

## APPENDIX

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Order of the Court of Appeals for the Eleventh Circuit, Denying Motion for Certificate of Appealability, *Johnson v. United States*, No. 17-14026 (11th Cir. Jan. 03, 2018) .....A-1

District Court's Order Adopting Magistrate Judge's Report and Recommendation and Dismissing Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255, *Johnson v. United States*, No. 16-cv-61506-BLOOM/White (S.D. Fla. July 17, 2017).....A-2

**A-1**

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 17-14026-D

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JOHN WILLIAM JOHNSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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ORDER:

John William Johnson, a federal prisoner, moves for a certificate of appealability in order to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. 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). Because Johnson has failed to make the requisite showing, his motion for a COA is DENIED.

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

**A-2**

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

**Case No. 16-cv-61506-BLOOM/White**

JOHN WILLIAM JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Defendant.

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**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

**THIS CAUSE** was referred to the Honorable Patrick A. White, United States Magistrate Judge, for a Report and Recommendation on the motion of Petitioner John William Johnson ("Petitioner") to vacate his sentence, pursuant to 28 U.S.C. § 2255, challenging the constitutionality of his conviction and sentence for brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). *See* ECF No. [1] ("Motion"). Judge White was assigned the matter pursuant to Administrative Order 2003-19 for a ruling on all pre-trial, non-dispositive matters. *See* ECF No. [3]. On June 12, 2017, Judge White issued a Report and Recommendation recommending that the Motion be dismissed as time-barred or, in the alternative, denied on the merits. *See* ECF No. [12] (the "Report") at 33. On June 14, 2017, Petitioner timely filed his Objections to the Report. *See* ECF No. [13] ("Objections"). Thereafter, on July 7, 2017, the Government filed a notice of Supplemental Authority, ECF No. [14], to supplement its previously filed Response to Petitioner's Motion, ECF No. [9], to which Petitioner filed a Reply on July 10, 2012, ECF No. [15].

“By way of background, [Petitioner] was charged with and pleaded guilty to Hobbs Act robbery, in violation of 18 U.S.C. §1951(a) (Count 1), and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count 2).”<sup>1</sup> ECF No. [12] at 2. In his Objections, Petitioner reasserts the argument, addressed by Judge White in the Report, that Hobbs Act robbery does not qualify as a “crime of violence” as required by 18 U.S.C. §924(c)(1)(A) following the Supreme Court’s decision in *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551 (2015). See ECF No. [13] at 1. Petitioner asserts that he “is actually innocent of the § 924(c) count” and that the Court therefore “lacked the authority to adjudicate and sentence him for that offense[.]” *Id.* at 20. In addition, Petitioner argues that Judge White erred in concluding that his claim is time-barred, and in recommending that no certificate of appealability be issued. See *id.* at 16-20.

Central to Petitioner’s Motion is the threshold (and ultimately dispositive) issue of timeliness. After entering his guilty plea, Petitioner “was adjudicated guilty and sentenced to a total term of 108 months imprisonment, consisting of: a 24-month term of imprisonment as to Count 1, and a consecutive 84-month term of imprisonment as to Count 2.” ECF No. [12] at 2. The Judgment was entered on December 16, 2014, and no direct appeal was taken. *Id.* at 5. The 14-day appeal period in which to do so expired on December 30, 2014. *Id.* As such, pursuant to 28 U.S.C. § 2255(f)(1), Petitioner had until December 30, 2015—one year from the date his conviction became final—to timely file his federal habeas petition. See *id.* at 5-6. Here,

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<sup>1</sup> Under 18 U.S.C. § 924(c)(3), “crime of violence” means an offense that is a felony and: “(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) *that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*” 18 U.S.C. §§ 924(c)(3)(A), (B) (emphasis added). The “crime of violence” definition under the second prong has often been referred to as § 924(c)’s “residual clause.”

however, as stated in the Report, Petitioner's Motion was not filed until June 21, 2016—nearly six months after his conviction became final. *See* ECF No. [1].

Petitioner nevertheless argues that his Motion is timely pursuant to 28 U.S.C. § 2255(f)(3), under which the one-year limitations period begins to run not from the date on which the judgment of conviction becomes final, but instead from “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]” 28 U.S.C. § 2255(f)(3). The new rule of constitutional law Petitioner relies upon is the rule announced by the Supreme Court in *Johnson*, which struck down the “residual clause” of the statutory definition for “violent felony” provided in the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), as void for vagueness.<sup>2</sup> 135 S. Ct. 2551. Accordingly, Petitioner argues that his Motion is timely because he had one year from the date *Johnson* was decided—which was June 26, 2016—to seek the relief he now seeks. ECF No. [13] at 16-17.

Judge White addressed this point in the Report, agreeing with the Government's argument that the new rule of constitutional law under *Johnson* applies retroactively only to ACCA cases involving the ACCA's residual clause and reasoning as follows:

As applied here, since [Petitioner] was not sentenced under the ACCA, the Government argues that Johnson did not restart the [ ] one-year clock under § 2255(f)(3) and his § 924(c) claim[] is also time-barred under 2255(f)(3). The government's argument is well taken.

If, as here, the movant was not sentenced under the ACCA residual clause found unconstitutional in Johnson, then the movant cannot utilize Johnson to circumvent

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<sup>2</sup> The ACCA defines the term “violent felony” as any crime punishable by a term of imprisonment exceeding one year that: “(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B) (emphasis added). The final clause of the “violent felony” definition under the second prong—worded somewhat similarly to the “crime of violence” definition under 18 U.S.C. § 924(c)(3)(B)—is commonly called the ACCA's “residual clause.”

the [] one-year limitations period. Consequently, this federal petition is time-barred.

ECF No. [12] at 7-8. That same position was taken by the Eleventh Circuit shortly after the issuance of the Report. On June 30, 2017, the Eleventh Circuit issued a published opinion in *Ovalles v. United States*, --- F.3d ----, 2017 WL 2829371, at \*8 (11th Cir. June 30, 2017), in which it unequivocally held that “*Johnson* does not apply to, or invalidate, the ‘risk-of-force’ clause in § 924(c)(3)(B).”<sup>3</sup> Soon after, the Government brought the *Ovalles* decision to the Court’s attention in its notice of Supplemental Authority. See ECF No. [14].

Despite (or perhaps because of) the clear import of *Ovalles* and its dispositive impact on this case, Petitioner argues in his Reply that “the *Ovalles* decision is fatally flawed and should not be followed by this Court” and that, given those flaws, the Court “should decline to follow the opinion before it becomes a final appellate judgment” when the mandate issues. ECF No. [15] at 1-2. But the Court will follow the *Ovalles* decision as it remains binding precedent all the same. See generally *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) (“Although the mandate in [*Johnson v. Singletary*, 938 F.2d 1166 (11th Cir.1991)] has not yet issued, it is nonetheless the law in this circuit. A mandate is the official means of communicating our judgment to the district court and of returning jurisdiction in a case to the district court. The stay of the mandate in *Johnson* merely delays the return of jurisdiction to the district court to carry out our judgment in that case. The stay in no way affects the duty of this panel and the courts in this circuit to apply now the precedent established by *Johnson* as binding authority. Thus, *Johnson* is the law in this circuit unless and until it is reversed, overruled, vacated, or otherwise modified by the Supreme Court of the United States or by this court sitting en banc.”); see also,

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<sup>3</sup> Although having previously referred to the “crime of violence” definition provided in 18 U.S.C. § 924(c)(3)(B) as § 924(c)’s “residual clause,” see, e.g., *In re Chance*, 831 F.3d 1335 (11th Cir. 2016), the Eleventh Circuit in *Ovalles* referred to that definition as the “risk-of-force” clause in § 924(c)(3)(B).

*e.g.*, *Siniard v. Ford Motor Co.*, 554 F. Supp. 2d 1276, 1279 (M.D. Ala. 2008) (“[T]he Court cannot agree that it has the option of ignoring [*Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1207 (11th Cir.2007)] until after the mandate issues or the Supreme Court addresses that case. It is well-settled that *Lowery* is binding on this Court even though the mandate has not issued and even if the United States Supreme Court were to grant certiorari in *Lowery*.”) (citing *Martin*, 965 F.2d at 945). Petitioner also argues in his Reply that the Court should, as a matter of prudence, wait for the Supreme Court to issue an opinion in *Lynch v. Dimaya*, — U.S. —, 137 S. Ct. 31 (2016), granting review of *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), a case in which the Supreme Court has granted certiorari to determine whether *Johnson* affects the validity of 18 U.S.C. § 16(b), a statute defining a “crime of violence” with the same language in § 924(c)(3)(B). See ECF No. [15] at 5-6. But the Court disagrees that such an approach would prove worthwhile one way or another, as the Eleventh Circuit signaled in *Ovalles* its view that the determinations involved in § 924(c)(3)(B) cases and § 16(b) cases are constitutionally distinct from one another. See 2017 WL 2829371, at \*8 (“[T]he task in § 16(b) cases is not as precise and predictable as in § 924(c)(3)(B) cases. A § 16(b) determination involves a recidivist statute and whether a defendant, convicted of illegal reentry after removal under 8 U.S.C. § 1326, has a prior, wholly unrelated felony conviction that qualifies as an ‘aggravated felony.’ Section 16(b) requires the federal court to look back at prior criminal history and evaluate, often under divergent state laws, whether a prior conviction was an aggravated felony. . . . In contrast, . . . in § 924(c)(3)(B) cases, the required substantial nexus between the § 924(c) firearm offense and the contemporaneous federal predicate crime of violence makes the crime of violence determination more precise, predictable, and judicially administrable.”) (disagreeing with *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2017)) (internal citations omitted).

Accordingly, the Court concludes that the one-year limitations period began to run on the date Petitioner's conviction became final (pursuant to 28 U.S.C. § 2255(f)(1)), and not on the date *Johnson* was decided (pursuant to 28 U.S.C. § 2255(f)(3)). The Court therefore agrees with Judge White that Petitioner's Motion is time-barred. Ultimately, the Court need go no further, as *Johnson* is the only basis on which Petitioner argues in his Objections that his Motion is timely. See ECF No. [13] at 16-17.

Untimeliness aside, the Motion also fails on the merits as well, as Petitioner cannot show that he is actually innocent of the § 924(c) count.<sup>4</sup> The Eleventh Circuit held in *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016) that a conviction for Hobbs Act robbery "clearly qualifies as a 'crime of violence' under . . . § 924(c)(3)(A)." Petitioner argues in his Objections, as he argued before the issuance of the Report, that this Court should nonetheless ignore *In re Saint Fleur*. See ECF No. [13] at 6 (citing *In re Pinder*, 824 F.3d 977 (11th Cir. 2016) as conflicting and controlling authority under the prior panel precedent rule).<sup>5</sup> However, "the Eleventh Circuit has cited to *Saint Fleur* as controlling in subsequent cases and has repeatedly confirmed, albeit in the context of applications to file second or successive petitions, that Hobbs Act robbery is a crime of violence." *Vega v. United States*, 2017 WL 2822072, at \*1 (S.D. Fla.

<sup>4</sup> As indicated in the Report, "the Eleventh Circuit has never held that Section 2255's limitations period carries an exception for actual innocence, and it has declined to reach the issue whether the absence of such an exception would violate the Constitution." ECF No. [12] at 13-14 (collecting cases).

<sup>5</sup> In this sense, Petitioner's Objections ask this Court to disregard two controlling precedents issued by the Eleventh Circuit. With respect to *Pinder*, the Eleventh Circuit has already addressed and rejected the notion that *Saint Fleur* conflicts with *Pinder*, stating as follows:

The applicant's argument that *Saint Fleur* . . . conflict[s] with *Pinder* fails because the companion conviction in *Pinder* was conspiracy to commit Hobbs Act robbery, while *Saint Fleur* . . . involved [a] different companion conviction[], that is substantive Hobbs Act robbery . . . . Indeed this Court specifically distinguished *Pinder* in [] *Saint Fleur* . . . . Therefore, we reject the claim that under the prior panel precedent rule, *Pinder*, not *Saint Fleur* . . . control[s] . . . .

*In re Gordon*, 827 F.3d 1289, 1294 (11th Cir. 2016).

June 29, 2017) (collecting cases); *see, e.g., In re Gordon*, 827 F.3d 1289 (“*Saint Fleur* controls . . . . This Court has held that a companion Hobbs Act robbery conviction . . . qualifies as a ‘crime of violence’ under the use-of-force clause in § 924(c)(3)(A) . . . .”); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (citing to *Saint Fleur* in support of the statement that “[t]his Court has held that a companion substantive Hobbs Act robbery conviction qualifies as a ‘crime of violence’ under the use-of-force clause in § 924(c)(3)(A).”); *In re James*, 2016 WL 4608125, at \*2 (11th Cir. July 21, 2016) (citing to *Saint Fleur* in support of the statement that “[i]n some cases, it has been clear that the § 924(c) companion conviction qualifies as a crime of violence under § 924(c).”). “Thus, this Court is bound by *Saint Fleur*.” *Vega*, 2017 WL 2822072, at \*1.

Finally, it is worth noting that irrespective of whether Hobbs Act robbery qualifies as a “crime of violence” under § 924(c)(3)(A), Petitioner has never argued that Hobbs Act robbery does not qualify as a “crime of violence” under § 924(c)(3)(B) if that clause is indeed constitutionally valid—instead having opted to argue only that § 924(c)(3)(B) was invalidated by *Johnson*, as discussed. *See generally Ovalles*, 2017 WL 2829371, at \*9 (“*Ovalles* has never argued that her attempted-carjacking offense charged in Count Four would not qualify as a crime of violence under the ‘risk-of-force’ clause in § 924(c)(3)(B) if that clause is constitutionally valid. Instead, *Ovalles* has argued only (1) that after *Johnson* the ‘risk-of-force’ clause is invalid and (2) that her attempted-carjacking offense charged in Count Four does not qualify as a crime of violence under the ‘use-of-force’ clause in § 924(c)(3)(A). Accordingly, *Ovalles*’s attempted carjacking offense qualifies as a crime of violence under § 924(c)(3)(B), and the district court properly denied *Ovalles*’s § 2255 motion raising a *Johnson* claim as to Count Five [(using and carrying a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii)].”). Although here the Court does not address this issue as it was never raised,

the Court does note that other courts that have considered whether Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)(3)(B) have found that it does. *See, e.g., United States v. Quashie*, 162 F. Supp. 3d 135, 144 (E.D.N.Y. 2016) ("Even if a Hobbs Act robbery does not fall within the force clause of the statute, it would fall within the residual clause."); *United States v. Morgan*, 2015 WL 9463975, at \*7-8 (E.D. Mich. Dec. 18, 2015).

Based on the foregoing, the Court finds the analysis in Judge White's Report, which concluded that Petitioner's Motion is time-barred and, alternatively, fails on the merits, to be well reasoned and correct. This is particularly in light of the Eleventh Circuit's recent decision in *Ovalles*.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Petitioner's Objections, **ECF No. [13]**, are **OVERRULED**;
2. Judge White's Report, **ECF No. [12]**, is **ADOPTED**;
3. Petitioner's Motion, **ECF No. [1]**, is **DISMISSED**;
4. No Certificate of Appealability shall issue; and
5. The Clerk shall **CLOSE** this case.

**DONE AND ORDERED** in Miami, Florida, this 17th day of July, 2017.



**BETH BLOOM**  
**UNITED STATES DISTRICT JUDGE**

Copies furnished to:

The Honorable Patrick A. White

Counsel of record