A P P E N D I X

APPENDIX

A-1

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
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July 27, 2023

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 23-11174-D
Case Style: Julio Rolon v. USA
District Court Docket No: 1:20-cv-20384-JAL
Secondary Case Number: 09-cr-20710-JAL-2

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
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CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11174

JULIO ROLON,

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. 1:20-cv-20384-JAL

ORDER:

Julio Rolon is a federal prisoner serving a life sentence after a jury convicted him of various drug, Hobbs Act robbery, and firearms charges. In January 2020, we granted Mr. Rolon leave to file a successive 28 U.S.C. § 2255 motion, in order to raise a claim under *United States v. Davis*, 139 S. Ct. 2319 (2019), which the district court ultimately denied. Mr. Rolon has appealed, and he now moves, through counsel, for a certificate of appealability ("COA").

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Here, reasonable jurists would not debate the district court's finding that Mr. Rolon's *Davis* claim was procedurally defaulted. *See id.* A review of the record reveals that Mr. Rolon never argued in the original criminal proceedings, or on direct appeal, that his convictions for Counts 5 and 6 were invalid because 18 U.S.C. § 924(c)'s residual clause was unconstitutionally vague. Thus, the instant *Davis* claim was procedurally defaulted. *See Granda v. United States*, 990 F.3d 1272, 1285-86 (11th Cir. 2021).

Moreover, in the § 2255 proceedings, Mr. Rolon failed to establish, or even allege, either (1) cause to excuse to excuse the default and actual prejudice from the claimed error, or (2) that he was actually innocent of Counts 5 and 6. *See Parker v. United States*, 990

F.3d 1257, 1262 (11th Cir. 2021). Accordingly, Mr. Rolon's motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-20384-CIV-LENARD
(Criminal Case No. 09-20710-Cr-Lenard)

JULIO ROLON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

THIS CAUSE is before the Court following the Court's Order Denying Movant Julio Rolon's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. Pursuant to Rule 58(a) of the Federal Rules of Civil Procedure, it is hereby **ORDERED AND ADJUDGED** that:

1. **FINAL JUDGMENT** shall be entered in favor of Respondent United States of America; and

2. This case is now **CLOSED.**

DONE AND ORDERED in Chambers at Miami, Florida this 21st day of March, 2023.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-20384-CIV-LENARD
(Criminal Case No. 09-20710-Cr-Lenard)

JULIO ROLON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER VACATING ORDER OF REFERRAL TO MAGISTRATE JUDGE (D.E. 15), DENYING MOTION TO VACATE § 924(c) CONVICTION AND SENTENCE UNDER 28 U.S.C. § 2255 (D.E. 5), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on Movant Julio Rolon's Motion to Vacate § 924(c) Conviction and Sentence under 28 U.S.C. § 2255, ("Motion," D.E. 5),[1] filed March 16, 2023. The Government filed a Response on May 14, 2020, ("Response," D.E. 11), to which Movant filed a Reply on May 21, 2020, ("Reply," D.E. 13). On October 14, 2020, the Court issued an Order referring the case to Magistrate Judge Jacqueline Becerra for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. That Order is **VACATED**. Upon review of the Motion, Response, Reply, and the record, the Court finds as follows.

[1] The Court will cite to docket entries in this case as ("D.E. [#]"), and will cite to docket entries in the underlying criminal case as ("Cr-D.E. [#]").

I. Background

The facts giving rise to Movant's criminal case were summarized by the Eleventh Circuit Court of Appeals as follows:

> On July 31, 2009, Defendants Rolon and [Rodolfo] Ortiz, both with extensive prior felony convictions, were arrested after they agreed to participate in, and took substantial steps toward completing, a "reverse sting" home invasion robbery. A confidential informant ("CI") alerted law enforcement that Ortiz was seeking help to rob a marijuana grow house, and Miami–Dade police and federal authorities began investigating Ortiz. Law enforcement discovered that defendant Ortiz's robbery target was not actually a marijuana grow house, and law enforcement then staged a false raid on the house to deter Ortiz's robbery.
>
> . . .
>
> Thereafter, the CI made a recorded phone call to defendant Ortiz explaining that the CI knew someone who could arrange another home invasion robbery. [D]efendant Ortiz agreed to meet with the CI and the CI's contact, who, unbeknownst to Ortiz, was an undercover Miami–Dade police detective (the "undercover detective").
>
> Defendant Ortiz brought defendant Rolon to the meeting with the CI and the undercover detective. At that meeting, which was audio and video recorded, the undercover detective told Ortiz and Rolon that he was a cocaine courier. The detective told the pair that (1) he typically transported between 20 and 25 kilograms of cocaine per delivery; (2) he had not been paid for his recent deliveries; and (3) he wanted to rob the house where he brought his deliveries (the "stash house") without arousing suspicion that he had participated in the robbery.
>
> Defendants Ortiz and Rolon asked a number of questions, including whether there was cash in the stash house, whether the house was guarded, who was guarding it, and how many and what type of guns the guards would be carrying. Defendant Ortiz advised the undercover detective that he would bring in a third man to help with the robbery, that he and his associates were "professionals," and that each of them would be armed and wearing police badges. Defendant Rolon specifically stated that (1) he would bring either a .9 millimeter Glock or an AR–15 assault rifle and (2) he would not hesitate to "blow up someone's head" if necessary. Ortiz, Rolon, the CI, and the undercover detective agreed that the undercover detective and the CI would

> take half of the cocaine at the stash house and that Ortiz, Rolon, and their third accomplice would split the other half among them.
>
> In the following days, defendant Ortiz and the CI made several telephone calls, all recorded, during which they planned the second meeting with the undercover detective and Ortiz discussed his preparation for the robbery. At the second meeting, defendant Ortiz assured the undercover detective that Ortiz had previously committed home invasion robberies and that Ortiz and his associates would use two-way radios to communicate.
>
> On July 31, 2009, the day of the planned robbery, the CI placed a recorded phone call to Ortiz and told him to meet the CI at a gas station. The undercover detective observed the gas station from across the street. Defendants Ortiz and Rolon arrived approximately 20 minutes later and provided the CI with a black t-shirt with the letters "DEA" printed on the front, a black ski mask, a pair of black latex gloves, and other police apparel. Ortiz and Rolon then followed the CI to a warehouse, where they believed the CI was picking up a vehicle. When they arrived, law enforcement surrounded the vehicles and apprehended Ortiz and Rolon.
>
> Among the items police recovered from Rolon's car were two black hats with the word "Narcotics" written on them, a black hat with the word "Police" written on it, two black t-shirts with the letters "DEA" on one side and the word "Police" on the other side, two black ski masks, a box of latex gloves, 18 wire tie straps, three law enforcement badges, a 9 millimeter Ruger handgun and magazine loaded with 15 rounds of ammunition, and a 9 millimeter Smith & Wesson handgun and magazine loaded with 12 rounds of ammunition.
>
> Police recovered similar items—including a Ruger .357 Magnum revolver—from the car of codefendant Federico Dimolino, the third accomplice.
>
> Defendant Ortiz admitted that he had intended to rob 25 kilograms of cocaine and that he planned the robbery. Ortiz also claimed responsibility for the two loaded handguns found in Rolon's car.

United States v. Rolon, 445 F. App'x 314, 316-17 (11th Cir. 2011).

On August 14, 2009, a Grand Jury sitting in the Southern District of Florida returned an Indictment charging Movant with:

- Count 1: Conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. § 846;
- Count 2: Attempted possession with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846 and 2;
- Count 3: Conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a);
- Count 4: Attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a);
- Count 5: Conspiracy to use, carry, or possess a firearm during and in furtherance of a crime of violence and a drug trafficking crime—and specifically, the crimes "set forth in Counts 1, 2, 3, and 4 of th[e] Indictment"—in violation of 18 U.S.C. § 924(o);
- Count 6: Using, carrying, or possessing a firearm during and in furtherance of a crime of violence and drug trafficking crime—and specifically, the crimes "set forth in Counts 1, 2, 3, and 4 of th[e] Indictment"—in violation of 18 U.S.C. § 924(c)(1)(A); and
- Count 9: Felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1).

(Indictment, Cr-D.E. 15.) The case proceeded to trial where a jury found Movant guilty of Counts 1, 2, 3, 4, 5, 6, and 9. ("Jury Verdict," Cr-D.E. 218.) As to Count 5, the jury specifically found that Movant knowingly conspired to (1) possess and (2) use or carry "a firearm in relation to the crimes charged in Counts 1 through 4." (Id. at 2.) As to Count 6,

the jury specifically found that Movant (1) possessed and (2) used or carried "a firearm in relation to the crimes charged in Counts 1 through 4." (Id. at 3.)

On January 21, 2011, Judge Alan Gold sentenced Movant to concurrent terms of life imprisonment as to Counts 1, 2, 5, and 9; concurrent terms of 240 months' imprisonment as to Counts 3 and 4; and a consecutive term of life imprisonment as to Count 6, to be followed by five years' supervised release as to Counts 1, 2, 5, 6, and 9, and three years' supervised release as to Counts 3 and 4, all to run concurrently. (See Cr-D.E. 248.) The Court entered written Judgment on January 24, 2011. (Cr-D.E. 250.)

Movant appealed, and the Eleventh Circuit affirmed his convictions and most of his sentence; however, it vacated the life sentence imposed as to Count 5 because it exceeded the statutory maximum and remanded for resentencing on Count 5. United States v. Rolon, 445 F. App'x 314, 318 n.4, 332 (11th Cir. 2011).

On June 12, 2012, Judge Gold resentenced Movant to 240 months' imprisonment as to Count 5. (Cr-D.E. 333.) The Court entered a written Amended Judgment on June 14, 2012. (Cr-D.E. 335.) Movant appealed, and the Eleventh Circuit affirmed. United States v. Rolon, 511 F. App'x 883 (11th Cir. 2013). Movant filed a petition for writ of certiorari, but the Supreme Court denied the petition. (Cr-D.E. 361, 363, 366.)

On July 14, 2014, Movant filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, (Cr-D.E. 367), which was assigned Civil Case No. 14-22631-Civ-Cooke ("Rolon I"). On August 31, 2015, Judge Marcia Cooke entered an Order denying the Motion, denying a certificate of appealability, and closing the case. (Cr-D.E. 371.) Movant appealed, Rolon I, D.E. 19, but the Eleventh Circuit ultimately denied him

a certificate of appealability and dismissed the case, id., D.E. 42. The Supreme Court subsequently denied Movant's petition for writ of certiorari. Id., D.E. 44.

On June 24, 2016, Movant filed a second Motion under 28 U.S.C. § 2255, (Cr-D.E. 372), which was assigned Civil Case No. 16-22630-Civ-Lenard ("Rolon II"). The Court transferred the case to the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 for authorization to file a second or successive motion under Section 2255. Rolon II, D.E. 5. However, the Eleventh Circuit denied Movant's application for leave to file a second or successive 2255 Motion as premature because his appeal in Rolon I was still pending in the Eleventh Circuit. Id., D.E. 7. Thus, on September 6, 2015, this Court issued an Order dismissing the second 2255 Motion for lack of jurisdiction. Id., D.E. 9.

On January 23, 2020, the Eleventh Circuit Court of Appeals granted Movant leave to file a successive 2255 Motion to raise a claim under United States v. Davis, __ U.S. __, 139 S. Ct. 2319 (2019). (Cr-D.E. 385; D.E. 1.) The Court subsequently appointed counsel to represent Movant in these proceedings, (D.E. 3), and on January March 16, 2020, Movant filed the instant Amended 2255 Motion, (D.E. 5). The Government filed a Response, (D.E. 11), to which Movant filed a Reply, (D.E. 13).

The Court later issued an Order staying this case pending the Supreme Court's decision in United States v. Taylor, 141 S. Ct. 2882 (2021) (granting certiorari). On June 21, 2022, the Supreme Court issued an opinion in Taylor. __ U.S. __, 142 S. Ct. 2015 (2022), holding that attempted Hobbs Act robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s elements clause. On June 29, 2022, the Court lifted the stay and reopened the case. (D.E. 20.) The Motion is ripe for disposition.

II. Legal Standard

Pursuant to 28 U.S.C. § 2255, a prisoner in federal custody may move the court which imposed the sentence to vacate, set aside, or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. See United States v. Jordan, 915 F.2d 622, 625 (11th Cir. 1990). However, "[a] second or successive motion must be certified . . . by a panel of the appropriate court of appeals to contain" either:

> **(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C).

The Court of Appeals' determination is limited. See Jordan v. Sec'y, Dep't of Corrs., 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that the court of appeals' determination that an applicant has made a prima facie showing that the statutory criteria have been met is simply a threshold determination). If the Court of Appeals authorizes the applicant to file a second or successive 2255 Motion, "'[t]he district court is to decide the [§ 2255(h)] issue[s] fresh, or in the legal vernacular, de novo.'" In re Moss, 703 F.3d 1301,

1303 (11th Cir. 2013) (quoting Jordan, 485 F.3d at 1358). Only if the district court concludes that the applicant has established the statutory requirements for filing a second or successive motion will it "proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise." Id.

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on a final judgment under 28 U.S.C. § 2255 are extremely limited. See Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004). If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

Under the procedural default rule, a defendant is generally barred from raising claims in a 2255 proceeding that could have been raised on direct appeal, but were not. Lynn, 365 F.3d at 1234 ("Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding.") (citations omitted). "This rule generally applies to all claims, including constitutional claims." Id. (citing Reed v. Farley, 512 U.S. 339, 354 (1994)). To overcome a procedural default arising from a claim that could have been, but was not raised on direct appeal, the movant must demonstrate either: (1) cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error; or (2) actual innocence. Id. See also McKay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011). The actual innocence exception "is exceedingly narrow in scope, as it concerns a petitioner's 'actual' innocence rather than his

'legal' innocence." Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001) (citation omitted).

Finally, the burden of proof is on Movant to establish that vacatur of the conviction or sentence is required. Beeman v. United States, 871 F.3d 1215, 1222 (11th Cir. 2017), reh'g and reh'g en banc denied, 899 F.3d 1218 (11th Cir. 2018), cert. denied, 139 S. Ct. 1168 (2019); Rivers v. United States, 777 F.3d 1306, 1316 (11th Cir. 2015); LeCroy v. United States, 739 F.3d 1297, 1321 (11th Cir. 2014). "In a section 2255 motion, a petitioner has the burden of sustaining his contentions by a preponderance of the evidence." Wright v. United States, 624 F.2d 557, 558 (5th Cir. 1980) (citations omitted).[2]

III. Discussion

As a threshold matter, the Court must determine de novo whether Movant has carried his burden under 28 U.S.C. § 2255(h) of showing that he is entitled to file a second or successive 2255 Motion. See In re Moss, 703 F.3d at 1303 (quoting Jordan, 485 F.3d at 1358). As relevant here, the Court must determine whether Movant's Motion contains a claim involving "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2).

In his Motion, Movant asserts that the Supreme Court's decision in Davis invalidates his convictions under 18 U.S.C. §§ 924(c) and (o). (See Mot. at 6-13.) Pursuant to 18 U.S.C. § 924(c), any person who possesses a firearm in furtherance of "any crime of

[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

violence or drug trafficking crime . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . be sentenced to a term of imprisonment of not less than 5 years[.]" 18 U.S.C. § 924(c)(1)(A)(i).[3] As used in Section 924(c), "crime of violence" means:

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

18 U.S.C. § 924(c)(3).[4] Subsection (A) is commonly referred to as the "elements" clause (or, sometimes, the "force" or "use-of-force" clause), while subsection (B) is commonly referred to as the "residual" clause. See Solomon v. United States, 911 F.3d 1356, 1358 (11th Cir. 2019).

In Davis, the Supreme Court held that Section 924(c)(3)(B)'s residual clause is unconstitutionally vague. 139 S. Ct. at 2336 (2019). In In re Hammoud, the Eleventh Circuit held that Davis announced a new substantive rule of constitutional law retroactively applicable to cases on collateral review. 931 F.3d 1032, 1038 (11th Cir. 2019).

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[3] Section 924(o) criminalizes conspiring to commit an offense under Section 924(c). 18 U.S.C. § 924(o) ("A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.").

[4] As used in Section 924(c), "drug trafficking crime" means "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46." 18 U.S.C. § 924(c)(2).

Accordingly, the Court finds that Movant is entitled to file a second or successive 2255 Motion challenging his Section 924(c) and (o) convictions under Davis.

To succeed on his Davis claim, Movant must establish that his § 924(c) and (o) convictions were predicated exclusively on an offense (or offenses) that could only qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(B)'s now-invalid residual clause.

Movant was found guilty in Count 5 of conspiracy to possess and use or carry a firearm during and in furtherance of a crime of violence and a drug trafficking crime—and specifically, "the crimes charged in Counts 1 through 4"—in violation of 18 U.S.C. § 924(o). (Jury Verdict at 2.) He was found guilty in Count 6 of possessing and using or carrying carry a firearm during and in furtherance of a crime of violence and a drug trafficking crime—and specifically, the crimes "the crimes charged in Counts 1 through 4"—in violation of 18 U.S.C. § 924(c)(1)(A). (Id. at 3.) As will be recalled, Count 1 charged Movant with conspiracy to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. § 846; Count 2 charged Movant with attempt to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 846 and 2; Count 3 charged Movant with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a); and Count 4 charged Movant with attempted Hobbs Act robbery in violation of 18 U.S.C. §§ 1951(a) and 2. (Id. at 1-4.) The jury found Movant guilty of each of these crimes. (See Cr- D.E. 218.)

Conspiracy to possess with intent to distribute cocaine (Count 1) and attempt to possess with intent to distribute cocaine (Count 2) qualify as valid drug-trafficking predicate offenses for purposes of Section 924(c). In re Navarro, 931 F.3d 1298, 1302

(11th Cir. 2019); see also United States v. Isnadin, 742 F.3d 1278, 1307-08 (11th Cir. 2014) (affirming conviction for possession of a firearm during a drug trafficking crime under 18 U.S.C. § 924(c) and conspiracy to use and carry a firearm during and in relation to a drug trafficking crime under 18 U.S.C. § 924(o) based upon predicate offense of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846). Conspiracy to commit Hobbs Act robbery (Count 3) and attempted Hobbs Act robbery (Count 4) do not qualify as a crimes of violence under 924(c)(3)(A)'s elements clause (and are not drug-trafficking crimes). Taylor, 142 S. Ct. at 2020-21; Brown, 942 F.3d at 1075-76.

Movant argues that he is entitled to relief under Davis because although his "§ 924(o) and (c) convictions in Counts 5 and 6 are supported by multiple predicates, the predicate offense of conspiracy to commit Hobbs Act robbery, which is not a 'crime of violence' under § 924(c)(3)(A), is the operative predicate here." (Mot. at 9 (citing Brown v. United States, 942 F.3d 1069, 1075-76 (11th Cir. 2019)).) He argues (incorrectly) that the Court cannot know which predicate offense(s) the jury used to support the firearm convictions because his Indictment is duplicitous and the jury rendered a "general verdict" without specifying which predicate offense supported the firearm convictions. (Id. at 10.) He argues that the Court cannot engage in "judicial factfinding" on the issue, (id. (citing In re Gomez, 830 F.3d 1225, 1228 (11th Cir. 2016) (citing Alleyne v. United States, 570 U.S. 99 (2013)))), and the Court "must use the predicate offense of conspiracy, which does not qualify under the elements clause and is therefore the least culpable offense, to analyze the § 924(c) convictions[,]" (id.). He further argues that this approach is supported by Shepard v. United States, 544 U.S. 13 (2005) and Stromberg v. California, 283 U.S. 359 (1931).

(Id. at 11.) He further argues that even if his conviction for attempted Hobbs Act robbery is the operative predicate, he should be entitled to relief because courts "have determined that attempted Hobbs Act robbery can be committed without the use, attempted use, or threatened use of physical force."[5] (Id. at 12-13 (citations omitted).)

The Government initially argues that this claim is procedurally defaulted because Movant failed to raise it on direct appeal, and he cannot establish cause to excuse the default, prejudice resulting from the default, or that he is actually innocent of Counts 5 and 6. (Resp. at 7-14.) The Government further argues that the claim fails on the merits because Counts 5 and 6 listed drug trafficking crimes as predicate offenses, and the jury found Movant guilty of those drug trafficking crimes.[6] (Id. at 14-15.) The Government argues that Movant failed to carry his burden of establishing that the jury relied solely on the Hobbs Act conspiracy predicate, and not one of his drug trafficking predicates, because the Jury Verdict explicitly found, as to Count 5, that Defendant conspired to possess and use or carry a firearm during and in furtherance of "the crimes charged in Counts 1 through 4," and, as to Count 6, that Defendant possessed and used or carried a firearm during and in furtherance of "the crimes charged in Counts 1 through 4." (Id. at 15 (quoting Jury

[5] As stated above, the Supreme Court has since issued its opinion in Taylor holding that attempted Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A)'s elements clause. 142 S. Ct. at 2021. In doing so, the Supreme Court abrogated the Eleventh Circuit's decision in United States v. St. Hubert, 909 F.3d 335, 352-53 (11th Cir. 2018), which held that attempted Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A)'s elements clause.

[6] The Government also argues that under St. Hubert, Defendant's conviction for attempted Hobbs Act robbery is a valid predicate for the Section 924(c) and (o) offenses. (Resp. at 14.) However, as stated in Note 5, supra, in Taylor, 142 S. Ct. at 2020-21, the Supreme Court abrogated the holding in St. Hubert.

Verdict, Cr-D.E. 218 at 2-3).) The Government further argues that the "categorical approach" is not relevant to the Court's inquiry. (Id. at 16-18.) It further argues that Alleyne is not relevant to the Court's inquiry because "[t]he predicate for a Section 924(c)/924(o) conviction does nothing to increase a statutory mandatory minimum—it is simply an element of the crime and results in either a valid or invalid conviction." (Id. at 18.) It further argues that Brown is distinguishable because in that case, conspiracy to commit Hobbs Act robbery was the only possible § 924(c) predicate, whereas Movant was convicted of two drug-trafficking offenses in addition to the Hobbs Act offenses. (Id. at 18-19.) The Government further argues that the drug trafficking offenses are inextricably intertwined with the Hobbs Act offenses, and thus Defendant cannot prove that the jury relied solely on the Hobbs Act offenses when convicting him of the 924(c) and (o) offenses. (Id. at 19-21 (discussing In re Cannon, 931 F.3d 1236, 1238-44 (11th Cir. 2019)).) Specifically, it argues that

> [t]here is no reasonable interpretation of these facts that would support the argument that Rolon and his conspirators conspired to possess, use, or carry a firearm in their conspiracy to rob the drug traffickers of cocaine, but somehow did not do so in their conspiracy/attempt to possess with intent to distribute that same cocaine they were conspiring to rob (or in their attempted robbery). These crimes are all intertwined and were committed as part of one scheme to rob the drugs. Rolon simply cannot show otherwise.

(Id. at 21.) As such, the Government argues that Movant "has not met his burden under Beeman and In re Cannon to show that his § 924(c) and § 924(o) convictions rested solely on the now-invalidated residual clause." (Id.) It further argues that even if Movant did meet his burden, "the Supreme Court plainly allows for courts to look back at the record

through the heightened Brecht[7] standard of harmless error review which, for the reasons outlined above, he cannot meet." (Id. (citing United States v. Driscoll, 892 F.3d 1127, 1135-36 (10th Cir. 2018)).)

In his Reply, Defendant largely reiterates the arguments asserted in his Motion. He argues that if "Hobbs Act conspiracy must be treated as the operative § 924(o) and (c) predicate, then he would be actually innocent of those convictions, overcoming any default." (D.E. 13 at 2 (citing Bousley v. United States, 523 U.S. 614, 623 (1998); Murray v. Carrier, 477 U.S. 478, 496 (1986)); id. at 18 (citing United States v. Reece, 938 F.3d 630, 634 n. 3 (5th Cir. 2019)).) Applying the "categorical approach," he argues that Hobbs Act conspiracy must be treated as the operative predicate for the firearm offenses because it is the "lease culpable offense[.]" (Id. at 3 (citing Gomez, 830 F.3d 1225); id. at 5 (citing Shepard, 544 U.S. 13); id. at 11 (citing Stromberg, 283 U.S. 359).) Movant further argues that "the errors complained of here—the constitutional defects in Mr. Rolon's § 924(o) and (c) convictions—is not structural error[,]" and Movant has met the Brecht standard of showing that the error substantially influenced the jury's verdict. (Id. at 12-13.) He argues (incorrectly) that "no one can know what the jury actually relied on when it found Mr. Rolon guilty on Counts 5 and 6—the § 924(o) and (c) counts." (Id. at 13.) Movant further argues that Beeman was "wrongly decided" and "has no application to Davis-based challenges to § 924(c) convictions and sentences based upon duplicitous indictments and

[7] Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

general jury verdicts[,]" but in any event, he has met the Beeman standard. (Id. at 14-15.) He further argues that the Government relies on dicta from In re Cannon. (Id. at 16-18.)

a. Procedural default

First, the Court finds that Movant's Davis claim is procedurally defaulted. Granda, 990 F.3d at 1285-86. "[A] defendant generally must advance an available challenge to a criminal conviction on direct appeal or else the defendant is barred from raising that claim in a habeas proceeding." Fordham v. United States, 706 F.3d 1345, 1349 (11th Cir. 2013). In Granda, the Eleventh Circuit held that that the movant had procedurally defaulted on his Davis claim because he "did not argue in the trial court, or on direct appeal, that his § 924(o) conviction was invalid since the § 924(c)(3)(B) residual clause was unconstitutionally vague." 990 F.3d at 1285-86. Here, too, Movant failed to raise this issue to the trial court or the Eleventh Circuit on direct appeal. See United States v. Rolon, 445 F. App'x 314 (11th Cir. 2011); United States v. Rolon, 511 F. App'x 883 (11th Cir. 2013). Consequently, his claim is procedurally defaulted and he cannot succeed in these 2255 proceedings "unless he can either (1) show cause to excuse the default and actual prejudice from the claimed error, or (2) show that he is actually innocent of the" § 924(c) and (o) convictions. Granda, 990 F.3d at 1286.

Here, Movant has not argued "cause and prejudice," and the Court finds that he has failed to show cause for the default and actual prejudice from the claimed error. Id. at 1286-88 (holding that the movant could not establish cause to excuse the procedural default of his Davis claim because a vagueness challenge to Section 924(c)(3)(B)'s residual clause was not so novel that its legal basis was not reasonably available during his direct appeal);

id. at 1288-91 (holding that the movant could not establish actual prejudice from the claimed error because the invalid predicate offense (conspiracy to commit Hobbs Act robbery) was "inextricably intertwined" with valid predicate offenses (including conspiracy and attempt to possess cocaine with intent to distribute, and attempted carjacking), such that the movant could not show "a substantial likelihood that the jury relied solely on [the Hobbs Act conspiracy offense] to predicate its conviction" on the 924(o) offense).

Because Defendant has not shown cause and prejudice, "his only way around procedural default would be to establish that he is actually innocent of the" § 924(c) and (o) convictions. Id. at 1291-92. To demonstrate actual innocence, Movant "would have to show that no reasonable juror would have concluded he [possessed or] conspired to possess a firearm in furtherance of any of the valid predicate offenses." Id. at 1292. Movant cannot do so, given the "overwhelming corpus of evidence" of his possession and plan to possess a firearm in furtherance of an attempted robbery of a cocaine stash house as part of a conspiracy and attempt to possess with the intent to distribute the cocaine. Id. Nor does he try. Instead, as in Granda, he admits that his "actual innocence" argument "rises and falls with the merits of Mr. Rolon's Davis claim: if Count 3 is the operative predicate[], then Mr. Rolon is 'actually innocent' of Counts 5 and 6." (Reply at 18.) But, as in Granda, the fact that his valid predicate offenses (i.e., the drug-trafficking offenses in Counts 1 and 2) are inextricably intertwined with his invalid predicate offenses (i.e., conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery) "makes it impossible for [Movant] to show that his § [924(c) and (o)] conviction[s] w[ere] in fact based on the"

invalid Hobbs Act predicates. Granda, 990 F.3d at 1292. To remove any doubt, the Jury's Verdict explicitly predicated the 924(c) and (o) offenses on "the crimes charged in Counts 1 through 4[,]" (Jury Verdict at 2-3 (emphasis added)), which includes the valid drug-trafficking offenses (in addition to the invalid Hobbs Act offenses).

Because Movant cannot show cause, prejudice, or actual innocence, he cannot overcome procedural default. Granda, 990 F.3d at 1292.

b. Merits

Even assuming arguendo that Movant's claim is not procedurally defaulted, the Court finds that the claim fails on the merits.

Davis claims are subject to harmless error review. Id. at 1292-96; see also Weston v. United States, 853 F. App'x 375, 378 n.2 (11th Cir. 2021). Specifically, collateral relief on a Davis claim is proper only if the court has "grave doubt" about whether a trial error had "substantial and injurious effect or influence" in determining the verdict. Id. (quoting Davis v. Ayala, 576 U.S. 257, 267-68 (2015)). There must be more than a reasonable possibility that the error was harmful; the Court may grant relief "only if the error 'resulted in actual prejudice'" to the movant. Id. (quoting Brecht, 507 U.S. at 637). Thus, Movant must show a "substantial likelihood" that the Court "did rely only" on Section 924(c)(3)(B)'s now-invalid residual clause. Id. at 1290. See also Weston, 853 F. App'x at 378.

The record does not provoke grave doubt about whether Movant's 924(c) and (o) convictions rested on an invalid ground. As explained above, Movant's invalid predicate offenses (conspiracy and attempt to commit Hobbs Act robbery) were inextricably

intertwined with the valid predicate offenses (conspiracy and attempt to possess with intent to distribute cocaine). There is little doubt that if the jury found that Movant possessed and conspired to possess a firearm in furtherance of his conspiracy to commit Hobbs Act robbery and attempt to commit Hobbs Act robbery, it also found that he possessed and conspired to possess a firearm in furtherance of the drug-trafficking predicates of which the jury convicted him. Granda, 990 F.3d at 1293. To remove any doubt, the Jury's Verdict explicitly predicated the 924(c) and (o) offenses on "the crimes charged in Counts 1 through 4[,]" (Jury Verdict at 2-3 (emphasis added)), which includes the valid drug-trafficking offenses (in addition to the invalid Hobbs Act offenses).

Because (1) the jury explicitly based Movant's § 924(c) and (o) convictions on valid drug-trafficking predicate offenses (in addition to invalid Hobbs Act offenses), and (2) the valid drug-trafficking predicates are, in any event, inextricably intertwined with invalid Hobbs Act predicates, Movant cannot carry his burden of showing a substantial likelihood that the Court relied on Section 924(c)(3)(B)'s now-invalid residual clause.

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Order of Referral to the Magistrate Judge (D.E. 2) is **VACATED**;

2. Movant Julio Rolon's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (D.E. 5) is **DENIED**;

3. A Certificate of Appealability **SHALL NOT ISSUE**;

4. All pending motions are **DENIED AS MOOT**; and

5. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 21st day of March, 2023.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE