

APPENDIX

APPENDIX

Order of the United States Court of Appeals for the Eleventh Circuit denying a certificate of appealability, *Michael William Jeczalik v. United States*, No. 17-12525 (11th Cir. Oct. 27, 2017).....A-1

Order of the United States District Court for the Southern District of Florida adopting magistrate judge's Report and Recommendation recommending denial of petitioner's motion to vacate sentence and for a certificate of appealability, *Michael William Jeczalik v. United States*, No. 16-81108-Civ-Hurley (S.D. Fla. Apr. 27, 2017) A-9

Order of the United States District Court for the Southern District of Florida entering Final Judgment denying motion to vacate sentence pursuant to 28 U.S.C. §2255, and denying certificate of appealability, *Michael William Jeczalik v. United States*, No. 16-81108-Civ-Hurley (S.D. Fla. Apr. 27, 2017).....A-11

Report and Recommendation of the magistrate judge recommending that the motion to vacate and a certificate of appealability be denied, *Michael William Jeczalik v. United States*, No. 16-81108-Civ-Hurley (S.D. Fla. Apr. 11, 2017).....A-12

No:

A-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12525-K

MICHAEL WILLIAM JECZALIK,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

In August 2010, a federal grand jury indicted Michael William Jeczalik for conspiracy to commit armed bank robbery, in violation of 18 U.S.C. §§ 371 and 2113(a) and (d); armed bank robbery, in violation of 18 U.S.C. §§ 2 and 2113(a) and (d); brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A)(ii); and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The indictment alleged that the bank robbery involved “force, violence, and intimidation,” as well

as “assault[ing] and put[ting] in jeopardy the life of a person, by the use of a dangerous weapon or device, that is, a firearm.”

Jeczalik pled guilty to armed bank robbery and to brandishing a firearm during and in relation to a crime of violence. He admitted that his codefendant, Andrew Wright, took money from a bank after brandishing a firearm and handing a bank teller a note that read: “I don’t wanna kill you so start with stacks of 100s. Nothing but big bills. Do everything correctly and no one will get hurt. No ink bombs. No talking unless I speak.” Jeczalik also admitted that he had provided Wright the firearm used in the bank robbery and that Wright had given him some of the proceeds from the bank robbery. The district court imposed a 24-month sentence for armed bank robbery and a consecutive 84-month sentence for the § 924(c) conviction. Jeczalik did not directly appeal.

In June 2016, Jeczalik filed the instant, counseled motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. He argued that his § 924(c) conviction was unconstitutional because armed bank robbery was not a crime of violence. Jeczalik asserted that the risk-of-force clause of the definition of the phrase “crime of violence” was unconstitutionally vague. He further asserted that armed bank robbery was not categorically a crime of violence under the use-of-force clause of the definition of that phrase. Jeczalik later acknowledged in a brief that we had decided that bank robbery and armed bank robbery were crimes of violence. However, he contended that those decisions

were not precedential in his case because they were made in proceedings for applications to file second or successive § 2255 motions.

A magistrate judge recommended that Jeczalik's § 2255 motion be denied. The magistrate judge concluded that, according to binding precedent, armed bank robbery was a crime of violence under § 924(c)'s use-of-force clause. The magistrate judge also concluded both that the first portion of the bank-robbery statute, 18 U.S.C. § 2113(a), was divisible and that Jeczalik's indictment showed that the bank robbery in which he participated involved the use, attempted use, or threatened use of physical force against the person or property of another.

Over Jeczalik's objection, the district court adopted the magistrate judge's recommendation, denied Jeczalik's § 2255 motion, and denied a certificate of appealability ("COA"). Jeczalik has appealed, and he now moves for a COA. In his counseled motion, he contends that reasonable jurists have debated whether armed bank robbery is a crime of violence and that the existence of precedent does not mean that reasonable jurists could not debate that issue.

A COA is required to appeal a final order in a § 2255 proceeding. 28 U.S.C. § 2253(c)(1)(B). To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473,

484 (2000) (quotation omitted). “[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law.” *Hamilton v. Sec’y, Fla. Dep’t of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015).

The Armed Career Criminal Act (“ACCA”) imposes a mandatory-minimum 15-year sentence on a defendant convicted of being a felon in possession of a firearm, if the defendant has 3 prior convictions of a combination of violent felonies and serious drug offenses. *See* 18 U.S.C. § 924(e)(1). A violent felony is a felony that (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another”; (2) is burglary, arson, or extortion or involves the use of explosives; or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another.” *Id.* § 924(e)(2)(B); *see also Johnson v. United States*, 135 S. Ct. 2551, 2555-56 (2015) (referring to the third clause of this definition as the residual clause). In *Johnson*, the Supreme Court held that the ACCA’s residual clause is unconstitutionally vague because it creates uncertainty about how to estimate the risks that a crime poses and how much risk it takes for a crime to qualify as a violent felony. 135 S. Ct. at 2557-58, 2563. *Johnson*’s ruling is retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

Under 18 U.S.C. § 924(c)(1)(A), it is a crime to use, carry, or possess a firearm during and in relation to a crime of violence or a drug-trafficking crime.

18 U.S.C. § 924(c)(1)(A); *see also id.* § 924(c)(1)(A)(ii) (providing for a mandatory-minimum seven-year sentence if the firearm is brandished). A crime of violence is a felony that either (1) “has as an element the use, attempted use, or threatened use of physical force against the person or property of another”; or (2) “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” *Id.* § 924(c)(3); *see also Ovalles v. United States*, 861 F.3d 1257, 1263 (11th Cir. 2017) (referring to the first clause of this definition as the use-of-force clause and to the second clause as the risk-of-force clause). We have held that *Johnson’s* ruling does not apply to or invalidate § 924(c)’s risk-of-force clause. *Ovalles*, 861 F.3d at 1265-67 (reasoning that the risk-of-force clause has distinctive textual features that make it more precise, predictable, and judicially administrable than the ACCA’s residual clause).

A person is guilty of bank robbery if he

by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association.

18 U.S.C. § 2113(a). A person may be imprisoned for up to 25 years if he, “in committing, or in attempting to commit, any offense defined in [§ 2113(a)], assaults any person, or puts in jeopardy the life of any person by the use of a

dangerous weapon or device.” *Id.* § 2113(d). Whoever “aids, abets, counsels, commands, induces or procures” the commission of a federal crime is punishable as a principal. *Id.* § 2.

In *In re Hines*, we concluded that a defendant’s conviction of armed bank robbery under § 2113(a) and (d) “clearly” qualified as a crime of violence under § 924(c)’s use-of-force clause when the indictment charged that the defendant used “force, violence and intimidation” and that he “did assault and put in jeopardy the life of two individuals by use of a dangerous weapon.” 824 F.3d 1334, 1337 (11th Cir. 2016) (alteration and quotations omitted). We subsequently stated that, in accordance with *Hines*, a conviction of armed bank robbery under § 2113(a) and (d) is as a crime of violence under § 924(c)’s use-of-force clause

if the record makes clear that the [defendant] by force, violence and intimidation, did take from the person or presence of a bank employee monies belonging to a federally-insured bank and that in doing so, [he] assaulted and put in jeopardy the life of others by use of a dangerous weapon.

In re Hunt, 835 F.3d 1277, 1277 (11th Cir. 2016) (alterations and quotation omitted). We also have held that “a bank robbery conviction under § 2113(a) by force and violence or by intimidation qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause.” *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016).

A “prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or

by this court sitting *en banc*.” *United States v. Baston*, 818 F.3d 651, 662 (11th Cir. 2016) (quotation omitted), *cert. denied*, 137 S. Ct. 850 (2017). This “prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions.” *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (clarifying that “published three-judge orders issued under [28 U.S.C.] § 2244(b) are binding precedent in [this] circuit”).

Reasonable jurists would not debate whether § 924(c)’s risk-of-force clause is unconstitutionally vague. We have held that *Johnson*’s ruling does not apply to or invalidate the risk-of-force clause. *See Ovalles*, 861 F.3d at 1265-67. *Ovalles*’s holding is binding precedent in this Circuit unless and until either the Supreme Court or this Court sitting *en banc* overrules or abrogates it. *See Baston*, 818 F.3d at 662. Jeczalik has not argued that his conviction of armed bank robbery does not qualify as a crime of violence under the risk-of-force clause if that clause is constitutionally valid.

Moreover, reasonable jurists would not debate whether Jeczalik’s conviction of armed bank robbery qualifies as a crime of violence under § 924(c)’s use-of-force clause. The record makes clear that Jeczalik pled guilty to participating in an armed bank robbery that involved “force, violence, and intimidation,” as well as “assault[ing] and put[ting] in jeopardy the life of a person, by the use of a dangerous weapon or device, that is, a firearm.” We have

concluded that such an armed bank robbery is a crime of violence under the use-of-force clause. *See Hunt*, 835 F.3d at 1277; *Hines*, 824 F.3d at 1337; *see also Sams*, 830 F.3d at 1239 (concluding that bank robbery by force and violence or by intimidation is a crime of violence under § 924(c)'s use-of-force clause).

The decisions in *Hines*, *Hunt*, and *Sams* were made in proceedings for applications to file second or successive § 2255 motions. Nevertheless, those decisions are binding precedent in this Circuit unless and until either the Supreme Court or this Court sitting *en banc* overrules or abrogates them. *See Baston*, 818 F.3d at 662; *Lambrix*, 776 F.3d at 794.

Binding precedent forecloses Jeczalik's argument that his § 924(c) conviction is unconstitutional. Accordingly, his motion for a COA is DENIED. *See Hamilton*, 793 F.3d at 1266.


UNITED STATES CIRCUIT JUDGE

A-9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-81108-HURLEY
CASE NO. 10-CR-80114-HURLEY

MICHAEL WILLIAM JECZALIK,
movant,

v.
UNITED STATES OF AMERICA,

respondent.

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

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

On April 12, 2017, Magistrate Judge Hopkins filed a Report and Recommendation [DE 22] recommending that petitioner's motion to vacate, set aside and correct sentence be denied. On April 13, 2017, the movant filed objections to the report and recommendation [DE 23]; and on April 19, 2017, the government filed its reply to those objections [DE 24].

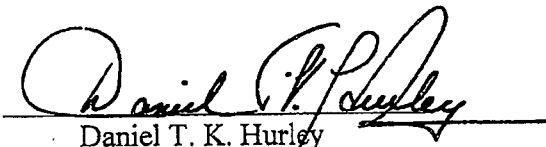
After carefully reviewing the Magistrate Judge's Report and Recommendation, and after making a *de novo* determination on the record as to all portions of the Magistrate Judge's disposition as to which specific written objection has been made, it is

ORDERED and ADJUDGED:

1. Magistrate Judge James Hopkins' Report and Recommendation entered April 12, 2017 [DE 22] is **APPROVED AND ADOPTED** in full.

2. The movant's motion to vacate, set aside and correct sentencing pursuant to 28 U.S.C. § 2255 [DE 1] is **DENIED**.
3. Further, pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). is **DENIED**.
4. The Clerk of Court is directed to enter this case as **CLOSED** and terminate all pending motions as **MOOT**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 27th day of April, 2017.


Daniel T. K. Hurley
United States District Judge

cc. All counsel

A-11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-81108-HURLEY
CASE NO. 10-CR-80114-HURLEY

MICHAEL WILLIAM JECZALIK,
movant,

v.

UNITED STATES OF AMERICA,

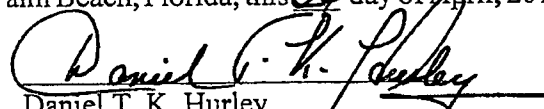
respondent.

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

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

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

DONE and **SIGNED** in Chambers at West Palm Beach, Florida, this 27 day of April, 2017.


Daniel T. K. Hurley
United States District Judge

Copies provided to Movant and counsel of record.

A-12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.:16-CV-81108-HURLEY/HOPKINS
10-CR-80114-HURLEY

MICHAEL WILLIAM JECZALIK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION ON MOTION TO CORRECT SENTENCE (DE 1)

THIS CAUSE is before this Court upon the District Court's Order referring Movant's Motion to Correct Sentence for a Report and Recommendation. (DE 4).¹ Movant, a federal prisoner, challenges his § 924(c) conviction for brandishing a firearm during and in relation to a crime of violence. (DE 1).

On October 13, 2010, Michael Jeczalik pled guilty to armed bank robbery, in violation of 18 U.S.C. § 2113 (a) and (d) and § 2 [Count 2], and brandishing a firearm during and in relation to a crime of violence – the armed bank robbery – in violation of 18 U.S.C. § 924(c)(1)(A)(ii) [Count 3]. (DEcr 43 at 1). On January 4, 2011, Jeczalik was sentenced to 108 months of imprisonment – 24 months for Count 2 and 84 months for Count 3 – as well as 5 years of supervised release. (DEcr 50); (DE cr52 at 2-3). Jeczalik argues that armed bank robbery is not a crime of violence and, therefore, that he is “actually innocent of the 924(c) sentence.” (DE 1 at 2). Depending on the extent of a reduction if his 924(c) sentence is overturned, Jeczalik may be a **candidate for immediate release.**

¹Docket entries referring to the instant civil case (16-cv-81108) are referenced as (DE XX). Docket entries referring to the underlying criminal case (10-cr-80114) are referenced as (DEcr XX).

Samuel Johnson and 18 U.S.C. § 924(c)

Jeczalik argues that the United States Supreme Court (“Supreme Court”) *Samuel Johnson* case, which invalidated the Armed Career Criminal Act (“ACCA”) residual clause, applies to invalidate the similarly worded § 924(c) residual clause. (DE 1 at 11-16). “Under the ACCA, a defendant convicted of violating 18 U.S.C. § 922(g) is subject to a mandatory minimum sentence of 15 years (180 months) if he has three prior convictions for a violent felony or serious drug offense.” *United States v. Fritts*, 841 F.3d 937, 938 (11th Cir. 2016) (citing 18 U.S.C. § 924(e)(1)). A violent felony is “any crime . . . 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, while the second prong contains the enumerated crimes clause and, finally, what is commonly called the residual clause.” *Fritts*, 841 F.3d at 939. In *Samuel Johnson*, the Supreme Court held that the ACCA residual clause was unconstitutionally vague. 135 S. Ct. 2551, 2563 (2015).

“Distinct from § 924(e)(1) of the ACCA, § 924(c)(1)(A) provides for a separate consecutive sentence if any person uses or carries a firearm during an[d] in relation to a crime of violence.” *Wallace v. United States*, No. CV 116-048, 2016 WL 4147164, at *1 (S.D. Ga. Aug. 4, 2016). “[I]f . . . the defendant brandished the firearm, the consecutive sentence is not less than 7 years.” *United States v. Langston*, No. 16-10689, 2016 WL 6276044, at *4 (11th Cir. Oct. 27, 2016) (unpublished) (quotation omitted). A crime of violence is a felony offense that “(A) has as an element the use, attempted use, or threatened use of physical force against the person or

property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 924(c)(3). “The former clause is referred to as the use-of-force clause,² and the later clause as the § 924(c)(3)(B) residual clause.” *Langston*, 2016 WL 6276044, at *5 (quotation omitted) (unpublished).

“[I]t is an open question whether [*Samuel*] *Johnson* applies to the residual clause set out in 18 U.S.C. § 924(c)(3)(B).” *In re Sams*, 830 F.3d 1234, 1237 (11th Cir. 2016), *accord*, *Langston*, 2016 WL 6276044 at *6 (“Neither the Supreme Court nor th[e] [Eleventh Circuit] has extended [*Samuel*] *Johnson*’s § 924(e) residual clause ruling to conclude that the § 924(c)(3)(B) residual clause is unconstitutionally vague.”). However, neither party disputes that Jeczalik’s conviction remains valid if armed bank robbery qualifies as a § 924(c)(3)(A) crime of violence.

Procedural Default

The Government argues Jeczalik’s claim is barred because he has not previously raised the arguments presented in his Motion. (DE 10 at 2-3). Jeczalik doesn’t dispute that he did not raise his claim during sentencing and acknowledges he did not file an appeal. (DE 11 at 32); (DE 1 at 3). “[A] motion to vacate under section 2255 is not a substitute for direct appeal, and issues which could have been raised on direct appeal are generally not actionable in a § 2255 motion and will be considered procedurally barred.” *Ginebra-Vera v. United States*, No. 11-20877-CR-COOKE, 2016 WL 1298387, at *7 (S.D. Fla. Feb. 1, 2016), *report and recommendation adopted*, No. 11-20877-CR, 2016 WL 1295965 (S.D. Fla. Mar. 30, 2016).

“A defendant can avoid a procedural bar only by establishing one of the two exceptions to the procedural default rule.” *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004) (per

² Jeczalik refers to 18 U.S.C. § 924(c)(3)(A) as the elements clause. (DE 1 at 22).

curiam). “Under the first exception, a defendant must show cause for not raising the claim of error on direct appeal *and* actual prejudice from the alleged error.” *Id.* “Alternatively, under the fundamental miscarriage of justice exception, ‘in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.’” *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). “Before resorting to the miscarriage of justice exception, a district court must first determine if procedurally defaulted claims meet the cause and prejudice exception.” *Scott v. United States*, 740 F. Supp. 2d 1317, 1324 (S.D. Fla. 2010) (citing *Dretke v. Haley*, 541 U.S. 386, 393–94 (2004)).

Cause and Prejudice

“[T]he cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests.” *Reed v. Ross*, 468 U.S. 1, 14 (1984). Thus, “where a constitutional claim is so novel that its legal basis [wa]s not reasonably available to counsel, a defendant has cause for his failure to raise the claim.” *Id.* There are “three situations in which a new constitutional rule” representing a sufficiently “clear break with the past might emerge from th[e] [Supreme] Court” such that it was not reasonably available. *Id.* at 17 (quotations omitted). Relevant to Jeczalik’s case is the first situation, where “a decision of th[e] [Supreme] Court [] explicitly overrule[s] one of [its] precedents.” *Id.* In that situation, “there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a court to adopt the position that th[e] [Supreme] Court [] ultimately adopted.” *Id.* “That is so because such changes, by definition, are

virtually unforeseeable, and reasonably competent counsel, therefore, cannot be said to have reasonably anticipated such changes.” *Moore v. Zant*, 885 F.2d 1497, 1507 (11th Cir. 1989).

However, “[w]here the basis of a constitutional claim [wa]s available, and other defense counsel [] perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.” *Pitts v. Cook*, 923 F.2d 1568, 1572 (11th Cir. 1991) (quoting *Engle v. Isaac*, 456 U.S. 107, 134 (1982)). Thus, courts “focus[] on whether others were recognizing and raising the same or similar claims in the period preceding or concurrent with the petitioner’s failure to raise his claim.” *Id.* (quotation omitted). When evaluating a defaulted sentencing objection where the petitioner did not appeal, a court examines the state of the law “at the time of his initial judgment.” *See Craig v. United States*, No. 1:01-CR-00003-GZS-3, 2016 WL 5874965, at *2 (D. Me. Oct. 7, 2016).

The basis for Jeczalik’s vagueness challenge to the § 924(c) residual clause is the Supreme Court’s *Samuel Johnson* case, where the Court found the similarly worded ACCA residual clause to be unconstitutionally vague. *See Samuel Johnson*, 135 S. Ct. at 2563 (2015) (“We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process.”). This decision signaled a “clear break with the past”; it overruled the Court’s earlier precedent to the contrary and was the first time in over sixty years that the Court found a criminal sentencing statute to be unconstitutionally vague. *See id.* (“Our contrary holdings in *James* and *Sykes* are overruled.”), overruling *James v. United States*, 550 U.S. 192 (2007) and *Sykes v. United States*, 564 U.S. 1 (2011); Katherine Menendez, *Johnson v. United States Don’t Go Away*, CRIM. JUST., Spring 2016, at 12, 17 (Before *Samuel Johnson*, “it had been decades [] since the Court held a

sentencing provision in a criminal statute to be unconstitutionally vague.”) (pointing to *United States v. Evans*, 333 U.S. 483 (1948)). This shift was “virtually unforeseeable,” such that “reasonably competent counsel [] cannot be said to have reasonably anticipated such [a] change[].” *See Moore*, 885 F.2d at 1507. *See also Garibo–Carmona v. United States*, No. 1:11-CR-302-SCJ, 2016 WL 6645831, at *3 (N.D. Ga. Oct. 28, 2016) (“Indeed, the original petition for certiorari in [*Samuel*] *Johnson* . . . did not assert vagueness; that issue only arose after the Court asked the parties” to address the argument.); *Samuel Johnson*, 135 S. Ct. at 2556 (2015) (noting that the Court “asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution’s prohibition of vague criminal laws.”).

The unpredictability of this shift makes it unsurprising that, at the time of Jeczalik’s sentencing in 2011, “other defense counsel” had not “perceived and litigated” a vagueness challenge to the § 924(c) residual clause. *See Pitts*, 923 F.2d at 1572 (quoting *Engle* 456 U.S. at 134). Indeed, the Government has not pointed to, and this Court has not found, a single case addressing a vagueness challenge to the § 924(c) residual clause that predates the *Samuel Johnson* decision. Following *Samuel Johnson*, the five circuits to consider the issue have reached conflicting conclusions. Compare *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (Concluding “that the residual clause in 18 U.S.C. § 924(c)(3)(B) is [] unconstitutionally vague” because “[s]ubsection (B) is virtually indistinguishable from the clause in [*Samuel*] *Johnson* that was found to be unconstitutionally vague.”), with *United States v. Hill*, 832 F.3d 135, 150 (2d Cir. 2016) (“We conclude that the Supreme Court’s explanation for its conclusion in [*Samuel*] *Johnson* [] renders that case inapplicable [§ 924(c)(3)(B)].”), *United States v. Davis*, No. 16-10330, 2017 WL 436037, at *2 (5th Cir. Jan. 31, 2017) (“We join several other circuits in

concluding that [*Samuel*] *Johnson* does not invalidate § 924(c)(3)(B).”), *United States v. Taylor*, 814 F.3d 340, 375–76 (6th Cir. 2016) (Concluding that the *Samuel Johnson* decision did not invalidate the 924(c) residual clause “[b]ecause § 924(c)(3)(B) is considerably narrower than the statute invalidated by the Court in [*Samuel*] *Johnson*[] and because much of [*Samuel*] *Johnson*’s analysis does not apply to § 924(c)(3)(B).”), and *United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016) (“We [] conclude that [*Samuel*] *Johnson* does not render § 924(c)(3)(B) unconstitutionally vague.”).

This situation is distinguishable from the one in *Bousley v. United States*, where, at the relevant time, “the Federal Reporters were replete with cases involving [similar] challenges.” 523 U.S. 614, 622 (1998). *See also United States v. Harris*, No. 1:CR-06-0268, 2016 WL 4539183, at *3 (M.D. Pa. Aug. 31, 2016) (finding cause where, “at the time [d]efendant was sentenced, the claim does not appear to have been raised in many federal cases”; distinguishing *Bousley*). Jeczalik has shown “cause for failing to raise the issue” because his “constitutional claim is so novel that its legal basis [wa]s not reasonably available to counsel” at the time of his sentencing. *See Reed*, 468 U.S. at 16-17. *See also Duhart v. United States*, No. 16-61499-CIV, 2016 WL 4720424, at *4 (S.D. Fla. Sept. 9, 2016) (petitioner showed cause for not raising vagueness challenge to § 924(c) residual clause because petitioner was sentenced before the *Samuel Johnson* case, which “overruled precedent, announced a new rule, and [is retroactively applicable]”); *Cowan v. United States*, No. 16-81050, D.E. 15 at 8 (S.D. Fla. Dec. 08, 2016) (citing to *Duhart*, 2016 WL 4720424, at *4, to conclude that petitioner showed cause for not raising claim that § 924(c) residual clause was unconstitutionally vague), *report and recommendation pending*; *Blackstone v. United States*, No. 2:16-CV-03872-CAS, 2016 WL

7469579, at *2 (C.D. Cal. Dec. 27, 2016) (petitioner's claim that § 924(c) residual clause was unconstitutionally vague was novel because, as "the Supreme Court itself recognized, [*Samuel*] Johnson expressly overruled Supreme Court precedent"); *United States v. Pruitt*, No. CR13131DSDTNL, 2016 WL 6601642, at *1 (D. Minn. Nov. 7, 2016) (petitioner's vagueness challenge to § 924(c) residual clause, which was based on "[*Samuel*] Johnson[,] would not have been reasonably available to him at the time of his sentencing because [*Samuel*] Johnson explicitly overruled Supreme Court precedent.").

"[T]o show prejudice, a petitioner must show that without an error, the conviction or sentence would have been different." *United States v. Trujillo*, No. 09-CR-00172-CMA, 2016 WL 7034973, at *6 (D. Colo. Dec. 1, 2016) (citing *Strickler v. Greene*, 527 U.S. 263, 289 (1999)). Jeczalik has shown prejudice; if armed bank robbery is not a crime of violence, his § 924(c) conviction is in error and the corresponding 84 month sentence should be vacated. See *Blackstone*, 2016 WL 7469579, at *2 (prejudice shown where movant argued predicate crime was no longer crime of violence and, therefore, that sentence for 924(c) conviction was error).

Armed Bank Robbery

Jeczalik's § 924(c) conviction was predicated on his companion conviction for armed bank robbery, in violation of 18 U.S.C. § 2113 (a) and (d) and § 2.³ (DEcr 21 at 3). To determine whether his conviction qualifies as a crime of violence under the use of force clause, this Court

³ The fact that Jeczalik was charged with aiding and abetting an armed bank robbery makes no difference. See *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) ("Aiding and abetting, under 18 U.S.C. § 2, is not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense. A person who aids, abets, counsels, commands, induces or procures the commission of an offense is punishable as a principal. Indeed, under § 2, the acts of the principal become those of the aider and abettor as a matter of law. Nothing in the language of § 924(c)(1) indicates that Congress intended to vitiate ordinary principles of aiding and abetting liability for purposes of sentencing under that subsection.") (citations and quotations omitted).

must determine whether the offense “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A). In doing so, this Court uses either the categorical or the modified categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (discussing the two approaches in evaluating whether a burglary conviction constituted a violent felony pursuant to the enumerated clause of the ACCA); *United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016) (citing to *Descamps* and discussing the application of the categorical and modified categorical approaches in evaluating whether a prior conviction constitutes a § 924(c) crime of violence).

If a statute “sets out a single (or ‘indivisible’) set of elements to define a single crime,” a court must use the categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under this approach, a court examines only “the fact of conviction and the statutory definition of the prior offense.” *United States v. Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015) (quotation omitted). The operative question is “whether in every case a conviction under the statute necessarily involves proof of the [physical force] element.” *United States v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014) (citation and quotation omitted).

On the other hand, when a statute “ha[s] multiple alternative elements,” or is “divisible,” a court must determine “which of the alternative elements listed . . . was integral to the defendant's conviction (that is, which was necessarily found or admitted).” *Mathis*, 136 S. Ct. at 2249. “To address that need, th[e] [Supreme] Court approved the modified categorical approach.” *Id.* This approach permits a court to “look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of.” *Id.* (citing *Shepard v. United States*,

544 U.S. 13, 26 (2005); *Taylor v. United States*, 495 U.S. 575, 602 (1990)). These documents are often called *Shepard* documents. See, e.g., *United States v. Braun*, 801 F.3d 1301, 1304 (11th Cir. 2015) (“Under the modified categorical approach, we consult [] *Shepard* documents . . . to determine which version of the crime [defendant] was convicted of.”).

Jeczalik’s indictment charged him with “knowingly tak[ing], by force, violence, and intimidation, from the person and presence of [a bank employee], approximately [\$1,431.40], belonging to [a federally insured bank]” and that in doing so, Jeczalik “did assault and put in jeopardy the life of a person, by the use of a dangerous weapon or device, that is, a firearm.” (DEcr 21 at 3). In two panel opinions denying applications for leave to file a second or successive § 2255 petition, the Eleventh Circuit held that this exact crime is a § 924(c)(3)(A) crime of violence. See *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. June 8, 2016) (“Count 1 charged that Hines by force, violence and intimidation, did take from the person or presence of a teller monies belong to a federally-insured bank and that in doing so, Hines did assault and put in jeopardy the life of two individuals by use of a dangerous weapon, all in violation of 18 U.S.C. § 2113(a) and (d). These allegations in the indictment mimic the requirements of § 2113 (a) and (d). The statutory elements that these allegations of the indictment repeat clearly meet § 924(c)(3)(A)’s requirement that the underlying felony offense must have as an element the use, attempted use, or threatened use of physical force against the person or property of another.”) (quotations omitted); *In re Hunt*, 835 F.3d 1277, 1277 (11th Cir. July 18, 2016) (“*Hines* narrowly held that an armed bank robbery, in violation of § 2113(a) and (d), qualifies as a crime of violence under § 924(c)’s elements clause . . . if the record makes clear that the applicant by force, violence and intimidation, did take from the person or presence of a bank employee

monies belonging to a federally-insured bank and that in doing so, assaulted and put in jeopardy the life of others by use of a dangerous weapon. Here, the record demonstrates that Hunt's § 2113(a) and (d) armed bank robbery conviction involved these various elements. Therefore, under *Hines*, the conviction is an elements-clause offense and does not implicate § 924(c)'s residual clause or [*Samuel*] *Johnson*.”) (citation and quotations omitted).

Neither panel addressed whether § 2113(a) is divisible. See *In re Hines*, 824 F.3d 1334; *In re Hunt*, 835 F.3d 1277. And the *In re Hunt* panel did not address the Supreme Court's *Mathis* decision, which had been issued shortly after the *In re Hines* opinion. See *In re Hunt*, 835 F.3d 1277. However, these opinions constitute binding precedent notwithstanding the fact that neither panel engaged in a divisibility analysis nor addressed the *Mathis* decision. See, e.g., *In re Jones*, No. 16-14106-J (11th Cir. July 27, 2016) (Martin, J., concurring in judgment) (voicing reservations about lack of divisibility analysis by *Hines* panel and possible inconsistency with *Mathis*, but acknowledging that *In re Hines* is binding precedent); *In re Hunt*, 835 F.3d at 1277 n.4 (11th Cir. 2016) (noting that *Hines* “was decided without briefing [and] without the benefit of a complete record,” but acknowledging that it is “binding precedent.”); *Colebrook v. United States*, No. 11-80014-CR, 2016 WL 5807916, at *3 (S.D. Fla. Oct. 5, 2016) (“Eleventh Circuit jurisprudence in the context of authorization to file second or successive habeas petitions is binding precedent”; concluding that *In re Hines* was binding precedent). But see *Paucar v. United States*, No. 16-22535, D.E. 24 at 3 (S.D. Fla. Aug. 8, 2016) (“[T]he Eleventh Circuit has made it clear that nothing it pronounces in orders on applications to file successive §2255 motions binds the district court.”).

Furthermore, engaging in a divisibility analysis – as elucidated by *Mathis* – confirms the

conclusion reached by the *Hines* and *Hunt* panels. In *Mathis*, the Supreme Court distinguished statutes “that list[] multiple elements disjunctively,” and are thus divisible, from those that “enumerate[] various factual means of committing a single element,” or are indivisible. 136 S. Ct. at 2249. “[T]he Court held that the modified categorical approach does not apply ‘when a statute happens to list possible alternative means of commission.’” *Esprit*, 841 F.3d at 1239–40 (quoting *Mathis*, 136 S. Ct. at 2257). Thus, if § 2113(a) lists alternative means of commission, then this Court must apply the categorical approach and “‘presume[s] that the conviction rested upon nothing more than the least of the acts criminalized.’” *United States v. Seabrooks*, 839 F.3d 1326, 1347 (11th Cir. 2016) (quoting *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013)). However, if § 2113(a) lists “different crimes” – or “alternative elements” – then the statute is divisible and this Court can apply the modified categorical approach to determine which version of the crime Jeczalik was convicted of. *See Mathis*, 136 S. Ct. at 2253–55.

Section 2113(a) states, in relevant part:

“Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to . . . any bank . . . ; or

Whoever enters or attempts to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.”

Jeczalik argues that § 2113(a) is indivisible because it merely lists alternate means of committing the offense. (DE 21 at 6, 8–9). He asserts that several of these “means” – bank robbery under the second paragraph of § 2113(a), bank robbery by extortion, and bank robbery by intimidation – do not have the required element of physical force. (DE 21 at 7–9). The

Government argues that (a) is divisible not only between the first and second paragraphs, but also between a bank robbery “by force and violence, or by intimidation” and “by extortion.” (DE 20 at 5, 7-11).

The first and second paragraphs describe two “different crimes, not [] different methods of committing one offense,” and are therefore divisible. *See Mathis*, 136 S. Ct. at 2254. *See also United States v. McGuire*, No. 16-3282, 2017 WL 429251, at *2 n.4 (10th Cir. Feb. 1, 2017) (“Section 2113(a) includes at least two sets of divisible elements: (1) taking, or attempting to take, by force, violence, or intimidation, property from a bank; and (2) entering or attempting to enter any bank . . . with the intent to commit a felony.”); *United States v. Williams*, 841 F.3d 656, 659 (4th Cir. 2016) (“As its text makes clear, subsection 2113(a) can be violated in two distinct ways: (1) bank robbery, which involves taking or attempting to take from a bank by force and violence, intimidation, or extortion; and (2) bank burglary, which simply involves entry or attempted entry into a bank with the intent to commit a crime therein.”) (quoting *United States v. Almeida*, 710 F.3d 437, 440 (1st Cir. 2013)); *United States v. Loniello*, 610 F.3d 488, 491 (7th Cir. 2010) (concluding that “paragraphs 1 and 2 of § 2113(a) create different offenses” for purposes of double jeopardy; detailing differences between the two offenses). Thus, to determine which of these crimes Jeczalik was convicted of, this Court may look to Jeczalik’s indictment – a *Shepard* document. *See Mathis*, 136 S. Ct. at 2253-55; *Braun*, 801 F.3d at 1304. The indictment reveals that Jeczalik was convicted under the first, instead of the second, paragraph of § 2113(a). (DEcr 21 at 3).

The exclusion of “extortion” from both Jeczalik’s indictment and the Eleventh Circuit’s pattern jury instructions indicates that extortion is likewise a separate element. *See Mathis*, 136

S. Ct. at 2257 (When an indictment and jury instructions “referenc[e] one alternative term to the exclusion of all others,” this may indicate “that the statute contains a list of elements, each one of which goes toward a separate crime.”); (DEcr 21 at 3) (Jeczalik’s indictment, charging him with taking “by force, violence, and intimidation”); Eleventh Circuit Pattern Jury Instructions O76.1 (Bank Robbery) (Government must prove that: “(1) the Defendant knowingly took [or attempted to take] money or property possessed by a federally insured [bank] [credit union] [savings-and-loan association] from or in the presence of the person described in the indictment; and (2) the Defendant did so [by means of *force and violence*] [by means of *intimidation*]”) (emphasis added).

In a similar context – under the Hobbs Act – courts treat robbery and extortion as separate elements. *See United States v. Hancock*, 168 F. Supp. 3d 817, 821 (D. Md. 2016) (“[T]he Hobbs Act is divisible as there are two or more alternative sets of elements. The [c]ourt must therefore use the modified categorical approach . . . to determine which of these forms of the Hobbs Act (robbery or extortion) is at issue in this case.”). Courts frequently analogize Hobbs Act robbery and § 2113(a) bank robbery. *United States v. Parks*, No. 3:15-CR-0152, 2017 WL 679945, at *7 (M.D. Pa. Feb. 21, 2017) (citing to Third Circuit case finding Hobbs Act robbery was a crime of violence in concluding that § 2113 bank robbery was a crime of violence); *United States v. Pena*, 161 F. Supp. 3d 268, 274–75 (S.D.N.Y. 2016) (looking to Second Circuit’s treatment of “federal bank robbery under 18 U.S.C. § 2113(a), which is defined similarly to Hobbs Act Robbery,” in evaluating whether conviction for Hobbs Act robbery was a § 924(c) crime of violence). Indeed, the extortion language was added to § 2113(a) to ensure that extortion directed at federally insured banks was prosecuted under that section and not under the Hobbs Act, as courts had found it chargeable under either. *See* H.R. Rep. No. 99-797, 32-33,

1986 U.S.C.C.A.N. 6138, 6155-56.

As is the case under the Hobbs Act, bank robbery and bank extortion under § 2113(a) are separate offenses. *See Delion v. United States*, No. 16-14265, D.E. 12 at 31 (S.D. Fla. Dec. 07, 2016) (“additional versions” of § 2113(a), “for extortion or for committing a felony that affects the bank,” are “divisible elements representing separate offenses”; analogizing to “the extortion version of Hobbs Act robbery”), *report and recommendation pending*; *United States v. McGuire*, No. 6:16-CV-01166-JTM, 2016 WL 4479129, at *2 (D. Kan. Aug. 25, 2016) (“§ 2113(a) also includes what is essentially a separate extortion offense”), *certificate of appealability denied*, No. 16-3282, 2017 WL 429251, at *2 (10th Cir. Feb. 1, 2017). To determine whether Jeczalik was convicted of bank robbery or bank extortion, this Court again looks to Jeczalik’s indictment. *See Mathis*, 136 S. Ct. at 2253-55; *Braun*, 801 F.3d at 1304. The indictment reflects that Jeczalik was charged with taking “by force, violence, and intimidation,” not by extortion. (DEcr 21 at 3).

This conviction remains a crime of violence under § 924(c)(3)(A) regardless of whether “by force and violence” and “intimidation” constitute means or elements. The Eleventh Circuit, along with every other circuit to consider the issue following the *Samuel Johnson* decision, has concluded that § 2113(a) bank robbery—“by force and violence, or by intimidation” is a crime of violence. *See In re Sams*, 830 F.3d at 1239 (“[A] bank robbery conviction under § 2113(a) by force and violence or by intimidation qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause.”); *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 164 (2016) (“[B]ank robbery under 18 U.S.C. § 2113(a) is a crime of violence within the meaning of the force clause of 18 U.S.C. § 924(c)(3), because it has as an element the use, attempted use, or threatened use of physical force—specifically, the taking or attempted taking

of property by force and violence, or by intimidation.”) (quotations omitted); *United States v. McBride*, 826 F.3d 293, 295-96 (6th Cir. 2016) (concluding that “[b]ank robbery by force and violence plainly involves the use, attempted use, or threatened use of physical force”; rejecting defendant’s “contention that daylight can be found between intimidation and threatened use of physical force” because “intimidation in the § 2113(a) context [] requires the threat to use physical force”); *United States v. Armour*, 840 F.3d 904, 908-09 (7th Cir. 2016) (attempted bank robbery is a 924(c)(3)(A) crime of violence, even when accomplished by intimidation).

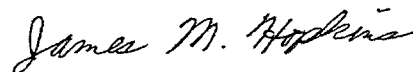
RECOMMENDATION

Based on the foregoing, this Court **RECOMMENDS** that Petitioner’s Motion to Correct Sentence (DE 1) be **DENIED**.

NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with the Honorable Daniel T. K. Hurley, Senior United States District Court Judge for the Southern District of Florida, within **fourteen (14) days** of being served with a copy of this Report and Recommendation. Failure to timely file objections shall constitute a waiver of a party’s “right to challenge on appeal the district court’s order based on unobjected-to factual and legal conclusions.” 11th Cir. R. 3-1 (2016).

DONE and SUBMITTED in Chambers this 11th day of April, 2017, at West Palm Beach in the Southern District of Florida.



JAMES M. HOPKINS
UNITED STATES MAGISTRATE JUDGE