

APPENDIX

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Order of the Court of Appeals for the Eleventh Circuit, Denying Motion for
Certificate of Appealability, *Lazaro Robbio v. United States*,
No. 17-13974-DD (12/20/17) A-1

District Court's Order Adopting Magistrate Judge's Report and
Recommendation And Denying Motion to Correct Sentence Pursuant to
28 U.S.C. § 2255 (7/18/17) A-2

Petitioner's Objections to Magistrate Judge's Report and
Recommendation (7/13/17) A-4

Magistrate Judge's Report and Recommendation To Deny Petitioner's
Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 (6/28/17) A-8

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13974-D

LAZARO ROBBIO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Lazaro Robbio moves for a certificate of appealability ("COA"), in order to appeal the denial of his counseled 28 U.S.C. § 2255 motion to vacate sentence. To merit a COA, Robbio must demonstrate 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) (quotations omitted). Because Circuit precedent forecloses Robbio's claim, he has not met this standard, and his motion for a COA is DENIED.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

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

CASE NO.:16-CV-22659-MIDDLEBROOKS/BRANNON
(97-CR-00155)

LAZARO ROBBIO,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

**ORDER ADOPTING REPORT IN PART AND DENYING MOTION TO VACATE
SENTENCE UNDER § 2255**

THIS CAUSE comes before the Court upon the Report and Recommendation issued by Magistrate Judge Dave Lee Brannon on June 28, 2017 (DE 26). Movant filed a Motion to Vacate pursuant to § 2255 (DE 1, "Motion"), seeking relief in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Report recommends denying Movant's Motion to Vacate and recommends that a certificate of appealability should be issued. Movant filed objections to the Report. (DE 27).

Movant challenges his 18 U.S.C. § 924(c) conviction based on *Johnson*. In addition to finding that *Johnson* does not apply to the so-called residual clause (or "risk-of-force" clause) found in § 924(c)(3)(B), the Report finds that Movant's § 924(c) conviction – which is based on attempted Hobbs Act robbery – is a crime of violence under § 924(c)(3)(A) without reliance on § 924(c)(3)(B). After the Report was issued, the Eleventh Circuit held in *Ovalles v. United States*, __ F.3d __, 2017 WL 2829371 (11th Cir. June 30, 2017), that *Johnson* does not apply to §

924(c)(3)(B) and thus the risk-of-force clause of § 924(c)(3)(B) “remains valid.”

Upon a careful, *de novo* review of the record, the Court agrees with the Report’s recommendation to deny the Motion to Vacate both for the reasons stated in the Report, as well as the Eleventh Circuit’s decision in *Ovalles v. United States*. Contrary to the Report, I find that a certificate of appealability should not be issued.

Accordingly,

It is **ORDERED AND ADJUDGED**:

(1) The Report (DE 26) is **ADOPTED IN PART**.

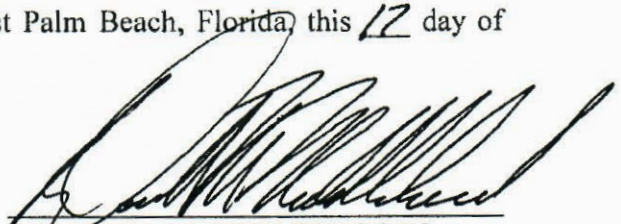
(2) The Motion to Vacate (DE 1) is **DENIED**.

(3) A Certificate of Appealability is **DENIED**.

(4) The Clerk of Court shall **CLOSE** this case and **DENY** all pending motions as

MOOT.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 12 day of July, 2017.


DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22659-CIV-MIDDLEBROOKS/BRANNON
(97-00155-CR-MIDDLEBROOKS)

LAZARO ROBBIO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Respondent.

**MOVANT LAZARO ROBBIO'S OBJECTIONS TO
MAGISTRATE JUDGE BRANNON'S REPORT AND RECOMMENDATION**

The Movant Lazaro Robbio, through his counsel, file the following objections to the Magistrate Judge Brannon's Report and Recommendation On Motion To Correct Sentence Pursuant To 28 U.S.C. § 2255 (D.E.26):

1. Mr. Robbio objects to the conclusion of law that *Johnson* case does not apply to § 924(c). Section 924(c)'s residual clause is not "markedly narrower" than the ACCA residual clause at issue in *Johnson*. Mr. Robbio relies on the arguments made in Motion To Correct Sentence Pursuant to 28 U.S.C. § 2255 (DE1) and Memorandum of Law in Support and Reply in Support of Motion to Vacate, Correct, or Set Aside Sentence Pursuant to 28 U.S.C. § 2255 (DE17) that *Johnson* is applicable to § 924(c).

2. Mr. Robbio objects to the conclusion that the offense of attempted Hobbs Act robbery categorically meets the definition of crime of violence and

constitutes a crime of violence as defined under 18 U.S.C. § 924(c). The offense does not have 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). Further, Mr. Robbio relies on the arguments made in Motion To Correct Sentence Pursuant to 28 U.S.C. § 2255 (DE1) and Memorandum of Law in Support and Reply in Support of Motion to Vacate, Correct, or Set Aside Sentence Pursuant to 28 U.S.C. § 2255 (DE17) that attempted Hobbs Act robbery is not a crime of violence because the residual clause is void for vagueness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on July 13, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/Panayotta Augustin-Birch, AFD
Panayotta Augustin-Birch

SERVICE LIST

LAZARO ROBBIO v. UNITED STATES OF AMERICA
Case No. 16-22659-CIV-MIDDLEBROOKS/BRANNON
(97-00155-CR-MIDDLEBROOKS)
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-22659-Civ-Middlebrooks/Brannon

LAZARO ROBBIO,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION

Before the Court is Movant Lazaro Robbio's ("Movant") Motion to Vacate Sentence Under 28 U.S.C. § 2255 [DE 1], which has been referred to the undersigned for a report and recommendation. The Government answered in opposition [DE 13], and Movant has replied [DE 17]. For the reasons set forth below, the undersigned **RECOMMENDS** that the Motion be **DENIED**.

I. BACKGROUND

A. Indictment and Pretrial Proceedings

On February 27, 1997, Movant was charged by Indictment with (1) conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951(a); (2) attempted Hobbs Act Robbery under 18 U.S.C. § 1951(a); and (3) possession of a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). *U.S. v. Robbio et al.*, No. 97-00155, DE 35 (S.D. Fla. Feb. 27, 1997) (hereinafter cited as "CR"). The Government alleged that Movant and others committed an armed takeover of a business while wearing police paraphernalia. [CR DE 36 ¶ 2]. Movant and others hand cuffed several patrons at gunpoint, stole money from the cash registers, and Movant

killed one of the patrons. [*Id.*]. Movant and his co-conspirators aborted their plan and fled, taking only \$45.00 from a cash register.

B. Conviction and Sentencing

On July 10, 1998, a jury returned a guilty verdict on all three counts. [CR DE 138]. Initially, Movant was sentenced to 240 months' imprisonment on each of the Hobbs Act counts, and life imprisonment on the § 924(c) offense, each to run consecutively. Movant appealed his conviction and sentence arguing that the life sentence on the § 924(c) count was improper based on Supreme Court precedent. The Government conceded that the life sentence was error. As such, the Eleventh Circuit affirmed Movant's convictions, but vacated Movant's sentence and remanded for resentencing.

On August 9, 2001, a resentencing hearing was held. [CR DE 241]. On August 10, 2001, the Court entered an amended judgment sentencing Movant to 240 months' imprisonment as to each of the Hobbs Act counts and to 60 months' imprisonment on the § 924(c) charge, each to be served consecutively, for a total of 540 months' imprisonment. [CR DE 236].

C. Post-Conviction Proceedings

On August 23, 2001 Movant appealed the amended judgment. [CR DE 237]. This time, however, the Eleventh Circuit affirmed. [CR DE 250]. Thereafter, Movant filed numerous *pro se* motions to vacate and appeals, to no avail.

On June 26, 2015, the U.S. Supreme Court decided *Johnson v. U.S.*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court found the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), to be void for vagueness and a violation of the Constitution's guarantee of due process. *Johnson*, 135 S. Ct. at 2563. On April 18, 2016, the U.S. Supreme Court decided *Welch v. U.S.*, 136 S. Ct. 1257, 1265 (2016) and held that the

substantive decision in *Johnson* is retroactive in cases on collateral review.

On June 25, 2016, Movant, now represented by counsel, filed the instant § 2255 Motion seeking to have his § 924(c) conviction and sentence vacated in light of *Johnson* and *Welch*.

II. LEGAL STANDARD

To prevail on a § 2255 motion, a movant must demonstrate that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the Court was without jurisdiction to impose such a sentence; (3) the sentence exceeded the maximum sentence authorized by law; or (4) the sentence is otherwise subject to collateral attack, *i.e.*, there is a fundamental defect that results in a complete miscarriage of justice. 28 U.S.C. § 2255(a). If a movant makes this showing, a court “shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” 28 U.S.C. § 2255(b). The movant bears a substantial burden in that he “must clear a significantly higher hurdle than would exist on direct appeal.” *U.S. v. Frady*, 456 U.S. 152, 153 (1982).

III. ANALYSIS

The basis for the Motion is that in light of *Johnson*’s holding that the ACCA’s “residual clause” in § 924(e)(2)(B)(ii) is unconstitutionally vague, Movant’s conviction and sentence on the § 924(c) charge violates due process because neither attempted Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery qualify as predicate “crimes of violence.” The Government counters that the Motion is (1) procedurally barred; and (2) fails on the merits. The Court will address each argument in turn.

A. Procedural Default

As a threshold issue, the Government argues that the Court should not reach the Motion's merits because Movant did not raise his arguments on direct appeal. Generally, the procedural default rule requires that a defendant "advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn v. U.S.*, 365 F.3d 1225, 1234 (11th Cir. 2004). A defendant, however, can avoid the procedural default bar (1) by demonstrating good cause for not raising the arguments on appeal and that he suffered actual prejudice from the alleged error; or (2) if the constitutional violation has probably resulted in the conviction of a defendant who is "actually innocent." *Id.*

Here, the Court finds that Movant meets the first exception to the procedural default rule: cause and prejudice. A movant meets the "cause" requirement by "showing that the legal basis for a claim was not reasonably available to counsel" at the time of appeal. *Ward*, 592 F.3d at 1157. A movant makes this showing if "his situation is one where a court has articulated a constitutional principle that has not been previously recognized but which has been held to have retroactive application." *Howard v. U.S.*, 374 F.3d 1068, 1072 (11th Cir. 2004). That decision must be "a sufficiently clear break with the past," so that counsel would not reasonably have had the tools for presenting the claim. *Id.* The quintessential example of such a scenario is when the U.S. Supreme Court explicitly overrules one of its precedents because "there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a [] court to adopt the position that [the Supreme Court] has ultimately adopted." *Reed v. Ross*, 468 U.S. 1, 17 (1984).

Applying the above principles here, the Supreme Court's *Johnson* decision clearly broke with the past by explicitly overruling established precedent and holding that the ACCA's

residual clause is unconstitutionally vague. The Supreme Court had previously rejected vagueness challenges to the ACCA's residual clause. *See e.g., Sykes v. U.S.*, 564 U.S. 1, 15 (2011); *James v. U.S.*, 550 U.S. 192, 202 (2007). In light of Movant's reliance on *Johnson*, which clearly broke with past precedent and raised serious debate about the constitutionality of similarly-worded statutes such as § 924(c), there exists quintessential "cause" under the first exception to the procedural default rule.

Movant has also established the required "prejudice" under the exception. Movant argues that he was convicted and sentenced under a constitutionally defective statute. Receiving an illegal sentence certainly satisfies the prejudice prong. *See Chatfield v. U.S.*, 2017 WL 1066776, at *5 (S.D. Fla. Mar. 2, 2017) (Torres, J.), *report & recommendation adopted* 2017 WL 1066779 (S.D. Fla. Mar. 21, 2017) (Cooke, J.) ("if the Petitioner has suffered an 'illegal sentence' on any count of conviction, he has sufficiently alleged actual prejudice as a matter of law and habeas relief may be warranted."). Thus, the Court finds that Movant has met the cause and prejudice exception to the procedural default rule.¹

B. The Motion's Merits

Movant argues that his § 924(c) conviction and sentence should be vacated after *Johnson* because his companion offenses of attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery do not qualify as "crimes of violence." Specifically, he argues that § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson* and that neither attempted Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery are crimes of violence under §

¹ Because Movant has met the cause and prejudice exception, the Court need not address the actual innocence exception. *See Chatfield*, 2017 WL 1066776, at *5 ("Because Petitioner has met the first exception to the procedural default rule, the Court need not consider the second exception").

924(c)(3)(A). The Court will address each argument in turn.

i. Johnson's Application to § 924(c)(3)(B)

Johnson analyzed the ACCA, which provides for a 15-year minimum mandatory sentence for a defendant convicted of being a felon in possession of a firearm if he has at least three convictions for a “violent felony or a serious drug offense, or both.” 18 U.S.C. § 924(e). The ACCA defines a “violent felony” as one 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....*

Id. § 924(e)(2)(B) (emphasis added). *Johnson* held that the so-called “residual clause” of subsection (ii), italicized above, is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. The Supreme Court focused on “two features” of the clause. First, it requires courts to estimate the potential risk of physical injury posed by “a judicially imagined ‘ordinary case’ of [the] crime,” and then to consider how that risk compares to the risk posed by the four enumerated crimes preceding the clause, which are themselves “far from clear in respect to the degree of risk each poses.” *Id.* at 2557-58 (quotations omitted). It is these two ambiguities *in conjunction* that render the clause unconstitutionally vague. *Id.* at 2560 (explaining that “each of the uncertainties in the residual clause may be tolerable in isolation, but their sum makes a task for us which at best could be only guesswork”) (quotations omitted).

This case, unlike *Johnson*, involves § 924(c). Section 924(c)(1)(A) provides for a separate consecutive sentence if a person uses or carries a firearm during and in relation to a “crime of violence.” A “crime of violence” under § 924(c) is one that:

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

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

18 U.S.C. § 924(c)(3)(A), (B). While the Eleventh Circuit has noted the differing language and statutory purpose of the ACCA and § 924(c), *see In re Colon*, 826 F.3d 1301, 1303-04 & n.2 (11th Cir. 2016), it considers the issue of whether *Johnson* applies to § 924(c)(3)(B) an open question. *See In re Hines*, 824 F.3d 1334, 1336-37 (11th Cir. 2016); *In re Pinder*, 824 F.3d 977, 978-79 (11th Cir. 2016). Nonetheless, the Second, Sixth, and Eighth Circuits have upheld § 924(c)(3)(B) against *Johnson* vagueness challenges. *See U.S. v. Hill*, 832 F.3d 135, 145 (2d Cir. 2016); *U.S. v. Taylor*, 814 F.3d 340, 375 (6th Cir. 2016); *U.S. v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016); *but see U.S. v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). And some courts within this District have found that reasoning persuasive. *See e.g., Morton v. U.S.*, No. 16-22522-CIV, 2017 WL 1041568, at *4 (S.D. Fla. Mar. 2, 2017) (Altonaga, J.) (“Section 924(c)(3)(B)’s text is materially distinguishable from the ACCA’s residual clause invalidated in *Johnson*, and so section 924(c)(3)(B) remains valid.”); *but see Benitez v. U.S.*, No. 16-23974-CIV, 2017 WL 2271504, at *4 (S.D. Fla. Apr. 6, 2017) (Ungaro, J.) (“the Court finds 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague in light of *Johnson*.”).

Indeed, § 924(c)(3)(B) is substantially narrower than the ACCA’s residual clause, so much of the analysis in *Johnson* simply does not apply. Specifically, determining if a felony falls within § 924(c)(3)(B)’s definition is a much “simpler undertaking than divining whether a felony, not being one of four enumerated, but disparate crimes, ‘otherwise involves conduct that presents a serious potential risk of physical injury to another.’” *Hill*, 832 F.3d at 146 (quotations omitted). To be sure, because § 924(c)(3)(B) “contains no mystifying list of offenses and no indeterminate ‘otherwise’ phraseology,” it is materially different from the ACCA’s residual clause. *Id.* *Johnson* made clear that it was limited to the specifically troubling language in the

ACCA's residual clause and it "stressed that its reasoning did not control other statutes that refer to predicate crimes." *Taylor*, 814 F.3d at 378.

The Court is persuaded by the "substantial majority of other courts" that have upheld the constitutionality of § 924(c)(3)(B) despite *Johnson*. See *Vasquez v. U.S.*, 2016 WL 378504 at *5 (S.D.N.Y. July 11, 2016); accord *Morton*, 2017 WL 1041568, at *4; *U.S. v. Dervishaj*, 169 F. Supp. 3d 339 (E.D.N.Y. 2016); *U.S. v. Green*, No. CR RDB-15-0526, 2016 WL 277982 (D. Md. Jan. 22, 2016); *U.S. v. Tsarnaev*, 157 F. Supp. 3d 57 (D. Mass. 2016). The Supreme Court did not hold that *Johnson* invalidated any statute other than § 924(e)'s residual clause and, until such binding authority, the Court declines "to get ahead of the Supreme Court, invalidating duly enacted and longstanding legislation by implication." *U.S. v. Gonzalez-Longoria*, 831 F.3d 670, 678 (5th Cir. 2016).²

Notably, Movant does not dispute that his convictions for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery satisfy the definition in § 924(c)(3)(B). He argues only that the statute is unconstitutional. Having rejected that argument, the Motion should be denied and the analysis may stop here. Nonetheless, in the interest of completeness, the Court will next determine if attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery are independently crimes of violence under § 924(c)(3)(A).

ii. Attempt and Conspiracy to Commit Hobbs Act Robbery Under § 924(c)(3)(A)

As stated, § 924(c)(3)(A) defines a crime of violence as one that "has an element the use, attempted use, or threatened use of physical force against the person or property of another." In

² The Court notes Movant's argument that courts have applied *Johnson* to 18 U.S.C. § 16(b), which is nearly identical to § 924(c)(3)(B). While reasonable minds may differ, the Court is persuaded that the reasoning in *Johnson* simply does not apply to § 924(c)(3)(B), which is materially different than the ACCA's residual clause for the reasons expressed.

determining whether an offense meets that definition, courts must apply the “categorical approach,” which requires looking only to the elements of the companion crime, not to the underlying facts on how that crime was committed. *U.S. v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013).³ Instead of focusing on facts, the inquiry focuses on the statutory elements of the predicate crime alone. *See Descamps v. U.S.*, 133 S. Ct. 2276, 2283 (2013) (courts applying the “categorical approach” look only to “the statutory definitions—*i.e.*, the elements—of a defendant’s prior offenses, and *not* to the particular facts underlying those convictions.”) (quotations omitted) (emphasis in original); *U.S. v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014) (whether the defendant *actually* used, attempted to use, or threatened to use physical force is “quite irrelevant.”) (quotations omitted). Thus, a conviction will qualify as a crime of violence under § 924(c)(3)(A) only if all applications of the predicate statute require the government to prove “the use, attempted use, or threatened use of physical force.” *McGuire*, 706 F.3d at 1337.⁴

Here, Movant’s predicate § 924(c) convictions are for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. The Hobbs Act criminalizes conduct of a person who “in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or

³ Although *McGuire* was decided before *Johnson*, the Eleventh Circuit has relied on *McGuire* in applying the categorical approach in § 924(c) cases after *Johnson*. *See Morton v. U.S.*, No. 16-22522-CIV, 2017 WL 1041568, at *3 n.4 (S.D. Fla. Mar. 2, 2017) (Altonaga, J.) (collecting cases).

⁴ Though not relevant here, there are a “narrow range of cases” in which sentencing courts may look beyond the statute and judgment of conviction and employ what is referred to as the “modified categorical approach.” *Descamps*, 133 S. Ct. at 2283-84. That approach applies when a statute is considered “divisible,” *i.e.*, when it concerns a list of “alternative elements.” *Id.* at 2285-86. Under those circumstances, in order to determine which element was relevant to the defendant’s conviction, the court may review *Shepard* documents, which are limited to “the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. U.S.*, 544 U.S. 13, 16 (2005). The focus of the “modified categorical approach” remains the same: a focus on the elements of the crime rather than on the defendant’s underlying conduct.

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” 18 U.S.C. § 1951(a). “Robbery” is defined as an “unlawful taking . . . by means of actual or threatened force, or violence, or fear of injury. . . .” 18 U.S.C. § 1951(b)(1).

It is well-settled that substantive Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A) because the robbery definition clearly “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” *See In re Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016) (holding that a “companion conviction for Hobbs Act robbery . . . clearly qualifies as a ‘crime of violence’” under § 924(c)(3)(A)); *see also U.S. v. Anglin*, 846 F.3d 954, 965 (7th Cir. 2017) (holding that “Hobbs Act robbery is a ‘crime of violence’ within the meaning of § 923(c)(3)(A)” and joining the “unbroken consensus of other circuits to have resolved this question.”) (collecting cases).

To that end, “it seems clear that attempted Hobbs Act robbery also qualifies as a violent felony under [§ 924(c)(3)(A)].” *Myrthil v. United States*, No. 16-22647-CIV, 2016 WL 8542856, at *14 (S.D. Fla. Dec. 29, 2016) (Torres, J.), *report and recommendation adopted*, 2017 WL 1066782 (S.D. Fla. Mar. 21, 2017) (Cooke, J.). Specifically, the plain language of § 924(c)(3)(A) says that a violent felony is a crime that “has as an element the use, attempted use, or threatened use of physical force. . . .” 18 U.S.C. § 924(c)(3)(A) (emphasis added). Thus, because a Hobbs Act robbery is a violent felony under § 924(c)(3)(A), so too is an “attempted” Hobbs Act robbery under the statute’s plain language. *See Myrthil*, 2016 WL 8542856, at *14 (holding that attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)); *see also U.S. v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) (holding that, because Florida robbery is a violent felony, so too is an “attempted” robbery for purposes of the

career offender enhancement); *U.S. v. Mansur*, 375 F. App'x 458, 463 (6th Cir. 2010) (explaining that if a substantive crime is a crime of violence, so too is an attempt to commit that crime under the ACCA)).

While it appears that attempted Hobbs Act robbery is a crime of violence under § 924(c)(3)(A), *conspiracy* to commit Hobbs Act robbery is a tougher question. To establish such a conspiracy, the Government must show: (1) an agreement between two or more people to commit a Hobbs Act robbery or extortion; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering the conspiratorial goal. *U.S. v. Pringle*, 350 F.3d 1172, 1176 (11th Cir. 2003). Notably, under the Hobbs Act, the Government need not prove an overt act in furtherance of the conspiracy. *Duhart v. U.S.*, No. 16-61499-CIV, 2016 WL 4720424, at *6 (S.D. Fla. Sept. 9, 2016) (Marra, J.) (citing *U.S. v. Pistone*, 177 F.3d 957, 959-960 (11th Cir. 1999)). Nor must the Government show that a particular conspirator personally agreed to commit, or was even capable of committing, the underlying robbery or extortion. *See Ocasio v. U.S.*, 136 S. Ct. 1423, 1432 (2016).

As such, courts in this District hold that under the categorical approach conspiracy to commit Hobbs Act robbery does not have “as an element the use, attempted use, or threatened use of physical force against the person or property of another” as required by § 924(c)(3)(A). *See Benitez v. U.S.*, No. 16-23974-CIV, 2017 WL 2271504, at *4 (S.D. Fla. Apr. 6, 2017) (Ungaro, J.) (“conspiracy to commit Hobbs Act robbery conviction does not qualify as a crime of violence under [§ 924(c)(3)(A)]”); *Mobley v. U.S.*, No. 16-61388-CIV, 2016 WL 7188296, at *4 (S.D. Fla. Dec. 9, 2016) (Bloom, J.) (“conspiracy to commit Hobbs Act robbery does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another required to qualify as a crime of violence under § 924(c)(3)(A).”); *Duhart*,

2016 WL 4720424, at *6 (Marra, J.) (“a conspiracy to commit a Hobbs Act robbery does not qualify as a crime of violence under [§ 924(c)(3)(A)]”). The Court finds this authority persuasive and determines that conspiracy to commit Hobbs Act robbery does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another required to qualify as a crime of violence under § 924(c)(3)(A).

Nonetheless, as explained above, Movant does not dispute that his convictions for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery each qualify as crimes of violence under § 924(c)(3)(B), which the Court finds is not unconstitutionally vague. Moreover, Movant’s attempted Hobbs Act robbery independently qualifies as a crime of violence under § 924(c)(3)(A). Thus, Movant’s conviction should stand notwithstanding the Court’s finding that a conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A). *See Mobley*, 2016 WL 7188296, at *1 (holding that conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A), but denying motion to vacate because § 924(c)(3)(B) is not unconstitutionally vague under *Johnson*).

IV. RECOMMENDATION

Johnson is of no help to Movant. His convictions for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery continue to qualify as a predicate § 924(c) offenses as set forth above. That said, the Court finds that a certificate of appealability should be issued in this case. Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” A certificate of appealability shall issue “if the applicant has made a substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(2). To make this showing, the applicant must show “that reasonable jurists could debate whether (or, for that

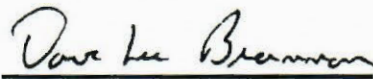
matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quotations omitted). Here, reasonable minds can differ on the issues involved in this report, and the Court finds that granting a certificate of appealability is appropriate.

As such, it is **RECOMMENDED** that the Motion to Vacate Sentence Under 28 U.S.C. § 2255 [DE 1] be **DENIED**. It is further **RECOMMENDED** that a certificate of appealability be **GRANTED** and that the Clerk of Court **CLOSE THIS CASE**.

V. NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with U.S. District Judge Donald M. Middlebrooks within 14 days after being served with a copy. 28 U.S.C. § 636(b)(1)(C). Failure to file timely objections may limit the scope of appellate review of factual findings contained herein. *U.S. v. Warren*, 687 F.2d 347, 348 (11th Cir. 1982), *cert. denied*, 460 U.S. 1087 (1983).

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 28th day of June, 2017.


DAVE LEE BRANNON
U.S. MAGISTRATE JUDGE