NO:

IN THE
SUPREME COURT OF THE UNITED STATES

CARL SAMSON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), is a "crime of violence" under 18 U.S.C. § 924(c)(3)(A), meaning that it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

This Court granted review on this issue in *United States v. Taylor*, No. 20-1459, cert. granted July 2, 2021.

INTERESTED PARTIES

There are no parties interested in the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

This case presents the same issue as *United States v. Taylor*, No. 20-1459, which this Court agreed to hear in the upcoming Term. As with *Taylor*, this case poses what should be a straightforward question of statutory interpretation: whether attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A), such that defendants who commit that offense are subject to conviction under § 924(c) and substantially enhanced criminal penalties when the attempt involves using or carrying a firearm. The answer to this question has profound consequences for thousands of criminal defendants nationwide.

The text of 18 U.S.C. § 924(c)(3)(A) and 18 U.S.C. § 1951 makes apparent that attempted Hobbs Act robbery is not categorically a crime of violence: The offense does not have the "attempted use" of force "as an element." The courts of appeals are nevertheless in conflict on the issue. Because the Court has already granted review in *Taylor* to resolve this question, the Court should hold this case until it has decided *Taylor*, and then should dispose of it in accordance with that decision.

OPINION BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit, in case number 19-11048, in an unpublished decision rendered by that court on April 2, 2021, available at 851 Fed.Appx. 950, affirmed the judgment of the United States District Court for the Southern District of Florida which denied petitioner's 28 U.S.C.

§ 2255 motion. A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on April 2, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(3)

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

18 U.S.C. § 1951(a)

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

Following a jury trial, petitioner Carl Samson was convicted of conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), attempt to commit Hobbs

Act robbery in violation of 18 U.S.C. § 1951(a), and using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). The district court sentenced petitioner to a 200-month term of imprisonment on the conspiracy and attempt counts, as well as a consecutive 120-month term on the § 924(c) count. On direct appeal to the Eleventh Circuit in 2013, petitioner's convictions and sentences were affirmed. *United States v. Samson*, 540 Fed.Appx. 927 (11th Cir. 2013).

In June 2016, with leave granted by the court of appeals, petitioner filed a second or successive § 2255 motion, arguing that, under *Johnson v. United States*, 576 U.S. 591 (2015), his § 924(c) conviction was invalid because *Johnson* invalidated § 924(c)(3)(B) and neither conspiracy nor attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A). The district court denied the § 2255 motion, relying on Eleventh Circuit precedent. App. 12. In November 2019, the Eleventh Circuit granted petitioner's motion for certificate of appealability as to "Whether, in light of *United States v. Davis*, 139 S.Ct. 2319 (2019), and *In re Hammoud*, 931 F.3d 1032 (11th Cir. 2019), the district court erred in denying [petitioner's] vagueness challenge to his conviction under 18 U.S.C. § 924(c)(3)(B)." After full briefing, the Eleventh Circuit affirmed the denial of § 2255 relief, concluding that petitioner's conviction of "attempted Hobbs Act robbery categorically qualifies as a crime of violence under the § 924(c)(3) elements clause and therefore is a valid predicate for [petitioner's] § 924(c)(1)(A)(iii) conviction." App. 6.

REASONS FOR ISSUING THE WRIT

The court of appeals held that attempted Hobbs Act robbery is categorically a "crime of violence" within the meaning of § 924(c)(3)(A) and denied relief on the basis that petitioner could not show that the offense of which he was convicted did not meet the statutory elements. On July 2, 2021, this Court granted the government's petition for a writ of certiorari in *United States v. Taylor*, No. 20-1459, to address that very issue. The Court accordingly should hold this petition pending its decision in *Taylor* and then should dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States v. Taylor*, No. 20-1459, and then should be disposed of as appropriate in light of that decision.

Respectfully submitted,

RICHARD C. KLUGH, ESQ.
Counsel for Petitioner

Miami, Florida
August 2021

APPENDIX

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11048
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-22521-RNS,
1:10-cr-20855-RNS-1

CARL RICHARD SAMSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(April 2, 2021)

Before LAGOA, BRASHER, and BLACK, Circuit Judges.

PER CURIAM:

Carl Richard Samson appeals the district court's denial of his authorized successive 28 U.S.C. § 2255 motion to vacate. We granted a certificate of appealability on one issue: whether in light of *United States v. Davis*, 139 S. Ct. 2319 (2019),[1] and *In re Hammoud*, 931 F.3d 1032 (11th Cir. 2019),[2] the district court erred in denying Samson's vagueness challenge to his conviction under 18 U.S.C. § 924(c)(3)(B). After review,[3] we affirm the district court's denial of Samson's motion to vacate.

I. BACKGROUND

We presume familiarity with the factual and procedural background and describe it below only to the extent necessary to address the issues raised in this appeal.

Samson was charged in a superseding indictment with (1) conspiracy to commit robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); (2) attempt to

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[1] In *Davis*, the Supreme Court extended its holdings in *Johnson v. United States*, 576 U.S. 591 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), to § 924(c) and held that § 924(c)(3)(B)'s residual clause, like the residual clauses in the Armed Career Criminal Act and 18 U.S.C. § 16(b), is unconstitutionally vague. *Davis*, 139 S. Ct. at 2325-26, 2336. The Court emphasized there was "no material difference" between the language or scope of § 924(c)(3)(B) and the residual clauses struck down in *Johnson* and *Dimaya*, and, therefore, concluded that § 924(c)(3)(B) was unconstitutional for the same reasons. *Id.* at 2326, 2336.

[2] In *Hammoud*, this Court held *Davis* announced a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *Hammoud*, 931 F.3d at 1038-39.

[3] When reviewing a district court's denial of a § 2255 motion, this Court reviews findings of fact for clear error and questions of law *de novo*. *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011).

commit robbery in violation of 18 U.S.C. §§ 1951(a) and (2) (Count 2); and (3) using and carrying a firearm during and in relation to a crime of violence—specifically, conspiracy to commit a robbery as charged in Count 1 and attempt to commit a robbery as charged in Count 2—in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2 (Count 3). Samson proceeded to jury trial on all three counts. As to Count 3, the district court instructed the jury:

> The defendant can be found guilty of violating 18 Section 924(c)(1)(A)(iii) only if all of the following facts are proved beyond a reasonable doubt: First, that the defendant committed at least one of the federal crimes of violence charged in Counts 1 or 2 of the superseding indictment; second, that during the commission of that offense the defendant knowingly used or possessed a firearm as charged; and third, that the defendant used the firearm in relation to the federal crime of violence or possessed the firearm in furtherance of the federal crime of violence.

Samson was found guilty on all three counts by a general jury verdict. This Court affirmed Samson's convictions on direct appeal. *United States v. Samson*, 540 F. App'x 927, 932 (11th Cir. 2013).

II. DISCUSSION

Samson asserts that because *Davis* held that the residual clause of § 924(c)(3)(B)[4] is unconstitutionally vague, his conviction for conspiracy to

[4] For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another [the elements clause], or

commit robbery in violation of 18 U.S.C. § 1951(a) (Hobbs Act), does not qualify as a crime of violence under § 924(c)(3)(B). Samson also argues that conspiracy to commit a Hobbs Act robbery does not qualify as a crime of violence under § 924(c)(3)(A)'s elements clause. Samson contends the district court's denial of his motion should be vacated because the district court had not determined whether his § 924(c) conviction rested on the Hobbs Act robbery conspiracy or attempt charge. Samson asserts it is not clear which evidence the jury relied on to distinguish between attempt and conspiracy, thus the jury reasonably could have relied solely on the broader conspiracy theory for its § 924(c) verdict. Samson asserts the unconstitutionality of § 924(c)(3)(B) and the need for resolution of the jury's reliance on the conspiracy charge as the basis for its determination of the § 924(c) count warrant vacating the district court's decision and remanding to the district court.

The Government responds that Samson procedurally defaulted his claim by not raising it on direct appeal. The Government argues that Samson has no cause to excuse his default because his vagueness challenge was not "novel" within the meaning of this Court's precedents and the legal basis of his vagueness claim was

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> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense [the residual clause].
>
> 18 U.S.C. § 924(c)(3).

available to him at all times. The Government also argues that Samson cannot show actual prejudice because his attempted Hobbs Act robbery qualified as a predicate crime of violence post-*Davis* and his § 924(c) count was alternatively predicated on the attempt. The Government contends that Samson cannot demonstrate actual innocence because his § 924(c) conviction was also predicated on attempted Hobbs Act robbery.

The Government also contends there was no possibility the jury's § 924(c) verdict rested solely on the conspiracy charge because the robbery conspiracy and its attempt were coextensive and the jury found the attempt was proven beyond a reasonable doubt. While the Government recognizes that Hobbs Act conspiracy no longer qualifies as a predicate crime of violence, *Davis* did not alter the validity of Samson's § 924(c) conviction because it was also predicated on attempted Hobbs Act robbery, which was unaffected by *Davis*. The Government states there is no need to remand to the district court because the record makes clear that the underlying offenses of conspiracy and attempted Hobbs Act robbery were so inextricably intertwined that Samson cannot meet his burden of proving entitlement to relief under *Davis*.

As an initial matter, we have held conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence" under § 924(c)'s elements clause and thus would only qualify as a predicate offense under the unconstitutional residual

clause. *Brown v. United States*, 942 F.3d 1069, 1075-76 (11th Cir. 2019). In contrast, attempted Hobbs Act robbery categorically qualifies as a crime of violence under the § 924(c)(3) elements clause and therefore is a valid predicate for Samson's § 924(c)(1)(A)(iii) conviction. *United States v. St. Hubert*, 909 F.3d 335, 351-53 (11th Cir. 2018), *abrogated in part on other grounds by Davis*, 139 S. Ct. at 2336.

This Court recently issued an opinion in *Granda v. United States*, __ F.3d __, 2021 WL 923282 (11th Cir. Mar. 11, 2021) that controls the resolution here. Granda also collaterally attacked his conviction under 18 U.S.C. § 924, arguing that one of the predicate crimes—conspiracy to commit Hobbs Act robbery—no longer qualifies as a crime of violence after *Davis*. We rejected Granda's arguments on appeal for two reasons: (1) he could not overcome the procedural default of his claim, and (2) he could not otherwise prevail on the merits. *Id.* at 1. We reject Samson's arguments on appeal for the same reasons.

A. Procedural Default

A prisoner in federal custody may file a motion to vacate, set aside, or correct his sentence pursuant to § 2255, claiming the right to be released based on the ground that his sentence was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255(a). A § 2255 claim may be procedurally defaulted if the petitioner failed to raise the claim on direct appeal. *Bousley v.*

United States, 523 U.S. 614, 622 (1998). A defendant can overcome this procedural bar by establishing cause and actual prejudice, or actual innocence. *Id.* Futility does not constitute cause to the extent that the movant's argument was "unacceptable to that particular court at that particular time." *Id.* at 623. In determining cause, the question is not whether subsequent case law has made counsel's task easier, but whether at the time of the alleged default, the claim was available at all. *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001).

Samson did not argue in the trial court, or on direct appeal, that his § 924(c)(1)(A)(iii) conviction was invalid because the § 924(c)(3)(B) residual clause was unconstitutionally vague. "He, therefore, procedurally defaulted this claim and cannot succeed on collateral review unless he can either (1) show cause to excuse the default *and* actual prejudice from the claimed error, or (2) show that he is actually innocent of the [§ 924(c)(1)(A)(iii)] conviction." *Granda*, 2021 WL 923282 at *5.

1. Cause

In *Granda*, we rejected the petitioner's argument that his §924(c)(3) argument was sufficiently novel to establish cause to excuse the procedural default. *Id.* at *5-*7. While *Davis* announced a new constitutional rule that has retroactive application, *Hammoud*, 931 F.3d at 1038-39, we explained "[t]o establish novelty sufficient to provide cause based on a new constitutional principle, [a petitioner]

must show that the new rule was a sufficiently clear break with the past, so that an attorney representing him would not reasonably have had the tools for presenting the claim," *Granda*, 2021 WL 923282 at *6 (quotations and alterations omitted). We determined Granda's claim did not fit into any of the three circumstances in which novelty might constitute cause for defaulting a claim: (1) "when a decision of the Supreme Court explicitly overrules one of its precedents"; (2) "when a Supreme Court decision overturns a longstanding and widespread practice to which the Supreme Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved"; and (3) "when a Supreme Court decision disapproves of a practice the Supreme Court arguably has sanctioned in prior cases." *Id.* (quotations and alterations omitted). We concluded because "the tools existed to challenge myriad other portions of § 924(c) as vague; they existed to support a similar challenge to its residual clause." *Id.* at *7. The same reasoning applies in Samson's case and Samson cannot show cause to excuse his procedural default.

2. Prejudice

We also determined the petitioner could not overcome the procedural default of his vagueness claim because he could not show actual prejudice. *Id.* "To prevail on a cause and prejudice theory, a petitioner must show actual prejudice. Actual prejudice means more than just the possibility of prejudice; it requires that

the error worked to the petitioner's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* (quotations omitted). To show actual prejudice, we determined that a petitioner would have to show a "substantial likelihood" the jury relied solely on the Hobbs Act conspiracy conviction as the predicate for his § 924 conviction. *Id.*

Samson has failed to show a substantial likelihood his § 924(c) conviction was predicated solely on his Hobbs Act conspiracy conviction. First, the district court instructed the jury it could find Samson guilty of § 924(c) upon finding beyond a reasonable doubt that he committed at least one of the crimes of violence charged in Count 1 or Count 2 of the indictment. Second, the jury found beyond a reasonable doubt that Samson committed attempted Hobbs Act robbery, which is a qualifying crime of violence predicate under § 924(c)(3)(A). Third, the general jury verdict did not specify upon which predicate offense(s) Samson's § 924(c) conviction was based. Fourth, the conspiracy and attempt offenses were inextricably intertwined, and Samson acknowledged in his reply brief that it was not clear which evidence the jury relied on to distinguish between attempt and conspiracy for his § 924(c) verdict, effectively conceding that he cannot meet his burden that the jury relied solely on the conspiracy conviction. Samson cannot show actual prejudice.

3. Actual Innocence

"The actual innocence exception to the procedural default bar is exceedingly narrow in scope as it concerns a petitioner's actual innocence rather than his legal innocence. Actual innocence means factual innocence, not mere legal innocence." *Granda*, 2021 WL 923282 at *10 (quotations omitted). Samson makes no argument that he is actually innocent of the offense, and he cannot show he is actually innocent of his § 924(c) offense.

Thus, because Samson cannot show cause, prejudice, or actual innocence, he cannot overcome procedural default.

B. Merits

In *Granda*, we determined "[t]he inextricability of the alternative predicate crimes compels the conclusion that the error Granda complains about—instructing the jury on a constitutionally invalid predicate as one [of several] potential alternative predicates—was harmless." *Id.* The same result follows here. Samson's conspiracy to commit Hobbs Act robbery was inextricably intertwined with the other predicate offense of attempted Hobbs Act robbery. There is little doubt that if a jury found Samson conspired to possess a firearm in furtherance of his conspiracy to commit Hobbs Act robbery, it also found that he conspired to possess a firearm in furtherance of the attempted Hobbs Act robbery. There is no grave doubt regarding whether the inclusion of the invalid predicate had a

substantial influence in determining the jury's verdict. *See Davis v. Ayala*, 576 U.S. 257, 267-68 (2015) (explaining on collateral review, the harmless error standard states "relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict" (quotations omitted)). Thus, any error of instructing Samson's jury on the invalid predicate is harmless.

III. CONCLUSION

We conclude that Samson procedurally defaulted his claim, and alternatively, that any potential error in instructing the jury on the invalid predicate was harmless. Thus, we affirm the district court's denial of Samson's successive § 2255 motion to vacate.

AFFIRMED.

United States District Court
for the
Southern District of Florida

Carl Richard Samson, Movant	)	
	)	
v.	)	
	)	Civil Action No. 16–22521-Civ-Scola
United States of America,	)	
Respondent.	)	

Order on Magistrate Judge's Report and Recommendations

This case was referred to United States Magistrate Judge Alicia M. Otazo-Reyes for a ruling on all pre-trial, nondispositive matters and for a report and recommendation on any dispositive matters. Judge Otazo-Reyes issued a report recommending that the Court deny Carl Richard Samson's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 5).[1] (Report of Magistrate Judge, ECF No. 31.) Mr. Samson filed objections to Judge Otazo-Reyes's Report. (Objections to Report, ECF No. 32.) Accordingly, the Court has reviewed the portions of Judge Otazo-Reyes's Report that Mr. Samson objected to *de novo*, *see* 28 U.S.C. 636, and the remaining portions for clear error. *See Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

Mr. Samson was convicted by a jury of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1915(a) (Count 1); attempt to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1915(a) and (2) (Count 2); and, using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) and (2) (Count 3). (Case No. 10-cr-20855, ECF No. 297 at 1.) Mr. Samson was sentenced to two concurrent sentences of 200 months' imprisonment for the first two counts, and a consecutive sentence of 120 months' imprisonment for the third count, with a supervised release term of five years. (*Id.* at 2–3.) Mr. Samson previously directly appealed his convictions, which were affirmed (Case No. 10-cr-20855, ECF No. 347), and filed a motion to vacate under § 2255, which this Court denied (Case No. 10-cr-20855, ECF No. 355). Mr. Samson's second motion to vacate is now before the Court (ECF No. 5). Mr. Samson initially raised two arguments in his pro se motion to vacate (ECF Nos. 1, 4), which the Eleventh Circuit reviewed pursuant

[1] Mr. Samson initially filed a pro se motion to vacate, with a corresponding memorandum of law in support of his motion (ECF Nos. 1, 4). Mr. Samson subsequently filed another motion to vacate, which was prepared by counsel (ECF No. 5). The Court has reviewed both motions. The Court, however, relies on the counseled motion when discussing Mr. Samson's motion to vacate. Judge Otazo-Reyes similarly cited to this version in her Report.

to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A). (Order on Appl. to File Second or Successive Mot., ECF No. 14.) The Eleventh Circuit, however, denied Mr. Samson leave to file a second or successive petition on the argument Mr. Samson presented regarding the residual clause of the Sentencing Guidelines and he has since withdrawn this argument. (Notice of Withdrawal, ECF No. 20.)

The remaining basis for Mr. Samson's second-in-time motion to vacate his sentence is that, following the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), his conviction under § 924(c) should be vacated because his convictions for conspiracy to commit Hobbs Act robbery and attempt to commit Hobbs Act robbery do not qualify as crimes of violence under 18 U.S.C. § 924(c)(3)(B). The Supreme Court in *Johnson* determined that the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557. The *Johnson* decision was then made retroactive under *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). Mr. Samson argues that the residual clause analyzed in *Johnson* is similar enough to the language in 18 U.S.C. 924(c)(3)(B) that *Johnson*'s void-for-vagueness determination applies to his case. Relatedly, Mr. Samson's motion asserts that his two companion convictions for conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery are not crimes of violence under § 924(c)(3)(A).

Since Mr. Samson's motion is second or successive, Mr. Samson's motion had to be "certified as provided in section 2244 by a panel of the appropriate court of appeals." 28 U.S.C. § 2255(h). Relatedly, 28 U.S.C. § 2244(b)(3)(A) states that "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move the appropriate court of appeals for an order authorizing the district court to consider the application." As a result, the Eleventh Circuit had to certify that Mr. Samson's motion contained one of the two bases for bringing a second or successive petition. *See* 28 U.S.C. § 2255(h)(1)–(2). Here, the Eleventh Circuit granted Mr. Samson's motion to file a second or successive motion pursuant to § 2255(h)(2) as to his *Johnson* claim, concluding that Mr. Samson made a prima facie showing that he was sentenced under the "residual clause" of § 924(c) and consequently, his claim fell within the substantive rule announced in *Johnson*, which the panel assumed would impact convictions under § 924(c). (Order, ECF No. 14.)

Upon reviewing Mr. Samson's motion to vacate, Judge Otazo-Reyes recommended that his motion be denied. (Report, ECF No. 31.) Judge Otazo-Reyes first concluded that Mr. Samson's § 924(c) conviction was based on a crime of violence under the use-of-force clause of § 924(c)(3)(A). In particular,

Judge Otazo-Reyes found that attempt to commit Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A), relying on a Second Circuit case, *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016). Next, Judge Otazo-Reyes concluded that even assuming that Mr. Samson was not convicted under the use-of-force clause, *Johnson* did not render § 924(c)(3)(B) unconstitutionally vague as recently determined by the Eleventh Circuit in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), so Mr. Samson cannot overcome § 2255's procedural bar on the basis of actual innocence.

Upon reviewing Judge Otazo-Reyes's report, the record, and the relevant legal authorities, the Court determines that Mr. Samson's second motion to vacate cannot proceed because it does not meet the requirements of § 2255(h). As a result, the Court cannot adopt Judge Otazo-Reyes recommendations to the extent they are merits determinations. In particular, the Court passes no judgment on whether attempt to commit Hobbs Act robbery or conspiracy to commit Hobbs Act robbery are crimes of violence under the use-of-force clause of § 924(c)(3)(A) because those questions are not properly before the Court.

As the Eleventh Circuit panel clarified in its order granting Mr. Samson leave to file his second or successive motion to vacate, "the district court not only can, but must, determine for itself whether those [§ 2255(h)] requirements are met." (Order, ECF No. 14 at 12.) (quoting *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357 (11th Cir. 2007)). As reiterated by the Eleventh Circuit in *In re Moss*, 703 F.3d 1301 (11th Cir. 2013), the district court is bound to decide "fresh" the issue of whether § 2255(h) criteria are met, and if so, proceed to considering the merits of the § 2255 motion. *Id.* at 1303 (quoting *Jordan*, 485 F.3d at 1358).

Relevant here, § 2255(h)(2) states that a movant must show that there is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" in order to file a second or successive motion to vacate. When the Eleventh Circuit granted Mr. Samson leave to file his second or successive motion, it had not yet resolved the question of whether *Johnson* invalidated § 924(c)(3)(B), and the panel was assuming—without holding—that Mr. Samson's motion could be filed pursuant to *Johnson*.

The Eleventh Circuit has since determined in *Ovalles* that *Johnson*'s void-for-vagueness determination in the ACCA context does not extend to § 924(c)(3)(B) and remains valid. *Ovalles*, 861 F.3d at 1263–67. We are bound by *Ovalles*, and as result, Mr. Samson's motion to vacate cannot proceed. The Court recognizes that in his objections, Mr. Samson alerted the Court to the fact that the mandate has not yet issued for *Ovalles* and that he asked the Court to stay this case until the Supreme Court decides *Sessions v. Dimaya*, S.

Ct. No. 15-1498, a case Mr. Samson believes will impact the Eleventh Circuit's resolution of *Ovalles*. The Court declines Mr. Samson's invitation to stay this case because the Court is bound by *Ovalles* notwithstanding the fact that the mandate has not yet issued; in fact, the Eleventh Circuit continues to apply *Ovalles* despite this fact. *See Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) (recognizing that panel was bound by case that had its mandate stayed pending the filing of petition for writ of certiorari and stating that "the stay in no way affects the duty of this panel or courts in this circuit to apply now the precedent established . . . as binding authority"); *King v. United States*, No. 17-11053, 2018 WL 566319, at *1 (11th Cir. Jan. 26, 2018) (applying *Ovalles* and stating "[w]e are bound by this Court's prior precedent unless and until it is overruled by this Court sitting *en banc* or by the Supreme Court"); *see also Godbee v. United States*, 711 F. App'x 588, 588-89 (11th Cir. 2018); *Williams v. United States*, 709 F. App'x 676, 676 (11th Cir. 2018). Moreover, the Eleventh Circuit recently declined to stay one of its cases on the basis that *Dimaya* is pending before the Supreme Court, finding the issues raised in *Dimaya* inapplicable to § 924(c) cases. *See United States v. St. Hubert*, 883 F.3d 1319, 1336–37 (11th Cir. 2018).

Accordingly, the Court **adopts the Report in part** to the extent it denies relief to Mr. Samson but **declines to adopt** Judge Otazo-Reyes's Report to the extent it reaches the merits of Mr. Samson's motion to vacate, and **dismisses** Mr. Samson's motion to vacate (ECF No. 5). The Court does not issue a certificate of appealability. Finally, the Court directs the Clerk to **close** this case.

Done and ordered at Miami, Florida, on April 3, 2018.

Robert N. Scola, Jr.
United States District Judge