

APPENDIX

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A-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13775-H

AHMAD ADAMS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Ahmad Adams is a federal prisoner who is serving a total 180-month sentence, after pleading guilty to knowingly using or carrying a firearm during and in relation to a crime of violence—conspiracy to commit armed bank robbery—in violation of 18 U.S.C. § 924(c)(1)(A)(I) (Count 1), and knowingly using or carrying a firearm during and in relation to a crime of violence—conspiracy to commit armed bank robbery—in violation of § 924(c)(1)(A) and (c)(1)(C)(i) (Count 2). He now seeks a certificate of appealability (“COA”), following the denial of his counseled 28 U.S.C. § 2255 motion to vacate, which challenged his § 924(c) sentences as unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which struck down the residual clause of the Armed Career Criminal Act (“ACCA”) as unconstitutionally vague.

To merit a COA, Adams must demonstrate that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In this case, reasonable jurists would not debate the district court’s determination that the claim in Adams’s § 2255 motion was procedurally defaulted, as he did not establish cause and prejudice, or actual innocence, to excuse not raising the claim on direct appeal. See *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (stating that a defendant can overcome procedural default by establishing either (1) cause for the default and actual prejudice from the alleged error, or (2) that he is actually innocent of the crimes for which he was convicted).

The record reflects that Adams’s judgment was entered on March 26, 2009, and he did not pursue a direct appeal. Although Adams contends that he is actually innocent of the § 924(c) convictions, his argument fails because he has presented no new, reliable evidence that he is factually innocent of the crime. See *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (stating that, to show actual innocence, a movant must present new, reliable evidence that he is factually innocent of the crime of conviction). Rather, his actual-innocence argument is based on legal insufficiency, which does not satisfy the actual-innocence exception for overcoming the procedural default. See *Bousley v. United States*, 523 U.S. 614, 623 (1998).

As for his argument that the procedural default is excused because *Johnson* established the basis of a new claim that he could not have raised on direct appeal, this argument also fails because Adams’s claim is not cognizable under *Johnson*. Notably, at the time when the district court denied Adams’s § 2255 motion, we had yet to address the issue of whether the holding in *Johnson* extended to the language of § 924(c)(3)(B). See *In re Pinder*, 824 F.3d 977, 978-79 (11th Cir. 2016) (noting that “the law [was] unsettled” on whether the rule announced in *Johnson*

applies to the “very similar” language of § 924(c)(3)(B) defining a crime of violence as one that involves “substantial risk” of physical force”). However, we recently held that “*Johnson* does not apply to, or invalidate, the risk-of-force clause in § 924(c)(3)(B).” *Ovalles v. United States*, 861 F.3d 1257, 1265-66 (11th Cir. 2017).

Consequently, Adams’s underlying claim that the holding in *Johnson* applied to, and invalidated, § 924(c)’s risk-of-force clause is now foreclosed by binding circuit precedent. *See id.*; *see also Hamilton v. Sec’y, Fla. Dep’t of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (stating that no COA should issue where the claim is foreclosed by binding Circuit precedent because reasonable jurists will follow controlling law). Therefore, his argument that his procedural default was excused by cause and prejudice resulting from the *Johnson* decision fails, and reasonable jurists would not debate the denial of his § 2255 motion, and his motion for a COA is DENIED. *See* 28 U.S.C. § 2253(c)(2); *Hamilton*, 793 F.3d at 1266.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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October 17, 2017

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 17-13775-H
Case Style: Ahmad Adams v. USA
District Court Docket No: 9:16-cv-80974-DTKH
Secondary Case Number: 9:08-cr-80074-DTKH-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."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-80974-Civ-HURLEY
(08-80074-Cr-HURLEY)
MAGISTRATE JUDGE PATRICK A. WHITE

AHMAD ADAMS,

Movant,

v.

REPORT OF
MAGISTRATE JUDGE

UNITED STATES OF AMERICA,

Respondent.

_____ /

I. Introduction

The movant, **Ahmad Adams**, through counsel, filed this motion to vacate, as amended (Cv-DE#8), pursuant to 28 U.S.C. §2255, challenging the constitutionality of his §924(c) convictions and sentences entered, following a guilty plea, for violation of §924(c)(1)(A). Movant argues that armed bank robbery does not constitute a "crime of violence," because it does not have the element of physical force required to support the §924(c) convictions and sentences, following the Supreme Court's decision in Johnson v. United States,¹ 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), made retroactively applicable to cases on collateral review by Welch v. United States, 578 U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016).

This Cause has been referred to the Undersigned for

¹As everyone is well-aware, in Johnson, the Supreme Court held that the Armed Career Criminal Act's (ACCA) residual clause was unconstitutionally vague, and that imposing an enhanced sentence pursuant to that clause thus violates the Constitution's guarantee of due process. In Welch v. United States, 578 U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), the Supreme Court held that Johnson announced a substantive rule that applied retroactively on collateral review.

consideration and report pursuant to 28 U.S.C. §636(b)(1)(B), (C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges, S.D. Fla. Admin. Order 2003-19; and, Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the movant's operative motion, as amended (Cv-DE#8), the government's response (Cv-DE#13) thereto, the movant's traverse (Cv-DE#14), together with the Presentence Investigation Report ("PSI"), Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file under attack here, including the written plea agreement (Cr-DE#40), together with the change of plea (Cr-DE#53) transcript.²

II. Claim

The movant, through counsel, raises as a sole ground for relief that his §924(c) convictions are no longer lawful after the Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015), because armed bank robbery is no longer a qualifying predicate "crime of violence" offense.

III. Procedural History

By way of background, the movant was charged by Superseding Information with two counts of using or carrying one or more firearms during and in relation to a crime of violence, i.e., conspiracy to commit armed robbery of a federally insured bank, in violation of 18 U.S.C. §371, and armed robbery of a federally insured bank, in violation of 18 U.S.C. §2113(a) and (d) and 18 U.S.C. §2 (Counts 1-2). (Cr-DE#32). Count 1 arose out of conduct

²The undersigned takes judicial notice of its own records as contained on CM/ECF in those proceedings. See Fed.R.Evid. 201.

occurring on December 10, 2003, at a Wachovia Bank, located in West Palm Beach, Florida; and, Count 2 arose out of conduct occurring on May 11, 2004, at a Fidelity Federal Bank and Trust, in Boca Raton, Florida. (Cr-DE#s32,40).

On November 26, 2008, the movant entered into a negotiated, written plea agreement with the government, agreeing to plead guilty as charged in the Superseding Information. (Cr-DE#40:1-2). Movant understood the court must impose a 5-year minimum mandatory and up to a term of life imprisonment as to Count 1; and, as to Count 2, that the court must impose a 25-year minimum mandatory and up to a term of life imprisonment, which must run consecutive to any other term of imprisonment, including the sentence imposed in Count 1, followed by a term of up to 5 years supervised release. (Cr-DE#40:3). The plea agreement also contained cooperation language. (Id.:3-4)). Movant acknowledged that the sentence had not yet been determined by the court, and that any estimate received by his attorney, the government, or the probation officer is a prediction, not a promise, is not binding on the government, the probation office, or the court. (Id.:5). Movant also understood and agreed that he could not withdraw his plea based solely upon the court's decision not to accept a sentencing recommendation made by the parties. (Id.). Finally, movant acknowledged that he had the right to appeal the sentence imposed, pursuant to 18 U.S.C. §3742, but in exchange for the undertakings of the government, he agreed to waive the right to appeal the sentence imposed, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the guideline range the court establishes at sentencing. (Id.:5).

On December 9, 2008, a thorough Rule 11 change of plea

proceeding was conducted. (Cr-DE#53). At that time, the government proffered and the movant agreed (Cr-DE#53:33), that from November 10, 2003, federal and local law enforcement agencies had been investigating numerous armed takeover robberies of federally insured banks in Florida. (Id.:24). On December 10, 2003, the movant and his coconspirators entered a Wachovia Bank, located at 1950 Golden Lakes Boulevard, in West Palm Beach, Florida, with their guns drawn, ordering everyone therein to get onto the floor, as some of the robbers vaulted over the teller counter. (Id.:25). One of the robbers forced one of the tellers to the vault, but when the teller stated it could not be opened, the robber hit the teller on the head with the firearm. (Id.). The other robbers brandished firearms, including an assault rifle with a light kit. (Id.:25-26). One of the robbers, guarding the lobby, also hit a customer on the head with a firearm. (Id.:26). Money, however, was stolen from the teller drawers, including a bait pack and a dye pack. (Id.:25-26).

Relevant to the movant, a black nylon cap and a beige pillowcase recovered from inside a 2004 Intrepid, abandoned in the vicinity of the bank, was tested for DNA, and came back to the movant as the major source of DNA contained inside the cap. (Id.). That vehicle had been reported stolen from a Residence Inn in Boca Raton on December 10, 2003. (Id.). Two days after the Wachovia Bank robbery, the movant and two coconspirators were arrested after returning from a shopping spree in a stolen vehicle. (Id.:27-28). Movant possessed a large amount of cash, including some of the bait bills stolen during the Wachovia Bank robbery. (Id.:28).

A few months later, on May 11, 2004, movant and his coconspirators also robbed the Fidelity Federal Bank and Trust at 2400 North Federal Highway, in Boca Raton, Florida. (Id.:28). Bank employees stated that some of the robbers brandished firearms,

ordering everyone to the floor, while movant and a coconspirator vaulted over the teller counter, at which time the coconspirator grabbed a female employee by the hair, ordering her to open the vault. (Id.:28-29). Some of the robbers were armed with firearms, including a handgun and a mini, 14-type assault rifle, wore dark clothing, and covered their faces with masks. (Id.:31). When the employee stated she could not open it, because she did not have the vault key, the robber struck her on the head, then found the keys to the night deposit box, and forced that employee, together with another employee, to open the night deposit box, while others stole monies from the teller drawers. (Id.:29). Thereafter, the robbers left the bank with approximately \$43,461 in bank proceeds. (Id.). A green, stolen, Mercury vehicle, used as the getaway vehicle, was recovered behind a shopping plaza near the bank. (Id.). After processing the car and various pieces of clothing contained therein, a gray ski cap was tested for DNA, which came back to the movant as a major source of the DNA profile obtained from the cap. (Id.:30).

Upon conclusion of the Rule 11 proceeding, the court indicated that it was satisfied that the movant was competent to change his plea, and, that he understood the terms of the negotiated plea agreement. (Cr-DE#53:33-34). The court then found the movant's plea was knowing and voluntary, that there was an independent basis for establishing the elements of the offenses, and as such, accepted the plea, and adjudicated the movant guilty of the offenses as charged in the Superseding Information. (Id.:34).

Prior to sentencing, a PSI was prepared which reveals as follows. Pursuant to U.S.S.G. §2K2.4(a), since the movant was convicted for violation of 18 U.S.C. §924(c), the term of imprisonment is that required by statute. (PSI ¶66). Statutorily,

as to Count 1, the movant faced a minimum of 5-years and up to a term of life imprisonment; and, as to Count 2, he faced a 25-year minimum and up to a term of life imprisonment, to run consecutive to any other term of imprisonment, for violation of 18 U.S.C. §924. (PSI ¶65).

On March 13, 2009, movant appeared for sentencing. (Cr-DE#44). At that time, the movant was sentenced to a total term of 360 months imprisonment, consisting of: 60 months (5 years) imprisonment as to Count 1, and a consecutive term of 300 months (25 years) imprisonment as to Count 2, to be followed by a total of 5 years supervised release. (*Id.*). The judgment was entered on the docket on **March 26, 2009**. (Cr-DE#44). No direct appeal was prosecuted. Consequently, the conviction became final on **Monday, April 8, 2009**, ten days after the entry of the judgment, when time expired for filing a notice of appeal.³

Pursuant to the AEDPA, the movant had one year from the time his conviction became final, or no later than **April 8, 2010**⁴ within which to timely file this federal habeas petition. See Griffith v.

³Where, as here, a defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a direct appeal expires. Adams v. United States, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999). On December 1, 2009, the time for filing a direct appeal was increased from 10 to 14 days after the judgment or order being appealed is entered. Fed.R.App.P. 4(b)(1)(A)(i). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). Moreover, now every day, including intermediate Saturdays, Sundays, and legal holidays are included in the computation. See Fed.R.App.P. 26(a)(1). However, since movant was sentenced prior to the effective date of the amendment, he had ten business days, excluding intermediate Saturdays and Sundays, within which to file his notice of appeal. See Fed.R.App.P. 26(a)(1)(B).

⁴See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008) (citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)); see also, 28 U.S.C. §2255.

Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008) (citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)). Applying the anniversary method to this case means petitioner's limitations period expired on **April 8 2010**.

Movant returned to this court filing his initial, unexecuted \$2255 motion, on **June 8, 2016**, after he completed and then handed it to prison authorities for mailing in accordance with the mailbox rule.⁵ (Cv-DE#1:13). On **June 24, 2016**, the movant, through court appointed counsel, filed an amended \$2255 motion, raising essentially the same claim as that raised in his initial motion. (Cv-DE#8).

IV. Threshold Issues

A. Timeliness

The government does not contest that the movant's initial

⁵"Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1) ("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

§2255 motion (Cv-DE#1), and his amendment thereto (Cv-DE#8) are timely filed under §2255(f)(3), because they were filed on **June 8, 2016** and **June 24, 2016**, respectively, both within one year of the Supreme Court's **June 26, 2015** Johnson decision, made retroactively applicable to initially filed §2255 cases on collateral review by Welch v. United States, 578 U.S. ____, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). As explained by the Supreme Court in Welch v. United States:

[T]he rule announced in Johnson is substantive. By striking down the residual clause as void for vagueness, Johnson changed the substantive reach of the Armed Career Criminal Act, altering "the range of conduct or the class of persons that the [Act] punishes." Schriro, supra, at 353, 124 S.Ct. 2519. Before Johnson, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After Johnson, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under Johnson, so it can no longer mandate or authorize any sentence. Johnson establishes, in other words, that "even the use of impeccable factfinding procedures could not legitimate" a sentence based on that clause. United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971). It follows that Johnson is a substantive decision ... Johnson is thus a substantive decision and so has retroactive effect under Teague in cases on collateral review.

136 S. Ct. 1257, 1265 (2016). Here, it is readily apparent that the movant was not sentenced under the ACCA.

Since the Government waived the timeliness issue, the court need not decide whether Johnson restarted the AEDPA one-year clock under §2255(f)(3) as it pertains to a §924(c) claim; or, whether this proceeding is time-barred.⁶ Because the government does not challenge the timeliness of this proceeding, it has waived the statute of limitations defense from consideration by the court under United States v. Frady, 456 U.S. 162, 162, 167-68 (1982). See Wood v. Milyard, 132 S.Ct. 1826, 1833 n.5, 1835 (2012). In Wood, the Supreme Court held that a district court abuses its discretion by considering a statute of limitation defense that has been affirmatively waived, as opposed to merely forfeited. (Id.). See also In Re Jackson, 826 F.3d 1343, 1347 (11 Cir. 2016) (citing Day v. McDonough, 547 U.S. 198, 210, 126 S.Ct. 1675, 1684, 164 L.Ed.2d 376 (2006) and Wood v. Milyard, 132 S.Ct. 1826 (2012)).

B. Procedural Default

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding. Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)

⁶However, it is undisputed that the movant was not sentenced under the ACCA. Therefore, the issue becomes here whether Johnson's retroactivity applies given the procedural posture and facts of this case. In all likelihood, since the movant's claim is not premised on ACCA, but a challenge to his §924(c) conviction, this proceeding is likely time-barred because Johnson has no bearing on the "use of force" clause. However, because the government has waived the limitations issue in its response, the court will determine whether movant is entitled to habeas relief on the merits.

(citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010); Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004).

To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can be shown when a claim "is so novel that its legal basis was not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998); see also, Reed v. Ross, 468 U.S. 1, 16 (1984).

Further, a meritorious claim of ineffective assistance of counsel can constitute cause. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000). Ineffective assistance of counsel claims, however, are generally not cognizable on direct appeal and are properly raised by a §2255 motion regardless of whether they could have been brought on direct appeal. Massaro v. United States, 538 U.S. 500, 503, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); see also United States v. Patterson, 595 F.3d, 1324, 1328 (11th Cir. 2010). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

If a petitioner is unable to show cause and prejudice, another avenue may exist for obtaining review of the merits of a procedurally defaulted claim. Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a

fundamental miscarriage of justice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96; see also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Id. at 496; see also Bousley, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992) ("the miscarriage of justice exception is concerned with actual as compared to legal innocence").

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). In other words, the Supreme Court has found cause to excuse the procedural default in situations where a claim is not "reasonably available to counsel" at the time of appeal because of the Supreme Court's subsequent articulation of a previously unrecognized constitutional principle that is held to have retroactive application. See Reed, 468 U.S. at 16. The Supreme Court in Johnson overruled precedent, announced a new rule, and then gave retroactive application to that new rule. Thus, Johnson constitutes a new rule unavailable to defendants convicted before it was handed down by the Supreme Court on June 26, 2015.

Here, the movant is also unable to demonstrate actual prejudice to excuse the procedural default because, regardless of Johnson's applicability on the residual clause of §924(c), the

companion charges for armed bank robbery qualify as "crimes of violence," as discussed in detail below.

Where the merits of the claims may be reached and readily disposed of, judicial economy has dictated reaching the merits of the claim while acknowledging the procedural default and bar in the alternative. See Lambrix v. Singletary, 520 U.S. 518 (1997). See also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999) (stating that judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 528 U.S. 846 (1999); Chambers v. Bowersox, 157 F.3d 560, 564 n. 4 (8th Cir. 1998) (stating that "[t]he simplest way to decide a case is often the best.").

V. General Legal Principles

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to §2255 are extremely limited. A prisoner is entitled to relief under §2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28 U.S.C. §2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations omitted). The "fundamental miscarriage of justice" exception recognized in Murray v. Carrier, 477 U.S. 478, 496

(1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent"

The law is well established that a district court need not reconsider issues raised in a section 2255 motion which have been resolved on direct appeal. Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Mills v. United States, 36 F.3d 1052, 1056 (11th Cir. 1994); United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981). Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255. Nyhuis, 211 F.3d at 1343 (quotation omitted). Broad discretion is afforded to a court's determination of whether a particular claim has been previously raised. Sanders v. United States, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) ("identical grounds may often be proved by different factual allegations ... or supported by different legal arguments ... or couched in different language ... or vary in immaterial respects").

Post-conviction relief is available to a federal prisoner under §2255 where "the sentence was imposed in violation of the Constitution or laws of the United States, or ... the court was without jurisdiction to impose such sentence, or ... the sentence was in excess of the maximum authorized by law." 28 U.S.C. §2255(a); see Hill v. United States, 368 U.S. 424, 426-27 (1962). A sentence is "otherwise subject to collateral attack" if there is an error constituting a "fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979); Hill v. United States, 368 U.S. at 428.

Applicable Law re 18 U.S.C. §924(c)

Title 18 U.S.C. § 924(c) (1) (A) provides for enhanced statutory penalties in cases where, among other things, the defendant uses or carries a firearm during and in relation to any "crime of violence or drug trafficking crime." The statute further defines "crime of violence" as any felony that

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) 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) (A)-(B). Under §924(c), subsection (A) is known as the "use-of-force" or "elements" clause; and, subsection (B) is frequently referred to as the "residual clause." See e.g., In re Sams, 830 F.3d 1234, 1237 (11 Cir. 2016); In re Gordon, 827 F.3d 1289, 1293 (11 Cir. 2016). As such, §924(c) (3) contains a "residual clause," very similar to the residual clause declared unconstitutionally vague in Johnson.⁷ However, unlike the ACCA, which requires a 15-year mandatory minimum sentence for a defendant convicted of being a felon in possession of a firearm who also has three previous convictions for a "violent felony" or "serious drug offense", §924(c) imposes a 5-year mandatory consecutive sentence for any defendant who uses a firearm during a "crime of violence" or "drug trafficking crime." 18 U.S.C. §924(c) (1) (A) (i).

⁷The ACCA's residual clause that was held to be unconstitutionally vague in Johnson defines "violent felony" as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e) (2) (B) (ii).

In Johnson, the Supreme Court struck down a portion of the Armed Career Criminal Act's definition of "violent felony," finding part of 18 U.S.C. §924(e)(2)(B)(ii), the so-called "residual clause," to be void for vagueness. See Johnson, __ U.S. ___, ___, 135 S.Ct. at 2557-2560. In so ruling, the Supreme Court found the phrase "physical force" in paragraph (i) "means violent force--that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010) ("Johnson I"); see also, 18 U.S.C. §924(e)(2)(B)(ii). The Supreme Court in Johnson limited its holding to the ACCA's residual clause, holding that it "does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." Johnson, __ U.S. at ___, ___, 135 S.Ct. 2551, 2563. (2015).

As the Supreme Court noted, the term "violent felony" has been defined as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a deadly weapon, [and] calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." Id. (internal quotations and citations omitted); see also Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 383, 160 L. Ed. 2d 271 (2004) (stating that the statutory definition of "crime of violence," in 18 U.S.C. §16, is similar to §924(e)(2)(B)(i) because it includes any felony offense which has as an element the use of physical force against the person of another, and as such, "suggests a category of violent, active crimes...").

In addition, the Supreme Court has stated that the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" and, the phrase "use...of physical

force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9-10; see also United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force;" citing Leocal).

While the meaning of "physical force" is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the (statutory) elements of state crimes. Johnson I, 559 U.S. at 138. Further, a federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise. See Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir.1983).

To determine whether a prior conviction is for a "violent felony" under the ACCA (and thus whether a conviction qualifies as a "crime of violence" for purposes of §924(c), assuming Johnson extends to § 924(c)), courts use, what has become known as, the "categorical approach." Descamps v. United States, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013); see also United States v. Estrella, 758 F.3d 1239 (11th Cir. 2014). To determine if an offense "categorically" qualifies as a "crime of violence" under the "elements" or "use-of-force" clause in §924(c)(3)(A) then, the court would have to determine if attempted Hobbs Act robbery has an element of "force capable of causing physical pain or injury to another person," as contemplated by Johnson I and its progeny. See Johnson, 559 U.S. at 140; Leocal, 543 U.S. at 11.

The Supreme Court has also approved a variant of the categorical approach, labeled the "modified categorical approach," for use when a prior conviction is for violating a so-called "divisible statute." Id. That kind of statute sets out one or more elements of the offense in the alternative. Id. If one alternative matches an element in the generic offense, but another does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, known as Shepard documents,⁸ to determine which alternative formed the basis of the defendant's prior conviction. Id. The modified categorical approach then permits the court to "do what the categorical approach demands: [analyze] the elements of the crime of conviction...." Id.

However, the modified categorical approach does not apply when the crime of which the defendant was convicted has a single, indivisible set of elements. Id. at 2282. Thus, when a defendant is convicted of a so-called "'indivisible' statute" - i.e., one not containing alternative elements- that criminalizes a broader swath of conduct than the relevant generic offense," that conviction cannot serve as a qualifying offense. Id. at 2281-82.

In sum, when determining whether a conviction qualifies as a predicate offense, the courts can only look to the elements of the statute of conviction, whether assisted by Shepard documents or not, and not to the facts underlying the defendant's prior conviction. See Descamps, 133 S.Ct. 2283-85. In so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, ____

⁸In Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court held that a sentencing court could examine only a limited category of documents in determining whether a prior guilty plea constituted a "burglary," and thus a "violent felony," under the Armed Career Criminal Act ("ACCA"). See id. at 16, 125 S.Ct. 1254.

U.S. ___, 133 S.Ct. 1678, 1684 (2011) (quoting Johnson I, 559 U.S. at 137).

More recently, the Supreme Court in Mathis v. United States, ___ U.S. ___, 136 S. Ct. 2243 (2016), the Supreme Court was called upon to determine whether federal courts may use the modified categorical approach to determine if a conviction qualifies as a predicate offense when a defendant is convicted under an indivisible statute that lists multiple, alternative means of satisfying one (or more) of its elements. Mathis, ___ U.S. at ___, 136 S. Ct. at 2247-48. The Mathis Court declined to find any such exception and, in so doing, addressed how federal courts are to make the threshold determination of whether an alternatively-phrased statute sets forth alternative elements (in which case the statute would be divisible and the modified categorical approach would apply to determine which version of the statute the defendant was convicted of violating), or merely lists alternative means of satisfying one element of an indivisible statute (in which case the categorical approach would apply). Id. at 2256-57.

VI. Discussion

Regardless of the foregoing, the movant alleges in this \$2255 proceeding that his convictions and resulting sentences for carrying and using a firearm during and in relation to a crime of violence (*i.e.*, the armed bank robberies), pursuant to 18 U.S.C. §924(c), are unconstitutional under the Supreme Court's decision in Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2557 (June 26, 2015). (Cv-DE#8). The government argues, however, that this \$2255 motion should be denied, in pertinent part, because: (1) the movant procedurally defaulted the claim since he failed to raise it on direct appeal; (2) the Johnson decision does not apply to

convictions under 18 U.S.C. §924(c); and, (3) the Johnson claim warrants no relief on the merits, since §2113(a) robbery qualifies under the use-of-force clause of §924(c).

Whether an offense is a "crime of violence" under Section 924(c) requires a categorical analysis of the offense's elements and not the actual facts of the Movant's conduct. United States v. McGuire, 706 F.3d 1333, 1336-37 (11th Cir. 2013). Here, the relevant inquiry, therefore, requires a determination whether armed bank robbery under §2113(a) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or that "by its nature, involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. §924(c) (3) (A)-(B).

"The generic definition of robbery is 'the taking of property from another person or from the immediate presence of another person by force or intimidation.'" United States v. Jenkins, 651 Fed. Appx. 920, 924-25 (11th Cir. 2016) (quoting Lockley v. United States, 632 F.3d 1238, 1244 (11 Cir. 2011)). The Jenkins court further noted that the elements of a §2113(a) offense are nearly identical to the elements of generic robbery, in that both, "at a minimum require [that] the taking to be by intimidation, i.e., a perceived threat of bodily harm." Jenkins, supra. The Eleventh Circuit in Jenkins concluded that "bank robbery, or attempted bank robbery, under §2113(a), qualifies as a crime of violence "under the elements clause," noting that to do so, an offense must have as an element "the use, attempted use, or threatened use of physical force against the person of another...." Jenkins, supra.

In Jenkins, the Court further concluded that the defendant's §2113(a) offense has as an element the "threatened use of physical

force" and as such, "requires the defendant to take actions from which an ordinary person could reasonably infer a threat of bodily harm." Jenkins, supra. Thus, Section 924(c)'s use of force clause was not called into question by Johnson. Therefore, like Jenkins, the movant's §924(c) convictions, based on armed bank robbery, in violation of §2113(a), continues to remain valid after Johnson. See also, United States v. Horstin, 2017 WL 462100, at *3 (11 Cir. Feb. 3, 2017) (finding §2113(a) robbery conviction qualified as a violent felony under the ACCA); In re Hines 824 F.3d 1334, 1337 (11 Cir. June 8, 2016) (Holding that even if Johnson extends to §924(c) violations, a companion conviction for armed bank robbery, in violation of §2113(a) and (D) clearly qualifies as a crime of violence under the §924(c) (3) (A) use-of-force clause without regard to the §924(c) (3) (B) residual clause, because it includes as an element, "the use, attempted use, or threatened use of physical force against the person or property of another."); In re Colon, 824 F.3d 1301, 1304-06 (11th Cir. June 24, 2016) (same for a companion conviction for aiding and abetting a Hobbs Act robbery); In re Smith, 829 F.3d 1276, 1276-80 (11th Cir. July 18, 2016) (same for a companion conviction for carjacking, in violation of 18 U.S.C. §2119); see also In re Gordon, 827 F.3d 1289, 1294 (11th Cir. July 8, 2016) (concluding that Saint Fleur and Hines do not conflict with Pinder and rejecting the claim that under the prior panel precedent rule, Pinder, not Saint Fleur and Hines, control the outcome of an applicant's Johnson-based §924(c) claim).

Further there is also persuasive authority from this and other courts that §2113(a) and (d) armed bank robbery qualifies as a crime of violence under the use-of-force clause of §924(c). See Colebrooks v. United States, 2016 WL 5807916 (S.D. Fla. Oct. 5, 2016); United States v. Cason, 2016 WL 7031329, at *2 (N.D. Fla. Nov. 1, 2016); United States v. Rachal, 2016 WL 7165712 (D. Mass.

Dec. 7, 2016); Miller v. United States, 2016 WL 5795966 (N.D. Miss. Oct. 3, 2016); United States v. McNeal, 818 F.3d 141, 153 (4 Cir. 2016). Thus, it is now well settled that movant's 924(c) convictions remain lawful post-Johnson because the offense was predicated on armed bank robbery which has the element of actual or threatened force, violence, and fear. Thus, even if Johnson is found to invalidate Section 924(c)'s residual clause, under the use-of-force clause, the movant's convictions remain lawful.

Moreover, the Movant did not argue at the trial level or on appeal that the §2113(a) and (d) armed bank robbery convictions fail to support his §924(c) firearm convictions. He appears to argue that this claim is nevertheless cognizable on Section 2255 review because, post-Johnson, they are non-existent offenses of which he is actually innocent and that his conviction as to those offenses resulted in a manifest injustice. This argument should be rejected. The Movant admitted in the written plea agreement, and under oath at the change of plea hearing, that he violated §924(c) by using and/or otherwise carrying a firearm while robbing federal banking institutions. His contention that he is "actually innocent" of the brandishing offense is thus conclusively refuted by the record. See Blackledge, 431 U.S. at 74.

Under the totality of the circumstances present here, because the movant's conviction for §2113(a) and (d) armed bank robbery convictions are a crime of violence under §924(c)'s use-of-force clause, he cannot demonstrate actual prejudice arising from any constitutional error in order to excuse or otherwise overcome the procedural default doctrine. See generally Bousley, 523 U.S. at 622; see, e.g., Chasse v. United States, 2016 WL 4926154 (D. New Hampshire Sept. 15, 2016) (the two convictions underlying the movant's Section 924(c) convictions, federal bank robbery and

pharmacy robbery, both qualify as crimes of violence under Section 924(c)'s use of force clause, therefore, he cannot establish prejudice to excuse his procedural default even if Johnson renders Section 924(c)'s residual clause unconstitutional). His contention that he is "actually innocent" of the brandishing offenses are thus conclusively refuted by the record. See Blackledge, 431 U.S. at 74.

Additionally, the movant is again reminded that he may not raise for the first time in objections to the undersigned's Report any new arguments or affidavits to support these claims. Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009) (citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009)). To the extent the movant attempts to do so, the court should exercise its discretion and decline to consider the argument. See Daniel, supra; See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). This is so because "[P]arties must take before the magistrate, 'not only their best shot but all of the shots.'" See Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987) (quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

For the foregoing reasons, the movant's Johnson claim is procedurally defaulted and, alternatively, fails on the merits.

VII. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the

showing required by 28 U.S.C. §2253(c)(2).” See Rule 11(a), Rules Governing §2255 Proceedings for the United States District Courts. A §2255 movant “cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c).” See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255-Rule 11(b).

However, “[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right.” See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001).

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

VIII. Conclusion

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

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

Signed this 20th day of June, 2017.



UNITED STATES MAGISTRATE JUDGE

cc: Robin C. Rosen-Evans, AFPD
Attorney for Movant
Federal Public Defender's Office
450 Australian Avenue, S., Suite 500
West Palm Beach, FL 33401
Email: Robin.Rosen-Evans@fd.org

Lauren E. Jorgensen, AUSA
U.S. Attorney's Office
500 Australian Avenue, Suite 400
West Palm Beach, FL 33401
Email: Lauren.Jorgensen@usdoj.gov

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 16-80974-CIV-HURLEY
(CASE NO. 08-80074-CR-HURLEY)**

**AHMAD ADAMS,
Movant,**

v.

**UNITED STATES OF AMERICA,
Respondent.**

**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
&
DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE AND CORRECT
SENTENCE PURSUANT TO 28 U.S.C. § 2255**

THIS CAUSE is before the court upon the Movant's motion to vacate, set aside and correct sentence pursuant to 28 U.S.C. §2255 [DE 1], which matter was previously referred to Magistrate Judge Patrick White for proposed findings and a recommended disposition.

On June 20, 2017, Magistrate Judge White filed a Report and Recommendation [DE 15] recommending that petitioner's motion to vacate, set aside and correct sentence be denied, with no certificate of appealability issued. On June 22, 2017, the movant, through counsel, filed his objections to the Report and Recommendation [DE 16] .

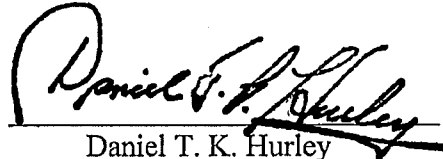
After carefully reviewing the Magistrate Judge's Report and Recommendation, in conjunction with the Movant's objections to the Report, and after conducting a *de novo* review as to all matters on which objection has been lodged, the Court finds the reasoning and recommendations of the Magistrate Judge on all claims to be well-founded and accordingly adopts

the Report & Recommendation in full. It is accordingly **ORDERED** and **ADJUDGED**:

1. Magistrate Judge Patrick White's Report and Recommendation [DE 15] is **APPROVED AND ADOPTED** in full.
2. The Movant's motion to vacate, set aside and correct sentencing [DE 1] is **DENIED**.
3. No certificate of appealability shall issue.
4. Pursuant to Rule 58, a final judgment of dismissal shall enter by separate order of the Court.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 5 day of

July, 2017.


Daniel T. K. Hurley
United States District Judge

Copies furnished to:

all parties

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 16-CIV-80974-HURLEY
(CASE NO. 08-CR-80074-HURLEY)**

**AHMAD ADAMS,
Movant,**

v.

**UNITED STATES OF AMERICA,
Respondent.**

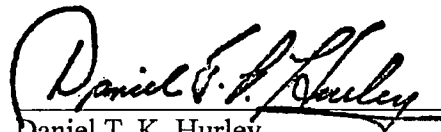
**FINAL JUDGMENT DENYING MOTION TO VACATE SENTENCE,
DENYING CERTIFICATE OF APPEALABILITY & CLOSING CASE**

THIS MATTER is before the Court following entry of an Order Adopting Magistrate Judge Patrick White's ' Report and Recommendation and denying the Movant's motion to vacate sentence under 28 U.S.C. § 2255. Bearing in mind that Rule 58 of the Federal Rules of Civil Procedure, requires a court to "set out . . . in a separate document" its judgment on a motion to vacate, set aside, or correct sentence, Fed. R. Civ. P. 58(a) and *Perez v. United States*, 277 Fed. Appx. 966, 967 (11th Cir. 2008), it is

ORDERED and ADJUDGED:

1. The Movant's Motion to Vacate, Set Aside, or Correct Sentence [DE 1] is **DENIED**.
2. A Certificate of Appealability is **DENIED**.
3. This case is **CLOSED**.

DONE and SIGNED in Chambers at West Palm Beach, Florida, this 5 day of June, 2017.


Daniel T. K. Hurley
United States District Judge

cc. All parties