APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14418-K

MIGUEL DELGADO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because appellant has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 16-22531-CIV-SEITZ/TURNOFF
(Criminal Case No. 10-20636-CR-SEITZ)

MIGUEL DELGADO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.
_______________________________/

ORDER DISMISSING MOTION TO VACATE SENTENCE

THIS MATTER is before the Court on a Report and Recommendation [DE 7], addressing Petitioner Delgado's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 [DE 1]. Delgado requests that his conviction for possession of a firearm in furtherance of a crime of violence be voided based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Report concludes Delgado's Motion is timely but that, despite the holding in *Johnson*, Delgado's predicate conviction for Hobbs Act Robbery qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). Accordingly, the Report recommends that the Motion be denied on the merits. Both the Government and Delgado have filed objections to the Report. [DE 8 & 9, respectively.] After reviewing the Report, both parties' objections and the record, the Court affirms and adopts the Report's factual findings but declines to adopt its conclusions of law as to the threshold issue of timeliness. In light of *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), Delgado's Motion is untimely. Therefore, the Motion must be dismissed.

BACKGROUND

The facts of this case are outlined in the Report and neither party has objected to its recitation of the facts. Therefore, the Court adopts the Report's factual findings. In summary, Delgado pled guilty to two counts of Hobbs Act Robbery involving two 7-11 stores, in violation of 18 U.S.C. 1951(a), and one count of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). [Case No. 10-20636-CR, DE 58 (Factual Proffer).] On January 24, 2011, Delgado was sentenced to 121 months imprisonment as to the two Hobbs Act Robbery convictions, and 84 months as to the § 924(c) conviction to run consecutively for a total sentence of 205 months. [Case No. 10-20636-CR, DE 89 (Judgment).] Delgado did not appeal his conviction or sentence. His conviction became final on January 21, 2011. Fed. R. App. P. 4(b)(1)(A) (providing defendants with 14 days to file a notice of appeal after entry of judgment).

On June 24, 2016, Delgado filed the instant Motion to Vacate. He claims that his Hobbs Act Robbery no longer qualifies as a "crime of violence" under § 924(c)(3).[1] Specifically, Delgado maintains that a Hobbs Act Robbery does not qualify as a crime of violence under § 924(c)(3)(A) ("elements clause") and that the language in § 924(c)(3)(B) ("risk-of-force clause") is unconstitutionally vague based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Government opposes the Motion, arguing that (1) the Motion is untimely; (2) the claim is procedurally barred for failure to raise it on appeal; and (3) Delgado is not entitled to relief on the merits. [DE 6.] On July 7, 2017, Magistrate Judge Turnoff issued his Report, finding that the Motion is timely and that Delgado is not procedurally barred from bringing the claim. However, the Report concludes that a Hobbs Act Robbery qualifies as a crime of violence under the elements clause and recommends that the Motion be dismissed on the merits. The Report does not reach Delgado's *Johnson* argument.

The Government objects to the Report's procedural conclusions but raises no objection as the discussion on the merits. Delgado does not respond to the Government's objections. Instead, Delgado raises his own objections to the Report, generally arguing that his conviction (1) violates

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[1] 18 U.S.C. § 924(c)(3) states:

> 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.

due process; (2) results in a fundamental miscarriage of justice; and (3) was entered in an excess of the Court's jurisdiction because Hobbs Act Robbery no longer qualifies as a "crime of violence."

DISCUSSION

In its Objections, the Government argues that *Johnson's* holding does not apply to a conviction under § 924(c) and, therefore, *Johnson* did not create a new right that would restart the one-year period in which to file a habeas petition. Accordingly, the Government maintains that Delgado's motion is untimely. In support, the Government points to the Eleventh Circuit's decision in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), in which the Court held that *Johnson's* holding does not void the risk-of-force clause under § 924(c)(3)(B). The Report does not consider the *Ovalles* decision and the Court reviews the Government's argument *de novo.*

Under 28 U.S.C. § 2255(f)(3), a 1-year statute of limitations begins to run from "the date on which 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." The Eleventh Circuit has defined "right asserted" to mean "the substantive right that forms the basis for the § 2255 motion." *Outler v. United States*, 485 F.3d 1273, 1280 (11th Cir. 2007). The parties agree that *Johnson* created a new substantive right that applied retroactively on collateral review. [DE 7 at 11.] The parties disagree as to whether that right extends to convictions under § 924(c). The Eleventh Circuit's decision in *Ovalles* definitively holds that the rights created under *Johnson* do not extend to Delgado's conviction under § 924(c).[2] Therefore, in light of *Ovalles, Johnson* provides no right upon which to restart the one-year limitations period under § 2255(f)(3).[3]

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[2] According to the Eleventh Circuit, there are "material textual differences between the residual clause in § 924(e) invalidated in *Johnson* and the [residual clause] in § 924(c)(3)(B). *Ovalles*, 861 F.3d at 1266-67. Because the decision in *Ovalles* precludes Delgado from any relief under *Johnson*, even if the Court had jurisdiction, it would be constrained to deny the Motion on the merits. [Case No. 10-20636-CR, DE 58.]

[3] Nor does Delgado's non-*Johnson* claim under the elements clause provide any right to restart the one-year limitations period. The Eleventh Circuit has held that a "Hobbs Act Robbery . . . clearly qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)." *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016).

In the absence of a new right asserted under § 2255(f)(3), Delgado was required to file his Motion within one year of the date his conviction became final. 28 U.S.C. § 2255(f)(1). His conviction became final on January 21, 2011. However, he didn't file his Motion until June 24, 2016. Accordingly, the Motion is untimely and the Court lacks jurisdiction to consider it. The Court need not address the Report's conclusions on the merits or the parties' remaining objections. It is hereby

ORDERED THAT

1) The Report and Recommendation [DE 6] is **AFFIRMED AND ADOPTED-IN-PART.** The Court **AFFIRMS AND ADOPTS** the Report's factual findings. However, the Court **DECLINES TO ADOPT** the Report's conclusions of law.

2) The Government's Objections [DE 8] are **SUSTAINED-IN-PART**. Its objection to the timeliness of Delgado's Motion is **SUSTAINED**. Its remaining objection is **OVERRULLED AS MOOT**.

3) Delgado's Objections [DE 9] are **OVERRULLED AS MOOT**.

4) Petitioner Delgado's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 [DE 1] is **DISMISSED** for lack of jurisdiction.

5) A certificate of appealability is **DENIED**.

6) This case is **CLOSED**.

DONE and ORDERED in Miami, Florida, this 8th day of August, 2017.

Patricia A. Seitz

PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record
Magistrate Judge Turnoff

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 16-22531-CV-SEITZ/TURNOFF
(CASE NO. 10-20636-CR-SEITZ)

MIGUEL DELGADO

Movant,

v.

UNITED STATES OF AMERICA

Respondent.

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REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Movant, Miguel Delgado ("Delgado's"), Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 **[CV-ECF No. 1]**, and an Order of Referral entered by the Honorable Patricia A. Seitz. **[CV-ECF No. 4]**. Upon review of the Motion **[CV-ECF No. 1]**, the Response **[CV-ECF No. 6]**, the court record, and being otherwise duly advised in the premises, the undersigned makes the following findings.

Background

Delgado was indicted by a grand jury on August 19, 2010. **[CR-ECF No. 1[1]]**. He was charged as follows: Count 1- Conspiracy to obstruct interstate commerce *via* robbery ("Hobbs Act robbery[2]") in violation of Title 18, United States Code, Section 1951(a); Counts 2, 4, and 6 - Hobbs

[1]There are two dockets related to Delgado - a civil and a criminal docket. References to the civil docket will be referred to as **[CV-ECF No.]**. References to the underlying criminal case (Case No. 10-20636-CR-SEITZ) will be referred to as **[CR-ECF No.]**.

[2]18 U.S.C. § 1951, the Hobbs Act, forbids actual or attempted, robbery or extortion that in any way interferes with commerce. 18 U.S.C. § 1951(a). The Act also prohibits the conspiracy to commit extortion or robbery. Id. Specifically, a Hobbs Act robbery is defined as:

[T]he unlawful taking or obtaining of personal property from the person or in the

Act robbery in violation of Title 18, United States Code, Sections 1951(a); and Counts 3, 5, 7 - Possession of a firearm in furtherance of a crime of violence, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2. **[CR-ECF No. 13]**. On September 30, 2010, at the request of the Government, the Court dismissed Counts 1, 6, and 7. **[CR-ECF No. 48]**. Subsequently, on October 22, 2010, Delgado pled guilty to Counts 2 and 4. **[CR-ECF No. 55]**. The case proceeded to trial as to Count 3. **[CR-ECF No. 64]**. Shortly after the commencement of trial, on November 29, 2010, Delgado decided to enter a guilty plea on this remaining count. **[CR-ECF No. 71]**.

Sentencing

On January 24, 2011, a sentencing hearing took place before Judge Seitz. **[CR-ECF No. 89]**. The court adopted the recommendations in the Pre-Sentence Investigation Report ("PSR")[3] and sentenced Delgado to 205 months followed by 5 years of supervised release. Id. The sentence breakdowns as follows: 121 months as to Counts 2 and 4, and 84 months as to Count 3, each to be served concurrently. Id. No appeal was filed.

§ 2255 Motion

On June 24, 2016, Delgado filed the instant Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255. **[CV-ECF No. 1]**. The matter was referred to the undersigned. **[CV-ECF No. 4]**. A few days later, on June 27, 2016, Delgado filed a *pro se* Application for Leave to File a Second or Successive Motion to Vacate under § 2255 in the Eleventh Circuit Court of Appeals. On July 12,

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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. 18 .S.C. § 1951(b)(1).

[3]A PSR was ordered by the Court to assist with sentencing. **[CR-ECF No. 72]**. However, the PSR does not appear in CM/ECF, the Court's electronic database.

2016, the Eleventh Circuit denied Delgado's request as premature – citing, among other reasons, the pending petition at bar. **[CV-ECF No. 5].** Thereafter, on July 27, 2016, the Government filed its response in opposition to the instant Motion to Vacate. **[CV-ECF No. 6]**. No Reply was filed. These matters are now ripe for judicial review.

Summary of the Arguments

In his Motion, Delgado asks this Court to vacate his sentence as to Count 3, possession of a firearm in furtherance of a crime of violence,[4] because a Hobbs Act robbery, as defined by 18 U.S.C. § 1951(a), can no longer constitute a "crime of violence," *post*-Johnson.[5] Id. **[CV-ECF No.1]**. Specifically, Delgado argues that a Hobbs Act robbery does not qualify as a "crime of violence" under the residual clause, because it is now void for vagueness under Johnson. Id. He raises the same argument as to the elements clause. In this connection, he contends that the offense can be committed by putting one in fear of future injury to his person, which can be accomplished without: (1) the threat of violent physical force against persons or property, and without (2) an intentional threat of the same. Id. The Government opposes the Motion, arguing that: (1) it is untimely, (2) the claim is procedurally barred, and that (3) the claim otherwise fails on the merits. **[CV-ECF No. 6]**.

The statutes and case law that impact Delgado's Motion shall be addressed below.

Applicable Law

I. 28 U.S.C. § 2255

Delgado asks this Court to correct his sentence, pursuant to 28 U.S.C. § 2255. This statute provides, in pertinent part:

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[4] 18 U.S.C. § 924(c)(1)(A)(ii).

[5] Johnson v. United States, 135 S. Ct. 2551 (2015). This landmark case served as the catalyst for hundred of motions to vacate sentences by inmates. It shall be referenced and discussed throughout this Report and Recommendation.

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

II. The Armed Career Criminal Act (hereinafter "ACCA")

"Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms." Johnson v. United States, 135 S. Ct. 2551, 2555 (2015); 18 U.S.C. § 922(g). "In general, the law punishes [a] violation of this ban by up to 10 years' imprisonment." Johnson, 135 S. Ct. at 2555; 18 U.S.C. § 922(g). The ACCA further mandates an enhanced sentence of a minimum term of fifteen years of imprisonment, and a maximum of life in prison, for a felon in possession of a firearm, who has at least three prior convictions for a "violent felony or serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

The ACCA defines a violent felony as any crime punishable by a term of imprisonment that exceeds one year and,

> (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).

Section (I) is commonly referred to as the "elements clause." The part of section (ii) that lists the felonies by name is known as the "enumerated offenses clause," and the part that begins with "or otherwise involves . . ." is known as the "residual clause." United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012).

III. 18 U.S.C. § 924 (c)

Distinguishable from the statutory provisions of § 924(e)(1) of the ACCA, § 924(c)(1)(A) provides that:

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

18 U.S.C. § 924(c)(1)(A)(ii) (emphasis added).

Under § 924(c)(3), the term "crime of violence" is defined as 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)(3).

Paragraph (A) is commonly referred to as the "elements clause," while paragraph (B) is commonly referred to as the "residual clause." Duhart v. United States, No. 16-61499, 2016 WL 4720424, at *3 (S.D. Fla. Sept. 9, 2016).

IV. Johnson and Related Cases

On June 26, 2015, the case of Johnson v. United States, 135 S. Ct. 2551 (2015) was decided by the Supreme Court. The petitioner, Johnson, plead guilty to being a felon in possession of a firearm. Id. at 2556. At his sentencing, the Government asked for an ACCA enhancement. Id. at 2556. The Government argued that an ACCA enhancement was appropriate because Johnson's prior conviction, unlawful possession of a short-barreled shotgun, was his third violent felony conviction. Id. at 2554. The district court concurred and imposed a 15-year sentence. Id. The Eighth Circuit Court of Appeals affirmed, and consequently, the Supreme Court granted *certiorari*. Id.

Upon review, the Supreme Court found that the ACCA's residual clause was unconstitutionally vague and violated due process. Id. at 2557, 2563. The court reasoned that "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime" and that "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." Id. at 2557-58. The Court further stated that "[b]y 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, the residual clause produces more unpredictability and arbitrariness than the Due Process clause tolerates." Id. at 2558. In doing so, however, the Court clarified that its holding only applied to ACCA's residual clause. Id.

Following this decision, in Welch v. United States, the Supreme Court was faced with the issue of whether the Johnson holding should apply retroactively to cases on collateral review. Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Welch, the petitioner was sentenced under ACCA before Johnson was decided. Id. at 1262. He pled guilty to the crime of being a felon in possession of a firearm, and he was sentenced to fifteen years with the ACCA enhancement. Id. On appeal, the

Eleventh Circuit affirmed his conviction and sentence. Id. at 1263. Consequently, the Supreme Court granted *certiorari* and held that the Johnson decision "announced a substantive rule that has [a] retroactive effect in cases on collateral review." Id. at 1268. The Supreme Court reasoned that because the residual clause was found void for vagueness in Johnson, it transformed the substantive reach of the ACCA. Id. at 1265. Following Johnson and Welch, prisoners can now file a second or successive 2255 motion to vacate, if they can make a *prima facie* showing that they were previously sentenced in reliance on the ACCA's recently voided residual clause. In re Smith, 829 F.3d 1276, 1278 (11th Cir. 2016).

However, it is important to note that Johnson "said nothing about the validity of the definition of a crime of violence found in § 924(c)(3)." Id. In addressing these issues, the Eleventh Circuit has noted "that there [is] good [reason] to question" the argument that Johnson also invalidates § 924(c)'s residual clause. Id. First, the language used in the residual clauses of the ACCA and in § 924 (c) are similar, but not identical. Id. Importantly, "[n]ot only did the Supreme Court in Johnson expressly decline to invalidate § 924(c)'s residual clause, but it further refused to broadly condemn other criminal law[s] that used risk-based terms." Id.

In this connection, second or successive § 2255 motions have been denied "where it is clear that a § 924 (c) conviction is *based on an underlying offense that satisfies the statute's use-of-force clause*." Smith, 829 F.3d at 1278 (emphasis added). As is relevant here, the Eleventh Circuit has previously held that Hobbs Act robbery "clearly qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)." In re Saint Fleur, 824 F.3d 1337, 1341 (11th Cir. 2016).

Although in some cases the underlying offense explicitly falls within § 924(c)'s use-of-force clause instead of the residual clause, the Eleventh Circuit has yet to decide whether Johnson applies to the residual clause itself.[6] In re Pinder, 824 F.3d 977, 979 (11th Cir. 2016). Neither the Supreme Court nor the Eleventh Circuit "has extended Johnson's § 924(e) residual clause ruling to conclude that the § 924(c)(3)(B) residual clause is [likewise] unconstitutionally vague." United States v. Langston, 662 Fed. App'x 787, 794 (11th Cir. 2016). In sum, the law remains unsettled as to whether § 924(c)'s residual clause is invalid *post*-Johnson. In re Pinder, 824 F.3d at 979.

V. Procedural Bar

In general, under the procedural default rule, a defendant must argue all available claims on direct appeal. Otherwise, he will be prohibited from raising them in a § 2255 motion. Lynn v. United States, 365 F.3d 1225, 1234 (11th Cir. 2004); Green v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). There are two exceptions to the procedural default rule. Lynn, 365 F.3d at 1234. First, a defendant must demonstrate an objective cause for failing to raise the claim on direct appeal, and must show actual prejudice from the alleged constitutional violation. Bousley v. United States, 523 U.S. 614, 622 (1998). The second exception, "actual innocence," requires a defendant to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).

Good cause is shown when the claim is "so novel that its legal basis [was] not reasonably available to counsel." Bousley, 523 U.S. at 622 (quoting Reed v. Ross, 468 U.S. 1, 16 (1984); see Duhart v. United States, No. 16-61499, 2016 WL 4720424, at *4 (S.D. Fla. Sept. 9, 2016). As

[6] Other circuits, such as the Second, Sixth, and Eighth Circuits, have found that Johnson did not invalidate § 924(c)'s residual clause. See United States v. Hill, 832 F.3d 135, 145-50 (2d Cir. 2016); United States v. Taylor, 814 F.3d 340, 375-379 (6th Cir. 2016); United States v. Prickett, 830 F.3d 760, 761 (8th Cir. 2016); but see United States v. Cardena, 842 F.3d 959, 996 (7th Cir. 2016) (holding that Johnson rendered § 924(c)'s residual clause as unconstitutionally vague).

explained by the Eleventh Circuit,

> In order to establish the novelty of a constitutional claim sufficient to provide cause, a defendant must initially demonstrate that 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." A new retroactive decision must be a sufficiently "clear break with the past," so that an attorney representing the defendant would not reasonably have had the tools for presenting the claim in [the] courts.

Howard v. United States, 374 F.3d 1068, 1072 (11th Cir. 2004) (quoting Reed v. Ross, 468 U.S. 1, 16-17 (1984).

When, like here, the Supreme Court overrules precedent and gives retroactive application to the new rule, "a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal." Id. As indicated above, a defendant must demonstrate actual prejudice that occurred from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 167-68 (1982); Wainwright v. Sykes, 433 U.S. 72, 84 (1977). "[I]f the Petitioner has suffered an 'illegal sentence' on any count of conviction, he has sufficiently alleged actual prejudice as matter of law and habeas relief may be warranted." Myrthil v. United States, 2016 WL 8542856, at *5 (S.D. Fla. Dec. 29, 2016); see Mays v. United States, 817 F.3d 728, 737 (11th Cir. 2016).

The second exception,"actual innocence" is proved "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 495-96 (1986); see Herrera v. Collins, 506 U.S. 390, 404 (1993); Kuhlmann v. Wilson, 477 U.S. 436 (1986). However, the Supreme Court has emphasized the narrowness of this exception. See Dugger v. Adams, 489 U.S. 401, 414 (1989). That is, the narrow exception defines "actual innocence" as factual innocence, not legal insufficiency. Murray, 477 U.S. at 496; see also Bousley, 523 U.S. at 623; Sawyer v. Whitley, 505 U.S. 333, 339 (1992). More specifically, because the exception is limited, "to make it workable it must be subject to determination by relatively objective standards." Sawyer, 505 U.S. at 341.

VI. Burden of Proof

Following Johnson, courts in every district have been inundated by petitions seeking relief under this new rule. In this connection, this court has addressed what a movant must prove when challenging the vagueness of the residual clause. Duhart v. United States, No. 16-61499, 2016 WL 4720424, at *2 (S.D. Fla. Sept. 9, 2016). For example, in Duhart, the court concluded a "the movant must show that he was convicted or sentenced using the residual clause and that the use of that clause made a difference in [his] sentence or conviction." See In re Moore, No. 16-13993-J, 2016 WL 4010433, at *4 (11th Cir. July 27, 2016) (*per curiam*).

Analysis

I. Timeliness

Here, the Government contends that Delgado's Motion is untimely under 28 U.S.C. § 2255(f)(1), which provides a one-year statute of limitations that begins to run from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1) **[CV-ECF No. 6]**. Specifically, the Government argues that the Motion is governed by§ 2255(f)(1)[7] because Johnson did not create a new right for Delgado. Id. Following this logic, the Government argues that Delgado did not appeal his conviction, and therefore, his conviction became final fourteen (14) days from the date of entry of the judgment, i.e., January 21, 2011.[8] Id. Accordingly, in its view, Delgado had until February 4, 2012 to seek relief. Id. Here, the instant Motion was filed on June 24, 2016. **[CV-ECF No. 1]**. Thus, the Government contends that the Motion is untimely. Id.

[7] As opposed to 28 U.S.C. § 2255(f)(3), which Delgado argues is the controlling statute.
[8] See Fed. R. App. P. 4(b)(1)(A).

Upon careful review, the undersigned disagrees. Pursuant to § 2255(f)(3), the one-year statute of limitations imposed by § 2255 runs from "the date on which 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." 28 U.S.C. § 2255(f)(3). Here, Delgado's Motion is timely under 28 U.S.C. § 2255(f)(3) because the Supreme Court has clearly stated that "[a]n applicant has one year from the date on which the right he asserts was initially recognized by this Court." Dodd v. United States, 545 U.S. 353, 357 (2005). As noted above, Johnson announced a new rule that did not exist at the time of Delgado's conviction. See Welch, 136 S. Ct. at 1264.; Teague v. Lane, 489 U.S. 288, 301 (1989). Before Johnson, the Supreme Court and the Eleventh Circuit, rejected the vagueness residual clause arguments. See Sykes v. United States, 564 U.S. 1, 16 (2011); James v. United States, 550 U.S. 192, 210 n. 6 (2007); United States v. Gandy, 710 F.3d 1234, 1239 (11th Cir. 2013). That is no longer the case. Stated differently, when Johnson declared that the ACCA's residual clause was void for vagueness, a new right, not previously available or "dictated by precedent" was made available to Delgado. See Howard, 374 F.3d at 1074. Because the Johnson rule is a substantive rule, it applies retroactively.[9] Therefore, it logically follows that Delgado had until June 26, 2016, or one year from the date Johnson was decided, to file a § 2255 motion. Because the instant Motion was filed on June 24, 2016, it is considered timely. **[CV-ECF No. 1]**.

II. Procedural Bar

Here, the Government contends that Delgado is procedurally barred from raising a Johnson claim. **[CV-ECF No. 6]**. Again, the argument is that Delgado never raised the claim that a Hobbs

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[9] Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

Act robbery fails to qualify as a "crime of violence, " nor did he appeal his sentence or conviction. Id. Specifically, the Government argues that Delgado cannot overcome the procedural default rule, as discussed above, because he is unable to establish either of the two exceptions to the general rule. Id.

First, the Government contends that Delgado "cannot demonstrate any cause for failing to assert the claim he now pursues for the first time in his § 2255 motion." Id. The Government argues that "the perceived futility of raising an objection when existing precedent had already rejected a claim does not constitute 'cause' excusing a default." Id. The Government also states that Delgado cannot "argue that a Johnson-type challenge to his § 924 (c) conviction was too 'novel' to be asserted prior to the Supreme Court's decision in Johnson." Id. In this connection, the Government argues that the vagueness argument existed long before the Johnson issue. Id. The Government also contends that Delgado cannot excuse his default by alleging that his counsel was constitutionally ineffective. Id. Alternatively, the government argues that even if Delgado were able to establish cause, he would be unable to show actual prejudice. Id.

Next, the Government argues that Delgado fails to satisfy the actual innocence exception. Id. The argument is that a Hobbs Act robbery constitutes a "crime of violence" under 18 U.S.C. § 924(c)(3)(A), because it "has as an element the use, attempted use, or threatened use of physical force." Id. Therefore, the Government contends that Johnson has no impact on Delgado because Johnson would only apply to 18 U.S.C. § 924(c)(3)(B), not 18 U.S.C. § 924(c)(3)(A). Id.

Upon review, the undersigned finds that Delgado has established both good cause and actual prejudice to excuse the procedural default rule. First, Delgado's requested relief is based on a new constitutional rule. Again, Johnson overruled precedent, established a new rule, and the

Supreme Court provided retroactive application to same. Duhart, WL 4720424, at *4. Again, *pre*-Johnson, there would have been no legal basis to raise the claim. Id.; see Reed, 468 U.S. at 16 (holding that cause for failure to raise a claim is established when a claim is so novel that it was not reasonably available to counsel).

Further, Delgado, without a doubt, is actually prejudiced because, if Johnson applies to § 924(c)'s residual clause, then he should never have been sentenced for a violation of that statute. See Duhart, WL 4720424, at *4 (rejecting the government's argument that the defendant was procedurally barred in a § 2255 proceeding *post*-Johnson for a § 924 (c) claim); Simmons v. United States, 2016 WL 4536092 (S.D. Fla. Aug. 31, 2016). "Actual prejudice means more than just the possibility of prejudice; it requires that the error 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Ward v. Hall, 592 F.3d 1144, 1178 (11th Cir. 2010) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). In short, because Delgado claims to have been improperly sentenced under a statute now deemed void, he has sufficiently alleged actual prejudice. For the foregoing reasons, the undersigned finds that Delgado's claim is not procedurally barred, and that the merits of same should be evaluated. Having made that determination, the Court shall now address the merits of the Motion.

III. Entitlement to Relief *post*-Johnson

For the above noted reasons, Delgado argues that his § 924 (c) conviction is void under both the elements clause and residual clause. **[CV-ECF No. 1]**. After applying the law to the facts of this case, the undersigned disagrees.

Elements Clause 18 U.S.C. § 924(c)(3)(A)

Again, here Delgado claims that he is entitled to relief under the elements clause because the crime "can be committed without actual or threatened violent force, but instead by merely placing another in fear or injury to person or property." Id.

To determine whether a violation is deemed a "crime of violence,"[10] courts apply the "categorical approach."[11] See Descamps v. United States, 133 S. Ct. 2276, 2283 (2013); Hernandez v. United States, 2016 WL 8078311, at *3 (S.D. Fla. Dec. 7, 2016). Under the categorical approach, "[we] may 'look only to the statutory definitions'—i.e., the elements—of a defendant's prior convictions." Descamps, 133 S. Ct. at 2283 (quoting Taylor v. United States, 495 U.S. 575, 600 (1990)). In other words, the specific conduct of the defendant is not taken into account. United States v. Chitwood, 676 F.3d 971, 976-77 (11th Cir. 2012).

The Eleventh Circuit has held that, by only looking at the statute and judgment, a conviction will only qualify under the elements clause "if the statute on its face requires the government to establish beyond a reasonable doubt and without exception, an element involving the use, attempted use, or threatened use of physical force against a person for every charge brought under the statute." United States v. Estrella, 758 F.3d 1239, 1244 (11th Cir. 2014). This approach requires courts to imagine the conduct of the crime involved in "the ordinary case, and to judge whether that abstraction presents a serious potential risk of physical injury" in order to determine whether an offense was a crime of violence. See Johnson, 135 S. Ct. at 2557. Although there are a narrow set of cases where the Supreme Court has employed a *modified* categorical approach, this approach is not proper here because "the modified categorical approach can be applied only when dealing with

[10] As defined in 18 U.S.C. § 924©.

[11] Some courts apply the *modified* categorical approach, as opposed to the categorical approach, in cases where the statute of conviction contains alternative, divisible elements. Therefore, "a later sentencing court cannot tell, without reviewing something more [than the statute and judgment of conviction], if the defendant's conviction qualifies as a violent felony. Descamps, 133 S. Ct. at 2284.

a divisible statute." Howard, 742 F.3d at 1344. The statute of conviction in this case, the Hobbs Act, is not divisible.[12]

Again, 18 U.S.C. § 924(c)(3)(A) defines a "crime of violence" as any felony offense that "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). Along these same lines, the Supreme Court instructs that "the phrase 'physical force' means *violent force*–that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010); see also United States v. Owens, 672 F.3d 966, 970 (11th Cir. 2012) (holding that in the ACCA the statutory definition of violent felony " 'means *violent* force—that is, force capable of causing physical pain or injury to another person' ") (quoting Johnson, 559 U.S. at 134).

In addressing these issues, the Eleventh Circuit has found convictions under Hobbs Act robbery to be constitutional *post*-Johnson. See In re Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016); In re Darren Demeatrie Gordon, 827 F.3d 1289, 1294 (11th Cir. 2016). For example, in Saint Fleur, this Court held that a "Hobbs Act robbery . . . clearly qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)." Saint Fleur, 824 F.3d at 1340. In doing so, the Court specifically noted that " '[it] hasn't decided if Johnson applies to § 924(c)(3)(B)' " and " 'the law is unsettled' as to whether Johnson invalidates sentences that relied on the § 924(c)(3)(B) residual clause." Id.; (quoting In re Pinder, 824 F.3d 977, 978-79 (11th Cir. 2016)). The Court also acknowledged that "Johnson [never] address[ed] the definition for 'crime of violence' under § 924(c)(3)." Saint Fleur,

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[12] The Hobbs Act is technically "divisible" because it prohibits the two crimes of robbery and extortion. Descamps, 133 S. Ct. at 2281. However, this case only deals with Hobbs Act robbery. See, e.g., United States v. Smith, Case No. 2:11-cr-00058-JAD-CWH, 2016 WL 2901661, at *4 (D. Nev. May 18, 2016) (finding that Hobbs Act robbery is not itself divisible because it "does not contain alternative elements on which a jury must agree").

824 F.3d at 1340. In light of this, it upheld Saint Fleur's Hobbs Act robbery conviction. Id. at 1340-41. The Court reasoned that even if Johnson made § 924(c)(3)(B)'s residual clause invalid, its "use of force" clause explicitly defines Hobbs Act robbery as a "crime of violence." Id.

Subsequently, in Demeatrie Gordon, the Eleventh Circuit reaffirmed its holding in Saint Fleur, and noted that a Hobbs Act robbery qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A) without regard to § 924(c)(3)(B)'s residual clause. Demeatrie Gordon, 827 F.3d 1289, 1294 (11th Cir. 2016) (quoting Saint Fleur, 826 F.3d at 1305-06)). Other circuits, including the Ninth Circuit, have made similar findings. See United States v. Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993); United States v. Howard, 650 Fed. App'x. 466, 468 (9th Cir. 2016) (holding that " 'we have previously stated that Hobbs Act 'robbery indisputably qualifies as a crime of violence' under § 924 (c)") (quoting Mendez, 992 F.2d at 1491)).

Here, Delgado's requested relief is contrary to the binding decisions in Saint Fleur and Demeatrie Gordon. Further, as explained in United States v. Peña, 161 F. Supp. 3d 268, 275-76 (S.D.N.Y. 2016), a threat of physical injury does not require physical force. Additionally, "the force element of robbery has traditionally been identified with strong or violent force" and "[t]he most sound interpretation of the Hobbs Act is that the word 'force' means 'power, violence, or pressure directed against a person or thing,' just as it does in Section 924(c)(3)." See Myrthil v. United States, 2016 WL 8542856, at *8 (S.D. Fla. 2016). In sum, "every 'means' that would satisfy a Hobbs Act robbery is categorically a 'crime of violence.'" See Myrthil, 2016 WL 8542856, at *14 (holding that a Hobbs Act robbery is categorically a "crime of violence" under the "use of force" clause of 18 U.S.C. § 924(c)(3)(B) and that the Eleventh Circuit is bound by the decision in Saint Fleur).

Because the Eleventh Circuit has already determined that a "conviction for Hobbs Act robbery . . . clearly qualifies as a crime of violence under the use-of-force clause in § 924(c)(3)(A)," Delgado's claim must fail. See Saint Fleur, 824 F.3d at 1341; see also Demeatrie Gordon, 827 F.3d 1289 (11th Cir. 2016); In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016).

B. Residual Clause 18 U.S.C. § 924(c)(3)(B)

Having found that a Hobbs Act robbery is categorically a "crime of violence" under the elements clause, there is no need to address whether the same qualifies as a "crime of violence" under the residual clause. However, for completeness, the undersigned shall briefly discuss the issue.

Here, as mentioned *supra*, Delgado's sentence did not include an ACCA enhancement. Nevertheless, he argues that his conviction for Hobbs Act robbery was invalidated *post*-Johnson because § 924(c)(3)(B)'s residual clause, and the ACCA residual clause, "are essentially the same and contain the same flaws." Id. However, as correctly noted by the Government, and as discussed above, Johnson never rendered § 924(c)(3)(B) void for vagueness. **[CV-ECF No. 6]**. The Supreme Court "spoke not at all about the validity of the definition of a crime of violence found in § 924(c)(3)." In re Hines, 824 F.3d 1334, 1336 (11th Cir. 2016); see In re Smith, 829 F.3d 1276, 1279 (11th Cir. 2016). Again, while § 924(c)(3)(B) and the ACCA's residual clause may have similar language, the differences between the two clauses "appear to serve a different statutory purpose." Saint Fleur, 824 F.3d at 1340. Consistent with the above, including binding precedent, the undersigned finds that Delgado's conviction remains unaffected by Johnson, and is therefore, valid.

Conclusion

For the foregoing reasons, the undersigned **RESPECTFULLY RECOMMENDS** that Delgado's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 **[CV-ECF**

No. 1] be **DENIED**.

Pursuant to S.D. Fla. Magistrate Rule 4(b), the parties may serve and file written objections to this Recommendation with the Honorable Patricia A. Seitz within fourteen (14) days after being served with a copy of this Report and Recommendation. Failure to timely file objections shall bar the parties from attacking on appeal any factual findings contained herein. RTC v. Hallmark Builders, Inc., 996 F.2d 1144 (11th Cir. 1993); LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988).

RESPECTFULLY RECOMMENDED in Chambers at Miami, Florida, this 17th day of July 2017.

Wm. C. Turnoff

WILLIAM C. TURNOFF
UNITED STATES MAGISTRATE JUDGE

cc: Honorable Patricia A. Seitz
Counsel of Record

A-4

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16198-B

KENNETH H. BURKE, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Kenneth Burke, Jr. seeks a certificate of appealability ("COA") in order to appeal from the denial of his counseled 28 U.S.C. § 2255 motion. To merit a certificate of appealability, Burke must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Burke is GRANTED a COA on the following issues only:

(1) Whether the district court erred, under 28 U.S.C. § 2244(b)(4), by finding that Burke had not met the requirements to file a second or successive § 2255 motion.

(2) Whether Burke's § 924(c) conviction is now unconstitutional based on *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Burke's motion for leave to proceed on appeal *in forma pauperis* is GRANTED.

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

A-5

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

MIGUEL DELGADO

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:10-20636-CR-SEITZ-01

USM Number: 83938-004

Counsel For Defendant: Michael D. Spivack, AFPD
Counsel For The United States: Maria K. Medetis, AUSA
Court Reporter: David Ehrlich

The defendant pleaded guilty to Counts Two, Three and Four of the Indictment.
The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1951(a)	Interference with commerce by threats or violence	July 17, 2010	2
18 U.S.C. § 924(c)(1)(A)(ii)	Possession of a firearm in furtherance of a crime	July 17, 2010	3
18 U.S.C. § 1951(a)	Interference with commerce by threats or violence	July 17, 2010	4

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Any remaining Counts are Dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
1/21/2011

PATRICIA A. SEITZ
United States District Judge

January 21, 2011

DEFENDANT: MIGUEL DELGADO
CASE NUMBER: 1:10-20636-CR-SEITZ-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **205 months. The term consist of 121 months as to each of Counts Two and Four, to be served concurrently with each other, and 84 months as to Count Three, consecutively to the terms imposed as to Counts Two and Four.**

The Court makes the following recommendations to the Bureau of Prisons: that the Defendant be housed in a facility close to South Florida consistent with his security ratings and bed availability.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

____

____

____

____

Defendant delivered on ________________ to ________________________

at ________________________________, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By: __________________________
Deputy U.S. Marshal

DEFENDANT: MIGUEL DELGADO
CASE NUMBER: 1:10-20636-CR-SEITZ-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years. This term consist of three (3) years as to each of Counts Two and Four and five (5)years as to Count Three, all such terms to run concurrently..**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MIGUEL DELGADO
CASE NUMBER: 1:10-20636-CR-SEITZ-01

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Anger Control/Domestic Violence Treatment - The defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: MIGUEL DELGADO
CASE NUMBER: 1:10-20636-CR-SEITZ-01

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$300.00		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MIGUEL DELGADO
CASE NUMBER: 1:10-20636-CR-SEITZ-01

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$300.00** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Forfeiture of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement of forfeiture. The United States shall submit a proposed order of forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution,(7) penalties, and (8) costs, including cost of prosecution and court costs.