APPENDIX
(A-1)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10960-C

TERRIL KINCHEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Terril Kinchen's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10960-C

TERRIL KINCHEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: MARTIN and LUCK, Circuit Judges.

BY THE COURT:

Terril Kinchen has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2 and 22-1(c), of this Court's July 7, 2021, order denying a certificate of appealability and leave to proceed on appeal *in forma pauperis*. Upon review, Kinchen's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-21280-CV-MIDDLEBROOKS
(16-20119-CR-MIDDLEBROOKS)

TERRIL KINCHEN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOTION TO VACATE PURSUANT TO 28 U.S.C. §2255

THIS CAUSE is before the Court on movant Terril Kinchen's Amended Motion pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside, Or Correct his sentence in *United States v. Terril Kinchen,* Case No. 16-20119-CR-DMM ("CR DE"). (DE 11). The government responded to the Motion on June 24, 2019 (DE 15), and Mr. Kinchen filed a Reply on October 22, 2019 (DE 21). Mr. Kinchen was permitted to supplement his claims for relief (DE 23, DE 24), to which the government filed a supplemental response in opposition (DE 26). On June 3, 2020, Mr. Kinchen filed a Motion for Leave to Amend his Motion to Vacate in light of *Eason v. United* States (DE 27), which is also fully briefed (DE 28, 29).

The government agrees Mr. Kinchen's § 2255 Motion is timely. However his claims lack merit and are therefore denied.

BACKGROUND

On July 21, 2016, the grand jury returned a second superseding indictment charging Mr. Kinchen and a number of co-conspirators with the following offenses: (1) conspiracy to commit

Hobbs Act robberies, in violation of 18 U.S.C. § 1951(a) (Count 1); (2) two counts of Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Counts 5 and 19); (3) two counts of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2 (Counts 6 and 20); and one count of firearm possession by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) (CR DE:115). For each of the § 924(c) charges, the predicate crime of violence was the immediately preceding Hobbs Act robbery count. (*Id.*). Mr. Kinchen was charged in the substantive Hobbs Act robbery counts as both a principal and as an aider and abettor pursuant to 18 U.S.C. § 2. (*Id.*).

On November 30, 2016, Mr. Kinchen entered into a written plea agreement (CR DE 232) in which he agreed to plead guilty to Count 1 (conspiracy to commit Hobbs Act robberies) and two counts of brandishing a firearm during and in relation to a crime of violence (Counts 6 and 20) (CR DE 232 at ¶ 1). He acknowledged that "Counts 6 and 20 charge [him] with using and brandishing a firearm during and in relation to a crime of violence, that is, the armed robberies charged in Counts 5 and 19 in violation of Title 18, United States Code, Sections 924(c)(l)(A)(ii) and 2" (CR DE 232 at ¶ 1). In return, the government agreed to dismiss the other counts in which he was charged (CR DE 232 ¶¶ 1-2). Mr. Kinchen and the government agreed to recommend a total sentence of 420 months. (CR DE 232 at ¶ 13). The plea agreement included an appellate waiver.

Mr. Kinchen also executed a written Factual Proffer where he agreed that the facts set forth in the proffer "which do not include all of the facts known to the government and to the Defendant, are sufficient to prove his guilt as to Counts One, Six and Twenty of the above-referenced Second Superseding Indictment." (DE 233).

Because of his criminal history, Mr. Kinchen scored as a Category VI. His guidelines range before inclusion of the 924(c) convictions was 151 to 188 months. Count 6 required an 84-month term of imprisonment consecutive to Count 1 and Count 20 required a term of 300 months consecutive to Count 6. A low end guidelines sentence would therefore have been 535 months. (PSI; CR DE 35). Pursuant to the plea agreement however, Mr. Kinchen was sentenced to 420 months, 36 months as to Count 1, 84 months consecutively as to Count 6, 300 months consecutively as to Count 20. (CR DE 335).

Despite the appellate waiver in the plea agreement, Mr. Kinchen appealed and appellate counsel was appointed. On appeal, Mr. Kinchen argued (1) the district court plainly erred by accepting his guilty plea as to the 924(c) charge, and (2) imposed an unreasonable sentence. He argued that his guilty plea was not knowing and voluntary. He further argued that his conviction for conspiracy to commit Hobbs Act robbery could not serve as a predicate offense for his 924(c) convictions because conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the use-of-force clause in 18 U.S.C. § 924(c)(3)(A), and the residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The government moved to dismiss the appeal based upon the appellate waiver in the plea agreement. Alternatively, the government requested summary affirmance.

The Court of Appeals' decision is largely determinative of Mr. Kinchen's claims here.

First, reviewing the plea colloquy, the court found that the guilty plea was knowing and voluntary and therefore the appeal waiver was valid and due to be enforced. "Thus, his claim that his sentence was substantively unreasonable is barred." *United States v. Kinchen,* 2018 U.S. LEXIS 12078, *1 (11th Cir., Mar. 7, 2018), *reconsideration denied, United States v. Kinchen,* 2018

U.S. App LEXIS 19708 (11th Cir. Fla. July 17, 2018), *cert. den., Kinchen v. United States,* 139 S. Ct. 294 (U.S. Oct. 1, 2018).

The guilty plea did not bar Mr. Kinchen's jurisdictional challenge to his 924(c) convictions. However, the Court of Appeals found his challenge to be foreclosed by binding circuit precedent.

> [T]he record shows that Kinchen's conspiracy conviction was not the predicate offense underlying his § 924(c) convictions. Instead, his § 924(c) convictions were based on two substantive Hobbs Act robberies that were charged in the second superseding indictment but dismissed as part of the plea agreement. This Court has held that substantive Hobbs Act robbery is a crime of violence under the use-of-force clause in 924(c)(3)(A). *See Hubert,* 883 F.3d at 1328-29.

The court continued:

> As part of his plea agreement, Kinchen signed a factual proffer admitting that, on April 21, 2015, and in May 17, 2015, he entered a store and ordered those inside to give him money and property "at gunpoint." This was sufficient to establish the substantive Hobbs Act robbery counts as the predicates for Kinchen's § 924(c) convictions. *See Frye,* 402 F. 3d at 1128-29. Because Kinchen's § 924(c) convictions were not actually predicated on his conspiracy conviction, his arguments with respect to his conspiracy conviction are unavailing.

2018 U.S. App. LEXIS 12018, *4.

Summary affirmance was granted as to Kinchen's challenge to his 924(c) convictions. *See also United States v. Nelson,* 761 Fed. Appx. 917 (11th Cir. 2019).

DISCUSSION

Mr. Kinchen frames the issues in his § 2255 Motion as follows:

I. Whether the Trial Court plainly erred when it accepted Terril Kinchen's Guilty Plea to "Conspiracy to Commit Robbery" and 924(c) charges where Terril Kinchen was Actually Innocent of those Charges Pursuant to *Johnson v. United States,* 135 S. Ct. 2551 (2015).

II. Whether the Trial Court Plainly Erred When it Imposed an Unreasonable Sentence as Outlined in 18 U.S.C. § 3553.

(DE 11).

As noted above, both of these questions have been answered by the Eleventh Circuit on direct appeal. The Court determined that Mr. Kinchen's plea was knowing and voluntary and therefore his claim that his sentence was substantively unreasonable was barred.

The Court also found that Mr. Kinchen's signed factual proffer stating that he entered stores on two occasions and ordered those inside to give him money at gunpoint was sufficient to establish substantive Hobbs Act robbery counts as to the predicates for his 924(c) convictions.

His claims are therefore not cognizable on collateral review under § 2255. The law of the case doctrine prevents Mr. Kinchen from relitigating issues that were litigated and decided against him in his direct appeal. "[W]hen an issue is once litigated and decided, that should be the end of the matter." *United States v. Smelting Ref. Mining Co.,* 339 U.S. 186, 198 (1950). Absent an intervening change in the law or a claim of actual innocence, neither of which are present here, a § 2255 proceeding may not be used to litigate questions that were considered on direct appeal. *See Stoufflet v. United States,* 757 F. 3d 1236, 1239-40 (11th Cir. 2014); *United States v. Rowan,* 663 F. 2d 1034 (11th Cir. 1981). The validity of Mr. Kinchen's § 924(c) convictions has been decided, and he is now procedurally barred from raising that issue here. The law has not changed since Mr. Kinchen's direct appeal. In *United States v. Hubert,* 909 F. 3d 335 (11th Cir. 2018), *cert. den.* 140 S. Ct. 1727 (2020), the Eleventh Circuit explained why its binding precedent, *In re Saint Fleur,* 824 F. 3d 1337, 1340-41 (11th Cir. 2016) (addressing Hobbs Act robbery); *In re Colon,* 826 F. 3d 1301, 1305 (11th Cir. 2016) (addressing aiding and abetting Hobbs Act robbery), properly concluded that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). Section 924(c)'s elements clause is established by Hobbs Act robbery "because it reaches the use, attempted use, or threatened use of force against property." *United States v. Eason,* No. 16-15413, 2020 WL

1429110, at *4 (11th Cir. Mar. 24, 2020). *See also United States v. Gibbs-King,* No. 19-11802, 2020 WL 1527700, at *2 (11th Cir. Mar. 31, 2020) ("Thus, we conclude that Gibbs-King's argument that Hobbs Act robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s elements clause after *Davis* is foreclosed by precedent.").

Mr. Kinchen's conclusory claim of "actual innocence" is unavailing. Actual innocence means factual innocence not legal insufficiency. *See McKay v. United States,* 657 F. 3d 1190 (11th Cir. 2011). Mr. Kinchen's change of plea, factual proffer and the decision on direct appeal show the emptiness of his claim of innocence.

In the argument section of his Motion to Vacate, Mr. Kinchen couches his argument in terms of sufficiency of the evidence. But to the extent they fall outside the affirmance of the § 924(c) convictions on direct appeal, they are procedurally barred *See Mills v United States,* 36 F. 3d 1052 (11th Cir. 1994). *See also Kristiansand v. United States,* 319 F. 2d 416, 417 (5th Cir. 1963) ("The authorities uniformly and without number hold that § 2255 may not be used as a substitute for an appeal and that insufficiency or irrelevance of evidence is not grounds for relief under this section.").

Motion to Amend. On June 3, 2020, Mr. Kinchen filed Motion to Amend his habeas claims. (DE 27). The government responded in opposition to the Motion to Amend. (DE 28), and Mr. Kinchen replied on July 20, 2020. (DE 29).

Mr. Kinchen asserts that amendment should be permitted due to the Eleventh Circuit's opinion in *United States v. Eason,* No. 16-15413, 2020 WL 1429110 (11th Cir. Mar. 24, 2020), which held that Hobbs Act robbery could not predicate the imposition of a career offender guideline. *Id.* However, Mr. Kinchen was not sentenced as a career offender. According to the Presentence Investigation Report, Mr. Kinchen's offense level was 29 and he had 16 criminal

history points, establishing a Criminal History Category of VI. The advisory guidelines range for Total Offense Level 29, Criminal History Category VI is 151 to 188 months. Had I sentenced him to the low end of that guidelines range, together with the mandatory consecutive 84 months for Count 6, and the mandatory consecutive 300 months for Count 20, his sentence would have been 535 months. However in the plea agreement, the government and Mr. Kinchen agreed to recommend 420 months and that was the sentence I imposed. The Career Offender guideline range of 535 to 572 months had no impact on his sentence. I have considered Mr. Kinchen's *Eason* arguments and they provide him no benefit.

CONCLUSION

Evidentiary Hearing. Mr. Kinchen is not entitled to an evidentiary hearing because "the motion and the files and records of the case conclusively show" that Mr. Kinchen is not entitled to relief. *See* 28 U.S.C. § 2255(b).

Certificate of Appealability. "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2255 Proceedings. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court rejects a habeas petitioner's constitutional claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). By contrast, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows . . . that jurists of reason would find it debatable whether the petition state 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.*

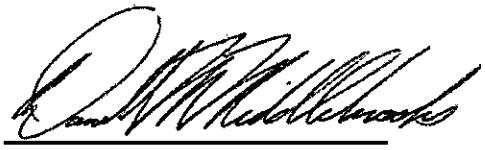
I conclude that no reasonable jurist would find it debatable whether the Motion to Vacate states a valid claim of the denial of a constitutional right. I further find that jurists of reason would not find it debatable that the procedural rulings herein are correct. Accordingly, a certificate of appealability is denied.

CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

1. The Amended Motion to Vacate pursuant to 28 U.S.C. § 2255 (DE 11) is **DENIED.**
2. The Motion to Amend (DE 27) is **DENIED.**
3. No certificate of appealability shall issue.
4. The Clerk of Court shall **CLOSE THIS CASE.**
5. All pending motions are **DENIED AS MOOT**.

SIGNED at West Palm Beach, Florida this 9th day of March, 2021.



Donald M. Middlebrooks
United States District Judge

cc: Counsel of record;

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