[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-12945

Non-Argument Calendar

EMILIO GOMEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:16-cv-22057-DPG

Before JILL PRYOR, BRANCH, and LUCK, Circuit Judges.

PER CURIAM:

Emilio Gomez appeals the district court's denial of his successive section 2255 motion collaterally attacking his conviction for possessing a firearm in furtherance of a crime of violence or drug trafficking crime, in violation of 18 U.S.C. section 924(c), because it "may have rested" on an invalid predicate offense. Because Gomez's arguments are foreclosed by our recent decision in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On August 25, 2006, a confidential informant met Nelson Peña, Gomez's eventual coconspirator, and discussed a plan to rob a cocaine-filled tractor-trailer. Peña later introduced the informant to Gomez and Reynaldo Aviles, another future coconspirator, and the four met to discuss plans to rob the tractor-trailer at gunpoint. At the meeting, Gomez suggested that they rob the tractor-trailer dressed as the police and steal the drugs but leave the tractor-trailer behind.

During the evening of September 6, 2006, Gomez, Peña, Aviles, and three others "got everything ready"—"the guns and stuff"—and discussed their plan to wear "police shirts" and shout "police" as they approached the tractor-trailer so the driver would "get scared and give [them] everything." Gomez, Peña, and Aviles then met with the informant at a gas station to do a "drive-by" of

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the tractor-trailer, and Peña told the informant that they planned to bring firearms for the robbery.

After the drive-by, the crew rendezvoused back at the gas station and drove three cars to the warehouse where they expected to find the tractor-trailer; Gomez was one of the drivers. When they arrived, three members of the crew approached the tractor-trailer, and one screamed "police" as another opened the tractor-trailer door—all according to plan. But the real police were there waiting. A shootout ensued, and the police killed one member of the crew and wounded another. The police then arrested Gomez.

A grand jury indicted Gomez for: (1) conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. sections 841(a)(1) and 846; (2) attempting to possess with intent to distribute cocaine, in violation of 21 U.S.C. sections 841(a)(1) and 846; (3) conspiring to commit a Hobbs Act robbery, in violation of 18 U.S.C. section 1951(a); (4) attempting to commit a Hobbs Act robbery, in violation of 18 U.S.C. section 1951(a); (5) possessing a firearm during a drug trafficking crime or a crime of violence, in violation of 18 U.S.C. section 924(c)(1)(A); and (6) possessing a firearm as a felon, in violation of 18 U.S.C. section 922(g)(1). As to the possessing a firearm during a drug trafficking crime or crime of violence charge, the indictment alleged that Gomez possessed a firearm in furtherance of the first four counts: the cocaine distribution charges and the Hobbs Act robbery charges were all listed as predicate offenses.

The jury found Gomez guilty on all counts in a general verdict. The district court then sentenced Gomez to life imprisonment on the drug charges, 240 months on the Hobbs Act charges, and 120 months for possessing a firearm as a felon, all served concurrently; and 84 months for possessing a firearm during a drug trafficking crime or a crime of violence, to be served consecutively. We upheld Gomez's convictions and sentences on direct appeal. *See generally United States v. Gomez*, 302 F. App'x 868 (11th Cir. 2008). In 2009, Gomez filed an unsuccessful section 2255 motion.

In 2016, after the Supreme Court held in *Johnson v. United States*, 576 U.S. 591, 597 (2015), that the residual clause of the Armed Career Criminal Act was "unconstitutionally vague," Gomez sought permission to file a second section 2255 motion. We granted his application because we couldn't tell which count the jury relied on when it convicted him of possessing a firearm during a drug trafficking crime or a crime of violence and because we hadn't yet decided whether attempted Hobbs Act robbery was "categorically" a crime of violence under section 924(c)'s elements clause. *In re Gomez*, 830 F.3d 1225, 1227–28 (11th Cir. 2016).

Gomez then filed his second section 2255 motion. In it, he argued that, because conspiracy to commit Hobbs Act robbery under 18 U.S.C. section 1951 was a crime of violence only under section 924(c)(3)'s residual clause, which was unconstitutionally vague, his section 924(c) conviction may have rested on an invalid predicate. The government opposed Gomez's motion, arguing that Gomez procedurally defaulted his vagueness claim and that

the claim failed on the merits because *Johnson* didn't apply to section 924(c).

Several legal developments followed the government's response. First, we held that attempted Hobbs Act robbery categorically qualifies as a crime of violence under section 924(c)(3)'s elements clause. *See United States v. St. Hubert*, 909 F.3d 335, 351–53 (11th Cir. 2018), *abrogated on other grounds by United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). Second, the Supreme Court extended the reasoning of *Johnson* to hold that section 924(c)(3)'s residual clause was "unconstitutionally vague." *Davis*, 139 S. Ct. 2336; *see also Granda*, 990 F.3d at 1283–84 (discussing the legal developments since *Johnson*). And third, post-*Davis*, we held that conspiracy to commit Hobbs Act robbery is not a crime of violence. *See Brown v. United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019).

In 2020, the district court denied Gomez's motion. The district court concluded that Gomez "demonstrated cause for his failure to raise his *Davis* claim on direct review since the legal basis for his claim was 'not reasonably available to counsel at the time of [Gomez]'s appeal,'" but that he "could neither establish that he was actually innocent of violating [section] 924(c) . . . nor that the now-defunct residual clause played any role in his [section] 924(c) conviction." The district court concluded that Gomez "could not establish prejudice and was thus procedurally defaulted from bringing his *Davis* claim." It then issued a certificate of appealability to address: (1) "the correct legal standard that [Gomez] must meet in

order to prove that he is entitled to relief[,] and (2) the precedential weight that should be afforded to prior published panel decisions on applications for second or successive motions to vacate."

STANDARD OF REVIEW

We review the district court's section 2255 factual findings for clear error and its legal determinations de novo. *United States v. Pickett*, 916 F.3d 960, 964 (11th Cir. 2019).

DISCUSSION

The Armed Career Criminal Act makes it a separate crime to use or carry a firearm "during and in relation to," or possess a firearm "in furtherance of," any "crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A) (2006) (amended 2018). The Act defines a "crime of violence" as a felony offense that: (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"; or (B) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 924(c)(3)(A)–(B). The first part of the definition is known as the "elements clause," and the second part is known as the "residual clause." *Granda*, 990 F.3d at 1284. In *Davis*, the Supreme Court held that section 924(c)(3)'s residual clause was unconstitutionally vague. 139 S. Ct. at 2336.

Gomez argues that, because 924(c)(3)'s residual clause is unconstitutionally vague and his conspiracy to commit Hobbs Act

robbery conviction doesn't qualify as a "crime of violence" under 924(c)(3)'s elements clause, his section 924(c) conviction "may have rested" on a constitutionally invalid predicate. He contends that "the jury's general verdict" makes it "impossible to say" which predicate offense the jury relied on for its verdict. So, he says, the district court erred in denying his motion.

The government responds that Gomez procedurally defaulted his claim by not raising it on direct appeal. "Gomez has no cause to excuse his default" because his vagueness challenge was not "novel," the government argues, and Gomez cannot show "actual prejudice" or "actual innocence." The government continues that, "[e]ven if he had not procedurally defaulted his claim, Gomez is not entitled to relief on the merits" because "the Hobbs Act conspiracy predicate is inextricably intertwined with the three other, still-valid predicate offenses." According to the government, "if the jury found that Gomez possessed a firearm in furtherance of his conspiracy to commit Hobbs Act robbery," there "can be no grave doubt" that the jury "also found that he possessed a firearm in furtherance of the other crime of violence and drug trafficking predicates of which the jury convicted him."

We agree with the government and conclude that Gomez's appeal is controlled by our recent decision in *Granda*. *Granda* answered the first issue in Gomez's certificate of appealability: to overcome the procedural default, it was Gomez's "burden to show a substantial likelihood of actual prejudice." *See* 990 F.3d at 1291. And "relief is proper only if the 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." *Id.* at 1292 (alteration adopted). Gomez hasn't made either showing. We conclude, like in *Granda*, that Gomez's claim is procedurally defaulted, and, even if it wasn't, he hasn't shown grave doubt that the residual clause error had a substantial and injurious effect on the jury's verdict.

We have already answered the second issue in Gomez's certificate of appealability about the precedential weight afforded to prior published panel decisions on second and successive section 2255 applications: the "prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions."[1] *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015); *St. Hubert*, 909 F.3d at 346 (same).

Procedural Default

A prisoner may move to vacate his sentence under section 2255 because it was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255(a). But a section 2255 claim may be procedurally defaulted if the movant could have

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[1] Gomez argues that we should take the "opportunity" to reconsider this rule. But "we are bound by all prior panel decisions, 'unless and until they are overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting en banc.'" *Hylor v. United States*, 896 F.3d 1219, 1223–24 (11th Cir. 2018) (alteration adopted and citation omitted).

raised the issue, but failed to, on direct appeal. *See Bousley v. United States*, 523 U.S. 614, 622 (1998). A movant can overcome the procedural default by establishing either "cause and actual prejudice," or "that he is actually innocent." *Id.* (cleaned up).

"Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim." *Granda*, 990 F.3d at 1286 (alteration adopted and citation omitted). "To establish novelty 'sufficient to provide cause' based on a new constitutional principle, [a movant] 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.'" *Id.* (alteration adopted and citation omitted). "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001) (citation omitted). For this reason, futility doesn't constitute cause where the movant's argument was simply "unacceptable to that particular court at that particular time." *Bousley*, 523 U.S. at 623 (citation omitted).

Gomez did not argue in the trial court, or on direct appeal, that his section 924(c) conviction was invalid because the 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 section 924(c) conviction. *See Granda*, 990 F.3d at 1286. Because Gomez hasn't shown "cause and actual prejudice" or "actual innocence," he defaulted on his claim. *See Bousley*, 523 U.S. at 622–23 (citation omitted).

Cause

In *Granda*, we rejected the movant's contention that his section 924(c) vagueness challenge was sufficiently novel to establish cause to excuse his procedural default. *Id.* at 1285–88. Although *Davis* announced a new constitutional rule with retroactive application, *In re Hammoud*, 931 F.3d 1032, 1038–39 (11th Cir. 2019), Granda needed to "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*, 990 F.3d at 1286 (alteration adopted and citation omitted). We determined that Granda's claim didn't fit into any of the three circumstances where 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.* (alterations adopted and citation omitted). We concluded that Granda failed to show cause to excuse his procedural default because "[t]he tools existed to challenge myriad other portions of [section] 924(c) as vague" and

therefore those tools "existed to support a similar challenge to its residual clause." *Id.* at 1288.

The same reasoning applies to Gomez's section 924(c) vagueness challenge. Like in *Granda*, the "building blocks" of Gomez's vagueness challenge "existed" in relation to "myriad other portions" of section 924(c) and thus existed "to support a similar challenge to its residual clause." *See id.*; *McCoy*, 266 F.3d 1258. Gomez failed to demonstrate "a sufficiently clear break with the past, so that an attorney representing him would not reasonably have had the tools" for arguing that the residual clause's vagueness invalidated his section 924(c) conviction. *See Granda*, 990 F.3d at 1286 (alteration adopted and citation omitted). Gomez's claim was not sufficiently novel to establish cause to excuse his procedural default.

Prejudice

In *Granda*, we also determined that the movant could not overcome a procedural default of his vagueness claim because he could not show "actual prejudice." *Id.* at 1288–91. "To prevail on a cause and prejudice theory, a [movant] must show actual prejudice," meaning "more than just the possibility of prejudice; it requires that the error worked to the [movant]'s actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 1288 (citation omitted). To show actual prejudice, a movant would have to show a "substantial likelihood" that the jury relied solely on the Hobbs Act robbery conspiracy as the predicate for his section 924 conviction. *Id.*

We found that "Granda [could not] make this showing." *Id.* at 1289. "Based on his role as a lookout in a conspiracy and an attempt to rob at gunpoint a truck carrying some sixty to eighty kilograms of cocaine, the jury unanimously found Granda guilty of conspiracy and attempt to possess cocaine with intent to distribute, attempted carjacking, conspiracy to commit Hobbs Act robbery, and attempt to commit Hobbs Act robbery." *Id.* "The trial record ma[de] it abundantly clear that all of these findings rested on the same operative facts and the same set of events—the jury found beyond a reasonable doubt that Granda had conspired and attempted to rob the truck in order to possess and distribute the cocaine it held." *Id.*

We determined that "[t]he objective of the robbery and the carjacking was the same: to obtain and sell the multi-kilogram quantity of cocaine that was to be taken by force from the truck." *Id.* "So the jury could not have concluded that Granda conspired to possess a firearm in furtherance of his robbery conspiracy without also finding at the same time that he conspired to possess the firearm in furtherance of his conspiracy and attempt to obtain and distribute the cocaine, his attempt at carjacking, and the attempt at the robbery itself." *Id.*

Just like in *Granda*, the trial record here "makes it abundantly clear" that all of the jury's findings "rested on the same operative facts and the same set of events" and Gomez has failed to show a "substantial likelihood" that his section 924(c) conviction was predicated solely on his Hobbs Act conspiracy conviction. *See*

id. at 1288–89. The district court instructed the jury that it could find Gomez guilty of violating section 924(c) if it found beyond a reasonable doubt that he "committed a drug trafficking offense" and "that during the commission of that offense, [he] knowingly carried a firearm in relation to that drug trafficking crime . . ., as charged in the indictment," or "knowingly possessed a firearm in furtherance of that drug trafficking crime . . ., as charged in the indictment." The jury found beyond a reasonable doubt that Gomez committed two drug trafficking crimes. And the general jury verdict did not specify which predicate offense or offenses the jury relied on for Gomez's section 924(c) conviction.

Like in *Granda*, Gomez's Hobbs Act conspiracy, attempted Hobbs Act robbery, and drug trafficking crimes were "inextricably intertwined" because they all arose out of the same attempted robbery of the cocaine-filled tractor-trailer. *See id.* at 1280 ("Among the shortcomings that defeat [Granda's] claim is a fundamental one that cuts across both the procedural and merits inquiries: all of the [section] 924(o) predicates are inextricably intertwined, arising out of the same cocaine robbery scheme."). As Gomez acknowledged in his initial brief, it was not clear which predicate offense or offenses "formed the basis of the [section] 924(c) conviction[]." Without showing a "substantial likelihood" that the jury relied on Hobbs Act conspiracy—and "only" Hobbs Act conspiracy—as the predicate offense for the section 924(c) verdict, Gomez cannot show actual prejudice under *Granda*. *See id.* at 1288 ("More specifically, [the movant] must establish a substantial likelihood that

the jury relied *only* on the [Hobbs Act conspiracy] conviction, because reliance on any of [the other counts] would have provided a wholly independent, sufficient, and legally valid basis to convict [under section 924(o)].").

Actual Innocence

"The actual innocence exception to the procedural default bar is 'exceedingly narrow in scope as it concerns a [movant]'s actual innocence rather than his legal innocence. Actual innocence means factual innocence, not mere legal innocence.'" *Id.* at 1292 (citation omitted). Gomez doesn't argue that he is "actually innocent" of the section 924(c) offense. *See id.* at 1286. And, because Gomez cannot show "cause and actual prejudice" or "actual innocence," he cannot overcome his procedural default. *See Bousley*, 523 U.S. at 622–23 (citation omitted).

Merits

In *Granda*, we also concluded in the alternative that, even if the vagueness argument was not procedurally defaulted, the movant's claim failed on the merits because "[t]he inextricability of the alternative predicate crimes compel[led] the conclusion that the error Granda complain[ed] about . . . was harmless." 990 F.3d at 1292.

The same result follows here. The jury unanimously found Gomez guilty of conspiring to possess with intent to distribute cocaine, attempting to possess with intent to distribute cocaine, conspiring to commit Hobbs Act robbery, attempting to commit

Hobbs Act robbery, possessing a firearm during a drug trafficking crime or a crime of violence, and possessing a firearm as a felon. Each of the two cocaine charges was an independent predicate offense to the section 924(c) charge of possessing a firearm during a drug trafficking crime. Just like in *Granda*, the record "makes it abundantly clear that all of [the jury's] findings rested on the same operative facts and the same set of events." *See id.* at 1289. Gomez's conspiracy to commit Hobbs Act robbery was "inextricably intertwined" with his predicate offenses of conspiring and attempting to possess cocaine with intent to distribute it. *See id.* at 1293. "There is little doubt that if the jury found that" Gomez possessed "a firearm in furtherance of his conspiracy to commit Hobbs Act robbery, it also found that he" possessed "a firearm in furtherance of the other crime[]of[]violence and drug[]trafficking predicates of which the jury convicted him." *See id.*

Because we have no "grave doubt" that the inclusion of the invalid predicate offense—conspiracy to commit Hobbs Act robbery—had a "substantial" influence in determining the jury's verdict, any error resulting from the inclusion of the invalid predicate was harmless. *See Davis v. Ayala*, 576 U.S. 257, 267–68 (2015) (explaining that, on collateral review under the harmless error standard, "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" (cleaned up)).

CONCLUSION

We conclude that Gomez procedurally defaulted his claim and, also, that any error resulting from the inclusion of the invalid predicate was harmless. Thus, we affirm the district court's denial of Gomez's successive section 2255 motion to vacate.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:16-cv-22057-GAYLES/REID

EMILIO GOMEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE comes before the Court on Magistrate Judge Lisette M. Reid's Report (the "Report") [ECF No. 44]. On June 7, 2016, Movant Emilio Gomez filed a *pro se*[1] Motion to Vacate, pursuant to 28 U.S.C. § 2255, challenging the constitutionality of his conviction and sentence for his violation of 18 U.S.C. § 924(c) (the "Motion"). [ECF No. 1]. On July 25, 2016, the Eleventh Circuit granted Movant permission to file this successive § 2255 Motion.[2] [ECF No. 6]. The Eleventh Circuit reasoned that Movant's § 924(c) conviction implicated the statute's "residual clause," § 924(c)(3)(B), which included language similar to a phrase in a different statute that the Supreme Court held was unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). Following the Eleventh Circuit's grant of Movant's application to file this successive § 2255 Motion, the Supreme Court held that the residual clause in the statute at issue in this case was also unconstitutionally vague. *See United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).[3]

[1] Movant was appointed counsel on August 15, 2016. [ECF No. 11].
[2] Movant filed his first motion to vacate, pursuant to 28 U.S.C. § 2255, in 2009. *See Gomez v. United States*, Case No. 09-23660-cv-Jordan (S.D. Fla. 2009). Movant's first motion did not challenge his § 924(c) conviction.
[3] As Movant's claim is based on the *Davis* decision, the Court refers to the claim in this Order as a "*Davis* claim."

On January 3, 2019, the case was referred to Judge Reid,[4] pursuant to Administrative Order 2019-2, for a ruling on all pretrial, non-dispositive matters and for a Report and Recommendation on dispositive matters. [ECF No. 39]. On June 15, 2020, Judge Reid issued the Report, recommending that (1) the Motion be denied; (2) a certificate of appealability be issued regarding (a) the correct legal standard that Movant must meet in order to prove that he is entitled to relief and (b) the precedential weight that should be afforded to prior published panel decisions on applications for second or successive motions to vacate; and (3) the case be closed. [ECF No. 44].

On June 22, 2020, the Government filed objections to the Report, arguing that Judge Reid incorrectly concluded that Movant was not procedurally barred from bringing his *Davis* claim. [ECF No. 45]. The Government maintains that Movant is procedurally barred because he cannot establish cause and prejudice or actual innocence. On June 25, 2020, Movant filed objections to the Report, [ECF No. 46], which reiterate the arguments that he made in his Memorandum of Law in support of the Motion, [ECF No. 22], and are sufficiently addressed by the Report.

A district court may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1). Those portions of the report and recommendation to which objection is made are accorded *de novo* review, if those objections "pinpoint the specific findings that the party disagrees with." *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009); *see also* Fed. R. Civ. P. 72(b)(3). Any portions of the report and recommendation to which *no* specific objection is made are reviewed only for clear error. *Liberty Am. Ins. Grp., Inc. v. WestPoint Underwriters, L.L.C.*, 199 F. Supp. 2d 1271, 1276 (M.D. Fla. 2001); *accord Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

[4] The case was originally referred to Magistrate Judge Patrick A. White on June 7, 2016. [ECF No. 2].

Having conducted a *de novo* review of the record, the Court agrees with Judge Reid's well-reasoned analysis and conclusions that the Motion should be denied and that a certificate of appealability should issue for the reasons stated in the Report.

The Court next addresses the Government's objections to Judge Reid's finding that Movant was not procedurally barred from bringing his *Davis* claim. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent[.]'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (internal quotations and citation omitted). "To establish prejudice, a petitioner must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Glass v. Williams*, 325 F. App'x 752, 753 (11th Cir. 2009) (citation omitted) (emphasis in original).

The Court agrees with Judge Reid's conclusion that Movant demonstrated cause for his failure to raise his *Davis* claim on direct review since the legal basis for his claim was "not reasonably available to counsel at the time of Movant's appeal." [ECF No. 44 at 27]; *see Bousley*, 523 U.S. at 622 (noting that "a claim that is so novel that its legal basis is not reasonably available to counsel may constitute cause for a procedural default") (internal quotation marks and citation omitted). Judge Reid also correctly found that Movant could neither establish that he was actually innocent of violating § 924(c) (because his companion crimes that also provided the basis for his § 924(c) conviction are proper predicate offenses[5]) nor that the now-defunct residual clause played any role in his § 924(c) conviction. [ECF No. 44 at 27].

[5] As a reminder, Count 5 (the § 924(c) count) of Movant's indictment charged him with carrying and possessing a firearm in relation to a crime of violence *and* a drug trafficking crime and referred to two drug trafficking crimes (Counts 1 and 2); conspiracy to commit Hobbs Act robbery (Count 3); and attempt to commit Hobbs Act robbery

Therefore, the Court finds that Movant could not establish prejudice and was thus procedurally defaulted from bringing his *Davis* claim. *See, e.g.*, *Lassend v. United States*, 898 F.3d 115, 123 (1st Cir. 2018) (holding that if a petitioner's "challenge fails on the merits, there cannot be actual prejudice because there would be no error from which such prejudice would flow"). However, because the issue of whether Movant could establish prejudice for his procedural default was intertwined with, and thus necessarily turned on, a determination of his claim on the merits, it was entirely proper for Judge Reid to reach the merits of Movant's *Davis* claim. *See Brown v. Sirmons*, 515 F.3d 1072, 1092–93 (10th Cir. 2008) (holding that for efficiency, courts can avoid questions of procedural bar if it is easier to rule on the merits).

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

(1) Judge Reid's Report [ECF No. 44] is **AFFIRMED AND ADOPTED** and incorporated into this Order by reference;

(2) Movant's Motion to Vacate [ECF No. 1] is **DENIED**;

(3) For the reasons set forth in the Report, a certificate of appealability is **GRANTED** to address (1) the correct legal standard that Movant must meet in order to prove that he is entitled to relief and (2) the precedential weight that should be afforded to prior published panel decisions on applications for second or successive motions to vacate; and

(4) The case shall be **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of July, 2020.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

(Count 4). The jury convicted Movant of all counts and, with respect to Count 5, the jury found Movant guilty without indicating which count or counts was/were the predicate offense(s).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22057-CV-GAYLES
(06-20592-CR-GAYLES)
MAGISTRATE JUDGE REID

EMILIO GOMEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

This matter is before the Court on Movant's Successive Motion to Vacate, filed pursuant to 28 U.S.C. § 2255. [CV ECF No. 1]. 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. Admin. Order 2019-2; and Rules 8 and 10 Governing Section 2255 Proceedings in the United States District Courts. [CV ECF No. 39].

In Movant's underlying federal criminal case, Case No. 06-20592-CR-GAYLES[1], Movant was convicted of a variety of offenses, but in this collateral proceeding challenges only his Count 5 conviction for the possession of a firearm

[1] The case was tried before the Honorable Adalberto Jordan.

during the commission of a drug trafficking crime and a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). [CV ECF No. 1 at 4]. In support, Movant's counsel also filed a Memorandum of Law attacking the constitutionality of his conviction and sentence entered following the jury verdict against Movant. [CV ECF No. 22].

The Court has reviewed the motion [CV ECF No. 1], Movant's Memorandum of Law in support [CV ECF No. 22], the Government's Answer [CV ECF No. 25], the supplemental authorities filed by the parties [CV ECF Nos. 26 and 35], and all pertinent portions of the underlying criminal file.

To briefly summarize these proceedings, since Movant's initial filing[2], the law related to the issues raised in this case has evolved. Namely, the Supreme Court of the United States held that what are referred to as the residual clauses of the Armed Career Criminal Act (the "ACCA") and 18 U.S.C. § 16(b) (a provision of the criminal code incorporated into the Immigration and Nationality Act (the "INA")) were void for vagueness. *See Johnson*, 576 U.S. at 591; *see also Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018).

Initially, the Eleventh Circuit held in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), that *Johnson* did not apply to § 924(c) challenges or extend to

[2] The Eleventh Circuit authorized this successive motion based on *Johnson v. United States*, 576 U.S. 591 (2015). [CV ECF No. 6].

invalidate § 924(c)'s residual clause, § 924(c)(3)(B). However, the Eleventh Circuit vacated its decision in *Ovalles*, so in 2018 the Court administratively closed this case while the Eleventh Circuit again addressed the issue. [CV ECF No. 33]. The second time around, the Eleventh Circuit nevertheless held that § 924(c)'s residual clause was not unconstitutionally vague and the case became ripe for disposition. *See Ovalles v. United States*, 905 F.3d 1231, 1252 (11th Cir. 2018).

As a result of the frequently changing law, however, multiple Reports[3] from the prior assigned Magistrate Judge and supplemental briefings and authorities from the parties were necessary.[4] Further complicating things, since those Reports were entered, the Supreme Court overruled *Ovalles* and held that § 924(c)(3)(B) is indeed unconstitutionally vague. *See Davis*, 588 U.S. at ___, 139 S. Ct. at 2336. Also importantly, the Eleventh Circuit recently held that *Davis* is retroactively applicable to cases on collateral review. *See In re Hammoud*, 931 F.3d 1032, 1039 (2019).

Now, Movant's sole claim is that his Count 5 conviction under 18 U.S.C. § 924(c) must be reversed because it relied upon the residual clause which, after *Davis*, was held to be void for vagueness. [CV ECF Nos. 1, 22]. Movant's claim

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[3] *See* [CV ECF Nos. 5, 27, 30, and 37]. The Undersigned vacated the prior Magistrate Judge's Report given the Supreme Court's decision in *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019). [CV ECF No. 37]. The Court originally referred the case to Magistrate Judge Patrick A. White [CV ECF No. 3] and then re-assigned it to the Undersigned. [CV ECF No. 39].

[4] *See* CR ECF Nos. 26, 31, and 32.

should be denied, however, because he cannot sustain his burden to show that it was more likely than not that he was sentenced solely under the now-defunct residual clause.

II. Relevant Procedural History

A. Indictment

Movant, along with four co-defendants,[5] was initially charged in a six-count indictment with: (Count 1) conspiracy with intent to distribute five kilograms or more of cocaine; (Count 2) attempt to possess with intent to distribute five kilograms or more of cocaine; (Count 3) conspiracy to commit Hobbs Act robbery; (Count 4) attempt to commit Hobbs Act robbery; (Count 5) possession of a firearm during the commission of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c) and 2; and (Count 6) as a felon in possession of a firearm. [CR ECF No. 18]. With respect to Count 5, the indictment charged that Counts 1, 2, 3, and 4 were the predicate crimes of violence and drug-trafficking crimes. [*Id.*].

B. Facts Established at Trial[6]

[5] Nelson Pena, Reynaldo Aviles, Mario Bachiller, and Joe Guevara were charged with Movant. Pena and Guevara pled guilty to certain counts and received 252 months in prison and 180 months in prison, respectively. Case Nos. 06-20592-CR-DPG-1, ECF No. 218; 06-20592-CR-DPG-5, ECF No. 217. The remaining three proceeded to trial. Guevara testified. [CR ECF No. 274-1 at 134-194, 196-240].

[6] Because there is a more detailed account of the facts established at trial in the magistrate judge's report issued in Movant's first habeas case, the Undersigned presents an abbreviated version in the instant report citing those facts most relevant the instant claim including the respective citations. *See* Case No. 09-23660-AJ, ECF No. 20 at 4-9.

In August 2006, a confidential informant provided information to Detective Sanchez[7], an undercover officer, that Nelson Pena was interested in committing home invasion robberies. [CR ECF No. 272-1 at 68-69]. Sanchez searched the law enforcement database, found a photo of Pena, and recognized him from a prior investigation in May 2006.[8] [*Id.* at 69]. Sanchez would not be the undercover in this case because his identity "had been compromised" during the May investigation. [*Id.*]. Instead, Humberto Gamez, a confidential informant, would set up the operation for Pena and his crew to rob a tractor-trailer allegedly containing cocaine. [*Id.* at 69-72, 145]. Sanchez remained on the investigation as surveillance to monitor the meetings via transmitter and videotape. [*Id.* at 71-74]. Humberto Gamez; Detective Mitch Jacobs, who provided surveillance; and Juan Guevara, a co-defendant who participated in the robbery, all testified at trial.[9] Gamez organized and attended all the meetings to set up the robbery. [*Id.* at 147, 155]. During the meetings, Gamez told the conspirators he needed someone to do the job and explained the location of

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[7] *See* Juan Sanchez's entire testimony. [CR ECF No. 272-1 at 48-123].

[8] In the underlying criminal case, the government noticed its intent to rely on evidence from the May investigation that defendants participated "in the robbery of a grow house," as inextricably intertwined with the instant case. [CR ECF No. 87].

[9] *See* Humberto Gamez's entire testimony. [CR ECF No. 272-1 at 128-189; CR ECF No. 273-1 at 5-128, 131-137]. *See* Detective Mitch Jacobs' entire testimony. [CR ECF No. 273-1 at 138-170; CR ECF No. 274-1 at 7-45, 48-52]. *See* Juan Guevara's entire testimony. [CR ECF No. 274-1 at 134-194, 196-240].

the tractor-trailer scheduled to contain 80 kilograms of cocaine. [*Id.* at 155-177, 179-188; CR ECF No. 273-1 at 5-8, 10-38, 40-78, 82-100, 148-150, 153-176]. Pena advised Gamez he had the crew, equipment, and firearms to do it. [*Id.*]. On September 5, 2006, Gamez organized another meeting to plan the robbery; several defendants attended, including Movant. [CR ECF No. 273-1 at 30-60]. They agreed to rob the tractor-trailer at gunpoint dressed as police. [*Id.* at 48-59; CR ECF No. 274-1 at 170-171, 180]. On September 6, 2006,[10] the day of the robbery, Gamez drove the defendants in his vehicle to show them the location; Movant was in the back seat.[11] [CR ECF No. 273-1 at 83-93]. They did not bring firearms to the meeting but explained to Gamez they would have to go back to get them for the robbery. [*Id.* at 92-93]. Gamez returned the defendants to a gas station. Movant got into a Chevy, as the driver, and waited for the weapons to arrive. [CR ECF No. 273-1 at 165-168]. Eventually, Guevara and two others arrived at the gas station in a Cadillac with the weapons in the vehicle. [CR ECF No. 273-1 at 167-168; CR ECF No. 274-1 at 184-189]. Six people "showed up" to commit the robbery, including Movant. [CR ECF No. 273-1 at 151-170]. The group arrived at the scene in three cars, led by the Cadillac. [*Id.* at 173-188]. Movant was the driver of the Chevy, while Guevara and

[10] The government incorrectly states that the robbery occurred on September 6, 2016. [CV ECF No. 25 at 3]. The year is an apparent scrivener's error. *See also* witnesses testimony confirming the date of the robbery as September 6, 2006. [CR ECF Nos. 273-1, 274-1, 275-1].

[11] *See also* [CR ECF No. 273-1 at 166].

George Torres rushed the tractor trailer brandishing loaded firearms. [CR ECF No. 273-1 at 170; CR ECF No. 274-1 at 176-192; CR ECF No. 275-1 at 83-90]. Police shot Guevara and Torres; Torres died at the scene. [CR ECF No. 274-1 at 40, 165, 193, 215, 233-234].

At the close of the government's case, all defendants moved for a mistrial and, then, acquittal. [CR ECF No. 275-1 at 249-252]. In denying the motions, the court noted the evidence was "overwhelming." [*Id.* at 252].

As to Count 5, the court instructed the jury:

> A defendant can be found guilty of that offense, as charged in Count 5 of the indictment, **only if** all of the following facts are proved beyond a reasonable doubt:
>
> First, that the defendant committed a drug trafficking offense or crime of violence charged in Counts 1, 2, 3, or 4 of the indictment; and, second, that during the commission of that offense, the defendant knowingly carried a firearm in relation to that drug trafficking crime or crime of violence, as charged in the indictment; or that during the commission of that offense, the defendant knowingly possessed a firearm in furtherance of that drug trafficking crime or crime of violence, as charged in the indictment. . .

[CR ECF No. 277-1 at 20-21] (emphasis added).

The court instructed the jury that "[t]he indictment charges" the offense two ways.

> The indictment charges that the defendants knowingly carried a firearm during and in relation to a drug trafficking offense or crime of violence, and possessed a firearm in furtherance of a drug trafficking crime or crime of violence. It is charged, in other

> words, that the defendants violated the law as charged in Count 5 in two separate ways. It is not necessary, however, for the government to prove that the defendants violated the law in both of those ways. It is sufficient if the government proves, beyond a reasonable doubt, that a defendant knowingly violated the law in either way; but, in that event, you must unanimously agree upon the way in which the defendant committed the violation.

[*Id.* at 22]. The jury convicted Movant of all counts of the indictment. [*Id.* at 49]. With respect to Count 5, the verdict form gave the jury the option of finding Movant either guilty or not guilty, without indicating which count or counts of conviction was the predicate offense, or whether the jury had found that Movant had knowingly carried the firearm or had possessed the firearm. [ECF No. 205]. Nevertheless, for reasons not explained in the record, the judgment of conviction stated that Movant was convicted of "possession of a firearm during the commission of a drug trafficking crime." [ECF No. 256].

C. Sentencing, Direct Appeal, and Movant's First § 2255 Motion

For Count 5, the court sentenced Movant to 84 months in prison to be served consecutively to the lifetime terms imposed for Counts 1 and 2. [CR ECF No. 256]. Movant timely filed an appeal challenging the sufficiency of the evidence, asserting that the court abused its discretion by admitting evidence of other crimes as inextricably intertwined, and claimed the court incorrectly calculated the advisory guideline range. *See United States v. Gomez*, 302 F. App'x 868 (11th Cir. 2008) (*per*

curiam). The Eleventh Circuit found no merit in the arguments and affirmed Movant's conviction and sentence. *See id.* at 870.

In 2009, Movant filed his first motion to vacate pursuant to 28 U.S.C. § 2255 but it did not challenge his § 924(c) conviction. *See Gomez v. United States*, Case No. 09-23660-CV-Jordan (S.D. Fla. 2009). The Court denied relief. *Id.* at ECF No. 24. Movant sought to appeal, but the Eleventh Circuit denied a certificate of appealability. *Id.* at ECF No. 34.

D. The Instant Proceeding – Movant's Second § 2255 Motion

On June 2, 2016, Movant filed the instant Motion asserting the residual clause of § 924(c) was void for vagueness and that his conviction under § 924(c) relied upon it. [CV ECF No. 1]. The Court recommended Movant seek authorization from the Eleventh Circuit Court of Appeals to file a successive motion to vacate, and stayed and administratively closed the case. [CV ECF Nos. 5, 7].

Ultimately, the Eleventh Circuit granted Movant's Application to file a successive motion because, at the time of filing, the question remained whether *Johnson* invalidated Movant's sentence and it was unclear which offense served as the predicate offense for Movant's § 924(c) conviction. [CV ECF No. 6 at 7-8]. At that time, the law was also unsettled as to whether § 924(c) was unconstitutionally vague, as discussed above. [CV ECF No. 6 at 3]. Further, the question remained whether conspiracy to commit Hobbs Act robbery and attempt to commit Hobbs Act

robbery categorically qualified as crimes of violence that could serve as predicate offenses under § 924(c)(3)(A). [*Id.* at 7-8].

After the Eleventh Circuit found § 924(c)(3)(B) was not unconstitutionally vague, in *Ovalles*, 905 F.3d at 1252, the former Magistrate Judge issued a Report that recommended the denial of the motion to vacate because there was no constitutional rule that rendered § 924(c)(3)(B) void and because the drug trafficking and attempted Hobbs Act robbery convictions still qualified as predicate offenses supporting the § 924(c) conviction. [CV ECF No. 37]. Movant filed objections [CV ECF No. 38]. However, while the Report was pending, the Supreme Court held in *Davis* that § 924(c)(3)(B), the residual clause, was void for vagueness. Accordingly, the Undersigned vacated the then-pending Report to issue this Report analyzing Movant's claims in light of *Davis*. [CV ECF No. 40].

III. Standard of Review for Section 2255 Motions

Generally, a movant may collaterally attack his federal conviction or sentence when it violates the Constitution or federal law, exceeds the maximum authorized by law, is imposed without jurisdiction, or is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a). "Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a

complete miscarriage of justice." *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations, internal quotation marks, and bracket omitted). Conviction of "an act that the law does not make criminal [i.e., actual innocence]" "inherently results in a complete miscarriage of justice." *See Davis v. United States*, 417 U.S. 333, 346 (1974); *see also Spencer v. United States*, 773 F.3d 1132, 1139 (11th Cir. 2014) (*en banc*).

IV. Threshold Issue - Timeliness

Movant correctly asserts that his motion is timely. [CV ECF No. 1 at 13]. The Government asserts that the motion is only timely if *Johnson* applied retroactively to violations of § 924(c); otherwise, if *Johnson* does not apply, then the motion is untimely. [CV ECF No. 25 at 8].

The Antiterrorism and Effective Death Penalty Act ("AEDPA") created a time limitation for filing a motion to vacate. Pursuant to 28 U.S.C. § 2255(f), a one-year period of limitations applies to a motion under the section. The one-year period runs from the latest of:

> 1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> 2) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the movant is prevented from filing by such governmental action;

> 3) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> 4) the date on which the facts supporting the claim or claims could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). "Typically, the applicable triggering date is 'the date on which the judgment of conviction becomes final.'" *Beeman v. United States*, 871 F.3d 1215, 1219 (11th Cir. 2017) *cert. denied,* 139 S. Ct. 1168 (2019) (internal citations omitted).

Movant has the permission of the Eleventh Circuit Court of Appeals to raise a claim that the residual clause of § 924(c) is void for vagueness. At the time of his filing, the only case law voiding a similar residual clause was *Johnson*, followed by *Dimaya*. Such reliance squarely falls within § 2255(f)(3). *Johnson* and *Dimaya* clearly ushered out new rules of constitutional law by invalidating the residual clauses of the ACCA and § 16(b), respectively.

Regardless of which case or cases Movant relies upon, his Motion is timely filed and is not procedurally barred. *Johnson* was issued on June 26, 2015, and deemed retroactively applicable in *Welch v. United States*, 578 U.S. ___, ___, 136 S. Ct. 1257, 1268 (2016). Movant filed the instant case within one year of *Johnson*,

on June 2, 2016, pursuant to the prison mailbox rule.[12] Furthermore, Movant's case remained pending at the time *Davis* invalidated the residual clause of § 924(c), and Davis has also been deemed to be retroactive to cases on collateral review. *See Hammoud*, 931 F.3d at 1039. Thus, his claim was properly preserved and is timely.

V. Discussion

A. Gomez Has the Burden of Proof To Establish His Claim

It is well established that in all § 2255 cases, the movant bears the burden of proving his claims and entitlement to relief. *See In re Moore*, 830 F.3d 1268, 1272 (11th Cir. 2016) (collecting cases). More specifically, in the context of a *Davis* claim, a § 2255 movant must prove "that his § 924(c) conviction resulted from application of *solely* the [now defunct] residual clause [in § 924(c)(3)(B)]." *Hammoud*, 931 F.3d at 1041 (emphasis added) (citing *Beeman*, 871 F.3d at 1222-25; *Moore*, 830 F.3d at 1271); *but see Wainwright v. United States*, No. 19-62364-CIV-COHN, 2020 U.S. Dist. LEXIS 63247, at *40-43 (S.D. Fla. Apr. 6, 2020) (suggesting that the Eleventh Circuit's instructions on the burden in a *Davis* claim are nonprecedential dicta, distinguishing *Beeman* as applied to a *Davis* claim, and stating that the movant's

[12] Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. *See Houston v. Lack*, 487 U.S. 266, 275 (1988) (setting forth the "prison mailbox rule"); *see also Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001).

burden is "to show by a preponderance of the evidence, that is it unclear whether the jury based its convictions on [a constitutionally invalid ground.]").

Thus, following the instructions from the Eleventh Circuit in similar orders granting applications to file successive motions to vacate based on *Davis*, a movant must show "that it was more likely than not [that] he in fact was sentenced . . . [solely] under [§ 924(c)'s] residual clause." *Beeman*, 871 F.3d at 1225. "If it is just as likely that the [jury] relied on [§ 924(c)'s] elements . . . clause, solely or as an alternative basis for the [conviction], then [] movant has failed to show that his [§ 924(c) conviction in Count XI] was due to use of the residual clause." *Id.* at 1222; *see also In re Cannon*, 931 F.3d 1236, 1243 (11th Cir. 2019) ("[T]he [§ 2255] movant . . . bears the burden of proving the likelihood that the jury based its verdict of guilty . . . solely on the [offense that is not a crime of violence under § 924(c)'s residual clause], and not also on one of the other valid predicate offenses identified in the count . . . ." (citing *Beeman*, 871 F.3d at 1222; *Moore*, 830 F.3d at 1272)); *but see Wainwright*, 2020 U.S. Dist. LEXIS 63247, at *41-43 (stating that *Cannon's* statement on the movant's burden "was not given in the context of a fulsome discussion and thus may be characterized as nonprecedential dicta.").

Under the ACCA, the statute discussed in the Supreme Court's *Johnson* decision, a defendant convicted of violating 18 U.S.C. § 922(g) is subject to a mandatory minimum sentence of fifteen years if he or she has three prior convictions

for a violent felony or serious drug offense. *See* 18 U.S.C. § 924(e)(1). Before *Johnson*, a violent felony was defined as any offense punishable by a term of imprisonment exceeding one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another," or certain enumerated offenses, including burglary, arson or extortion, or offenses that involved the use of explosives, or any felony that "*involves conduct that presents a serious potential risk of physical injury to another.*" 18 U.S.C. § 924(e)(2)(B) (emphasis added).

The final clause was commonly known as the risk-of-force clause or the residual clause and *Johnson* held that this clause was void for vagueness. The Eleventh Circuit held that in order to prove a *Johnson* claim, "a movant must establish that his sentence enhancement 'turn[ed] on the validity of the residual clause.' In other words, he must show that the clause actually adversely affected the sentence he received." *Beeman*, 871 F.3d at 1221 (citing *In re Thomas*, 823 F.3d 1345, 1349 (11th Cir. 2016)). Movant has the burden to

> show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence. If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause. We rest our conclusion that a § 2255 movant must prove his *Johnson* claim on a long line of authority holding that a § 2255 movant bears the burden to prove the claims in his § 2255 motion.

Id. at 1222.

Following *Johnson* and *Dimaya*, which invalidated the residual clause in 18 U.S.C. § 16(b), in *Davis*, the Supreme Court similarly found the residual clause of § 924(c) was unconstitutionally vague because there was no "material difference" between the residual clauses of § 16(b) and § 924(c). *Davis*, 588 U.S. at ___, 139 S. Ct. at 2326. Still, like the ACCA, the elements clause of § 924(c)(3)(A) remains intact. Therefore, unless Movant can demonstrate that his conviction, more likely than not, rested upon the now-void residual clause, his claim fails.

B. The Predicate Offenses Supporting Movant's Section 924(c) Conviction are a Drug Trafficking Crime and a Crime of Violence

Section 924(c)(1)(A) provides for a separate consecutive sentence if any person uses or carries a firearm during and in relation to a drug trafficking crime or crime of violence or possesses a firearm in furtherance of such crimes:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any ***crime of violence or drug trafficking crime*** (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possess a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;

> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (emphasis added).

The term "crime of violence" is defined in two subparts: the elements clause § 924(c)(3)(A) and the residual clause § 924(c)(3)(B). Pursuant to the elements clause, a "crime of violence" is "an offense that is a felony and has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). On the other hand, the residual clause additionally includes as a crime of violence "an offense that is a felony and that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). Only the residual clause of § 924(c)(3) was found to be void for vagueness in *Davis*.

In looking to potential predicate crimes of violence, both Hobbs Act robbery and attempted Hobbs Act robbery categorically qualify as crimes of violence under the elements clause, § 924(c)(3)(A). This is because an attempted federal offense, the completed offense of which categorically qualifies as an elements clause crime of violence, also categorically qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. *See United States v. St. Hubert*, 909 F.3d 335, 349

(11th Cir. 2018), *cert. denied*, *St. Hubert v. United States*, 590 U.S. ___, 2020 WL 3038291 (U.S. June 8, 2020). Thus, both Hobbs Act robbery and attempted Hobbs Act robbery categorically qualify as "crimes of violence" under the elements clause of § 924(c)(3)(A). *See id.*; *see also In re Saint Fleur*, 824 F.3d 1337, 1341 (11th Cir. 2016). In contrast, conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)'s elements clause. *See Brown v. United States*, 942 F.3d 1069, 1075-76 (11th Cir. 2019) (*per curiam*).

Movant argued in his Memorandum that Hobbs Act robbery was not, categorically, a crime of violence but concedes that *Saint Fleur* controls [CV ECF No. 22 at 21-27], and the current state of the law is that Movant's conviction for attempted Hobbs Act robbery qualifies as a predicate offense to support his § 924(c) conviction.

Under § 924(c) the predicate offense can either be a crime of violence or a drug trafficking crime. Even so, the Eleventh Circuit has "held that a conviction under § 924(c) does not require that the defendant be convicted of, or even charged with, the predicate offense. Instead, § 924(c) requires only that the predicate crime be one that may be prosecuted." *In re Navarro*, 931 F.3d 1298, 1302 (11th Cir. 2019) (citing *United States v. Frye*, 402 F.3d 1123, 1127 (11th Cir. 2005); 18 U.S.C. § 924(c)(1)(A)). Thus, "[t]o the extent that [a movant] is arguing that he must be convicted of the predicate drug trafficking crime or that the crime must be charged

in the indictment, he is wrong." *United States v. Treffinger*, 464 F. App'x 777, 781 n. 1 (11th Cir. 2012) (citing *Frye*, 402 F.3d at 1127)).

Moreover, because the remainder of the statute remains intact, it also follows that "a criminal defendant properly remains subject to § 924(c) where the companion offense is a "drug trafficking crime." *See Navarro*, 931 F.3d at 1298 (denying leave to file a successive motion because movant's conviction was independently supported by the charged drug-trafficking crimes).

Here, given the evidence presented at trial and the current state of the law, to remain intact, Movant's § 924(c) conviction can be predicated on any of the charged offenses except Count 3 (conspiracy to commit Hobbs Act robbery). Additionally, the narcotics offenses, Counts 1 and 2, independently qualify as drug trafficking crimes that would support Count 5. *See United States v. Isnadin*, 742 F.3d 1278, 1307-08 (11th Cir. 2014) (holding that the defendant's conviction under 18 U.S.C. § 924(c)(1)(A) was supported by the drug trafficking crime of conspiracy to possess cocaine with the intent to distribute).

C. The Jury Found Unanimously that Movant Committed a Predicate Offense to Support the § 924(c) Conviction

The indictment charged Movant with Count 5 in the conjunctive: possession of the firearm "in furtherance of a crime of violence *and* a drug trafficking crime." [CR ECF No. 18]. However, the Government explained to the Court that in the indictment the government to "charg[ed] [Count 5] two different ways." [CR ECF

No. 276-1 at 97]. As a result, the court specifically instructed the jury that it could find Movant guilty of Count 5 only if Movant had committed a drug trafficking offense or crime of violence as charged in Counts 1, 2, 3, or 4, and Movant "knowingly carried a firearm in relation to that drug trafficking crime or crime of violence *or* that during the commission of that offense, the defendant knowingly possessed a firearm in furtherance of that drug trafficking crime or crime of violence..." [CR ECF No. 277-1 at 20-21] (emphasis added). There is no dispute that the verdict form does not specify which predicate offense supported the § 924(c) conviction. But, based upon the nature of the evidence presented of a planned and attempted Hobbs Act robbery of a large quantity of cocaine while armed, the intertwined nature of the robbery and drug trafficking offenses, and the fact that Movant was convicted of all of the offenses, the jury must have necessarily found the firearms were an integral part of the attempted robbery and drug trafficking crimes. Moreover, under *Beeman*, it remains Movant's burden to demonstrate that more likely than not the jury relied solely on the offense that is no longer a qualifying predicate. Specifically, to prove his claim, Movant must show that it is more likely than not that he was adjudicated guilty under § 924(c)'s residual clause. Under these facts, he cannot sustain that burden.

In this Court, District Judge Lenard recently opined: "[i]f it is just as likely that the movant was adjudicated guilty of using or carrying a firearm during, or

possessing a firearm in furtherance of, a "crime of violence" under Section 924(c)(3)(A)'s "elements clause,'" then his motion fails. *Martinez v. United States*, No. 19-23455-CV-Lenard, 2020 U.S. Dist. LEXIS 14282 (Jan. 27, 2020) (citing *United States v. Cooper*, No. 4:99cr37-RH-CAS, 2019 U.S. Dist. Lexis 141917, 2019 WL 3948098 at 1 (N.D. Fla. Aug. 20, 2019)); *but see Wainwright, supra*. For these same reasons, Movant fails to show that the clause actually adversely affected the sentence he received and cannot satisfy his burden under *Beeman*.

To the extent that Movant attempts to argue that because the verdict form is unclear as to which predicate offense supports the § 924(c) conviction, the Court should presume that his conviction relies on the least of the acts, such an argument is misplaced. There is no legal basis for the Court to use the least culpable conduct as supporting the § 924(c) conviction, as Hobbs Act robbery, attempted Hobbs Act robbery, and conspiracy to commit Hobbs Act robbery are equally culpable. More importantly, the Eleventh Circuit did not direct this Court to choose the lesser of the offenses in determining whether Movant's § 924(c) conviction was supported.

D. Whether the § 924(c) Charge is Duplicitous

In granting the successive application the Eleventh Circuit questioned the nature of the § 924(c) conviction:

> Gomez's indictment, which lists "a crime of violence and a drug trafficking crime" as the companion convictions for his § 924(c) offense, suffers from this infirmity. And his case demonstrates the "dangers" that may lurk in indictments that list multiple

> potential predicate offenses in a single § 924(c) count. Count 5 of his indictment alleges that he used and possessed a firearm during two drug trafficking offenses and an attempted Hobbs Act robbery on the same day, as well as an ongoing conspiracy to commit Hobbs Act robbery that lasted two weeks. It is certainly possible that the government may have presented evidence that Gomez "possessed" a firearm at some point during the ongoing Hobbs Act conspiracy. But, the evidence may likewise have shown that he left that firearm at home for the drug trafficking crimes, or the attempted robbery. And we can't know what, if anything, the jury found with regard to Gomez's connection to a gun and these crimes. That is because the jurors had multiple crimes to consider in a single count, so they could have convicted Gomez of the § 924(c) offense without reaching unanimous agreement on during which crime it was that Gomez possessed the firearm. Or, they could have unanimously agreed that he possessed a firearm at some point during the Hobbs Act conspiracy, but not during the drug trafficking crime.

Gomez, 830 F.3d at 1227.

Based on the excerpt above, Movant attempts to raise a duplicity argument in his memorandum following the granting of his successive application. [ECF No. 25]. The government asserts that a duplicity argument would be time barred and procedurally defaulted because a challenge to the indictment should have been raised on direct appeal and such an argument does not rely upon a new retroactively applicable rule of constitutional law. [ECF No. 25 at 22]. Moreover, the Government suggests that the Eleventh Circuit's statements whether the indictment was duplicitous are merely dicta. [*Id.* at 24].

The Eleventh Circuit, in granting Movant's Application, emphasized that the verdict's lack of specificity *might* be significant. It did not indicate the indictment

was defective or authorize Movant to make the claim as a claim separate from his *Johnson* claim in his successive motion. Rather, the issues authorized to be resolved were whether § 924(c)'s residual clause was unconstitutional and whether attempted Hobbs Act robbery qualified as a predicate offense under § 924(c)'s elements clause. This conclusion is supported by the Eleventh Circuit's opinion discussing *Gomez* in *Cannon*. There, the Eleventh Circuit stated that it was "mindful" that it granted Gomez's application only because he had made a "prima facie showing his conviction may implicate § 924(c)(3)(B)'s residual clause and *Johnson*." *Cannon*, 931 F.3d at 1242. It clarified their statement in *Gomez*, stating "that threshold determination was not a merits determination." *Id.* at n.4. It further clarified that after granting Gomez's Application, as a matter of law, attempted Hobbs Act robbery qualified as a crime of violence under the elements clause. *Id.* at 1242.

Second, even if Movant's claim was not untimely and procedurally defaulted and it could be argued that the indictment was defective under *Alleyne v. United States*, 570 U.S. 99 (2013), an independent duplicitous indictment claim is not cognizable here because *Alleyne* does not apply retroactively on collateral review. *See Jeanty v. Warden*, 757 F.3d 1283, 1285 (11th Cir. 2014).

E. Whether Stromberg Applies

Finally, to the extent that there may be any argument challenging the indictment and general verdict based on *Stromberg v. People of California*, 283 U.S.

359 (1931), such an argument would still fail. The Eleventh Circuit explained that "*Stromberg* held that 'a conviction cannot be upheld if (1) the jury was instructed that a guilty verdict could be returned with respect to any one of several listed grounds, (2) it is impossible to determine from the record on which ground the jury based the conviction, and (3) one of the listed grounds was constitutionally invalid.'" *Knight v. Dugger*, 863 F.2d 705, 730, (11th Cir. 1988). Here, while Movant likely easily meets (1) and (3), it would likely nevertheless fail because, it is possible to determine from the record which grounds supported Movant's conviction.

The Eleventh Circuit noted in granting Gomez authority to file this successive § 2255 action, that it could only "guess which predicate the jury relied on" and that it may be "possible" to make that determination from the reviewing the trial evidence. *Gomez*, 830 F.3d at 1228. It is possible to make that determination here because, as previously discussed, all of the acts and offenses were intertwined and Movant was found guilty of all of them. Under these facts, it is unlikely that the jury would have relied solely upon the Hobbs Act Robbery conspiracy count as the predicate offense for Movant's § 924(c) conviction. The trial evidence demonstrated that Movant not only agreed to commit an armed robbery and a drug trafficking crime, but also actually participated in the attempted robbery of 80 kilograms of cocaine. He waited at the gas station for the other co-conspirators to bring the firearms necessary to cover him and others during the attempted robbery, and

immediately, followed them to the tractor-trailer allegedly containing 80 kilograms of cocaine. Further, Guevara and Torres brandished the firearms in attempt to commit the robbery. *See United States v. Mack*, 572 F. App'x 910 (11th Cir. 2014) (sufficient evidence supported aiding and abetting possession of a firearm under 18 U.S.C. §§ 924(c) and 2 where defendants knowingly associated themselves with a drug trafficking conspiracy, took affirmative acts toward it, and facilitated the carrying of the firearm. The facilitation element can be met by knowingly benefitting from the protection afforded by the firearm.). If the firearm was only discussed during the planning of the Hobbs Act robbery, but for some reason was not possessed or carried during the robbery attempt, perhaps Gomez could sustain his burden to prove that it was more likely than not that he was convicted solely under the now defunct residual clause. Even then, Gomez was found guilty of a drug trafficking crime and drug trafficking conspiracy, offenses that were unaffected by the now-defunct § 924(c)(3)(B) residual clause, and the events that established his guilt of the drug trafficking conspiracy and substantive drug trafficking crime and the attempted Hobbs Act Robbery were so interrelated that he could hardly have been found guilty of one without being guilty of the other.

Accordingly, for all of the above reasons, Movant's Motion to Vacate is should be DENIED.

VI. Fundamental Miscarriage of Justice – Actual Innocence

Courts have "equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition." *McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013). However, "[t]he miscarriage of justice exception . . . applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the movant].'" *Id.* at 394-95 (quoting *Schlup v. Delo*, 513 U.S. 298, 303 (1995)). This type of claim is commonly referred to as an "actual innocence" claim. *McQuiggin*, 569 U.S. at 392 (citation omitted); *see also Bousley v. United States*, 523 U.S. 614, 623 (1998).

"'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Johnson v. Fla. Dep't Of Corr.*, 513 F.3d 1328, 1334 (11th Cir. 2008) (quoting *Bousley*, 523 U.S. at 623). "Actual innocence claims must also be supported 'with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial.'" *Rich v. Dep't of Corr. State of Fla.*, 317 F. App'x 881, 882 (11th Cir. 2008) (*per curiam*) (quoting *Schlup*, 513 U.S. at 324). Movant bears the burden to adequately allege actual innocence. *See Schlup*, 513 U.S. at 327; *see also Beeman*, 871 F.3d at 1222.

Here, Movant is not procedurally barred from raising his claim. He established cause for not raising a *Johnson* or *Davis*-based claim on appeal because the new rules set forth by these opinions were not reasonably available to counsel at the time of Movant's appeal. However, his companion crimes that provide the basis for the § 924(c) conviction are a crime of violence under the elements clause and drug trafficking crimes. Therefore, Movant cannot establish that he was actually innocent of violating § 924(c); and he cannot show that the residual clause played any role in the conviction. A jury determined Movant's guilt; and, in affirming the conviction and sentence, the Eleventh Circuit found the evidence sufficient to support the verdict.

Consequently, this § 2255 motion should be DENIED.

VII. Evidentiary Hearing

Movant is not entitled to an evidentiary hearing. Movant has the burden of establishing the need for an evidentiary hearing and would only be entitled to a hearing if his allegations, if proved, would establish his right to collateral relief. *See Schriro v. Landrigan*, 550 U.S. 465, 473-75 (2007) (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing); *see also Townsend v. Sain*, 372 U.S. 293, 307 (1963).

VIII. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal and must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); *see also Harbison v. Bell*, 556 U.S. 180, 183 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2).

Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Upon consideration of the record as a whole, this Court should grant a certificate of appealability due to the novelty of the issue regarding the alternative means of supporting Movant's conviction in Count 5, as well as the applicability of published decisions from applications for second or successive motions to vacate, and the debate regarding the appropriate burden Movant must meet.

More specifically, reasonable jurists might find the district court's assessment of the constitutional claims debatable or wrong as to whether Movant's burden of proof requires him to prove that it is more likely than not that he was adjudicated guilty solely under § 924(c)'s residual clause or, as in *Wainwright*, "to show by a preponderance of the evidence, that is it unclear whether the jury based its convictions on [a constitutionally invalid ground.]" There has been considerable debate regarding the burden of a movant in a *Davis*-based § 2255, and at least one member of this Court has stated that the Supreme Court decision in *Stromberg*, 283 U.S. 359, and the Eleventh Circuit's decision in *Knight*, 8632 F.2d at 730, are controlling in this case. *See Wainwright, supra*. Thus, to the extent that the Court may be relying upon the incorrect legal standard that Movant must meet in order to prove he is entitled to relief, the Undersigned recommends granting a certificate of appealability.

Second, reasonable jurists could disagree with respect to the precedential weight that should be afforded to prior published panel decisions on applications for second or successive motions to vacate. *See St. Hubert*, 590 U.S. ___, No. 19-5267 (slip op.) (Sotomayor, J.) (suggesting that the Eleventh Circuit's process treatment of these decisions could potentially violate Due Process). This issue is also implicated in *Wainwright*, where another member of this Court suggested that portions of certain published panel decisions on applications for successive motions

to vacate were nonprecedential dicta, otherwise they would conflict with controlling earlier published decisions from the Eleventh Circuit and binding Supreme Court precedent in *Stromberg*. Accordingly, to the extent that this Court relies upon such language from published decisions from applications for successive motions to vacate as wholly controlling and dispositive of the issues in this case, a certificate of appealability should be granted on this issue as well.

IX. Recommendations

Based on the foregoing, it is recommended that the motion to vacate [ECF No. 1] be DENIED on the merits, however, that a certificate of appealability be issued as described above, and that this 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. Failure to do so will bar a *de novo* determination by the District Judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge. *See* 28 U.S.C. § 636(b)(1)(C); *see also Thomas v. Arn,* 474 U.S. 140, 149 (1985).

SIGNED this 15th day of June, 2020.

UNITED STATES MAGISTRATE JUDGE

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