

No. _____

IN THE
Supreme Court of the United States
October Term 2017

MICHAEL SHANE RAGLAND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

18 U.S.C. § 924(c) criminalizes using or carrying a firearm during and in relation to a crime of violence, or possessing a firearm in furtherance of such an underlying crime. A first conviction under § 924(c) carries a five-year mandatory minimum penalty, while a second conviction carries an additional 25-year mandatory minimum. This petition presents the following questions:

I. Whether § 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).¹

II. Whether Hobbs Act robbery (18 U.S.C. § 1951(a)), Attempted Hobbs Act robbery, and Aiding and Abetting Hobbs Act robbery, which may be committed by causing an individual to fear financial loss, are "crimes of violence", and have as an element "the use . . . of physical force against the person or property of another," under 18 U.S.C. § 924(c)(3)(A).

III. Whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent, even where a judge on the panel issuing the binding precedent subsequently states the panel's decision may be erroneous, misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and more recently in *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a certificate of appealability (COA).

¹ The issue of whether the identically-worded residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague after *Samuel Johnson* is currently before this Court in *Lynch v. Dimaya*, 137 S. Ct. 31 (2016).

LIST OF PARTIES

Petitioner, Michael Shane Ragland, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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**On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Michael Shane Ragland respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his application for a certificate of appealability (COA) on the issue of whether his § 924 (c) convictions are unconstitutional in light of this Court's decision in Samuel Johnson.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Raglands' application for a COA in Appeal No. 17-11925-J, is provided in Appendix A.

JURISDICTION

The United States District Court for the Southern District of Florida had original jurisdiction over Mr. Raglands' criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. The district court denied Mr. Raglands' § 2255 motion on June 1, 2017. Mr. Ragland subsequently filed a notice of appeal and an application for a COA in the Eleventh Circuit, which was denied on September 27, 2017. *See* Appendix A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely filed under Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 924(c) provides in pertinent part:

- (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
 - (i) be sentenced to a term of imprisonment of not less than 5 years;
 - (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

...

- (3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

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

18 U.S.C. § 1951 provides in pertinent part:

- (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

- (b) As used in this section—

- (1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

28 U.S.C. § 2253(c) provides in pertinent part:

- (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.

- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On April 30, 2009, a Superseding Indictment [ECF:98] was filed against Mr. Ragland charging him as follows:

Count 1: Conspiracy to affect interstate commerce by Hobbs Act Robbery, as defined in 18 USC § 1951(b), in that the defendants did unlawfully take property belonging to a business engaged in interstate commerce, against the will of said employee, by means of actual and threatened force, violence and fear of injury, immediate and future, to said employees, in violation of 18 USC § 1951(a);

Count 2: Hobbs Act Robbery of the Rightway Food Mart, which occurred on December 11, 2007, in violation of 18 USC § 1951(a).

Count 3: Brandishing a firearm during and in relation to, a "crime of violence", specifically the Rightway Food Mart robbery on December 11, 2007, in violation of 18 USC §924(c)(1)(A)(ii), § 924(c)(1)(C)(i), and 2.

Count 4: Hobbs Act Robbery of Island Beverage which occurred on December 14, 2007, in violation of 18 USC § 1951(a), and 2.

Count 5: Brandishing a firearm during and in relation to, a "crime of violence", specifically the Island Beverage robbery on December 14, 2007, in violation of 18 USC §924(c)(1)(A)(ii), § 924(c)(1)(C)(i), and § 2.

Count 6: Hobbs Act Robbery of the Shell Gas Station which occurred on January 12, 2008, in violation of 18 USC § 1951(a), and § 2.

Count 7: Brandishing a firearm during and in relation to, a "crime of violence", specifically the Shell Gas Station robbery on January 12, 2008, in violation of 18 USC § 924(c)(1)(A)(ii), § 924(c)(1)(C)(i).

Count 8: Attempted Hobbs Act Robbery of the Knights of Columbus which occurred on January 27, 2008, in violation of 18 USC § 1951(a), and § 2.

Count 9: Hobbs Act Robbery of the Texaco Gas Station which occurred on January 27, 2008, in violation of 18 USC § 1951(a), and § 2.

Count 10: Brandishing a firearm during and in relation to, a "crime of violence", specifically the Texaco Gas Station on January 27, 2008, in violation of 18 USC § 924(c)(1)(A)(ii), § 924(c)(1)(C)(i), and § 2.

Count 11: Hobbs Act Robbery of the A&M Discount Beverage which occurred on February 1, 2008, in violation of 18 USC § 1951(a).

Count 12: Brandishing a firearm during and in relation to, a "crime of violence", specifically the A&M Discount Beverage robbery on February 1, 2008, in violation of 18 USC § 924(c)(1)(A)(ii), § 924(c)(1)(C)(i), and § 2.

Count 13: Hobbs Act Robbery of the BP Gas Station which occurred on February 3, 2008, in violation of 18 USC § 1951(a), and § 2.

Count 14: Brandishing a firearm during and in relation to, a "crime of violence", specifically the BP Gas Station robbery on February 3, 2008, in violation of 18 USC § 924(c)(1)(A)(ii), § 924(c)(1)(C)(i), and § 2.

Count 15: Attempted Hobbs Act Robbery of the Coastal Gas Station which occurred on February 18, 2008, in violation of 18 USC § 1951(a), and § 2.

Count 16: Brandishing a firearm during and in relation to, a "crime of violence", specifically the Coastal Gas Station robbery on February 18, 2008, in violation of 18 USC § 924(c)(1)(A)(ii), § 924(c)(1)(C)(i), and § 2 .

Count 17: Hobbs Act Robbery of the Stop & Shop Food Store which occurred on February 18, 2008, in violation of 18 USC 1951(a), and § 2.

Count 18: Brandishing a firearm during and in relation to, a "crime of violence", specifically the Stop & Shop Food Store robbery on February 18, 2009, in violation of 18 USC § 924(c)(1)(A)(ii), § 924(c)(1)(C)(i), and § 2.

Count 19: Hobbs Act Robbery, of the Shell Gas Station which occurred on February 20, 2008, in violation of 18 USC § 1951(a), and § 2.

Count 20: Brandishing a firearm during and in relation to, a "crime of violence, specifically the Shell Gas Station robbery on February 20, 2008, in violation of 18 USC § 924(c)(1)(A)(ii), § 924(c)(1)(C)(i), and § 2.

Count 21: Hobbs Act Robbery of the Chevron Gas Station which occurred on February 22, 2008, in violation of 18 USC § 1951(a), and § 2 .

Count 22: Brandishing a firearm during and in relation to, a "crime of violence", specifically the Chevron Gas Station robbery on February 22, 2008, in violation of 18 USC § 924(c)(1)(A)(ii), § 924(c)(1)(C)(i), and § 2.

On May 8, 2009, Mr. Ragland appeared before United States Magistrate Judge Frank J. Lynch, Jr., for his arraignment and detention hearing. Mr. Ragland entered a not guilty plea to all charges listed in the Superseding Indictment and after an evidentiary hearing was ordered detained. [ECF:130,131].

On November 9, 2009, Mr. Ragland's trial on the Superseding Indictment commenced. [ECF:297]. After a seven day jury trial, the jury returned a guilty verdict as to Counts 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, and 22. The jury returned not guilty verdicts as to Counts 6 and 7. (The government dismissed Count 13 and 14 at the Defendant's sentencing). [ECF:310].

On March 1, 2009, Mr. Ragland appeared before the district court for sentencing. [ECF:329]. The district court imposed a total term of imprisonment of 2,352 months. The district court structured Mr. Ragland's sentence as follows: 168 months as to Counts 1, 2, 4, 8, 9, 11, 15, 17, 19, and 21 to be served concurrently with each other and concurrent to the undischarged term of imprisonment in Bucks County, Pennsylvania in Case No: CP 09-2832-2008. A term of 84 months as to Count 3 consecutive to the terms of imprisonment imposed in Counts 1, 2, 4, 8, 9, 11, 15, 17, 19, and 21, and the Bucks County Pennsylvania case; and a term of 300 months as to Count 5 consecutive to the term of imprisonment imposed in Count 3; a term of 300 months as to Count 10 consecutive to the term of imprisonment imposed in Count 5, a term of 300 months as to Count 12 consecutive to the term of imprisonment imposed in Count 10, a term of 300 months in Count 16 consecutive to the term of imprisonment imposed in Count 12; a term of 300 months as to Count 18 consecutive to the term of imprisonment imposed in Count 16; a term of 300 months as to Count 20 consecutive to the term of imprisonment imposed in Count 18, and a term of 300 months as to Count 22 consecutive to the term of imprisonment imposed in Count 20. [ECF:329].

At Ragland's sentencing hearing, the district court suggested, when addressing the use of acquitted conduct to enhance his sentence, that all of Ragland's convictions, including the § 924(c) convictions, should be treated as if the defendant had been convicted on a separate count of conspiracy for each offense he conspired to commit. [ECF:368,p.10]. The district court further suggested that because Ragland was convicted of the Conspiracy charge in count 1, U.S.S.G § 1B1.2, considers each separate conviction as a separate count of conviction for each offense he conspired to commit, ie., the ten robbery crimes. Therefore, there is a real question whether Ragland was sentenced on the § 924(c) counts pursuant to the conviction for the Conspiracy count, as opposed to each substantive count of Hobbs Act robbery.

On May 20, 2010, an Amended Judgment was entered by the district court, amending the judgment to include restitution. [ECF:367].

On March 4, 2010, Mr. Ragland timely filed his Notice of Appeal the judgment and conviction entered in his criminal case. [ECF:333]. On January 27, 2012, the Eleventh Circuit Court of Appeals issued a Mandate affirming the convictions and sentence. *See, United States v. Ragland*, 434 Fed. Appx. 863 (11th Cir. 2011). On February 3, 2013, a certified copy of the Mandate was filed and made part of the record. [ECF:383]. Mr. Ragland did not file a Motion to Vacate Under 28 U.S.C. § 2255.

On June 23, 2016, based upon the Supreme Court's decision in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), Mr. Ragland filed his first Motion to Vacate Under 28 U.S.C. § 2255. [ECF:1, Case No. 16-cv-14251-KMM]. The petition

alleged that his convictions and sentences were imposed in violation of the Constitution. Specifically, Mr. Ragland claimed that his convictions for Conspiracy, Hobbs Act Robbery, and Attempted Hobbs Act Robbery, were not "crimes of violence", and therefore not appropriate predicate offenses for a subsequent conviction and mandatory sentence under 18 U.S.C. § 924(c). On December 5, 2016, United States Magistrate Judge Frank J. Lynch, Jr., issued a Report and Recommendation, recommending that the district court deny Ragland's Motion. On June 1, 2017, the district court issued a paperless order denying Ragland's Motion to Vacate Under U.S.C. § 2255, and because the district court found that Ragland did not make a substantial showing of a denial of a constitutional right, no certificate of appealability was issued.

On May 31, 2017, Mr. Ragland filed a timely notice of appeal and a motion for certificate of appealability. On September 27, 2017, the Circuit Court of Appeals for the Eleventh Circuit issued an order denying a certificate of appealability, stating only that Ragland had, "failed to make a substantial showing of the denial of a constitutional right. Appx. A-1.

REASONS FOR GRANTING THE WRIT

I. Reasonable jurists could debate whether § 924(c)'s residual clause is unconstitutionally vague.

This Court granted certiorari in *Lynch v. Dimaya*, 137 S. Ct. 31 (2016), because the circuits are split regarding whether § 16(b)'s residual clause is unconstitutionally vague in light of *Samuel Johnson*. Compare *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (holding that § 16(b)'s residual clause is unconstitutional), and *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th

Cir. 2016) (same), with *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc) (holding that § 16(b)'s residual clause is constitutional). The residual clauses in § 16(b) and § 924(c) are identically worded, and the circuits are also divided on whether § 924(c)'s residual clause is unconstitutionally vague in light of *Johnson*. Compare *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that § 924(c)'s residual clause is unconstitutionally vague), with *United States v. Taylor*, 814 F.3d 340, 375–79 (6th Cir. 2016) (holding that § 924(c)'s residual clause is constitutional), and *United States v. Hill*, 832 F.3d 135, 150 (2d Cir. 2016) (same).

Based on this Court's consideration of the materially-identical provision in *Dimaya*, and the circuit split concerning the constitutionality of § 924(c)'s residual clause, Mr. Ragland respectfully seeks this Court's review. Should this Court decide in *Dimaya* that § 16(b) is unconstitutionally vague, that decision will confirm Mr. Ragland's position that § 924(c)'s residual clause is unconstitutionally vague. At a minimum, these splits show that reasonable jurists may debate whether § 924(c)'s residual clause is unconstitutionally vague.

Section 924(c)'s residual clause suffers from the same vagueness problems as the residual clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(c)(2)(B)(ii). In *Samuel Johnson*, this Court determined that “[t]wo features of the [ACCA’s] residual clause conspire to make it unconstitutionally vague.” 135 S. Ct. at 2557. First, “the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime,” because “[i]t ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime” rather than “to real-world facts or statutory elements.” *Id.* Second, the ACCA’s residual clause “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony,” stating “[i]t is one thing to apply

an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.” *Id.* at 2558.

Like the ACCA’s residual clause, § 924(c)(3)(B) requires an analysis of an “ordinary case” and the risk that it presents. *See United States v. McGuire*, 706 F.3d 1333, 1336–38 (11th Cir. 2013) (applying categorical approach to § 924(c)(3)(B)).² Section 924(c)(3)(B) therefore fails, like the ACCA’s residual clause, because it requires “courts to assess the hypothetical risk posed by an abstract generic version of the offense.” *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016). As this Court reemphasized in *Welch*, the “vagueness of the residual clause rests in large part on its operation under the categorical approach.” *Id.* And like the ACCA, § 924(c)(3)(B) does not provide guidance as to what constitutes a substantial enough risk of force to fall within the statute.

Admittedly, the ACCA and § 924(c) are not identical insofar as the ACCA includes a list of enumerated offenses and § 924(c)(3)(B) does not. *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with* 18 U.S.C. § 924(c)(3)(B). However, the ACCA’s enumerated offenses were not necessary to this Court’s vagueness determination. True enough, the Court considered the enumerated offenses in concluding that the ACCA’s residual clause left too much uncertainty about “how much risk it takes for a crime to qualify as a violent felony,” but that was not the central problem. *See Samuel Johnson*, 135 S. Ct. at 2558. To the contrary, the central problem was the ordinary-case analysis and uncertainty of the risk required to qualify as a predicate offense:

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise “serious potential risk” standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime “otherwise involves conduct that presents a serious potential risk,” moreover, the residual clause forces courts to interpret “serious potential risk” in light of the

² Retired Supreme Court Justice O’Connor authored *McGuire*.

four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are “far from clear in respect to the degree of risk each poses.”

Id. (emphasis in underline added). The Court addressed the enumerated offenses again in response to the argument that its decision would also invalidate other laws that used terms such as “substantial risk.” *Id.* at 2561. After noting that “[a]lmost none” of these laws included “a confusing list of examples,” the Court stated:

More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as “substantial risk” to real-world conduct The residual clause, however, requires application of the “serious potential risk” standard to an idealized ordinary case of the crime.

Id. (emphasis in underline added). *Samuel Johnson* thus makes clear that the ordinary-case analysis drove its decision, and that problem is squarely presented by § 924(c)(3)(B). *See Welch*, 136 S. Ct. at 1262.

Moreover, the absence of any enumerated offenses in § 924(c)(3)(B), if anything, makes this provision even more vague. Without any enumerated offenses, there is no benchmark to measure the degree of risk required for an offense to be a “crime of violence.” For example, the Court acknowledged that a commonsense approach had not provided “a consistent conception of the degree of risk posed by each of the four enumerated crimes”; it therefore doubted it would “fare any better with respect to thousands of unenumerated crimes.” *Samuel Johnson*, 135 S. Ct. at 2559. It follows, then, that in the absence of enumerated offenses to anchor the analysis regarding the degree of risk, § 924(c)(3)(B) provides no guidance for determining whether an offense is a crime of violence. Accordingly, for the reasons set forth above, § 924(c)(3)(B), like the ACCA’s residual clause, is unconstitutionally vague. At a minimum, reasonable jurists may debate the issue.

Further, other courts have reached the conclusion that *Johnson*, invalidates the § 924(c) residual clause. See, *United States v. Lattanaphom*, 159 F. Supp. 3d 1157 (E.D. Cal. 2016); *United States v. Edmundson*, 153 F. Supp. 3d 857 (D. Md. 2015). And recently, the Supreme Court granted certiorari in *Lynch v. Dimaya* No. 15-1498, (September 29, 2016), to resolve a circuit split and decide the question of whether the residual clause in 18 U.S.C. § 16(b) is void for vagueness. The Sixth, Seventh, Ninth and Tenth Circuits have held that § 16(b) is unconstitutionally vague under the reasoning in *Johnson*: the Fifth Circuit held that it is not. Because the residual clause in § 16(b), is identical to the residual clause in 18 U.S.C. § 924(c)(3)(B), the outcome in this case should also decide whether the residual clause in § 924(c)(3)(B), is unconstitutionally vague as well. At a minimum, Mr. Ragland has shown that reasonable jurists would find it debatable whether *Johnson* invalidated the § 924(c) residual clause.

II. Reasonable jurists could debate whether Hobbs Act robbery, Attempted Hobbs Act robbery and Aiding and Abetting Hobbs Act robbery, which may be committed by causing an individual to fear financial loss, are "crimes of violence, that have as an element the "use, attempted use, or threatened use of physical force against the person or property of another."

A. Hobbs Act Robbery is not a "Crime of Violence".

Mr. Ragland seeks this Court's review because reasonable jurists may debate whether Hobbs Act robbery, Attempted Hobbs Act robbery and Aiding and Abetting Hobbs Act robbery, is a "crime of violence" under § 924(c)'s force clause. 18 U.S.C. § 924(c)(3)(A). For an offense to qualify under the force clause, it must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* Whether Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)'s force clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the

defendant's conduct. *See McGuire*, 706 F.3d at 1336. Pursuant to this categorical approach, if Hobbs Act robbery may be committed without "the use, attempted use, or threatened use of physical force," then that crime may not qualify as a "crime of violence" under § 924(c)'s force clause.

Under § 924(c)'s force clause, the term "physical force" means "violent force," "force that is capable of causing physical pain or injury to another person." *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). Because Hobbs Act robbery may be committed without the use of "physical force," it does not qualify as a "crime of violence" under § 924(c)'s force clause.

Significantly, Hobbs Act robbery may be committed "by means of actual or threatened force, or violence, or fear of injury." 18 U.S.C. § 1951(b)(1) (emphasis added). Because the statute lists alternative means, and not alternative elements, this Court has no occasion to decide which statutory alternative was at issue, and must presume Mr. Ragland was convicted of the least culpable act. *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

The pattern jury instruction for Hobbs Act robbery in a number of circuits define the term "fear of injury" to include the fear of financial or economic loss. 11th Cir. Pattern Jury Instructions 70.3; 10th Cir. Pattern Jury Instructions 2.70; 3d Cir. Pattern Jury Instructions 6.18.1951-4; *see also United States v. Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that "other circuits which have considered this question are unanimous in extending Hobbs Act to protect intangible property"). Thus, under the least-culpable-act rule, the Court must presume Mr. Raglands' robbery offenses occurred by causing a victim to fear financial loss. Because a Hobbs Act robbery committed by causing a victim to fear financial loss does not necessarily have as an element "the use, attempted use or threatened use" of violent physical force,

Hobbs Act robbery does not categorically qualify as a “crime of violence” under § 924(c)’s force clause.

B. Attempted Hobbs Act Robbery is Not a "Crime of Violence".

Even Assuming, arguendo, that substantive Hobbs Act robbery is categorically a "crime of violence", the plausible applications of Attempted Hobbs Act robbery might not all require the attempted use of threatened use of force. Hence, that type of conviction may not categorically qualify as an elements-clause predicate." *In re: Gomez*, 830 F.3d 1225 (11th Cir. 2016). See also, *United States v. Victor John Walker*, No. 16-16676-D (11th Cir.)(granting COA on issue of "whether Walker's conviction for using and carrying a firearm during and in relation to the crime of violence of attempted Hobbs Act robbery is now unconstitutional after *Johnson v. United States*, 135 S. Ct. 2551 (2015)(W. Pryor, Jr., J.).

The Gomez court's observation was correct. Several circuit and district decisions establish that one can attempt to commit Hobbs Act robbery without actually using, attempting to use, or threatening to use violent, physical force. See, *United States v. Gonzalez*, 322 Fed. Appx. 963, 969 (11th Cir. 2009)(upholding conviction where defendants merely traveled to location in preparation for committing robbery); *United States v. Muratovic*, 719 F.3d 809, 815-16 (7th Cir. 2013)(upholding conviction where defendant finalized plans, conducted surveillance, procured supplies, and arrived at destination point on the day set for the robbery); *United States v. Gonzalez*, 441 Fed. Appx. 31, 36 (2nd Cir. 2011)(upholding conviction where defendant was casing location and began preparations to commit robbery); *United States v. Turner*, 501 F.3d 59, 68-69 (1st Cir. 2007)(proof sufficient where defendant arrived at prearranged location mile away from robbery site, told co-defendant he had seen armored truck, brought license plate to use after robbery, and discussed clothing for the robbery); *United States v. Williams*, 2011WL2621005 (E.D. Pa.

2011)(proof sufficient where defendant participated in meetings, gathered documents, and armed himself). In all of these cases, the evidence was sufficient for conviction even though none of the defendants actually committed, attempted to commit, or even threatened to commit, a violent act. By their nature as "attempt" cases, rather than substantive robberies, they never reached the stage of actual, attempted or threatened violence.

C. Aiding and Abetting Hobbs Act Robbery is not a "Crime of Violence".

Further distancing Mr. Ragland from a "crime of violence", is the fact that in Count 2,4,6,9,13,17,19, and 21 convicting Ragland of Aiding and Abetting Hobbs Act robbery; and Counts 8 and 15, convicting Ragland of Aiding and Abetting the Attempted Hobbs Act robbery, in violation of 18 U.S.C. § 2. To prove aiding and abetting, the government need not show that the defendant committed all the acts constituting the crime. *United States v. Rivera*, 551 Fed. Appx. 531,534 (11th Cir. 2014). The government need only show that the defendant "associated himself in some way with the criminal venture, that he wished to bring it about, and that he sought by his actions to make it succeed." *Id.*, (quoting *United States v. Broadwell*, 870 F.2d 594 (11th Cir. 1989). "As almost every court of appeals has held, a defendant can be convicted as an aider and abetter without proof that he participated in each and every element of the offense. In prescribing aiding and abetting, Congress used language that comprehends all assistance rendered by words, acts, encouragement, support, or presence -- even if that aid relates to only one (or some) of a crimes phases or elements." *Rosemond v. United States*, ___ U.S. ___, 134 S. Ct. 1240, 1246-47 (2014)(emphasis added).

In, *In Re: Colon*, 826 F.3d 1301 (11th Cir. 2016), the Eleventh Circuit address for the first time whether a conviction under 924(c), is properly predicated on Aiding and Abetting Hobbs Act robbery. The Eleventh Circuit seems to dismiss Colon's aiding and abetting claim under Johnson

relying on the decision in *Saint Fleur* and *United States v. Williams*, 334 F.3d 1228 (11th Cir. 2003). However, Judge Martin issued a written dissenting opinion concluding that at a minimum a defendant could aid and abet a robbery without ever using, threatening to use, or attempting any force at all. *Colon*, 826 F.3d at 1306. Judge Martin further points out that, Mr. Colon's aiding and abetting could have been based on his aid of an element of robbery that involved no force....but Johnson may have invalidated that definition. *Id.* at 1307. As for 924(c)'s surviving "crime of violence" definition, it is at least unclear whether aiding and abetting a robbery "has as an element the use, attempted use, or threatened use of physical force." *Id.* at 1308. Mr. Ragland respectfully submits that, at a minimum, reasonable jurists may debate whether Aiding and Abetting Hobbs Act robbery categorically qualifies as a "crimes of violence" under § 924(c)'s force clause and a COA should be granted.

Further, because the indictment and judgments in Mr. Ragland's case do not specify whether the convictions rest on the completed offense of Hobbs Act robbery, Attempted Hobbs Act robbery, or Conspiracy to Commit Hobbs Act robbery, this Court must assume "that the conviction rests on nothing more than the least of the acts criminalized." *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014). That is, aiding and abetting, 18 U.S.C. § 2. That statute requires nothing more than proof of some form of assistance to the endeavor. It does not require proof that the defendant assisted or participated in each of the elements. Therefore, it does not necessarily contain "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

Based on the foregoing, Mr. Ragland respectfully submits that, at a minimum, reasonable jurists may debate whether Hobbs Act robbery, Attempted Hobbs Act robbery and Aiding and Abetting Hobbs Act robbery, categorically qualify as a "crimes of violence" under § 924(c)'s force

clause. Indeed, some have said as much. *See Davenport v. United States*, No. 16-15939, Order at 5–8 (11th Cir. March 28, 2017) (“[R]easonable jurists could debate whether Hobbs Act robbery is a crime of violence for the purposes of § 924(c)”); *In re Garcia*, No. 16-14320, Order at 13–16 (11th Cir. July 27, 2016) (Martin, J., concurring) (“Though I joined the court’s unanimous decision in *Saint Fleur*, I may have been mistaken in doing so.”). Given the important and recurring nature of this issue, Mr. Ragland respectfully seeks this Court’s review.

III. The Eleventh Circuit’s rule that a COA may not be granted where binding circuit precedent forecloses a claim erroneously applies the COA standard articulated by this Court in *Miller-El* and *Buck*.

To obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.” *Buck*, 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). “At the COA stage, the only question is whether the applicant has shown that ‘jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.’” *Id.* (quoting *Miller-El*, 537 U.S. at 327). “This threshold question should be decided without ‘full consideration of the factual or legal bases adduced in support of the claims.’” *Id.* (quoting *Miller-El*, 537 U.S. at 336). “When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.” *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit’s rule, COAs may not be granted where binding circuit precedent forecloses a claim. *See Hamilton*, 793 F.3d 1261 (“[R]easonable jurists will follow controlling

law.”); *see also* *Tompkins v. Sec’y, Dep’t of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec’y, Dep’t of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). To be sure, the Court phrased its decision in Mr. Ragland’s case using the proper terms—that reasonable jurists would not debate whether Mr. Ragland is entitled to relief—but reached its conclusion by essentially deciding the case on the merits, that he would be unsuccessful on appeal because *Saint Fleur* is binding circuit precedent. *Buck*, 137 S. Ct. at 773. The Eleventh Circuit’s rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

[W]hen a court of appeals properly applies the COA standard and determines that a prisoner’s claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and “first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,” it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El*, 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, as this Court stated in *Miller–El*, “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” 537 U.S. at 338. A COA should be denied only where the district court’s conclusion is “beyond all debate.” *Welch*, 136 S. Ct. at 1264. Here, we know that is not the case, particularly because a member of the *Saint Fleur* panel subsequently wrote that her decision in that case may have been erroneous. *In re Garcia*, No. 16-14320, Order at 13–16 (11th Cir. July 27, 2016) (Martin, J., concurring). Because the Eleventh Circuit’s rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable

jurists debate whether a movant is entitled to relief, Mr. Ragland respectfully request that this Court grant this petition to review the Eleventh Circuit's erroneous application of the COA standard.

More importantly, the Eleventh Circuit has already established a precedent that the claim Mr. Ragland makes herein, that is, whether the district court erred in concluding that Ragland's convictions under 18 U.S.C. § 924(c), predicated on Hobbs Act robbery, was unaffected by the Supreme Court's ruling in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). See, *Ashly Davenport v. United States*, Case No. 16-15939-G (11th Cir. March 28, 2017). In *Davenport*, the Eleventh Circuit concluded that reasonable jurists could debate the district court's assessment of his constitutional claims and granted Davenport's COA. In *Davenport*, the Eleventh Circuit points out that, "if Hobbs Act robbery can be committed without "the use, attempted use, or threatened use of physical force," then that crime obviously can't have "as an element the use, attempted use, or threatened use of physical force." *Davenport Order* at p.6. The Eleventh Circuit goes on to say, "In my haste to rule in *Saint Fluer*, I overlooked the possibility that Hobbs Act robbery can be committed without the type of force described in Curtis Johnson. For example, the Eleventh Circuit's pattern jury instructions show that a jury can convict a defendant of Hobbs Act robbery so long as it believes the defendant "took property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm either immediately or in the future." See, *Davenport Order*, p.6. Noting that, this "causing the victim to fear harm can include causing fear of financial loss, including tangible rights that are a source or element of income or wealth." *Id.*, at p.6.

Because the Eleventh Circuit has previously decided in *Davenport* that, reasonable jurists could debate the district court's assessment of his constitutional claim, the very issue raise by Mr.

Ragland in this petition, he respectfully asks that this Court grant this petition to review the Eleventh Circuit's erroneous application of the COA standard.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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Appendix

Decision of the Court of Appeals for the Eleventh Circuit,
Michael Shane Ragland v. United States, 17-11925-J..... A-1

Order Adopting in Part Report and Recommendation,
Michael Shane Ragland v. United States, 16-cv-14251-KMM A-2

Report and Recommendation Denying Motion to Vacate,
Michael Shane Ragland v. United States, 16-cv-14251-KMM A-3

A-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11925-J

MICHAEL SHANE RAGLAND,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Michael Ragland moves for a certificate of appealability in order to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate sentence. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motions for leave to proceed *in forma pauperis* on appeal and for appointment of counsel are DENIED AS MOOT.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

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

Case No. 2:16-cv-14251-KMM

MICHAEL SHANE RAGLAND,

Movant,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER ADOPTING IN PART REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Movant Michael Shane Ragland's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 (ECF No. 1). On June 23, 2016, Ragland filed the instant Motion to Correct Sentence under 28 U.S.C. § 2255. This matter was referred to the Honorable Frank Lynch, Jr., United States Magistrate Judge, who issued a Report (ECF No. 14) recommending that the Court dismiss Movant's motion. Movant and the Government timely filed objections to the Report (ECF Nos. 16, 18).

The Court reviews *de novo* any part of the Magistrate Judge's report that has been properly objected to. Fed. R. Civ. P. 72(b)(3). The Court has undertaken a *de novo* review of the record, the Report, the Objections, and the relevant legal authority. For the reasons that follow, the Court adopts in part Magistrate Judge Lynch's Report.

I. BACKGROUND

In November 2009, Movant was convicted by a jury of ten counts of Hobbs Act robbery (both substantive and attempt offenses) under 18 U.S.C. § 1951 and eight counts of 18 U.S.C. § 924(c) (brandishing a firearm in the furtherance of a crime of violence). The Hobbs Act robbery convictions serve as the predicate offenses for the Section 924(c) convictions. Section 924(c) requires that the sentences for those convictions run consecutively. As a result, Movant has been sentenced to 2,352 months' imprisonment.

Movant now collaterally attacks his conviction and sentence under 28 U.S.C. § 2255.

II. LEGAL STANDARD

Section 2255 authorizes a prisoner to move a court to vacate, set aside, or correct his or her sentence 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, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a).

III. DISCUSSION

Movant argues that the Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidating the Armed Career Criminal Act of 1984's (“ACCA”) residual clause, similarly invalidates the residual clause of Section 924(c), that Hobbs Act robbery is not a “crime of violence,” and that he is consequently actually innocent of his Section 924(c) convictions. The Government argues that Movant is procedurally barred from raising his claim by failing to raise it either at sentencing or on direct appeal, that Section 924(c) is not rendered unconstitutionally vague by the Supreme Court's holding in *Johnson*, and that Movant's Hobbs Act robbery offenses nevertheless fall within Section 924(c)'s “use-of-force” clause.

Section 1924(c) provides in relevant part:

(c)(1)(a) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c). The first clause of Section 924(c)(3) is at times referred to as the “use-of-force” clause and the second clause is referred to as the “residual clause.” *In re Gordon*, 827 F.3d 1289, 1293 (11th Cir. 2016).

The ACCA provides in relevant part that a person who violates 18 U.S.C. § 922(g), possession of a firearm by a convicted felon, and has three prior convictions for a violent felony or serious drug offense, shall be imprisoned for at least fifteen years. 18 U.S.C. § 924(e)(1). Under the ACCA, a “violent felony” is defined as any crime punishable by a term of imprisonment exceeding one year that:

(i) Has as an element the use, attempted use, or threatened use of physical force against the person of another; or

- (ii) Is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is referred to as the “elements clause” and the second prong contains what are known as the “enumerated crimes clause” and the “residual clause.” *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

On June 26, 2015, the Supreme Court held in *Johnson* that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a particular crime and how much risk constitutes as a violent felony. *Johnson*, 135 S. Ct. at 2557–58, 2563. The Supreme Court did not invalidate the application of the elements clause or the enumerated crimes of the ACCA’s definition of a violent felony. *Id.* at 2563. The Supreme Court subsequently held that *Johnson* created a new substantive rule and therefore must be applied retroactively. *Welch v. United States*, 136 S. Ct. 1257 (2016).

To convict a defendant of Hobbs Act robbery, a prosecutor must prove beyond a reasonable doubt that that the defendant took the victim’s property against the victim’s will either by (1) actual or threatened force, (2) violence, or (3) causing the victim to fear either immediate or future harm. 18 U.S.C. § 1951. In *In re Fleur*, the United States Court of Appeals for the Eleventh Circuit held that the defendant’s Hobbs Act robbery charge “clearly qualifie[d] as a ‘crime of violence’ under the use-of-force clause.” 824 F.3d 1337, 1340 (11th Cir. 2016). In that case, the defendant had pleaded guilty to affecting commerce “by means of robbery” in violation of the Hobbs Act. *Id.* Here, Movant was convicted of affecting commerce by robbery under the Hobbs Act. The Court therefore agrees with Judge Lynch’s conclusion that Movant’s Hobbs Act robbery convictions qualified as crimes of violence under the “use-of-force” clause, and denies his petition for this reason.

Although Judge Lynch recommends dismissal of Movant's petition under the "use-of-force" clause analysis, in his Report he gives Movant the "benefit of the doubt" with regard to his argument that Section 924(c)'s residual clause is unconstitutionally vague. *See* Report at 35–36 (ECF No. 14). The Court disagrees with Judge Lynch's decision to do so.

The Eleventh Circuit has yet to decide the precise question of whether the residual clause of 924(c) is unconstitutionally vague. However, recent decisions provide guidance and set forth the current landscape in this district, as well as other districts and Courts of Appeal. In *Mobley v. United States*, Judge Beth Bloom agreed with the Courts of Appeals for the Second, Sixth and Eighth Circuits, which have all held that *Johnson* does not render Section 924(c)'s residual unconstitutionally vague. *Id.* at *5–7. (citing *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016)). The Court finds Judge Bloom's decision in *Mobley* persuasive.

In *In re Pinder*, the Eleventh Circuit noted the similarities between Section 924(c) and Section 924(e), specifically that both are penal statutes "requir[ing] higher sentences once a court decides that an offense is a 'crime of violence.'" 824 F.3d 977, 978 (11th Cir. 2016). Although the Eleventh Circuit explicitly stated it had not yet decided the applicability of *Johnson* to the residual clause of Section 924(c), it stated that the "question is decided 'categorically'—that is, by reference to the elements of the offense, and not the actual facts of [the defendant's] conduct." *Id.* (quoting *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013)).

Turning to the residual clause of 924(c), the Court finds that *Johnson* does not render the clause unconstitutionally vague. Although the Eleventh Circuit has not squarely addressed the issue, the analysis set forth in *Mobley* and the holdings of other Courts of Appeal are compelling.

See Mobley, 2016 WL 7188296, at *5–7 (citing *Hill*, 832 F.3d 135; *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016)).

In *Hill*, the Second Circuit analyzed the Supreme Court’s holding in *Johnson* and the features of the ACCA residual clause which “conspire to make it unconstitutionally vague.” 832 F.3d at 145. Specifically, “[i]t was these twin ambiguities—‘*combining* indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony’—that offended the Constitution.” *Id.* (emphasis in original) (internal citation omitted). Unlike the ACCA residual clause, Section 924(c) “contains no mystifying list of offenses and no indeterminate ‘otherwise phraseology.’” *Id.* Further, the Second Circuit stated that even if the list of enumerated offenses distinction were not sufficient, “the text of the risk-of-force clause differs in additional, material ways.” *Id.* at 147–148 (noting that the language of Section 924(c)(3)(B) is “both narrower and easier to construe”). This Court agrees.

Accordingly, under the current law, the Court “decline[s] to get ahead of the Supreme Court, invalidating duly enacted and longstanding legislation by implication” and finds that Movant is not “actually innocent” of his 18 U.S.C. § 924(c)(1)(A) conviction such that he may vacate or amend his sentence under 28 U.S.C. § 2255. *United States v. Gonzalez-Longoria*, 831 F.3d 670, 678 (5th Cir. 2016).

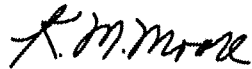
IV. CONCLUSION

UPON CONSIDERATION of Movant’s Motion (ECF No. 1), the Report (ECF No. 14), the Objections (ECF Nos. 16, 18), the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED as follows: (1) Magistrate

Judge Lynch's Report is ADOPTED IN PART; (2) Movant's Motion (ECF No. 1) is DENIED; and (3) no certificate of appealability shall issue.

It is further ORDERED AND ADJUDGED that the Clerk of the Court is instructed to CLOSE this case. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of February, 2017.



K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-14251-CIV-MOORE/LYNCH

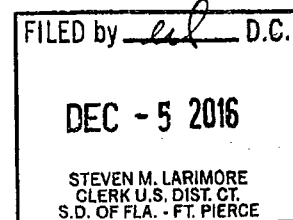
MICHAEL SHANE RAGLAND,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.



REPORT AND RECOMMENDATION ON
MOTION TO CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 (DE 1)

(The Motion also is docketed at DE 409 in the underlying
criminal case of U.S. v. Ragland, 09-14016-CR-MOORE.)

THIS CAUSE comes before this Court upon an Order of Reference and the above Motion. Having reviewed the Motion, Response, and Reply, this Court recommends as follows:

BACKGROUND

1. By way of a Superseding Indictment the Movant was charged with multiple counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and of brandishing a firearm in the furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). Two counts were dismissed at the start of trial. After trial a jury convicted him of all remaining counts except for two. The jury found the Movant guilty of ten counts of various forms of Hobbs Act robbery. For them the District Court sentenced the Movant to 168 months to run concurrently. These

Hobbs Act robbery convictions served as the predicate for the eight § 924(c) counts of which the jury also found the Movant guilty. For the § 924(c) convictions, the District Court sentenced the Movant to 84 months (for Count 3) and 300 months for each of the remaining counts. As required by that statute, the sentence for each of the § 924(c) counts was made to run consecutively. This added up to a total sentence of 2,352 months' imprisonment.

2. The Movant now attacks his § 924(c) convictions and sentence collaterally. He argues that the substantive and attempted Hobbs Act robbery offenses no longer meet § 924(c)'s definition of a "crime of violence". The Movant seeks the benefit of Johnson v. U.S., 135 S.Ct. 2551 (2015). Johnson addressed the different, but still comparable, statute: the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). That statute imposes an enhanced sentence for felons found in possession of a firearm and who have three previous convictions for a violent felony. The ACCA defines a "violent felony" at § 924(e) (2) (B). Johnson held that one of the ACCA's "violent felony" definitions is unconstitutionally vague. Then in Welch v. U.S., 136 S.Ct. 1257 (2016) the Supreme Court made its Johnson holding retroactively available on collateral review. The Movant now seeks to extend Johnson's holding beyond the ACCA

and apply it to his § 924(c) convictions and sentence. Therefore this Court must decide whether Johnson even applies to his situation and if so how it ultimately affects his claim for relief.

3. This is the Movant's first § 2255 Motion. As such the Movant is entitled to relief if his "sentence was imposed in violation of the Constitution or laws of the United States" or if his sentence exceeds the maximum authorized by law. See 28 U.S.C. § 2255(a). There are many questions of law that the Movant must pass before he prevails on his § 2255(a) claim for relief. This case raises (1) preliminary questions over whether his claim for relief is cognizable and whether he satisfies other prerequisites to raise it and (2) substantive questions over whether his claim prevails on the merits. This Court answers them in turn below.

4. Before answering those many questions, this Court first clarifies the scope of its review. This Court undertakes a comprehensive analysis of all the legal questions that this case raises and on a de novo basis. This Court does so for the sake of thoroughness and to comply with governing case law. See generally, in re: Deshawn James, 2016 WL 4608125 (11th Cir. 2016) (instructing district courts to undertake a de novo review) and Long v. U.S., 626 F.3d 1167 (11th Cir. 2010)

(instructing district courts to address all issues and to provide a complete analysis for the benefit of appellate review). To the extent this Court cites Eleventh Circuit decisions rendered in the context of §§ 2255(h) and 2244(b)(3)(C) certifications (which are indicated by their "in re:" case style), this Court also keeps in mind their prima facie standard of review. Certification decisions therefore may have limited precedential value in the resolution of this case, but some have binding precedential effect. This Court gives each such decision its due weight.

5. This Court adds that it decides this § 2255 Motion contemporaneously and in conjunction with several other pending § 2255 Motions that turn on the same or similar issues. This Court does so to ensure uniformity given the rapidly developing case law.

DISCUSSION OF PRELIMINARY ISSUES

6. This Court considers first those arguments regarding the cognizability of the Movant's claim for relief and whether the Movant satisfies all of the procedural and other prerequisite requirements to raise it. The first such question is whether the Motion is timely. Section 2255(f) gives a movant just one year to assert a claim for collateral relief. Section 2255(f)(3) begins that one year period of time on the date when "the right

asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review". As noted above, Johnson created the new right on which the Movant bases his Motion and Welch made it retroactively available.

7. There is no dispute that the Movant filed his Motion within one year of the Johnson decision. To this extent, it is timely. The question instead is whether Johnson created a right that the Movant may apply to his situation. In a narrow sense, it does not. At issue in Johnson was the Residual Clause of the ACCA. The Residual Clause was the ACCA's third definition of a "violent felony". The Residual Clause was a catch-all definition that supplemented the first two, and it defined "violent felony" to be a felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another". Johnson found that Residual Clause definition too vague and thus void.

8. Unlike Mr. Johnson, the Movant was not sentenced under the ACCA. However he was convicted of an offense and received a sentence under a statute that, like the ACCA, seeks to account for firearm involvement. The ACCA makes it a crime for a felon with three past violent felony convictions to possess a firearm. By comparison, 18 U.S.C. § 924(c) makes it a crime for someone to use, carry, possess, or brandish a firearm in furtherance of

a "crime of violence", and it adds an enhanced penalty for that situation when a firearm is involved. It defines what crimes constitute a "crime of violence" at § 924(c)(3). Section 924(c)(3) has two alternative definitions for "crime of violence", the second of which, at § 924(c)(3)(B), is its Residual Clause. It defines a "crime of violence" to be a felony "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 [companion] offense".

9. The timeliness question turns on how broadly to construe § 2255(f)(3). That is, whether it should be construed narrowly so that only those movants who were sentenced under ACCA may invoke it to assert the new right that Johnson created. Or, whether § 2255(f)(3) is broad enough to permit a claim for relief that is based on Johnson and applies it beyond the ACCA to an analogous context like § 924(c)(3)(B). This Court will refer to this broader application of Johnson which the Movant seeks to do here as a "Johnson-based" claim for relief. This Court does so to differentiate it from the situation where a movant uses Johnson directly to challenge the imposition of the ACCA sentencing enhancement. This Court, itself, may decide whether the kind of claim that the Movant is raising falls within the scope of § 2255(f)(3). See generally, Figuereo-

Sanchez v. U.S., 678 F.3d 1203, 1207 (11th Cir. 2012) (noting the general rule "that a court other than the Supreme Court may determine retroactivity under § 2255(f)(3).").

10. To answer this question, this Court turns first to the case law. In Wims v. U.S., 2016 WL 5899738 (11th Cir. 2016), the Eleventh Circuit permitted that movant to challenge his ACCA sentence enhancement on Johnson grounds in a first § 2255 motion. This Court discerns, however, no on-point binding precedent from the Eleventh Circuit that says that a Johnson-based claim, applied to a Residual Clause outside of ACCA, is not the kind of "right asserted" that § 2255(f)(3) contemplates.

11. This Court therefore expands its case law review. This Court cites to two district court cases outside of the Eleventh Circuit that directly considered § 2255(f)(3) timeliness in the context of movants who used their first § 2255 motion to raise a Johnson-based challenge to the Residual Clause of § 924(c). The district courts in both U.S. v. Le, 2016 WL 4718947 (E.D.Va. 2016) and Kucinski v. U.S., 2016 WL 4926157 (D.N.H. 2016), did not find those movants' § 924(c) challenges timely under § 2255(f)(3). That is not to say no contrary decisions exist in the case law. The district court in Brown v. U.S., 2016 WL 5439718 (E.D.Tenn. 2016) found the motion timely under § 2255(f)(3)---although it found the movant's Johnson-based attack

on his § 924(c) conviction to fail on the merits. Similarly the district courts in Fowler v. U.S., 2016 WL 6623799 (M.D.Fla. 2016) and DeJesus v. U.S., 2016 WL 6084100 (M.D.Fla. 2016) found those movants' first § 2255 motions untimely for the reason being that their Johnson-based attacks on their § 924(c) convictions fail on the merits.

12. In the absence of on-point binding precedent, this Court assumes for present purposes that Johnson does create the kind of right that started the one year clock of § 2255(f)(3) to run for purposes of making his Johnson-based attack on his § 924(c) convictions and sentence. Because the Movant files his Motion within the one-year time period of § 2255(f)(3), his Motion is timely.

13. This Court resolves the timeliness issue in the Movant's favor for three reasons. First, his claim for relief does bear a clear analogous relationship to the Johnson holding. Both the ACCA and § 924(c) are statutes that create an enhanced penalty for firearm possession or use, and both statutes employ a Residual Clause definition to capture a wide range of violent or potentially violent conduct. That Johnson bears an analogous relationship to § 924(c) is not in dispute. (What is in dispute is whether the law allows the Movant to apply Johnson by analogy to his § 924(c) convictions and sentence, but this Court answers

that question later in its review of the Motion's merits.) For present purposes this Court finds the analogous relationship sufficient to invoke § 2255(f)(3). Second, § 2255(f) and federal habeas corpus law, generally, create an imperative to raise claims for relief as early as possible. Were the Movant to wait until the Supreme Court directly held the § 924(c) Residual Clause to be void for vagueness on Johnson grounds, the Respondent might then argue that the Movant should have acted now, when he first could have raised the Johnson-based claim. Third, this Court sees no instance where the Eleventh Circuit has declined certification in the § 2255(h) context on § 2255(f)(3) timeliness grounds. This suggests the absence of a clear legal bar to using § 2255(f)(3)'s time frame to raise a Johnson-based claim for relief.

14. This point of consideration is limited to one of procedural timeliness. As for whether the Movant has a successful Johnson-based claim for relief, this Court will answer that question below in a separate analysis of the claim's merits. Unlike the Fowler and DeJesus decisions, supra, which combined the two, this Court separates the timeliness analysis from the merits analysis. This Court therefore follows the same analytical steps that the Brown court, supra, did. At this

juncture in the analysis, this Court sees no timeliness bar to reaching the claim's merits.

15. This Court now turns to the other preliminary issue: whether the Movant is barred from raising his Johnson-based claim because of procedural default. The Respondent argues that because the Movant did not challenge his § 924(c) convictions and sentence on direct appeal (and thus before Final Judgment was rendered against him in his criminal case, as well), he is estopped from doing so now. This Court does not find the Respondent's argument availing. First, there is the simple fact that Johnson announced a new rule of law which the Supreme Court made retroactive and thus available for collateral review. In its Welch opinion the Supreme Court did not limit Johnson's retroactivity only to those movants who already were actively pursuing that very same claim for relief.

16. Second, even if the procedural default rule does apply to this case, the Movant meets both of its two exceptions. See McKay v. U.S., 657 F.3d 1190, 1196 (11th Cir. 2011). The first exception applies when a movant can show cause for not raising the claim of error on direct appeal and is suffering actual prejudice from the alleged error. The Movant can show both because Johnson was decided after Final Judgment was entered against him and because Johnson brings into question whether he

is innocent of the § 924(c) convictions and sentence. Nor does this Court agree that at the time of the Final Judgment's rendition, the Movant was wrong to perceive the futility in making a Johnson-based objection. The situation at that time was not one of perceived, but rather, actual futility. Had he raised a Johnson-based objection at the time, he would have done so contrary to then, and later, precedent. See James v. U.S., 550 U.S. 192 (2007), Sykes v. U.S., 564 U.S. 1 (2011), and U.S. v. Gandy, 710 F.3d 1234 (11th Cir. 2013). The implication of the Respondent's procedural default argument is that defendants should raise any and all imaginable claims for relief during the course of their criminal case, even claims contrary to binding precedent. That would be impractical. Nor is the issue one of novelty. It was not that a Johnson-based objection was a legal argument that no one had yet thought of; rather it was a legal argument that the then (and subsequent) case law directly foreclosed. Indeed case law would not consider an attorney's failure to raise a Johnson-based objection in the underlying criminal case to be ineffective performance. See, e.g., Denson v. U.S., 804 F.3d 1339 (11th Cir. 2015) and Clark v. U.S., 2016 WL 845271 (E.D.Wis. 2016).

17. The Movant also shows prejudice. The Movant shows prejudice whether it be for purposes of the first "cause and

prejudice" exception discussed above or for purposes of the second exception to the procedural default rule: actual or factual innocence. See Bousley v. U.S., 523 U.S. 614 (1998) (recognizing the actual innocence exception to procedural default in the § 924(c) context). If the Movant is correct on his present claim for relief, then he is innocent of his § 924(c) convictions, and his § 924(c) sentence is keeping him imprisoned unlawfully. Cf. U.S. v. Adams, 814 F.3d 178 (4th Cir. 2016) (finding the defendant actually innocent of his § 922(g)(1) conviction after a change in law converted the predicate offenses to non-felonies). See also, Spencer v. U.S., 773 F.3d 1132, 1143 (11th Cir. 2014) (stating that the court "can collaterally review the misapplication of § 924(c) because . . . that misapplication results in a sentence that exceeds the statutory maximum.")

18. The Respondent's argument ignores the nature of the Johnson holding: it caused a reversal in the case law. Beyond the seminal procedural default rule decisions generally, the Respondent cites no specific on-point case law to support its argument. However there is case law that supports the Movant's position. See Morton v. U.S., 550 Fed.Appx. 807 (11th Cir. 2013) (allowing the movant to challenge his ACCA sentence based on new case law in a first § 2255 motion despite the procedural

default). See also, Simmons v. U.S., 2016 WL 4536092 (S.D.Fla. 2016), Duhart v. U.S., 2016 WL 4720424 (S.D.Fla. 2016), and Carmona v. U.S., 2016 WL 6645831 (N.D.Ga. 2016).

19. As it does for the timeliness issue, this Court separates the procedural bar analysis from consideration of the claim's merits. At this juncture in the analysis, this Court sees no procedural default bar to prevent this Court from reaching the merits of the claim. Of course, if the Movant does not prevail on the merits of his claims, then that prevents him from demonstrating either prejudice or actual innocence.

MERITS DISCUSSION

20. The Movant, as part of a group¹, committed a spree of gas station robberies. See U.S. v. Ragland and James, 434 Fed.Appx. 863, 865 (11th Cir. 2011) (summarizing the factual background of the robberies). For this robbery spree he faced multiple charges of violating the Hobbs Act, 18 U.S.C. § 1951(a). After trial, he was convicted of seven counts of substantive Hobbs Act robbery and two counts of attempted Hobbs Act robbery. Additional charges arose from the way he committed the robberies. Because he brandished a firearm during the

¹ The participants in that spree now move for § 2255 relief. Two of their motions are before this Court: Ragland v. U.S., Case No. 16-14251-CIV-MOORE and James v. U.S., Case No. 16-14245-CIV-MOORE. Two are pending before Magistrate Judge White: Anderson v. U.S., Case No. 16-14257-CIV-MOORE and Taylor v. U.S., 16-14238-CIV-MOORE. The Eleventh Circuit denied § 2255(h) certification in the remainder: Ramsdell v. U.S., 16-14390-CIV-MOORE.

commission of these robberies, he was charged with violating 18 U.S.C. § 924(c)(1)(A)(ii). That provision makes it unlawful to brandish a firearm during and in relation to a crime of violence, and the Hobbs Act robberies provide the predicate "crimes of violence". The substantive Hobbs Act robbery offenses of Counts 2, 4, 9, 11, 17, 19 and 21 served as the predicate offenses to the § 924(c) offenses of Counts 3, 5, 10, 12, 18, 20 and 22, respectively. The Count 15 offense of attempted Hobbs Act robbery served as the predicate offense to the § 924(c) offense of Count 16.

21. The Movant argues that after Johnson, neither the substantive Hobbs Act robbery offenses nor the attempted Hobbs Act robbery offense count as a "crime of violence". Without that predicate, he is actually innocent of the § 924(c) convictions, and without those § 924(c) convictions, his sentence would be substantially shorter. This is the Movant's Johnson-based claim for relief. To prevail on it, he must connect Johnson's holding to his § 924(c) convictions.

22. This Court begins with the two different ways § 924(c) defines a "crime of violence". First, a felony offense is a crime of violence if it "has an element the use, attempted use, or threatened use of physical force against the person or property of another". This definition, found at § 924(c)(3)(A),

is referred to generally as the Element Clause or the Use of Force Clause. For present purposes this Court refers to it as the "Force Clause". Second, a crime of violence is a crime "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 [companion] offense". For present purposes this Court refers to this definition, found at § 924(c)(3)(B), as the "Residual Clause".

23. The first step the Movant must make is to establish that the Residual Clause of § 924(c)(3)(B) is unconstitutionally vague. To do so, the Movant must argue successfully that it suffers from the same vagueness defect that the Supreme Court in its Johnson decision found in the Residual Clause of the ACCA sentencing enhancement. This Court begins by noting that in the Eleventh Circuit, this question remains open. In its in re: Devon Chance decision, 831 F.3d 1335, 1337 (11th Cir. 2016), the Eleventh Circuit recognized that the law is unsettled on the question of whether the "Johnson holding may invalidate the 'very similar' § 924(c)(3)(B) residual clause", citing in re: Pinder, 824 F.3d 977 (11th Cir. 2016), and "left it to the district court to decide in the first instance what effect Johnson had on § 924(c)'s residual clause." See also, U.S. v. Fox, 650 Fed.Appx. 734, 737-38 (11th Cir. 2016) (likewise

observing that "it is not clear or obvious that Samuel Johnson invalidated § 924(c)(3)(B)" and leaving it for de novo consideration).

24. To answer this question, this Court starts with the Johnson opinion and what the Supreme Court found problematic with the ACCA's Residual Clause. The Constitution prohibits vague criminal laws. A criminal law is vague if ordinary people lack notice of what conduct it punishes or if it invites arbitrary enforcement. The Supreme Court held the ACCA's Residual Clause to be unconstitutionally vague because it is too difficult and uncertain to measure the risk that the ordinary version of the crime poses. The focus of the inquiry is how the law defines the offense objectively, not how a particular defendant committed the offense specifically. The Residual Clause's other flaw, the Supreme Court held, was that it is too difficult and uncertain to quantify how much risk of harm a crime must pose for it to be violent. The ACCA's Enumerated Clause definition of a violent felony, the Supreme Court explained, makes this second inquiry even more uncertain. Lastly the Supreme Court observed how case law has struggled to apply the Residual Clause. See Samuel Johnson v. U.S., 135 S.Ct. 2551 (2015). See also, Fox, 650 Fed.Appx. at 737 (summarizing Johnson's holding and discussion).

25. Next this Court surveys the case law for how Johnson has been applied to § 924(c)(3)(B), the Residual Clause at issue in this case. As noted above, there is no on-point binding precedent from the Eleventh Circuit---although in Fox, supra, the Eleventh Circuit strongly doubts whether Johnson impacts § 924(c)(3)(B). The greater weight of non-binding case law likewise has found § 924(c)(3)(B) not vague after Johnson. See DeJesus v. U.S., 2016 WL 6084100 (M.D.Fla. 2016), Fowler v. U.S., 2016 WL 6623799 (M.D.Fla. 2016), and Kim v. U.S., 2016 WL 5438449 (N.D.Ga. 2016). See also, Brown v. U.S., 2016 WL 5439718 (E.D.Tenn. 2016), U.S. v. Le, 2016 WL 4718947 (E.D.Va. 2016), and Kucinski v. U.S., 2016 WL 4926157 (D.N.H. 2016) (following the Second, Sixth, and Eighth Circuits--- U.S. v. Hill, 832 F.3d 135 (2nd Cir. 2016), U.S. v. Taylor, 814 F.3d 340 (6th Cir. 2016), and U.S. v. Prickett, 2016 WL 5799691 (8th Cir. 2016)--- which hold the same). Relatedly several courts have found Hobbs Act robbery offenses to count as a crime of violence under the Residual Clause of § 924(c)(3)(B). See, e.g., U.S. v. Quashie, 162 F.Supp.3d 135 (E.D.N.Y. 2016), U.S. v. Green, 2016 WL 277982 (D.Md. 2016), and U.S. v. Walker, 2016 WL 153088 (E.D.Va. 2016).

26. No uniform consensus has formed, however. See Chasse v. U.S., 2016 WL 4926154 (D.N.H. 2016) (noting the disagreement in the case law). There is case law that has found §

924(c)(3)(B) to be unconstitutionally vague. See Duhart v. U.S., 2016 WL 4720424 (S.D.Fla. 2016). See also, U.S. v. Bell, 158 F.Supp.3d 906 (N.D.Cal. 2016), U.S. v. Lattanaphom, 159 F.Supp.3d 1157 (E.D.Cal. 2016), and U.S. v. Edmundson, 153 F.Supp.3d 857 (D.Md. 2015). This Court discerns no Circuit Court that has held the same, however.

27. It is reasonable to argue that the Residual Clause of § 924(c)(3)(B) suffer from the same defects as the Residual Clause of the ACCA. The Respondent counters that the two Residual Clauses are worded differently and are contextually different. The Respondent argues that the Residual Clause of § 924(c)(3)(B) is different in a way that permits a more reliable risk determination than what the ACCA Residual Clause does. This Court agrees that there are differences in wording and context, but the fundamental problem in applying the objective ordinary case test of James v. U.S., 550 U.S. 192 (2007) to a risk-based measure remains. Nor does the Respondent give a practical, concrete example of how the Residual Clause of § 924(c)(3)(B) yields a qualitatively simpler and more reliable risk measurement, one that allays the Supreme Court's concerns.

28. There is case law that finds a third Residual Clause, the one used at 18 U.S.C. § 16(b), to be vague. See Golicov v. Lynch, 2016 WL 4988012 (10th Cir. 2016) and U.S. v. Vivas-Ceja,

808 F.3d 719 (7th Cir. 2015). The Sixth Circuit held the same in Shuti v. Lynch, 828 F.3d 440 (6th Cir. 2016) in a decision in which it receded somewhat from its Taylor decision, supra. So did the Ninth Circuit in Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), a decision which is now before the Supreme Court, 2016 WL 3232911 (2016) (granting cert.). But see U.S. v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. 2016) (after an en banc rehearing finding it not unconstitutionally vague). This is a relevant point because the Residual Clauses of § 924(c)(3)(B) and § 16(b) are identically worded. Moreover case law has treated the Residual Clauses of these three statutes (as well as the one used in the U.S. Sentencing Guidelines) as analogous generally. See, e.g., U.S. v. Sanchez-Espinal, 762 F.3d 425 (5th Cir. 2014) (noting that while the Residual Clauses of the ACCA and § 16(b) differ in their focus, case law nevertheless has looked to the ACCA to decide whether offenses are crimes of violence under § 16(b)). The Eleventh Circuit does so, as well. See U.S. v. Keelan, 786 F.3d 865 (11th Cir. 2015). There are many more such cases which the parties cite in their pleadings. In its Brief to the U.S. Supreme Court, 2015 WL 1284964, the Solicitor General opined that the Residual Clause of § 16(b) suffers from the same defects as the ACCA one---despite the two having a different risk focus. The line of reasoning drawn

therefrom is that if the Residual Clause of 18 U.S.C. § 16(b) is void for vagueness, then the Residual Clause of § 924(c)(3)(B) should be void for vagueness, too. The U.S. Sentencing Commission found as such. After Johnson, it dropped the Residual Clause from its definition of "crime of violence". See Amy Baron-Evans, Litigating Challenges to the Amended Definition of "Crime of Violence" in 4B1.2(a), Champion 40 (Aug. 2016). This Court notes that this change has no direct bearing on this analysis, however. See U.S. v. Strevig, 2016 WL 6406597, *5 (11th Cir. 2016).

29. As the above shows, it is not yet conclusive that the Residual Clause of § 924(c)(3)(B) survives Johnson unaffected. Even in light of the strong doubt expressed by the Eleventh Circuit in its Fox opinion, supra, this Court gives the Movant the benefit as to this point. This Court assumes for present purposes that the Residual Clause of § 924(c)(3)(B) is unconstitutionally vague and may not be used to support the Movant's § 924(c) convictions and sentence. In any event it is a moot point. Even if the Residual Clause of § 924(c)(3)(B) is void for vagueness, the companion Hobbs Act robbery offenses still meet the statute's alternative definition of a "crime of violence". See Chasse, supra.

30. The next step in the analysis is to determine what effect deeming the Residual Clause of § 924(c)(3)(B) void has on the Movant's claim for relief. The underlying record does not affirmatively show that the Residual Clause was the definition used. The record is ambiguous which of the two definitions of a "crime of violence" the District Court based the § 924(c) convictions and sentence. (There was no need for such specificity under the then case law). This converts the question into how this ambiguity affects the analysis and the Movant's burden of proof. Must the District Court have expressly and directly relied on the Residual Clause in order for the Movant to benefit from Johnson? This Court answers this question in the negative. The ambiguity does not bar the Movant from seeking the benefit of Johnson. Rather this Court finds sufficient the potential that the District Court may have relied on the Residual Clause definition. This Court explains why below.

31. The Eleventh Circuit offers two approaches to answer the above question. One approach is found in the in re: Jasper Moore, 830 F.3d 1268, 1273 (11th Cir. 2016) decision. There, the Eleventh Circuit concludes that a § 2255 motion should be denied if ambiguity over the basis of the sentence's imposition remains. In the other approach, set forth in the in re: Devon Chance, 831 F.3d 1335 (11th Cir. 2016) decision, a broader

inquiry is undertaken, one that looks to whether there is any basis to support the conviction and sentence and one that applies the current state of the law. Neither in re: Jasper Moore nor in re: Devon Chance is controlling. Having considered the issue de novo, this Court elects to follow the Devon Chance approach.

32. This Court finds the Devon Chance approach more consistent with how this situation has been handled, generally speaking. This Court observes how before Johnson, the Government used the Residual Clause catch-all definition to defend enhanced sentences when alternative definitions were challenged. The Residual Clause provides the "easier" definition to meet, generally speaking. In its Report and Recommendation of December 3, 2014 and found at DE 13 in the case of Wojcieszak v. U.S., Case No. 14-14240-CIV-GRAHAM/LYNCH, this Court denied a § 2255 motion based on the Respondent's reliance on the Residual Clause as an alternative basis to support the ACCA sentencing enhancement's continued application. See also, U.S. v. Winston, 2016 WL 4940211 (W.D.Va. 2016) (observing the same). The Eleventh Circuit has observed how it likewise has looked to alternative definitions to support an enhanced sentence when one definition no longer is available. See in re: Kiwanis Jones, 830 F.3d 1295, 1305 (11th Cir. 2016) (concurring opinion). See also,

U.S. v. Langston, 2016 WL 6276044 (11th Cir. 2016). The implication is that all of the alternative bases supporting a conviction or sentence must be considered before declaring the movant actually or legally innocent. Lastly this approach is consistent with the remand instruction that the Supreme Court gave in its Welch opinion to test whether Mr. Welch's § 2255 motion can be denied on other grounds in the absence of the Residual Clause. See in re: Deshawn James, 2016 WL 4608125, *3 (11th Cir. 2016) (citing Welch as instructing "that even if a defendant's prior conviction was counted under the residual clause, courts can now consider whether that conviction counted under another clause of the ACCA even without the residual clause."). Supreme Court precedent supports a movant-favorable approach in other ways. These include lenity-related principles and Suspense Clause concerns, see Simmons and Winston, supra, as well as the instruction in Teague v. Lane, 489 U.S. 288, (1989), to apply new rules equally to similarly situated defendants.

33. Thus this Court finds that the Movant may progress to the core dispositive question underlying his claim for relief: if there are no procedural bars to relief and if the Residual Clause of § 924(c)(3)(B) is void, do his Hobbs Act robbery convictions count as "crimes of violence" under the Force Clause definition of § 924(c)(3)(A)? In other words this Court must,

decide whether the other definition of a "crime of violence" provides alternative support to the Movant's § 924(c) convictions and sentence.

34. The Force Clause at § 924(c)(3)(A) defines the term "crime of violence" to be any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another". As they do with the Residual Clause, the other enhanced penalty statutes share a forced-based definition for what offenses count as a predicate "crime of violence" or "violent felony". The Force Clause of § 16(a) is identical to the one at § 924(c)(3)(A) at issue here. The Force Clause definition that the ACCA (at § 924(e)(2)(B)(i)) and the U.S.S.G. employ to define their predicate "violent felony" is the same, as well, except that their version is limited to force used against just "the person of another" and not also the property of another. Case law generally treats both versions as equivalents such that an interpretation of one statute's Force Clause relates to the interpretation of another's. See, e.g., U.S. v. Langston, 2016 WL 6276044, *5 (11th Cir. 2016) (considering the Force Clauses of § 924(c)(3)(A) and the ACCA as equivalent for analysis purposes).

35. With this commonality in mind, this Court considers how the case law construes the Force Clause definition and what

it means. For a felony to meet the Force Clause definition of a "crime of violence", it must require as an element of conviction conduct that involves "physical force". Case law looks for a certain quantum of force: a violent and strong degree of physical force and the degree of force that causes physical pain or bodily injury. "Physical force" also has a mens rea component. A "crime of violence" is a felony for which the prosecutor must prove the defendant's intent to cause bodily harm or at least the defendant's subjective belief that his conduct likely would cause bodily harm. A high degree of intent therefore is needed. Crimes that can be committed by way of reckless, negligent, or accidental bodily harm do not meet the definition. See Leocal v. Ashcroft, 543 U.S. 1 (2004), Curtis Johnson v. U.S., 559 U.S. 133 (2010), and U.S. v. Palomino Garcia, 606 F.3d 1317 (11th Cir. 2010). Condensed down and applied here, for a felony crime to count as a "crime of violence", the prosecutor must have to prove a defendant's proactive use of a violent degree of force with the intent and purpose of causing another bodily injury (or of causing injury to another's property).

36. This Court notes that the above definition may not be the only way to construe the Force Clause. In its in re: Charles Edward Jones decision (found at DE 12 in Jones v. U.S., Case No.

16-22268-CIV-MOORE (S.D.Fla.), the Eleventh Circuit stated that Curtis Johnson "has no application to" the § 924(c)(3)(A) Force Clause because the Supreme Court did not consider "physical force" against property and because it did not consider the attempted or threatened use of physical force. See also, in re: Sams, 830 F.3d 1234, 1237 (11th Cir. 2016). For purposes of the present analysis, this Court applies Curtis Johnson to the construction of the Force Clause. This Court does so to give the Movant the benefit on this point and to progress the analysis to the next step.

37. Two crimes were used to support the Movant's § 924(c) convictions and sentence. They were substantive Hobbs Act robbery and attempted Hobbs Act robbery, both in violation of 18 U.S.C. § 1951(a). They were used to establish the "during and in relation to a drug trafficking or a crime of violence" element of a § 924(c) offense. See also, U.S. v. Brewton, 2016 WL 4501650, *2 (11th Cir. 2016) (setting forth the elements of a § 924(c) conviction).

38. The question therefore is whether the above two kinds of Hobbs Act robbery count as "crimes of violence" under the Force Clause definition at § 924(c)(3)(A). To determine whether a crime falls within the scope of the Force Clause definition, courts use the "Categorical Approach" test. The Categorical

Approach test shifts the inquiry away from the facts of how a particular defendant committed the crime to the objective legal definition of the crime. This test limits the inquiry to the elements that a prosecutor must prove to secure a conviction. This test primarily relies on the elements that the criminal statute sets out, but Standard Jury Instructions and case law also may be consulted for what elements are needed to prove the crime. Once the crime's elements are ascertained, then the test looks for what the least culpable act satisfies those elements. See U.S. v. Strevig, 2016 WL 6406597, *2 (11th Cir. 2016)

(summarizing the seminal Supreme Court decisions of Descamps, Moncrieffe, and Mathis regarding the Categorical Approach as well as U.S. v. Estrella, 758 F.3d 1239 (11th Cir. 2014)).

39. It is this least culpable version of the crime that controls. If a defendant can be convicted of the crime for conduct that is less than "physical force", then it fails the Force Clause definition. Examples of crimes that do not meet the Force Clause definition are aggravated assault, see Palomino, supra; second degree rape, see U.S. v. Owens, 672 F.3d 966 (11th Cir. 2012); and wantonly or maliciously throwing a hard object at an occupied car, see U.S. v. Estrella, 758 F.3d 1239 (11th Cir. 2014). Conversely, if the very least conduct that could support a conviction still is severe enough to be the kind of

"physical force" that the Force Clause contemplates, then the crime passes the Force Clause test and counts as a crime of violence. In other words the Court must determine whether the crime can be committed by any non-violent means.

40. This Categorical Approach test applies to the various "crime of violence" or "violent felony" definitions discussed above, generally. It also applies to the Force Clause of § 924(c)(3)(A), specifically. See in re: Gomez, 830 F.3d 1225, 1228 (11th Cir. 2016) (citing U.S. v. McGuire, 706 F.3d 1333 (11th Cir. 2013) (O'Connor, Supreme Court Justice (Ret.)). For present purposes this Court gives the Movant the benefit on this point, and applies the Categorical Approach test here. The Respondent concedes that it applies, as well. However this Court does observe some expressions of doubt in the case law over the applicability of the Categorical Approach test in the § 924(c) context. See in re: Charles Edward Jones, supra; U.S. v. Collins, infra; and Chasse, supra, at n.7.

41. This Court considers first whether the crime of substantive Hobbs Act robbery is as a "crime of violence". Title 18 U.S.C. § 1951(a) makes unlawful robbery² that affects

² Title 18 U.S.C. § 1951(a) also makes unlawful extortion that affects interstate commerce. Because extortion is a separate, divisible kind of Hobbs Act offense, this Court does not take it, and its definition, into consideration. See U.S. v. Collins, 2016 WL 1639960, *30 (N.D.Ga. 2016). While Hobbs Act robbery and extortion are two different crimes, Hobbs Act

interstate commerce. Section 1951(b)(1) defines "robbery" to be the taking of the victim's property against the victim's will by one of the various means specified. Standard Pattern Jury Instruction 70.3 (2010) lists out the three alternative means of committing a Hobbs Act robbery. As it breaks this element of the statute down, a prosecutor must prove beyond a reasonable doubt that the defendant took the victim's property against the victim's will by either (1) actual or threatened force, (2) violence, or (3) causing the victim to fear either immediate or future harm.

42. The Movant points to the first and third means of commission to show how a prosecutor may obtain a Hobbs Act robbery conviction by proving either just a simple, non-violent use of force or by instilling fear of bodily harm. Because the use of a violent, physical degree of force is not a necessary element, the Movant argues that substantive Hobbs Act robbery fails the Force Clause definition of a "crime of violence". The Movant also argues that the act of threatening someone's intangible economic interest---which would support finding a defendant guilty of the offense---is less than a threat of violent force to property needed to meet the Force Clause

robbery, itself, is not further divisible. See U.S. v. Smith, 2016 WL 2901661, *4 (D.Nev. 2016).

definition. Lastly case law generally affirms Hobbs Act robbery convictions on a broad range of conduct on direct appeal. The defendant's use of force can be unintentional or indirect. This raises the potential that the breadth of conduct that can support a conviction is broader than what the Force Clause contemplates.

43. The Eleventh Circuit resolves this issue against the Movant, however. In its in re: Saint Fleur decision rendered on July 22, 2016 and found at DE 5 in the Southern District of Florida case of Saint Fleur v. U.S., 16-22655-COOKE, the Eleventh Circuit expressly rejected the same arguments that the Movant raises here. Moreover that July 22, 2016 decision was the second time the Eleventh Circuit declined to give Mr. Saint Fleur leave to challenge his § 924(c) conviction. The Eleventh Circuit affirmed its first denial at 824 F.3d 1337 (11th Cir. June 8, 2016) and affirmed its holding that a "Hobbs Act robbery conviction qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause." The Eleventh Circuit decided the issue on its merits. The Saint Fleur decisions therefore are binding, on-point precedent that control the outcome here, even if they were rendered in the context of § 2255(h) certification. The second Saint Fleur decision is further strengthened by the fact that it was decided after Mathis v. U.S., 136 S.Ct. 2243

(2016). The Movant's claim for relief fails on the merits for the same reason Mr. Saint Fleur failed to state a prima facie claim for relief.

44. The Eleventh Circuit has denied other movants' § 2255(h) certification requests for the same reason. See in re: Chance, 2016 WL 4123844 (11th Cir. 2016) and in re: Gordon, 827 F.3d 1289, 1293–94 (11th Cir. 2016). This includes for two of the Movant's Co-Defendants from his underlying criminal case. See in re: Deshawn James, 2016 WL 4608125 (11th Cir. 2016) and in re: Ramsdell, Appeal Case No. 16-16015-J (11th Cir. Oct. 14, 2016) (docketed at DE 39 in Ramsdell v. U.S., 16-14390-CIV-MOORE (S.D.Fla.)). The Eleventh Circuit both affirmed its holding that a substantive Hobbs Act robbery offense is a crime of violence for § 924(c) purposes and deemed its Saint Fleur decision to be binding precedent on that point.

45. The Eleventh Circuit does not limit this holding to the § 2255(h) certification context. The Eleventh Circuit also has reached this same conclusion on direct appeal. See U.S. v. Langston, 2016 WL 6276044, *6 (11th Cir. 2016) (noting its prior conclusion "that a conviction for the substantive offense of Hobbs Act robbery qualifies as a crime of violence under the use-of-force clause after Johnson"). Other circuits likewise find Hobbs Act robbery to count as a "crime of violence" under §

924(c)(3)(A). See Brown v. U.S., 2016 WL 5439718, *4 (E.D.Tenn. 2016) (collecting opinions).

46. This Court notes how the substantive versions of other robbery-type crimes also fall within the scope of the Force Clause. The Eleventh Circuit holds that bank robbery in violation of § 2113(a), even if committed by simple force or by intimidation, falls within the scope of the § 924(c)(3)(A) Force Clause. See in re: Sams, 830 F.3d 1234 (11th Cir. 2016). In a Report and Recommendation that this Court renders in a contemporaneous § 2255 Motion, this Court finds the offense of bank robbery to count as a "crime of violence" under the § 924(c)(3)(A) Force Clause definition. The Eleventh Circuit holds that carjacking in violation of 18 U.S.C. § 2119 is a "crime of violence" as well. See in re: Jeffrey Smith, 829 F.3d 1276 (11th Cir. 2016). The Eleventh Circuit holds on direct appeal that armed robbery in violation of § 812.13, Fla. Stat., whose least culpable act is putting the victim in fear of great bodily harm, falls within the scope of ACCA's Force Clause. See U.S. v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016). See also, Baxter v. U.S., Case No. 16-14264-CIV-MIDDLEBROOKS/LYNCH.

47. The foregoing case law compels the finding that the Movant's substantive Hobbs Act robbery convictions count as "crimes of violence" for § 924(c) purposes. This Court turns

next to the question of whether his conviction for attempted Hobbs Act robbery counts as a "crime of violence" also. Unlike for substantive Hobbs Act robbery, case law does not preclude a movant from stating a prima facie challenge. This is because the question of whether an attempted Hobbs Act robbery conviction counts as a "crime of violence" remains unsettled in the Eleventh Circuit. See in re: Deshawn James, 2016 WL 4608125 (11th Cir. 2016).

48. This Court begins with the elements of the offense. This Court relies on Pattern Jury Instruction S11 for the required elements to prove the attempt version of a crime and on Pattern Jury Instruction O70.3 for the required elements to prove a substantive Hobbs Act robbery. Construed together and edited for relevance to this analysis, the prosecutor must prove beyond a reasonable doubt that: (1) the defendant knowingly attempted to acquire someone else's property by robbery; (2) the defendant attempted to take the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and (3) the defendant's intent was strongly corroborated by his taking a substantial step toward committing the crime. These are the elements given to the jury in the case of U.S. v. Holland, 10-14069-CR-MARTINEZ (found at DE 175 in that criminal

case) which the Eleventh Circuit approved on direct appeal, 503 Fed.Appx. 737 (11th Cir. 2013). The dispositive question is whether these elements of attempted Hobbs Act robbery have "as an element the use, attempted use, or threatened use of physical force against the person or property of another". This Court finds that it does.

49. Eleventh Circuit case law supports this conclusion. In U.S. v. Gonzalez, 322 Fed.Appx. 963, 967 (11th Cir. 2009), the Eleventh Circuit unequivocally stated that an attempted Hobbs Act robbery "constitutes a crime of violence under § 924(c)(1)(A)." The Eleventh Circuit has held that the offense of carjacking in violation of 18 U.S.C. § 2119---which includes both an actual taking and an attempted taking version---meets the § 924(c)(1)(A) Force Clause definition of a "crime of violence". See in re: Jeffrey Smith, 829 F.3d 1276, 1280 (11th Cir. 2016). Moreover, in another analogous situation, the Eleventh Circuit found attempted robbery under Florida law to qualify as a "violent felony" under the Force Clause of U.S.S.G. § 4B1.2(a). See U.S. v. Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011).

50. Of course, the offense of attempted Hobbs Act robbery means that the defendant did not or was unable to complete the robbery. However the attempt version of the offense still

requires the purposeful intent to try and complete an actual robbery and the taking of a substantial step toward committing the robbery. The mens rea component of attempted robbery implies the intent to use physical force to try and rob the victim. This Court finds this to satisfies the "attempted use . . . of physical force" that the Force Clause definition of § 924(c)(3)(A) requires. This Court does not read § 924(c)(3)(A) to require the actual use of physical force. Rather it is broad enough to include the attempted or threatened use of physical force. Therefore, the fact that a defendant fails to complete the planned robbery does not exempt it as a crime of violence.

51. This Court's finding that both substantive and attempted Hobbs Act robbery meet the Force Clause definition of a "crime of violence" is consistent with how the aiding and abetting version of the offense is considered. See in re: Colon, 826 F.3d 1301, 1305 (11th Cir. 2016).

52. This Court sees no need for an evidentiary hearing to resolve the issues that the Movant raises in his Motion. The parties' briefing and the record provide an ample basis by which to rule.

CONCLUSION

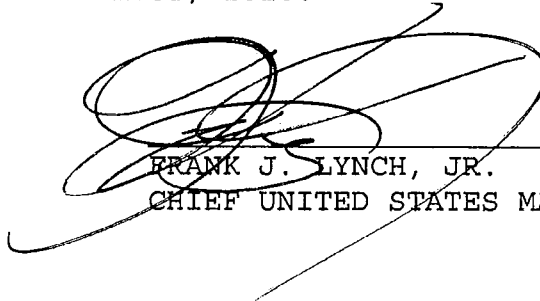
53. In framing the legal analysis, this Court gives the Movant the benefit of the doubt on the various preliminary

issues such as procedural bar and cognizability as well as on the issues of Johnson applicability and whether the Residual Clause of § 924(c)(3)(B) is unconstitutionally vague. This Court resolves all such issues in the Movant's favor and in a way that permits this Court to reach the merits of the underlying dispositive issue. That is: do his convictions for substantive and attempted Hobbs Act robbery meet the § 924(c)(3)(A) Force Clause definition of a "crime of violence"? Having reached the endpoint of the analysis, this Court finds the weight of binding Eleventh Circuit case law to direct an answer in the affirmative. This Court finds both the substantive and attempted Hobbs Act robbery convictions to count as crimes of violence. Consequently both of those convictions may be used as predicates to his § 924(c) convictions and sentence. That means his § 924(c) convictions and sentence suffer from no legal defect and that he is not legally innocent of them under the current state of the law. He therefore states no basis for § 2255 relief.

ACCORDINGLY, this Court recommends to the District Court that the Motion to Correct Sentence pursuant to 28 U.S.C. § 2255 (found at DE 1 in this civil case, Case No. 16-14251-CIV-MOORE/LYNCH and at DE 409 in the underlying criminal case, Case No. 09-14016-CR-MOORE/LYNCH) be **DENIED**.

The parties shall have fourteen (14) days from the date of this Report and Recommendation within which to file objections, if any, with the Honorable K. Michael Moore, the United States District Judge assigned to this case. Failure to file timely objections shall bar the parties from a de novo determination by the District Court of the issues covered in this Report and Recommendation and bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745, 749-50 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988).

DONE AND SUBMITTED in Chambers at Fort Pierce, Florida,
this 5th day of December, 2016.



FRANK J. LYNCH, JR.
CHIEF UNITED STATES MAGISTRATE JUDGE

cc: Hon. K. Michael Moore
Peter T. Patanzo, Esq.
Rinku Tribuiani, AUSA