

NO:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2021

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BOBBY MARTIN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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PETITION FOR WRIT OF CERTIORARI

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September 20, 2021

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## **APPENDIX**

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**A-1**

852 Fed.Appx. 485 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

Bobby MARTIN, Petitioner - Appellant,

v.

UNITED STATES of America,  
Respondent - Appellee.

No. 18-12337

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Non-Argument Calendar

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(April 21, 2021)

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket Nos. 0:16-cv-61848-JJC, 0:07-cr-60153-JJC-2

#### Attorneys and Law Firms

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Before MARTIN, GRANT, and BRASHER, Circuit Judges.

#### Opinion

MARTIN, Circuit Judge:

\***486** Bobby Martin was convicted after a jury trial on seven charges related to a conspiracy to rob a cocaine stash house. He now appeals the denial of his [28 U.S.C. § 2255](#) petition, arguing that one of his convictions is invalid in light of [United States v. Davis](#), 588 U.S. —, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019). [Davis](#) invalidated 18 U.S.C. § 924(c)'s residual

clause on the ground that it is unconstitutionally vague. [139 S. Ct. at 2336](#).

While this appeal was pending, this Circuit issued a published decision in [Granda v. United States](#), 990 F.3d 1272 (11th Cir. 2021), which resolved the open issues in Mr. Martin's case against him. After careful consideration, and on the basis of [Granda](#), we therefore affirm the denial of the § 2255 petition.

## I

In 2007, a confidential informant tipped off the Bureau of Alcohol, Tobacco, and Firearms ("ATF") that a particular group of people, which came to include Mr. Martin, wanted to rob a target of cash or drugs. That informant worked with an undercover ATF agent to investigate this group. The undercover ATF agent, posing as a disgruntled drug courier who wanted to steal cocaine from his employer, met with the group. The undercover agent proposed stealing at least 15 kilograms of cocaine from his employer's stash house, which was protected by armed guards. Mr. Martin and others agreed to the plan. Specifically, Mr. Martin agreed to commit the robbery, proposed a method of dividing the cocaine they anticipated recovering, and said the guard protecting the cocaine might be killed if he offered any resistance during the robbery. When asked if the group had the tools to commit the robbery, Mr. Martin assured the undercover agent, "everything is done."

Mr. Martin repeatedly reaffirmed his willingness to perform the robbery. He said he and his crew would be ready, and again indicated that anyone guarding the cocaine might be killed if he resisted during the robbery: "I can eliminate everything. Sometimes guys like that don't deserve to breathe." Mr. Martin confirmed he had all the materials necessary to commit the robbery, including a silencer, and said he would bring an extra gun to plant it on the guard and "make it look like a drug deal gone bad." Mr. Martin also reassured the undercover agent that he had experience with these jobs and had been committing robberies for a long time. Over the next month, Mr. Martin asked about the status of the impending cocaine robbery. Mr. Martin also discussed with the undercover agent the plan for the robbery. He explained who would be on lookout while he and another co-conspirator entered the stash house to steal the cocaine. He assured the undercover agent that all firearms needed for the robbery had been acquired. He also discussed plans for the proceeds he would earn from selling the stolen cocaine.

On the day of the arranged robbery, Mr. Martin and his co-conspirators met with the undercover agent. Everyone in the group dressed in black and wore skull caps and gloves to conceal their appearances. They again discussed the plan for the robbery.

At that point, law enforcement moved in to arrest the defendants. The vehicle in which Mr. Martin and his co-conspirators \*487 came to the scene contained: two loaded rifles (including a short-barreled rifle), binoculars, a knife, a canvas bag to carry cocaine, and other items for use in the robbery. Following his arrest, Mr. Martin confessed that he was going to conduct a robbery of 15 kilograms of cocaine and that the firearms brought to commit the robbery had been used before.

Mr. Martin was charged with conspiracy to obstruct, delay, and affect interstate commerce by means of robbery, in violation of 18 U.S.C. § 1951(a) (“Hobbs Act robbery”) (Count 1); conspiracy to possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a) and 846 (Count 2); attempt to possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846 (Count 3); conspiracy to carry a firearm during and in relation to a crime of violence and during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(o) (Count 4); knowingly carrying a firearm during and in relation to a crime of violence and during and in relation to a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(B), and 2 (Count 5); possession of an unregistered firearm, in violation of 26 U.S.C. §§ 5861(d) and 5871 and 18 U.S.C. § 2 (Count 6); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count 7).

The jury found Mr. Martin guilty on all counts. The District Court sentenced him to 240 months’ imprisonment as to Counts 1 and 4; 260 months as to Counts 2 and 3; and 120 months as to Counts 6 and 7; all to run concurrently with each other. The court also sentenced him to 120 months’ imprisonment as to Count 5, to be served consecutively to the terms imposed in the other counts. This resulted in a total term of 380 months’ imprisonment for Mr. Martin.

In 2016, Mr. Martin filed a motion seeking leave to file a second or successive § 2255 motion, which this Court granted.<sup>1</sup> He argued his § 924(c) conviction should be invalidated in light of Johnson, 576 U.S. 591, 135 S. Ct.

2551, 192 L.Ed.2d 569, and Welch, — U.S. —, 136 S. Ct. 1257, 194 L.Ed.2d 387. He contended his § 924(c) conviction was no longer valid because conspiracy to commit Hobbs Act robbery no longer qualified as a crime of violence. The government argued that Mr. Martin’s claims were procedurally defaulted; that Johnson did not apply to § 924(c)(3)(B); and that, in any event, his § 924(c) conviction was based on the alternative drug trafficking predicates left unaffected by Johnson.

In 2018, the District Court denied the § 2255 petition and denied a certificate of appealability (“COA”) based on this Court’s then-binding precedent.<sup>2</sup>

\*488 In 2019, the Supreme Court decided Davis, holding that the § 924(c)(3)(B) residual clause was unconstitutionally vague. 139 S. Ct. at 2336. In 2020, this Court granted Mr. Martin a COA on the following issue:

Whether Martin’s conviction for using a firearm in furtherance of a conspiracy to commit Hobbs Act robbery and drug-trafficking crimes in violation of 18 U.S.C. § 924(c) remains valid in light of Davis v. United States, — U.S. —, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019)?

We now address this issue.

## II

In reviewing a district court’s denial of a motion to vacate under 28 U.S.C. § 2255, this Court reviews *de novo* legal conclusions and reviews factual findings for clear error. Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (per curiam).

## III

Because we conclude Mr. Martin’s Davis challenge fails on the merits, we need not decide whether the argument is procedurally defaulted.

The merits question before us is whether Mr. Martin's conviction for using a firearm, in the furtherance of a conspiracy to commit Hobbs Act robbery and drug-trafficking crimes, in violation of 18 U.S.C. § 924(c) remains valid in light of *Davis*, 139 S. Ct. at 2336, which invalidated § 924(c)'s residual clause as unconstitutionally vague. Relief is only proper if we have "grave doubt" about whether Mr. Martin's conviction rested on the invalid predicate. *See Granda*, 990 F.3d at 1293.

We begin with the counts of his conviction. The indictment alleged that the predicate offenses for the § 924(c) charge in Count 5 were the Hobbs Act robbery offense in Count 1 and the two drug trafficking offenses in Counts 2 and 3. Both sides agree the Hobbs Act robbery offense (Count 1) can no longer serve as a predicate offense after *Davis*. As such, the question in Mr. Martin's case is whether his § 924(c) conviction (Count 5) nevertheless remains valid because it rests on an alternative drug trafficking predicate (Count 2 or 3) left unaffected by *Johnson*.

In *Granda*, our Circuit answered this question yes. 990 F.3d at 1291. Mr. Granda argued his § 924(o) conviction should be vacated in light of *Davis*. *Id.* at 1280. But this Court determined that this argument was procedurally defaulted and that, regardless, it failed on the merits because any error was harmless. *Id.* at 1280–81. The panel concluded there was a fundamental shortcoming "that cut[ ] across both the procedural and merits inquiries." *Id.* at 1280. Namely, the § 924(o) predicates were "inextricably intertwined," because they arose out of the same cocaine robbery scheme. *Id.* at 1280, 1290. *Granda* held that the jury could not have found that Mr. Granda conspired to possess a firearm in furtherance of a Hobbs Act conspiracy without also finding he conspired to possess a firearm in furtherance of the attempted Hobbs Act robbery, as well as in furtherance of conspiring and attempting to possess cocaine with intent to distribute and in furtherance of attempting a carjacking. *See id.* Each of these other offenses remained a valid predicate for the § 924(o) conviction after *Davis*. Thus, the panel concluded the overlapping facts considered by the jury in deciding the alternative predicate offenses \*489 rendered any error in the jury instructions harmless. *Id.* at 1290–91.

That reasoning applies here. Mr. Martin was convicted of conspiring and attempting to commit an armed robbery of a cocaine stash house, specifically a § 924(c) offense (Count 5) predicated on the now-invalid conspiracy to commit Hobbs Act robbery (Count 1) or either one of the still-valid offenses

of conspiracy and attempted cocaine trafficking (Counts 2 and 3). Like Mr. Granda, this record shows that Mr. Martin's predicate offenses are also inextricably intertwined because they all arose out of the same cocaine robbery. A jury, on these facts, could not have found that Mr. Martin committed Count 5—carrying a firearm during and in relation to a crime of violence and a drug trafficking crime—in relation to Count 1—Hobbs Act robbery—without also finding that Martin committed Count 5 in relation to Count 2—conspiracy to possess with intent to distribute five kilograms or more of a mixture and substance containing cocaine—or Count 3—attempt to possess with intent to distribute five kilograms or more of a mixture and substance containing cocaine. Therefore, Mr. Martin has not shown that the § 924(c) conviction necessarily rested on Count 1. The acts for which Mr. Martin was convicted of in Count 1 are inextricably intertwined with two predicates—Counts 2 and 3—that remain valid after *Davis*.

#### IV

Mr. Martin makes several other arguments. None persuade us.

First, he argues *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L.Ed. 1117 (1931), and its progeny mean a "general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Zant v. Stephens*, 462 U.S. 862, 881, 103 S. Ct. 2733, 2745, 77 L.Ed.2d 235 (1983).

But in *Granda*, this Court held that *Stromberg* error is subject to the harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L.Ed.2d 353 (1993). 990 F.3d at 1294. And under harmless error review, "reversal is warranted only when the petitioner suffered 'actual prejudice' from the error." *Id.*; *see also Hedgpeth v. Pulido*, 555 U.S. 57, 61, 129 S. Ct. 530, 532, 172 L.Ed.2d 388 (2008) (per curiam) (holding that "[a]n instructional error arising in the context of multiple theories of guilt" does not "vitiate[ ] all the jury's findings").

Mr. Martin has not shown that he suffered actual prejudice from the general verdict. As set out above, the predicate offenses for his § 924(c) conviction are inextricably intertwined. *Granda*, 990 F.3d at 1293. This record demonstrates that Mr. Martin was extensively involved in

planning the robbery of a drug stash house containing at least 15 kilograms of cocaine. He repeatedly told co-conspirators he was willing to bring firearms to the robbery and kill anyone offering resistance during the robbery. Given this, Mr. Martin's case is comparable to that in [Granda](#). His still-valid drug trafficking offenses (Counts 2 and 3) are inextricably intertwined with the now-invalid Hobbs Act robbery (Count 1). [See id.](#) Mr. Martin carried a firearm during and in relation to the robbery offense that was also intertwined with the drug trafficking offenses. We also note the strength of the evidence against Mr. Martin, including his confession to law enforcement that he planned to conduct a robbery of 15 kilograms of cocaine and brought firearms to commit the robbery. Given the facts of this case, Mr. Martin has not shown that he suffered actual prejudice <sup>\*490</sup> from the general verdict for the § 924(c) conviction. Thus, his [Stromberg](#)-based argument fails.<sup>3</sup>

Next, Mr. Martin urges this panel to apply the “categorical approach” to presume his § 924(c) conviction rests on the now-invalid Hobbs Act robbery. The categorical approach is used “to determine whether a particular offense qualifies under crime-of-violence-type elements clauses such as those found in § 924(c)(3)(A) and in the [Armed Career Criminal Act].” [Granda](#), 990 F.3d at 1295. Under the categorical approach, courts “examin[e] only the elements of the statute of conviction, not the specific conduct of a particular offender.” [United States v. Oliver](#), 962 F.3d 1311, 1316 (11th Cir. 2020) (quotation marks omitted). Courts further “assume that the conviction rested on the ‘least of the acts criminalized’ by the statute, because to determine upon which of the criminalized acts the conviction rested would

violate the categorical approach’s command not to analyze the facts underlying the conviction.” [Granda](#), 990 F.3d at 1295 (quotation marks omitted) (quoting [Oliver](#), 962 F.3d at 1316; [Moncrieffe v. Holder](#), 569 U.S. 184, 190–91, 133 S. Ct. 1678, 1684, 185 L.Ed.2d 727 (2013)). But in [Granda](#) this Court also rejected the argument that the categorical approach prohibits courts from determining that the jury did not rely solely on a now-invalid Hobbs Act conviction as the predicate. [Id.](#) Therefore, this argument is unavailing.

Mr. Martin's next argument, invoking judicial factfinding, fares no better. He argues that concluding the jury relied on still-valid predicates would constitute impermissible judicial factfinding in violation of [Alleyne v. United States](#), 570 U.S. 99, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013).<sup>4</sup> However, “a judge conducting a [Brecht](#) harmless error analysis does not find a fact at all; instead, the judge asks [as a matter of law](#) whether there is grave doubt about whether an instruction on an invalid predicate substantially influenced what the jury already found beyond a reasonable doubt.” [Granda](#), 990 F.3d at 1295. Thus, Mr. Martin's [Alleyne](#) argument also fails.

Mr. Martin's arguments not otherwise addressed in this opinion are also unpersuasive. His § 2255 petition fails on the merits.

## AFFIRMED.

### All Citations

852 Fed.Appx. 485 (Mem)

## Footnotes

<sup>1</sup> This Court affirmed Mr. Martin's convictions. [United States v. Chung](#), 329 F. App'x 862, 865, 869 (11th Cir. 2009) (per curiam) (unpublished). In October 2009, the Supreme Court denied his petition for writ of certiorari. Mr. Martin then filed his initial § 2255 motion, alleging a variety of claims, which the District Court denied. He then filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c) and Amendment 782 to the Sentencing Guidelines, which the District Court granted, reducing Mr. Martin's sentence from 380 months' imprisonment to 328 months' imprisonment. In 2016, Mr. Martin filed a motion to preserve claims under [Johnson v. United States](#), 576 U.S. 591, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), and [Welch v. United States](#), 578 U.S. —, 136 S. Ct. 1257, 194 L.Ed.2d 387 (2016), in the event those decisions could apply retroactively to career offender provisions. The District Court dismissed the motion as an unauthorized second or successive § 2255 motion.

- 2 Under this Court's precedent at the time, the District Court was bound to hold that [Johnson](#) did not apply to § 924(c)(3)(B). [Ovalles v. United States](#), 861 F.3d 1257 (11th Cir. 2017), [reh'g en banc granted and opinion vacated](#), 889 F.3d 1259 (11th Cir. 2018), [and on reh'g en banc](#), 905 F.3d 1231 (11th Cir. 2018), [and opinion reinstated in part](#), 905 F.3d 1300 (11th Cir. 2018) (per curiam), [and abrogated by Davis](#), 139 S. Ct. 2319.
- 3 [In re Gomez](#), 830 F.3d 1225 (11th Cir. 2016) (per curiam), does not compel a different conclusion. In [Granda](#), this Court distinguished [Gomez](#) and held that it did not apply to preclude [Brecht](#) harmless error inquiry on the merits of a claim like Mr. Granda's. [990 F.3d at 1296](#).
- 4 [Alleyne](#) applies to findings of fact that increase a mandatory minimum, which must be proven to a jury beyond a reasonable doubt. [570 U.S. at 114–16](#), 133 S. Ct. at 2162–63.

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**A-2**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61848-CIV-COHN/WHITE  
(Case No. 07-60153-CR-COHN)

BOBBY MARTIN,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

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**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT**

**THIS CAUSE** is before the Court upon the Report and Recommendation [DE 23] ("Report") of United States Magistrate Judge Patrick A. White regarding Movant Bobby Martin's Amended Motion for habeas relief pursuant to 28 U.S.C. § 2255 [DE 18] ("Motion"). The Court has conducted a *de novo* review of the Motion, the Report, Movant's Objections to the Report [DE 26] ("Objections"), all related filings, and the record in this case, and is otherwise advised in the premises. Upon careful consideration, the Court will adopt the Report and deny the Motion.

**BACKGROUND**

On October 25, 2007, a jury convicted Movant on all seven counts of a superseding indictment charging him with: (1) conspiracy to affect interstate commerce by robbery; (2) conspiracy to possess with intent to distribute five or more kilograms of cocaine; (3) attempt to possess with intent to distribute five or more kilograms of cocaine; (4) conspiracy to use and carry a firearm during and in relation to a crime of violence; (5) carrying a short-barreled firearm during and in relation to a crime of

violence; (6) possession of an unregistered firearm; and (7) felon in possession of a firearm. [Cr. DE 141; Cr. DE 193.]<sup>1</sup> The Court sentenced Movant to a term of 240 months imprisonment on Counts 1 and 4, 260 months on Counts 2 and 3, and 120 months on Counts 6 and 7, with all three terms to be served concurrently. [Cr. DE 193.] It also sentenced Movant to a consecutive 120 month term on Count 5, as required by 18 U.S.C. § 924(c)(1)(B)(i). That statute imposes a ten year mandatory minimum sentence for use of a short-barreled rifle or shotgun “during and in relation to any crime of violence.”

Movant filed his first § 2255 motion in August 2010. [Cr. DE 271.] The Court denied that motion in June 2011. [Cr. DE 275.] In July 2016, Movant obtained leave from the United States Court of Appeals for the Eleventh Circuit to file a second or successive § 2255 motion (the Motion). [DE 1.] In the Motion, Movant argues that his sentence is constitutionally flawed in light of the Supreme Court’s decision in Johnson v. United States, 135 S.Ct. 2551 (2015). [DE 18 at 5-6.] Johnson held that the Armed Career Criminal Act’s residual clause, codified at 18 U.S.C. § 924(e)(2)(B)(ii), is void-for-vagueness. 135 S.Ct. 2551. Movant argues that Johnson’s natural extension is a finding that § 924(c)(3)(B)’s residual clause—defining “crime of violence”—is similarly vague. [DE 18 at 10-12.] Such a finding would invalidate the predicate for his ten year mandatory sentence on Count 5.

This matter is easily resolved. During the pendency of the Motion, the Eleventh Circuit explicitly held that “Johnson’s void-for-vagueness ruling does not apply to or invalidate the ‘risk-of-force’ clause in § 924(c)(3)(B).” United States v. Ovalles, 861 F.3d

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<sup>1</sup> “Cr. DE” refers to docket entries in the underlying criminal case: Case No. 07-60153-CR-COHN.

1257, 1265 (11th Cir. 2017). Movant argues that the constitutionality of § 924(c)(3)(B) is the subject of a split amongst the appellate circuits. [DE 26 at 2-3.] He notes, for instance, that the United States Court of Appeals for the Seventh Circuit has held that § 924(c)(3)(B) is void-for-vagueness. [*Id.* at 3 (citing United States v. Jackson, 865 F.3d 946, 952-54 (7th Cir. 2017)).] While that fact would be helpful to Movant if this Court were located in the Seventh Circuit, its location in the Eleventh means that the Court must apply the holding in Ovalles, not Jackson. Nor will the Court adopt Movant's suggestion to delay ruling until the Supreme Court has an opportunity to resolve the split. This Court refuses to speculate as to what action the Supreme Court may or may not take if and when it chooses to address the issue. Until the Supreme Court or an *en banc* panel of the Eleventh Circuit says otherwise, Ovalles remains controlling law in this circuit. Accordingly, the Motion must be denied.

### **CONCLUSION**

In light of the foregoing, it is thereupon **ORDERED and ADJUDGED** as follows:

1. The Report [DE 23] is hereby **ADOPTED** in its entirety.
2. The Objections [DE 26] are **OVERRULED**.
3. The Motion [DE 18] is hereby **DENIED**.
4. Pursuant to Rule 11 of the Rules Governing habeas cases, Movant is **DENIED** a certificate of appealability because he has failed to make a substantial showing that he was denied a constitutional right. The Court notes that pursuant to Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Movant may request issuance of a certificate of appealability from the United States Court of Appeals for the Eleventh Circuit.

5. The Clerk of Court is directed to **CLOSE** this case and **DENY as moot** all pending motions.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida, this 2nd day of April, 2018.



JAMES I. COHN  
United States District Judge

Copies provided to:  
United States Magistrate Judge Patrick A. White  
Counsel of record via CM/ECF

**A-3**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-61848-CV-COHN  
(07-60153-CR-COHN)  
MAGISTRATE JUDGE PATRICK A. WHITE

BOBBY MARTIN,

Movant,

**REPORT OF MAGISTRATE JUDGE**

v.

UNITED STATES OF AMERICA,

Respondent.

/

**I. Introduction**

The movant, a federal prisoner, currently confined at the Coleman Low Correctional Institution in Coleman, Florida, has filed this §2255 motion challenging his conviction and sentence entered following a guilty plea in case no. 07-60153-CR-COHN. He seeks relief in light of the Supreme Court's ruling in Johnson v. United States, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2551 (2015)<sup>1</sup>, made retroactively applicable to cases on collateral review by Welch v. United States, \_\_\_ U.S. \_\_\_, 136 S.Ct. 1257 (2016).

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.

The petitioner's application to file a second or successive motion to vacate his sentence was granted by the Eleventh Circuit

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<sup>1</sup>In Johnson, the Supreme Court held that the Armed Career Criminal Act's (ACCA) residual clause was unconstitutionally vague, and that imposing an enhanced sentence pursuant to that clause thus violates the Constitution's guarantee of due process.

Court of Appeals. (DE# 1). In the order granting the application the Eleventh Circuit recognized that the movant had not been sentenced under the Armed Career Criminal Act but that he was sentenced under 18 U.S.C. § 924(c).

The counsel was appointed and the parties were directed to brief the issues. The government filed a response opposing the motion to vacate. (CV-DE# 5). The movant, through counsel, filed a motion to correct sentence and memorandum. (CV-DE# 18). The government then filed a supplemental response to which the movant again replied. (CV-DE# 19, 22). The court has reviewed all of the pleadings, the Presentence Investigation Report ("PSI") and all pertinent portions of the underlying criminal case.

## **II. Procedural History**

On August 23, 2007, the movant was charged, along with others, with conspiracy to obstruct, delay, and affect interstate commerce by means of robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); conspiracy to possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a), 846 (Count 2); attempt to possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a), 846 (Count 3); conspiracy to carry a firearm during and in relation to a crime of violence and during and in relation to a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A), (c)(1)(B), and (o) (Count 4); knowingly carrying a firearm during and in relation to a crime of violence and during and in relation to a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A), (c)(1)(B), and 2 (Count 5); and possession of an unregistered firearm, in violation of 26 U.S.C. §§ 5861(d), 5871 and 18 U.S.C. § 2 (Count 6). (CR-DE# 62). The movant was individually charged with possession of a firearm by a convicted

felon, in violation of 18 U.S.C. § 922(g)(1) (Count 7).

The movant was convicted of all charges. (CR-DE# 141). A PSI was prepared. Under the PSI the movant's guideline sentencing range was 210 to 262 months. (PSI ¶74). The court was required to impose a consecutive 10 year sentence for the 924(c) charge. (PSI ¶74). He was sentenced to a total sentence of 380 months imprisonment, the sentence included concurrent sentences of 240 months imprisonment on Counts 1 and 4, 260 months imprisonment on Counts 2 and 3, and 120 months' imprisonment on Counts 6 and 7, with a consecutive sentence of 120 months imprisonment on Count 5, followed by three years' supervised release as to Counts 1, 4, 6 and 7, and five years' supervised release as to Counts 2, 3 and 5, all to run concurrently for a total period of supervised release of five years. (CR-DE 193).

On May 11, 2009, the Eleventh Circuit affirmed the movant's conviction and sentence. (CR-DE# 268). The Supreme Court denied movant's petition for certiorari on October 5, 2009. (CR-DE# 270).

Movant has now returned to this court filing his first motion to vacate on August 31, 2010. He raised eight claims for relief. None of the claims addressed the issue raised in the instant motion. The motion was denied on June 2, 2011. The Eleventh Circuit denied his request for a certificate of appealability on November 23, 2011.

The instant motion raises the single claim that his sentence should be reduced in light of Johnson.

### **III. Discussion**

The movant argues that Johnson is applicable to § 924(c)'s residual clause. He argues conspiracy to commit Hobbs Act robbery is not a crime of violence and that it is impossible to discern whether the conviction under § 924(c) was based on the conspiracy to commit Hobbs Act robbery or the drug trafficking charges. He further argues that the 924(c) was duplicitous as charged because it could not be determined if the jury determined the movant was guilty based on the Hobbs Act conspiracy charge or the drug trafficking charge.

The government has responded that the movant's claim is procedurally barred because it was not raised on direct appeal. The government argues that the claim is not so novel that it could not have been raised on direct appeal prior to the issuance of the Johnson decision. The government further argues that the movant cannot rely on a claim of actual innocence to avoid the procedural bar. Finally the government contends that the § 924(c) charge can be supported by either the conspiracy charge or the trafficking charge.

Since the briefing of this issue, the Eleventh Circuit has determined that the decision in Johnson does not apply to residual clause found in § 924(c), thus rendering these arguments moot and requiring that the motion be denied. Although there is a split amongst the Circuits with regard to whether §924(c)(3)(B) is unconstitutionally void-for-vagueness post-Johnson, the Eleventh Circuit has recently agreed with decisions from the Second,<sup>2</sup> Sixth,<sup>3</sup> and Eighth<sup>4</sup> Circuits, "holding that Johnson's void-for-vagueness ruling does not apply to or invalidate the 'risk-of-force' clause

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<sup>2</sup>United States v. Hill, 832 F.3d 135, 145-49 (2d Cir. 2016).

<sup>3</sup>United States v. Taylor, 814 F.3d 340, 375-79 (6th Cir. 2016).

<sup>4</sup>United States v. Prickett, 839 F.3d 697, 699-700 (8th Cir. 2016).

in §924(c) (3) (B).” See Ovalles v. United States, 861 F.3d 1257, 1265 (11th Cir. 2017). In so ruling, the Eleventh Circuit observed that the “ACCA identifies ‘previous convictions’ for the purpose of applying a recidivist sentencing enhancement to a defendant felon who later possesses a firearm in violation of 18 U.S.C. §922(g),” while “§924(c) creates a new and distinct offense for a person who, ‘during and in relation to any crime of violence or drug trafficking crime, ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of such crime, possesses a firearm.’” Id. (quoting §924(c) (1) (A)).

In other words, the Eleventh Circuit determined that §924(c) “is not concerned with recidivism, but rather with whether the instant firearm was used ‘during and in relation to’ the predicate crime of violence (or drug trafficking offense) or possessed in furtherance of such predicate offenses.” Id. (citing §924(c) (1) (A) (ii)-(iii)). Thus, the Eleventh Circuit concluded that the “‘nexus’ between the §924(c) firearm offense and the predicate crime of violence makes the crime of violence determination more precise and more predictable.” Id.

The Eleventh Circuit further found that “§924(c) (3) (B) is not plagued by the same contradictory and opaque indications as the ACCA’s residual clause on ‘how much risk’ is necessary to satisfy the statute, because the phrase ‘substantial risk’ is not preceded by a ‘confusing list of examples.’” Id. at \*8. Since movant’s challenge to his §924(c) conviction is now foreclosed by binding Eleventh Circuit precedent, this claim warrants no federal habeas corpus relief.

#### **V. Certificate of Appealability**

As amended effective December 1, 2009, §2255 Rule 11(a)

provides that “[t]he district court must issue or deny a certificate of appealability (“COA”) when it enters a final order adverse to the applicant,” and if a certificate is issued “the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2).” See Rule 11(a), Rules Governing §2255 Proceedings for the United States District Courts. A §2255 movant “cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c).” See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255–Rule 11(b).

However, “[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right.” See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate “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.” Miller-El v. Cockrell, 537 U.S. 322, 336–37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11<sup>th</sup> Cir. 2001).

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11<sup>th</sup> Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this

argument to the attention of the Chief Judge in objections.

**VI. Conclusion**

Based on the foregoing, it is recommended that this motion to vacate be DENIED, that no certificate of appealability issue, and the case be closed.

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

Signed this 20<sup>th</sup> day of February, 2018.



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UNITED STATES MAGISTRATE JUDGE

cc:

Daryl Elliott Wilcox  
Federal Public Defender's Office  
One East Broward Boulevard  
Suite 1100  
Fort Lauderdale, FL 33301-1842

Donald F. Chase, II  
United States Attorney's Office  
500 E Broward Boulevard  
7th Floor  
Fort Lauderdale, FL 33394

**A-4**

**United States District Court**  
**Southern District of Florida**  
**FT. LAUDERDALE DIVISION**

**UNITED STATES OF AMERICA****JUDGMENT IN A CRIMINAL CASE****v.****Case Number: 07-60153-CR-COHN****BOBBY MARTIN****USM Number: 77357-004**

Counsel For Defendant: Gennaro Cariglio, Jr., Esq.  
 Counsel For The United States: Donald Chase, II, AUSA  
 Court Reporter: Tammy Nester

The defendant was found guilty on Count(s) 1 through 7 of the Superseding Indictment.

The defendant is adjudicated guilty of the following offense(s):

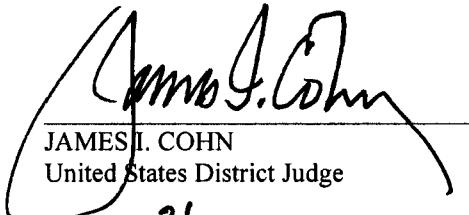
<b><u>TITLE/SECTION NUMBER</u></b>	<b><u>NATURE OF OFFENSE</u></b>	<b><u>OFFENSE ENDED</u></b>	<b><u>COUNT</u></b>
18 U.S.C. §1951(a)	Conspiracy to affect interstate commerce by robbery	June 5, 2007	1
21 U.S.C. §846	Conspiracy to possess with intent to distribute five or more kilograms of cocaine	June 5, 2007	2
21 U.S.C. §846	Attempt to possess with intent to distribute five or more kilograms of cocaine	June 5, 2007	3
18 U.S.C. §924(o)	Conspiracy to use and carry a firearm during and in relation to a crime of violence.	June 5, 2007	4
18 U.S.C. §924(c)(1)(A) and §924(c)(1)(B)	Carrying a short-barreled firearm during and in relation to a crime of violence.	June 5, 2007	5
26 U.S.C. §5861(d)	Possession of an unregistered firearm.	June 5, 2007	6
18 U.S.C. §922(g)(1)	Felon in possession of a firearm.	June 5, 2007	7

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of

name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:  
1/31/2008

  
JAMES I. COHN  
United States District Judge  
January 31, 2008

DEFENDANT: BOBBY MARTIN  
CASE NUMBER: 07-60153-CR-COHN

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **380 MONTHS**. This term consists of **240 Months as to Counts One and Four, 260 Months as to Counts Two and Three, and 120 Months as to Counts Six and Seven, to be served concurrently with each other, and 120 Months as to Count Five, to be served consecutively to the terms imposed in Counts, One, Two, Three, Four, Six and Seven..**

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

1. The defendant be designated to a facility as close to South Florida as possible.

The defendant is remanded to the custody of the United States Marshal.

### RETURN

I have executed this judgment as follows:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By: \_\_\_\_\_  
Deputy U.S. Marshal

DEFENDANT: BOBBY MARTIN  
CASE NUMBER: 07-60153-CR-COHN

## **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 YEARS**. This term consists of **3 Years as to Counts One, Four, Six and Seven and 5 Years as to Counts Two, Three and Five, all to run concurrently**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

**The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

## **STANDARD CONDITIONS OF SUPERVISION**

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: BOBBY MARTIN  
CASE NUMBER: 07-60153-CR-COHN

### **SPECIAL CONDITIONS OF SUPERVISION**

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

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

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act.

If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

**Self-Employment Restriction:** The defendant shall obtain prior written approval from the Court before entering into any self-employment.

**Permissible Search:** The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: BOBBY MARTIN  
CASE NUMBER: 07-60153-CR-COHN

### CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$700.00	\$	\$

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

DEFENDANT: BOBBY MARTIN  
CASE NUMBER: 07-60153-CR-COHN

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **\$700.00** due immediately.

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

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

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

**U.S. CLERK'S OFFICE  
ATTN: FINANCIAL SECTION  
301 N. MIAMI AVENUE, ROOM 150  
MIAMI, FLORIDA 33128**

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

The defendant shall forfeit the defendant's interest in the following property to the United States:

**Pursuant to the Preliminary Order of Forfeiture entered by  
this Court.**

The defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.