. See In re Gordon, 827 F.3d 1289, 1294 (11th Cir. 2016) ("The applicant's argument that Saint Fleur . . . conflicts with Pinder fails because the companion conviction in Pinder was conspiracy to commit Hobbs Act robbery, while Saint Fleur . . . substantive Hobbs Act robbery . . . Indeed this Court specifically distinguished Pinder in . . . Saint Fleur . . . Therefore, we reject the claim that under the prior panel precedent rule, Pinder, not Saint Fleur . . . control[s] . . .").

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), Rules Governing Section 2255 Proceedings for the United States District Courts

(hereinafter "Habeas Rules"). 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). 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's claims are barred on procedural grounds, 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 debatable the correctness of the court's procedural rulings. Accordingly, a certificate of appealability is not warranted. See Slack, 529 U.S. at 484-85 (each component of the §2253(c) showing is part of a threshold inquiry); see also Rose, 252 F.3d at 684.

Conclusion

Based upon the foregoing, it is recommended that the motion to vacate be DENIED, and that no certificate of appealability be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections with regard to the denial of a certificate of appealability.

SIGNED this 28th day of April, 2017.

UNITED STATES MAGISTRATE JUDGE

cc: Elizabeth Rainbow Willard
Federal Public Defender
150 West Flagler Street, Suite 1700
Miami, FL 33130

Jonathan Kobrinski
U.S. Attorney's Office
Miami, FL 33131

		Attorney Jonathan Kobrinski added to party United States of America(pty:dft). (Kobrinski, Jonathan) (Entered: 08/04/2016)
08/05/2016	9	NOTICE of Attorney Appearance by Elizabeth Rainbow Willard on behalf of Eric Hanna. Attorney Elizabeth Rainbow Willard added to party Eric Hanna (pty:pla). (Willard, Elizabeth) (Entered: 08/05/2016)
09/16/2016	10	SUPPLEMENT to 1 Motion (Complaint) to Vacate/Set Aside/Correct Sentence (2255) *and Memorandum of Law in Support* by Eric Hanna (Willard, Elizabeth) (Entered: 09/16/2016)
09/21/2016	11	ANSWER to Complaint by United States of America. (Kobrinski, Jonathan) (Entered: 09/21/2016)
09/30/2016	12	REPLY *in Support of Motion to Vacate, Correct or Set Aside* by Eric Hanna. (Willard, Elizabeth) (Entered: 09/30/2016)
04/28/2017	13	REPORT AND RECOMMENDATIONS on 28 USC 2255 case re 1 Motion (Complaint) to Vacate/Set Aside/Correct Sentence (2255) filed by Eric Hanna ; Recommending that the motion to vacate be DENIED, and that no certificate of appealability be issued. Objections to R&R due by 5/12/2017. Signed by Magistrate Judge Patrick A. White on 4/28/2017. (br) (Entered: 04/28/2017)
05/12/2017	14	OBJECTIONS to 13 Report and Recommendations by Eric Hanna. (Willard, Elizabeth) (Entered: 05/12/2017)
06/01/2017	15	PAPERLESS ORDER ADOPTING REPORT AND RECOMMENDATION 13 . THIS CAUSE came before the Court upon Petitioner Eric Hanna's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence 1 . THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, who issued a Report 13 recommending that the Motion 1 be denied and that no certificate of appealability issue. Petitioner filed Objections 14 . The matter is now ripe for review. Petitioner argues that the Supreme Court's holding in Johnson v. United States, 135 S. Ct. 2551 (2015), which invalidated the ACCAs residual clause, similarly invalidates the residual clause of 18 U.S.C. Section 924(c). Thus, Petitioner argues, his underlying convictions (Counts 7 and 15) under Section 924(c) for brandishing a firearm in furtherance of a "crime of violence" should be set aside because Hobbs Act Robbery should not qualify as a crime of violence. And therefore, Petitioner argues, he is actually innocent. See, e.g., Supporting Brief (ECF No. 10) at 2, 6. Magistrate Judge White found that although Petitioner's Section 2255 Motion was timely filed, Petitioner was procedurally barred from raising this challenge. Specifically, Judge White found that Petitioner was barred due to his failure to assert the challenge at trial or direct appeal. Judge White further found that Petitioner could not overcome this procedural bar because (1) to qualify as a claim of actual innocence requires proof of factual innocence, not just legal innocence, and (2) Petitioner could not establish prejudice in light of his companion charge (Hobbs Act robbery), which the Eleventh Circuit has held qualifies as a "crime of violence" under Section 924(c)'s elements clause. Judge

White then recommended that no certificate of appealability should issue because reasonable jurists would not debate the above findings.

First, Petitioner objects to Judge White's reliance on In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016) to establish that the Hobbs Act robbery qualifies as a crime of violence, instead of the Court conducting its own "categorical analysis" of the statute as required by Mathis v. United States, 136 S. Ct. 2243 (2016). See Objections (ECF No. 14) at 5-6. In so doing, the Petitioner re-lodges arguments which he had previously proffered and which the Report already addressed and rejected. See Report (ECF No. 13) at 10-14. The Court finds that these objections are fully addressed in Judge White's Report.

Despite Plaintiff's arguments to the contrary, this Court is bound to apply the Eleventh Circuit's prior holdings. See In re Hubbard, 803 F.3d 1298, 1309 (11th Cir. 2015) (describing " the fundamental rule that courts of this circuit are bound by the precedent of this circuit"); see also United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (The holding of a case is comprised both of the result of the case and those portions of the opinion necessary to that result by which we are bound.). The Court is not persuaded by Plaintiff's argument that the Eleventh Circuit's holdings in "successive" Section 2255 cases are not binding. See Objections (ECF No. 14) at 1-4 (citing Jordan v. Secy Dept of Corr., 485 F.3d 1351, 1358 (11th Cir. 2007); In re Jackson,826 F.3d 1343, 1351 (11th Cir. June 24, 2016); In re Rogers, 825 F.3d 1335, 1340 (11th Cir. June 17, 2016); In re Gomez, 830 F.3d 1225, 1228 (11th Cir. 2016)). Petitioner misconstrues the quotations he pulled from these cases, which merely stand for the proposition that a district court, in assessing the merits of habeas petition, does not need to defer to the Court of Appeals' prima facie determinations authorizing a successive petition because "in issuing a § 2244(b)(3)(A) order authorizing the filing of a second or successive petition in the district court, [the Court of Appeals] do[es] not make any factual determinations." See Jordan, 485 F.3d at 1357; see also In re Jackson, 826 F.3d at 1351; In re Rogers, 825 F.3d at 1340; In re Gomez, 830 F.3d at 1228.

In Saint Fleur, the Eleventh Circuit found that Defendant's companion conviction for Hobbs Act robbery clearly qualified as a crime of violence under the elements clause in Section 924(c)(3)(A). See In re Saint Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016). Judge White correctly noted that the Saint Fleur Court's conclusion that a Hobbs Act robbery conviction qualified as a "crime of violence" under the elements clause was necessary to determine the outcome in that case: holding that Saint Fleur's sentence would be valid even if Johnson invalidated the Section 924(c) residual clause. Therefore, the Eleventh Circuit's assessment that a Hobbs Act robbery is a "crime of violence" was part of the holding and, accordingly, is binding on this Court. Thus, Judge White was correct to conclude as it did: Petitioner did not establish prejudice because regardless of whether Johnson applies to Section 924(c)'s residual clause, Petitioner's companion charges for substantive Hobbs Act robbery still qualify as "crimes of violence" under Section 924(c)'s elements clause.

Second, Petitioner objects to Judge White's conclusion that no Certificate of

		Appealability should issue because "reasonable jurists can and do debate" whether Hobbs Act robbery is a crime of violence under Section 924(c)'s elements clause. See Objections (ECF No. 14) at 9-10. As discussed above, Petitioner's claims are barred on procedural grounds. "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. " Pio v. United States, No. 13-23666-CIV, 2014 WL 4384314, at *6 (S.D. Fla. Sept. 3, 2014) (quoting Rose v. Lee, 252 F.3d 676, 684 (4th Cir. 2001) (internal quotation marks omitted)). After reviewing the issues presented, the Court finds that reasonable jurists would not find debatable the correctness of the court's procedural rulings. Accordingly, a certificate of appealability is not warranted. Accordingly, UPON CONSIDERATION of the Report 13 , the Petition 1 ,Petitioner's Memoranda in Support 10 and in Reply 12 , the Government's Answer 11 , and after a de novo review of the record, it is hereby ORDERED AND ADJUDGED that the Petition 1 is DENIED, and that no certificate of appealability issue. It is further ORDERED AND ADJUDGED that Magistrate Judge White's Report and Recommendation 13 is ADOPTED with the exceptions of: the first sentence of the last paragraph on page 12, which should read "It is axiomatic that federal district courts in the Eleventh Circuit are bound by the precedent of this circuit"; and the first sentence of the first full paragraph on page 5, which should read, "If a petitioner is unable to show cause and prejudice, yet another avenue exists for obtaining review.... " The Clerk of the Court is instructed to CLOSE this case. All pending motions are DENIED AS MOOT. Signed by Chief Judge K. Michael Moore on 6/1/2017. (bvr) **NOTICE: If there are sealed documents in this case, they may be unsealed after 1 year or as directed by Court Order, unless they have been designated to be permanently sealed. See Local Rule 5.4 and Administrative Order 2014-69.** (Entered: 06/01/2017)
06/02/2017	16	Case No Longer Referred to Magistrate Judge Patrick A. White/Case Closed by the District Judge. Signed by Magistrate Judge Patrick A. White on 6/2/2017. (br) (Entered: 06/02/2017)
06/07/2017	17	Notice of Reassignment of Assistant Federal Public Defender by Brenda Greenberg Bryn on behalf of Eric Hanna. Attorney Elizabeth Rainbow Willard terminated.. Attorney Brenda Greenberg Bryn added to party Eric Hanna (pty:pla). (Bryn, Brenda) (Entered: 06/07/2017)
07/27/2017	18	Notice of Appeal as to 15 Order on Report and Recommendations,,,,,,,,,,,,,,,,,,,,,,,,,,,, by Eric Hanna. Filing fee $ 505.00. USA/FPD Filer - No Filing Fee Required. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered

No. 17-13441-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ERIC HANNA,
Petitioner/Appellant,

v.

UNITED STATES OF AMERICA,
Respondent/Appellee.

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

MOTION FOR CERTIFICATE OF APPEALABILITY BY APPELLANT ERIC HANNA

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

BRENDA BRYN
ASSISTANT FEDERAL PUBLIC DEFENDER
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THIS CASE IS ENTITLED TO PREFERENCE
(28 U.S.C. §2255 APPEAL)

CERTFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Eric Hanna v. United States of America
Case No. 17-13441-F

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Abrams, Stewart Glenn, Assistant Federal Public Defender

Bryn, Brenda, Assistant Federal Public Defender

Cariglio, Gennaro, Jr., Counsel for Defendant Lowe

Caruso, Michael, Federal Public Defender

Choe, Olivia S., Assistant United States Attorney

Clark, Nathan D., Counsel for Montavis Middleton

Davis, Robert, Co-Defendant

Dubé, Hon. Robert L., United States Magistrate Judge

Farina, Vincent P., Former Assistant Federal Public Defender

Ferrer, Wifredo A., Former United States Attorney

Friedman, Jonathan S., Counsel for Defendant Ransfer

Gonzalez, Manuel, Jr., Counsel for Defendant Davis

Greenberg, Benjamin G., Acting United States Attorney

Hanna, Eric, Petitioner/Appellant

Houlihan, Raymond D'Arsey, III, Former Assistant Federal Public Defender

Kukec, Kenneth J., Counsel for Fabian Warren

Kobrinski, Jonathan, Assistant United States Attorney

Low, Kendrick, Co-Defendant

McAliley, Hon. Chris M, United States Magistrate Judge

Middleton, Montavis, Co-Defendant

Moore, Hon. Kevin M., United States District Judge

Palermo, Hon. Peter R., United States Magistrate Judge

Parente, Christopher, Assistant United States Attorney

Rashkind, Paul M., Assistant Federal Public Defender

Ransfer, Trevor, Co-Defendant

Samms, Gregory Antonio, Trial Counsel

Smachetti, Emily M., Assistant United States Attorney

Torres, Hon. Edwin G., United States Magistrate Judge

United States of America, Respondent/Appellee

Walkins, Arimentha R, Assistant United States Attorney

Warren, Fabian, Co-Defendant

White, Hon. Patrick A. White, United States Magistrate Judge

Willard, Elizabeth Rainbow, Former Assistant Federal Public Defender

MOTION FOR CERTIFICATE OF APPEALABILITY

Eric Hanna, through undersigned counsel, respectfully moves this Court for a certificate of appealability ("COA") on the following questions:

1. Whether the district court erred in dismissing Mr. Hanna's first §2255 challenge to his Count 7 and 15 convictions under 18 U.S.C. §924(c), filed within a year of *Johnson v. United States*, 135 S. Ct. 2551 (2015), on grounds that such convictions remained lawful under §924(c)'s elements clause regardless of whether *Johnson* invalidated §924(c)'s residual clause?

2. Whether *Johnson* has rendered §924(c)'s residual clause unconstitutionally vague?

I. PROCEDURAL HISTORY

On September 29, 2011, Eric Hanna was charged with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. §1951(a)(Count 1); two counts of Hobbs Act robbery/aiding and abetting that crime under 18 U.S.C. §1951(a) and §2 (Counts 6 and 14); and two counts of using/carrying/possessing a firearm in relation to a "crime of violence" as set forth in Counts 6 and 14, or aiding and abetting that crime, pursuant to 18 U.S.C. §924(c)(1)(A)(ii) & 2 (Counts 7 and 15). (Cr. DE3).

At the conclusion of Hanna's trial, the district court instructed the jury that Hanna had been charged with aiding and abetting as well as the substantive offense

of Hobbs Act robbery in Counts 6 and 14, (Cr. DE 229:12), and could be convicted on those counts, and the §924(c) counts as well, on an aiding and abetting theory. (Cr. DE229: 22-23).

After being so instructed, the jury returned a general verdict finding Hanna guilty of all five counts as charged. (Cr. DE231).

On May 24, 2012, the district court sentenced Hanna to 51 months on Counts 1, 6 and 14 concurrent; 84 months consecutive on Count 7 (the first §924(c) count); and 300 months consecutive to that on Count 15 (the second §924(c) count) – for a total of 435 months imprisonment, followed by 5 years supervised release. (Cr. DE306; Cr. DE339).

On June 21, 2016, Hanna filed a *pro se* motion to vacate under 28 U.S.C. §2255 (his first such motion), arguing that his two §924(c) convictions should be vacated since §924(c)'s residual clause was unconstitutionally vague in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015), and Hobbs Act robbery was not otherwise a "crime of violence." (Cr. DE528; DE1). The Federal Public Defender filed an amended motion on Hanna's behalf, arguing *inter alia*, that Hobbs Act robbery was "indivisible" according to *Descamps v. United States*, 133 S.Ct. 2276 (2013); that one "means" of committing it was by putting someone in fear of injury to property (which included intangible assets); that the offense did not require the use or threat of violent force in every case. (DE10).

The government responded that Hanna had procedurally defaulted his claims, and both his challenge to the constitutionality of §924(c)(3)(B) and to Hobbs Act robbery as a "crime of violence" lacked merit given this Court's decision in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), holding Hobbs Act robbery necessarily qualifies as a "crime of violence" within §924(c)(3)(A). Thus, the government argued, Hanna could not show either "actual innocence" or prejudice from failing to challenge his convictions on these grounds previously; *Johnson* had no impact on his case; and it was unnecessary to consider whether *Johnson* invalidated §924(c)'s residual clause. (DE11:6-15).

Defense counsel replied that *In re Saint Fleur* was not precedential outside the second or successor ("SOS") motion context, and its reasoning should be rejected under *de novo* review since the panel did not properly apply the categorical approach as required by prior circuit precedent (*United States v. McGuire*, 706 F.3d 133 (11th Cir. 2013), and *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016)); prior Supreme Court precedent (*Descamps* and *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013)); and intervening Supreme Court precedent, *Mathis v. United States*, 136 S.Ct. 2243 (June 23, 2016). (DE 12:3-10).

These precedents, counsel argued, precluded a court from presuming that an offense met the elements clause simply from the language of the statute tracked in the indictment without considering either standard jury instructions or interpretive

caselaw or. (DE12: 10-13). Moreover, the legislative history of the Hobbs Act indicated that the offense was modeled upon New York robbery which necessitates only minimal force – which further confirmed that the level of "force" required under the Hobbs Act was *not violent* physical force. (DE12:13-18).

On April 28, 2017, the magistrate judge recommended that the district court deny Hanna's §2255 motion as procedurally barred. (DE13). According to the magistrate, Hanna's procedural default of his challenges to his §942(c) convictions could not be excused by either cause and prejudice or actual innocence, since his Hobbs Act robbery convictions still qualified as "crimes of violence" within §924(c)'s elements clause under *In re Saint Fleur*. (DE13:4-6, 10-14). He stated:

> Movant [] argues that if this Court conducts the proper analysis [under the categorical approach, as clarified by recent Supreme Court precedents], it will conclude that substantive Hobbs Act robbery does not qualify as a crime of violence for purposes of §924(c). ***That may well be true.*** The problem is that it would be futile for the Court to conduct any such analysis, because the Eleventh Circuit has already decided the issue in *Saint Fleur*. ...
>
> [R]egardless of whether the Eleventh Circuit in *Saint Fleur* should have undertaken a determination of whether *Saint Fleur*'s Hobbs Act conviction qualified as a "crime of violence," the fact remains that it did. Moreover, the Court's conclusion that *Saint Fleur*'s Hobbs Act conviction did qualify as a "crime of violence" was necessary to the result in that case, since his application for leave to file a successive §2255 motion was denied on that basis. As such, *Saint Fleur* holds that Hobbs Act robbery is a "crime of violence" for purposes of § 924(c), ... and this Court is thus bound by it.

(DE13:11, 13-14) (emphasis added).

Given that determination, the magistrate declined to "address the unsettled [constitutional] question of whether *Johnson* invalidates §924(c)'s residual clause." (DE 13: 6 n. 5). He recommended denial of a COA since the movant must show both that the procedural ruling and the constitutional issue were debatable, and in his view, "reasonable jurists would not find debatable the correctness of the court's procedural rulings." (DE 13: 15-16).

Counsel filed timely objections, urging the district court at least to grant Hanna a COA. (DE14:9-13).

On June 1, 2017, however, the district court entered a paperless order adopting the report and recommendation, and denying Hanna a COA, stating:

> Petitioner objects to Judge White's reliance on *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016) to establish that the Hobbs Act robbery qualifies as a crime of violence, instead of the Court conducting its own "categorical analysis" of the statute as required by *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See* Objections (ECF No. 14) at 5-6. In so doing, the Petitioner re-lodges arguments which he had previously proffered and which the Report already addressed and rejected. See Report (ECF No. 13) at 10-14. The Court finds that these objections are fully addressed in Judge White's Report.
>
> Despite Plaintiff's arguments to the contrary, this Court is bound to apply the Eleventh Circuit's prior holdings. *See In re Hubbard*, 803 F.3d 1298, 1309 (11th Cir. 2015) (describing " the fundamental rule that courts of this circuit are bound by the precedent of this circuit"); *see also United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (The holding of a case is comprised both of the result of the case and those portions of the opinion necessary to that result by which we are bound.). The Court is not persuaded by Plaintiff's argument that the Eleventh Circuit's holdings in "successive" Section 2255 cases are not binding. *See* Objections (ECF No. 14) at 1-4 (citing

Jordan v. Secy Dept of Corr., 485 F.3d 1351, 1358 (11th Cir. 2007); *In re Jackson*, 826 F.3d 1343, 1351 (11th Cir. June 24, 2016); *In re Rogers*, 825 F.3d 1335, 1340 (11th Cir. June 17, 2016); *In re Gomez*, 830 F.3d 1225, 1228 (11th Cir. 2016)). Petitioner misconstrues the quotations he pulled from these cases, which merely stand for the proposition that a district court, in assessing the merits of habeas petition, does not need to defer to the Court of Appeals' prima facie determinations authorizing a successive petition because "in issuing a § 2244(b)(3)(A) order authorizing the filing of a second or successive petition in the district court, [the Court of Appeals] do[es] not make any factual determinations." *See Jordan*, 485 F.3d at 1357; *see also In re Jackson*, 826 F.3d at 1351; *In re Rogers*, 825 F.3d at 1340; *In re Gomez*, 830 F.3d at 1228.

In *Saint Fleur*, the Eleventh Circuit found that Defendant's companion conviction for Hobbs Act robbery clearly qualified as a crime of violence under the elements clause in Section 924(c)(3)(A). *See In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016). Judge White correctly noted that the *Saint Fleur* Court's conclusion that a Hobbs Act robbery conviction qualified as a "crime of violence" under the elements clause was necessary to determine the outcome in that case: holding that *Saint Fleur*'s sentence would be valid even if *Johnson* invalidated the Section 924(c) residual clause. Therefore, the Eleventh Circuit's assessment that a Hobbs Act robbery is a "crime of violence" was part of the holding and, accordingly, is binding on this Court. Thus, Judge White was correct to conclude as it did: Petitioner did not establish prejudice because regardless of whether *Johnson* applies to Section 924(c)'s residual clause, Petitioner's companion charges for substantive Hobbs Act robbery still qualify as "crimes of violence" under Section 924(c)'s elements clause.

Second, Petitioner objects to Judge White's conclusion that no Certificate of Appealability should issue because "reasonable jurists can and do debate" whether Hobbs Act robbery is a crime of violence under Section 924(c)'s elements clause. *See* Objections (ECF No. 14) at 9-10.

As discussed above, Petitioner's claims are barred on procedural grounds. "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. " *Pio v. United States*, No. 13-23666-CIV, 2014 WL 4384314, at *6 (S.D. Fla. Sept. 3, 2014) (quoting *Rose v. Lee*, 252 F.3d 676, 684 (4th Cir. 2001) (internal quotation marks omitted)). After reviewing the issues presented, the Court finds that reasonable jurists would not find debatable the correctness of the court's procedural rulings. Accordingly, a certificate of appealability is not warranted.

(DE 15).

II. LEGAL STANDARD

A certificate of appealability ("COA") must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. §2253(c)(2). To obtain a COA under this standard, the applicant need *not* show that he would win on the merits; he must only "sho[w] 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."' *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

Where, as here, a district court denies a §2255 on a procedural ground such as default, without reaching the underlying constitutional claim, the movant must show that reasonable jurists could debate both the correctness of the court's procedural ruling, as well as whether the petition states a valid claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484.

That being said, the Supreme Court has emphasized that a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Under the "debatable among reasonable jurists" standard, the fact that there is adverse circuit precedent is not preclusive. If, for example, there is a split among various courts on the question, that will satisfy the standard for obtaining a COA. *See Lambright v. Stewart*, 220 F.3d 1022, 1028-29 (9th Cir. 2000).

But notably, a circuit split is not even a prerequisite for a COA. Because a COA is necessarily sought in the context that a petitioner has lost on the merits, the Supreme Court has been adamant that it will "*not* require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, *a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.*" *Miller-El*, 537 U.S. at 338 (emphasis added); *see also Buck v. Davis*, 137 S.Ct. 759, 774 (U.S. Feb. 22, 2017) (citing and following *Miller-El* on that point; "That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable;" "[W]hen a reviewing court ... inverts the statutory order of operations and 'first decid[es] the merits of an appeal, ... then justif[ies] its denial of a COA based on its adjudication of the actual

merits,' it has placed too heavy a burden on the prisoner at the COA stage;" "*Miller-El* flatly prohibits" denying a COA based upon adjudication of the merits").

Ultimately, any doubt about whether to grant a COA must be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001). According to the Supreme Court, a COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). It is not here.

III. HANNA SHOULD BE GRANTED A CERTIFICATE OF APPEALABILITY SINCE REASONABLE JURISTS COULD DEBATE THE LEGALITY OF HIS §924(C) CONVICTIONS AFTER *JOHNSON*

A certificate of appealability is warranted here for three reasons.

A. REASONABLE JURISTS COULD DEBATE WHETHER HOBBS ACT ROBBERY IS A "CRIME OF VIOLENCE" UNDER §924(C)'S ELEMENTS CLAUSE

The district court held that according to binding Circuit "precedent," *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), Hobbs Act robbery remains a "crime of violence" under §924(c)'s elements clause, 18 U.S.C. §924(c)(3)(A). The correctness of that ruling could be debated – and is being debated – among reasonable jurists for multiple reasons.

1. Whether published SOS orders are binding outside the SOS context, and specifically, in a first §2255 case such as this one, is debatable among reasonable jurists. Judge Martin has repeatedly challenged the assumption by the district court here that a published SOS order such as *In re Saint Fleur*, has any precedential and/or preclusive force outside the SOS context. Indeed, Judge Martin has explained in granting a COA motion to a *first* §2255 movant similarly-situated to Mr. Hanna, that *Saint Fleur*

> was decided in the unique context of an application for leave to file a second or successive §2255 motion. This Court did hold that published decisions in the context of applications to file second or successive motions have precedential effect in this circuit. *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). But *Lambrix* was itself a published decision in the context of an application to file a second or successive motion. *See id.* And arguably, any conclusion about the reach of *Lambrix* outside of the second or successive application context is dicta, and therefore non-binding. As this Court has "explained time and again: A decision can hold nothing beyond the facts of that case." *United States v. Birge*, 830 F.3d 1229 (11th Cir. 2016) (quotation omitted and alteration adopted).
>
> I wrote about this in *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016):
>
> > [B]ecause the decision on whether to allow a second or successive motion is not a ruling on the merits of a prisoner's habeas claims, the process by which we make these rulings falls well short of what one expects for decisions requiring precedential deference. ... The statute requires us to act on these applications within thirty days. 28 U.S.C. § 2244(b)(3)(D). Unlike our Court's merits decisions, the statute strictly prohibits any review of our rulings on these applications. *Id.* §2244(b)(3)(E). Our Court has even ruled that we can't

> consider a prisoner's application if that prisoner has already made substantively the same claims in an earlier application. *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016). This makes it possible for a three-judge ruling (or even a two-judge ruling) on one of these applications to say things rejected by every other member of the court. It is neither wise nor just for this type of limited ruling, resulting from such a confined process, to bind every judge on this court as we consider fully counseled and briefed issues in making merits decisions that may result in people serving decades or lives in prison.

Id. at 1349–50 (Martin, J., concurring) (footnote omitted).

> It is also worth mentioning that a grant of Mr. Saint Fleur's application would have had no binding effect on the §2255 proceeding that followed in the District Court. *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007)(holding that the District Court should decide every aspect of such a case "fresh, or in the legal vernacular, *de novo*"). And we have also said that in any appeal from the District Court's determination, "nothing in this order [deciding a second or successive application] shall bind the merits panel in that appeal." *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013). This is another reason to doubt the precedential impact of this Court's published orders outside of the second or successive application context in which they were decided.

Davenport v. United States, Case No. 16-15939, Slip op. at 3-5 (March 28, 2017)(Martin, J.)(Order granting COA); *see also Wilkes v. United States*, Case No. 16-17658, Slip op. at 5-7 (May 4, 2017)(Martin, J.)(same).

In *United States v. Rosales-Acosta*, 679 Fed. Appx. 860, 2017 WL 562439 (11th Cir. Feb. 13, 2017), Judges Marcus, Julie Carnes, and Jill Pryor acknowledged that "*it may be true*, as Rosales-Acosta argues, that *In re Saint*

Fleur is not controlling because it deals with an application for second and successive motions under 28 U.S.C. § 2255." *Id.* at *3 (emphasis added; holding, nonetheless, that such an argument "misse[d] the point" in a direct appeal where the appellant faced "plain error" review, which could not be met without on-point contrary precedent).

These several opinions make clear reasonable jurists are still debating whether published SOS orders are controlling outside the unique SOS context. And notably, this case, like *Davenport* and *Wilkes*, is an appeal from the denial of a ***first*** §2255 motion. Limiting the precedential value of published SOS decisions to the unique SOS context is reasonable since the prior panel rule depends on the availability of *en banc* and Supreme Court review of a panel decision, which does not exist in the SOS context.

2. Whether the *In re Saint Fleur* panel erroneously failed to apply the categorical approach in the manner dictated by current Supreme Court and prior Circuit precedent is debatable among reasonable jurists. As Judge Martin recognized in *Davenport* and *Wilkes*, if *In re Saint Fleur* is not precedential in a first §2255, the elements clause reasoning in *Saint Fleur* should not even be persuasive in a case like Hanna's since the *Saint Fleur* panel overlooked the dictates of the now-clarified categorical approach. Specifically,

> The *Saint Fleur* panel held that Hobbs Act robbery "has as an element the use, attempted use, or threatened use of physical force," 18 U.S.C.

§924(c)(3)(A), without citing any caselaw or other authority on that crime. The Supreme Court has held that the term "physical force" as used in §924(c)(3)(A) requires "*violent* force" which means "strong physical force" or "force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 139, 130 S. Ct. 1265, 1270 (2010) (quotation omitted). Of course, any given defendant's crime may have involved "physical force" as described by *Curtis Johnson*. But the actual facts of Mr. Davenport's convictions have no legal relevance to determining whether the crime he was convicted of is a "crime of violence" under §924(c)'s elements clause. Again, this analysis is a question "we must answer 'categorically'—that is, by reference to the elements of the offense, and not the actual facts of [the defendant's] conduct." *McGuire*, 706 F.3d at 1336.

Pursuant to this categorical approach, if Hobbs Act robbery can be committed without "the use, attempted use, or threatened use of physical force," then that crime obviously can't have "as an element the use, attempted use, or threatened use of physical force." In my haste to rule in *Saint Fleur*, I overlooked the possibility that Hobbs Act robbery can be committed without the type of force described in *Curtis Johnson*. For example, the Eleventh Circuit's pattern jury instructions show that a jury can convict a defendant of Hobbs Act robbery so long as it believes the defendant "took the property against the victim's will, by using actual or threatened force, or violence, or *causing the victim to fear harm*, either immediately or in the future." 11th Cir. Pattern Jury Instructions 70.3 (emphasis added). This "causing the victim to fear harm" can include causing fear of "financial loss," which "includes . . . intangible rights that are a source or element of income or wealth." *Id.*; *see also United States v. Local 560 of the Int'l Bhd, of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that "other circuits which have considered this question are unanimous in extending Hobbs Act to protect intangible property").

It also bears repeating that Hobbs Act robbery can be committed "by means of actual or threatened force, or violence, or fear of injury." 18 U.S.C. §1951(b)(1). Even though this language says Hobbs Act robbery can be committed either with violence or mere intimidation, "our inquiry can't end with simply looking at whether the statute is written disjunctively (with the word 'or'). The text of a statute won't

always tell us if a statute is listing alternative means or definitions, rather than alternative elements." *United States v. Lockett*, 810 F.3d 1262, 1268 (11th Cir. 2016). *Mathis v. United States*, 579 U.S., 136 S. Ct. 2243(2016), tells us what to do when faced with an alternatively phrased statute:

> The first task for a sentencing court ... is [] to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.

*Id.*at 2256. *Mathis* examined the distinction between the elements which define a crime and the means by which it can be committed in reference to a statute's use of the word "burglary." But this distinction may be even more significant for §924(c)'s "elements clause." The "elements clause" expressly requires a particular kind of "element"—the use, attempted use, or threatened use of physical force against the person or property of another. The law has long been clear that alternative means in a federal criminal statute are not alternative "elements." *See, e.g., Richardson v. United States*, 526 U.S. 813, 817, 119 S. Ct. 1707, 1710 (1999).

> And again, whether a crime is "within the ambit of 18 U.S.C. §924(c) ... is a question ... we must answer 'categorically'—that is, by reference to the *elements* of the offense." *McGuire*, 706 F.3d at 1336 (emphasis added). If *Saint Fleur* is wrong, then Mr. Davenport's § 924(c) sentence may be unlawful.

*Davenpo*rt, Slip op. at 5-8 (granting a COA for those reasons); *Wilkes*, Slip op. at 7-10 (same); *see also In re Garcia*, Slip. Op. at 13-17 (Martin, J., concurring)(acknowledging, in an SOS case, that she "may have been mistaken" in

joining the *Saint Fleur* opinion due to the panel's failure to apply the categorical approach, as dictated by this Court's prior precedent in *McGuire*).

The *Saint Fleur* panel's multiple errors under the categorical approach are further detailed below. But notably, even *if* this Court were to agree with the magistrate and district court that regardless of those errors *In re Saint Fleur* remains precedential for a first §2255 case in ***this*** Circuit, the panel's reasoning in *Saint Fleur* is *still* reasonably debatable under Supreme Court precedents clarifying the categorical approach. And at the very least, a COA is warranted to further pursue that issue before the Supreme Court.

***

> The term "robbery" under 18 U.S.C. §1951(a) means:
>
> > [T]he unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1). As Judge Martin has rightly recognized, whether Hobbs Act robbery qualifies as a "crime of violence" under §924(c)'s elements clause is a question that must be answered *categorically* by reference to the elements of the offense, not the actual facts of the defendant's conduct. That is dictated not only by Supreme Court precedents like *Descamps* involving the similar elements clause

in the ACCA, but this Court's 2013 precedent in *McGuire*, in which Justice O'Connor sitting by designation specifically held that the "crime of violence" determination under both the elements and residual clauses of §924(c) must be made "categorically." *See* 706 F.3d at 1336-1337.

Judge Martin is correct that under the prior panel precedent rule, there is simply "no legal basis for suddenly discarding our precedent in *McGuire*." *In re Garcia, Slip*. Op. at 15 (Martin, J., concurring). Indeed, as another panel of this Court recognized in a post-*Saint-Fleur* decision in the same SOS context, *McGuire* continues to have controlling force in resolving whether an offense qualifies as a "crime of violence" under §924(c)'s elements clause. *In re Gomez*, 830 F.3d 1225, 1228 (11th Cir. July 25, 2016)(citing *McGuire*'s holding that whether an offense qualifies as a crime of violence under §924(c)(3)(A)'s elements clause is a question "that we must answer 'categorically'"). In *Gomez*, this Court thus cited *McGuire* for the precise principle that should have informed the panel's analysis in *Saint Fleur*. On that basis alone, the conclusion reached in *Saint Fleur* is debatable as it contravenes the well-settled rule in this circuit that the earliest case always controls. *See Walker v. Mortham*, 158 F.3d 1171, 1188-1189 (11th Cir. 1998).

Under the categorical approach as clarified by the Supreme Court in *Descamps*, *Moncrieffe v. Holder*, 569 U.S. 184 (2013), and *Mathis v. United States*, 136 S.Ct. 2243 (2016), and this Court in *United States v. Estrella*, 758 F.3d

1239 (11th Cir. 2014) and *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016), *every* Hobbs Act robbery must be committed with "the *use*, attempted use, or threatened use of *physical force*" to qualify as a "crime of violence" under § 924(c)'s elements clause if the offense is indivisible. And, *Mathis* has confirmed that Hobbs Act robbery is indeed an indivisible offense. Accordingly, if the "least culpable" *means* of committing that offense does not require the use or threat of the *Johnson* level of "*violent* force," the offense should not count as a "crime of violence" within §924(c)(3)(A).

In ruling on the defendant's motion for authorization to file a SOS motion in *Saint Fleur*, the panel notably did not did not even attempt to determine whether the offense of Hobbs Act robbery is "divisible" as *Descamps* and *Mathis* now mandate, and/or the "least culpable conduct" for conviction under the statute. Instead, the panel held that based upon the allegations in the Hobbs Act count of the defendant's indictment (which simply tracked the language in §1951(1)), his Hobbs Act robbery conviction "clearly qualifies as a 'crime of violence' under the use-of-force clause in §924(c)(3)(A)." 824 F.3d at 1340. And that approach, *Mathis* has since confirmed, was erroneous under the categorical approach.

Had the *Saint Fleur* panel analyzed Hobbs Act robbery in the manner dictated by *Descamps*, *Moncrieffe*, *Estrella*, *Lockett*, and *Mathis*, it would have found that Hobbs Act robbery is indeed an indivisible offense, based upon 11th

Cir. Pattern Jury Instr. 70.3 (2010), which requires that the government prove and the jury find beyond a reasonable doubt as the second element of the offense that

> the Defendant took the property against the victim's will by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future.

Federal juries are not required to agree on whether the property was taken by means of "force," *or* "violence," *or* "causing the victim to fear harm," *or* that the fear is "either immediate" *or* "in the future." While it may be unclear simply from the face of the statute which of these "means" is the "least of the acts criminalized" in a Hobbs Act robbery offense, *Mathis* dictates that the court consult interpretive caselaw. And, as will be discussed in the next section, the relevant caselaw makes clear that several different "means" criminalized under §1951 most definitely do *not* require the use of "violent force" either against a person or property.

3. Whether Hobbs Act robbery categorically requires, as an element in every case, the use of *violent* force against property, or even against a person, is debatable among reasonable jurists. As Judge Martin has rightly noted, jurists could reasonably debate whether Hobbs Act robbery is an offense that categorically meets §924(c)'s elements clause because a defendant can be convicted of that offense simply because he caused the victim to "fear harm" to "property," which includes "financial loss" and "intangible rights." *Davenport*, Slip op. at 6; *Wilkes*, Slip op. at 8. *See generally* Eleventh Circuit Pattern Jury

Instruction 70.3 ("Property includes ... intangible rights that are a source or element of income or wealth," and "[f]ear ... includes the fear of financial loss as well as fear of physical violence"); *see also United States v. Arena*, 180 F.3d 380, 392 (2d. Cir. 1999)("[t]he concept of 'property' under the Hobbs Act is an expansive one" that includes "*intangible assets*, such as rights to solicit customers and to conduct a lawful business"), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003); *United States v. Iozzi,* 420 F.2d 512, 514 (4th Cir. 1970)(sustaining Hobbs Act conviction when boss threatened "to slow down or stop construction projects unless his demands were met").

But notably, a Hobbs Act robbery may be committed by two other means – placing someone in fear of direct fear of future injury to his "*person*," and by "actual or threatened force" – which are also overbroad vis-a-vis an offense within §924(c)'s elements clause.

Courts have rightly recognized in analogous settings that physical injury can easily occur without the use or threat of any force, let alone, violent force. *See, e.g., United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 194 (2d Cir. 2003); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010); *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005). It is debatable based upon these decisions whether a Hobbs Act

robbery by causing a person to fear injury, requires the use or threat of violent force in every case.

And it is also debatable whether committing the offense by means of "actual or threatened force" necessarily requires the *Curtis Johnson* level of *violent* force, for a unique reason: In passing the Hobbs Act, Congress expressly adopted New York's definition of "robbery."[1] As multiple courts have now recognized, although the New York robbery statute requires "forcible stealing" in every case, New York case law is clear that "forcible stealing" can occur without "force capable of causing physical pain or injury or another." *See, e.g., United States v. Brown*, 2017 WL 2859932 at *2 (E.D.N.Y. May 26, 2017)(the "force necessary to 'forcibly steal" in New York does not rise to the level of force that must be used for a crime to be a 'violent felony' under the ACCA;" citing four prior E.D.N.Y. cases holding similarly); *Diaz v. United States*, 2017 WL 1855895 at *2 (W.D.N.Y. May 9,

[1] *See United States v. Nedley*, 255 F.2d 350, 355, 357 (3rd Cir. 1958); *United States v. Aguon*, 851 F.2d 1158, 1164 (9th Cir. 1988)(en banc)("Congressman Hobbs said explicitly that the definitions of robbery and extortion were modeled on the New York Penal Code"), *overruled on other grounds by Evans v. United States*, 504 U.S. 255 (1992); *Nat'l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807, 813 (7th Cir. 2005)("Congress used the Penal Code of New York as a model for the Act."); *United States v. Capati*, 980 F. Supp. 1114, 1125 (S.D. Cal. 1997)("The legislative history of the Hobbs Act indicates that Congress took its definition of robbery from the New York statute. Congress manifested no intention to alter that definition substantially. Thus, a presumption exists that Congress intended to incorporate New York's interpretation of its robbery statute."), *aff'd*, 162 F.3d 1170 (9th Cir. 1998); *Dooley v. Crab Boat Owners Ass'n*, 271 F. Supp. 2d 1207, 1213 (N.D. Cal. 2003)(noting "the legislative history of the Hobbs Act and its origins in New York penal law").

2017)(same holding; finding *United States v. Corey Jones*, 2016 WL 3923838 (2nd Cir. July 21, 2016), *vacated on other grounds*, 838 F.3d 296 (2nd Cir. 2016) still persuasive; also citing supportive New York decisions); *United States v. Batista*, Case No. 5:09-cr-00037-MFU, DE 112 at 11, 15, 17 (W.D.Va. May 11, 2017)(New York first-degree robbery was not an ACCA "violent felony" because "New York precedent is replete with convictions for 'forcible stealing' that do not involve *Johnson I* force").

"[I]t is a well-established principle of statutory construction that when one jurisdiction adopts the statute of another jurisdiction as its own, there is a presumption that the construction placed upon the borrowed statute by the courts of the original jurisdiction is adopted along with the statute and treated as incorporated therein." *Aguon*, 851 F.2d at 1164 (citations omitted). Applying that presumption here, it is at least debatable that since a Hobbs Act robbery, like a New York robbery (on which it was modeled), can be committed by "less-than-violent force," it is not categorically a "crime of violence" within §924(c)(3)(A).

The *Saint Fleur* panel, and the district court, failed to consider the above points in their decisions. And they improperly ignored the Supreme Court's own statutory construction jurisprudence that has long emphasized that the meaning of terms in a statute depends upon "context;" "context" includes a statute's legislative history and specific indications of Congressional intent; and identical terms or

phrases in different statutes may indeed have different meanings because of different "contexts." *See, e.g., Begay v. United States*, 533 U.S. 137, 143-144 (2008); *Castleman v. United States*, 134 S.Ct. 1405, 1413, 1415 (2014).

For these several reasons, reasonable jurists could debate whether Hobbs Act robbery is categorically a crime of violence within §924(c)(3)(A). Notably, reasonable jurists are still debating that issue in the Ninth Circuit, and multiple COAs have been granted there to definitively decide it.[2] The Court should do the same here.

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[2] *See, e.g., United States v. Williams*, Case No. 16-56640, DE 3-1 (9th Cir. March 16, 2017); *United States v. Stankus*, Case No. 3:12-cr-00032-LRH-WGC, DE 57 (D. Nev. July 12, 2017)(granting COA because "this section 2255 motion involves questions of law that are partially unsettled and are currently being addressed by higher courts"); *United States v. Espinoza*, Case No. 3:13-cr-00037-LRH-WGC, DE 38 (D. Nev. July 12, 2017)(same); *United States v. Hall*, Case No. 2:12-cr-00132-JAD-CWH, DE 201 (D. Nev. May 17, 2017)(following an unpublished Ninth Circuit case holding Hobbs Act robbery qualifies as a COV, but granting a COA because "other courts have held otherwise," and even while "endeavor[ing] to be true to the Ninth Circuit guidance in this order, the truth is, when applying the 'hopeless tangle' 'of inconsistent case law' that make up the categorical test, reasonable jurists rarely agree on anything")(citation omitted); *United States v. Goldstein*, Case No. 2:10-cr-00525-JAD-PAL, DE 219 (D. Nev. May 17, 2017)(same); *United States v. Pulido*, Case No. Case No. 2:11-cr-00102-APG-CWH, DE 78 (D. Nev. May 16, 2017)(same); *United States v. Casas*, 2017 WL 1008109 (S.D. Calif. March 14, 2017)(issuing a COA on all issues including whether a Hobbs Act robbery was not a "crime of violence" because it could be accomplished without an intentional *mens rea* and/or less than violent force); *United States v. Lott*, 2017 WL 553467 (S.D. Calif. February 9, 2017)(challenge to a Hobbs Act robbery conviction under § 924(c)(3)(A) met the *Miller-El* standard of debatability); *Wade v. United States*, Case No. 2:16-cv-06515-CAS, DE 17 (C.D. Calif. April 5, 2017)(granting COA in acknowledgement of the fact that "the legal landscape is still developing in the wake of *Johnson II*," and that other district

B. Reasonable Jurists Could Debate Whether Aiding And Abetting A Hobbs Act Robbery Is A "Crime Of Violence" Within § 924(c)'s Elements Clause

Even the district court's threshold finding that Hanna's §924(c) convictions were clearly predicated upon Hobbs Act robbery could be seriously debated by reasonable jurists. For indeed, here as in *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016), the indictment charged more than one "crime of violence" – a substantive Hobbs Act robbery, and aiding and abetting that crime – in support of each §924(c) offense, and the jury returned a general verdict. Under those circumstances, *Gomez* held, the jury could have convicted on the §924(c) offense "without reaching unanimous agreement on during which crime it was that [the defendant] possessed the firearm." *Id.* at 1227. And the "lack of specificity" in the verdict had Sixth Amendment significance under *Alleyene v. United States*, 133 S.Ct. 2151, 2155 (2013) since the jury's undifferentiated findings increased a minimum mandatory. *Gomez*, 830 F.3d at 1228-1229.

Since it is impossible to know the true basis for the Count 7 and 15 convictions, and *Alleyne* and the Sixth Amendment preclude any further judicial fact-finding on that point, the Court must presume Counts 6 and 14 rested upon the least culpable crime charged – aiding and abetting a Hobbs Act robbery. Any other result would be tantamount to the type of judicial fact-finding prohibited by

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courts considering similar cases – such as those in *Casas* and *Lott* – had granted petitioners COAs).

Alleyne. 830 F.3d at 1227-1228. And notably, reasonable jurists within this Circuit have debated whether aiding and abetting a Hobbs Act robbery categorically qualifies as a "crime of violence" within §924(c)'s elements clause.

In *In re Colon*, 826 F.3d 1301 (11th Cir. 2016), Judge Martin dissented from the majority's decision that aiding and abetting a Hobbs Act robbery "clearly qualifies as a 'crime of violence' under the use-of-force clause in §924(c)(3)(A)." She distinguished aiding and abetting a Hobbs Act robbery from the substantive crime, arguing (1) that *United States v. Williams*, 334 F.3d 1228, 1232 (11th Cir. 2003), the sole authority relied upon by the majority may not have survived *Johnson*, and (2) that it was "plausible that a defendant could aid and abet a robbery without using, threatening, or attempting any force at all." *Colon*, 826 F.3d at 1306-1307 (Martin, J., dissenting)(citing *Rosemond v. United States*, 134 S.Ct. 1240, 1246-47 (2014), for the principle that "[e]ven when a principal's crime involves an element of force, there is 'no authority for demanding that an affirmative act go toward an element considered peculiarly significant; rather, ... *courts have never thought relevant the importance of the aid rendered.*") (emphasis in original).

Judge Martin was "not willing to assume, as the majority [did there], that aiding and abetting crimes meet the 'elements clause' definition simply because an aider and abettor 'is punishable as a principal.' 18 U.S.C. §2(a)." *Colon, id.* at

1308 (Martin, J., dissenting). Instead, because a defendant could clearly be convicted of aiding and abetting a Hobbs Act robbery "based on his aid of an element of robbery that involved no force," Judge Martin explained aiding and abetting a Hobbs Act robbery should not satisfy §924(c)'s elements clause.

And indeed, in light of *Rosemond* (not considered by the *Colon* majority) reasonable jurists could well debate whether an aiding and abetting crime categorically meets §924(c)(3)(A). As Judge Martin correctly observed, this Court had never held until *In re Colon* "that aiding and abetting crimes fall under §924(c)(3)(A)." *Id.* Notably, Judge Jill Pryor has implicitly recognized that the issue is still debatable as well, notwithstanding *In re Colon*, by granting a COA in *Levatte v. United States*, Case No. 16-17685 (11th Cir. June 6, 2017). The Court should so find here.

C. Reasonable Jurists Could Debate Whether *Johnson* Invalidated the §924(c) Residual Clause

On June 30th, without hearing oral argument, a panel of this Court issued a published decision holding as a matter of first impression that *Johnson*'s determination that the ACCA's residual clause was unconstitutionally vague "does not apply to or invalidate" the similar residual clause in 18 U.S.C. §924(c)(3)(B). *Ovalles v. United States*, ___ F.3d ___, 2017 WL 2829371 at *7 (11th Cir. June 30, 2017). However, the correctness of the *Ovalles* panel's reasoning can be – and is

being – debated among reasonable jurists both within this Circuit and across the country at this time, and a COA should issue for the following reasons.

1. Only a week after the issuance of the decision in *Ovalles*, the mandate was *sua sponte* withheld by the Court, and that non-final decision may still be reconsidered and withdrawn. On July 6, 2017 – only one week after *Ovalles* was issued – this Court *sua sponte* withheld the mandate in *Ovalles*. *See Ovalles*, 11th Cir. Case No. 17-10712 (DE of July 6, 2017)("Mandate Withheld Pursuant to Court Instructions."). This near-immediate, *sua sponte* reaction may indicate that there is interest on the Court in rehearing *Ovalles* en banc. Or, it may mean that members of the Court believe *Ovalles* could be affected by the Supreme Court's decision in *Sessions v. Dimaya* (U.S. No. 15-1498) on the related issue of whether *Johnson* renders the identically-worded residual clause in 18 U.S.C. §16(b) unconstitutionally vague.

Notably, it appears that the Court is itself still debating the constitutional issue in *Dimaya*, since it has ordered re-argument at the beginning of the new term to definitively decide the case. *See* DEs of Jan. 17 and June 26, 2017. And plainly, because §16(b) is perfectly identical to § 924(c)(3)(B), a favorable decision in *Dimaya* could itself abrogate *Ovalles*. Notably, *Ovalles* made no mention of *Dimaya*, even though the government in *Dimaya* is seeking to

distinguish §16(b) from the ACCA's residual clause on the same bases that the *Ovalles* panel distinguished §924(c)(3)(B).

In any event, whatever the reason for the withholding of the mandate in *Ovalles*, the panel's decision is not yet final. And significantly, multiple judges on this Court have now granted joint motions by the defense and government to stay the briefing schedule in §924(c)/*Johnson* appeals pending issuance of the *Ovalles* mandate. *See Davenport v. United States*, Case No. 16-15939-GG (11th Cir. July 21, 2017)(Jordan, J.); *Barriera-Vera v. United States*, Case No. 17-10029 (11th Cir. July 24, 2017)(Tjoflat, J.); *Wilkes v. United States*, Case No. 16-17658 (11th Cir. July 25, 2017)(Wilson, J.); *Blackman v. United States*, Case No. 16-17294 (11th Cir. July 26, 2017)(Martin, J.); *Young v. United States*, Case No. 16-17300 (11th Cir. July 27, 2017)(Tjoflat, J.); *Paige v. United States*, Case No. 16-16043 (11th Cir. July 28, 2017)(Rosenbaum, J.); *Trubey v. United States*, Case No. 16-17663 (11th Cir. Aug. 1, 2017)(Wilson, J.). These stays would not likely have been granted if the analysis in *Ovalles* was "beyond all debate." Clearly, it is not. The decision may well be short-lived.

Since the law in this area remains in tremendous flux, it would be imprudent and inefficient for the Court to rely on *Ovalles* now to deny a COA. Doing so would needlessly result in an additional round of litigation if *Ovalles* is abrogated by *Dimaya*. Even if *Ovalles* is not completely abrogated, *Dimaya* may at least

require reconsideration of certain conclusions in *Ovalles* either by the panel or the en banc Court. The constitutional issue resolved by the *Ovalles* panel is now being vigorously debated among reasonable jurists throughout the country. And that debate will continue – at the very least – until *Dimaya* is decided.

2. Whether *Johnson*'s invalidation of the ACCA's residual clause as unconstitutionally vague has rendered §924(c)'s residual clause unconstitutional as well, is an issue that has divided the circuits and it remains debatable among reasonable jurists at this time. In *Johnson*, the Supreme Court held the *residual* clause in 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.

It is well-settled in this Circuit that the same, *categorical* "ordinary case" inquiry that led the Supreme Court to conclude that the ACCA residual clause is unconstitutionally vague applies to the similarly-worded residual clauses in 18 U.S.C. §924(c)(3)(B) and 16(b). In *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), Justice O'Connor sitting by designation held that whether an offense is a "crime of violence" "within the ambit of 18 U.S.C. §924(c)" is a question "that we must answer 'categorically' – that is, by reference to the elements of the offense, and not the actual facts of McGuire's conduct." *Id.* at 1336. And, she explained, "[w]e employ the categorical approach" under both the elements and residual clauses of §924(c),

> because of the statute's terms: It asks whether McGuire committed "an offense" that "has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another," or that "*by its nature*, involves a substantial risk that physical force against the person or property of another may be used. 18 U.S.C. §924(c)(3)(A)-(B) (emphasis added).

Id. at 1336-1336 (emphasis in original).

Notably, the residual clause in §924(c) is identical to 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"). And the law in this Circuit is clear that the same "ordinary risk" analysis this Court applied pursuant to the categorical approach in ACCA residual clause cases applies equally in the §16(b) context. *See United States v. Keelan*, 786 F.3d 865, 871 (11th Cir. May 13, 2015) (as a matter of first impression, "adopt[ing] the 'ordinary case' standard [from *James*] for analyzing §16(b);" "applying the categorical approach looking only to the ordinary case;" concluding that a violation of 18 U.S.C. §2422(b) for enticing a minor is a "crime of violence" under §16(b) since the "ordinary" violation involves a substantial risk that the defendant may use physical force in the course of committing the offense).

Because other circuits as well have employed similar approaches in analyzing these provisions, in the aftermath of *Johnson* the Third, Seventh, Ninth, and Tenth Circuits have each ruled that 18 U.S.C. §16(b) – which again, is identical to §924(c)(3)(B) – is void for vagueness in light of *Johnson*. *See Baptiste v. Attorney General*, 841 F.3d 601 (3d Cir. 2016), *gov't pet. for cert. filed* Feb. 6, 2017 (No. 16-978); *Golikov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016), *gov't pet. for cert. filed* Feb. 2, 2017 (No. 16-966); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), *gov't pet'n for reh'g denied* (Mar. 22, 2016); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 2016 WL 3232911 (U.S. Sept. 29,

2016); *see also Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (same), *gov't pet. for cert filed* Feb. 13, 2017 (No. 16-991); *In re Hubbard*, 825 F.3d 225, 232 n.4 (4th Cir. 2016) (noting split); *United States v. Hernandez-Lara*, 817 F.3d 651 (9th Cir. 2016) (§16(b)'s residual clause as incorporated in U.S.S.G. §2L1.2(b)(1)(C) is void for vagueness in light of *Dimaya*), *gov't pet. for cert. filed* Nov. 7, 2016 (No. 16-617).

On November 18, 2016, in *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016), the Seventh Circuit became the first federal circuit to specifically address the constitutionally of §924(c)'s residual clause in light of *Johnson*. And notably, the Seventh Circuit held that because §924(c)'s residual clause was "virtually indistinguishable" from the ACCA's residual clause which "*Johnson* found to be unconstitutionally vague," §924(c)(3)(B) was unconstitutionally vague as well. *Id.* at 996 (noting that §924(c)'s residual clause was "the same residual clause" in §16(b) that the court had already invalidated in *Vivas-Ceja*). The panel's decision in *Ovalles* directly conflicts with that of the Seventh Circuit in *Cardena*.

Although that direct circuit split is itself sufficient to meet *Slack*'s "reasonable jurists could debate" standard and require the issuance of a COA here, *see Lambright v. Stewart*, 220 F.3d at 1028-29, the clear "debatability" of the reasoning in *Ovalles* is confirmed by the number of reasonable jurists at the district

court level throughout this country who have specifically found the residual clause of §924(c)(3)(B) unconstitutionally vague in light of *Johnson*.

For decisions outside this Circuit, *see, e.g.*, *United States v. Smith*, No. 2:11-CR-058-JAD-CWH, 2016 WL 2901661 (D. Nev. May 18, 2016); *United States v. Lattaphom*, 159 F.Supp.3d 1157 (E.D. Cal. Feb. 2, 2016); *United States v. Bell*, 158 F.Supp.3d 906, 920 (N.D. Ca. Jan. 28, 2016); *United States v. Edmundson*, 153 F.Supp.3d 857, 859-60 (D. Md. Dec. 30, 2015).

For decisions within this Circuit, *see, e.g.*, *Mann v. United States*, Case No. 16-22605-Civ-Ungaro, DE22 & DE 27 (Orders of March 16 and April 19, 2017); *Jardines v. United States*, Case No. 16-22604-Civ-Ungaro, DE 17 and DE 21 (Orders of March 17, and April 19, 2017); *Duhart v. United States*, Case No. 16-61499-Civ-Marra, DE 13 and DE 18 (Orders of September 9, 2016, and February 1, 2017); and *Hernandez v. United States*, Case No. 16-22657-Civ-Huck (Order of September 27, 2016).

In rejecting the views of these jurists, the *Ovalles* panel emphasized that the ACCA and §924(c) are not word-for-word identical. In particular, the panel found "significant" and "material" the fact that §924(e)(2)(B)(ii), defines a "violent felony" as an offense that "*otherwise* involves conduct that presents a serious potential risk of *physical injury* to another," while §924(c)(3)(B) defines a crime of violence as one 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*." *See* 2017 WL at **5-8.

These are minor differences in the wording of the two provisions. They are neither significant nor material when considered against the Supreme Court's actual reasoning in *Johnson*. For the reasons detailed below, the *Ovalles* panel's conclusions to the contrary are debatable for multiple reasons.

1. Section 924(c)'s residual clause is not "markedly narrower" than the ACCA residual clause at issue in *Johnson*.

The textual differences between the residual clause of the ACCA at issue in *Johnson* and the residual clause of §924(c) (and its twin §16(b)) are not material because they do not impact the constitutional analysis in any manner. The *Ovalles* panel ignored the fact that not only in this Circuit, but in other circuits as well, these provisions have always been regarded as analogous and analyzed identically. *See United States v. Keelan*, 786 F.3d 865, 871 n.7 (11th Cir. 2015) (describing the ACCA residual clause and the residual clause of §16(b) as "analogous"); *Vivas-Ceja*, 808 F.3d at 722 ("§16(b) substitutes 'substantial risk' for the residual clause's 'serious potential risk.' Any difference between the two phrases is superficial. Just like the residual clause [in §924(c)], §16(b) offers courts no guidance to determine when the risk involved in the ordinary case of a crime qualifies as 'substantial.'"); *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). *See also United States v. Gomez-Leon,* 545 F.3d 777 (9th Cir. 2008); *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998); *United States v. Kirk*, 111 F.3d 390, 394 (5th Cir. 1997); *United States v. Bauer*, 990 F.2d 373, 374 (8th Cir. 1993) (describing the differences between the statutes as "immaterial" and holding that U.S.S.G. §4B1.2, which uses the ACCA language, "is controlled by" a decision that interprets §16(b)).

Federal courts have historically and regularly analyzed and imported decisions from one residual clause to another due to their substantial similarities.[3] Although the risk at issue in the ACCA is a risk of injury, and the risk at issue in both §16(b) and §924(c) is a risk that force will be used against person or property, this difference is immaterial to the due process problem and has no impact on the

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[3] Though the comparison tends to mostly address 18 U.S.C. § 16(b), that provision is identical to §924(c)(3)(B). *See, e.g., Chambers v. United States*, 555 U.S. 122, 133, n.2 (2009)(citing circuit splits on § 16(b) in the context of a residual clause case because §16(b) "closely resembles ACCA's residual clause")(Alito, J., concurring). *See also 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)); *United States v. Aragon*, 983 F.2d 1306, 1314 (4th Cir. 1993)(same); *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. 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)").

applicability of *Johnson* to this case. This is because the Supreme Court's holding in *Johnson* did not turn on the type of risk, but rather how a court assesses and quantifies the risk.[4] In fact, the Solicitor General has candidly conceded that § 16(b) is "equally susceptible to ... the central objection" in *Johnson*—namely, that they both "require[d] 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*, U.S. Supp. Br., 2015 WL 1284964, at 22-23.

The two-step process is the same under the ACCA and §924(c)(a twin to §16(b)). All three statutes require courts first to picture the "ordinary case" embodied by a felony, and then decide if it qualifies as a crime of violence by assessing the quantum of risk posed by the "ordinary case."[5] The *Ovalles* panel

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[4] Of course, many federal and state criminal laws include "risk" standards that employ adjectives similar to those in the ACCA and §924(c), such as "substantial," "grave," and "unreasonable." And the Supreme Court in *Johnson* said it did not mean to call most of these into question. But, as Justice Scalia's majority opinion observed, that is because the vast majority of such statutes require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion; in other words, applying such a standard to "real-world conduct." By contrast, the ACCA's residual clause, and §924(c)(3) too, require it to be applied to "an idealized ordinary case of the crime," an "abstract inquiry" that "offers significantly less predictability." *Johnson*, 135 S. Ct. at 2558.

[5] The ACCA, §924(c), and §16(b) require courts to discern what the "ordinary case" of a crime is by using the categorical approach. Courts may not consider the factual means of committing any given offense, but must consider the nature of the offense in the "ordinary case," regardless of whether the ACCA, §924(c)(3)(B), or § 16(b) is at issue. *See Keelan*, 786 F.3d at 871 (adopting "ordinary case" analysis for identical provision in §16(b)); *see also United States v. Naughton*, 621 F.

unfairly ignored this *material identity* in the way predicate crimes have always been analyzed under these statutes – not only in other circuits, but in our circuit. There is no acknowledgement of *McGuire*, *Keelan*, or the dictates of the categorical approach in the panel's entire discussion of §924(c)'s residual clause.[6]

As other courts have rightly explained, the "§924(c) residual clause suffers from exactly the same double indeterminancy as the ACCA residual clause." *Edmundson*, 2015 WL 9582736, at *4. Moreover, the Ninth and Seventh Circuits have recognized the same in invalidating §16(b), the identical twin to §924(c)(3)(B), as void for vagueness under *Johnson*. *See Vivas-Ceja,* 808 F.3d at 722; *Dimaya*, 803 F.3d at 1117.

App'x 170, 178 (4th Cir. Sept. 2, 2015)(applying the ordinary case inquiry to the residual clause of §924(c)); *Fuertes,* 805 F.3d at 498; *United States v. Ramos-Medina*, 706 F.3d 932, 938 (9th Cir. 2012)(citing *James* as the source of the "ordinary case" analysis required by §16(b)); *United States v. Butler*, 496 F. App'x 158, 161 n.4 (3d Cir. 2012); *Evans v. Zych*, 644 F.3d 447, 453 (6th Cir. 2011); *United States v. Serafin*, 562 F.3d 1104, 1108 (10th Cir. 2009); *Van Don Nguyen v. Holder*, 571 F.3d 524, 530 (6th Cir. 2009) (considering §16(b) and concluding that "[t]he proper inquiry is one that contemplates the risk associated with the proscribed conduct in the mainstream of prosecutions brought under the statute."); *United States v. Green*, 521 F.3d 929, 932 (8th Cir. 2008); *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1213 (10th Cir. 2007); *United States v. Acosta*, 470 F.3d 132, 134 (2d Cir. 2006); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995).

[6] The *Ovalles* panel cited *McGuire* only in its analysis of whether carjacking qualified under §924(c)'s elements clause, 2017 WL 2829371 at *9–even though *McGuire* clearly held that the categorical approach applies in analyzing predicate offenses under ***both*** the elements ***and*** the residual clauses of §924(c).

Section 924(c)'s residual clause, like the ACCA residual clause, similarly requires the "ordinary case" analysis to assess the risk involved in a predicate offense, and how risky that ordinary case is – the identical analytical steps that brought down the ACCA residual clause – and thus §924(c)'s residual clause 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).

To the extent the *Ovalles* panel characterized the residual clause of §924(c) as "markedly narrower" than the ACCA's residual clause in two respects, it erred. The panel noted first that §924(c)'s residual clause requires a "risk of injury" to the victim and in its view that was "more definite" than a "risk of physical force" being used against the victim. Second, it argued, §924(c)'s residual clause is also temporally "narrower" than the ACCA's residual clause because it looks to the risk of force "aris[ing] during the commission of the offense." 2017 WL 2829371 at **5, 7.

But like the absence of enumerated offenses (discussed *infra*), these textual differences simply have no bearing on the threshold "ordinary case" inquiry that the Supreme Court determined is impossibly arbitrary, and that this Court held in

Keelan applies to the precise language at issue here.[7] In focusing specifically on the risk during the predicate offense, §924(c)'s residual clause does not call for any narrower an inquiry than the ACCA's residual clause. The Supreme Court's determinations whether certain crimes were sufficiently risky under the ACCA also focused on the risk during the commission of the offense, rather than some time later after it had ended. *See, e.g., James*, 550 U.S. at 203-04, 210 (looking to conduct that typically occurs "while the crime [attempted burglary] is in progress," "while the break-in is occurring," and "during attempted burglaries"); *Sykes*, 131 S. Ct. at 2273-74 (same for crime of vehicular flight from police).

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[7] That inquiry requires the Court to imagine the facts that typically make up the predicate crime. That inquiry involves asking whether, for example, "the ordinary instance of witness tampering involve[s] offering a witness a bribe? Or threatening a witness with violence?" *Johnson*, 135 S. Ct. at 2557. Or whether the "ordinary burglar invade[s] an occupied home by night or unoccupied by day?" *Id.* at 2558. Or "[d]oes the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information?" *Id.* Or whether the "ordinary case of vehicular flight" is "the person trying to escape from police by speeding or driving recklessly . . . [o]r is it instead the person driving normally who, for whatever reason, fails to respond immediately to a police officer's signal?" *Sykes v. United States*, 131 S. Ct. 2267, 2291 (2011)(Kagan and Ginsberg, JJ., dissenting). If a court cannot conjure the idealized "typical" scenario in which an offender embarks on the predicate crime, it cannot proceed to determine how the offense is likely to play out and, thus, cannot gauge the riskiness of the probable ensuing conduct – whether that conduct occurs during or after the commission of the crime. As the Ninth Circuit explained, "[t]his reasoning applies equally whether the inquiry considers the risk of violence posed by the commission and the aftereffects of a crime, or whether it is limited to consideration of the risk of violence posed by acts necessary to satisfy the elements of the offense." *Dimaya*, 803 F.3d at 1119.

Likewise, the supposedly "typical" conduct the Supreme Court found sufficiently risky in the ACCA cases involved conduct during the predicate crime, rather than at some later time. *See, e.g., James*, 550 U.S. at 211-12 ("An armed would-be burglary may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner ... may give chase"); *Sykes*, 131 S. Ct. at 2274 (driver's knowingly fleeing law enforcement officer held a violent felony given risk that, during pursuit, driver might cause accident or commit another crime to avoid capture). In *no* case did the Supreme Court actually rely on "post-offense conduct" to find a predicate crime sufficiently risky under the ACCA's residual clause. And in fact, the Court specifically questioned whether this would even be a statutorily permissible basis to qualify an offense a "crime of violence." *See Chambers v. United States*, 555 U.S. 122, 129 (2009).

Moreover, in assessing riskiness, §924(c)(3)(B) and its twin, §16(b) – just like the ACCA – looks not just at the initiation of the predicate crime (*e.g.*, the burglar's climbing through the window), but beyond that, through the entire "course" of the offense to its completion (*e.g.*, while the burglar is in the house, until he successfully flees). *See Leocal*, 543 U.S. at 10 ("[B]urglary, by its nature, involves a substantial risk that the burglary will use force against a victim in completing the crime.").

The *Ovalles* panel attempted to distinguish §924(c)(3)(B) from both §16(b) and the ACCA residual clause by pointing to "different function" of these statutes – namely, that § 924(c) is not concerned with recidivism, and requires a "nexus" to the instant companion crime – which it claimed makes that clause "more precise and predictable." 2017 WL 2829371 at *7. But the functional difference between these statutes does not change the vagueness calculus in any manner for a simple reason the *Ovalles* panel ignored: According to *McGuire* and *Keelan* the proper analysis under §924(c)(3)(B) is *not* fact-centric, based upon the defendant's real-world conduct. Rather, due to the "*by its nature*" language used by Congress in both §924(c)(3)(B) and §16(b), it is categorical and based entirely on the elements of the offense. And the categorical approach uses the hopelessly indeterminate, impossibly vague "ordinary case" benchmark to measure risk.

In sum, neither the textual or functional distinctions identified by the *Ovalles* panel establish a material difference between the unconstitutional residual clause in the ACCA and the residual clauses in §16(b) and §924(c). All three clauses require courts to divine what the "ordinary case" of a crime is, and then decide whether that abstraction poses enough of a risk to be a qualifying offense. *See Shuti v. Lynch*, 828 F.3d 440, 448 (6th Cir. 2016)("[A] marginally narrower abstraction is an abstraction all the same."). Whatever textual differences exist between these clauses, they are not significant enough to treat §924(c)(3)(B)

differently with respect to *Johnson*'s vagueness analysis. At the very least, reasonable jurists could debate – and are debating – the materiality of the distinctions drawn in *Ovalles*.

2. The list of enumerated offenses preceding the ACCA residual clause was not dispositive in *Johnson*.

Another basis upon which the *Ovalles* panel distinguished §924(c)'s residual clause from the ACCA's was the fact that the ACCA's residual clause contained a confusing prefatory list of enumerated offenses which complicated the assessment of risk, whereas §924(c) does not have such a list. 2017 WL 2829371 at *6–*8. While the *Ovalles* panel deemed this difference "material," *id.*, analytically it is not because the Supreme Court's decision in *Johnson* did not hinge on the list of enumerated offenses that precedes the ACCA's residual clause. The Supreme Court simply noted that the enumerated offenses which precede the ACCA residual clause were an *added* problem. *Johnson*, 135 S. Ct. at 2558. The Supreme Court said the residual clause was void for vagueness based on the "two features" turning on the ordinary case – not a third feature turning on the enumerated offenses. *Id.* at 2557; *see also Vivas-Ceja*, 808 F.3d at 723 ("The list [of enumerated offenses] itself wasn't one of the 'two features' that combined to make the clause unconstitutionally vague.") (citing *Johnson*, 135 S. Ct. at 2557).

As a matter of pure logic, *Johnson* could not have turned on the enumerated offenses. The "ordinary case" problem exists ***with or without*** enumerated offenses because a lower court must determine the idealized ordinary case of the predicate offense before it can even begin to evaluate and compare the type of risk presented by that offense. *Id.* at 2557-58. Because courts cannot answer the *threshold question* with any certainty, logic compels that the "ordinary case" analysis itself renders the residual clause unconstitutionally void. If a court cannot determine the "ordinary case" of the predicate offense, then a court cannot proceed with its risk analysis – enumerated offenses or not. The *Johnson* Court made clear that the "ordinary case" problem was really the central distinguishing and dispositive feature, by stating: "*More importantly*, almost all of the cited laws require gauging the riskiness of conduct in which an individual engages on a particular occasion . ... The residual clause, however, requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Johnson*, 135 S. Ct. at 2561 (emphasis added). For this very reason, *Dimaya*, 803 F.3d at 1117-18, *Vivas-Ceja*, 2015 WL 9301373, at *4, and *Edmundson,* 2015 WL 9582736, at *5, all flatly rejected the government's argument that *Johnson* turned on the enumerated offenses. Reasonable jurists, thus, have seriously debated the very argument the *Ovalles* panel adopted without responding to any of the above concerns.

Notably, this very issue was one that split the Fifth Circuit in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. Aug. 5, 2016)(en banc). As four reasonable jurists on that court rightly pointed out in their dissent from that decision, even without a prefatory list of examples "through judicial interpretation, §16(b) not only contains an example, it *contains the very example that most troubled the* Johnson *Court*. Specifically, the Supreme Court has previously explained that burglary is the 'classic example' of a §16(b) crime," "[a]nd 'burglary' was the most confusing of the residual clause's 'confusing examples.' If 'burglary' is a confusing example in one statute, then it is just as confusing in the other." 831 F.3d at 685 (Jolly, J. joined by Stewart, C.J., Dennis, J., and Graves, J., dissenting)("the (judicially created) example in §16(b) is nearly as confusing as the textual examples in the residual clause;" and again, any distinction between the two statutes is not salient enough to constitutionally matter")(emphasis in original).

The lack of enumerated examples in §924(c) thus does not make its residual clause any more clear. If anything, the lack of a prefatory list makes §924(c)'s residual clause *more* capacious that the ACCA's residual clause. Indeed, because §924(c) lacks a prefatory list of examples, its residual clause covers *every* offense that involves a "substantial risk of the use of physical force against the person or property of another." *See Begay v. United States*, 553 U.S. 137, 144 (2008) ("Congress rejected a broad proposal that would have [amended the ACCA to

cover] *every* offense that involved a substantial risk of the use of physical force against the person or property of another.")(internal quotation marks omitted).

In *Welch*, the Supreme Court confirmed that "[t]he residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." 136 S. Ct. at 1262. Significantly, the *Welch* Court did not even mention the list of enumerated crimes, let alone indicate the list was relevant to its holding. Thus, contrary to the finding in *Ovalles*, the list of examples within the ACCA is not a legally "material" difference between the two clauses. At the very least, the panel's conclusion on that point could be debated by reasonable jurists.

3. The same confusion surrounds §924(c)'s residual clause (and its twin §16(b)'s residual clause) as surrounded the ACCA's and, in any event, this was not a dispositive part of the *Johnson*'s holding.

A final reason given by the *Ovalles* panel for why §924(c)'s residual clause is not unconstitutionally vague is that courts have not had the same difficulty construing it as they have had with the ACCA's residual clause. 2017 WL 2829371 at *7. But that argument simply "ignores the reality of judicial review." *Shuti*, 828 F.3d at 450. That the Supreme Court has not taken any cases regarding §924(c)'s residual clause, and therefore has not experienced "repeated failures" in interpreting §924(c)'s residual clause, is "probative only of the Court's

composition of its docket – not absence of vagueness in the provision." *Baptiste v. Attorney Gen.*, 841 F.3d 601, 620 n.21 (3d Cir. 2016); *Shuti*, 828 F.3d at 450 (citing *Singleton v. Commissioner*, 439 U.S. 940, 942 (1978)(Stevens, J., respecting the denial of certiorari)("The Supreme Court's docket is almost entirely discretionary."). The *Johnson* Court's discussion of its repeated failures in crafting a "principle and objective standard" was simply additional evidence confirming the residual clause's vagueness. *Shuti*, 828 F.3d at 450 ("[T]he government mistakes a correlation for causation; conflicting judicial interpretations only provide *ex post* 'evidence of vagueness'"). The Supreme Court's failures in attempting to develop a workable standard for the ACCA's residual clause "was not a necessary condition to the Court's vagueness determination." *Vivas-Ceja*, 808 F.3d at 723.

Moreover, the *Ovalles* panel's suggestion that §924(c)(3)(B), unlike the ACCA, is not shrouded in confusion, is at the very least debatable if not demonstrably incorrect since the panel glossed over the fact that cases addressing §924(c) and §16(b) regularly rely on ACCA cases, and *vice-versa*. Confusion over the meaning of § 924(c)'s residual clause is subsumed in the confusion surrounding the ACCA because federal courts use the same body of precedent to interpret all three. Thus, confusion surrounding the ACCA reflects difficulties with §924(c)(3)(B) and §16(b), even without the same explicit chorus of criticism. And indeed, some circuits have actually split over how to apply §16(b), which is

additional evidence of the confusion surrounding the language of the residual clause of §16(b) and its twin in § 924(c)'s residual clause. *See e.g., Chambers*, 555 U.S. at 133 (Alito and Thomas, JJ., concurring)(citing some illustrative cases). There is no reasonable way to separate the level of confusion over the scope of these three residual clauses.

In any event, as the Seventh Circuit explained in *Vivas-Ceja*, "[t]hat the [ACCA] residual clause had persistently eluded stable construction, was *additional* evidence that served to 'confirm its hopeless indeterminancy.' *Johnson*, 135 S. Ct. at 2558. The chaotic state of the caselaw was not a necessary condition to the Court's vagueness determination." 808 F.3d at 723 (citation and internal quotation marks omitted) (emphasis added). Nor is it a necessary condition to strike down the §924(c) residual clause. *See also Dimaya*, 803 F.3d at 1119 ("That the Supreme Court has decided more residual clause cases than §16(b) cases, however, does not indicate that it believes the latter clause to be any more capable of consistent application.").

3. The Contrary Circuit Decisions followed in *Ovalles* are Unpersuasive

The *Ovalles* panel explicitly adopted the arguments advanced in *United States v. Taylor*, 814 F.3d 340, 376-79 (6th Cir. 2016), *pet. for cert. filed* Oct. 12, 2016 (No. 16-6392); *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); and *United States v. Prickett*, 839 F.3d 697 *8th Cir. 2016), *pet. for cert filed* Dec. 30, 2016

(No. 16-7373). But the reasoning in these decisions is not only debatable by jurists from other circuits who have rejected as immaterial the points of distinction upon which these decisions have relied. The reasoning *Ovalles* relied upon most extensively – that of the Sixth Circuit in *Taylor* – is highly debatable even within the Sixth Circuit itself.

As a threshold matter, the panel decision in *Taylor* upon which *Ovalles* relied, was not itself a unanimous decision. Dissenting judge, Judge Helene White, persuasively criticized the majority opinion. In doing so, Judge White reiterated the importance of the categorical approach in analyzing crimes of violence under §924(c)(3)(B), notably citing this Circuit's decision in *McGuire* for that proposition. *See id.* at 393-98 & n.19 (White, J., dissenting)("Although a fact-centric approach might make sense in the §924(j) context because th[at] statute addresses present rather than past conduct, case law squarely holds that the ["by its nature"] language of §924(c) requires courts to use a categorical approach; citing *McGuire*, 706 F.3d at 1336-1337). The *Taylor* majority opinion, however, minimized that key point of similarity. *See id.* at 378. For the reasons set forth in Judge White's dissenting opinion, as well as those advanced by the Seventh, Ninth, and Tenth Circuits, the majority opinion in *Taylor* is unpersuasive.

Furthermore, it is noteworthy that the Sixth Circuit itself appears to have receded from, or at least substantially limited, its decision in *Taylor*. In its July

2016 decision in *Shuti v. Lynch*, a unanimous panel of that court squarely held that *Johnson* rendered §16(b) unconstitutionally vague in the immigration context, notwithstanding its earlier decision in *Taylor*. Specifically, it accepted the petitioner's argument, and expressly agreed with the Seventh and Ninth Circuits, that §16(b) "suffer[ed] from the same defects as the statute at issue in *Johnson* and, so too, runs afoul of the Fifth Amendment's prohibition of vague laws." 828 F.3d at 445. In doing so, the Sixth Circuit rejected the government's attempts to distinguish the two residual clauses. *See id.* at *446-50

Even more notable, the Sixth Circuit in *Shuti* understood its earlier decision in *Taylor* to be based on the fact that §924(c) involves "real-world conduct," and therefore did not require application of the categorical approach. *Id.* at 449-50. According to the *Shuti* court, that "ma[de] all the difference," since *Johnson* was limited only to statutes applying the categorical/ordinary-case approach. *Id.* at 450 ("We understand *Taylor*, then, as applying *Johnson*'s real-world conduct exception to upholding the constitutionality of" §924(c)'s elements clause). In that regard, the Sixth Circuit emphasized that this limitation of *Johnson* was subsequently reiterated by the Supreme Court in *Welch*, and the court in *Taylor* "did not have the benefit of the Court's guidance in that regard." *Id.*

That limited reading of *Taylor* is critical here, because, as explained above, binding Eleventh Circuit precedent in *McGuire* makes clear that the same

categorical approach governing the ACCA also governs §924(c)'s residual clause. Accordingly, under this Circuit's prior panel precedent rule, the *Ovalles* panel should have been legally precluded by *McGuire* from following *Taylor*, given that the Sixth Circuit has since clarified that *Taylor* rests on the premise that the categorical approach does not apply to §924(c). And that premise is contrary to this Circuit's binding precedent in *McGuire*.

For these reasons, reasonable jurists could debate – and are still debating – whether the residual clause in §924(c)(3)(B) is void for vagueness.

CONCLUSION

This Court should grant a COA to permit further review of Hanna's §924(c) convictions and consecutive sentences.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this pleading complies with the type-volume limitation and typeface requirements of Fed. R. App. P. 32(a)(7)(B) and 11th Cir. R. 22-2, because it contains 12,999 words, excluding the parts of the pleading exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on this 3rd day of August 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and it is being served this day via CM/ECF on Emily M. Smachetti, Chief, Appellate Division, U.S. Attorneys' Office, 99 N.E. 4th Street, Miami, FL 33132-2111.

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