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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Clerk of Court

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November 16, 2023

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

Appeal Number: 23-11967-H
Case Style: Rodolfo Ortiz v. USA
District Court Docket No: 1:19-cv-23752-JAL
Secondary Case Number: 09-cr-20710-JAL-1

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
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
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. 23-11967

RODOLFO ORTIZ,

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. 1:19-cv-23752-JAL

ORDER:

Rodolfo Ortiz moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion. 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, 484-85 (2000). Because Ortiz has failed to make the requisite showing, his motion for a COA is DENIED.

/s/ Robert J. Luck

UNITED STATES CIRCUIT JUDGE

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-23752-CIV-LENARD/VALLE
(Criminal Case No. 09-20710-Cr-Lenard)

RODOLFO ORTIZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

THIS CAUSE is before the Court following the Court's Order Denying Movant Rodolfo Ortiz'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 10th day of April, 2023.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-23752-CIV-LENARD/VALLE
(Criminal Case No. 09-20710-Cr-Lenard)

RODOLFO ORTIZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING AND SUPPLEMENTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE (D.E. 29), DENYING MOTION TO VACATE § 924(c) AND § 924(o) CONVICTIONS AND SENTENCE UNDER 28 U.S.C. § 2255 (D.E. 8), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on the Report and Recommendation of Magistrate Judge Alicia O. Valle issued March 8, 2023. ("Report," D.E. 29.)[1] Movant Rodolfo Ortiz filed Objections on March 22, 2023, ("Objections," D.E. 30), to which the Government filed a Response on March 30, 2023, ("Response," D.E. 31). Upon review of the Report, Objections, Response, and the record, the Court finds as follows.

I. Background

The facts giving rise to Movant's criminal case were summarized by the Eleventh Circuit Court of Appeals 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. [#]").

On July 31, 2009, Defendants [Julio] Rolon and 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 8: 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 8. ("Jury Verdict," Cr-D.E. 217.) 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 8; 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 8, 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. 253.)

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. 332.) The Court entered a written Amended Judgment the same day. (Cr-D.E. 334.) Movant appealed, and the Eleventh Circuit affirmed. United States v. Rolon, 511 F. App'x 883 (11th Cir. 2013).

On March 21, 2013, Movant filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, (Cr-D.E. 356), which was assigned Civil Case No. 13-21028-Civ-Gold ("Ortiz I"). On October 1, 2014, the case was reassigned to Judge Ursula Ungaro. Ortiz I, D.E. 30. On August 5, 2015, Judge Ungaro issued an Order denying the 2255 Motion and closing the case. Id., D.E. 43. Movant filed a Motion for Reconsideration, id., D.E. 46, which Judge Ungaro denied, id. D.E. 47). Movant appealed, id., D.E. 48, but the Eleventh Circuit denied Movant a Certificate of Appealability and dismissed the appeal, id., D.E. 59.

On July 13, 2016, Movant filed a second Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, (Cr-D.E. 375), which was assigned Civil Case No. 16-23035-Civ-Lenard ("Ortiz II"). On October 5, 2018, the Court entered an Order dismissing

the second 2255 Motion as an unauthorized second or successive 2255 Motion, denying a certificate of appealability, and closing the case. Ortiz II, D.E. 17. Movant filed a Motion for Rehearing/Reconsideration, id. D.E. 19, which the Court denied, id., D.E. 20.

On September 6, 2019, 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), which held that the "residual clause" definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. (Cr-D.E. 383; D.E. 1.) The Court subsequently appointed counsel to represent Movant in these proceedings, (D.E. 4), and on October 28, 2019, Movant filed the instant Amended 2255 Motion, (D.E. 8). Therein, Movant argues that in light of Davis, he is actually innocent of the firearm offenses charged in Counts 5 and 6. (Id. at 1-2.) Specifically, he argues that one of the offenses predicating his firearm convictions in Counts 5 and 6—conspiracy to commit Hobbs Act robbery (as charged in Count 3)—does not qualify as a crime of violence under § 924(c)(3)(A)'s "elements" clause, and therefore the Court should vacate his convictions for Counts 5 and 6. (Id. at 1-2.) The Government filed a Response, (D.E. 11), to which Movant filed a Reply, (D.E. 12). The Court referred the Motion (as amended) to Judge Valle for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. (D.E. 14.) Thereafter, Movant filed a Supplemental Brief, (D.E. 16), to which the Government filed a Response, (D.E. 18). In his Supplemental Brief, Movant argued, inter alia, that "a defendant's challenge to a § 924(c) conviction on grounds that the purported 'crime of violence' is not – as a matter of

law – a 'crime of violence,' is a jurisdictional claim that cannot be waived." (D.E. 16 at 10 (citing United States v. St. Hubert, 909 F.3d 335, 340-44 (11th Cir. 2018)).)

On August 24, 2021, Judge Valle issued an Order staying this case pending the Supreme Court's decision in United States v. Taylor, 141 S. Ct. 2882 (2021) (granting certiorari). (D.E. 21.) 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. Judge Valle solicited a Joint Status Report on Taylor's effect on these proceedings, (D.E. 24), and the Parties filed a Joint Status Report on September 19, 2022, (D.E. 27).

On March 8, 2023, Judge Valle issued her Report and Recommendation. (D.E. 29.) Initially, Judge Valle found that the claimed error is not jurisdictional. (Id. at 10-11 (citing Worldly v. United States, 2023 WL 1775723, at *4 (11th Cir. 2023)).) Next, Judge Valle found that the Davis claim was procedurally defaulted because Movant did not challenge the use of the Hobbs Act offenses as predicate crimes of violence for his §§ 924(c) and (o) convictions on direct appeal, and Movant failed to establish cause for this failure or actual prejudice resulting from it, (id. at 11-15 (citing Granda v. United States, 990 F.3d 1272 (11th Cir. 2021))), and further failed to establish that he was actually innocent of Counts 5 and 6, (id. at 15-16). Finally, Judge Valle found that even if Movant could overcome the procedural default, any error was harmless. (Id. at 16-17 (citing Granda, 990 F.3d at 1294).)

On March 22, 2023, Movant filed Objections, (D.E. 30), to which the Government filed a Response, (D.E. 31).

II. Legal Standard

a. Report and recommendations

Upon receipt of the Magistrate Judge's Report and Movant's Objections, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); accord Fed. R. Civ. P. 72(b)(3). The court must conduct a de novo review of any part of the Report that has been "properly objected to." Fed. R. Civ. P. 72(b)(3); see 28 U.S.C. § 636(b)(1) (providing that the district court "shall make a de novo determination of those portions of the [R & R] to which objection is made"). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988). Those portions of a magistrate judge's report and recommendation to which no objection has been made are reviewed for clear error. See Lombardo v. United States, 222 F. Supp. 2d 1367, 1369 (S.D. Fla. 2002); see also Macort v. Prem, Inc., 208 F. App'x 781, 784 (11th Cir. 2006) ("Most circuits agree that [i]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.") (internal quotation marks and citations omitted). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

b. 28 U.S.C. § 2255

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). Pursuant to Section 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). Thus, relief under Section 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, 365 F.3d at 1232 (quotation marks and citations omitted). 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]

[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.

III. Discussion

a. 28 U.S.C. § 2255(h): New rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable

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—an issue Judge Valle did not specifically address. 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 5-16.) Pursuant to 18 U.S.C. § 924(c), any person who possesses a firearm in furtherance of "any crime of 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—

[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.").

> (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). 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.

b. Procedural default

Movant objects to Judge Valle's conclusion that his Davis claim is non-jurisdictional and therefore subject to procedural default. He further argues that the Court should grant a Certificate of Appealability as to whether he can establish "cause and prejudice" or "actual innocence" to excuse any default.

[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).

1. Movant's Davis claim is not jurisdictional

Movant initially objects to Judge Valle's conclusion that his Davis claim is non-jurisdictional. (Obj. at 2-5 (citing United States v. Bane, 948 F.3d 1290, 1294 (11th Cir. 2020); St. Hubert, 909 F.3d at 340-44; United States v. Peter, 310 F.3d 709, 711-16 (11th Cir. 2002); Abraham v. United States, Case No. 20-24980-Civ-Huck, D.E. 17 at 2 (S.D. Fla. June 10, 2021); Wainwright v. United States, Case No. 19-62634-Civ-Cohn, D.E. 22 at 28-29 (S.D. Fla. Apr. 6, 2020); Adside v. United States, 19-24475-Civ-Huck, D.E. 19 at 8 (S.D. Fla. Sept. 25, 2020); Wright v. United States, Case No. 19-24060-Civ-Huck, D.E.11 (S.D. Fla. Oct. 7, 2020)).) He further objects to Judge Valle's reliance on Worldly, because the opinion is unpublished and no other Court has cited it. (Id. at 5.)

Upon de novo review, the Court agrees with Judge Valle that Movant's Davis challenge is not jurisdictional and is therefore subject to procedural default. "It is true that a movant on collateral review can avoid the procedural default bar altogether 'if the alleged error is jurisdictional.'" Williams v. United States, 2022 WL 1214141, at *3 (11th Cir. 2022) (quoting Bane, 948 F.3d at 1294). "Although a district court has the statutory power under 18 U.S.C. § 3231 to adjudicate the prosecution of federal offenses, [the Eleventh Circuit has] held 'that a district court lacks jurisdiction when an indictment alleges only a non-offense.'" Id. (quoting Peter, 310 F.3d 709, 715-16 (11th Cir. 2002)). "'So long as the indictment charges the defendant with violating a valid federal statute as enacted in the United States Code, it alleges an 'offense against the laws of the United States' and, thereby, invokes the district court's subject-matter jurisdiction.'" Id. (quoting United States v. Brown, 752 F.3d 1344, 1354 (11th Cir. 2014)).

Movant was charged in Count 5 with 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 set forth in Counts 1 through 4 of the Indictment—in violation of 18 U.S.C. § 924(o). (Indictment at 4.) He was charged in Count 6 with 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 set forth in Counts 1 through 4 of the Indictment—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.)

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) and (o). 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.

On virtually indistinguishable facts, the Eleventh Circuit has repeatedly held that a movant cannot demonstrate that his indictment alleged only a "non-offense" where, as here, the 924(o) and/or (c) counts allege both invalid Hobbs Act predicates and valid drug trafficking predicates. Veliz v. United States, 2023 WL 2506680, at *2 (11th Cir. 2023); Worldly, 2023 WL 1775723, at *3-4; Rosello v. United States, 2022 WL 12144331, at *3 (11th Cir. 2022); Williams, 2022 WL 1214141, at *3; United States v. Torres, 2022 WL 894545, at *3 (11th Cir. 2022); Aviles v. United States, 2022 WL 1439333, at *4 (11th Cir. 2022); Wright v. United States, 2022 WL 130832, at *5 (11th Cir. 2022).[5] In each of these cases, the Eleventh Circuit concluded that the Movant's Davis challenge was not jurisdictional and was therefore subject to procedural default. Veliz, 2023 WL 2506680, at *4; Worldly, 2023 WL 1775723, at *3-4; Rosello, 2022 WL 12144331, at *3; Williams, 2022 WL 1214141, at *3; Torres, 2022 WL 894545, at *3; Aviles, 2022 WL 1439333, at *4; Wright, 2022 WL 130832, at *5. Although these unpublished opinions are non-binding, see United States v. Izurieta, 710 F.3d 1176, 1179 (11th Cir. 2013) (citing 11th Cir. R. 31-1, IOP 6), the Court is persuaded by their reasoning and adopts it. Consequently,

[5] Although Movant cites Wright v. United States, Case No. 19-24060-Civ-Huck, D.E.11 (S.D. Fla. Oct. 7, 2020), as authority supporting his argument that the claimed error is jurisdictional, the Eleventh Circuit reversed Judge Huck's conclusion that the claimed error is jurisdictional, and remanded with instructions to deny Wright's 2255 motion. Wright v. United States, 2022 WL 130832, at *3-4.

the Court finds that Movant's Davis challenge is not jurisdictional and is therefore subject to procedural default.

2. Movant cannot establish an excuse for the procedural default

Next, Movant argues that the Court should grant a Certificate of Appealability on whether he can establish "cause and prejudice" or "actual innocence" to excuse the default. (Obj. at 5-12.)

To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under [Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983)], includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ''adequate to deserve encouragement to proceed further.''" Slack v. McDaniel, 429 U.S. 473, 483-84 (2000).

A. Cause and actual prejudice

Movant argues that reasonable jurists could debate whether "cause" exists to excuse the procedural default because there is a circuit split on the issue. (Obj. at 6-8.) He further argues that reasonable jurists could debate whether he suffered actual prejudice from a Davis error. (Id. at 8-9.)

i. Cause

First, Movant argues that reasonable jurists could debate whether "cause" exists to excuse the procedural default because there is a circuit split on the issue. (Obj. at 6.) He concedes that this Court is bound by the Eleventh Circuit's opinion in Granda, 990 F.3d at 1286-88, which held that a 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.) However, he argues that other circuits hold that under Reed v. Ross, 468 U.S. 1, 15 (1984), a movant can establish cause to excuse the default where "near-unanimous circuit precedent foreclosed a claim, when the Supreme Court overrules its own precedent, or both." (Id. at 7 (citations omitted). He argues that this rule would apply here. (Id. at 7-8.)

However, on virtually indistinguishable facts, the Eleventh Circuit explicitly rejected Movant's argument that any alleged circuit split warrants the issuance of a COA. Aviles, 2022 WL 1439333, at *4. In Aviles, the Eleventh Circuit explained that "a COA shall not issue if the claim is foreclosed by binding precedent." 2022 WL 1439333, at *4 (citing Hamilton v. Sec'y, Fla. Dep't of Corrs., 793 F.3d 1261, 1266 (11th Cir. 2015)). Here, Movant's claim is foreclosed by Granda, 990 F.3d at 1286-88, which is binding upon this Court. Accordingly, he is not entitled to a COA on whether "cause" exists to excuse the procedural default. Aviles, 2022 WL 1439333, at *4. See also Torres, 2022 WL 894545, at *4 ("Granda . . . forecloses Torres's argument that he can establish cause and prejudice to overcome his procedural default.").

Because Movant cannot establish cause to excuse the default, the Court need not address whether a COA is warranted on the issue of actual prejudice. See Engle v. Isaac, 456 U.S. 107, 134 n.43 (1982) ("Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice.").

However, even if Movant could establish cause to excuse the default, the Court would find that Movant is not entitled to a COA on the issue of "actual prejudice."

ii. Actual prejudice

Even if Movant could establish cause to excuse the default, the Court would find that Granda forecloses his claim of "actual prejudice." 990 F.3d 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). Movant's attempt to distinguish Granda on the basis that Movant's sentence as to Count 6 runs consecutively to his other sentences, whereas Granda's § 924(o) sentence ran concurrently with his other sentences, is meritless. (See Obj. at 8-10.) That Movant's sentence for Count 6 runs consecutively to his other sentences is irrelevant to whether the Hobbs Act offenses were inextricably intertwined with the valid drug-trafficking offenses. See Granda, 990 F.3d at 1288-91.

The Court further notes that Movant's claim of actual prejudice is particularly meritless because the jury 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).

Regardless, because Granda forecloses Movant's actual innocence claim, he is not entitled to a COA on the issue. See Torres, 2022 WL 894545, at *4 ("Granda . . . forecloses Torres's argument that he can establish cause and prejudice to overcome his procedural default.").

B. Actual innocence

Movant concedes that Granda forecloses his claim of actual innocence, (Obj. at 10), but argues that the Court should issue a COA because "[r]easonable jurists can debate, and indeed have debated, whether a claim of action [sic] innocence based on a new statutory interpretation like that in Davis and Taylor – what Granda defines as 'legal innocence,' . . . – can excuse a procedural default[,]" (id.)

However, as explained in Section III(b)(2)(A), supra, "a COA shall not issue if the claim is foreclosed by binding precedent." Aviles, 2022 WL 1439333, at *4 (citing Hamilton, 793 F.3d at 1266). Here, Movant's claim is (concededly) foreclosed by Granda, 990 F.3d at 1291-92, which is binding upon this Court. Accordingly, he is not entitled to a COA on his claim of actual innocence. See Torres, 2022 WL 894545, at *4 (noting that the movant conceded that Granda foreclosed his actual innocence claim).

c. Merits

Finally, Movant argues that the Court should issue a COA as to whether he is entitled to relief on the merits because, in his view, "Granda employed an incorrect legal standard." (Obj. at 12.)

However, as explained in Section III(b)(2)(A), supra, "a COA shall not issue if the claim is foreclosed by binding precedent." Aviles, 2022 WL 1439333, at *4 (citing

Hamilton, 793 F.3d at 1266). Here, Movant's Davis claim is foreclosed by Granda, 990 F.3d at 1292-96, which is binding upon this Court. Accordingly, Movant is not entitled to a COA on the merits of his claim.

IV. Conclusion

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

1. The Report and Recommendation of the Magistrate Judge issued March 8, 2023, (D.E. 29), is **ADOPTED** as supplemented herein;
2. Movant Rodolfo Ortiz's Motion to Vacate § 924(c) and § 924(o) Convictions and Sentences under 28 U.S.C. § 2255 (D.E. 8) is **DENIED**;
3. A Certificate of Appealability **SHALL NOT ISSUE**; and
4. All pending motions are **DENIED AS MOOT**; and
5. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 10th day of April, 2023.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-CV-23752-LENARD/VALLE
(CASE NO. 09-CR-20710-LENARD)

RODOLFO ORTIZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION TO DISTRICT JUDGE

This matter is before the Court on Movant Rodolfo Ortiz's Motion to Vacate Judgment and Sentence, filed pursuant to 28 U.S.C. § 2255 (the "Motion") (CV-ECF Nos. 1, 8).[1] United States District Judge Joan A. Lenard has referred the Motion to the undersigned for a Report and Recommendation, pursuant to 28 U.S.C. § 636. (CV-ECF Nos. 13, 14).

After due consideration of the Motion, Respondent's Response (CV-ECF No. 11), Movant's Reply (CV-ECF No. 12), Movant's Supplemental Brief (CV-ECF No. 16), Respondent's Response to Supplemental Brief (CV-ECF No. 18), the parties' Joint Status Report (CV-ECF No. 27), and all pertinent portions of the underlying criminal file, the undersigned recommends that the Motion be **DENIED** without an evidentiary hearing. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

[1] For ease of reference, citations to the underlying criminal case, No. 09-CR-20710-LENARD, will include "CR" preceding the docket number entry. Citations to the civil docket for this Motion will have a "CV" preceding the docket number entry.

I. FACTUAL SUMMARY

The facts underlying the criminal case are fully set forth in the Eleventh Circuit's opinion affirming Movant's convictions, which is incorporated by reference. (CR-ECF No. 306 at 4-7); *see also Ortiz v. United States*, No. 13-CV-21028 (S.D. Fla. Nov. 19, 2013) (ECF No. 10 at 7-9). In brief, Movant and his co-conspirators were arrested for participating in a conspiracy to steal cocaine from a "stash house." The "stash house" was fictional, and the purported disgruntled drug courier was, in fact, an undercover Miami-Dade police detective (the "undercover detective").

The events that led to Movant's arrest began when an unnamed confidential informant ("CI") told law enforcement that Movant was seeking help to rob a marijuana grow house. Following this tip, the undercover detective arranged a meeting with Movant. At their first meeting, the undercover detective told Movant and co-conspirator Julio Rolon that he: (i) was a cocaine courier; (ii) typically transported between twenty and twenty-five kilograms of cocaine per delivery; (iii) had not been paid for his recent deliveries; and (iv) wanted to rob the stash house where he brought his deliveries without arousing suspicion that he had participated in the robbery. Movant advised the undercover detective that he would bring in a third man (co-conspirator Federico Dimolino) to help with the robbery, that he and his associates were "professionals," and that each of them would be armed and wearing police badges. Rolon added that he would bring either a .9-millimeter Glock or an AR-15 assault rifle and not hesitate to "blow up someone's head" if necessary. The men agreed to split the stolen drugs amongst themselves. In a subsequent meeting, Movant assured the undercover detective that he had previously committed home invasion robberies.

On the day of the planned robbery, the CI arranged to meet Movant at a gas station, which was under law enforcement surveillance. There, Movant and Rolon provided the CI with a black

t-shirt with the letters "DEA" on the front, a black ski mask, a pair of black latex gloves, and other police apparel. Movant and Rolon then followed the CI to the purported stash house, where they believed the CI was picking up a vehicle. Instead, they were arrested upon arrival.

Following the arrests, law enforcement searched Rolon's car and recovered black hats with the words "Narcotics" and "Police" on them, black t-shirts with "DEA" on one side and "Police" on the other side, black ski masks, a box of latex gloves, eighteen wire tie straps, three law enforcement badges, a .9-millimeter Ruger handgun and magazine loaded with fifteen rounds of ammunition, and a .9-millimeter Smith & Wesson handgun and magazine loaded with twelve rounds of ammunition. Police recovered similar items, including a Ruger .357 Magnum revolver, from co-conspirator Dimolino's car. After his arrest, Movant admitted that he had intended to rob twenty-five kilograms of cocaine from the fictional stash house and that he planned the robbery. Movant claimed responsibility for the loaded handguns found in Rolon's car.

II. PROCEDURAL BACKGROUND

A. Criminal Proceedings

Movant and his co-conspirators were charged in a ten-count Indictment. Movant was charged in seven of the ten counts with: (i) conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846 (Count 1); (ii) attempted possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii), and 846 (Count 2); (iii) conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 3); (iv) attempted Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Count 4); (v) conspiracy to use and carry a firearm during and in relation to a crime of violence and a drug-trafficking crime, in violation of 18 U.S.C. § 924(o) (Count 5); (vi) using and carrying a firearm during and in relation to a crime of violence

and a drug-trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Count 6); and (vii) being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1) (Count 8). *See generally* (CR-ECF No. 15) (Indictment). Relevant to the Motion, Counts 5 and 6 (charging violations of 18 U.S.C. §§ 924(o) and (c), respectively) listed Counts 1, 2, 3, and 4 as predicate offenses.[2] *See id*. at 3-4.

Although co-defendant Dimolino pled guilty, Movant and co-defendant Rolon proceeded to trial. *See generally* (CR-ECF Nos. 93, 191-93). Relevant to Counts 5 and 6, the Court instructed the jury that Movant was charged with conspiring and using/carrying a firearm in "two separate ways:" (i) in furtherance of a crime of violence; and (ii) in connection with a drug trafficking crime. (CR-ECF No. 212 at 17, 20) (Jury Instruction Nos. 11, 12). The Court further instructed the jury that to find Movant guilty, "you must all agree on which of the two ways, if any, [Movant] violated the law." *Id*. After six days of trial, the jury found Movant guilty on all seven counts. (CR-ECF No. 217) (Jury Verdict). As to Counts 5 and 6, the verdict sheet reflects that the jury relied on "the crimes charged in Counts 1 through 4" as predicate offenses for the §§ 924(c) and (o) counts. (CR-ECF No. 217 at 2-3).

Movant appealed his conviction on several grounds. *See generally* (CR-ECF No. 306) (Eleventh Circuit's order affirming convictions). Relevant to the Motion, Movant challenged the District Court's jury instruction on Counts 5 and 6 as having constructively amended the Indictment by using the disjunctive ("or") instead of the conjunctive ("and") as alleged in the Indictment. *Id.* at 27-32. Movant, however, did not challenge Counts 5 and 6 on the basis that

[2] By way of background, §§ 924(c) and (o) make it a crime to possess or conspire to possess a firearm in furtherance of a crime of violence or drug-trafficking crime, respectively. 18 U.S.C. §§ 924(c), (o). The statute defines the term "crime of violence" in two ways, known as the elements clause and the residual clause. *Wordly v. United States*, No. 22-10166, 2023 WL 1775723, at *2 (11th Cir. Feb. 6, 2023).

Count 3 (conspiracy to commit Hobbs Act robbery) or Count 4 (attempted Hobbs Act robbery) did not qualify as "crimes of violence" and were invalid predicates for Counts 5 and 6, or whether the term "crimes of violence" was unconstitutionally vague. (CV-ECF No. 11 at 7); (CV-ECF No. 12 at 2).

The Eleventh Circuit rejected Movant's challenge to the jury instruction on Counts 5 and 6, and affirmed the lower court's rulings on all but one sentencing issue, which was subsequently corrected on remand.[3] On remand, the District Court amended Movant's sentence to concurrent life sentences on Counts 1, 2, and 8; 240 months in prison on Counts 3, 4, and 5, all to run concurrently; and a consecutive term of life on Count 6. *See* (CR-ECF No. 334) (Amended Judgment).

B. Postconviction Proceedings

In 2013, Movant filed his initial § 2255 motion (the "Initial Motion"). *Ortiz v. United States*, No. 13-CV-21028 (S.D. Fla. Mar. 21, 2013) (ECF No. 1). In the Initial Motion, Movant raised 13 grounds for relief. *Ortiz*, No. 13-CV-21028 (ECF No. 10 at 2-3). However, as in his direct appeal, Movant did not argue that conspiracy to commit Hobbs Act robbery or attempted Hobbs Act robbery were not "crime[s] of violence" under § 924(c) or (o) or that the "crimes of violence" provisions were unconstitutionally vague. *See id.* A magistrate judge issued a report recommending that the Initial Motion be denied. *Id.* The District Judge adopted the magistrate judge's recommendation and ultimately denied a Certificate of Appealability. *Ortiz*, No. 13-CV-21028 (ECF Nos. 43, 48, 56, 57).

[3] The Eleventh Circuit found that Movant's sentence on Count 5 had exceeded the statutory 20-year maximum and remanded for resentencing on that issue only. (CR-ECF No. 306 at 10 n.4, 44).

In July 2016, Movant filed a second § 2255 motion. *Ortiz v. United States*, No. 16-CV-23035 (S.D. Fla. July 13, 2016) (ECF No. 1). In this second motion, Movant challenged, among other things, his §§ 924(c) and (o) convictions and sentences on the ground that, following *Johnson v. United States*, 576 U.S. 591 (2015), attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery no longer qualified as crimes of violence. *Id.* at 4-6. The District Judge dismissed Movant's second motion because he had not obtained authorization from the Eleventh Circuit to file a successive petition, as required by 28 U.S.C. § 2244(b)(3). (ECF No. 17); *see also* (CR-ECF No. 381 at 1-2).

Three years later, in August 2019, Movant sought leave from the Eleventh Circuit to bring this Motion, now his third § 2255 application, to challenge his conviction on Counts 5 and 6 pursuant to *United States v. Davis*, 139 S. Ct. 2319 (2019). (CV-ECF No. 1 at 20-28). The Eleventh Circuit granted leave, limited to Movant's claim that the "[§§] 924(c) and (o) convictions were predicated on multiple offenses, including one that has not been determined to qualify as a crime of violence . . . ." (CV-ECF No. 1 at 8). In so doing, the appeals court concluded that Movant "ha[d] made a prima facie showing that he is entitled to relief under *Davis*," noting that this was a "narrowly circumscribed" threshold determination that left it to the district court to "determine *de novo* whether [the] *Davis* challenge to [the] § 924(o) conviction met the requirements of § 2255(h)(2)." (CV-ECF No. 1 at 9) (quoting *In re Cannon*, 931 F.3d 1236, 1244 (11th Cir. 2019)). The appellate court further noted that "[e]ven if the district court concludes that a conspiracy to commit Hobbs Act robbery constitutes a predicate crime under § 924(c) only under the statute's now invalid residual clause, the movant still bears the burden of proving the likelihood that the jury based its verdict of guilty . . . solely on the Hobbs Act conspiracy, and not also on one of the other valid predicate offenses identified in the count . . . ." (CV-ECF No. 1 at 10) (quoting

In re Cannon, 931 F.3d at 1243) (alterations in original and internal quotation marks omitted). Thus, the appellate court concluded that because the convictions on Counts 5 and 6 were tied to multiple predicate offenses, some of which may not be valid predicate offenses, and the jury rendered a general verdict, Movant may have been sentenced under the now-invalid residual clause of § 924(c)(3)(B). (CV-ECF No. 1 at 10). The instant Motion followed.

Thereafter, in August 2021, Movant filed an unopposed motion to stay his § 2255 proceeding pending the Supreme Court's decision in *United States v. Taylor*, 142 S. Ct. 2015 (2022). (CV-ECF No. 22). In *Taylor*, the Supreme Court ultimately held that attempted Hobbs Act robbery is not a "crime of violence" under § 924(c)'s elements clause because it can be committed by an attempted threat of force, which is not a use of force, attempted use of force, nor a threatened use of force. *Taylor*, 142 S. Ct. at 2020-21. With *Taylor* decided, the stay in Movant's case should be lifted, and the Motion is ripe for review.

III. LEGAL STANDARD FOR HABEAS RELIEF

§ 2255 allows a federal prisoner to move the sentencing court to vacate or set aside his sentence if: (i) its imposition violates the Constitution or laws of the United States; (ii) the sentencing court lacked jurisdiction; (iii) it exceeds the maximum authorized by law; or (iv) it is otherwise subject to collateral attack. 28 U.S.C. § 2255(a); *Samak v. Warden, FCC Coleman-Medium*, 766 F.3d 1271, 1278 (11th Cir. 2014) (Pryor, J., concurring); *see also McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011) (citing 28 U.S.C. § 2255(a)). Nonetheless, because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to § 2255 are narrowly limited. *See United States v. Frady*, 456 U.S. 152, 165 (1982). Thus, "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) (per curiam) (internal quotation marks omitted). In turn, "miscarriage of justice" requires a showing that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent . . . ." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Before determining whether a § 2255 claim is cognizable, the district court must determine whether the movant exhausted all available claims on direct appeal. *See Lynn*, 365 F.3d at 1232 (citing *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994)). Next, the district court must consider whether the type of relief sought is appropriate under § 2255. *Id.* at 1232-33 (citations omitted). To be sure, to obtain relief on collateral review, a movant must "clear a significantly higher hurdle than would exist on direct appeal." *Frady*, 456 U.S. at 166. Lastly, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro*, 550 U.S. at 474 (2007).

Also relevant to the Motion are two recently decided Supreme Court cases: *Davis* and *Taylor*. In *Davis*, the Supreme Court held that the residual clause in § 924(c) was unconstitutionally vague.[4] *See Davis*, 139 S. Ct. at 2326-27, 2336. Consequently, any § 924(c) conviction "predicated solely" upon conspiracy to commit Hobbs Act robbery (as alleged in Count 3) is no longer valid pursuant to *Davis*. *Id.* at 1076. More recently, in *Taylor*, the Supreme Court held that attempted Hobbs Act robbery (as alleged in Count 4) does not qualify as a "crime of

[4] Relatedly, the Eleventh Circuit has held that *Davis* is retroactively applicable to criminal cases on collateral review and could form the basis of a valid, successive § 2255 motion. *In re Hammoud*, 931 F.3d 1032, 1039 (11th Cir. 2019). Additionally, in *Brown v. United States*, the Eleventh Circuit concluded that "conspiracy to commit Hobbs Act robbery does not qualify as a 'crime of violence,'" as defined by § 924(c)'s elements clause. 942 F.3d 1069, 1075 (11th Cir. 2019).

violence" under the elements clause.[5] 142 S. Ct. at 2021. Together, *Taylor* and *Davis* establish that a § 924(c) or (o) conviction, as in Counts 5 and 6, is invalid if its *sole* predicate is conspiracy to commit Hobbs Act robbery or attempted Hobbs Act robbery, as alleged in Counts 3 and 4, respectively. *See Madison v. United States*, No. 19-14132, 2022 WL 3042848, at *1 (11th Cir. Aug. 2, 2022) (vacating defendant's § 924(c) conviction "based on attempted Hobbs Act robbery" since "*Taylor* governs").

IV. ARGUMENTS

In the Motion, Movant asserts that he is entitled to vacatur of his §§ 924(c) and (o) convictions on Counts 5 and 6 and his consecutive sentence of life imprisonment on the § 924(c) count (Count 6) because these convictions are predicated solely on the conspiracy to commit Hobbs Act robbery or attempted Hobbs Act robbery, both of which have been held invalid predicate offenses under *Davis* and *Taylor*, respectively. *See* (CV-ECF No. 27 at 1-2) (explaining Movant's position in the Joint Status Report that "there is at least a substantial likelihood . . . that the jury *actually relied* only on one of the Hobbs Act predicates—and not also on either of the drug trafficking predicates.") (internal quotation marks omitted). Although Movant acknowledges that he did not raise this claim on direct appeal, (CV-ECF No. 12 at 2), he nonetheless argues that he can establish cause and prejudice *and* actual innocence to excuse his procedural default. *Id.* at 2-9; (CV-ECF No. 16 at 14-18); (CV-ECF No. 27 at 2-3). Lastly, Movant argues that his claim cannot be procedurally defaulted because it is jurisdictional in nature. (CV-ECF No. 16 at 10-11).

[5] The Court's ruling expressly rejected the Eleventh Circuit's reasoning in *United States v. St. Hubert*, 909 F.3d 335, 352-53 (11th Cir. 2018), that "the elements clause encompasses not only any offense that qualifies as a 'crime of violence' but also any attempt to commit such a crime." *Taylor*, 142 S. Ct. at 2021.

Respondent opposes the Motion on several grounds. First, Respondent asserts that Movant procedurally defaulted on the *Davis* and *Taylor* claim by not challenging on direct appeal the propriety of the Hobbs Act counts (Counts 3 and 4) as predicate "crimes of violence" for Counts 5 and 6. (CV-ECF No. 11 at 6-7); (CV-ECF No. 18 at 4); (CV-ECF No. 27 at 4). Second, Respondent argues that there is no equitable exception that would excuse the default because Movant cannot show: (i) cause and prejudice; or (ii) actual innocence. (CV-ECF No. 11 at 7-11); (CV-ECF No. 18 at 5-10); (CV-ECF No. 27 at 4-7). According to Respondent, the convictions on Counts 5 and 6 are predicated on two remaining and still valid drug-trafficking convictions in Counts 1 and 2. (CV-ECF No. 11 at 11-15); (CV-ECF No. 27 at 6-7). Lastly, Respondent argues that Movant's challenge is not jurisdictional. (CV-ECF No. 18 at 10-11). For the reasons discussed below, the undersigned finds that Movant has procedurally defaulted on his claim, has not established cause and prejudice or actual innocence to excuse the default, and that his challenge is not jurisdictional. Accordingly, the Motion should be denied.

V. ANALYSIS

A. The Claimed Error is Not Jurisdictional

A movant can avoid the procedural default bar altogether and raise a claim for the first time on collateral review (without demonstrating cause and prejudice or actual innocence) if he can show that the alleged error is jurisdictional. *See United States v. Bane*, 948 F.3d 1290, 1294 (11th Cir. 2020); *Wordly*, 2023 WL 1775723, at *3-4 (affirming district court's finding that *Davis* error was not jurisdictional). Here, Movant argues that because two of the predicate offenses on which Counts 5 and 6 were based are no longer "crimes of violence," his Indictment is flawed and contains allegations of conduct not covered under §§ 924(c) and (o). (CV-ECF No. 16 at 10). Respondent, on the other hand, argues that the Indictment is still valid because it lists other valid

predicate offenses on which Movant's §§ 924(c) and (o) charges (Counts 5 and 6) could rest. (CV-ECF No. 18 at 11).

Respondent's argument is persuasive. Movant's argument ignores the fact that the §§ 924(c) and (o) charges and resulting convictions remain supported by two still-valid drug-trafficking predicates in Counts 1 and 2. *See Wordly*, 2023 WL 1775723, at *4 ("Because [the movant] could lawfully have been convicted on [§§ 924(c) and (o) charges] based on one of several valid predicates . . . , his conduct was within the scope of § 924(o), and the indictment properly invoked the district court's jurisdiction.") (citations omitted). Here, because Counts 1 and 2 are valid drug-trafficking predicates on which Counts 5 and 6 can still validly rest, Movant's challenge is not jurisdictional. *Granda v. United States*, 990 F.3d 1272, 1288-89 (11th Cir. 2021) (explaining that a § 924(c) conviction is "legally valid" if supported by at least one valid predicate, despite the presence of invalid predicates), *cert. denied*, 142 S. Ct. 1233 (2022). Thus, the Indictment properly invoked the District Court's jurisdiction.

Therefore, because the Indictment properly invoked the District Court's jurisdiction, Movant must either show: (i) cause to excuse the default and actual prejudice from the claimed error; or (ii) that he is actually innocent of his convictions on Counts 5 and 6.

B. Movant Cannot Establish Cause and Prejudice

Movant concedes that he did not challenge on direct appeal the use of attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery (Counts 3 and 4) as predicate "crime[s] of violence" for his §§ 924(c) and (o) convictions (Counts 5 and 6). (CV-ECF No. 12 at 2). Under the procedural default rule, however, "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) (citation

omitted). As discussed above, the default can only be excused if one of two exceptions applies: (i) Movant can show cause and actual prejudice; or (ii) Movant can show actual innocence. *Id.* As discussed below, Movant has failed to establish any exception that would excuse his procedural default.

First, Movant cannot show "cause" for his failure to attack the constitutionality of his §§ 924(c) and (o) convictions on direct appeal because Movant had "the building blocks" to make a due process vagueness challenge to the § 924(c) residual clause. *See Granda*, 990 F.3d at 1287 (noting that the movant had "the building blocks [to make] a due process vagueness challenge to the § 924(c) residual clause.") (internal quotation marks omitted). Indeed, a movant's failure to raise a constitutional claim on direct appeal can be excused only when the claim "is so novel that its legal basis is not reasonably available to counsel . . . ." *Id.* at 1286 (quoting *Howard v. United States*, 374 F.3d 1068, 1072 (11th Cir. 2004)). Here, however, as the Eleventh Circuit found in *Granda*, Movant possessed the tools necessary to raise vagueness challenges to his §§ 924(c) and (o) convictions. *See, e.g.*, *Parker v. United States*, 993 F.3d 1257, 1265 (11th Cir. 2021); *Hartsfield v. United States*, No. 20-CV-20362, 2022 WL 4295979, at *3-4 (S.D. Fla. Sept. 19, 2022) (discussing the long history of vagueness challenges to residual clauses like the one at issue).

Movant argues, however, that *Granda* was wrongly decided and that this Court should instead follow the Eighth Circuit's decision in *Jones v. United States*, 39 F.4th 523 (8th Cir. 2022), which permits a movant to establish cause to excuse his failure to raise a *Davis* challenge on appeal. (CV-ECF No. 27 at 3). The undersigned declines Movant's invitation to ignore binding Eleventh Circuit case law. *See, e.g.*, *United States v. Torres*, No. 20-14416, 2022 WL 894545, at *4 (11th Cir. Mar. 28, 2022) (concluding that *Granda* foreclosed the movant's "argument that he can establish cause and prejudice to overcome his procedural default"); *Hartsfield*, 2022 WL 4295979,

at *6 (noting that "*Granda* definitively and unquestionably forecloses [a movant] from arguing that the 'cause and prejudice' exception applies . . . ."); *Wordly*, 2021 WL 5310732, at *6 (concluding that the district court "is bound by the Eleventh Circuit's decision in *Granda*").

Next, because Movant cannot show cause, the Court need not address whether "actual prejudice" exists. *See, e.g.*, *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982) ("Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice."); *Cannon v. United States*, No. 19-CV-23145, 2021 WL 5114822, at *3 (S.D. Fla. Oct. 13, 2021) (declining to address actual prejudice when movant failed to establish cause); *Wordly*, 2021 WL 5310732, at *8 ("Having found that [the movant could not] show cause for failing to raise this issue at trial or on appeal, the court need not address whether [the movant] can show actual prejudice."). Nonetheless, in the interest of completeness, the undersigned will briefly address Movant's argument that he can establish actual prejudice.

"Actual prejudice means 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." *Granda*, 990 F.3d at 1288 (quoting *Fordham*, 706 F.3d at 1350). This standard is "more stringent than the plain error standard." *Id.* (quoting *Parks v. United States*, 832 F.2d 1244, 1245 (11th Cir. 1987)). Under the circumstances of this case, Movant cannot establish a substantial likelihood that the jury relied *only* on his convictions for conspiracy to commit Hobbs Act robbery and attempt to commit Hobbs Act robbery as predicates for Counts 5 and 6 because the jury also convicted Movant of two still-valid predicate drug-trafficking crimes in Counts 1 and 2 (conspiracy and attempt to possess cocaine with intent to distribute).

Here, the trial evidence reflects that Movant's convictions rested on the same set of operative facts and were thus inextricably intertwined. *See Foster v. United States*, 996 F.3d 1100,

1107 (11th Cir. 2021) (concluding that the movant could not prevail because his "Hobbs Act conspiracy was inextricably intertwined with [his] conspiracy and attempt to possess with intent to distribute cocaine"); *see also Parker*, 993 F.3d at 1263 (concluding that it was "undeniable on [the] record" that the movant's "valid drug trafficking predicates [were] inextricably intertwined with the invalid Hobbs Act conspiracy predicate"). Based on the interrelated evidence, the jury could not have concluded that Movant conspired to possess a firearm in furtherance of the conspiracy to commit and attempt to commit robbery without also finding that he conspired to possess the firearm in furtherance of his conspiracy and attempt to obtain and distribute the cocaine. *See Granda*, 990 F.3d at 1292 (concluding that the "tightly bound factual relationship of the predicate offenses preclude[d] [the movant] from showing [on collateral attack] a substantial likelihood that the jury relied solely on" the invalid predicate); *Torres*, 2022 WL 894545, at *4 (explaining that because all of movant's predicates "[were] inextricably intertwined, arising out of the same cocaine robbery scheme," movant could not establish that he was convicted only on invalid predicates); *Rodriguez v. United States*, No. 20-CV-22003, 2020 WL 9549856, at *9-10 (S.D. Fla. Oct. 28, 2020) (finding that the interrelatedness of the trial evidence negated movant's argument that it was more likely than not that the jury based his §§ 924(c) and (o) convictions solely on the now invalid predicates); *cf. Hartsfield*, 2022 WL 4295979, at *7-8 (finding "actual innocence" and excusing procedural default where no valid predicate remained after *Davis* and *Taylor*).

The Eleventh Circuit's holding in *United States v. Cannon*, 987 F.3d 924 (11th Cir. 2021), further supports the undersigned's conclusion. In *Cannon*, the defendants were convicted of several crimes, including using and carrying a firearm during and in relation to a drug trafficking crime in violation of § 924(c), for participating in a scheme to rob a cocaine stash house. *Id.* at

933-34, 936. As in Movant's case, the indictment in *Cannon* listed both an invalid predicate offense (conspiracy to commit Hobbs Act robbery) and a valid predicate offense (conspiracy to possess cocaine with intent to distribute) for the § 924(c) charge. *Id.* at 934, 946-47. Like Movant, the movants in *Cannon* argued that because the jury returned a general verdict, the court could not know whether the jury relied on the now-invalid Hobbs Act robbery conspiracy predicate or the still-valid cocaine conspiracy predicate. *Id.* at 947. The Eleventh Circuit, however, found that the trial evidence established that the cocaine the movants in *Cannon* planned to steal was the same cocaine they were planning to possess with intent to distribute. *Id.* at 948. Thus, the appeals court concluded that "no reasonable juror could have found that [defendants] carried their firearms in relation to the Hobbs Act robbery conspiracy but not the cocaine conspiracy." *Id.* The undersigned finds that the Eleventh Circuit's logic in *Cannon* also applies here and, therefore, reaches a similar conclusion.

C. Movant cannot Establish Actual Innocence

Movant also argues that his default should be excused because he is "actually innocent" on the §§ 924(c) and (o) charges. (CV-ECF No. 12 at 23); (CV-ECF No. 27 at 3). The actual innocence exception is "exceedingly narrow in scope" and requires Movant to show that he is factually innocent of the charge against him; legal insufficiency is not enough. *Lynn*, 365 F.3d at 1235 n.18; *accord Torres*, 2022 WL 894545, at *4 ("Actual innocence means factual innocence, not mere legal innocence."). To establish actual innocence, Movant must demonstrate that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted).

To meet this standard as to the §§ 924(c) and (o) offenses, Movant would have to show that no reasonable juror would have concluded that he conspired to possess a firearm in furtherance

of any of the two remaining valid drug-trafficking predicate offenses (Counts 1 and 2). But as discussed above, Movant's convictions for conspiracy and attempt to possess cocaine with intent to distribute (Counts 1 and 2), and his convictions for conspiracy to commit Hobbs Act robbery and attempt to commit Hobbs Act robbery (Counts 3 and 4) all rested on the same set of interrelated facts. *See supra* Part IV.B. Because still-valid drug-trafficking predicate offenses remain, and the evidence on all the crimes of conviction is inextricably intertwined, Movant cannot show that his §§ 924(c) and (o) convictions were based *solely* on the now invalid Hobbs Act predicates.

Accordingly, since Movant cannot establish either cause and prejudice or actual innocence, Movant cannot overcome procedural default, and his claim for relief is barred.

D. Any Error is Harmless

Finally, even if Movant could overcome his procedural default, he could not prevail on the merits of his claim. For the same reason Movant cannot show actual innocence (i.e., because the evidence on all counts was inextricably intertwined), the inclusion of an invalid predicate offense in the Indictment and jury instructions was harmless.

Under the harmless error analysis applicable on collateral review, "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." [6] *Granda*, 990 F.3d at 1294 (quoting *Davis v. Ayala*, 576 U.S. 257, 267-68 (2015)); *accord Brecht*, 507 U.S. at 623 ("[T]he standard for determining whether habeas relief must be granted is whether the [] error had substantial and

[6] Movant argues that the harmless error analysis established in *Stromberg v. California*, 283 U.S. 359 (1931), controls and requires the Court to vacate his §§ 924(c) and (o) convictions. (CV-ECF No. 16 at 5-9); (CV-ECF No. 27 at 3). But that is not the correct standard. In *Hedgpeth v. Pulido*, 555 U.S. 57 (2008), the Supreme Court rejected the application of *Stromberg* to general verdict cases such as this one, holding that the proper test is that set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See Rodriguez*, 2020 WL 9549856, at *9, 11.

injurious effect or influence in determining the jury's verdict.") (internal quotation marks omitted); *see also Rodriguez*, 2020 WL 9549856, at *9, *11 (applying *Brecht* harmless error analysis in movant's habeas challenge to his §§ 924(c) and (o) convictions); *Cannon*, 2021 WL 5114822, at *3 (same). There must be more than a reasonable possibility that the error was harmful. *Ayala*, 576 U.S. at 268. Under the *Brecht* analysis, reversal is warranted only when the movant suffered "actual prejudice" from the error. *Brecht*, 597 U.S. at 637 (internal quotation marks omitted). Thus, it is proper for the reviewing court to look at the record to determine whether the invalid predicate "actually prejudiced" the movant (i.e., actually led to his conviction), or whether the jury instead also found the movant was guilty based on another valid predicate. *Granda*, 990 F.3d at 1294. The burden to show that the jury relied solely on an invalid predicate rests squarely on the movant. *Cannon*, 2021 WL 5114822, at *3.

The record in this case does not provoke grave doubt whether Movant's §§ 924(c) and (o) convictions rested solely on the invalid Hobbs Act predicates. As explained in greater detail above, the evidence pertaining to Movant's conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery was inextricably intertwined with the evidence supporting the drug-trafficking predicate offenses. Under these circumstances, where valid predicates remain, the inclusion of conspiracy to commit Hobbs Act robbery or attempted Hobbs Act robbery as a potential predicate was harmless. *See Cannon*, 987 F.3d at 949 (noting that the trial record made clear that no rational juror could have found that defendants carried firearms in connection with a conspiracy to rob a cocaine stash house but not also in connection with a conspiracy to possess with intent to distribute the cocaine to be taken from the house).

Thus, even if Movant could overcome his procedural default, he could not prevail on the merits because he did not suffer harm.

VI. CONCLUSION

For the reasons discussed above, the undersigned finds that Movant procedurally defaulted his only claim for relief. Accordingly, the undersigned respectfully **RECOMMENDS** that the Motion be **DENIED** without an evidentiary hearing. The undersigned further recommends that a Certificate of Appealability also be **DENIED** because reasonable jurists would not find the denial to be debatable, and Movant has not made a substantial showing of denial of a constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *see also* 28 U.S.C. § 2253(c)(2).

Within 14 days after being served with a copy of this Report and Recommendation, a party may serve and file specific written objections to the above findings and recommendations as provided by the Local Rules for this District. *See* 28 U.S.C. § 636(b)(1); S.D. Fla. Mag. R. 4(b). Failure to timely object waives the right to challenge on appeal the District Court's order based on unobjected-to factual and legal conclusions contained in this Report and Recommendation. 11th Cir. R. 3-1 (2022); *see also Thomas v. Arn*, 474 U.S. 140, 149 (1985).

DONE AND ORDERED at Chambers in Fort Lauderdale, Florida, on March 8, 2023.

Alicia O. Valle

ALICIA O. VALLE
UNITED STATES MAGISTRATE JUDGE

cc: U.S. District Judge Joan Lenard
All counsel of record