NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

BRYAN WHITEHEAD,

PETITIONER,

vs.

THE UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CORRECTED PETITION FOR WRIT OF CERTIORARI

OBRONT COREY, PLLC
100 South Biscayne Boulevard
Suite 800
Miami, Florida 33131
(305) 373-1040 Telephone
(305) 373-2040 Facsimile

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

1. Whether the Petitioner was denied his Fifth Amendment right to due process of law by virtue of his conviction and sentence under the residual clause of 18 U.S.C. §924(c) in violation of *United States v. Davis*, ____ U.S. ____, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019)?
2. Whether the Petitioner was denied his Fifth and Sixth Amendment rights to have a jury decide whether the element of crime of violence under 18 U.S.C. §924(c) has been proven beyond a reasonable doubt in contravention of the holding in *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151 (2013)?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Marc Anton, Assistant United States Attorney

Robert Juman, Assistant United States Attorney

Angela Noble, Clerk, United States District Court

Curt Obront, Esq., Attorney for Bryan Whitehead

Ariana Fajardo Orsham, United States Attorney

The Honorable Lisette Reid, United States Magistrate Judge

Emily Smachetti, Assistant United States Attorney

David J. Smith, Clerk, Eleventh Circuit Court of Appeals

Bryan Whitehead, Petitioner

The Honorable William Zloch, United States District Judge

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

BRYAN WHITEHEAD,

PETITIONER,

vs.

THE UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, BRYAN WHITEHEAD, respectfully prays that a Writ of Certiorari issue to review the denial of his Certificate of Appealability by the United States Court of Appeals for the Eleventh Circuit in contravention of this Court's recent decision in *United States v. Davis*, ____ U.S. ____, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019) and *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151

(2013) as well as the denial of his Motion for Reconsideration.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Eleventh Circuit Denying Bryan Whitehead's Certificate of Appealability dated July 19, 2019 and appears in Appendix "A". The Order of the United States Court of Appeals Denying Bryan Whitehead's Motion for Reconsideration dated September 12, 2019 and appears in Appendix "B". The Judgment; Report and Recommendation; Order Adopting Report and Recommendation Denying Petitioner's Motion to Vacate Conviction and appears in Appendix "C"; Appendix "D" and Appendix "E".

JURISDICTION

The Court of Appeals Order in this matter was filed on July 19, 2019 pursuant to 28 U.S.C. §2253 and the Court of Appeals Order Denying Motion for Reconsideration was filed on September 12, 2019. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in Appendix "F". Amendment VI to the United States Constitution is set forth in Appendix "G". The United States District Court, Southern District of Florida has jurisdiction pursuant to 28 U.S.C. Section 2255. An appeal was brought from the Petitioner's

denial of a Certificate of Appealability pursuant to 28 U.S.C. §2253 which was affirmed by the United States Court of Appeals for the Eleventh Circuit. Petitioner also filed a Motion for Reconsideration with the United States Court of Appeals for the Eleventh Circuit which was also denied. This Petition for Writ of Certiorari follows.

STATEMENT OF THE CASE

Mr. Whitehead, a first time offender, was convicted of two counts of bank robbery in violation of 18 U.S.C. Section 2113(a) and two counts of brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. Section 924(c)(1), and received a sentence of 432 months imprisonment which he is currently serving. After exhausting his direct appeal, he timely filed a Motion to Vacate pursuant to 28 U.S.C. Section 2255, which was denied by the District Court and a Certificate of Appealability was denied by the Eleventh Court on July 19, 2019. The Petitioner filed a Motion for Reconsideration with the Eleventh Circuit on August 9, 2019 which was denied by the Eleventh Circuit on September 12, 2019. This Petition for Writ of Certiorari follows.

FACTUAL BACKGROUND

Mr. Whitehead was convicted of two counts of bank robbery in violation of 18 U.S.C. §2113(a) and two counts of brandishing a firearm during and in relation

to a crime of violence in violation of 18 U.S.C. §924(c)(1).

On February 1, 2013, the District Court sentenced Mr. Whitehead to a total term of 432 months imprisonment including a 32-year mandatory minimum consecutive sentence for this offense.

Mr. Whitehead timely filed his Motion to Vacate Pursuant to 28 U.S.C. §2255 prior to this Court's decision in *United States v. Davis*, ____ U.S. ____, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019). In this post-*Davis* world, Mr. Whitehead's conviction for brandishing a firearm during a crime of violence in violation of U.S.C. §924(c)(1) is no longer valid since the residual clause of that statute has been deemed void for vagueness in violation of both the Fifth and Sixth Amendments to the constitution.

Additionally, Mr. Whitehead was convicted and sentenced for the above referenced 18 U.S.C. § offenses by general verdict. The jury was not instructed, nor did they unanimously decide, that Mr. Whitehead committed a crime of violence, in contravention of *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151 (2013).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this petition presents an important issue which has directly been addressed by this Court, where the denial of Plaintiff's

Certificate of Appealability pursuant to 28 U.S.C. §2253 violated the Petitioner\s Fifth and Sixth Amendment due process rights and the imposition of a 432 month sentence of imprisonment which Mr. Whitehead is currently serving, in direct contravention of *United States v. Davis*, ____ U.S. ____, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019) which held the residual clause of 18 U.S.C. §924(c) unconstitutionally vague.

STANDARD OF REVIEW

A Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 1034 (2003); see, 28 U.S.C. Section 2253(c)(2). An applicant for a habeas petition meets this standard by showing 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, 120 S.Ct. 1595, 1603-04 (2000).

A 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 the standard, the applicant must "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).

When the district court denies a claim on procedural grounds without reaching the underlying claim, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484.

As this Court has emphasized, 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). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, this Court explained: "We do 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." Id. at 338. Any doubt about whether to grant a COA is 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).

This Court applied this standard in Welch v. United States, 136 S.Ct. 1257 (2016), which arose from the denial of a COA. Id. at 1263-64. In that case, the Court broadly held that Johnson announced a substantive rule that applied retroactively in cases on collateral review. Id. at 1268. But, in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA, because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." Id. at 1264, 1268. In that case, the parties disputed whether his robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. See Id. at 1263-64, 1268. Accordingly, the Court held that a COA should issue.

As explained above, Mr. Whitehead has satisfied this standard. The Movant has demonstrated that he has both a cognizable claim under *Davis* as well as a cognizable *Alleyne* claim. Accordingly, the Court should allow Mr. Whitehead to appeal the denial of his Certificate of Appealability.

FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION VIOLATION DUE TO IMPOSITION OF A SENTENCE PREDICATED UPON AN UNCONSTITUTIONALLY VAGUE STATUTE

As discussed below, Mr. Whitehead should have been granted a Certificate of Appealability since this Court has recently held that the residual clause of 18 U.S.C. §924(c) is unconstitutionally vague. See, *United States v. Davis*, ____ U.S. ____, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019).

In *United States v. Davis*, ____ U.S. ____, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019), this Court held, in the context of 18 U.S.C. § 924(c) convictions premised on conspiracy to commit Hobbs Act robbery, that § 924(c)(3)(B) is unconstitutionally vague. This Court affirmed the Fifth Circuit's decision vacating the § 924(c) convictions for which the predicate crime of violence was Hobbs Act robbery conspiracy. Id. *Davis* overruled the Eleventh Circuit's decision in *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (en banc), on which Mr. Whitehead's Certificate of Appealability application was denied and remanded to the Fifth Circuit for consideration of a motion for rehearing filed in that court by the *Davis* petitioners, seeking to vacate their sentences in their entirety and to vacate their convictions of a second § 924(c) offense that was predicated on a completed Hobbs Act robbery. *Davis*, 139 S.Ct. at 2336.

In light of *Davis's* holding that the firearm enhancement residual clause, 18

U.S.C. § 924(c)(3)(B), is unconstitutionally vague and cannot support a § 924(c) conviction, and in light of the fact that the elements essential to the movant's conviction under § 924(c) in the present case encompass the predicate offense of bank robbery in violation of 18 U.S.C. §2113(a) which is not a valid predicate offense to a § 924(c) conviction, Mr. Whitehead should be granted relief on his 28 U.S.C. § 2255 motion and his Certificate of Appealability should not have been denied.

Following the *Davis* ruling, this Court held that Section 924(c)(3)(b) is unconstitutionally vague also holding that the statutory text commands the categorical approach, as opposed to the case-specific approach.

Applying the categorical approach, as *Davis* instructs, to Petitioner's 924(c) offense reveals that the 924(c) statute is no longer constitutional. Under a proper application as laid out in *Taylor*[1] and its progeny, a court may look to the statutory elements of the (offense). As it relates to the Section 924(c) Statute, the 924(c)(3) element lists alternatively phrased ways of satisfying the crime of violence element, respectively known as Section 924(c)(3)(A) - the elements clause, and 924(c)(3)(B) - the residual clause. "The first task for a sentencing court faced with

[1] *Taylor v. United States*, 495 U.S. 575, 600 (1990).

an alternatively phrased statute is thus to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved ... But if instead there are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." *Mathis v. United States*, 136 S.Ct. 2243, 2256 (2016).

In this approach, this Court emphasized both Fifth and Sixth Amendment concerns and the need to avert the practical difficulties and potential unfairness of a (daunting) factual approach. Id. As a result, the courts must look no further than the statute and judgment of conviction. *United States v. Estrella* 758 F.3d 1239, 1244 (11th Cir. 2014). And in doing so, we "must presume that the conviction 'rests upon nothing more than the least of the acts criminalized." *Moncrieffe v. Holder,* 133 S. Ct. 1678, 1684 (2011). Because *Davis* has voided the residual clause in 924(c)(3)(B), the least criminal of the acts under Section 924(c)(3) no longer satisfies the crime of violence element. And ultimately this invalidates the constitutionality of the Section 924(c) Statute which Mr. Whitehead was convicted and sentenced on.

Based on the holdings in *Davis* and the reasons stated above, Petitioner asserts that that a reasonable jurist would debate that the 924(c) is unconstitutional.

Prior to *Davis* the District Court denied Petitioner's vagueness claim (claim #6) stating that "The Eleventh Circuit has made clear that armed bank robbery, a violation of 18 U.S. C. 2113(a) and (d) is a crime of violence-under Section 924(c)(3)(A) citing *United States v. Faurisma,* 716 Fed. Appx 932 (11th 2018) and *In re Hines,* 824 F.3d 1334, 1332 (11th 2016).

However, that Court has not directly applied the categorical approach to the Section 2113(a) bank robbery standing alone. That is to say, though the Eleventh Circuit has addressed Section 2113(a) and (d), as meeting the requirements for 'crime-of-violence' under Section 924(c)(3)(A), it has never applied the categorical approach to Section 2113(a) standing alone, as being a crime of violence under Section 924(c)(3)(A) - force clause. "While we have not directly held that a bank robbery conviction under only Section 2113(a), rather than an armed bank robbery conviction under Section 2113(a) and (d), qualifies as a crime of violence under the Section 924(c)(3)(A) use of force clause, the statutory language in Section 2113(a) and our holdings in *Hines* and *Moore* make clear that such a conviction falls within the scope of the Section 924(c)(3)(A) use of force clause." *In Re: Sams,* 800 F.3d 1234, 1240 (11th Cir. 2016) (emphasis added).

However, neither of those two cases actually apply the categorical approach as *Davis* instructs. Though the Eleventh Circuit considered the 'force, violence, or

by intimidation' in Section 2113(a), it has not determined 2113(a) in its entirety to be categorically a crime of violence, particularly in regard to the language in Section 2113(a) "attempts to take" , "attempts to obtain by extortion" "extortion" and "larceny" as satisfying the crime of violence under Section 924(c)(3)(A)'s force clause. Neither *Hines* nor *Moore* or any other case in the Eleventh Circuit has addressed the above language in Section 2113 as constituting a crime of violence under the force clause as applied to a post *Davis* categorical context which is now required. Appellant asserts that a proper application of the categorical approach as mandated in Davis, establishes that Section 2113(a) is overbroad and encompasses non-violent means of violating the statute. Because Section 2113(a) standing alone does not constitute a crime-of-violence under 924(c)(3)(A), Mr. Whitehead asserts that his Section 924(c) offenses are invalid.

Based on the holdings in *Davis* and the reasons stated above, Mr. Whitehead asserts that a reasonable jurist would debate that 2113(a) is not a crime of violence under the force clause.

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATION DUE TO IMPOSITION OF A MANDATORY MINIMUM SENTENCE IN VIOLATION OF ALLEYNE V. UNITED STATES

Mr. Whitehead is actually innocent of the 924(c) enhancement because the jury was not instructed and did not find that bank robbery was a "crime of violence", in violation of *Alleyne v. United States*, 133 S.Ct. 2151 (2013)[2].

Movant proceeded to trial in a four-count indictment for two Section 2113(a) bank robbery offenses (Counts 1 and 3) and two 924(c) offenses (Counts 2 and 4) . At the close of trial, the jury was submitted a general verdict form. The verdict form required only that the jury reach a verdict on Count 1, Count 2, Count 3, and Count 4. The jury also made a specific determination as to if a firearm was brandished. However, the jury was not instructed by the court to make a determination as to whether the two bank robbery charges were crimes of violence. Movant asserts the jury was required to make a specific finding of whether the substantive bank robbery charges were crimes of

[2] In *Alleyne,* this Court overruled prior precedent in *Harris v. United States*, 536 U.S. 545 (2002), which held that a fact triggering an increased mandatory minimum penalty was a "sentencing factor" that could be found by a judge, rather than an element of the crime. In so doing, the Court reasoned that *Harris* could not be reconciled with the rule announced in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which held that any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime that must be proved to a jury beyond a reasonable doubt. *Alleyne*, ___ U.S. ___, 133 S.Ct. 2151, 2160. The Court thus held that any fact that increases a mandatory minimum penalty is an element of the crime, and not a "sentencing factor", that must be found by a jury. *Alleyne*, 133 S.Ct. 2151, 2162.

violence since that was an "element" of the companion 924(c) offenses.

In *Alleyne*, this Court has said: "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." Id. The "crime of violence" element/ingredient is essential to determining whether the 924(c) offense has been proven. Thus, determining whether the offense constituted a crime of violence was an element of the offense to be submitted to and found by a jury beyond a reasonable doubt.

To start, a plain reading of the 924(c)(1)(a) reads:

> ... Any person who during and in relation to any **crime of violence** or drug trafficking crime (including a crime of violence or drug trafficking crime that provide for an enhanced punishment if committed by the use of deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who in the furtherance of any such crime possess a firearm, shall in addition to the punishment provided for such crime of violence or drug trafficking crime ... (emphasis added)

The 924(c) statute is not a transformative statute meaning it does not transform any predicate offense it was charged with to a "crime of violence". Though Section 2113(a) bank robbery by itself is a "crime", it nevertheless does not now make the bank robbery a "crime of violence", even if a firearm was used during its commission. Rather, that fact is an "element" of the 924(c) offense required to be found by a jury beyond a reasonable doubt like any other element of

any other criminal offense.

The 924(c)(1)(a) statute can be violated in two ways, (1) any person who during and in relation to ... and (2) who in the furtherance of any such crime ... . The 924(c) statute does not, however, provide a statutory list enumerating specific crimes that constitute a crime of violence. Bank robbery, therefore, cannot automatically be presumed to be a crime of violence. Additionally, nowhere in either of the two ways the 924(c) statute could be violated does it state or remotely state that it somehow elevates a predicate offense it is charged along with to a "crime of violence" status.

Since Section 2113(a) bank robbery is not predetermined to be a "crime of violence", the 924(c) statute does not independently elevate a bank robbery offense to a "crime of violence" offense. Accordingly, the "crime of violence" element, an essential element of the 924(c) offense, should have been required to be found by the jury beyond a reasonable doubt if bank robbery indeed is a "crime of violence". That was never done. Ultimately, this implicates a Sixth Amendment violation analogous to that found in *Alleyne v. United States*, 133 S.Ct. 2151 (2013).

In *Alleyne*, the defendant was convicted of using or carrying a firearm in relation to a crime of violence under 18 U.S.C. Section 924(c)(1)(a). However, the sentence was based on a finding that he "brandished" the firearm even though the

jury did not find brandishing beyond a reasonable doubt. Since brandishing triggered a seven-year mandatory minimum sentence, the Court invalidated that sentence since it was not both charged in the indictment and decided by a jury.

Although there is not a "brandishing" issue in the instant case, the jury verdict form's lack of a "crime of violence" determination for the bank robbery offenses violates the *Alleyne* principle since that is clearly an element of the 924(c) offenses. Without the jury's finding of this element, the judge was not permitted to impose the enhanced 924(c) penalty.

> "Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment. See *Apprendi*, 530 U.S. at 478-479." It also preserves the historic role of the jury as an intermediary between the state and criminal defendants". *Alleyne*, Id.

The crime of violence element is important because it is a core element of the 924(c)(1)(a) offense which triggers the mandatory minimum penalties under the statute. *In Re: Emilio Gomez*, 830 F.3d 1225 (11th Cir. 2016) clarified the significance of where a minimum mandatory is increased, and held:

> This lack of specificity has added significance because Section 924(c) "increases [the] mandatory minimum" based on a finding that the defendant "used or carried a firearm" (mandatory minimum of five years), "brandished" a firearm (seven years), or "discharged" a firearm (ten years). See, *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 2155 (2013). *Alleyne* held that because these findings "increase the mandatory minimum sentence," they are "elements and must be submitted to the jury and found beyond a reasonable doubt." Id. at 2158. An indictment that lists multiple predicates in a single Section 924(c) count allows for a defendant's mandatory minimum to be increased without the unanimity *Alleyne* required. For example, half of the jury may have believed that Gomez used the gun at some point during his Hobbs Act conspiracy, and the other half that he did so only during the drug trafficking offense. The way Gomez's indictment is written, we can only guess which predicate the jury relied on. It's possible that we can make a guess based on the PSI or other documents from Gomez's trial or sentencing. But *Alleyne* expressly prohibits this type of "judicial fact-finding" when it comes to increasing a defendant's mandatory minimum sentence. Id. at 2155. *In Re: Gomez* Id. at 1227-1228.

Congress did not Designate 924(c) as a Sentencing Factor Nor was it Deemed One in Any of its Provision

The Sixth Amendment, in conjunction with the Due Process Clause, requires that each element of a crime be found by a jury beyond a reasonable doubt. *Alleyne v. United States* (2013). The substance and scope of this depends upon the proper designation of the facts that are elements of the crime. In other words, the determination of an offense's element as a sentencing factor or element to be found by a jury beyond a reasonable doubt is "a question for Congress" to answer. *United States v. O'Brien*, 560 U.S. 218, 225, 130 S.Ct. 2169, 176 L.Ed.2d

979 (2010). And even so, Congress would have to go through a process to explicitly designate whether a statute's ingredients are a sentencing factor or otherwise remains an element that must be found by a jury beyond a reasonable doubt.

In *Taylor v. United States*, 495 U.S. 575 (1990), the 924(e) statute was acknowledged as a "sentence-enhancement provision", with "sentence" being the operative word. The Government's reliance on *Greer* and *Greer's* reference to *Almendares-Torres* draws upon the view of the ACCA being a sentencing factor. The Eleventh Circuit's case law supports the position that an element that concerns itself with prior convictions is in essence addressing recidivism which is a sentencing factor. In that regard, the Court stated "the sentencing factor at issue here – recidivism - is a traditional, if not the most traditional basis for sentencing courts increasing an offender's sentence". United States v. Burge, 407 F.3d 1183, 1188 (11th Cir. 2005) citing *Almendarez-Torres*. And here the Government asserts in its response that the ACCA statute is the type of offense that falls into the "narrow exception" of offenses in which a Judge is permitted to increase a sentence. *Apprendi v. New Jersey*. "When Congress is not explicit as is often the case … courts look to the provisions and framework of the statute to determine whether a fact is an element or a sentencing factor". *O'Brien*, 560 U.S. at 225.

Because the ACCA has been deemed a "sentencing factor", that characterization seemed to grant permission to judges to make a determination on the nature of a prior conviction. Labeling an offense a 'sentencing factor', rather than an "element", makes the offense a special category of offense and such determination takes place at a stage in the judicial proceedings that infringe on the defendant's Sixth Amendment rights.

However, 924(c) is distinct from 924(e) in that the 924(c) is not a sentencing factor and does not fall into the "narrow exception" category. A defendant has rights as it relates to being charged with 924(c) at every stage of the proceedings starting with it being charged in the indictment all the way to the jury's findings on a verdict form. Unlike 924(e), a penalty provision which authorizes a court to increase a sentence for a recidivist, the 924(c) statute is its own separate crime that does not concern itself with any past convictions and all of its elements must be found by a jury beyond a reasonable doubt. *Alleyne*. Moreover, this Court in *United States v. O'Brien* had occasion to evaluate Congress's intent with the 924(c) statute. There, *O'Brien*_reveals that Congress did not designate 924(c) as a sentencing factor and thus did not abandon legal traditions of treating the 924(c) as a separate crime or any of its penalty enhancing offenses as a sentencing factor. What it found was that Congress was either "silent" or "neutral" as to any aspect of

the 924(c) being a sentencing factor.

So if Congress never explicitly deemed 924(c) a sentencing factor nor did they implicate this in the construction of the statute, the Government here cannot simply legislate on its own that the Movant's 924(c) crime of violence element is merely a sentencing factor thus permitting the Judge and not the jury to decide that element. Stated another way, legislative powers are not extended to the Government, but rather left to Congress. But even more compelling is the fact that the U.S. Supreme Court identified a concrete limit on the types of facts that even legislatures may designate as sentencing factors. *Alleyne,* Id. In light of that, the U.S. Supreme Court in *Alleyne* (which was addressing the 924(c) statute), explained that in defining the limits on the legislature that there was no principal basis for treating a fact increasing the maximum term of imprisonment differently than facts constituting the base offense. In other words, 924(c)(1)(a) is the base offense and as the U.S. Supreme Court in *O'Brien* made clear, a jury (rather than a judge) is to make a finding on an element outside the 924(c)(1)(a) base. It is, therefore, implicit that a jury would be required to find the elements of the 924(c)(1)(a) base offense as well. Supporting case law says the same, See, e.g., *United States v. McDaniel*, 147 F.Supp.3d 427, 432 (E.D.Va. 2015). "The phrase 'crime of violence' is an element of § 924(c) - rather than a sentencing factor – and

therefore must be submitted to a jury beyond a reasonable doubt". See, also, *United States v. Fuentes*, 805 F.3d 485, 498 (4th Cir. 2015) (reversing 924(c) conviction on plain error standard due to the Court's instruction to the jury that sex trafficking offense was categorically a crime of violence). Ultimately, the 924(c) statute would keep to the constitutionally mandated norm by having all the 924(c) elements including "crime of violence" under the beyond a reasonable doubt standard, especially since 924(c) was never explicitly or implicitly included in the "narrow exception" of § 924(e).

Finally, in closing, Mr. Whitehead is not asserting that the crime of violence argument is limited solely to the *Alleyne* beyond a reasonable doubt argument. Rather, Mr. Whitehead is arguing that a defendant who goes to trial should be permitted to argue both. In one light, he could bring an argument that the jury did not find beyond a reasonable doubt every element of the offense. Alternatively, in another situation, the jury might have made such a finding but the statute itself may be flawed and therefore Movant must be permitted to bring a categorical argument if appropriate. In other words, a defendant that goes to trial should not lose the right to have a jury make a finding of every element of the offense, regardless of the separate and independent categorical argument to the applicability of the statute.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the denial of Petitioner's Certificate of Appealability by the Court of Appeals for the Eleventh Circuit in this matter.

Dated: January 7, 2020.

Respectfully submitted,

OBRONT COREY, PLC
100 South Biscayne Boulevard
Suite 800
Miami, Florida 33131
Phone: (305) 373-1040
Fax: (305) 373-2040
E-mail: curt@obrontcorey.com

By: _____
CURT OBRONT, ESQ.

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to all counsel of record this the 7th day of January, 2020.

_____
CURT OBRONT, ESQ.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11355-C

BRYAN WHITEHEAD,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Bryan Whitehead moves for a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate. To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted). Because Whitehead has failed to make the requisite showing, his motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11355-C

BRYAN WHITEHEAD,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: JORDAN and GRANT, Circuit Judges.

BY THE COURT:

Bryan Whitehead has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's July 19, 2019, order denying a certificate of appealability, following the dismissal of his motion to vacate sentence, 28 U.S.C. § 2255. Upon review, Whitehead's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-62163-CIV-ZLOCH

BRYAN WHITEHEAD,

Movant,

vs.

FINAL JUDGMENT

UNITED STATES OF AMERICA,

Respondent.
_____/

THIS MATTER is before the Court upon Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 8) as amended by Movant's Reply To Government's Consolidated Response To Movant's Motion To Vacate, Correct, Or Set Aside Sentence Pursuant To 28 U.S.C. Section 2255 (DE 45). For the reasons expressed in this Court's Order denying said Motion, entered separately, and pursuant to Federal Rule of Civil Procedure 58, it is

ORDERED AND ADJUDGED as follows:

1. Final Judgment be and the same is hereby **ENTERED** in favor of Respondent United States of America and against Movant Bryan Whitehead upon the Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 8) as amended by Movant's Reply To Government's Consolidated Response To Movant's Motion To Vacate, Correct, Or Set Aside Sentence Pursuant To 28 U.S.C. Section 2255 (DE 45) filed herein. Movant shall take nothing by this action and said Respondent shall go hence without

day; and

2. To the extent not otherwise disposed of herein, all pending motions are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of February, 2019.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

The Honorable Lisette M. Reid
United States Magistrate Judge

All Counsel of Record

Bryan Whitehead PRO SE
99876-004
Coleman Medium
Federal Correctional Institution
Inmate Mail/Parcels
Post Office Box 1032
Coleman, FL 33521

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 15-62163-CIV-ZLOCH
(12-60130-CR-ZLOCH)
MAGISTRATE JUDGE P. A. WHITE

BRYAN WHITEHEAD,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE RE §2255 CHALLENGING, IN PART,18 U.S.C. §924(C) CONVICTION

I. Introduction

Initially, the movant, **Bryan Whitehead**, while proceeding *pro se*, filed this motion to vacate, as amended (Cv-DE#8), pursuant to 28 U.S.C. §2255, raising five grounds for relief. After prolific, piecemeal filings, the court appointed counsel following movant's claims challenging his 18 U.S.C. §924(c) convictions and sentences for knowingly using or carrying a firearm during and in relation to a crime of violence, entered following a jury verdict in **Case No. 12-60130-Cr-Zloch**. Movant argues, in relevant part, that his §924(c) convictions and sentences are unlawful in light of the Supreme Court's decision in Johnson v. United States,[1] 576 U.S.

[1]As everyone is well-aware, on June 26, 2015, the United States Supreme Court, in Johnson, held that the Armed Career Criminal Act's (ACCA) residual clause was unconstitutionally vague, and that imposing an enhanced sentence pursuant to that clause thus violates the Constitution's guarantee of due process. In Welch v. United States, 578 U.S. __, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), the Supreme Court held that Johnson announced a substantive rule that applied retroactively on collateral review.

____, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), made retroactively applicable to cases on collateral review on April 18, 2016, by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). (Cv-DE#s8,45).

This Cause has been referred to the Undersigned for consideration and report, pursuant to 28 U.S.C. §636(b)(1)(B), (C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges; S.D. Fla. Admin. Order 2003-19; and, Rules 8 and 10 Governing §2255 Cases in the United States District Courts.

After the initial *pro se* filing, the movant and government embarked on protracted, piecemeal litigation. As a result, the court entered an Order, indicating that the movant's motion, as amended (Cv-DE#8) would be the operative §2255 motion, appointed counsel, and entered a briefing schedule. (Cv-DE#37). In compliance therewith, the government file its all-inclusive response (Cv-DE#41), the movant filed his own *pro se* reply (Cv-DE#44), and movant's counsel filed an all inclusive reply (Cv-DE#45) to the government's response, together with a notice of supplemental authority (Cv-DE#46). In addition to the foregoing, before the Court for review is the Presentence Investigation Report ("PSI"), Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file under attack here.[2]

II. Claims

In his operative §2255 motion (Cv-DE#8), together with counsel's briefing (Cv-DE#45), the movant raised the following

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

grounds for relief:

1. He was denied effective assistance of counsel, where his lawyer failed to adequately argue that there was insufficient evidence to support the convictions as to Counts 3 and 4 of the Second Superseding Indictment. (Cv-DE#8:4).

2. He was denied effective assistance of counsel, where his lawyer failed to object to the introduction and/or use of evidence relating to the 2012 bank during the portion of movant's trial relating to the 2010 bank robbery. (Cv-DE#8:8).

3. He was denied effective assistance of counsel, where his lawyer failed to renew the movant's motion for severance on the grounds that several of the government's actions prevented the jury from separately appraising the government's evidence as to each offense. (Cv-DE#8:12).

4. He was denied effective assistance of counsel, where his lawyer failed to object to the court's jury instructions. (Cv-DE#8:16).

5. He was denied effective assistance of counsel, where his lawyer failed to move for a continuance or to object to the government's discovery violation. (Cv-DE#8:18).

6. His convictions for brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §924(c)(1), are no longer lawful in light of Johnson v. United States, 576 U.S. ___, 135 S.Ct. 2551 (2015). (Cv-DE#45:3).

7. His convictions for using or carrying a firearm, during and in relation to a crime of violence, in violation of 18

U.S.C. §924(c)(1), are no longer lawful in light of the Supreme Court's decision in Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151 (2013). (Cv-DE#45:3).

III. Procedural History

By way of background, the movant's convictions arose out of two bank robberies that occurred within thirty miles of each other, two years apart. United States v. Whitehead, 567 Fed.Appx. 758 (11 Cir. 2014). The first bank robbery occurred on May 1, 2010, at a Bank of America ("BofA"), in Delray Beach, Florida. The second robbery occurred on May 21, 2012, at a BB&T Bank ("BB&T") in Plantation, Florida. United States v. Whitehead, supra. On October 30, 2012, a Second Superseding Indictment was returned charging the movant with two bank robberies, one occurring in 2012 (Count 1) and the other in 2010 (Count 3), in violation of 21 U.S.C. §2113(a), two counts of possessing and brandishing a firearm during and in relation to a crime of violence, to-wit, the 2012 robbery as charged in Count 1 (Count 2) and the 2010 robbery as charged in Count 3, in violation of 18 U.S.C. §§924(c)(1)(A) and 924(c)(1)(A)(ii) (Counts 2 and 4). (Cr-DE#56).

Movant engaged in pretrial motion practice, including the filing of a motion to suppress evidence and eyewitness identification of the movant. (Cr-DE#57). Following an evidentiary hearing, the district court denied the motion. (Cr-DE#s108-109, 127). Next, movant filed a motion to sever the trial on the 2012 bank robbery from the 2010 bank robbery, but the district court denied the motion. (Cr-DE#s68,70,103). Movant then proceeded to trial, where he was convicted as charged, following a jury verdict. (Cr-DE#85).

A PSI was prepared which recommended a base offense level 20 for Counts 1 and 3 (the bank robberies), pursuant to U.S.S.G. §2B3.1(a). United States v. Whitehead, 567 Fed.Appx. at 764. The PSI added a total of seven levels to the base offense level, (1) for taking property of a financial institution, (2) because the loss was more than $10,000, but less than $50,000, and (3) for abduction of a person to facilitate the commission of the offense. Id. Pursuant to the U.S.S.G. §3D1.4 adjustment, the movant's base offense level became a level 29. (Id.). The resulting guideline range on Counts 1 and 3 was 87 to 108 months imprisonment. United States v. Whitehead, 567 Fed.Appx. at 765. Count 2 carried a mandatory consecutive term of 7 years' imprisonment, and Count 4 had a mandatory consecutive term of 25 years imprisonment. Id.

Movant appeared for sentencing on February 1, 2013, at which time the movant objected to the four-level increase for abduction under U.S.S.G. §2B3.1(b)(4)(A). Id. The objection was overruled and the guideline range was adopted a to Count 1 and 3, as set forth in the PSI. Id. The movant was then sentenced to a total term of 471 months imprisonment, consisting of: two concurrent terms of 87 months imprisonment as to Counts 1 and 3, a consecutive term of 84 months imprisonment as to Count 2, and a second consecutive term of 300 months imprisonment as to Count 4, to be followed by total term of 5 years supervised release. (Cr-DE#129,154). Movant prosecuted a direct appeal, raising multiple claims, including the denial of the suppression motion, the sufficiency of the evidence, and the lawfulness of his sentences. United States v. Whitehead, 567 Fed.Appx. 758 (11 Cir. 2014); (Cr-DE#161). The Eleventh Circuit affirmed the convictions, but remanded for resentencing, finding the district court erred in applying a 4-level increase for abduction instead of a 2-level increase for physical restraint. Id. Therefore, the Eleventh Circuit determined that the advisory

guideline range as to Counts 1 and 3 was incorrectly calculated, and thus remanded for resentencing. Id. Certiorari review was denied on **October 6, 2014**. Whitehead v. United States, ___ U.S. ___, 135 S.Ct. 308, 190 L.Ed.2d 223 (2014); (Cr-DE#174).

Following issuance of the mandate, the district court held a resentencing hearing. (Cr-DE#175). The movant's advisory guideline range was recalculated as to Counts 1 and 3, and movant's request for a downward variance as to Counts 1 and 3 was granted, after which the court sentenced him to two concurrent terms of 48 months imprisonment on Counts 1 and 3, a consecutive term of 84 months imprisonment as to Count 2, and a second consecutive term of 300 months imprisonment as to Count 4. (Cr-DE#168).

Movant appealed the resentencing judgment, challenging the reasonableness of his sentence, claiming the court was required to vary downward to a total zero-month prison sentence on Counts 1 and 3 to alleviate the severity of his mandatory, consecutive sentences on Counts 2 and 4, and requested that the appellate court remand with instructions to impose a total 384-month sentence. United States v. Whitehead, 605 Fed.Appx. 888 (11 Cir. 2015); (Cr-DE#181). On **April 3, 2015**, the Eleventh Circuit affirmed the resentencing judgment in a written, but unpublished opinion. United States v. Whitehead, supra.; (Cr-DE#181). No certiorari review petition appears to have been filed. Thus, the movant's judgment of conviction following resentencing become final on **July 2, 2015**, when the 90-day period for seeking certiorari review with the U.S. Supreme Court expires following conclusion on direct appeal.[3]

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[3]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufman, 282 F.3d 1336 (11th Cir. 2002); Wainwright v. Sec'y Dep't of

The movant had one year from the time his judgment became final, or no later than **July 2, 2016,**[4] within which to timely file this federal habeas petition. See Insignares v. Fla. Dep't of Corr's,[5] 755 F.3d 1273, 1280 (11th Cir. 2014)(citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1293 (11th Cir. 2007), cert. den'd, 555 U.S. 1149, 129 S.Ct. 1033, 173 L.Ed.2d 315 (2009))(commencing the one year period from the date of resentencing, where state prisoner was resentenced as a result of a successful Fla.R.Cr.P. 3.850 motion), applying Burton v. Stewart, 549 U.S. 147, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007)(other citations omitted). Applying the anniversary method to this case means movant's collateral attack to the original judgment of conviction and resultant sentence expired on **July 2, 2016.**

Approximately **three months** of the federal one-year limitations period went untolled before the petitioner returned to this court, filing his initial motion to vacate on **October 6, 2015,** after he signed and handed his motion to prison authorities for mailing, in accordance with the mailbox rule, as evidenced by the prison

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Corr's, 537 F.3d 1282, 1283 (11th Cir. 2007)(conviction final under AEDPA the day U.S. Supreme Court denies certiorari, and thus limitations period begins running the next day). Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry. The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir. 2003).

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

[5]In Insignares, the Eleventh Circuit found that, for purposes of the AEDPA, "judgment" refers to the underlying conviction and the most recent sentence that authorizes a petitioner's current detention. Id. The court noted that a resentencing results in a new judgment that restarts the AEDPA's one-year statute of limitations period. Id. (citing Ferreira, at 1292-1293).

facility stamp, raising four grounds for relief.[6] (See Cv-DE#1:24). Well within the one-year federal limitations period, the movant next filed the operative, amended §2255 motion (Cv-DE#8), on **November 19, 2015**, raising **claims 1 through 4**, as listed above, the same claims previously raised in his initial motion, and adding **claim 5**, as listed above.

Meanwhile, the Supreme Court's decision in Johnson, supra. was issued on June 26, 2015, and was made retroactively applicable to cases on first collateral review by Welch, supra on April 18, 2016. On **March 30, 2016**, one month before the one-year period for raising a new Johnson claim expired, the movant sought leave to amend his §2255 motion, adding **claim 6**, challenging his §924(c) convictions. (Cv-DE#18). The motion for leave to amend was granted, with instructions that the movant need not refile the amendment. (Cv-DE#21).

Undeterred, the movant filed yet another motion for leave to amend, which was undated and not filed under penalty of perjury, but file stamped as received by the Clerk on **July 11, 2016**, seeking to raise for the first time **claim 7**, asserting that he is actually innocent of both §924(c) convictions, based on the Supreme Court's decision in Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151,

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

186 L.Ed. 314 (2015).[7] (Cv-DE#24). The motion was granted, subject to application of the federal one-year statute of limitations and application of without prejudice to the application of Davenport v. United States, 217 F.3d 1341 (11 Cir. 2000). (Cv-DE#37).

Because of the multiple, piecemeal filings and responses, the court appointed counsel for the movant, set a briefing schedule, and required the government to file one consolidated response to the operative motion (Cv-DE#8), and to address the lawfulness of the movant's §924(c) convictions, as raised in claims 6 and 7. (Cv-DE#37). Movant was permitted to file a *pro se* response to claims 1 through 5, and movant's counsel was to file a response to the government's motion, re-addressing the lawfulness of movant's claims 6 and 7. (Id.). The government filed it's consolidated response (Cv-DE#41), and the movant filed his *pro sei* reply (Cv-DE#44), while movant's counsel filed a comprehensive reply (Cv-DE#45), as ordered.

IV. Threshold Issues-Timeliness

The government concedes claims 1 through 5 of movant's motion, as amended (Cv-DE#8), are timely because the amended motion was filed well before expiration of the federal one-year limitations period. (Cv-DE#41:18). The government also does not dispute that

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[7]In Alleyne, the United States Supreme Court overruled its prior precedent in Harris v. United States, 536 U.S. 545 (2002), which held that a fact triggering an increased mandatory minimum penalty was a "sentencing factor" that could be found by a judge, rather than an element of the crime. In so doing, the Court reasoned that Harris could not be reconciled with the rule announced in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which held that any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime that must be proved to a jury beyond a reasonable doubt. Alleyne v. United States, ___ U.S. at ___, 133 S.Ct. at 2160. The Court thus held that any fact that increases a mandatory minimum penalty is an element of the crime, and not a "sentencing factor," that must be found by a jury. Alleyne v. United States, ___ U.S. at ____, 133 S.Ct. at 2162.

claim 6, wherein movant challenges his §924(c) convictions, in light of the Supreme Court's Johnson decision, was also timely instituted because the claim was filed before the one-year limitation for raising such a claim expired. (DE#41:27). The government questions the timeliness of claim 7, but explicitly concedes it has "no basis to dispute Movant's representation that he placed his motion in the prison mail system on July 2, 2016." (Cv-DE#41:52). Thus, the government "concedes that Movant's motion raising Claim 7 was timely filed." (Id.:52).

The government argues correctly that the one-year limitations period, as applied here, must be determined on a claim-by-claim basis, citing Zack v. Tucker, 704 F.3d 917, 925-26 (11 Cir. 2013). (Id.). The government rightfully argues that under §2255(f), movant's conviction became final at the latest on July 2, 2015, when the 90-day period for seeking certiorari review expired.

Although it appears that claim 7 may not have been timely instituted, the government has waived the statute of limitations defense from consideration by this court under United States v. Frady, 456 U.S. 152, 162, 167-68, 102 S.Ct. 1584, 1594, 1599-1600, 7 L.Ed.2d 816 (1982). See Wood v. Milyard, 566 U.S. 463, 470 n.5, 472, 132 S.Ct. 1826, 1833, 1835, 182 L.Ed.2d 733 (2012). In Wood, the Supreme Court held that a district court abuses its discretion by considering a statute of limitation defense that has been affirmatively waived, as opposed to merely forfeited. (Id.). See also In Re Jackson, 826 F.3d 1343, 1347 (11 Cir. 2016)(citing Day v. McDonough, 547 U.S. 198, 210, 126 S.Ct. 1675, 1684, 164 L.Ed.2d 376 (2006) and Wood v. Milyard, 546 U.S. 463, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012)); Rogers v. United States, 569 Fed. Appx. 819, 821 (11th Cir. 2014)(Determining government's miscalculation was not related to the timeliness of the motion, but

rather an intelligent waiver of the statute of limitations defense, citing Day v. McDonough, 547 U.S. at 202 and Gay v. United States, 816 F.2d 614, 616 n. 1 (11th Cir.1987)("[T]he principles developed in habeas cases also apply to §2255 motions.")).

V. General Legal Principles

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

The law is well established that a district court need not reconsider issues raised in a section 2255 motion which have been resolved on direct appeal. Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Mills v. United States, 36 F.3d 1052, 1056 (11th Cir. 1994); United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir.

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

The movant raises multiple claims challenging counsel's effectiveness during all stages of the proceeding. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the assistance of counsel during criminal proceedings against them. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When assessing counsel's performance under Strickland, the Court employs a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance ...." Burt v. Titlow, ___ U.S. ___, 134 S.Ct. 10, 18, 187 L.Ed.2d 348 (2013). To prevail on a claim of ineffective assistance of counsel, the movant must demonstrate (1) that his counsel's performance was deficient, i.e., the performance fell below an objective standard of reasonableness, and (2) that he suffered prejudice as a result of that deficient performance. Strickland, 466 U.S. at 687-88.

To establish deficient performance, the movant must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. Strickland,

supra. See also Cummings v. Sec'y for Dep't of Corr's, 588 F.3d 1331, 1356 (11th Cir. 2009)("To establish deficient performance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place.")(internal quotation marks omitted). The Court's review of counsel's performance should focus on "not what is possible or what is prudent or appropriate but only [on] what is constitutionally compelled." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000)(*en banc*), cert. den'd, 531 U.S. 1204 (2001)(quoting Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)). There are no absolute rules dictating what is reasonable performance because absolute rules would restrict the wide latitude counsel have in making tactical decisions. Id. at 1317. The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Chandler, 218 F.3d at 1313. Instead, the test is whether what counsel did was within the wide range of reasonable professional assistance. Id. at 1313 n.12.

Regarding the prejudice component, the Supreme Court has explained "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. Strickland, 466 U.S. at 689. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A court need not address both prongs of Strickland if the defendant makes an insufficient

showing on one of the prongs. Stickland, 466 U.S. at 697. See also Brown v. United States, 720 F.3d 1316, 1326 (11 Cir. 2013); Butcher v. United States, 368 F.3d 1290, 1293 (11 Cir. 2004). Further, counsel is not ineffective for failing to raise non-meritorious issues. Chandler v. Moore, 240 F.3d 907, 917 (11 Cir. 2001). Moreover, counsel is not required to present every non-frivolous argument. Dell v. United States, 710 F.3d 1267, 1282 (11 Cir. 2013).

A court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. Id. at 690-91. To uphold a lawyer's strategy, the Court need not attempt to divine the lawyer's mental processes underlying the strategy. "There are countless ways to provide effective assistance in any given case." Strickland, 466 U.S. at 689. No lawyer can be expected to have considered all of the ways. Chandler, 218 F.3d at 1316.

Since the sentence ultimately imposed upon the defendant is a "result of the proceeding," in order for a petitioner to satisfy the prejudice-prong of Strickland, he must demonstrate that there is a reasonable probability that his sentence would have been different but for his trial counsel's errors. See United States v. Boone, 62 F.3d 323, 327 (10th Cir.)(rejecting the defendant's claim that counsel was ineffective in part because the defendant failed to show "that the resulting sentence would have been different than that imposed under the Sentencing Guidelines"), cert. denied, 516 U.S. 1014 (1995). Thus, the Strickland test applies to claims involving ineffective assistance of counsel during the punishment phase of a non-capital case. See Glover v. United States, 531 U.S.

198 (2001)(holding "that if an increased prison term did flow from an error [of counsel] the petitioner has established Strickland prejudice"); Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993). If the petitioner cannot meet one of Strickland's prongs, the court does not need to address the other prong. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. See also Butcher v. United States, 368 F.3d 1290, 1293 (11th Cir. 2004).

Furthermore, a §2255 movant must provide factual support for his contentions regarding counsel's performance. Smith v. White, 815 F.2d 1401, 1406-07 (11th Cir.1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the Strickland test. See Boyd v. Comm'r, Ala. Dep't of Corr's, 697 F.3d 1320, 1333-34 (11th Cir. 2012); Garcia v. United States, 456 Fed.Appx. 804, 807 (11th Cir. 2012) (citing Yeck v. Goodwin, 985 F.2d 538, 542 (11th Cir. 1993)); Wilson v. United States, 962 F.2d 996, 998 (11th Cir. 1992); Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991); Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(citing Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); United States v. Ross, 147 Fed.Appx. 936, 939 (11th Cir. 2005).

Finally, the Eleventh Circuit has recognized that the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. Williamson v. Moore, 221 F.3d 1177, 1180 (11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" Dingle, 480 F.3d at 1099 (quoting Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)). The Sixth Circuit

has framed the question as not whether counsel was inadequate, but was counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory." United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992).

As will be demonstrated in more detail below, the movant is not entitled to vacatur on the claims presented.[8] When viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the movant a fundamentally trial and due process of law. The movant therefore is not entitled to habeas corpus relief. See Fuller v. Roe, 182 F.3d 699, 704 (9th Cir. 1999)(holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation), overruled on other grounds, Slack v. McDaniel, 529 U.S. 473, 482 (2000). See also United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990)(stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to the movant's apparent assertions, the result of the proceedings were not fundamentally unfair or unreliable. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

VI. Facts Adduced at Trial

Given the nature of claims raised herein, a succinct, detailed recitation of the facts, as set forth by the Eleventh Circuit in

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[8]Briefly, the evidence against the movant was more than sufficient to support his convictions. The movant has not shown that the result of the trial or appeal would have been affected had counsel proceeded differently. Further, no denial of due process has been demonstrated. To the contrary, it is clear after independent review of the record that the movant received a fair trial, and that no constitutional violations occurred. Consequently, he has failed to demonstrate that he is entitled to relief in this collateral proceeding.

its published opinion, reveals that:

I. FACTUAL BACKGROUND

This case involves Whitehead's commission of two bank robberies that occurred within thirty miles of each other, two years apart. The first robbery occurred on May 1, 2010, at a Bank of America in Delray Beach, Florida. The second robbery occurred on May 21, 2012 at a BB&T Bank in Plantation, Florida....

A. May 1, 2010 Bank of America Robbery

On the morning of May 1, 2010, Whitehead entered the Delray Beach Bank of America, which had just opened for business, and shouted, "This is a bank robbery. Everybody get down. This is not a joke. This is the real deal." Whitehead, a black male, had bare hands and wore a black mask to obscure his face, a safari hat over the mask, loose blue hospital scrubs, and a stethoscope around his neck. Whitehead was armed with a black semi-automatic gun.

Whitehead ordered the bank's employees not to push any alarms. Whitehead vaulted over the counter that separated the tellers from the bank's lobby. As he leapt over the counter, a black walkie-talkie fell from the pocket of his pants onto the ground. Whitehead did not retrieve the walkie-talkie off of the ground, and it remained there until law enforcement later discovered it.

Whitehead ordered the tellers to bring the money from their drawers to him, first removing any dye packs or tracking devices from the bills.[9] While the tellers complied with Whitehead's order, a bank customer started to exit the bank. Whitehead pointed the gun at the customer, stated that he was "not playing," and racked the gun, letting those in the bank know the gun was loaded and ready to be fired.

Whitehead ordered, at gunpoint, the bank's assistant manager to take Whitehead to the bank's vault, which was located in a separate room of the bank. All of the bank

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[9]At that time, Bank of America used dye packs, but not tracking devices. A dye pack is placed into stacks of bills, and when taken from the bank, the dye pack explodes, causing brightly colored pain to cover the bills and, possibly, the robber.

employees went to the vault with Whitehead. Once at the vault, the bank's assistant manager and another bank employee opened the vault, emptied it of money, and put the money, along with the money from the tellers' drawers, into a blue bag Whitehead had brought with him. Whitehead fled the bank with approximately $30,000 in cash in his bag and was not apprehended by law enforcement. Law enforcement was unable to determine the identity of the robber immediately following the robbery.

Law enforcement seized the walkie-talkie that Whitehead left behind and swabbed the walkie-talkie and its batteries for DNA. Two years later, after Whitehead's arrest for the May 21, 2012 robbery, which we describe below, law enforcement determined that the DNA on those swabs belonged to Whitehead.

B. May 21, 2012 BB&T Bank Robbery

On the morning of May 21, 2012, Whitehead, wearing a mask to obscure his face, entered the Plantation BB&T Bank on Pine Island Road and ordered those in the bank to "get on the ground now." Whitehead held a black semi-automatic gun and demanded that everyone put their hands in the air and refrain from pushing the silent alarm. Whitehead's hands were bare and looked "ashy" and "cracked."

This bank, unlike the Delray Beach branch of Bank of America, had bullet resistance glass that separated the tellers from the lobby and customers. Whitehead ordered a bank employee behind the glass to open the door that led to the tellers' stations and the bank's vault. The employee opened the door because she feared what Whitehead would do to the customers and bank employees in the lobby if she did not comply.

Once behind the glass, Whitehead emptied the tellers' drawers of cash into a navy-blue-or black-colored laundry bag he carried with him. The bag was "similar" to the blue bag Whitehead carried during the 2010 Bank of America robbery. Whitehead then had a bank employee lead him to the bank's vault, which was located in a separate room. Whitehead pointed his gun at that employee while she opened up the bank's vault for Whitehead, and Whitehead then put the cash from the vault into his bag. Whitehead then fled the bank with almost $14,000 in cash.

C. The May 21, 2012 Perimeter Stop

While the May 2012 bank robbery was in progress, a 911

operator received a call that a robbery was occurring at the Plantation BB&T Bank located on Pine Island Road. At 9:29 AM, officers from the City of Plantation police department were dispatched to the scene. At 9:31 AM, an officer arrived on the scene, but Whitehead was gone. Witnesses informed law enforcement that Whitehead had crossed Pine Island Road on foot and disappeared behind hedges in front of an apartment complex. An officer ordered that a perimeter be set up around the surrounding streets "to contain the fleeing suspect[ ]."

Law enforcement set up a perimeter around the bank, but there was a gap in the perimeter at the Chevron gas station on the northwest corner of Pine Island Road and West Broward Boulevard, about four blocks from BB&T Bank. Drivers traveling south on Pine Island Road could turn into the gas station's entrance on Pine Island Road before reaching the perimeter checkpoint set up at the intersection of Pine Island Road and West Broward Boulevard. These drivers could then drive through the gas station's parking lot and exit onto West Broward Boulevard in the westbound direction, thereby avoiding the perimeter checkpoint.

At approximately 9:34 AM, Sergeant Douglas Powell arrived at the Chevron gas station to fill the gap in the perimeter. Sergeant Powell parked his car at the West Broward Boulevard exit of the gas station and activated his overhead lights so that drivers could not leave the gas station without stopping at his checkpoint.

Sergeant Powell asked each driver who went through the checkpoint whether anyone had attempted to get in his or her car and looked at each driver to see if he or she matched the description of the suspect set forth in a police broadcast. The broadcast described the suspect as a black male, armed with a black handgun, in his early twenties "with a gray shirt, tan pants with a black belt, black shoes carrying a black bag."[10]

The first few cars passed Sergeant Powell's checkpoint without incident. Next, a gray truck pulled up to the checkpoint, and the driver, later determined to be Whitehead, rolled down his window. Sergeant Powell observed a black male driver, who appeared to be in his

[10]The bag was later determined to be blue.

early twenties, was "sweating profusely" and not wearing a seat belt.

Based on Sergeant Powell's observations and the fact that Whitehead was sweating profusely, despite it not being hot and no one else sweating to such an extreme degree, Sergeant Powell decided to investigate Whitehead's identity and asked him for identification. Whitehead searched for his license in several compartments in his truck, but could not find it. Whitehead then lifted his hips upward in an apparent attempt to retrieve his license from the left rear pocket of his pants. When Whitehead lifted his hips, Sergeant Powell (1) saw that Whitehead wore red pajama bottoms over tan pants and a black belt and (2) saw an antenna sticking out of the left front pocket of Whitehead's tan pants. Based on what Sergeant Powell observed, he asked Whitehead to step out of the vehicle, and Whitehead complied. As Whitehead complied, Sergeant Powell saw that Whitehead wore no shoes and black sneakers lay on the floorboard of Whitehead's truck.

Given the similarities between the broadcast description and his observations, Sergeant Powell told Whitehead to place his hands behind his back. While handcuffing Whitehead, Sergeant Powell noticed that Whitehead's hands were covered with a substance later determined to be super glue. Because of the super glue on Whitehead's hands, his hands appeared to be cracked. Sergeant Powell believed that Whitehead used the super glue to conceal his fingerprints.

Sergeant Powell then did a pat-down of Whitehead and removed a radio from his pocket, which Sergeant Powell determined was actually a police scanner, set to the broadcast of the Plantation Police Department's dispatch communications. Sergeant Powell believed that Whitehead used the police scanner to monitor the police department's radio transmissions to know the department's whereabouts.

At 9:37 AM, Sergeant Powell advised other officers that he had likely detained the robber. Sergeant Powell radioed Officer Albert Clark, who was at the scene of the robbery, to bring a witness to the gas station for a "show-up." A show-up involves a single suspect of a crime being presented to a witness for identification.

D. May 21, 2012 Show-Up

After receiving Sergeant Powell's request, Officer Clark decided to have Violet Cepeda, the person best-positioned to observe Whitehead during the robbery, BB&T Bank's manager, identify the suspect. During the robbery, Cepeda hid under the desk in her office and was as close as ten feet away from Whitehead. Cepeda clearly saw the side of Whitehead's face when, prior to exiting the bank, he lifted his mask all the way up, off of his face. Cepeda continued to observe Whitehead after he exited the bank until he disappeared into hedges across Pine Island Road. During the robbery, Cepeda called 911 and gave the operator a detailed description of Whitehead's clothing and build, and Cepeda later gave a more detailed description to law enforcement who arrived on the scene.

At approximately 9:41 AM, Officer Clark and Cepeda arrived at the Chevron gas station for the show-up. While Officer Clark's police vehicle was slowing to a stop in front of Whitehead, Cepeda looked through the front windshield, saw Whitehead from a distance of approximately ten feet away, and stated that Whitehead was the bank robber. At the time of the identification, Whitehead was in handcuffs and was surrounded by at least two uniformed police officers, in addition to plainclothes detectives. Cepeda made the identification without hesitation and was "a hundred percent positive" that Whitehead was the bank robber. Cepeda determined that Whitehead was the robber based on his profile, the shape of his face, his "pointy head," his lankiness, and his complexion. The police officers did not "parade" Whitehead in front of Cepeda, but did have him turn and face the vehicle in which Cepeda sat. No one else was presented to Cepeda as a possible suspect.

After the show-up, law enforcement searched the inside of Whitehead's truck and discovered, *inter alia*, a firearm loaded with three rounds, a total of $13,990 in U.S. currency (most was discovered in a blue bag, but some "loose currency" was found in the truck too), superglue, sandpaper, ear buds, a hat, and a mask.

After Whitehead was arrested, an officer obtained a DNA sample from Whitehead. The DNA sample was sent to the FBI's laboratory, which determined that Whitehead's DNA matched the DNA found on the walkie-talkie and batteries left on the scene of the 2010 Bank of America robbery. The evidence showed that there was a one in 4.4 trillion

> chance that the DNA belonged to an African-American who was not Whitehead.

See United States v. Whitehead, 567 Fed. Appx. 758, 760-63 (11th Cir.), cert. den'd, Whitehead v. United States, ___ U.S. ____, 135 S.Ct. 308, 190 L.Ed.2d 223 (2014).

VII. Discussion[11]

The government first argues that the substantive issues underlying movant's ineffective assistance of counsel claims, to-wit, claims 1 through 5, as listed above, were raised and rejected on direct appeal. (Cr-DE#41:19-20). It is true that claim 1, the sufficiency of the evidence as to Counts 3 and 4 was raised as ground 3 on direct appeal, but movant argues that appellate counsel failed to raise additional argument in support thereof. It is also true that, as to claims 2 through 5, the movant faults trial and appellate counsel for failing to preserve and then challenge on appeal the fact that the trial court erred in denying a motion to sever the charges relating to the 2012 bank robbery (Counts 1-2) from the charges relating to the 2010 bank robbery (Counts 3-4) prior to trial; and, that the government violated the discovery rules by relying upon the evidence seized from the 2012 bank robbery to support the 2010 bank robbery charges. The substantive

[11]To the extent the movant has raised new facts and provided new evidence to the undersigned, for the first time, in his traverse, something which is precluded under federal case law, it has been reviewed and considered herein. However, if the movant again attempts to raise new arguments or grounds for relief or otherwise provides additional evidence "for the first time in an objections to this Report, the district court may [and should] exercise its discretion and decline to consider the argument" or new facts. Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009)(citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009); see also, Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp.2d 168 (D.Me. 2004). "Parties must take before the magistrate, 'not only their best shot but all of the shots.'" Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)(quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

issues mentioned above were raised on direct appeal in relation to ground 4 on direct appeal. (Cr-DE#41).

It is worth mentioning at the outset that the arguments raised herein, to the extent they were not addressed on appeal, but could have been, are procedurally defaulted from review. It is well settled that a claim is procedurally barred if a movant fails to raise it on appeal. In that regard, there are three types of issues that a section 2255 motion cannot raise: (1) issues that were raised on direct appeal, absent a showing of changed circumstances; (2) nonconstitutional issues that could have been but were not raised on direct appeal; and (3) constitutional issues that were not raised on direct appeal, unless the section 2255 petitioner demonstrates cause for the procedural default as well as actual prejudice from failure to appeal. Belford v. United States, 975 F.2d 310 (7th Cir. 1992), overruled on other grounds by Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994). In order to overcome the bar, the movant must show cause for the default and actual prejudice, Wainwright v. Sykes, 433 U.S. 72 (1977), or a fundamental miscarriage of justice, Engle v. Isaac, 456 U.S. 107 (1982). No such showing has been made here.

A claim of ineffective assistance of appellate counsel may constitute cause for failure to previously raise the issue. United States v. Breckenridge, 93 F.3d 132 (4 Cir. 1996). Attorney error, however, does not constitute cause for a procedural default unless it rises to the level of ineffective assistance of counsel under the test enunciated in Strickland v. Washington, 466 U.S. 668 (1984); Murray v. Carrier, 477 U.S. 478, 488 (1986). Movant generally faults counsel for failing to raise additional arguments in relation to claims 1 through 5, as listed above. However, he does not challenge the fact that counsel did not raise claims 6 and

7 on appeal.

To the extent the movant is re-asserting substantive arguments previously presented on direct appeal, in support of his ineffective assistance of counsel claims, such arguments add nothing of substance which would justify a different result. See Hobson v. United States, 825 F.2d 364, 366 (11th Cir. 1987)(claim raised and considered on direct appeal precludes further review of the claim in a §2255 motion), vacated on other grounds, 492 U.S. 913 (1989); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Webb v. United States, 510 F.2d 1097 (5th Cir. 1975); Belford v. United States, 975 F.2d 310, 313 (7th Cir. 1992), overruled on other grounds by Castellanos v. United States, 26 F.3d 717 (7 Cir. 1994); Graziano v. United States, 83 F.3d 587 (2d Cir. 1996)(Collateral attack on a final judgment in a criminal case is generally available under §2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in complete miscarriage of justice.).

Moreover, to the extent the challenges here are based on a different legal argument, the claims should be summarily rejected as the movant cannot satisfy either the deficiency or prejudice prong of Strickland. Movant cannot demonstrate that, but for counsel's failure to pursue this precise issue either at trial or on appeal, that the result of the trial or appeal would have been different. For the reasons that follow, no prejudice, under Strickland, has been shown arising from counsel's failure to pursue these nonmeritorious issues, as suggested here.

A. Ineffective Assistance of Counsel Claims

In **claim 1**, the movant asserts he was denied effective assistance of counsel, where his lawyer failed to adequately argue that there was insufficient evidence to support his convictions as to Counts 3 and 4 of the Second Superseding Indictment. (Cv-DE#8:4). According to the movant, appellate counsel failed to adequately support the basis for the sufficiency of the evidence argument raised on direct appeal, omitting material facts. For example, he faults appellate counsel for failing to argue that there were two different DNA profiles recovered from the batteries/walkie-talkies, one of which did not belong to the movant. (Id.:5)(citing Cr-DE#117:229).

He claims the government's forensic expert testified that it could not be determined which DNA profile was on the batteries and which was on the walkie-talkie. (Id.). Movant maintains that since there were two DNA profiles recovered, and no evidence to support one DNA over the other, there could be no definitive statement made that the movant dropped the walkie talkie found inside the bank. (Id.). He also claims counsel should have emphasized that there were other areas of the bank swabbed for DNA, including the till drawer and right shelf window, but the movant was excluded as a contributor to that DNA. (Id.:6).

Movant also claims counsel failed to demonstrate that the government failed to establish sufficient evidence to provide identity through modus operandi, and committed error during closing argument when it suggested that there were "striking similarities" between the 2010 and 2012 bank robberies, when in fact, the robberies were no different than common bank robberies. (Id.). He faults counsel for failing to prove that the government was required to present evidence bearing a greater degree of similarity, as required by Eleventh Circuit precedent, to prove

identity through modus operandi. (Id.). Movant maintains that the walkie-talkie/two-way radio used in the 2010 bank robbery was not present in the 2012 bank robbery, in which a police scanner was used. (Id.:7).

In his supporting affidavit, movant states he spoke with appellate counsel, and advised him to raise the foregoing sufficiency of the evidence arguments, to which counsel responded that he would consider doing so. (Cv-DE#8:24). Although movant acknowledges that counsel raised the sufficiency of the evidence claim on direct appeal, he maintains that counsel did not include many of the arguments he had discussed with counsel to support the claim. (Id.) (emphasis added). For example, he faults counsel for not emphasizing that the government had not met its burden of establishing the degree of similarity necessary to prove identity through modus operandi; and, that the items seized from the 2012 bank robbery, to-wit, the mask and bag, were common items utilized during bank robberies, and thus insufficient to establish a unique or signature trait to support the convictions. (Id.).

As will be recalled, movant challenges the sufficiency of the evidence, as charged in Counts 3 and 4 of the Second Superseding Indictment, charging violations relating to the 2010 bank robbery, as follows:

COUNT THREE

On or about May 1, 2010, in Palm Beach County, in the Southern District of Florida, the defendant,

BRYAN WHITEHEAD,

did knowingly take by force, violence, and intimidation, from the person and presence of employees of a Bank of America located at 7215 West Atlantic Avenue, Delray Beach, Florida, 33446, approximately thirty thousand

dollars ($30,000.00) in United States currency, belonging to, and in the care, custody, control, and possession of Bank of America, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Section 2113(a).

COUNT FOUR

On or about May 1, 2010, in Palm Beach County, in the Southern District of Florida, the defendant,

BRYAN WHITEHEAD,

did knowing 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 defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 2113(a), as set forth in Count Three of this Indictment, in violation of Title 18, United States code, Section 924(c)(1)(A).

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that this violation involved the brandishing of a firearm.

(Cr-DE#56:2-3).

Pursuant to 18 U.S.C. §2113(a), a person commits bank robbery if he, "by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to [a bank,]" or he "enters or attempts to enter any bank...with intent to commit such bank...any felony affecting such bank" 18 U.S.C. §2113(a). A person commits armed bank robbery if, in committing or attempting to commit an offense defined in subsection (a), he "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." Id. §3113(d); see also United States v. Faurisma, 716 Fed.Appx. 932 (11 Cir. Mar. 28, 2018)(unpublished).

Further, like the defendant in Faurisma, the movant was sentenced to a mandatory, consecutive term of imprisonment as to Count 4, for brandishing a firearm during a crime of violence, in violation of 18 U.S.C. §924(c)(1)(A)(ii), which defines a "crime of violence" as a felony that:

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

18 U.S.C. §924(c)(3); see also United States v. Faurisma, 716 Fed.Appx. at 933; Williams v. United States, 709 Fed.Appx. 676 (11 Cir. Jan. 23, 2018)(unpublished). Subsection (A) above is referred to as the "use-of-force" clause. Id. The Eleventh Circuit has now made clear that bank robbery, pursuant to §§2113(a) and (d), is a crime of violence under §924(c)(3)(A)'s use-of-force clause because "the use, attempted use, or threatened use of physical force against the person or property of another is required. United States v. Faurisma, 716 F3d.Appx. at 933 (quoting In Re Hines, 824 F.3d 1334, 1337 (11 Cir. 2016)(quoting 18 U.S.C. §924(c)(3)(A).

On direct appeal, the movant argued that the DNA profile developed from the swabs of the walkie-talkie left behind at the scene, and the similarity between the blue nylon bag used to carry the cash in the 2010 and 2012 robberies was insufficient to establish guilt beyond a reasonable doubt as to Counts 3 and 4 of the Second Superseding Indictment. He also argued on appeal that there were height discrepancies, because the witnesses estimated the robber's height to be between 6' and 6-1/2' tall, but the movant only measured 5'10" tall, so that this too could support a

finding that he was not the robber. (Cr-DE#117:236-37,240; see also United States v. Whitehead, 567 Fed.Appx. 758 (11 Cir. May 27, 2014)(unpublished). The Eleventh Circuit rejected the movant's arguments, finding in pertinent part, as follows:

> Whitehead argues that the evidence was insufficient to support his convictions arising out of the 2010 Bank of America robbery (Counts 3 and 4). Whitehead does not challenge the absence of any of the elements to support his 2010 bank robbery and brandishing a firearm convictions, but rather argues that a reasonable jury could not have found that he was the armed robber. However, the evidence at trial, when viewed in the light most favorable to the government, showed that the DNA profile developed from the swabs of the walkie-talkie (and its batteries) that the bank robber left behind matched Whitehead's DNA. Furthermore, the evidence showed that there was a one in 4.4 trillion chance that Whitehead's DNA profile could match the DNA of another African-American. Additionally, the blue bag that the robber carried during the Bank of America robbery was similar to the bag that Whitehead carried during the BB&T Bank robbery. And, the Bank of America robbery, like the BB&T Bank robbery, occurred in the morning and was carried out by a single masked, hatted, and armed perpetrator.
>
> Whitehead argues that the eyewitness testimony suggested that he was not the perpetrator of the 2010 Bank of America robbery, as he is five feet ten inches tall, and witnesses to the robbery testified that the robbery was six feet five inches tall and "six foot plus." The witness' statements about the robber's height were estimates, however, and not actual determinations of that height. And, we note that the jury watched surveillance videos of the Bank of America robbery and had the opportunity to compare Whitehead's characteristics to those of the Bank of America robber. In light of the DNA evidence connecting Whitehead to the 2010 Bank of America robbery, and the similarities between that robber and robbery and the 2012 BB&T Bank robber and robbery, we conclude that the evidence was more than sufficient to support Whitehead's convictions on Counts 3 and 4.

United States v. Whitehead, 567 Fed.Appx. 758, 769-770 (11 Cir.

2014); (Cr-DE#161). Given the detailed foregoing findings, the movant has not demonstrated a change in circumstance, sufficient to warrant relitigation of the claim, even under the guise of an ineffective assistance of counsel claim. Thus, the claim is barred from review here. This is so because the presentation of the claim, in this §2255 proceeding, whether as a substantive issue, or in the guise of an ineffective assistance of counsel claim, adds nothing of substance which would justify a different result. See Hobson v. United States, 825 F.2d 364, 366 (11th Cir. 1987), vacated on other grounds, 492 U.S. 913 (1989); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Webb v. United States, 510 F.2d 1097 (5th Cir. 1975); Belford v. United States, 975 F.2d 310, 313 (7th Cir. 1992), overruled on other grounds by Castellanos v. United States, 26 F.3d 717 (7 Cir. 1994); Graziano v. United States, 83 F.3d 587 (2d Cir. 1996). Moreover, to the extent the challenges here are based on a slightly different factual basis or legal argument, for the reasons expressed herein, the claims should be summarily rejected as the movant cannot satisfy the prejudice prong of Strickland.

Briefly, the record reveals as to the 2010 Bank of America ("BofA") bank robbery, the government presented, in pertinent part, the testimony of the following witnesses: Jim Duros ("Duros"), the BofA Assistant Manager, Joshua Sariol ("Sariol"), the BofA Teller Operations Specialist, Mary Bain ("Bain"), the BofA part-time Teller, Mary Bain, a crime scene investigator with the Palm Beach County Sheriff's Office, Karin Crenshaw, a Sr. Forensic Analyst at the Palm Beach County Sheriff's Office, and Howard Heath White, a Federal Bureau of Investigations Agent ("FBI") assigned to the FBI Violent Crimes Task Force. (DE#s115-117).

Sariol and Duros, employees of the BofA robbed in 2010,

testified as to their perceptions of the bank robber, including his race, build, general height, clothing (including a facial mask), and the fact that he threatened them with a .45 caliber-type handgun (Cr-DE#117:133-34,140-41,152,165-68,182-83). In fact, Sariol and Duros narrated the events as memorialized in the videotape of the bank robbery taken from the bank's surveillance cameras, and introduced into evidence at trial. (Id.). Specifically, Duros recalled he was standing behind the teller line, between to associates, speaking to an account holder present, when the saw the bank robber entered the BofA, through the bank's east door, then cam right around the corner, straight to the teller station, yelling that it was a "bank robbery," and ordering everyone to "get down." (Id.:134-37). He then stated how he saw coming around a corner, a white sleeve, with an African-American or black hand holding a black firearm, which looked like a .45 type caliber or 9mm glock type weapon. (Id.:134,140). He further observed the robber waiving the gun around, but before doing so, at one point he observes the robber engage it, meaning the robber slid the trigger back, cocking the firearm by bringing a load up into the chamber. (Id.:140). Duros then confirmed that the BofA had a video surveillance of the events of that day, recognized his initials on the CD, and confirmed that he had reviewed the contents contained therein and it fairly and accurately depicted the events of the day. (Id.:135). At that time, the government introduced into evidence the CD, containing the bank's video surveillance of the day of the robbery. (Id.).

Duros next testified that the robber was wearing blue scrubs, with a short sleeve white, long sleeve undershirt, which came down to the end of the suspect's wrists. (Id.:141). He was not wearing any gloves, but had a black hat on, with a yellow band around it with multicolors, puffed back as if he could have had long dread

locks and could have been male or female, because there was a black stocking around the face. (Id.). Duros claims the suspect was possibly five feet nine inches to six feet four inches tall, with a slender build. (Id.:141).

Duros explained that he observed the robber place his hand up on top of the teller counter, then using leverage, vaulted over the counter to the teller side, demanding that all the cash drawers be brought to him. (Id.:141-42). At the time, Sariol was to Duros' left and Iacobelli was to his right. (Id.:142). After the cash drawers were brought over, the robber pushed the drawers around and then demand to know why one of them is empty, at which time one of the employees explains that it was his first day at the BofA. (Id.).

Next, the robber asked Duros to take him to the cash vault, so all employees got up and went towards the back where the vault was located. (Id.:143). Duros and another employee had to open a portion of the vault first in order to obtain all the combinations and back-up keys in order to access the cash vault, because the other individual with the second combination required to open the vault was not in that day. (Id.:144). Eventually, they were able to get the vault opened and took the cash out, putting it down on the teller counter. (Id.:145). The suspect put all of the money in a blue bag, made of a tent-like, non-shiny material, either nylon or cotton. (Id.:146). After being shown a photograph, government's exhibit 35, and then an actual bag, government's exhibit 13, Duros testified that the item could have been and was similar to the one used by the suspect, but he could not affirm whether it was the "exact one or not." (Id.:147). He did concede, however, that the color, size, [and] opening looks about the same." (Id.). Regarding the total amount stolen, Duros recalled it was $3,000 in singles,

$5,000 in fifties, and he was unaware of the amounts taken from the individual tellers. (Id.:148-49).

Once the robber left, Duros observed an item that looked like a walkie-talkie or a 2-way radio of some sort lying on the ground. (Id.:150-51). He also observed on the ground by teller station number one, what looked like a dye pack torn apart. (Id.). Duros explained that, prior to the robbery, the walkie-talkie was not on the ground, nor does the bank use that type of walkie-talkie. (Id.). Duros then explained to the jury what was in the video frames of the bank's video surveillance, including the blue bag which he testified was similar to the one that was previously admitted into evidence. (Id.:152-154). In fact, the video frames reveal the suspect pointing a gun at Duros, demanding that he take the robber into the cash vault. (Id.:154). After reviewing a report to refresh his recollection, Duros testified that approximately $30,000 was stolen from the BofA on May 1, 2010. (Id.:155).

Sariol corroborated Duros' testimony, explaining that he too heard the suspect rack the firearm, and observed that he was wearing blue scrubs with white sleeves, no gloves, but was wearing a hat, and something black over his face so that he could not see any facial features. (Id.:166-67). The suspect was of medium build, and about six feet tall, because Sariol is 5'11-1/2" tall and the suspect was a little bit taller. (Id.:168). He recalled the suspect was neither skinny nor fat, but rather was built somewhat like him. (Id.:169). He too was shown Government's Exhibit 13, the blue bag, and testified that it did look like the bag the robber used to take all of the BofA cash. (Id.:171). Sariol recalled that the bank cash with the dye packs were left behind by the suspect. (Id.:171-173). He also testified that he recalled the suspect stole approximately $30,000.00 that day. (Id.:175).

Iacobelli also testified consistent with the other BofA employees, that the suspect was pointing a gun at them, told them to get down, and later demanded that they get up and empty their cash drawers. (Id.:182-83). She too recalled that the suspect was very tall, had a "very dense black material" covering his face, and a hat on at the time. (Id.:183). She also recalled the suspect had blue medical scrubs on, and had a stethoscope around his neck. (Id.:183-84). She testified that, as the robber jumped over the teller counter, a black device fell out from his pocket. (Id.:184-85). She could not, however, recall the type of bag the suspect had used to place the bank money into. (Id.:188).

The crime scene investigator, Mary Bain ("CSI Bain"), employed with the Palm Beach County Sheriff's Office, testified that she took photographs of the crime scene, and ultimately impounded the walkie talkie recovered from the crime scene. (Id.:194). She also recalled processing the area for latent fingerprints, but no latents of value were recovered. (Id.:195-97). CSI Bain explained that she then swabbed the teller counter area, the shelved on the counter, and the till drawers for DNA. (Id.:198). She also swabbed a right side and left side window shelf. (Id.:199). CSI Bain next testified that Government's Exhibit 57 was the swabs recovered from the radio and the batteries found at the scene. (Id.:201-02).

Next, Karin Crenshaw ("Crenshaw"), a Sr. Forensic Scientist with the Palm Beach County Sheriff's Office, without objection, testified as an expert in forensic biology, regarding the nature of DNA and how it is unique to everyone with the exception of identical twins who have the same DNA profile. (Id.:218-19). Next, she explained the four basic steps in forensic DNA analysis, which starts with extraction of the DNA by breaking the cells open from the nucleus to release it, and then attempts to quantify it.

(Id.:219). The third step is the process of amplification or copying of the DNA, and finally the visualization, where the pieces are separated by their size until the DNA profile is obtained, which is simply a set of numbers. (Id.:219-220). A Kutosomla STR Analysis is done, which refers to a DNA analysis of all the chromosomes inside the cell. (Id.:22). This analysis is widely accepted as reliable and accurate in the scientific community. (Id.:220).

After further explaining how controls are also processed, Crenshaw testified that she conducted DNA analysis of processed swabs from a till drawer, the right side window shelf, the left side window shelf, and a radio and batteries. (Id.:223). She further testified that she took standards from the movant, identified as Government's Exhibit 58, which are swabs collected from, for example, the inside cheek of an individual, for comparison. (Id.:223-24). Swabs of the till drawer, right and left side window shelf excluded the movant as a contributor to the DNA mixture, meaning his DNA was not on those items. (Id.:224-25). She could not obtain a DNA profile for the left side window shelf, because there was insufficient DNA left behind on that shelf or on the swabs she obtained for her to get a DNA profile. (Id.). There are many things that can prevent a scientist from obtaining a DNA profile, including, for example, if someone wears gloves or had a glue like substance on his hands thereby hindering the release of cells, resulting in a lack of cell transfer. (Id.:226-27). Crenshaw next testified that the movant was, however, the source of the major DNA profile of the radio and batteries. (Id.:227-28,231).

Given the Eleventh Circuit's findings, coupled with the above facts adduced at trial, the movant has not demonstrated here a change in circumstance sufficient to warrant reconsideration of the

claim, either substantively or under the guise of an ineffective assistance of counsel claim. Therefore, relief is not warranted and the claim is barred from review here. Nevertheless, the evidence was more than sufficient upon which the jury could convict the movant of the offenses as charged in Counts 3 and 4 of the Second Superseding Indictment relating to the 2010 bank robbery.

A Rule 29(a) motion requires the district court, on its own or on the defendant's motion after the close of the government's evidence, or after the close of all the evidence, to enter a judgment of acquittal for "any offense for which the evidence is insufficient to sustain a conviction." Fed.R.Cr.P. 29(a). Rule 29(c)(1) allows a defendant to renew that motion within fourteen days of a guilty verdict. Here, the movant argued for a judgment of acquittal at the close of the government's evidence, which was denied by the court, finding that there was sufficient evidence to support the government's charges. (Cr-DE#117:40-41).

"A motion for judgment of acquittal is a direct challenge to the sufficiency of the evidence presented against the defendant." United States v. Aibejeris, 28 F.3d 97, 98 (11th Cir.1994). Both the district court and the appellate court view the evidence in the light most favorable to the government and draw all reasonable inferences in favor of the government. If, when so viewed, a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt, a Rule 29 motion must be denied. United States v. Frank, 599 F.3d 1221 (11th Cir. 2010); United States v. Molina, 433 F.3d 824, 828 (11 Cir. 2006).

Under the totality of the circumstances present here, the movant has not demonstrated that, but for counsel's failure to argue that there was insufficient evidence to support his

convictions as to Count 3 and 4, that the outcome of the trial would have been different, and resulted in an acquittal as to these charges which relate to the 2010 BofA bank robbery. The evidence presented by the government established the existence of the charged offenses. A reasonable jury could well have found defendant guilty beyond a reasonable doubt. Therefore, no prejudice under Strickland has been demonstrated arising from counsel's failure to raise the arguments postured herein, much less for failing to properly preserve the issue.

Further, although the issue was not properly preserved at the close of all the evidence at trial, after movant rested, no prejudice resulted to the movant because the movant cannot establish that had appellate counsel raised this precise factual arguments raised herein on appeal, that this appeal would have resulted in a finding of insufficient evidence. Consequently, appellate counsel has no duty to raise nonmeritorious issues on appeal. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). Relief is not warranted on this claim.

His suggestion that the government established the conviction by proving identity through modus operandi is not supported by the record. In fact, numerous witnesses gave detailed evidence regarding the appearance of the movant at the time of the bank robbery. The jury was allowed to weigh their credibility against the videotape surveillance of the 2010 bank robbery which was also introduced into evidence. Further, the movant's DNA was found on the walkie-talkie radio, and was observed falling out of the movant's clothing onto the floor, and left behind at the scene after he fled. The evidence also established that the bag used was similar to Government's Exhibit 13, a blue bag used in the 2012 bank robbery. However, as will be recalled, the bag and dark mask

were not the only pieces of evidence linking movant to the charged offenses. On the record here, movant is not entitled to relief, having failed to establish prejudice under Strickland arising from counsel's failure to pursue argue as suggested herein at trial and then on appeal Relief is thus not warranted here.

In **claim 2**, the movant asserts that he was denied effective assistance of counsel, where his lawyer failed to object to the introduction of the items relating to the 2012 bank robbery as evidence of the movant's 2010 bank robbery. (Cv-DE#8:8). Movant maintains that when the government witnesses were shown the actual blue bag and mask used during the bank robberies, they either testified that it was similar to the one used during the robberies or that they could not identify the bag. (Cv-DE#8:9)(citing Cr-DE#117:146). Movant suggests it was error to permit the government to introduce the mask and bag which they claimed was utilized during the 2012 offense, as also being involved in the 2010 bank robbery. (Cr-DE#115:182). Movant suggests that the government made the bag and mask used in the 2012 robbery a "focal point" of the 2010 robbery when it questioned witnesses whether those items were the same or similar to the items used in the 2010 robbery. He further finds fault with the government's closing argument, which he claims also honed in on those two pieces of evidence as the focal point to support movant's convictions on Counts 3 and 4. (Id:10, citing Cr-DE#118:22,22).

For the reasons previously articulated in relation to claim 1 above, the movant cannot demonstrate here that the mask and bag were, in fact, the focal points of the trial, as alleged. To the contrary, numerous witnesses testified, corroborating how events transpired, and as recorded on the bank's surveillance, which significantly was also introduced into evidence at trial. When

considering the government witness testimony, the video surveillance from the bank, and the mask and bag, there is nothing of record to suggest that the focal point of the trial was solely the bag and mask. To the contrary, there was also the walkie-talkie, the DNA evidence identifying movant's DNA profile thereon and/or in the batteries contained therein, and video surveillance of the incident. Contrary to movant's representations, there was no "inference" that the blue bag and black mask were the sole focal point upon which the jury rested its guilty verdicts. In fact, even if such evidence had been excluded, there still remained more than sufficient evidence upon which the jury could convict movant of the charged offenses. Consequently, movant has not demonstrated prejudice under Strickland arising from counsel's failure to pursue this issue either at trial or on appeal. Relief is not warranted on this claim.

Further, regarding movant's brief reference that the government engaged in prosecutorial misconduct, it is well settled that the standard for federal habeas corpus review of a claim of prosecutorial misconduct is whether the alleged actions rendered the entire trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-45 (1974); Hall v. Wainwright, 733 F.2d 766, 733 (11 Cir. 1984). In assessing whether the fundamental fairness of the trial has been compromised, the totality of the circumstances are to be considered in the context of the entire trial, Hance v. Zant, 696 F.2d 940 (11 Cir.), cert. denied, 463 U.S. 1210 (1983); and, "[s]uch a determination depends on whether there is a reasonable probability that, in the absence of the improper remarks, the outcome of the trial would have been different." Williams v. Weldon, 826 F.2d 1018, 1023 (11 Cir.), cert. denied, 485 U.S. 964 (1988). No such showing has been made here.

Instead, it is clear from the record that the government's argument was in response to the evidence adduced at trial and in response to defense counsel's forceful attack on the credibility of the government witnesses. Notwithstanding, prejudice during closing argument can be cured by the court's instructions that the arguments by the lawyers is not evidence and that the jury must decide the case solely on the evidence presented at trial, as was done here. See United States v. Iglesias, 915 F.2d 1524, 1529 (11th Cir. 1990). For the reasons previously expressed in this report, the Undersigned finds no prosecutorial misconduct during closing argument or throughout trial, contrary to the movant's allegations.

Movant, however, suggests that the prosecution's closing argument was also improper because it suggested that the blue bag and black mask introduced into trial as evidence in support of the 2012 bank robbery, were also the same items used during the 2010 bank robbery. (DE#8:10). During closing, the prosecution stated, in pertinent part, as follows:

> But again, you've got the same type disguise, long sleeve shirt, a hat. You've got pants being worn again, but you've got the same type of black mask. You heard the testimony of the witnesses that there was a black form fitting mask over the face of this particular robber. And whose mask? The defendant's mask. Because this robbery now, it's happening two years prior to the one in which he is caught, and some of this stuff is being recycled and reused, and here it is. This is the mask. The witnesses said, yeah, sure looks a lot like that mask.
>
> What else is similar? This bag. This is a bank robber who brings his own supplies. He brings a dark blue large bag to load up his haul. And what did the witnesses say when shown the bag and when shown the photographs of the bags? It sure looks a lot like the bag that I saw the defendant utilizing on the day of that particular bank robbery. You've got a defendant who then loads all the money onto the bag and flees from the scene of a bank robbery....

(Cr-DE#118:19-20).

Movant complains the foregoing was improper prosecutorial misconduct. However, after reviewing the record in its entirety, including the prosecution's closing argument, it is evident that the prosecutor's remarks were tied to a summary of the evidence presented at trial, inferences derived therefrom, and a discussion of the applicable law. The comments were also made in direct response to the defense's theory. When the prosecutor voices a personal opinion, but indicates this belief is based on evidence in the record, the comment does not require a new trial. See United States v. Granville, 716 F.2d 819, 822 (11 Cir. 1983). Here, in no way did the prosecutor present his personal opinion as to the petitioner's guilt and, even if such comments could be so interpreted by the jury, they were based upon evidence in the record.

The issue of credibility of government witnesses was indeed central to the case here, and the prosecutor's remarks as a whole were proper as a response to the defense's repeated attacks on the government witnesses' credibility. The remarks were not vouchers for the truthfulness of the subject witnesses' testimony. Even if the comments were improper, it did not affect the fundamental fairness of the movant's trial.

When reviewing the relevant portions of the trial transcript, it is apparent that the prosecutor did not misstate the evidence, but rather summarized the evidence adduced at trial. The government merely did its job by arguing that the evidence supported the government's theory, not the defense's theory, and urged the jury to believe the government witnesses' testimony. See e.g., United States v. Granville, 716 F.2d 819, 822 (11th Cir. 1983)(finding no

prosecutorial misconduct where prosecutor, in effort to support testimony of two government witnesses, only pointed to matters in evidence, the demeanor of one witness and testimony of support witnesses, as well as a tape recording corroborating the testimony of another); United States v. Johns, 734 F.2d 657, 663 (11 Cir. 1983)(noting that the State may present its "contention as to the conclusions the jury should draw from the evidence"). See also Davis v. Singletary, 853 F.Supp. 1492, 1560 (M.D.Fla. 1994), aff'd, 119 F.3d 1471 (1997), cert. deni'd, 523 U.S. 1141(1998)(finding that "[i]n response to an attack on the government and the conduct of its case, a prosecutor may present what even amounts to a bolstering argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon the government or its witnesses.")(citation omitted).

Also, this court points out that any potential prejudice was diminished by the trial court's clear and correct instructions to the jury regarding that it could believe or disbelieve all or any part of the evidence presented or the testimony of any witness. It is generally presumed that jurors follow their instructions. See, e.g., Richardson v. Marsh, 481 U.S. 200, 211 (1987). Thus, there is no reasonable probability that the result of the trial would have been different if the now challenged comments had not occurred, or the line of questioning been done differently as suggested by the movant here. Thus, this claim is fatally defective, and movant is entitled to no relief. Moreover, contrary to the movant's assertion, even absent the two items, there was more than sufficient independent evidence adduced at trial, including the movant's DNA profile, and video surveillance of the robbery, upon which the jury could have easily found movant guilty as charged. The government did not shift the burden of proof to the movant, which is clearly improper under both federal law. See e.g., United

States v. Downs, 615 F.2d 677, 679 (5 Cir. 1980).

It is also important to note that there is no indication whatever that the prosecutor made any comments in a deliberate attempt to distract the jury from the issue of the movant's guilt or mislead the jurors as to issues of guilt or innocence. However, even if this Court were to view the government's closing argument as improper for any or all the reasons claimed, when taken together or separately, these arguments did not so invade the province of the jury to render the trial fundamentally unfair, requiring a new trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)(improper prosecutorial comment not reversible error unless remarks "so infect the trial with unfairness as to make the resulting conviction a denial of due process"); Strickland v. Washington, 466 U.S. at 695 (to find prejudice for purposes of ineffective assistance claim, court "must consider the totality of the evidence before the judge or jury").

Moreover it would have been futile for trial counsel to object to the comments, or move for a mistrial based on the above-mentioned remarks by the prosecutor, given the "wide latitude" accorded counsel in making closing arguments. Under the totality of the circumstances, including the strength of the evidence of the movant's guilt, it is apparent that the prosecutor's statements were, at worst, no more than harmless error. See Brecht v. Abrahamson, 507 U.S. 619, 623 (1993), quoting, Kotteakos v. United States, 328 U.S. 750, 776 (1946)(a petitioner is entitled to federal habeas corpus relief only if the constitutional error from his trial had substantial and injurious effect or influence in determining the jury's verdict). Accordingly, the movant is entitled to no relief on this claim, having failed to demonstrate deficient performance and prejudice under Strickland. Thus, this

claim warrants no federal habeas corpus relief.

In **claim 3**, the movant asserts that he was denied effective assistance of counsel, where his lawyer failed to renew the movant's motion for severance on the grounds that several of the government's actions prevented the jury from separately appraising the government's evidence as to each offense. (Cv-DE#8:12). Movant maintains that during it's case-in-chief as to the 2010 bank robbery, the government introduced several pieces of evidence into the trial relating to the 2012 bank robbery. (Id.:12). The movant claims that the jury was thus unable to separately appraise each offense of conviction. (Id.). On this alternative basis, movant claims that severance should have been granted. (Id.).

Movant concedes he had discussions with defense counsel regarding how they wished to proceed after the government returned a Second Superseding Indictment that included the 2010 Bank of America robbery. (DE#8:Affidavit:27). Counsel advised that the government did not have much information regarding the 2010 bank robbery, and movant suggests he was never made aware that the government intended to introduce the 2012 bank robbery evidence to support the 2010 robbery. (Id.:27-28). He faults counsel for failing to renew his objection regarding severance and/or to seek a continuance of trial so that further investigation could be done and a defense prepared, neither of which he claims was done by counsel. (Id.:28).

Rule 8(a), Federal Rules of Criminal Procedure states:

> Joinder of offenses. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged-whether felonies or misdemeanors or

> both-are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

Fed.R.Cr.P. 8(a).

Rule 8(a) is construed broadly in favor of initial joinder and permit "joinder of offenses that 'are of the same or a similar character,' even if such offenses do not arise at the same time or out of the same series of acts or transactions." See United States v. Bully, ___ Fed.Appx. ___, 2018 WL 1136513, at *1 (11th Cir. Mar. 2, 2018) (citing United States v. Hersh, 297 F.3d 1233, 1241 (11th Cir. 2002)(quoting Fed.R.Cr.P. 8(a)).

To decide a challenge under Rule 8(a), the Court looks solely to the four corners of the indictment. United States v. Morales, 868 F.2d 1562, 1567-1568 n. 3 (11th Cir. 1989); United States v. Weaver, 905 F.2d 1466, 1476 (11th Cir. 1990); see also United States v. Dominguez, 226 F.3d 1235, 1239 n.4 (11th Cir. 2000)(finding, for present purposes, that the governing principles for Fed.R.Cr.P. 8(a) and (b) are the same). Crimes of "similar character" mean "[n]early corresponding; resembling in many respects; somewhat alike; having a general likeness." United States v. Hersh, 297 F.3d at 1241 (internal quotation marks omitted). Additionally, the offense only need to be similar in "category, not in evidence." Id. In this case, the evidence adduced at trial establishes that joinder in the Second Superseding Indictment of the 2010 and 2012 bank robberies as proper.

Regardless, Rule 14 of the Federal Rules of Criminal Procedure, however, may prohibit joinder of offenses which pass muster under Rule 8(a). Rule 14(a) states in pertinent part:

"Relief. If the joinder of offenses or defendants in an indictment ... appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed.R.Cr.P. 14(a). To determine whether severance is appropriate, the court balances the prejudice to the defendant against the interests of judicial economy. United States v. Benz, 740 F.2d 903, 911 (11th Cir. 1984).

Compelling prejudice-not simple prejudice is sufficient reason under the rule to severe. United States v. Walser, 3 F.3d 380, 386 (11th Cir. 1993). To demonstrate compelling prejudice places a heavy burden upon a defendant which mere conclusory allegations cannot carry. United States v. Hogan, 986 F.2d 1364, 1375 (11th Cir. 1993). Whether compelling prejudice exists hinges on the inquiry of whether under all the circumstances of a particular case it is within the capacity of jurors to follow a court's limiting instructions and appraise the independent evidence against a defendant solely on that defendant's own acts, statements, and conduct in relation to the allegations contained in the indictment and render a fair and impartial verdict. "If so, 'though the task be difficult,' there is no compelling prejudice." Walser, 3 F.3d at 387 (quoting United States v. Fernandez, 892 F.2d 976, 990 (11th Cir. 1989), cert. dismis'd, 495 U.S. 944 (1990)). Moreover, if the possible prejudice may be cured by a cautionary instruction, severance is not required. Id. at 387 (citing United States v. Jacoby, 955 F.2d 1527, 1542 (11th Cir. 1992)).

Here, the movant fails to establish that joinder was improper, much less that he suffered prejudice therefrom. From the face of the Second Superseding Indictment, there is nothing in the counts of conviction which compels the court to conclude the verdict might

have been tainted by improper considerations. Juries are presumed, and rightly so, to follow the instructions of the court. See Raulerson v. Wainwright, 753 F.2d 869, 876 (11th Cir. 1985). Consequently, the movant cannot establish either deficient performance or prejudice arising from counsel's failure to pursue this nonmeritorious claim.

When the issue was raised on direct appeal, the Eleventh Circuit found that movant had "failed to demonstrate that he 'received an unfair trial and suffered compelling prejudice,' such that we [the appellate court] must reverse the district court." United States v. Whitehead, 567 Fed.Appx. at 770 (citation omitted). Thus, the Eleventh Circuit concluded that the district court did not err under Rule 8(a) and did not abuse it's "considerable discretion" under Rule 14(a). United States v. Whitehead, supra. The Eleventh Circuit specifically found:

> Here, we conclude that Counts 1 and 2 (concerning the 2012 BB&T Bank robbery) and Counts 3 and 4 (concerning the 2010 Bank of America robbery) were properly joined under Rule 8(a) because the counts are all of the same or similar character. See Fed.R.Crim.P. 8(a). Counts 1 and 2 were similar to Counts 3 and 4 both in terms of the types of crimes charges and the similarities in how the crimes were perpetrated.
>
> Further, the district court's limiting instruction to the jury to evaluate the evidence on the two bank robberies independently cured any possible prejudice.

United States v. Whitehead, 567 Fed.Appx. at 770; (Cr-DE#161).

As will be recalled, prior to trial defense counsel did, in fact, move to sever Counts 1 and 2, relating to the BB&T bank robbery, from Counts 3 and 4, concerning the 2010 BofA bank robbery, pursuant to Fla.R.Cr.P. 8(a) and 14. (Cr-DE#68). In support thereof, the movant argued that joinder was improper

because the two bank robberies were "separate and distinct transactions," committed two years apart in two different counties. He further argued that he was prejudiced because evidence of the 2012 bank robbery, which was strong, compelled severance because the evidence as to the 2010 bank robbery was weak. (Id.). The government responded (Cr-DE#70), arguing in pertinent part, that the robberies in Counts 1 and 3 were of the same or similar character, citing United States v. Walser, 3 F.3d 380, 385 (1 Cir. 1993). (Cr-DE#70:2-3).

The court denied severance on the finding that joinder was proper under Rule 8(a) because the two bank robberies were of "general likeness" and that the movant had not demonstrated compelling prejudice to justify severance under Rul 14. (Cr-DE#103). In fact, the court highlighted the similarities in the robberies, namely, the robber was a black male with a thin build, acting alone, armed with a black handgun, clad in layered clothing with a black stocking-type face mask, filling a blue bag with the bank cash, and possessing a walkie-talkie or police scanner, and having bypassed tellers in order to gain access to the cash vault. (Id.:4). That denial was subsequently affirmed on appeal. United States v. Whitehead, 567 Fed.Appx. at 770; (Cr-DE#161).

Movant suggests that prejudice was not cured because there were no limiting jury instructions that the bag and mask were not evidence of the 2010 bank robbery and that it could only be considered in relation to the 2012 bank robbery. Even if counsel had requested such a limiting instruction, no showing has been made here that it would have been granted. As will be recalled, the witnesses as to the 2010 robbery testified that the items shown to them, i.e., the bag and mask, were similar to those used by the movant during the robbery. The jury was instructed, in pertinent

part, that:

> A separate crime or offense is charged in each count of the Second Superseding Indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.
>
> I caution you, members of the jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the Second Superseding Indictment.

(Cr-DE#89:13-14).

Given the foregoing, coupled with the evidence adduced at trial, and the court's reasoning for denying movant's motion to sever, the movant cannot establish prejudice under Strickland arising from counsel's failure to preserve at trial and then pursue on appeal the additional facts in support of severance. In other words, even if those arguments had been raised, the movant has failed to demonstrate prejudice under Strickland, because he cannot show that, but for counsel's purported deficiency, the outcome would have been different, resulting in severance of the offenses, and then an acquittal at trial. No such showing has been made here. Therefore, this claim warrants no federal habeas corpus relief.

Alternatively, movant suggests that the evidence from the 2012 bank robbery, i.e., the bag and mask, should not have been introduced in relation to the 2010 bank robbery because it was unduly prejudicial and violated Fed.R.Evid. 404. (DE#8; DE#44). Generally, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show

action in conformity therewith." Fed.R.Evid. 404(b). Thus, "[e]vidence of extrinsic offenses is inadmissible to prove that the accused has the propensity to commit the crime charged." United States v. Pearson, 308 Fed. Appx. 375, 376-78 (11th Cir. 2009); United States v. Veltmann, 6 F.3d 1483, 1498 (11th Cir. 1993). Extrinsic evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b).

To be admissible under Rule 404(b), "(1) the evidence must be relevant to an issue other than the defendant's character; (2) there must be sufficient proof so that the factfinder could find that the defendant committed the extrinsic act; and (3) the evidence must possess probative value that is not substantially outweighed by undue prejudice." United States v. Perez, 443 F.3d 772, 779 (11th Cir. 2006); United States v. Pearson, 308 Fed. Appx. 375, 376-78 (11th Cir. 2009).

Unfair prejudice, however, can be mitigated by limiting instructions from the court. United States v. Diaz-Lizaraza, 981 F.2d 1216, 1225 (11th Cir. 1993); see also United States v. Pearson, 308 Fed. Appx. 375, 376-78 (11th Cir. 2009). In Pearson, the defendant argued that the third prong of the Perez test, arguing that the probative value of the 404(b) evidence to prove identity substantially outweighs the risk of unfair prejudice to the Defendant. Id. When evidence is introduced to prove identity, its probity "depends upon both the uniqueness of the modus operandi and the degree of similarity between the charged crime and the uncharged crime." United States v. Myers, 550 F.2d 1036, 1044-45 (5th Cir.1977).

The Eleventh Circuit has made clear that "it is not necessary that the charged crime and the other crimes be identical in every detail[,] they must possess a common feature or features that make it very likely that the unknown perpetrator of the charged crime and the known perpetrator of the uncharged crime are the same person." United States v. Myers, 550 F.2d at 1045. See also United States v. Lail, 846 F.2d 1299, 1301 (11th Cir.1988) ("the likeness of the offenses is the crucial consideration. The physical similarity must be such that it marks the offenses as the handiwork of the accused.") (quotation omitted). Here, as in Pearson, the record supports a finding that the physical similarities between the 2012 and 2010 bank robberies were sufficiently similar to mark them as the "handiwork" of the same individual and, thus, demonstrate a modus operandi. Lail, 846 F.2d at 1301. Both robberies involved a single perpetrator, wearing blue scrubs, a hat, and a dark cover concealing his facial features, to rob a bank with a black handgun who told the bank's occupants to "get down" and place the money in a blue bag.

It bears noting, however, that unlike Myers and Pearson, the evidence admitted here specifically related to both the 2012 and 2010 bank robberies. It was not introduced as evidence of other uncharged crimes. The court did not err in allowing evidence from the 2012 bank robbery to be introduced and/or otherwise identified by witnesses to the 2010 robbery. Even had the items not been introduced, there still remained sufficient evidence, independent of the blue bag and mask, upon which the jury could convict the movant as to 2010 bank robbery charged in Counts 3 and 4. The evidence of the 2012 robbery was sufficiently probative of the identity of the perpetrator of the 2010 bank robbery, and its probative value was not substantially outweighed by undue prejudice. Consequently, the movant cannot demonstrate deficient

performance or prejudice arising from counsel's failure to pursue this claim either at trial or on appeal. Relief is not warranted on this claim on this alternative basis. Strickland v. Washington, supra.

In **claim 4**, the movant asserts that he was denied effective assistance of counsel, where his lawyer failed to object to the court's jury instructions. (Cv-DE#8:16). Movant claims that the court erred in failing to instruct the jury on the "much greater degree of similarity" required to prove when evidence is introduced to prove identity through modus operandi. (Id.:17). He also suggests that since trial counsel failed to object, the jury was never advised that the "inference of identity flowing from the evidence must be extremely strong, and must bear such a peculiar, unique, or bizarre similarity as to mark them as the handiwork of the same person." (Id.). He claims the jury should have been further instructed on the degree of similarity necessary to establish that both bank robberies were committed by the same individual. (Id.). As he has argued throughout the prior claims raised in this proceeding, movant suggests that the government was attempting to prove the existence of identity through modus operandi. (Cr-DE#44:9). Movant is mistaken.

As will be recalled, the government had independent witness testimony, bank video surveillance of the robbery, and DNA evidence that the movant was the individual involved in the 2010 bank robbery. Further, the two offenses were, in fact, similar. As noted by the court when it denied severance, the evidence demonstrates that the robber in both incidents was acting alone, and was described as a thin built, African-American, wearing blue scrubs, a hat, and dark stocking-type facial mask, which obscured movant's facial features, and carrying a black handgun. The robber

also carried a blue bag which he used to fill with the bank cash stolen at the time of each robbery. Moreover, as explained previously, there was independent evidence, including bank video surveillance and DNA evidence to support movant's convictions regarding the 2010 bank robberies. See United States v. Slaughter, 708 F.3d 1208, 1213 (11 Cir.), cert. den'd, __ U.S. __, 133 S.Ct. 2868 (2013); United States v. Levinson, 504 Fed.Appx. 824, 826-27 (11 Cir.), cert. den'd, 2013 WL 2392810 (Oct. 7, 2013); United States v. Bone, 433 Fed.Appx. 831, 834 (11 Cir. 2011); United States v. Bannister, 285 Fed.Appx. 621, 626 (11 Cir. 2008).

Given the evidence adduced at trial as it relates to the 2010 bank robbery and the 2012 bank robbery, the movant has failed to demonstrate that counsel was ineffective, much less that he has suffered prejudice, arising from the failure to request a limiting instruction, as suggested. Therefore, relief is not warranted as to this claim.

In **claim 5**, the movant asserts that he was denied effective assistance of counsel, where his lawyer failed to move for a continuance or to object to the government's discovery violation. (Cv-DE#8:18). In support thereof, the movant does not claim the government failed to disclose discovery, but instead, argues that it failed to state that the item seized from the 2012 bank robbery, including a bag and mask, would be used as direct evidence of the 2010 bank robbery. (Id.). Movant claims that the prosecutor, during closing, stated that the 2012 mask was used during the 2010 bank robbery, but that mask was never introduced into evidence in relation to the 2010 bank robbery, nor did the government provide evidence to support that it was, in fact, the mask used at that time. (Id.). Movant states he was prejudice by its introduction because he was unable to prepare a defense to challenge the

evidence as it relates to the 2010 bank robbery. (Id.).

By movant's own admissions, no actual discovery violation occurred. The gist of movant's argument is that the government should have advised the defense that it intended to utilize the bag and mask seized in relation to the 2012 bank robbery, as evidence of the 2010 bank robbery. Movant again suggests here that counsel was not apprised of the fact that the government intended to utilize evidence relating to the 2012 as direct evidence of the 2010 bank robbery. Again, for the reasons previously stated in this Report, that was not the only evidence introduced at trial in relation to the 2010 conviction. While it is true that the bag and mask where identified as being similar to that used during the 2010 bank robbery, there was also independent evidence linking the movant to the 2010 bank robbery, including eyewitness testimony, DNA evidence, and bank video surveillance of the robbery. Thus, movant has not demonstrated that had counsel sought a continuance or moved to suppress the evidence from the 2012 robbery being introduced into the 2010 robbery, that the motion to continue would have been granted, must less that suppression or exclusion of the evidence would have been successful. Movant has not satisfied Strickland's prejudice prong and is thus entitled to no relief on the claim.

B. Challenge to 924(c) Convictions

It must first be noted that the Eleventh Circuit has now settled the issue regarding the burden of proving a Johnson claim in Beeman v. United States, 871 F.3d 1215 (11 Cir. 2017). There, the Eleventh Circuit made clear that the movant, not the government, "bears the burden to prove the claims in his §2255 motion." Beeman v. United States, 871 F.3d at 1222 (citing Rivers

v. United States, 777 F.3d 1306, 1316 (11 Cir. 2015); LeCroy v. United States, 739 F.3d 1297, 1321 (11 Cir. 2014); Barnes v. United States, 579 F.2d 364, 366 (5 Cir. 1978)("Under Section 2255, [the movant] had the burden of showing that he was entitled to relief."); Coon v. United States, 441 F.2d 279, 280 (5 Cir. 1971)("A movant in a collateral attack upon a judgment has the burden to allege and prove facts which would entitle him to relief.")). In that regard, the Eleventh Circuit held:

> To prove a Johnson claim, the movant must show that--more likely than not--it was use of the residual clause that led to the sentencing court's enhancement of his sentence. If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause.

Beeman v. United States, 871 F.3d 1215, 1221-1222 (11 Cir. 2017).

In so ruling, the Eleventh Circuit recognized that "[O]ne of the principal functions of [the] AEDPA was to ensure a greater degree of finality for convictions." Beeman v. United States, 871 F.3d at 1223 (citations omitted). The court recognized that "[P]utting the burden of proof and persuasion on the Government in a §2255 proceeding to show the absence of a constitutional violation or that an error had no effect on the judgment would undermine the presumption of finality that attaches at the end of the direct appeal process," and "would go a long way toward creating a presumption of non-finality and undermine the important interests that finality protects." Beeman v. United States, 871 F.3d at 1223.

Further, the Eleventh Circuit has also made clear in Beeman

that:

> [A] Johnson claim and a Descamps claim make two very different assertions. A Johnson claim contends that the defendant was sentenced as an armed career criminal under the residual clause, while a Descamps claim asserts that the defendant was incorrectly sentenced as an armed career criminal under the elements or enumerated offenses clause.

See Beeman v. United States, 871 F.3d at 1220. In Beeman, the movant's arguments "focused" or raised a Descamps[12] claim, maintaining that his Georgia conviction for aggravated assault could no longer qualify as an aggravated felony under the element clause. Id. However, the movant also raised, what "sounds like a Johnson claim," arguing that the sentencing court erred in relying on the residual clause to determine that his aggravated assault conviction in Georgia qualified as a crime of violence under the ACCA. The defendant supported his argument, stating that aggravated assault in Georgia had historically qualified as an ACCA predicate under that statute's residual clause." Id.

In **claim 6**, the movant asserts that his convictions for brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §924(c)(1), as charged in claims Count 2 and 4 of the Second Superseding Indictment, are no longer lawful in light of Johnson v. United States, 576 U.S. ___, 135 S.Ct. 2551 (2015). (Cv-DE#45:3).

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[12]Descamps v. United States, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). In Descamps, the Supreme Court described "how federal courts should determine whether an offense qualifies as a predicate offender under the ACCA's enumerated offenses and elements clauses." Beeman v. United States, 871 F.2d at 1218)(citing Mathis v. United States, 579 U.S. ___, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016); Descamps, 527, U.S. 2254, 133 S.Ct. 2276; Shepard v. Untied States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)).

1. Timeliness

First, the government concedes the movant's Johnson claim was timely instituted because he raised the claim on April 5, 2016, within a year following the June 2015 Johnson decision. (Cv-DE#41:27).

2. Procedural Default

Second, the government argues that the Johnson claim, however, is procedurally defaulted from review because the movant did not raise a constitutional challenge to the §924(c)'s residual clause on direct appeal. (Cv-DE#41:28). The government argues that to overcome the default, movant must demonstrate cause and prejudice, something he cannot do. (Id.). The government argues that the Johnson claim is procedurally barred from review, because the vagueness objection to the court's reliance on the residual clause was not preserved at sentencing nor was it then raised on direct appeal. (Cv-DE#9:15).

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. Massaro v. United States, 538 U.S. 500, 504 (2003); see also Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010); Lynn v. United States, 365 F.3d 1225, 1232 (11th

Cir. 2004).

a. Cause

To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can be shown when a claim "is so novel that its legal basis was not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998); see also, Reed v. Ross, 468 U.S. 1, 16 (1984).

Further, a meritorious claim of ineffective assistance of counsel can constitute cause. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000). Ineffective assistance of counsel claims, however, are generally not cognizable on direct appeal and are properly raised by a §2255 motion regardless of whether they could have been brought on direct appeal. Massaro v. United States, 538 U.S. 500, 503, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); see also United States v. Patterson, 595 F.3d, 1324, 1328 (11th Cir. 2010). See also Rose v. United States, ___ F.3d ___, 2018 WL 2727387, at *8 (11th Cir. June 6, 2018).

b. Prejudice

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). As will be recalled, the movant argues that the §924(c) convictions and resultant sentences are unlawful post-Johnson.

c. Analysis

As applied here, the movant has filed this §2255 motion raising a Johnson claim in support of his argument that his §924(c) convictions are no longer lawful. Movant does not allege new evidence, nor the existence of an error that would render his sentence unlawful, but rather argues that he is entitled to Johnson relief.

Consequently, where the Supreme Court explicitly overrules well-settled precedent, a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of sentencing or direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). That is precisely the circumstance here. The Supreme Court in Johnson overruled precedent, announced a new rule, and then gave retroactive application to that new rule. Under the totality of the circumstances present here, the movant's claim fits squarely within §2255(f) and is thus not procedurally barred from review, but only if the Johnson decision is applicable to him. See Rose v. United States, ___ F.3d ___, 2018 WL 2727387, at *8 (11th Cir. June 6, 2018).

3. Fundamental Miscarriage of Justice

If, however, the movant is unable to show cause and prejudice to excuse the procedural default of the claim, another avenue may exist for obtaining review of the merits of the 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"). No such showing has been made here.

Nevertheless, when judicial economy dictates, where the merits of the claim may be reached and readily disposed of, judicial economy has dictated reaching the merits of the claim while acknowledging the procedural default and bar in the alternative.[13] See Lambrix v. Singletary, 520 U.S. 518 (1997). See also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999)(stating that judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 528 U.S. 846 (1999); Chambers v. Bowersox, 157 F.3d 560, 564 n.4 (8th Cir. 1998)(stating that "[t]he simplest way to decide a case is often the best.").

4. Lawfulness of §924(c) Convictions

[13]Even if a claim is technically unexhausted here, the Court has exercised the discretion now afforded by Section 2255, as amended by the AEDPA, which permits a federal court to deny on the merits a habeas corpus application containing unexhausted claims. See Johnson v. Scully, 967 F.Supp. 113 (S.D.N.Y. 1996); Walker v. Miller, 959 F.Supp. 638 (S.D. N.Y. 1997; Duarte v. Miller, 947 F.Supp. 146 (D.N.J. 1996).

The movant concedes he was charged by Second Superseding Indictment with two counts of violating §924(c) (Counts 2 and 4). The movant argues, however, that he is actually innocent of the two §924(c) convictions because the federal bank robbery, 18 U.S.C. §2113(a), is not a "crime of violence" under either the elements or residual clause of §924(c).

Section 924(c) provides for a mandatory consecutive sentence of at least seven years for any defendant who brandishes a firearm during a crime of violence. 18 U.S.C. §924(c)(1). Under §924(c), a "crime of violence" is a felony that:

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

Id. §924(c)(3)(A), (B). The Eleventh Circuit has referred to the "first prong" of the §924(c) definition above as the "use-of-force" clause, and refers to the "second prong" of the definition as the "risk-of-force" clause. See Sanchez v. United States, 717 Fed.Appx. 974 (11 Cir. 2018)(unpublished)(citing Ovalles v. United States, 861 F.3d 1257, 1263 (11th Cir. 2017); see also Marcano v. United States, 2017 WL 5171194, at *2 (11th Cir. Nov. 8, 2017).

To begin with, the movant's §924(c) challenges remain foreclosed by the Eleventh Circuit's decisions in United States v. Faurisma, 716 Fed.Appx. 932 (11 Cir. Mar. 28, 2018)(unpublished)(citing In re Hines, 824 F.3d 1334, 1337 (11 Cir. 2016)(quoting 18 U.S.C. §924(c)(3)(A)); see also Williams v. United

States, 709 Fed.Appx. 676 (11 Cir. Jan. 23, 2018)(noting that it had previously determined that a conviction for armed bank robbery, in violation of 18 U.S.C. §2113(a) and (d), "clearly meets the requirements for an underlying felony offense, as set out in §924(c)(3)(A)" quoting In re Hines, 824 F.3d 1334, 1337 (11 Cir. 2016)). See also Beeman v. United States, 871 F.3d 1215, 1224 (11 Cir. 2017). In Faurisma, the Eleventh Circuit made clear that "a conviction under 18 U.S.C. §§2113(a) and (d) is a crime of violence under §924(c)(3)(A)'s use of force clause because it requires 'the use, attempted use, or threatened use of physical force against the person or property of another.'" See United States v. Faurisma, 716 Fed.Appx. at 933.

The movant seeks an Order from this court granting the motion and extending the reasoning in Johnson to declare the residual clause of §924(c)(3)(B) to be unconstitutionally vague. Movant also argues that the force clause does not apply to the federal bank robbery statute, 18 U.S.C. §2113(a), such a violation no longer qualifies as a crime of violence under the categorical approach mandated by Descamps v. United States, ___ U.S. ____, 133 S. Ct. 2276, 2283 (2013). Under this approach, courts "look only to the statutory definitions—i.e., the elements—of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a crime of violence. Descamps, 133 S.Ct. at 2283. If the violation charged can be committed without the commission of an act that qualifies as an act of violence, then the statute categorically fails to qualify as a "crime of violence." See United States v. McGuire, 706 F.3d 1333, 1336-1337 (11th Cir. 2013).

Defendant argues that the federal bank robbery statute does not meet the categorical standard, because such an offense can be

committed through mere "intimidation," 18 U.S.C. §2113(a), which can include conduct that does not involve the use or threat of physical force to another. As noted previously, however, the Eleventh Circuit has made clear that armed bank robbery, a violation of 18 U.S.C. §§2113(a) and (d) is a crime of violence under 18 U.S.C. §924(c)(3)(A)'s use-of-force clause. Therefore, even if Johnson's void-for-vagueness challenge were applicable, it would be of no consequence here since the convictions remain lawful in light of the use-of-force clause in §924(c)(3)(A). United States v. Faurisma, 716 Fed.Appx. at 933 (11 Cir. 2018)(unpublished). Several other circuits, including the Eighth, Second, and Sixth, have distinguished §924(c)(3)(B) from the ACCA's residual clause and upheld the use-of-force clause in §924(c)(3)(B). See United States v. Prickett, No. 15-3486, ___ F.3d ___, 2016 WL 5799691, at *2 (8th Cir. Oct. 5, 2016) ("'[B]ecause several factors distinguish the ACCA residual clause from § 924(c)(3)(B),' ... we join the Second and Sixth Circuits in upholding § 924(c)(3)(B) against a vagueness challenge.") (citations omitted); United States v. Hill, ___ F.3d ____, 2016 WL 4120667, at *7-12 (2d Cir. Aug. 3, 2016) (declining to extend Johnson and finding § 924(c)(3)(B) was not unconstitutionally vague); United States v. Taylor, 814 F.3d 340, 375-78 (6th Cir. 2016) (finding significant differences between the language of § 924(c)(3)(B) and the ACCA's residual clause and thus the movant's argument "that Johnson effectively invalidated §924(c)(3)(B) is accordingly without merit.").

In this circuit, binding authority holds that federal bank robbery robbery qualifies as "crimes of violence" for purposes of §924(c)'s force clause. See In re Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016) ("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, Saint Fleur's claim does not meet the statutory criteria for granting this §2255(h) application. This is because Saint Fleur'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)."). The Eleventh Circuit has previously held that a bank robbery conviction under §2113(a) and (d) qualifies as a crime of violence under the §924(c)(3)(A) use-of-force clause. United States v. Faurisma, 716 Fed.Appx. 932 (11 Cir. 2018); In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016).

Since the Eleventh Circuit has already stated in unpublished opinions that federal bank robberies (both armed and non-armed) categorically qualify as crimes of violence for purposes of the use-of-force clause under §924(c), such a finding, as reference above, is binding on this court. See Williams v. United States, 709 Fed.Appx. 676 (11 Cir. 2018)(unpublished). In Williams, the Eleventh Circuit made clear that its "prior-panel-precedent rule applies with equal force as to prior panel decision published in the context of applications to file second or successive petitions." Williams v. United States, 709 Fed.Appx. at 676 (quoting In re Lambrix, 776 F.3d 789, 794 (11 Cir. 2015). Consequently, in Williams, the Eleventh Circuit made clear that its holding in In re Hines is binding precedent, and it forecloses the movant's claim here. Williams v. United States, supra. Thus, until the Eleventh Circuit itself or the Supreme Court overturns the precedents discussed herein, this court is foreclosed from finding otherwise. Therefore, the movant is not entitled to relief because his convictions are still valid post-Johnson. See also Marcano v. United States, 2017 WL 5171194, at *3 (11 Cir. Nov. 8, 2017).

Movant also suggests that Johnson extends to his §924(c)

convictions because §924(c)'s "residual clause" is almost identical to the ACCA's "residual clause." The Eleventh Circuit, however, has made clear, that post-Johnson, a conviction for federal bank robbery, a violation of §2113(a) constitutes a crime of violence and therefore can be used to support a §924(c) conviction. See United States v. Faurisma, 716 Fed.Appx. 932 (11 Cir. Mar 28, 2018). Consequently, the movant cannot demonstrate that he is entitled to relief on the merits.

Under the totality of the circumstances present here, because the movant's federal bank robbery convictions used to support his §924(c) convictions, as charged in Counts 2 and 4, constitute crimes of violence under §924(c)'s use-of-force clause, the movant cannot demonstrate that he is entitled to §2255 Johnson relief. Given the foregoing, the movant's Johnson claim should be dismissed as procedurally defaulted from review since movant has neither shown cause or prejudice to overcome the default of his Johnson claim. Finally, even on the merits, the Johnson claim fails, especially in light of controlling Eleventh Circuit precedent. In other words, the movant has not shown, and cannot show, that his motion contains a claim based upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable." See 28 U.S.C. §22855.

In related **claim 7**, the movant asserts that his convictions for using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §924(c)(1) are no longer lawful in light of the Supreme Court's decision in Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151 (2013). (Cv-DE#45:3).

The government concedes movant's Alleyne claim was timely instituted. (Cv-DE#41:52). Even if the Alleyne claim were not

timely filed, as it was raised for the first time in an amended motion, filed over a year after his judgment became final after resentencing, the government has affirmatively waived the statute of limitations defense from consideration by this court under United States v. Frady, 456 U.S. 152, 162, 167-68, 102 S.Ct. 1584, 1594, 1599-1600, 7 L.Ed.2d 816 (1982), when it acknowledged that the motion was timely filed. (Cv-DE#41:52). See Wood v. Milyard, 566 U.S. 463, 470 n.5, 472, 132 S.Ct. 1826, 1833, 1835, 182 L.Ed.2d 733 (2012). In Wood, the Supreme Court held that a district court abuses its discretion by considering a statute of limitation defense that has been affirmatively waived, as opposed to merely forfeited. (Id.). See also In Re Jackson, 826 F.3d 1343, 1347 (11 Cir. 2016)(citing Day v. McDonough, 547 U.S. 198, 210, 126 S.Ct. 1675, 1684, 164 L.Ed.2d 376 (2006) and Wood v. Milyard, 546 U.S. 463, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012)); Rogers v. United States, 569 Fed. Appx. 819, 821 (11th Cir. 2014) (Finding government's miscalculation was not related to the timeliness of the motion, but rather an intelligent waiver of the statute of limitations defense, citing Day v. McDonough, 547 U.S. at 202 and Gay v. United States, 816 F.2d 614, 616 n. 1 (11th Cir.1987)("[T]he principles developed in habeas cases also apply to § 2255 motions.")).

To the extent the movant appears to argue, in the alternative, that his §924(c) convictions are unlawful pursuant to Alleyne, even if the claim were cognizable here, for the reasons previously stated in this Report, in relation to claim 6 above, any challenge in light of Alleyne also fails because the movant's prior §924(c) convictions, do not suffer from the same infirmity as the residual clause found void for vagueness in Johnson. The Eleventh Circuit has made clear that a violation of the federal bank robbery statute, 18 U.S.C. §2113(a) and (d) constitutes a crime of violence

for purposes of §924(c). Therefore, any argument to the contrary here is devoid of merit.

If the movant means to argue that his sentences for violation of §924(c) were unlawfully increased and that the decision whether the federal bank robbery statute used to support the §924(c) was a crime of violence should have been left to the jury, such an argument has also been foreclosed by Eleventh Circuit precedent. See United States v. Jones, 608 Fed.Appx. 822 (11 Cir. 2015).[14]

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

VIII. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of

[14]It is also worth mentioning here that movant's resentencing was affirmed on direct appeal. Movant has not demonstrated here, even in light of Alleyne that the sentence was unreasonable, much less unlawful. Relief is not warranted here and the challenge to the sentences imposed should not be disturbed herein.

appealability ("COA"). See 28 U.S.C. §2253(c)(1); Harbison v. Bell, 556 U.S. 180, 129 S.Ct. 1481 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if petitioner does not agree, he may bring this argument to the attention of the district judge in objections.

IX. Conclusion

Based on the foregoing, it is recommended that: (1) the movant's motions be DENIED in its entirety; (2) final judgment be entered; (3) a certificate of appealability be DENIED; and, (4) the case be CLOSED.

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

Signed this 13th day of July, 2018.

UNITED STATES MAGISTRATE JUDGE

cc: Bryan Whitehead, Inmate/Movant
Reg. No. 99876-004
F.C.I.- Coleman Med.
Inmate Mail/Parcels
Post Office Box 1032
Coleman, FL 33521

Curt David Obront, Esquire
Attorney for Movant
Obront Corey, PLLC
One Bayfront Tower
100 South Biscayne Blvd.
Suite 800
Miami, FL 33131
Email: Curt@obrontcorey.com

Robert Juman, AUSA
U.S. Attorney's Office
99 N.E. 4th Street
Miami, FL 33128
Email: robert.juman@usdoj.gov

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-62163-CIV-ZLOCH
(12-60130-CR-ZLOCH)

BRYAN WHITEHEAD,

Movant,

vs.

O R D E R

UNITED STATES OF AMERICA,

Respondent.
_____/

THIS MATTER is before the Court upon the Report Of Magistrate Judge Re § 2255 Challenging, In Part, 18 U.S.C. 924(c) Conviction (DE 47) filed herein by United States Magistrate Judge Patrick A. White, Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 8) as amended by Movant's Reply To Government's Consolidated Response To Movant's Motion To Vacate, Correct, Or Set Aside Sentence Pursuant To 28 U.S.C. Section 2255 (DE 45), Movant's Motion For Leave To Append Addendum Arguments To Movant's "Objections To Claim #1 And #2" (DE 52), and Movant's Requesting Leave To Clarify Movant's Objections To The Magistrate's Report & Recommendations (DE 53). The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Movant's Motion For Leave To Append Addendum Arguments To Movant's "Objections To Claim #1 And #2" (DE 52) and Movant's Requesting Leave To Clarify Movant's Objections To The Magistrate's Report & Recommendations (DE 53) be and the same are hereby **GRANTED** to the extent that the Court deems the arguments in said Motions

timely filed and incorporated into Movant's Objections (DE 51);

2. The Objection To Magistrate's Report And Recommendation (DE 50) and Movant's Objections To The Magistrate's Report And Recommendations (DE 51) be and the same are hereby **OVERRULED;**

3. The Report Of Magistrate Judge Re § 2255 Challenging, In Part, 18 U.S.C. 924(c) Conviction (DE 47) filed herein by United States Magistrate Judge Patrick A. White be and the same is hereby approved, adopted, and ratified by the Court;

4. Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 8) as amended by Movant's Reply To Government's Consolidated Response To Movant's Motion To Vacate, Correct, Or Set Aside Sentence Pursuant To 28 U.S.C. Section 2255 (DE 45) be and the same is hereby **DENIED;** and

5. Final Judgment will be entered by separate Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of February, 2019.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

The Honorable Lisette M. Reid
United States Magistrate Judge

All Counsel of Record

Bryan Whitehead PRO SE
99876-004
Coleman Medium
Federal Correctional Institution
Inmate Mail/Parcels
Post Office Box 1032
Coleman, FL 33521

APPENDIX F

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.