APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10482-G

JAY A. RICHITELLI,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Jay Richitelli moves for a certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. Jay A. Richitelli is a federal prisoner serving a life imprisonment sentence after being convicted of conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, conspiring to use a firearm during the commission of a crime of violence, using a firearm during the commission of a crime of violence, and possession of a firearm by a convicted felon. At sentencing, the government sought to enhance Richitelli's sentence to life imprisonment pursuant to 18 U.S.C. § 3559(c).

Richitelli's presentence investigation report ("PSI") reported that he had 59 prior felony convictions, including convictions for Florida armed robbery with firearms, Florida armed robbery with a deadly weapon, and Florida armed robbery. Richitelli did not object to the accuracy of his prior convictions at sentencing. Moreover, Richitelli conceded at sentencing that he was unable to find any legal basis to attack the § 3559(c) enhancement, and, under the enhancement, the court was required to sentence him to a minimum mandatory life sentence. Thus, the sentencing court imposed a life sentence and entered an amended judgment reflecting that sentence.

On April 29, 2010, Richitelli appealed his convictions and sentences, and in 2011, this Court affirmed the convictions and sentences. Thereafter, Richitelli filed a petition for a writ of certiorari, which the United States Supreme Court denied in April 2011.

On April 11, 2012, Richitelli filed his first § 2255 motion, which the district court denied. This Court also denied Richitelli a COA. In 2016, Richitelli filed an application for leave to file a second or successive § 2255 motion. Richitelli's application raised only one ground for relief, namely, that increasing his sentence to mandatory life imprisonment pursuant to § 3559(c) violated his due process rights. He argued that, based on *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) and *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), *Johnson*'s ACCA

residual clause analysis (that the ACCA's residual clause void for vagueness) also applied to § 3559(c)'s similarly worded residual clause, and therefore, he was denied due process because his prior Florida armed robbery convictions only qualified as § 3559(c) predicates under the statute's residual clause. In June 2016, this Court granted Richitelli leave to file a successive § 2255 motion based on his *Johnson* challenge to the § 3559(c) definition of a "serious violent felony," which included a residual clause component similar to the ACCA.

On June 25, 2016, Richitelli filed the instant § 2255 motion, arguing that, in light of the Supreme Court's decision in *Johnson*, he was not eligible for a mandatory life sentence under § 3559(c) because: (1) *Johnson*'s residual clause analysis also applied to § 3559(c)'s residual clause; and (2) his § 3559(c) qualifying convictions only qualified under § 3559(c)'s residual clause. Further, he argued that his motion was timely under 28 U.S.C. § 2255(f)(3) because it was filed within one year of *Johnson* decision. The magistrate judge: (1) determined that Richitelli's prior convictions qualified as "serious crimes of violence" under § 3559(c)'s elements clause; (2) noted that *Johnson* did not provide relief from the classification of Richitelli's prior convictions as "serious violence felonies" under § 3559(c)'s elements clause; and (3) recommended dismissing the motion as untimely because *Johnson*'s inapplicability to § 3559(c)'s elements clause prevented Richitelli from using *Johnson* as the date from which the § 2255(f)(3)

one-year limitations period began to run. Over Richitelli's objections, the district court adopted the magistrate judge's recommendation, dismissed Richitelli's successive § 2255 motion as untimely, and alternatively denied the successive § 2255 motion on the merits. The district court denied a COA in the same order.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas motion on the merits, the prisoner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year statute of limitations for filing a § 2255 motion that begins to run from the latest of four possible events:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) 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; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Commonly referred to as the "three-strikes" statute, § 3559(c) provides for mandatory life imprisonment for any person who is convicted of a "serious violent felony and who has previously been convicted of two or more "serious violence felonies." *See* 18 U.S.C. § 3559(c)(1)(A). The statute defines the term "serious violent felony" as:

> (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; [the "enumerated offense" clause] and
>
> (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use attempted use, or threatened use of physical force against the person of another [the "elements" clause] or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense [the "residual" clause].

See 18 U.S.C. § 3559(c)(2)(F).

On June 26, 2015, the Supreme Court in *Johnson* held that the residual clause of the Armed Career Criminal Act ("ACCA") is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and

how much risk it takes to qualify as a violent felony. *Johnson*, 135 S. Ct. at 2557-58, 2563. *Johnson*, however, did not call into question the ACCA's to the four enumerated offenses clause or elements clause, which remained valid. *Id.* at 2563. In *Welch*, the Supreme Court held that *Johnson* announced a new substantive rule of constitutional law that applied retroactively to cases on collateral review. *See* 136 S. Ct. at 1268.

"Generally, . . . in determining whether a prior conviction is a qualifying offense for sentencing enhancement purposes," this Court applies a "categorical approach." *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010). Using the categorical approach, this Court looks only at the statutory elements of an offense, and not the particular facts underlying the conviction, in determining whether an offense qualifies as a predicate for enhancement. *Descamps v. United States*, 133 S. Ct. 2276, 2283-86 (2013); *see also Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) ("How a given defendant actually perpetrated the crime . . . makes no difference."). Further, this Court must assume that the offense "rests upon the least of the acts criminalized" by the statute. *United States v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014). If a criminal statute is divisible, meaning it lists multiple potential offense elements in the alternative, only some of which qualify as a predicate for enhancement, this Court may use the "modified categorical approach" and look to a restricted set of

materials such as plea agreements or plea colloquy transcripts to determine which element formed the basis of the defendant's conviction. *Descamps*, 133 S. Ct. at 2283-85; *Shepard v. United States*, 544 U.S. 13, 26 (2005) (limiting inquiry to "the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information"). Nonetheless, the modified categorical approach retains the categorical approach's central feature, a focus on the elements, rather than the facts, of a crime. *Descamps,* 133 S. Ct. at 2283-85.

The Supreme Court has made clear 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*, 130 S. Ct. 1265, 1271 (2010); *United States v. Owens*, 672 F.3d 966, 971 (11th Cir. 2012) (observing that under *Johnson*, the term "physical force," as used in the ACCA's elements clause, means "strong physical force or a substantial degree of force"). The Supreme Court has also made clear that the term "use" requires the "active employment" of force, which demands a high degree of intent, not mere negligence or accidental conduct. *See Leocal v. Ashcroft*, 125 S. Ct. 377, 381 (2004).

Hobbs Act robbery requires "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means

of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property. 18 U.S.C. § 1951(b)(1). This Court has previously determined that Hobbs Act robbery clearly qualifies as a "crime of violence" under the use of force clause in § 924(c)(3)(A). *See In re Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016); *In re Gordon*, 827 F.3d 1289, 1294 (11th Cir. 2016). Although this Court has determined that Hobbs Act robbery satisfies the elements/use of force clause in § 924(c)(3)(A), it has not determined whether the Hobbs Act robbery, or attempted Hobbs Act robbery satisfies the elements/use of force clause in § 3559(c). Whereas Hobbs Act robbery requires an "unlawful taking or obtaining of personal property from . . . another, against his will, by means of actual or threatened force, or violence, or fear of injury, a criminal "attempt" requires not only a specific intent to commit the underlying offense, but also an overt act constituting a substantial step toward the commission of the offense. *See United States v. Resendiz-Ponce*, 127 S. Ct. 782, 787 (2007). This Court has stated that to convict a defendant of an attempt charge, the government must prove that the defendant "had the specific intent to engage in criminal conduct and that he took a substantial step toward the commission of the offense" and explained that "a substantial step must be more than remote preparation, and must be conduct strongly corroborative of the firmness of the defendant's criminal intent." *United States v. Perez*, 580 Fed. App'x 795, 803 (11th Cir. 2014) (unpublished).

As discussed above, among Richitelli's 59 prior convictions, 4 were Florida convictions for armed robbery and all of which occurred between 1986 and 1995. Both the 1986 and 1995 versions of Fla. Stat. § 812.13(1) defined robbery as taking money or property from another by force, violence, assault or putting the victim in fear. *See* Fla. Stat. § 812.13(1) (1986); *see also* Fla. Stat. § 812.13(1) (1995). In addition, both versions classified robbery as a first-degree felony where "in the course of committing the robbery the offender carried a firearm or other deadly weapon." *See* Fla. Stat. § 812.12(2)(a).

In *United States v. Lockley*, this Court held that a conviction for robbery under Florida law constitutes a conviction for a "crime of violence" under the Sentencing Guidelines elements clause of § 4B1.2(a), a clause whose language is identical to that in the § 3559(c)'s elements clause. *See* 632 F.3d 1238, 1245 (11th Cir. 2011); *see also United States v. Gonzalez-Lopez*, 911 F.2d 542, 548 (11th Cir. 1990). This Court has recently reaffirmed the continuing vitality of *Lockley*. *See United States v. Seabrooks*, 839 F.3d 1326, 1341-42 (11th Cir. 2016). Further, in *Seabrooks*, this Court affirmed that Fla. Stat. § 812.12(1) has "consistently" required more force than sudden snatching. *Id.* at 1343-44; *see also Robinson v. State*, 692 So. 2d 883, 887 (Fla. 1997).

Here, reasonable jurists would not find the district court's assessment of Richitelli's successive § 2255 motion debatable. Neither the Supreme Court nor

this Court have held that the residual clause analysis in *Johnson* applied to § 3559(c)'s residual clause. Moreover, in granting Richitelli's successive application, this Court explicitly stated that it had not determined whether the new rule announced in *Johnson* would invalidate § 3559(c)'s residual clause. Further, this Court stated that in some cases, it had been able to bypass this type of issue because the record made it clear that the predicate crimes met the statute's definitional requirements under § 3559(c)'s elements or enumerated offenses clauses.

To determine whether Richitelli's prior convictions for attempted Hobbs Act robbery and Florida armed robbery qualify as serious violent felonies under § 355(c)(2)(F)'s elements or use of force clause, this Court must employ the categorical approach. Because attempted Hobbs robbery required Richitelli to take a substantial step toward committing an offense (Hobbs robbery) that requires the actual or threatened use of force, which is an element of the offense, Richitelli necessarily committed an offense (attempted Hobbs robbery) that has as an element the "attempted use" or the "threatened use" of physical force, which satisfies the elements clause definition of a "serious violent felony." *See* 18 U.S.C. § 3559(c)(2)(F)(ii). An individual convicted of attempted Hobbs Act robbery has not only acted with a specific intent, but has also taken a substantial step to unlawfully take property from another, against his will, by means of actual or

threatened force, or violence, or fear of injury. *See* 18 U.S.C. § 1951(b)(1). By doing so, such individual has committed an offense that necessarily involved the attempted or threatened use of physical force against another. *See id.* Accordingly, attempted Hobbs Act robbery, one of Richitelli's instant conviction, qualifies as a "serious violent felony," as defined under § 3559(c)(2)(F)'s elements clause.

Additionally, given that Florida robbery requires either the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm, and this Court has previously considered Florida robbery a "crime of violence" under the Sentencing Guidelines, Florida robbery necessarily satisfies § 3559(c)'s use of force clause definition of a "serious violent felony" because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See* Fla. Stat. § 812.13(1) (1986); *see also* Fla. Stat. § 812.13(1) (1995); 18 U.S.C. § 3559(c)(2)(F).

Because *Johnson* does not provide relief from the classification of attempted Hobbs robbery or Florida robbery as a "serious violent felony" under § 3559(c)'s elements clause, Richitelli cannot invoke the date of the *Johnson* decision as the date from which the § 2255(f)(3) one-year limitations period began to run. Further, Richitelli did not file his successive § 2255 motion until June 2016, more

than four years beyond the date on which his conviction became final. *See* 28 U.S.C. § 2255(f). Accordingly, Richitelli's motion for a COA is DENIED.



UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61345-CIV-COHN/SELTZER
(Case No. 09-60229-CR-COHN)

JAY ANTHONY RICHITELLI,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT

THIS CAUSE is before the Court upon the Report and Recommendation [DE 19] ("Report") of Magistrate Judge Barry S. Seltzer to Movant Jay Anthony Richitelli's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [DE 4] ("Motion"). The Court has reviewed *de novo* the Motion, the Report, Movant's Objections [DE 20] ("Objections"), the record in this case, and is otherwise advised in the premises. Upon careful consideration, the Court will adopt the Report in its entirety and dismiss the Motion as untimely, or in the alternative, deny it on the merits.

The Court agrees with Judge Seltzer's thorough analysis. The Motion fails on the merits because Movant's instant conviction for attempted Hobbs Act robbery and his prior convictions for Florida armed robbery qualify as "serious violent felonies" under 18 U.S.C. 3559(c)'s elements/use-of-force clause, as well as under its enumerated offenses clause, and therefore remain a proper predicate for Movant's § 3559(c) enhancement . As § 3559(c)'s residual clause is not implicated in this case, the Court

need not decide whether Johnson v. United States, 135 S. Ct. 2551 (2015) extends to same.

The Motion is also untimely. Because Johnson does not apply Movant's case, Movant cannot rely on the date of the Johnson decision to calculate the applicable one-year limitations period. Nor did Movant file his Motion within one year of the date that his conviction became final.

Movant objects to the Report on several grounds, none of which the Court finds persuasive. First, Movant argues that the Report improperly relied upon the Eleventh Circuit's decision in In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016), in concluding that attempted Hobbs Act robbery qualifies as a "serious violent felony" under § 3559(c). The Court finds nothing misplaced about Judge Seltzer's reliance on Fleur. Like many other judges in this Circuit, the Court finds Fleur to be highly persuasive, if not controlling, authority, notwithstanding that it arose on an application for leave to file a second or successive § 2255 motion. See, e.g., Smith v. United States, CV 416-150, 2016 WL 4942019, at *1 (S.D. Ga. Sept. 15, 2016); Wallace v. United States, CV 116-048, 2016 WL 4147164, at *1 (S.D. Ga. Aug. 4, 2016); United States v. Perry, Civ. No. 16-00292, 2016 WL 3676596, at *2 (S.D. Ala. July 5, 2016); see also In re Gordon, 827 F.3d 1289, 1294 (11th Cir. 2016) (describing Fleur as controlling).

Second, Movant argues that even if substantive Hobbs Act robbery qualifies as a "serious violent felony" under § 3559(c), attempted Hobbs Act robbery does not because one can attempt to commit Hobbs Act robbery without attempting to use any force. This objection is without merit. As the Report correctly explains in great detail, an individual convicted of attempted Hobbs Act robbery has acted with a specific intent

and taken a substantial step to unlawfully take property from another, against his will, by means of actual or threatened force, violence, or fear of injury, and has therefore committed an offense that involves the attempted or threatened use of physical force against another.

In support of his argument to the contrary, Movant cites several cases, including one from the Eleventh Circuit, United States v. Gonzalez, 322 Fed. Appx. 963 (11th Cir. 2009), as allegedly establishing that one can attempt to commit Hobbs Act robbery without actually attempting or threatening to use physical force. Movant asserts that in Gonzalez, the Eleventh Circuit upheld a conviction for attempted Hobbs Act robbery although the defendants had "merely traveled to [a prearranged] location in preparation for committing robbery." [DE 20 at 12.] The Hobbs Act robbery conviction in Gonzalez involved more than mere travel, however, as the Eleventh Circuit noted that the defendants were arrested with brass knuckles and multiple black stockings. 322 Fed. Appx. at 969. Thus, Gonzalez does not demonstrate that one can attempt to commit Hobbs Act robbery without attempting to use any force.

Finally, Movant argues that the Report improperly concluded that pre-1999 Florida robbery convictions required more force than a sudden snatching. Although, in United States v. Jenkins, 651 Fed. Appx. 920 (11th Cir. 2016), the Eleventh Circuit held that a 1999 Florida robbery conviction[1] qualified as a crime of violence under the elements clause of the career offender guidelines (which is nearly identically worded to § 3559(c)'s elements/use-of-force clause), Movant argues that Jenkins is unpublished,

[1] The 1999 robbery conviction in Jenkins pre-dated the Florida Legislature's 1999 enactment of a separate robbery by sudden snatching statute. 651 Fed. Appx. at 922-23.

and therefore non-binding, and that the Court should find Jenkins unpersuasive because, *inter alia*, it "appears to conflict with" the published decision of United States v. Welch, 683 F.3d 1304 (11th Cir. 2012). [DE 20 at 15] (quoting Report and Recommendation in Melvin Jones v. United States, Civ. No. 15-81380, DE 35 at 21-22 (S.D. Fla. June 23, 2016)).

Movant ignores, however, that the Eleventh Circuit recently reaffirmed that "from the 1970's to the present," Florida robbery has had as an element "the use, attempted use, or threatened us of physical force." United States v. Seabrooks, 839 F.3d 1326, 1343 (11th Cir. 2016) (citing United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011)). Seabrooks even noted the limitation of the holding in Welch, explaining that "Welch held only that a 1996 Florida robbery conviction was a violent felony under the ACCA's residual clause . . . Welch contains no ruling, much less a holding, about Florida's robbery statute under the elements clause." Id. at 1344 (emphasis in original). The Eleventh Circuit further explained that "even as to its residual-clause analysis, Welch contains no holding about whether sudden snatching sufficed for Florida robbery prior to 1997." Id. at 1345. The Court therefore finds no err in the Report's reliance on Jenkins in support of its conclusion that Movant's pre-1999 Florida robbery convictions qualify as § 3559(c) predicates.

In light of the foregoing, it is hereby

ORDERED and ADJUDGED as follows:

1. The Report and Recommendation [DE 19] is hereby **ADOPTED** in its entirety.

2. Movant's Objections [DE 20] are **OVERRULED**.

3. The Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 [DE 4] is **DISMISSED** as untimely.

4. Alternatively, the Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 [DE 4] is hereby **DENIED**.

5. Pursuant to Rule 11 of the Rules Governing Section 2255 Cases, Movant is hereby **DENIED** a certificate of appealabilty because Movant has failed to make a substantial showing that he was denied a constitutional right. The Court notes that pursuant to Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Movant may request issuance of a certificate of appealability from the Eleventh Circuit.

6. The Clerk shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of December, 2016.

JAMES I. COHN
United States District Judge

Copies provided to:
United States Magistrate Judge Barry S. Seltzer
Counsel of record via CM/ECF

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61345-CIV-COHN/SELTZER
09-60229-CR-COHN

JAY ANTHONY RICHITELLI,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.
_____/

REPORT AND RECOMMENDATION TO DISTRICT JUDGE

I. INTRODUCTION

THIS CAUSE is before the undersigned on the Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 and Memorandum of Law in Support ("Motion" or "§ 2255 motion") (DE 4 - civil),[1] filed by Jay Anthony Richitelli ("Movant"). The matter was referred to United States Magistrate Judge Barry S. Seltzer pursuant to the provisions of 28 U.S.C. § 636 and Rule 1(e) of the Magistrate Rules of the United States District Court for the Southern District of Florida (DE 5 – civil).

Movant argues that "[i]n light of the Supreme Court's decision in Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (June 26, 2015), which held that the ACCA's 'residual clause' in § 924(e)(2)(B)(ii) is unconstitutionally vague, [he] is not eligible for a mandatory life sentence under § 3559(c), nor is he subject to punishment under the ACCA or the career offender provisions under U.S.S.G. § 4B1.1." Motion at 2 (DE 4 – civil).

[1] Some documents cited herein have been docketed in the underlying criminal action (09-60229-Cr-Cohn) only, some documents have been docketed in the instant civil action (16-61345-Civ-Cohn/Seltzer) only, and one document – the Motion to Correct Sentence – has been docketed in both. Except where expressly noted as civil entries, all docket entries refer to the criminal action.

Because the Eleventh Circuit granted Movant leave to file a second § 2255 motion only as to the § 3559(c) claim, the lone issue is whether as a result of Johnson Movant's instant conviction for attempted Hobbs Act robbery and his prior convictions for Florida (armed) robbery[2] constitute "serious violent felonies" as defined under 18 U.S.C. § 3559(c)(2)(F), such that he is properly serving a mandatory life sentence. For the reasons that follow, the undersigned concludes that the § 2255 motion is untimely, as Johnson does not apply to Movant's case. Yet, even if the § 2255 motion were deemed timely, the undersigned concludes that attempted Hobbs Act robbery and Florida robbery qualify as "serious violent felonies" under the elements clause of § 3559(c)(2)(F)(ii), as well as under the enumerated offenses clause of § 3559(c)(2)(F)(i), and that Movant's mandatory life sentence under § 3559(c)(1) remains valid. Accordingly, the undersigned RECOMMENDS that the Motion be DISMISSED as untimely or, in the alternative, be DENIED on the merits.

II. PROCEDURAL HISTORY

On November 17, 2009, a federal grand jury in the Southern District of Florida returned a six-count superseding indictment charging Movant with the following offenses: conspiring to commit a Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a)[3] (Count 1);

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[2] Although Movant has four (4) prior Florida convictions for armed robbery, for purposes of this Report and Recommendation, these convictions are analyzed primarily as ordinary robberies. However, the fact that Movant was armed during these robberies is raised to explain why the escape clause or affirmative defense provided by 18 U.S.C. § 3559(c)(3)(A) is not available to him. See infra. at 34-35.

[3] Commonly known as the "Hobbs Act," 18 U.S.C. § 1951(a) provides, in pertinent part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so

attempting a Hobbs Act robbery, in violation of 18 USC § 1951(a) (Count 2); conspiring to use a firearm during the commission of a crime of violence, in violation of 18 USC § 924(o) (Count 3); using a firearm during the commission of a crime of violence, in violation of 18 USC § 924(c)(1)(A) (Count 4); and, possession of a firearm by a convicted felon, in violation of 18 USC § 922(g)(1) (Count 6). Superseding Indictment (DE 55). Movant was not charged in Count 5 of the superseding indictment.

On February 7, 2010, the government filed a Notice of Sentencing Enhancement Pursuant to 18 U.S.C. § 3559(c) ("sentencing enhancement notice") (DE 165) providing that upon Movant's conviction of either or both of the offenses set forth in Count 1 and Count 2 of the superseding indictment – respectively, conspiracy and attempt to commit a Hobbs Act robbery – it would seek to enhance his sentence to life imprisonment pursuant to § 3559(c). The notice further provided the critical information – the offense, the date of conviction, the county of conviction, and the case number – with respect to the convictions upon which the Government intended to rely. Although the statute requires only two (2)

> 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 . . . .

(emphasis added). In turn, the Hobbs Act defines "robbery" as:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1) (emphasis added).

prior convictions, the notice listed all fifty-nine (59) of Movant's prior felony convictions. For purposes of the instant analysis, the notice included the case numbers (as well as the dates and counties of conviction) for four (4) Florida armed robbery convictions: 86-07879; 86-07926; 86-14110; and 95-11685.

On February 11, 2010, a jury found Movant guilty of the five counts (Counts 1, 2, 3, 4, and 6) with which he was charged (DE 173). In advance of sentencing, the Probation Office prepared a Pre-Sentence Investigation Report ("PSI") (DE 386). The PSI noted that the Government had previously provided Movant with notice pursuant to § 3559(c) that upon conviction in Count 1 and/or Count 2 he would be subject to the mandatory minimum penalty of life imprisonment. PSI ¶¶ 1, 87 (DE 386). And like the sentencing enhancement notice, the PSI listed all of Movant's adult convictions, including the four (4) Florida armed robbery convictions that are pertinent to the instant analysis:

- armed robbery with firearms (3 counts) – case number 86-7926C (PSI ¶ 40);
- armed robbery with a deadly weapon (2 counts) – case number 86-7879CF10B (PSI ¶ 41);
- armed robbery (2 counts) – case number 86-14110CFA (PSI ¶ 42); and
- robbery with a deadly weapon (6 counts) – case number 95-11685CF10A (PSI ¶ 47).

Finally, the Probation Office made clear that "[n]either [Movant] nor this attorney ha[d] reported objections [to the PSI] pursuant to Administrative Order 95-02." PSI Addendum (DE 386). Nor did Movant object to the PSI at the sentencing hearing.[4]

[4] At the start of the sentencing hearing, the Court confirmed that Movant had received and reviewed the PSI, and it inquired of Movant whether there were any errors in the PSI. Sent. Tr. at 3 (DE 266). In making this inquiry, the Court clarified that "if it's a tax-related matter, [it was] not going to impose a fine," that it "would find that [Movant is]

On April 23, 2010, the Court conducted a sentencing hearing. When asked by the Court if he wished to be heard, Movant's counsel stated that he had "fully researched the three strikes law" and that aside from one decision "finding that the escape shouldn't be used as a [predicate] offense, I was unable to find any legal basis to attack the life enhancement." Sent. Tr. at 4-5 (DE 266). Moreover, Movant's counsel acknowledged that the Court "is required to sentence [Movant] to a minimum mandatory life." Id. at 5. After then hearing from Movant, who did not challenge the accuracy of his prior convictions, the Court proceeded to impose the sentence: "life imprisonment as to each of Counts 1 and 2, 240 months as to Count 3, and 180 months as to Count 6; said counts to be served concurrently with each other; and 60 months as to Count 4 to be served consecutively to Counts 1, 2, 3, and 6." Id. at 11. An Amended Judgment reflecting this sentence was entered into the record on April 27, 2010 (DE 226).

On April 29, 2010, Movant appealed his conviction and sentence to the Eleventh Circuit (DE 229). On February 3, 2011, the Eleventh Circuit affirmed the conviction and sentence; the mandate issued on March 4, 2011 (DE 328). Thereafter, Movant filed a petition for a writ of certiorari, which the United States Supreme Court denied; that decision was entered into the record on April 25, 2011 (DE 330).

On April 11, 2012, Movant filed his first §2255 motion (DE 334; 12-60647-CV-DE 1). None of the claims raised in the first § 2255 motion addressed whether any of Movant's instant or prior convictions qualified as "serious violent felonies" to warrant a life sentence

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unable to pay a fine," and that this matter "will not affect the Court's sentence at all." Id. The Court then asked, "With that, any other objections?" Id. In response, Movant's counsel stated clearly: "There are no other objections, Your Honor." Id. at 4.

under § 3559(c). On August 4, 2014, the District Court denied the first § 2255 motion, as well as a Certificate of Appealability (DE 352). The Eleventh Circuit also refused to issue a Certificate of Appealability.

On May 23, 2016, Movant filed in the Eleventh Circuit a counseled Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence [Pursuant to] 28 U.S.C. § 2255 By a Prisoner in Federal Custody ("Application") (DE 1 – civil at 9-53). The Application raised only one ground for relief: "Increasing [Movant's] sentence to mandatory life sentence pursuant to 18 USC 3559(c), Three Strikes Law violated due process" (DE 1 – civil at 13). The Application additionally offered the following supporting facts: "The United States Supreme Court has declared the ACCA's residual clause unconstitutionally vague, and has held that increasing a defendant's sentence under that clause violates due process. Due to the similarities between the ACCA's and Three Strike's residual clauses it follows that the Three Strikes' residual clause is void for vagueness as well. Accordingly, [Movant] was denied due process" (DE 1 – civil at 13).

On June 21, 2016, the Eleventh Circuit granted Movant leave to file a second or successive § 2255 motion based on his Johnson challenge to the § 3559(c) definition of a "serious violent felony," a definition used to determine if a convicted defendant has the number and type of prior convictions to qualify for a mandatory life sentence as a "three strikes" offender (DE 1 – civil at 2-8). In its authorization, however, the Eleventh Circuit expressed no opinion as to the merits of the successive motion. Indeed, the Eleventh Circuit has stated that "nothing we pronounce in orders on applications to file successive § 2255 motions binds the district court," which must engage in a de novo review of the case. In re Rogers, 825 F.3d 1335, 1340 (11th Cir. 2016) (emphasis added).

On June 25, 2016, Movant filed the instant § 2255 motion (DE 4 – civil). On July 28, 2016, the Government responded to the motion ("Response") (DE 10 – civil), and on September 12, 2016, Movant replied thereto ("Reply") (DE 15 – civil).

The § 2255 motion, therefore, is now ripe for review.

III. THE LIMITATIONS PERIOD

Movant is seeking relief under 28 U.S.C. § 2255, which authorizes a federal prisoner claiming "that [his] sentence was imposed in violation of the Constitution . . . or that the sentence was in excess of the maximum authorized by law . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). That statutory authorization, however, is subject to a one-year limitations period, which runs from the latest of four determining dates. See 28 U.S.C. § 2255(f)(1-4).

In this matter, Movant is claiming that the one-year limitations period runs from the third of the four statutory alternatives: "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); see Motion at 6-7 (DE 4 – civil). The newly recognized right on which he is relying – a due process right initially recognized by the Supreme Court in Johnson, 135 S. Ct. 2551 – was announced on June 26, 2015. Motion at 6-8 (DE 4 – civil). Thereafter, in Welch v. United States, 136 S. Ct. 1257, 1268 (2016), the Supreme Court made Johnson retroactively applicable to cases on collateral review. Because Movant had one year from June 26, 2015, the date Johnson was decided, to seek relief, and because Johnson has been made retroactively applicable to cases on collateral review, Movant reasons that the instant § 2255 motion (filed June 25, 2016) "is timely under § 2255(f)(3)." Motion at 7 (DE

4 – civil).

IV. THE § 2255 MOTION

A. Movant's Arguments

In his § 2255 motion, Movant asserts and argues that:

- on February 11, 2010, he was convicted of conspiracy to commit Hobbs Act robbery (Count 1), attempted Hobbs Act robbery (Count 2), conspiracy to use a firearm during the commission of a crime of violence (Count 3), use of a firearm during the commission of a crime of violence (Count 4), and possession of a firearm by a convicted felon (Count 6);

- the Court sentenced him to mandatory life imprisonment as to Counts 1 and 2 (pursuant to 18 U.S.C. § 3559(c)), 240 months as to Count 3, and 180 months as to Count 6 (pursuant to the ACCA), all to run concurrent; the Court also sentenced him to a consecutive 60 months as to Count 4; and the Court designated him as a career offender under USSG § 4B1.1; and

- in light of the Supreme Court's decision in Johnson, which held that the ACCA's residual clause in § 924(e)(2)(B)(ii) is unconstitutionally vague, Movant is not eligible for a mandatory life sentence under § 3559(c), nor is he subject to punishment under the ACCA or the career offender provisions of USSG § 4B1.1.

Motion at 1-2 (DE 4 – civil). Concluding that he "is entitled to relief under § 2255," Movant seeks to have this Court "vacate his life sentence and resentence him without imposing recidivist enhancements under 18 U.S.C. § 3559(c), 18 U.S.C. § 924(e), and U.S.S.G. § 4B1.1." Id. at 2, 55.

Although Movant now seeks to additionally challenge the sentencing enhancements under the ACCA and the career offender guidelines, he had applied for leave to file a second or successive § 2255 motion only as to the mandatory life sentence imposed pursuant to 18 U.S.C. § 3559(c) (DE 1– civil at 13). And in granting the (counseled) application, the Eleventh Circuit expressly noted the limited scope of the application: Movant "indicates that he wishes to raise one claim in the second or successive § 2255

motion" and that "although [Movant] appears to have received an ACCA sentence enhancement for his felon-in-possession conviction (Count 6), he does not challenge the validity of his apparent ACCA sentence in his application. Nor does he challenge his designation as a career offender under U.S.S.G. § 4B1.1" (DE 1 – civil at 3, 6 n.1). Indeed, the Eleventh Circuit summarized Movant's lone argument: "[Movant] argues that Johnson implicates his mandatory life sentence, imposed pursuant to 18 U.S.C. § 3559(c), which contains language similar to the ACCA's residual clause" (DE 1 – civil at 3). Because Movant only sought, and the Eleventh Circuit only granted, leave to challenge the mandatory life sentence under § 3559(c), the undersigned restricts the instant analysis to that one claim.[5]

B. Analysis

Movant challenges the mandatory life sentence imposed pursuant to 18 U.S.C. § 3559(c). He argues that Johnson extends to § 3559(c) and invalidates the statute's residual clause and, further, that neither his instant convictions nor his prior convictions qualify as "serious violent felonies" under the statute's elements clause or enumerated

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[5] Although the ACCA and career offender guidelines are not addressed herein, as Movant did not seek or receive leave to raise them, the undersigned notes that the instant analysis as to the elements clause of 18 U.S.C. § 3559(c)(2)(F)(ii) would apply equally to the nearly identically worded elements clauses of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), and of the career offender guidelines, USSG § 4B1.2(a)(1). Indeed, to the extent that there exists any difference in the language of the respective clauses, § 3559(c)(2)(F)(ii) is narrower in scope, as it covers offenses qualifying under the language of the elements clause, but only where they are punishable by a maximum term of 10 years or more.

The undersigned further notes that because § 3559(c) provides for mandatory life imprisonment, Movant's failure to prevail on his challenge under that statute means that any challenge under the ACCA or the career offender guidelines would not affect the ultimate sentence.

offenses clause. Motion at 8-50 (DE 4 – civil).

1. The "Three Strikes" Statute

Commonly referred to as the "three-strikes" statute, § 3559(c) provides for mandatory life imprisonment for any person who is convicted of a "serious violent felony" and who has previously been convicted of, inter alia, two or more "serious violent felonies":

> (1) Mandatory life imprisonment.--Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if--
>
> (A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of–
>
> (i) 2 or more serious violent felonies; or
>
> (ii) one or more serious violent felonies and one or more serious drug offenses; . . .

18 U.S.C. § 3559(c)(1)(A) (emphasis added). The statute defines the term "serious violent felony" through three clauses – an enumerated offenses clause[6] (§ 3559(c)(2)(F)(i), an elements/use-of-force clause (first portion of § 3559(c)(2)(F)(ii)), and a residual clause (last portion of § 3559(c)(2)(F)(ii)). More specifically, the statute defines a "serious violence felony" as:

> (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a));

[6] Although Movant has several other convictions that would arguably qualify under the enumerated offenses clause, the undersigned is restricting the analysis to his instant federal conviction for attempted Hobbs Act robbery and to his prior Florida convictions for (armed) robbery.

> assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and
>
> (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another[7] or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

18 U.S.C. § 3559(c)(2)(F) (emphasis added).

2. Residual Clause

Movant argues that as a result of Johnson the residual clause provision of 18 U.S.C. § 3559(c)(2)(F)(ii) is "void for vagueness and a life sentence imposed under it may stand only if a defendant's underlying federal convictions and prior convictions qualify as 'serious violent felonies' under § 3559(c)'s elements and enumerated crimes clauses." Motion at 10 (DE 4 – civil). Johnson, however, did not address § 3559(c), but § 924(e), also known as the Armed Career Criminal Act ("ACCA"). And, in any event, § 3559(c)'s residual clause is not implicated in this case.

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[7] Beyond the limiting language that the offense be punishable by imprisonment of 10 years or more, the elements clause provision of 18 U.S.C. § 3559(c)(2)(F)(ii) is identical to those of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), and the career offender guidelines, USSG § 4B1.2(a)(1), and is nearly identical to those of 18 U.S.C. § 924(c)(3)(A) and 18 U.S.C. § 16(a). The latter provisions both contain only two additional words; they provide that the proscribed use of force be against the person "or property" of another. Given the identity or near identity of these elements clauses, the undersigned believes that caselaw addressing the elements clauses of § 16(a), § 924(c)(3)(A), § 924(e)(2)(B)(i), and USSG § 4B1.2(a)(1) applies to § 3559(c)(2)(F)(ii) as well.

The ACCA, 18 U.S.C. § 924(e), provides for a mandatory minimum sentence of 15 years' imprisonment for a defendant who violates § 922(g) and has 3 prior "violent felony" or "serious drug offense" convictions. In Johnson, the Supreme Court held that the ACCA's residual clause – the provision that defines a "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added) – is unconstitutionally vague. 135 S. Ct. at 2557. Therefore, imposing an increased ACCA sentence under the residual clause "violates the Constitution's guarantee of due process." Id. at 2563. Johnson, however, did "not call into question application of the [ACCA] to the four enumerated offenses or the remainder of the Act's definition of a violent felony." Id. The ACCA, therefore, still applies to defendants who have three prior convictions for a "serious drug offense," 18 U.S.C. § 924(e)(2)(A), or for a "violent felony," as defined under the elements clause or under the enumerated offenses clause, 18 U.S.C. § 924(e)(2)(B)(i) and (ii).

The unconstitutionally vague residual clause definition of a "violent felony" in § 924(e)(2)(B)(ii), although similar to, is nonetheless distinct from the residual clause definition of a "serious violent felony" in § 3559(c) – "any other offense punishable by a maximum term of imprisonment of 10 years or more . . . that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." (emphasis added.) Whether the pertinent language of the § 3559(c) residual clause will be held to suffer the same constitutional infirmities as that of the § 924(e) residual clause remains an open question. Indeed, in granting Movant's application to file a second or successive § 2255 motion, the Eleventh Circuit stated: "This Court has not determined whether the new rule announced in Johnson would invalidate

§ 3559(c)'s residual clause. That is a legal issue we have yet to address" (DE 1 – civil at 7). Significantly, however, the Eleventh Circuit added that "[i]n some cases, we have been able to bypass this type of issue because the record made clear that the predicate crimes met the applicable requirements without regard to language similar to the ACCA's residual clause" (DE 1 – civil at 7) (citations omitted). So too, this Court need not decide whether Johnson extends to § 3559(c)'s residual clause because attempted Hobbs Act robbery and Florida robbery categorically qualify as "serious violent felonies" under the statute's elements/use-of-force clause, as well as under its enumerated offenses clause, and, thus, the ACCA's residual clause infirmities have no bearing on Movant's sentence.

3. Elements/Use-of-Force Clause

To determine whether attempted Hobbs Act robbery and Florida armed robbery qualify as "serious violent felonies" under § 3559(c)(2)(F)'s elements/use-of-force clause, the Court must employ what is known as the "categorical approach." See Leocal v. Ashcroft, 125 S. Ct. 377, 381 (2004). In Leocal, the Supreme Court examined "the elements and the nature of the offense of conviction, rather than . . . the particular facts relating to petitioner's crime" to determine whether a prior felony conviction was for a "crime of violence." Id. (discussing definition of "crime of violence" in 18 U.S.C. § 16). Under the categorical approach, courts may examine only the "elements of the offense" and not "the specific conduct of [the] particular offender." United States v. Chitwood, 676 F.3d 971, 976-77 (11th Cir. 2012) (citations omitted).

The § 3559(c)(2)(F) elements/use-of-force clause defines a "serious violent felony" as "any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against

the person of another." 18 U.S.C. § 3559(c)(2)(F)(ii) (emphasis added). The Supreme Court has made clear 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, 130 S. Ct. 1265, 1271 (2010) ("Curtis Johnson") (comparing favorably the term "physical force" as used in the ACCA and 18 U.S.C. § 16); United States v. Owens, 672 F.3d 966, 971 (11th Cir. 2012) (observing that under Curtis Johnson, the term "physical force," as used in the ACCA's elements clause, means "strong physical force or a substantial degree of force"). The Supreme Court has also made clear that the term "use" requires the "active employment" of force, which demands a high degree of intent, not mere negligence or accidental conduct. Leocal, 125 S. Ct. at 382.

i. Attempted Hobbs Act Robbery

To determine whether attempted Hobbs Act robbery satisfies the elements clause, the Court must first determine whether the crime attempted, itself, satisfies the elements clause. Hobbs Act robbery requires "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1). Employing actual or threatened force or violence, or creating fear of injury, to take another's property against his will, by its terms, involves a use, attempted use, or threatened use of physical force. See United States v. Pena, 161 F. Supp. 3d 268, 275 (S.D.N.Y. 2016) (observing that "[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)"). Accordingly, Hobbs Act robbery qualifies as a "serious violent felony" as it requires the same type of force as the

elements/use-of-force clause.

Movant, however, argues that Hobbs Act robbery does not qualify as a "serious violent felony" under the elements clause of § 3559(c) because the offense may be committed not only through the use of force or violence, but also by putting a person in "fear of future injury to his person or property." Motion at 18 (DE 4 - civil). According to Movant, the statute "does not require the use or threat of violent physical force in every case." Id. at 22. The undersigned disagrees.

The Hobbs Act definition of "robbery" requires that the "fear of injury" be instilled in close physical proximity to the victim. See 18 U.S.C. § 1951(b)(1). Like "actual or threatened force, or violence," "fear of injury" is a means of unlawfully taking "from the person or in the presence of another, against his will." Id. By requiring physical proximity, the statute clearly indicates that "fear of injury" means fear of bodily injury. In this respect, Hobbs Act robbery, by requiring "fear of injury," 18 U.S.C. § 1951(b)(1), is distinguishable from Hobbs Act extortion, which requires only that a victim be placed in "fear," 18 U.S.C. § 1951(b)(2).[8] Indeed, courts that have considered Movant's interpretation of the term "fear of injury" have rejected it. See, e.g., United States v. Williams, 2016 WL 1555696, at *9 (D. Me. Apr. 15, 2016) (observing that Hobbs Act "fear of injury" means "fear of injury produced by physical force," citing United States v. Castleman, 134 S. Ct. 1405 (2014));

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[8] The Hobbs Act defines "extortion" as:

> the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951(b)(2) (emphasis added).

Pena, 161 F. Supp. 3d at 279 (noting that "Hobbs Act provides a list of means by which robbery can be committed" and concluding that "fear of injury," like other means specified, is a fear arising "from the use of force"); United States v. Collins, 2016 WL 1639960, at *28 (N.D. Ga. Feb. 9, 2016) ("[A] defendant who commits a Hobbs Act robbery by 'fear of injury' necessarily commits it by 'fear of physical force'" (citations omitted)).

Movant also argues that Hobbs Act robbery is not a "crime of violence" because it can be accomplished by placing an individual in fear of economic injury to his property, which is not a threat of "violent force." Motion at 21-22 (DE 4 – civil). Although Hobbs Act extortion can be achieved by placing a person in fear of financial loss, see, e.g., United States v. Bornscheuer, 563 F.3d 1228, 1237 (11th Cir. 2009), courts have rejected the suggestion that Hobbs Act robbery can be construed so broadly, particularly under the Supreme Court's "ordinary case" approach and given the textual differences between the two offenses, as noted above. See, e.g., Pena, 161 F. Supp. 3d at 282 (rejecting hypothetical "fear of injury" to intangible property as not constituting an ordinary case of Hobbs Act robbery); Collins, 2016 WL 1639960, at *28; United States v. Hancock, 168 F. Supp. 3d 817, 822-23 (D. Md. 2016).

Not surprisingly, the Eleventh Circuit has stated in unequivocal language that "Hobbs Act robbery . . . clearly qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)." In re Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016) (emphasis added) (involving indictment – like the indictment in which Movant was charged – that contained the language "by means of actual and threatened force, violence, and fear of injury"). Indeed, as recently as July 8, 2016, in denying an application to authorize a successive motion, the Eleventh Circuit left little doubt as to its view that Hobbs Act robbery

categorically qualifies as a "crime of violence" under the elements/use-of-force clause in § 924(c)(3)(A), stating plainly that Fleur's conclusion "controls." In re Gordon, 827 F.3d 1289, 1294 (11th Cir. 2016) (stating that because Hobbs Act robbery categorically "qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A) without regard to the § 924(c)(3)(B) residual clause," it did not need to decide whether Johnson's holding as to the § 924(e)(2)(B)(ii) residual clause extends to the § 924(c)(3)(B) residual clause; adding that the applicant's "§ 924(c) sentence would be valid even if Johnson makes the § 924(c)(3)(B) residual clause unconstitutional"); accord In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016) (same).[9]

Fleur is controlling authority – or, at the very least, highly persuasive authority – notwithstanding that it arose on an application for leave to file a second or successive § 2255 motion. Although the Eleventh Circuit has stated that "nothing we pronounce in orders on applications to file successive § 2255 motions binds the district court," In re Rogers, 825 F.3d at 1340 (emphasis added), the undersigned construes that statement

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[9] So too, the Ninth Circuit has twice concluded (both before and after Johnson) that Hobbs Act robbery qualifies as a "crime of violence" under the elements/use-of-force clause: United States v. Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993) (observing that substantive Hobbs Act robbery "indisputably qualifies as a crime of violence" because it "contain[s] [an] element of 'actual or threatened force, or violence'"); United States v. Howard, 650 Fed. Appx. 466, 468 (9th Cir. 2016) (holding that Hobbs Act robbery constitutes a "crime of violence" under § 924(c)'s use-of-force clause and declining to consider whether it also qualifies under residual clause). See also United States v. Farmer, 73 F.3d 836, 842 (8th Cir. 1996) (concluding that Hobbs Act robbery constitutes a "serious violent felony" under 18 U.S.C. § 3559(c)(2)(F) because, among other things, "it has as an element the use, attempted use, or threatened use of physical force against the person of another"); cf. United States v. Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011) (concluding that robbery under Fla. Stat. § 812.13(1) qualifies as a "crime of violence" under elements clause of sentencing guidelines because it requires the "use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm").

to mean only that the appellate court's threshold determination – whether a movant has established a prima facie case that his claim satisfies the statutory criteria to file a second or successive motion – does not bind the district court, which must engage in a de novo review of the case. Stated differently, the appellate court's decision to grant leave to file is not, itself, a substantive decision on the merits of a movant's claim. However, that does not mean that affirmative rules of law set forth in the Eleventh Circuit's published opinions on successive § 2255 motions are without binding effect. Indeed, the Rogers court expressly noted that it was "bound" by several of the circuit's recent (published) decisions on petitions to file successive § 2255 motions in light of Johnson. In re Rogers, 825 F.3d at 1338 (citing three such binding decisions). Yet, even if the Eleventh Circuit's affirmative rules of law in these published decisions were not binding, a district court would nonetheless be free to consider the appellate court's pronouncements, particularly when, as in Fleur, it invokes unequivocal terms: "Hobbs Act robbery . . . clearly qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)." In re Fleur, 824 F.3d at 1340 (emphasis added); accord In re Gordon, 827 F.3d at 1294; In re Colon, 826 F.3d at 1305.

Although the Eleventh Circuit has decided that Hobbs Act robbery satisfies the elements/use-of-force clause, it has not yet decided whether the offense at issue here – attempted Hobbs Act robbery – also satisfies that clause. See In re Gomez, 830 F.3d 1225, 1228 (11th Cir. 2016) (noting that circuit has decided that Hobbs Act robbery constitutes an elements clause predicate but has not yet decided as to attempted Hobbs Act robbery); In re James, 2016 WL 4608125, at *3 (11th Cir. July 21, 2016) (same).

An examination of the pertinent statutory language, however, supports a conclusion

that attempted Hobbs Act robbery does satisfy the elements/use-of-force clause and, therefore, constitutes a "serious violent felony." Whereas Hobbs Act robbery requires an "unlawful taking or obtaining of personal property from . . . another, against his will, by means of actual or threatened force, or violence, or fear of injury," 18 U.S.C. § 1951(b)(1), a criminal "attempt" requires not only a specific intent to commit the underlying offense, but also an overt act constituting a substantial step toward the commission of the offense. See United States v. Resendiz-Ponce, 127 S. Ct. 782 (2007). As the Supreme Court explained in Resendiz-Ponce:

> At common law, the attempt to commit a crime was itself a crime if the perpetrator not only intended to commit the completed offense, but also performed some open deed tending to the execution of his intent. As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct.
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> . . . .
>
> Not only does the word "attempt" as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements.

Id. at 787 (citations and internal quotations omitted). In similar fashion, the Eleventh Circuit stated that to convict a defendant of an attempt charge, the Government must prove that the defendant "had the specific intent to engage in criminal conduct and that he took a substantial step toward commission of the offense"; it explained that "[a] substantial step must be more than remote preparation, and must be conduct strongly corroborative of the firmness of the defendant's criminal intent." United States v. Perez, 580 Fed. Appx. 795, 803 (11th Cir. 2014) (citations and internal quotations omitted); accord United States v. Moore, 535 Fed. Appx. 795, 797 (11th Cir. 2013) ("A substantial step must be shown by

objective acts that are strongly corroborative of criminal intent.").

Consistent with Supreme Court and Eleventh Circuit authority, the District Court instructed the jury as to the requirements for finding Movant guilty of an attempt to commit an offense:

> A Defendant can be found guilty of an attempt to commit that offense only if the following facts are proved beyond a reasonable doubt:
>
> First: That the Defendant knowingly and willfully intended to commit the offense of obstructing, delaying or affecting commerce or the movement of articles in commerce by taking money from a courier by actual or threatened force, violence and fear of injury, as charged; and
>
> Second: That the Defendant engaged in conduct which constituted a substantial step toward the commission of the crime and which strongly corroborates the Defendant's criminal intent.
>
> A "substantial step" means some important action leading to the commission of a crime as distinguished from some inconsequential or unimportant act. It must be something beyond mere preparation; it must be an act which, unless frustrated by some condition or event, would have resulted, in the ordinary and likely course of things, in the commission of the crime being attempted.

Jury Instructions at 15 (DE 178).

By proving not only that Movant specifically intended to commit, but also that he took a substantial step toward committing an offense (robbery) that requires the actual or threatened use of force, the Government thereby proved that Movant committed an offense (attempted robbery) that has as an element the "attempted use" or the "threatened use" of physical force, which satisfies the elements clause definition of a "serious violent felony." See 18 U.S.C. § 3559(c)(2)(F)(ii). As one district court recently explained, "Attempted

Hobbs Act Robbery would in fact qualify as a crime of violence because the force clause explicitly encompasses attempted use of physical force." United States v. Baires-Reyes, -- F. Supp. 3d - -, 2016 WL 3163049, at *3 (N.D. Cal. June 7, 2016) (emphasis added) (discussing § 924(c)'s elements/use-of-force clause). Applying this same logic, the Sixth Circuit held that an Ohio conviction for attempted robbery satisfied the ACCA's elements clause because the offense has as an element the use, attempted use, or threatened use of physical force:

> A "criminal attempt" occurs when "one purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."
>
> Looking at the language of the statute, attempted robbery has as an element the use, attempted use, or threatened use of physical force against the person of another and, therefore, it is a violent felony as defined under the first prong of 18 U.S.C. § 924(e)(2)(B)(i). The crime of robbery requires as an element that the person shall use or threaten the immediate use of force against another. . . . Therefore, the crime of robbery clearly has as an element the use, attempted use, or threatened use of physical force against another person. Similarly, the crime of attempted robbery also has as an element of the offense the use, attempted use, or threatened use of physical force against another person.

United States v. Mansur, 375 Fed. Appx. 458, 464 (6th Cir. 2010) (unpublished) (citations and footnotes omitted) (emphasis added). Because Hobbs Act robbery similarly requires the use, attempted use, or threatened use of force against another, and because federal criminal attempt similarly requires a substantial step in a course of conduct planned to culminate in the commission of the crime, attempted Hobbs Act robbery similarly has as an element of the offense the attempted use or threatened use of physical force against another, as required by § 3559(c)(2)(F)(ii).

Although the Eleventh Circuit has not yet decided whether the type of attempted robbery at issue here – attempted Hobbs Act robbery – satisfies the elements clause, it has decided that another type of attempted robbery – attempted bank robbery – does satisfy the elements clause because it has as an element the threatened use of physical force. See United States v. Jenkins, 651 Fed. Appx. 920, 2016 WL 3101281, at *4 (11th Cir. June 3, 2016) (unpublished) (analyzing conviction under the career offender guidelines). That the attempt at issue here involves Hobbs Act robbery, rather than federal bank robbery, is of no consequence to the elements clause analysis, given the similarity of the pertinent statutory language.

More specifically, the federal bank robbery statute makes it a crime if any person "by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . any property or money," 18 U.S.C. § 2113(a), whereas the Hobbs Act robbery statute, which expressly extends to "attempts," 18 U.S.C. § 1951(a), makes it a crime if any person takes "personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury," 18 U.S.C. § 1951(b). Both statutes, therefore, prohibit taking property from another by "force" and/or "violence." Both additionally prohibit taking by analogous means, the bank robbery statute by "intimidation," and the Hobbs Act robbery statute by "fear of injury." See Howard, 650 Fed. Appx. at 468 (analogizing Hobbs Act "fear of injury" with element of "intimidation" in federal bank robbery statute (18 U.S.C. § 2113(a)), and concluding that both satisfy the § 924(c)(3)(A) element of "threatened use of physical force"). In sum, the Eleventh Circuits's reasoning as to attempted bank robbery should apply as well to attempted Hobbs Act robbery. Both statutes criminalize attempts, both set forth nearly

identical violent means by which the proscribed (attempted) taking may be committed, and both therefore involve an "attempted use" or "threatened use" of physical force that satisfies the elements clause.

Finally, the undersigned notes that the Eleventh Circuit, in holding that a Florida attempted robbery satisfied the elements clause definition of a "crime of violence," cited guidelines commentary for the proposition that an attempt to commit a crime of violence is itself a "crime of violence": "Moreover, because the commentary explicitly states that the attempt to commit a 'crime of violence' is itself a 'crime of violence,' Lockley's attempted robbery conviction categorically qualifies under the elements clause as a predicate for the career offender enhancement." United States v. Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011); cf. United States v. Taylor, 529 F.3d 1232, 1238 (9th Cir. 2008) ("Arizona's definition of attempt is coextensive with the federal definition" and thus defendant's "attempted armed robbery conviction was a crime of violence pursuant to USSG § 4B1.2(a)(1)," the elements clause).

In sum, an individual convicted of attempted Hobbs Act robbery has not only acted with a specific intent, but has also taken a substantial step to unlawfully take property from another, against his will, by means of actual or threatened force, or violence, or fear of injury. By doing so, such individual has committed an offense that involves the attempted or threatened the use of physical force against another. Accordingly, attempted Hobbs Act robbery, one of Movant's instant offenses of conviction, qualifies as a "serious violent felony," as defined under by § 3559(c)(2)(F)'s elements clause.

ii. Florida Robbery

In addition to requiring that at least one of the instant offenses of conviction be a "serious violent felony," the mandatory life imprisonment provision of § 3559(c) requires that a defendant have been convicted on separate prior occasions of, inter alia, two or more "serious violent felonies." 18 U.S.C. § 3559(c)(1)(A). Among Movant's fifty-nine (59) prior convictions are four (4) Florida convictions for armed robbery.[10] Movant argues that

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[10] Without any citation to authority, Movant argues that this Court should disregard two of his armed robbery convictions, Case No. 86-07879 and Case No. 86-14110, set forth in the Government's notice of sentencing enhancement because it "failed to submit judgments" in those cases and instead "submitted either clerk's minute orders or uncertified docket sheets downloaded from the Broward County clerk website to prove the convictions." Motion at 23 (DE 4 – civil). The undersigned does not find this argument persuasive.

The Government is not required to append judgments of conviction to its notice of sentencing enhancement. The pertinent statute, 18 U.S.C. § 3559(c)(4) ("Information filed by United States Attorney") states that the provisions of 21 U.S.C. § 851(a) apply to the imposition of a mandatory life sentence. In turn, § 851(a)(1) requires that the United States attorney file an information with the court and serve a copy on opposing counsel "stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). Nowhere does the statute require that the pertinent judgments be appended to the notice; nor has Movant provided any authority supporting such a requirement. Indeed, the Eleventh Circuit very recently upheld the sufficiency of a notice that contained multiple errors, explaining that it nonetheless conveyed the Government's intent to seek an enhancement based on a particular and defined prior felony conviction. United States v. DiFalco, - - F.3d - -, 2016 WL 5092599, at *10 (11th Cir. Sept. 20, 2016) (upholding sufficiency of § 851 notice even though information provided wrong year and county in which prior conviction occurred and erroneously listed marijuana conviction, but had correctly listed underlying case number and circuit court in which defendant was convicted and defendant plainly knew that government was relying on amphetamine conviction). The DiFalco court reasoned that despite the errors, the notice served the intended purpose of providing "enough accurate information to enable [the defendant] easily to research, identify, and potentially contest the accuracy of the notice and the information." Id. at *11; accord United States v. Brown, 513 Fed. Appx. 830, 833 (11th Cir. 2013); Perez v. United States, 249 F.3d 1261, 1265-66 (11th Cir. 2001). Here, the Government's Notice of Sentencing Enhancement, filed February 7, 2010, plainly served the purpose behind the notice requirement. By providing Movant with the offense, the date of conviction, the county of conviction, and the case number, the Government not only unambiguously signaled its intent, but it also allowed Movant to contest the accuracy of the information and to decide whether to enter a plea

his Florida (armed) robbery convictions do not qualify as "serious violent felonies" as defined by the elements/use-of-force clause. The undersigned does not agree.

In four separate cases, all filed in 1986 and 1995, Movant was charged with armed robbery and was subsequently convicted of each. See PSI ¶¶ 40, 41, 42, 47 (DE 386). In Florida, the term "robbery" is defined by statute. See Fla. Stat. 812.13(1). For purposes of the elements clause analysis, both the 1986 and 1995 versions of Fla. Stat. 812.13(1) defined "robbery" as taking money or property from another by force, violence, assault, or putting in fear.[11] In addition, both versions classified robbery as a first-degree felony where

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or go to trial with full knowledge of the consequences of a potential guilty verdict.

Further, to the extent Movant is challenging not only the sufficiency of the notice, but also the sufficiency of the evidence of prior convictions at sentencing, that challenge also fails. Despite being given the opportunity to do so, Movant never objected to the PSI, which detailed each of those convictions, as well as the facts supporting those convictions. "It is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes and precludes the argument that there was error in them." United States v. Sanders, 442 Fed. Appx. 428, 429 (11th Cir. 2011); accord United States v. Hall, 456 Fed. Appx. 873, 875 (11th Cir. 2012) (same); United States v. Freeman, 194 Fed. Appx. 777, 781 (11th Cir. 2006) (same).

Finally, the undersigned notes that § 3559(c) requires only two prior convictions for a "serious violent felony." Accordingly, even if the Court were to disregard the Florida armed robbery convictions in Case No. 86-07879 and Case No. 86-14110, Movant would still have the requisite number of predicate armed robbery convictions in Case No. 86-07926 and Case No. 95-11685.

[11] As of 1986, Florida Statutes provided: "'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (1986) (emphasis added).

Thereafter, the statutory definition of "robbery" underwent two amendments, neither of which is material to the elements clause analysis. In 1987, the definition was amended by substituting "when in the course of the taking there is the use of" for "by," and in 1992 it was amended again by inserting "with intent to either permanently or temporarily deprive the person or the owner of the money or other property." See Fla. Stat. § 812.13(1), Amendment Notes.

Accordingly, the 1995 (and current) version of the statute provides: "'Robbery' means the taking of money or other property which may be the subject of larceny from the

"in the course of committing the robbery the offender carried a firearm or other deadly weapon." See Fla. Stat. 812.13(2)(a).

In Lockley, 632 F.3d 1238, the Eleventh Circuit held that a conviction for robbery under Florida law, Fla. Stat. § 812.13(1), constitutes a conviction for a "crime of violence" under the guidelines' elements clause of USSG § 4B1.2(a) – a clause whose language is identical to that in the "three strikes" statute, 18 U.S.C. § 3559(c)(2)(F)(ii) – explaining:

> [R]obbery under that statute requires either the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm. All but the latter option specifically require the use or threatened use of physical force against the person of another. And, once again, we find it inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force. Section 812.13(1) accordingly has, as an element, the "use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1).

Id. at 1245; accord Jenkins, 2016 WL 3101281, at *5 (concluding that 1999 robbery conviction under Fla. Stat. § 812.13(1) qualifies as crime of violence under the elements clause of the career offender guidelines); United States v. Gonzalez-Lopez, 911 F.2d 542, 548 (11th Cir. 1990) (stating in guidelines case that the Florida robbery statute, Fla. Stat. § 812.13 (1976), has as an element the use of force, violence, assault, or putting in fear and describes a crime of violence consistent with the guidelines). Indeed, as recently as October 19, 2016, the Eleventh Circuit reaffirmed the continuing vitality of Lockley. See

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person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (1995), (2016) (emphasis added).

United States v. Seabrooks, 2016 WL 6090860, at *11 (11th Cir. Oct. 19, 2016) (stating, in review of prior Florida armed robbery convictions, that panel members all agree that Lockley binds the court).[12] Accordingly, binding Eleventh Circuit precedent plainly supports the conclusion that a Florida conviction for robbery satisfies the elements/use-of-force clause and, therefore, constitutes a "serious violent felony" for purposes of the § 3559(c) enhancement.

Movant, however, argues that Lockley is not binding here because the opinion addressed a robbery conviction under § 812.13(1) from 2001, which post-dated the Florida Legislature's 1999 enactment of a separate "robbery by sudden snatching" statute. Motion at 27-30 (DE 4 – civil). Movant explains that when he was charged in 1986 and 1995, non-

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[12] Although Lockley addressed a Florida conviction for ordinary robbery under § 812.13(1), which does not involve a weapon and is a felony in the second degree, armed robbery is an even more egregious crime, as it does involve a firearm or other deadly weapon and is a felony in the first degree. Not surprisingly, therefore, in 2006, the Eleventh Circuit left no doubt that a (1974) Florida armed robbery conviction was a conviction for a "violent felony," citing to the elements clause of the ACCA: "Dowd's January 17, 1974, armed robbery conviction is undeniably a conviction for a violent felony. See 18 U.S.C. § 924(e)(2)(B)(i)." United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir. 2006) (emphasis added); see also United States v. Johnson, 634 Fed. Appx. 227, 232 (11th Cir. 2015) (unpublished) ("Each of [Johnson's] predicate felonies was an armed robbery, which had as an element 'the threatened use of force against the person of another.'"); United States v. Oner, 382 Fed. Appx 893, 896 (11th Cir. 2010) (noting that Dowd "held that an armed robbery under Florida law in 1974 'undeniably' qualified as a violent felony because it has as an element the use, attempted use, or threatened use of physical force against the person of another," and concluding that "[t]he same conclusion unambiguously follows from the face of Florida's armed robbery statute today").

More recently, in May 2016, the Eleventh Circuit reiterated Dowd's holding that Florida convictions for armed robbery qualify as violent felonies under the ACCA's elements clause. In re Thomas, 823 F.3d 1345, 1349 (11th Cir. 2016). And in June 2016, the Eleventh Circuit stated that "[e]ven after Johnson's holding about the residual clause, this Court similarly has held that . . . a Florida armed robbery qualif[ies] as [a] violent felon[y] under the ACCA's elements clause." In re Hires, 825 F.3d 1297, 1302 (11th Cir. 2016).

forceful snatching offenses were being prosecuted as "strong arm" robberies under Fla. Stat. § 812.13(1). Movant reasons that the statute under which he was convicted included conduct – sudden snatching – that did not require the use of violent force and, therefore, cannot categorically qualify as a "serious violent felony" under § 3559(c)'s elements clause.

Preliminarily, the undersigned notes that Movant was convicted not of ordinary robbery, but of armed robbery, specifically: armed robbery with firearms – Case No. 86-7926 (PSI ¶ 40); armed robbery with a deadly weapon – Case No. 86-7879 (PSI ¶ 41); armed robbery – Case No. 86-14110 (PSI ¶ 42); and robbery with a deadly weapon – Case No. 95-11685 (PSI ¶ 47). Yet, even if Movant had been convicted of only ordinary robbery under Fla. Stat. § 812.13(1), his argument concerning pre-1999 prosecutions under Fla. Stat. § 812.13(1) for non-forceful snatching offenses would fail. In Jenkins, 2016 WL 3101281, at *5, a direct appeal of a sentencing enhancement under the guidelines, the Eleventh Circuit responded to Jenkins' argument that a pre-October 1999 conviction under Fla. Stat. § 812.13(1) was not a crime of violence by addressing the flaw in his premise: "The problem for Jenkins is that § 812.13(1) has never included a taking by sudden snatching, as the Florida Supreme Court explained in Robinson v. State, 692 So. 2d 883 (Fla. 1997)." The Jenkins court proceeded to explain the decision in Robinson, and it referenced the McCloud decision rendered twenty years earlier that Robinson reaffirmed:

> The Florida Supreme Court pointed to its 1976 decision in McCloud v. State, 335 So.2d 257 (Fla.1976), and reiterated that snatching does not involve the degree of physical force needed to constitute a robbery under § 812.13(1) because the physical force used must have overcome the victim's resistance, . . . The Florida Supreme Court reaffirmed that "[t]he snatching or grabbing of property without such resistance by the victim amounts to theft rather than robbery." Id. at 887. In Robinson, the Florida Supreme Court stated that "Florida

> courts have consistently recognized that in snatching situations, the element of force as defined herein distinguishes the offenses of theft and robbery." Id. In other words, Robinson reaffirmed and clarified what had already been the law in Florida since at least the McCloud decision in 1977—that merely snatching property without using force to overcome the victim's resistance did not constitute a robbery under § 812.13(1).

Jenkins, 2016 WL 3101281, at * 5 (emphasis added). Therefore, even though Robinson was decided in 1997, whereas Movant was charged in 1986 and 1995, the decision reaffirmed what had been the law for the previous 20 years and made clear that § 812.13(1) robbery has "consistently" required more force than a sudden snatching. 692 So. 2d at 887; accord Seabrooks, 2016 WL 6090860, at **14-15 (rejecting argument that the Lockley decision should be narrowly limited to only robbery convictions that occurred after 1999, when Florida enacted a separate sudden snatching criminal statute; "When the Florida Supreme Court in Robinson interprets the robbery statute, it tells us what that statute always meant."). Because federal courts are bound by the latest pronouncement of a state's highest court concerning the meaning of that state's laws, as recognized by the Eleventh Circuit in Jennings and Seabrooks, the undersigned concludes that Movant's challenge to the inclusion of his pre-1999 Florida (armed) robbery convictions warrants rejection.

In sum, a Florida robbery conviction satisfies the elements/use-of-force clause definition of a "serious violent felony" because Fla. Stat. § 812.13(1) "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 3559(c)(2)(F)(ii).

4. Enumerated Offenses Clause

Although the elements/use-of-force clause, alone, is dispositive of Movant's challenge to his predicate convictions under § 3559(c), his challenge also fails under the statute's enumerated offenses clause. See 18 U.S.C. § 3559(c)(2)(F)(i). More specifically, § 3559(c)(2)(F) defines a "serious violent felony" to include several federal and state offenses, and their related attempts and conspiracies, including "robbery (as described in section 2111, 2113, or 2118)." 18 U.S.C. § 3559(c)(2)(F)(i).

Movant, however, argues that his robbery convictions do not come within the scope of 18 U.S.C. § 3559(c)(2)(F)(i) and, therefore, cannot qualify as predicate convictions under the enumerated offenses clause. Motion at 34-35 (DE 4 – civil). In support, Movant makes essentially the same argument as the appellant made in United States v. Rosario-Delgado, 198 F.3d 1354 (11th Cir. 1999): "[S]ubsection (i) includes only robberies as defined in 18 U.S.C. §§ 2111 (robbery in maritime and territorial jurisdiction), 2113 (bank robbery), and 2118 (robbery in connection with drugs in the control of a person registered with the Drug Enforcement Administration), not any other type of robbery, including robbery as defined by the law of any state." Id. at 1357; see Motion at 34-35 (DE 4 – civil). Yet, the Eleventh Circuit rejected that argument because it ignored the language, and was based on an unduly narrow reading, of the statute. Rosario-Delgado, 198 F.3d at 1357 (citing United States v. Wicks, 132 F.3d 383, 386-87 (7th Cir.1997) ("[Congress] said that serious violent felonies included 'Federal or State offense[s] by whatever designation and wherever committed.' § 3559(c)(2)(F)(i)."). The Rosario-Delgado court held that "the plain meaning of § 3559(c)(2)(F)(i) demonstrates that Congress included robbery, as defined by, for example, the law of [a state or commonwealth]." 198 F.3d at 1357 (citing Wicks, 132 F.3d

at 387 (looking to the "common theme among §§ 2111, 2113, and 2118, not the differentiating factors")).

More recently, the Eleventh Circuit reiterated that the term "robbery," as used in § 3559(c)(2)(F)(i), is not limited to federal robbery offenses, but applies to "all robberies." Gray v. United States, 622 Fed. Appx. 788, 792 (11th Cir. 2015). In Gray, the Eleventh Circuit affirmed a district court's denial of a § 2241 habeas petition to vacate a life sentence imposed under § 3559; the life sentence had been predicated upon the petitioner's instant convictions for Hobbs Act robbery and for using and carrying a firearm during and in relation to Hobbs Act robbery and upon his prior Georgia convictions for robbery and for rape. Id. at 789. In holding that the Georgia robbery and rape convictions qualified as "serious violent felonies," the Gray court examined the scope of the term "robbery" as used in the enumerated offenses clause of § 3559(c):

> Mr. Gray's 1990 robbery conviction also constitutes a "serious violent felony" under § 3559(c). "[T]he term 'serious violent felony' means . . . robbery as described in [18 U.S.C. §§] 2111, 2113, or 2118." These referenced sections of the U.S.Code include regular robbery, bank robbery, and robberies and burglaries involving controlled substances. Importantly, robbery is defined as "tak[ing] or attempt[ing] to take from the person or presence of another anything of value . . . by force and violence, or by intimidation." 18 U.S.C. § 2111. Generally, therefore, all robberies are serious violent felonies under § 3559(c).

Id. at 792 (emphasis added).

A finding that particular convictions are for an offense enumerated within the statute, however, does not end the analysis. Instead, before a court may consider these convictions as predicate offenses, it must compare the elements of the crime(s) of conviction to the generic form of the offense to determine whether they qualify as "serious

violent felonies." See Jenkins, 2016 WL 3101281, at *4 (stating, in guidelines case, that "[w]hen an offense is specifically enumerated as a crime of violence, this Court compare[s] the elements of the crime of conviction to the generic form of the offense to determine whether the prior conviction qualifies as a crime of violence" (citations and internal quotations omitted)).

The Eleventh Circuit previously compared Florida robbery with the generic version of the offense. See Lockley, 632 F.3d 1238. More specifically, the Eleventh Circuit compared the Florida definition of robbery, Fla. Stat. § 812.13(1) – "the taking of money or other property . . . from the person or custody of another . . . when in the course of taking there is the use of force, violence, assault, or putting in fear" – with the generic definition of robbery – "the taking of property from another person or from the immediate presence of another person by force or intimidation." Lockley, 632 F.3d at 1242-44. Upon doing so, the Eleventh Circuit concluded: "A comparison of Fla. Stat. § 812.13(1) to this generic definition convinces us that they are clear equivalents." Id. at 1244. Similarly, a comparison of the generic definition of robbery to the Hobbs Act definition of robbery – "the unlawful taking or obtaining of personal property from . . . another, against his will, by means of actual or threatened force, or violence, or fear of injury," 18 U.S.C. § 1951(b)(1) – convinces the undersigned that they too are clear equivalents. See also Gray, 622 Fed. Appx. at 792 (stating that the offense of robbery, as used in the enumerated offenses clause of § 3559(c), includes "regular robbery" and, further, defining robbery as "tak[ing] or attempt[ing] to take from the person or presence of another anything of value . . . by force and violence, or by intimidation"). In sum, Movant's attempted Hobbs Act robbery and Florida (armed) robbery convictions each qualify as § 3559(c) predicates under the

enumerated offenses clause, 18 U.S.C. § 3559(c)(2)(F)(i), as each is the equivalent of a conviction for the generic form of robbery.

5. The Escape Provision

Finally, the undersigned notes that Movant's (instant and prior) convictions not only satisfy the elements clause and the enumerated offenses clause definitions of a "serious violent felony," but they cannot be disqualified as a basis for sentencing under § 3559(c)'s escape provision.[13] The escape provision disqualifies from consideration for sentencing enhancement purposes any robbery, as well any elements clause or residual clause offense, that is shown by the defendant to have been committed without a "firearm or other dangerous weapon." 18 U.S.C. § 3559(c)(3)(A)(i). It is this provision to which the Gray court was referring when it invoked the term "generally" to qualify its statement that "all robberies are serious violent felonies under § 3559(c)" and then added:

> But § 3559(c)(3)(A) provides defendants with an escape clause or affirmative defense to dispute whether their robbery conviction qualified as a predicate felony under the statute. If a defendant can "establish[ ] by clear and convincing evidence

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[13] The escape provision, 18 U.S.C. § 3559(c)(3)(A), provides:

> Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that--
>
> (i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and
>
> (ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

(emphasis added).

> that no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense," and "the offense did not result in death or serious bodily harm . . . to any person," his robbery conviction does not qualify as a "serious violent felony" under the statute.

Gray, 622 Fed. Appx. at 792 (citations omitted).

In Movant's case, neither his conviction for attempted Hobbs Act robbery nor his convictions for Florida (armed) robbery can satisfy the escape clause or affirmative defense provided by § 3559(c)(3)(A). With respect to the attempted Hobbs Act robbery, Movant's companion § 924(c) conviction (Count 4) conclusively establishes that the attempted robbery (Count 2) involved a threat of use of a firearm, specifically, a Baretta .40 caliber pistol. See Superseding Indictment at 3 (DE 55). Furthermore, the PSI, to which Movant did not object and is therefore deemed admitted, described Movant's role in planning the armed robbery of a money courier and in providing the firearm to be used in that robbery. PSI ¶¶ 7-13 (DE 386); see United States v. Wade, 458 F.3d 1273, 1277 (11th Cir. 2006) (stating "[i]t is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes"). So too, with respect to the Florida (armed) robbery convictions, the PSI set forth critical facts that, again, are deemed admitted for sentencing purposes, given that Movant did not object to the report either in writing or at the hearing. See Gray, 622 Fed. Appx. at 791 ("Because Mr. Gray did not object to the characterization of his rape conviction in the [presentencing] report or at the sentencing hearing, he is deemed to have admitted that he forcibly raped a woman against her will."). Movant's PSI describes the use or threatened use of firearms with respect to each of his four (armed) robbery convictions, each of which involved the armed invasion

of a home. See PSI ¶ 40 ("A number of the men pointed firearms at the victims"), ¶ 41 ("Two occupants of the residence were held at gunpoint . . . ."), ¶ 42 ("The co-conspirators were carrying firearms and made the occupants of the residence lie on the floor . . . ."), and ¶ 47 ("The perpetrators also carried firearms and often threatened to kill the victims.") (DE 386).

Because at least one of Movant's instant offenses of conviction – attempted Hobbs Act robbery – and at least two of his prior offenses of conviction – Florida (armed) robbery – qualify as "serious violent felonies" under both the elements clause and the enumerated offenses clause of § 3559(c)(2)(F), and because none of these convictions can satisfy the escape criteria of § 3559(c)(3)(A), the mandatory life sentence imposed under § 3559(c)(1) remains valid and should not be disturbed.

C. Timeliness

Because Johnson does not provide relief from the classification of attempted Hobbs Act robbery or Florida robbery as a "serious violent felony" under either the elements clause or the enumerated offenses clause of § 3559(c)(2)(F), Movant cannot invoke the date of the Johnson decision – June 26, 2015 – as the date from which the one-year limitations period began to run. See United States v. Armbrister, 2016 WL 287070, at *2 (D. Mont. Jan. 22, 2016) (finding § 2255 motion untimely and failing on the merits because the newly recognized right was not applicable to movant's case); Moreno v. United States, 2014 WL 2038419, at *2 (S.D.N.Y. May 15, 2014) (finding § 2255 motion untimely because right alleged did not apply to movant).

Of the three remaining dates from which the limitations period can run, only one has logical application here – "the date on which the judgment of conviction becomes final."

28 U.S.C. § 2255(f)(1). The Supreme Court has stated that a conviction is "final" when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." Griffith v. Kentucky, 107 S. Ct. 708, 712 n. 6 (1987). Here, the petition for certiorari was denied on April 25, 2011 (DE 330). Accordingly, Movant had one year from that date, that is, until April 25, 2012, to file a § 2255 motion. Movant, however, did not file the instant § 2255 motion until June 25, 2016, more than four years beyond the expiration of the one-year limitations period. The § 2255 motion, therefore, should be DISMISSED as untimely.

Yet, even if the § 2255 motion were deemed timely, it would nonetheless warrant denial because, as discussed supra, attempted Hobbs Act robbery and Florida (armed) robbery qualify as "serious violent felonies" as that term is defined under the elements clause, as well as under the enumerated offenses clause, of § 3559(c)(2)(F). It is therefore of no consequence whether, as a result of Johnson, any of Movant's other (instant or prior) convictions is also able to qualify as a "serious violent felony," and it is of no consequence whether Johnson is ultimately held to extend to the residual clause of § 3559(c)(2)(F)(ii).

V. CERTIFICATE OF APPEALABILITY

As amended effective December 1, 2009, § 2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rules Governing § 2255 Proceedings, Rule 11(b), 28 U.S.C. § 2255.

After reviewing the record, the undersigned concludes that Movant is not entitled to

a certificate of appealability. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a certificate of appealability, Movant must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 120 S. Ct. 1595 (2000); see also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because Movant's claims are without merit and are clearly not governed by Johnson, he cannot satisfy the Slack test.

As now provided by the Rules Governing § 2255 Proceedings, Rule 11(a), "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the District Judge in the objections permitted to this Report and Recommendation.

VI. CONCLUSION

For the foregoing reasons, the undersigned respectfully RECOMMENDS that: 1) the Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 and Memorandum of Law in Support (DE 4 – civil) be DISMISSED as untimely or, in the alternative, be DENIED on the merits; and 2) a Certificate of Appealability be DENIED as Movant has not made a substantial showing of a denial of a constitutional right.

The parties may file written objections to this Report and Recommendation with the Honorable James I. Cohn within fourteen (14) days of the date of this Report and Recommendation. The District Court judge is only obligated to make a de novo review of those factual findings and legal conclusions that are the subject of timely objections and only those objected-to factual findings and legal conclusions may be subject to review on

appeal, other than for plain error if necessary in the interest of justice. See Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 28 U.S.C. § 636(b)(1); 11th Cir. R. 3-1 (2016).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 25th day of October 2016.

BARRY S. SELTZER
United States Magistrate Judge

Copies to:

Honorable James I. Cohn
United States District Judge

All counsel of record

A - 4

United States District Court

Southern District of Florida

FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

JAY ANTHONY RICHITELLI

JUDGMENT IN A CRIMINAL CASE

Case Number - 0:09CR60229-COHN-1

USM Number: 91149-004

Counsel For Defendant: DAVID TUCKER
Counsel For The United States: DONALD CHASE
Court Reporter: TAMMY NESTOR

The defendant pleaded guilty to Count(s) 1, 2, 3, 4 and 6 of the Superseding Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. 1951(a) and 3559(c)	Conspiracy to commit Hobbs Act Robbery	8/25/2009	1
18 U.S.C. 1951(a) and 3559(c)	Attempted Hobbs Act Robbery	8/25/2009	2
18 U.S.C. 924(o)	Conspiracy to use a firearm during the commission of a crime of violence	8/25/2009	3
18 U.S.C. 924(c)(1)(A)	Use of a firearm during the commission of a crime of violence	8/25/2009	4
18 U.S.C. 922(g)(1)	Possession of a firearm by a convicted felon	8/25/2009	6

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.

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:
04/23/2010

JAMES I. COHN
United States District Judge

April 23, 2010

DEFENDANT: JAY ANTHONY RICHITELLI
CASE NUMBER: 0:09CR60229-COHN-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **LIFE AS TO COUNTS 1 and 2**

240 MONTHS AS TO COUNT 3

180 MONTHS AS TO COUNT 6

COUNTS 1, 2, 3 and 6 TO RUN CONCURRENTLY WITH EACH OTHER.

60 MONTHS AS TO COUNT 4, TO BE SERVED CONSECUTIVELY TO COUNTS 1, 2, 3 and 6.

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: JAY ANTHONY RICHITELLI
CASE NUMBER: 0:09CR60229-COHN-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 YEARS AS TO COUNTS 1, 2, 4 and 6 TO RUN CONCURRENTLY WITH EACH OTHER.**
3 YEARS AS TO COUNT 3 TO RUN CONCURRENTLY WITH COUNTS 1, 2, 4 and 6.

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: JAY ANTHONY RICHITELLI
CASE NUMBER: 0:09CR60229-COHN-1

SPECIAL CONDITIONS OF SUPERVISION

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

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.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

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.

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: JAY ANTHONY RICHITELLI
CASE NUMBER: 0:09CR60229-COHN-1

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
$500.00	$	$

*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: JAY ANTHONY RICHITELLI
CASE NUMBER: 0:09CR60229-COHN-1

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 **$500.00** 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/fine/restitution 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/fine/restitution 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.

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.