

No. _____

IN THE
Supreme Court of the United States

PHILLIP DUNNAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 924(c) criminalizes using or carrying a firearm during and in relation to a crime of violence, or possessing a firearm in furtherance of such an underlying crime. A first conviction under § 924(c) carries a five-year mandatory minimum penalty, while a second conviction carries an additional 25-year mandatory minimum. This petition presents the following question:

Can reasonable jurists debate whether Mr. Dunnam is innocent of his conviction under 18 U.S.C. § 924(c) after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*) and *Sessions v. Dimaya*, 584 U.S. ___, 2018 WL 1800371 (Apr. 17, 2018)?

LIST OF INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Phillip Dunnam respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' refusal to hear Mr. Dunnam's claim that he is innocent of his conviction under 18 U.S.C. § 924(c) in light of this Court's decision in *Johnson*.

OPINION AND ORDER BELOW

The Eleventh Circuit's decision declining to address the merits of Mr. Dunnam's § 924(c) claim in Appeal No. 17-14191 is provided in Appendix A.

JURISDICTION

The United States District Court for the Southern District of Florida had original jurisdiction over Mr. Dunnam's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. The district court denied Mr. Dunnam's § 2255 motion on August 22, 2017. Mr. Dunnam subsequently filed a notice of appeal in the Eleventh Circuit. The Eleventh Circuit denied Mr. Dunnam a certificate of appealability on his § 924(c) claim. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 924(c) provides in pertinent part:

- (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States,

uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

...

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 2114 provides in pertinent part:

- (a) Assault. A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a

subsequent offense, shall be imprisoned not more than twenty-five years.

28 U.S.C. § 2253(c) provides in pertinent part:

- (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.
- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

On March 4, 2008, the Government charged Mr. Dunnam with one count of conspiracy to commit assault or robbery on a postal employee, in violation of 18 U.S.C. § 2114(a) (Count 1); one count of assault or robbery on a postal employee, in violation of 18 U.S.C. § 2114(a) (Count 2); one count of assault with a dangerous weapon, in violation of 18 U.S.C. § 111(a) (Count 3); one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) (Count 4); one count of conspiring to possess and brandish a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(o) (Count 5); and one count of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Count 6).

On June 2, 2008, Mr. Dunnam pled guilty to Counts 1, 2, 4, and 6. The government dismissed Counts 3 and 5. The Court sentenced him to 60 months on Count 1, 110 months on Counts 2 and 4, to run concurrent with each other and Count 1, and a consecutive 84 months on Count 6, for a total sentence of 194 months' imprisonment.

On June 24, 2016, Mr. Dunnam filed a *pro se* motion to vacate, set aside or correct sentence. Mr. Dunnam argued that he was innocent of his conviction under § 924(c) after the Supreme Court's decision in *Johnson* because his predicate offenses of conspiracy to commit assault or robbery on a postal employee and assault or robbery on a postal employee were no longer crimes of violence. The Court appointed the Federal Public Defender to represent Mr. Dunnam in this matter on June 30, 2016.

The government filed its response to Mr. Dunnam's *pro se* motion on July 8, 2016. The government argued that § 924(c)'s residual clause was not unconstitutionally vague, that Mr. Dunnam's motion was untimely, that he procedurally defaulted on this claim, that § 2114(a) robbery qualifies as a crime of violence under § 924(c)'s use-of-force, or elements, clause, and that the dismissed count of assault could qualify as a predicate.

On August 22, 2016, Mr. Dunnam filed a reply. Mr. Dunnam argued that he was indeed innocent of his § 924(c) conviction because *Johnson* invalidated § 924(c)'s residual clause, and none of his predicate convictions were crimes of violence under

the elements clause. Mr. Dunnam also argued that his motion was timely and he did not procedurally default.

On August 22, 2017, the district court entered an order denying Mr. Dunnam's motion. Citing to the Eleventh Circuit's decision in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), the district court found Mr. Dunnam's motion was untimely. The district court further found that Mr. Dunnam procedurally defaulted on his claim because he could not show prejudice, as his conviction for assault or robbery on a postal worker under 18 U.S.C. § 2114 remained a crime of violence. The district court went on to deny a certificate of appealability ("COA") because Mr. Dunnam did not demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Mr. Dunnam filed a Notice of Appeal on September 1, 2017, and shortly thereafter filed a motion for certificate of appealability. Mr. Dunnam argued that reasonable jurists could debate whether he was innocent of his § 924(c) conviction after *Johnson*. On January 26, 2018, the Eleventh Circuit denied Mr. Dunnam's motion for certificate of appealability. This petition follows.

REASONS FOR GRANTING THE WRIT

Reasonable jurists could debate whether Mr. Dunnam is innocent of his § 924(c) conviction after *Johnson* and *Dimaya*. Thus, he should be granted a COA.

In this case, reasonable jurists could debate whether Mr. Dunnam is innocent of his § 924(c) conviction following *Johnson* and *Dimaya*. Thus, he should be granted a COA.

I. Legal standard for granting a COA.

A certificate of appealability (“COA”) must issue upon a “substantial showing of the denial of a constitutional right” by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant need *not* show that he would win on the merits; he must only “sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

Where, as here, a district court denies a § 2255 on a procedural ground such as default, without reaching the underlying constitutional claim, the movant must show that reasonable jurists could debate both the correctness of the court’s procedural ruling, as well as whether the petition states a valid claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484.

That being said, the Supreme Court has emphasized that a court “should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief.” *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Under the “debatable among reasonable jurists” standard, the fact that there is adverse circuit precedent is not preclusive. If, for example, there is a split among various courts on the question, that will satisfy the standard for obtaining a COA. *See Lambricht v. Stewart*, 220 F.3d 1022, 1028-29 (9th Cir. 2000).

But notably, a circuit split is not even a prerequisite for a COA. Because a COA is necessarily sought in the context that a petitioner has lost on the merits, the Supreme Court has been adamant that it will “*not* require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, *a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.*” *Miller-El*, 537 U.S. at 338 (emphasis added); *see also Buck v. Davis*, 137 S.Ct. 759, 774 (U.S. Feb. 22, 2017) (citing and following *Miller-El* on that point; “That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable;” “[W]hen a reviewing court . . . inverts the statutory order of operations and ‘first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,’ it has placed too heavy a burden on the prisoner at the COA stage;” “*Miller-El* flatly prohibits” denying a COA based upon adjudication of the merits”).

Ultimately, any doubt about whether to grant a COA must be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001). According to the Supreme Court, a COA should be denied only where the district court’s conclusion is “beyond all debate.” *Welch v. United States*, 136 S. Ct. 1257,

1264 (2016). It is not here. As explained below, Mr. Dunnam has satisfied this standard and the Eleventh Circuit should have granted a COA.

II. Reasonable jurists could debate whether *Johnson* invalidated the § 924(c) residual clause.

In *Sessions v. Dimaya*, 584 U.S. ___, 2018 WL 1800371 (Apr. 17, 2018), the Supreme Court declared unconstitutionally vague 18 U.S.C. § 16(b). That result was compelled by a “straightforward application” of the “straightforward decision” in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). *Id.* at 7. The Court found § 16(b) indistinguishable from the residual clause struck down in *Johnson*. It emphasized that both provisions required courts to imagine an “ordinary case” and apply it against an uncertain level of risk. *Id.* at 7-9. And the Court rejected the government’s textual and experiential attempts to distinguish the clauses, finding each “to be the proverbial distinction without a difference.” *Id.* at 12-16.

Dimaya fully vindicates Mr. Dunnam’s argument that *Johnson* renders 18 U.S.C. § 924(c)(3)(B) void for vagueness. Indeed, that provision is identical to § 16(b). Thus, in arguing that the ACCA’s residual clause was indistinguishable from § 924(c)(3)(B), Mr. Dunnam made the same arguments that *Dimaya* accepted. And, in arguing the opposite, the government made the same arguments that *Dimaya* rejected. Because § 16(b) and § 924(c)(3)(B) are identical, they stand in the same relation to *Johnson* and this Court’s reasoning in *Dimaya* should apply to § 924(c). As a result, *Dimaya* compels the conclusion that § 924(c)(3)(B) is void for vagueness as well. At the very least, *Dimaya* compels the conclusion that

reasonable jurists could debate whether the residual clause of § 924(c) is unconstitutionally vague, and thus, Mr. Dunnam should have been granted a COA.

In denying Mr. Dunnam a COA, the Eleventh Circuit relied on its decision in *Ovalles v. United States*, 861 F.3d 1257, 1263-67 (11th Cir. 2017), in which the Eleventh Circuit held *Johnson* did not invalidate the residual clause of § 924(c). However, that precedent was based on the exact same purported distinctions that *Dimaya* has now rejected as immaterial. *See Ovalles*, 861 F.3d at 1263-66. Thus, *Dimaya* abrogates that precedent in *Ovalles* and *United States v. St. Hubert*, 883 F.3d 1319, 1327-28 (11th Cir. 2018). Therefore, reasonable jurists could debate whether *Johnson* invalidated § 924(c)'s residual clause.

III. Reasonable jurists could debate whether assault or robbery of a postal worker, or conspiracy to commit assault or robbery of a postal worker, has as an element the “use, attempted use, or threatened use of physical force against the person or property of another.”

Initially, for an offense to qualify as a crime of violence under the elements clause, it must have “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” *Id.* Under this clause, the term “physical force” means “violent force,” and “force that is capable of causing physical pain or injury to another person.” *See Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). Whether Mr. Dunnam's convictions qualify is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant's conduct. *See McGuire*, 706 F.3d at 1336. Pursuant to this categorical approach, if the offense may be committed without “the

use, attempted use, or threatened use of physical force,” then that crime does not qualify as a “crime of violence” under § 924(c)’s force clause. Because Mr. Dunnam’s predicate convictions of assault or robbery of a postal worker and conspiracy to commit assault or robbery of a postal worker may be committed without the “use” of “physical force,” it does not qualify as a “crime of violence” under § 924(c)’s force clause, and thus, reasonable jurists could debate whether they qualify.

Assault with intent to rob or robbery of a postal employee does not qualify as a crime of violence because, as the jury instructions make clear, it can be committed not only “by means of force and violence” but “by means of intimidation.” Eleventh Circuit Pattern Jury Inst. No. 77 (2010). Committing a § 2114 offense by intimidation does not necessarily require the use, attempted use, or threatened use of violent, physical force, as required by *Curtis Johnson*. The jury instructions make clear that these are alternative “means” of satisfying a single element of the offense, and therefore the statute is indivisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016).

The pattern jury instructions also state that, “[t]o take ‘by intimidation’ is to say or do something that would make an ordinary person fear bodily harm. It doesn’t matter whether the victim in this case actually felt fear.” Eleventh Circuit Pattern Jury Instr. No. 77 (2010). The result is that violating § 2114 by intimidation does not necessarily require *in every case* a use or threatened use of violent, physical force,

as required by the Eleventh Circuit's decision in *United States v. Estrella*, 758 F.3d 1239 (11th Cir. 2014).

To the contrary, one can violate this section by threatening to infect the postal employee with a poison, toxin, or disease, which would not require any force at all. Other courts have recognized too that, even where this offense is committed by “force and violence,” it need not involve the use of violent, physical force required by *Curtis Johnson*. See, e.g., *United States v. Rodriguez*, 925 F.2d 1049, 1051-52 (7th Cir. 1991) (upholding § 2114 conviction where defendant stole a ring of keys by pulling a key chain attached to victim's clothing, and thus “amount of force or violence used . . . was rather minimal”); *United States v. Bell*, 158 F.Supp.3d 906, 914-916 (N.D. Cal. 2016) (relying on *Rodriguez* to conclude that analogous robbery statute in § 2112 was not a crime of violence under § 924(c)'s elements clause); *United States v. Pena*, 161 F.Supp.3d 268, 277 (S.D.N.Y. Feb. 11, 2016) (recognizing that common-law robbery standard governing § 2114 is satisfied where “as long as there is some resistance overcome by force, the degree of force necessary can be minimal”).

This conclusion is unaffected by the fact that the defendant was convicted of assault causing injury or using a dangerous weapon. Under § 2114(a), the maximum penalty increases where the defendant “wounds” the postal employee “or puts his life in jeopardy by the use of a dangerous weapon.” The jury instructions make clear that these represent alternative “means” for satisfying the third element of the offense, rendering that element indivisible under *Mathis*. Eleventh Circuit Pattern Jury Instr. No. 77 (2010). Moreover, *neither* of these alternative means, let alone both,

require the intentional use, attempted use, or threatened use of violent, physical force, as required by *Leocal* and *Curtis Johnson*.

As to the former, it is of course possible to “wound” a postal employee without the use, attempted use, or threatened use of violent, physical force—again, for example, by the use of poison, toxin, or disease. That possibility alone renders this third element of § 2114 categorically overbroad, and it does not qualify as a crime of violence.

Nonetheless, it is also noteworthy that the “use” of a firearm includes the mere “reference” to it. *Bailey v. United States*, 516 U.S. 137, 148 (1995). Thus, “a defendant could be convicted . . . for mentioning a firearm that he never brandished, displayed, or even possessed during the crime.” *In re Jones*, No. 16-14106, Order at 16 (11th Cir. July 29, 2016) (Martin, J., concurring in judgment) (citing *United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996), which involved a “reference to a gun ‘no one ever saw’”). Indeed, the Seventh Circuit in *Rodriguez* upheld the § 2114 conviction merely where the defendant’s accomplice was “armed and standing nearby.” *Rodriguez*, 925 F.2d at 1052-53. In that regard, Eleventh Circuit precedent makes clear that the mere possession of a weapon—even a dangerous weapon like a short-barreled shotgun—does not have as an element the use, attempted use, or threatened use of force. See *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010); *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

Furthermore, a defendant can place someone’s life in jeopardy under § 2114 without any *intent* to threaten or use violent physical force. Indeed, a defendant can

violate this provision merely by carrying because “he feels secure with it,” even though he has no intent to intimidate another. *United States v. Martinez-Jimenez*, 864 F.2d 664, 667 (9th Cir. 1989); *see Rodriguez*, 925 F.2d at 1052 (“The ready availability of the gun likely emboldened” the defendants, even if the gun was “not drawn”). No nexus is required between the weapon and the intimidation required under § 2114. The defendant therefore need not possess the intentional *mens rea* required by *Leocal*.

Undersigned counsel acknowledges that *In re Watt*, 829 F.3d 1287 (11th Cir. 2016) stated that assaulting a postal employee qualifies as a crime of violence under § 924(c)’s elements clause. However, that decision is not precedential because it arose in the procedurally unique context of adjudicating an application for leave to file a second or successive § 2255 motion. The Eleventh Circuit has made clear that even its published decisions in that context do not bind the district courts, which are required to analyze the issues *de novo*. And a *de novo* review of the arguments raised here compels the conclusion that assaulting a postal employee under § 2114 is not in fact a crime of violence under the elements clause in § 924(c). At the very least, these arguments compel the conclusion that reasonable jurists could debate whether assault of a postal employee is a crime of violence.

The Eleventh Circuit’s SOS orders lack precedential value. The Eleventh Circuit has expressly held that its decisions on SOS applications are not precedential outside of the SOS context. In *Mercado v. United States*, Case No. 17-10343-B (11th Cir. May 4., 2017), the movant filed a § 2255 motion, claiming that

he was innocent of his § 924(c) conviction because his predicate offense of armed bank robbery was no longer a crime of violence after *Johnson*. In that case, the government argued that a prior Eleventh Circuit case, *In re Hines*, 824 F.3d 1334 (11th Cir. 2016), where the Eleventh Circuit denied an SOS application in which the movant made the same claim, was precedential and thus precluded the Court from granting the motion for certificate of appealability. The *Mercado* Court found that *Hines* was not precedential because it was “decided in the unique context of an application for leave to file a second or successive § 2255 motion.” *Mercado*, Case No. 17-10343-B at 4. The Court reasoned that given the lack of process associated with filing and deciding SOS applications, it was “neither wise nor just for this type of limited ruling, resulting from such a confined process, to bind every judge on this court as we consider fully counseled and briefed issues in making merits decisions that may result in people serving decades or lives in prison.” *Id.* at 4-12 (citations omitted). The Court went on to reason that had the SOS application been granted, the Court’s opinion granting it would have no binding effect on the district court which thereafter hearing the § 2255 motion. Likewise, a denial can have no effect on a subsequent district or circuit court decision on the same issue. The Court consequently granted the certificate of appealability, despite the SOS decision in *Hines* stating that armed bank robbery was a crime of violence under § 924(c). *See also Gibson v. United States*, Case No. 16-6584-F (11th Cir. Mar. 8, 2017). Accordingly, just as the Eleventh Circuit determined in *Mercado*, the decision in *In re Watt* is not controlling here.

The circumstances of *In re Watt* are noteworthy, in that Mr. Watt proceeded *pro se*, and, while he attached a legal memorandum to his application, he did not raise the substantive arguments relating to § 2114 that are being raised here. Thus, the Eleventh Circuit did not have the benefit of any of the arguments being raised here. Accordingly, notwithstanding *In re Watt*, this Court is required to decide this issue *de novo*. Doing so results in the conclusion that § 2114 does not in fact qualify as a crime of violence, as explained above.

The Court in *In re Watt* relied exclusively on *United States v. Dowd*, 451 F.3d 1244, 1251 (11th Cir. 2006). However, *Dowd*'s conclusion that assaulting a postal employee was a crime of violence was accompanied by no reasoning or analysis whatsoever. Moreover, *Dowd* was decided before the seminal Supreme Court decisions in *Curtis Johnson* (2010), *Descamps v. United States*, 133 S. Ct. 2276 (2013), *Moncrieffe v. Holder*, 569 U.S. 184 (2013), *Samuel Johnson* (2015), and *Mathis* (2016). *Dowd* therefore did not, and could not have, conducted the analysis that Supreme Court precedent now requires, and it has therefore been abrogated.

In sum, § 2114 is indivisible and categorically overbroad, because the use, attempted use, or threatened use of force is not necessarily required to violate it. Accordingly, reasonable jurists could debate whether it qualifies as a crime of violence under § 924(c)'s elements clause.

The Eleventh Circuit has granted COAs in many cases for the crime of bank robbery that can similarly be committed by intimidation. *See e.g., Gibson v. United States*, Case No. 16-16584-F (11th Cir. Mar. 8, 2017); *Mercado v. United States*, Case

No. 17-10343-B (11th Cir. May 4, 2017); *Mitchell v. United States*, Case No. 16-15696-F (11th Cir. Feb. 27, 2017). In fact, the Eleventh Circuit in *Gibson* granted a COA on precisely the grounds that Mr. Dunnam argues here with respect to the intimidation element—that bank robbery may not necessarily include an element of the use of violent force because it can be committed by intimidation, extortion, and by entering with the intent to commit a felony affecting the bank. *Id.* at 8-9. For example, the Court stated, “Placing a person in fear of a ‘threat of bodily harm’ does not necessarily entail the use or threatened use of violent force.” *Id.* at 8.

District courts within this circuit have also granted COAs with respect to claims that bank robbery is no longer a predicate crime of violence under § 924(c) after *Johnson*. See e.g., *Nichols v. United States*, Case No. 16-81105-CV-HURLEY, DE 37 (S.D. Fl. Mar. 29, 2017); *McKinley v. United States*, Case No. 8:16-CV-1645-T-36AAS, DE 9 (M.D. Fl. Nov. 8, 2016); *Rayner v. United States*, Case No.: 5:16-cv-414-Oc-10PRL, DE 14 (M.D. Fl. Dec. 14, 2016).

Based on the foregoing, Mr. Dunnam respectfully submits that, at a minimum, reasonable jurists may debate whether assault or robbery on a postal worker, and conspiracy to assault or rob a postal worker, categorically qualifies as a “crime of violence” under § 924(c)’s force clause and consequently, whether Mr. Dunnam is innocent of his § 924(c) conviction.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

s/Julie Holt
JULIE HOLT*
ASS'T FED. PUBLIC DEFENDER
150 W. Flagler Street, Ste. 1500
Miami, FL, 33130
(305) 530-7000
Julie_Holt@fd.org

* Counsel of Record

APPENDIX

Judgment and Commitment Order, United States v. Dunnam, 07-20879-CR-CMA	A-1
Decision of the Court of Appeals for the Eleventh Circuit, Dunnam v. United States, 17-14191	A-2
Report of Magistrate Judge, Phillip A. Dunnam v. United States, 16-61458-CIV-CMA	A-3

United States District Court
Southern District of Florida
 MIAMI DIVISION

UNITED STATES OF AMERICA**JUDGMENT IN A CRIMINAL CASE****v.****Case Number: 113C 1: 07CR20879-
ALTONAGA****PHILLIP A. DUNHAM**
a/k/a Phillip A. Dunnham

USM Number: 77531-004

Counsel For Defendant: Thomas Risavy
Counsel For The United States: Sean McLaughlin
Court Reporter: Barbara Medina

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

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. §371	Conspiracy to commit offenses against the United States to wit: robbery of postal employee.	4/17/2006	1
18 U.S.C. §2114(a)	Robbery of postal employee.	4/17/2006	2
18 U.S.C. §922(g)	Felon in possession of firearm.	4/17/2006	4
18 U.S.C. §924(c)(1)(A)(ii)	Carrying and brandishing firearm during and in relation to a crime of violence.	4/17/2006	6

The defendant is sentenced as provided in the following pages of this judgment.

Count(s) Remaining are dismissed on the motion of the United States.

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

Date of Imposition of Sentence:
8/12/2008


 CECILIA M. ALTONAGA
 United States District Judge

August 13, 2008

DEFENDANT: PHILLIP A. DUNHAM
CASE NUMBER: 113C 1: 07CR20879-ALTONAGA

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a TOTAL term of **One hundred Ninety-four (194) months**. The terms consist of Sixty (60) Months as to count One, One hundred Ten (110) Month as to counts two and four to be run concurrently with each other, Eight-Four (84) Months as to count Six of the Superseding Indictment to run consecutively to the terms imposed in 07CR60268-ALTONAGA.

The Court makes the following recommendations to the Bureau of Prisons:

That this defendant be designated to a facility in the South Florida area.

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: PHILLIP A. DUNHAM
CASE NUMBER: 113C 1: 07CR20879-ALTONAGA

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a TOTAL term of Five (5) years. The term consist of Three (3) years as to counts One and Four and Five (5) Years as to counts two and six all such terms shall run concurrently and with the following special conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from 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, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, 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 as directed by the court or 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;
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: PHILLIP A. DUNHAM
CASE NUMBER: 113C 1: 07CR20879-ALTONAGA

SPECIAL CONDITIONS OF SUPERVISION

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

Mental Health and Substance Abuse Treatment:

The defendant shall participate in an approved treatment program for mental health/substance 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.

Financial Disclosure:

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

Employment Requirement:

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Self-Employment Restriction:

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

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.

DEFENDANT: PHILLIP A. DUNHAM
CASE NUMBER: 113C 1: 07CR20879-ALTONAGA

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment

\$400.00

Total Fine

\$

Total Restitution

\$280.00

Restitution with Imprisonment -

It is further ordered that the defendant shall pay restitution in the amount of \$ 780.00 . During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job,, then the defendant must pay %50 of wages earned toward the financial obligations imposed by this judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of 425 per quarter toward the financial obligations imposed in this order.

Upon release from incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the Court may alter payment schedule in the interest of justice. The U.S... Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay. These payments do not preclude the government, and subsequently the U.S. Probation Office from using any other anticipated or unexpected financial gains, assets or income of the defendant to satisfy the restitution obligations.

*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: PHILLIP A. DUNHAM
CASE NUMBER: 113C 1: 07CR20879-ALTONAGA

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 \$400.00 due immediately.

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 and restitution are 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.

RESTITUTION

Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

co-defendant Tywaan Tovoriz Johnson.

FORFEITURE ACTION

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

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14191-C

PHILLIP A. DUNNAM,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Phillip A. Dunnam is a federal prisoner serving a sentence of 194 months' imprisonment, after pleading guilty to conspiracy to commit offenses against the United States, to wit: robbery of a postal employee, and, in so doing, placing his life in jeopardy by the use of a dangerous weapon, 18 U.S.C. §§ 371, 2114(a); robbery of a postal employee, and, in so doing, placing his life in jeopardy by the use of a dangerous weapon, § 2114(a); felon in possession of a firearm, 18 U.S.C. § 922(g); and carrying and brandishing a firearm during, and in relation to, a crime of violence, 18 U.S.C. § 924(c). Judgment was entered in 2008, and Dunnam did not file a direct appeal.

In 2016, Dunnam filed *pro se* the instant 28 U.S.C. § 2255 motion to vacate, raising one claim: that his § 924(c) conviction is no longer lawful, in light of the Supreme Court's ruling in

Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d. 569 (2015) (holding that the Armed Career Criminal Act's ("ACCA") residual clause was unconstitutionally vague).

The district court denied the § 2255 motion as time-barred, finding that *Johnson* was inapplicable to Dunnam's claims, in light of *Ovalles v. United States*, 861 F.3d 1257, 1267 (11th Cir. 2017) (holding that *Johnson* did not invalidate § 924(c)'s residual clause). Alternatively, it found that Dunnam's claims were procedurally defaulted, as he did not raise them on direct appeal, nor could he show prejudice, because this Court, in *United States v. Dowd*, 4551 F. 3d 1244, 1251 (11th Cir. 2006), and *In re Watt*, 829 F. 3d 1287, 1289-90 (11th Cir. 2016), had already determined that a conviction under § 2114(a) constituted a crime of violence. In the same order, it denied a certificate of appealability ("COA"). Dunnam appealed, and has moved this Court for a COA.

DISCUSSION:

To merit a COA, the movant must show that reasonable jurists would find debatable both: (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000) (quotations omitted).

This Court has recently held that "*Johnson* does not apply to, or invalidate, the risk-of-force clause in § 924(c)(3)(B)." *Ovalles*, 861 F.3d at 1267 (noting that the risk-of-force clause has at times been referred to as a residual clause). Thus, this Court determined that § 924(c)(3)(B) was still valid, post-*Johnson*. *Id.* Consequently, Dunnam's claim that the holding in *Johnson* applied to, and invalidated, § 924(c)'s residual clause is foreclosed by binding Circuit precedent. *See Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015).

Further, this Court has already determined that a conviction under § 2114(a) "indisputably describes a crime of violence" under § 924(c). *See Dowd*, 451 F.3d at 1251.

Although this Court did not specify under which clause § 2114(a) qualified as a crime of violence—residual or use-of-force—such distinction is irrelevant here, because both clauses are still valid, post-*Johnson*.

Finally, Dunnam, like the appellant in *Ovalles*, did not argue that § 2114(a) did not qualify as a crime of violence under the residual clause, if that clause was valid. 861 F.3d at 1267. Instead, he has argued only that *Johnson* invalidated § 924(c)'s residual clause, and that § 2114(a) does not qualify as a crime of violence under § 924(c)'s use-of-force clause.

Because reasonable jurists would not find debatable: (1) the merits of the underlying claims; and (2) the procedural issues that he seeks to raise, Dunnam has failed to make the requisite showing and his motion for a certificate of appealability is DENIED. See *Slack*, 529 U.S. at 484, 120 S. Ct. 1595, 1603-04, 146 L. Ed. 2d 542.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

January 26, 2018

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 17-14191-C
Case Style: Phillip Dunnam v. USA
District Court Docket No: 0:16-cv-61458-CMA
Secondary Case Number: 0:07-cr-60268-CMA-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-61458-Civ-ALTONAGA
(07-20879-Cr-ALTONAGA)
(07-60268-Cr-ALTONAGA)
MAGISTRATE JUDGE PATRICK A. WHITE

PHILLIP A. DUNNAM also known
as PHILLIP A. DUNHAM,¹

Movant,

v.

REPORT OF
MAGISTRATE JUDGE

UNITED STATES OF AMERICA,

Respondent.

I. Introduction

The movant, **Phillip A. Dunnam also known as Phillip A. Dunham**, initially filed this *pro se* motion to vacate, pursuant to 28 U.S.C. §2255 (Cv-DE#1), challenging the constitutionality of his §924(c) conviction entered following a guilty plea in **case no. 07-60268-Cr-Altonaga**. (Cv-DE#1). However, in his supporting memorandum, he then lists in the caption, the criminal conviction under attack as **case no. 07-20879-Cr-Altonaga**. (Cv-DE#4). Careful review of both dockets reveals that the §924(c) violation and ensuing conviction is only applicable as to **case no. 07-20879-Cr-Altonaga**.

This court has looked behind the *pro se* "label" and identified that the proper criminal conviction under attack here is the one entered in **case no. 07-20879-Cr-Altonaga**, not **07-60268-Cr-Altonaga**. Since no claims are raised, nor any challenge made to **case no. 07-60268-Cr-Altonaga**, this proceeding should not be deemed as a first

¹In the underlying criminal case under attack here, the movant's last name is spelled "Dunham."

\$2255 motion attacking that proceeding.²

The Clerk should be directed to correct the docket to reflect the correct conviction under attack here. The Eleventh Circuit has long held that, when considering filings by a *pro se* prisoner, the court should "look behind the label" of *pro se* filings. Hall v. Warden, FCC Coleman-USP I, ___ F.3d ___, 2014 WL 3058592, *2 (11th Cir. 2014) (citing United States v. Jordan, 915 F.2d 622, 624-25 (11 Cir. 1990)); See also e.g., Gilbert v. United States, 640 F.3d 1293, 1323 (11 Cir. 2011) (*en banc*) (construing prisoner's Rule 60(b) motion as a successive habeas petition); United States v. Holt, 417 F.3d 1172, 1175 (11 Cir. 2005) (*per curiam*). This is so because "[P]risoners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in habeas corpus proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession." Id. (quoting Price v. Johnston, 334 U.S. 266, 292, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948)).

Thus, looking behind the movant's label in his initial motion and supporting memorandum, it is clear that he is only seeking to attack the constitutionality of his \$924(c) conviction and the resulting sentence, following entry of a guilty plea in **case no. 07-20879-Civ-Altonaga**.

This Cause has been referred to the Undersigned for

²The Clerk of Court shall be directed to change the docket to reflect the correct case no. under attack here as being 07-20879-Cr-Altonaga, and not 07-60268-Cr-Altonaga. Further, although the change of plea and sentencing proceedings in both criminal cases were conducted together, it does not appear that a formal order of consolidation was entered. Regardless, it also does not appear that the movant intended to attack case no. 07-60268-Cr-Altonaga. If he intends to do so, he should file a separate \$2255 motion, on the proper form. The undersigned, however, expresses no opinion on whether such future filing may be subject to dismissal as time-barred.

consideration and report pursuant to 28 U.S.C. §636(b)(1)(B), (C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges, S.D. Fla. Admin. Order 2003-19; and, Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the movant's motion (Cv-DE#1) with supporting memorandum (Cv-DE#4), the government's response (Cv-DE#9) and supplements thereto (Cv-DE#s10,11,15) to this court's order to show cause, the movant's traverse (Cv-DE#14), together with the Presentence Investigation Report ("PSI"), Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file under attack here, including the written plea agreement (Cr2-DE#37), the factual proffer (Cr2-DE#38), together with the change of plea (Cr1-DE#106; Cv-DE#10:Ex.1) and sentencing transcripts (Cr1-DE#107; Cv-DE#10:Ex.2).³

II. Claim

While proceeding *pro se*, movant filed an initial §2255 motion (Cv-DE#1) with supporting memorandum (Cv-DE#4), and when construed liberally, given his status as a *pro se* litigant, in light of Haines v. Kerner, 404 U.S. 519 (1972), it appears that he raises as a sole ground for relief that his §924(c) convictions are not longer lawful after the Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015).⁴

³The undersigned takes judicial notice of its own records as contained on CM/ECF in those proceedings. See Fed.R.Evid. 201.

⁴As everyone is well-aware, in Johnson, the Supreme Court held that the Armed Career Criminal Act's (ACCA) residual clause was unconstitutionally vague, and that imposing an enhanced sentence pursuant to that clause thus violates the Constitution's guarantee of due process. In Welch v. United States, 136 S.Ct. 1257 (2016), the Supreme Court held that Johnson announced a substantive rule that applied retroactively on collateral review.

III. Procedural History

By way of background, in **case no. 07-60268-Cr-Altonaga**, the movant was charged on **November 6, 2007**, and then pleaded guilty to conspiracy to commit offenses against the United States, to-wit, robbery of a postal employee, in violation of 18 U.S.C. §371 (Count 1), robbery of a U.S. postal employee, in violation of 18 U.S.C. §2114(a) (Count 2), possession of money obtained from the robbery of a U.S. postal employee, in violation of 18 U.S.C. §2114(b) (Count 3), and assault of a U.S. postal employee, in violation of 18 U.S.C. §111(a)-(b) (Count 4). (Cr2-DE#s1,37,48). These federal offenses all arose out of conduct which occurred on January 3, 2006, and involved the same victim, V.B. (Id.).

Following a Rule 11 proceeding, he was adjudicated guilty and sentenced to a total term of 194 months imprisonment, consisting of: 60 months as to Count 1; and three concurrent terms of 110 months as to Count 2, 3, and 4, all to run concurrent to the sentence imposed as to Count 1. (Cr-DE#45). The Judgment was entered on the docket on **August 14, 2008**. (Cr-DE#45). No direct appeal was prosecuted. The time for doing so expired at the latest on **August 28, 2008**, when the 10-day appeal expired.⁵

While the foregoing Indictment was pending, on **March 4, 2008**,

⁵Where, as here, a defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a direct appeal expires. Adams v. United States, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999). On December 1, 2009, the time for filing a direct appeal was increased from 10 to 14 days after the judgment or order being appealed is entered. Fed.R.App.P. 4(b)(1)(A)(i). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). Moreover, now every day, including intermediate Saturdays, Sundays, and legal holidays are included in the computation. See Fed.R.App.P. 26(a)(1). Here, movant was sentenced after the effective date of the amendment, thus he had **fourteen** days within which to file his notice of appeal. See Fed.R.App.P. 26(a)(1)(B).

in case no. 07-20879-Cr-Altonaga, the movant was charged with and then entered into a negotiated, written plea agreement, agreeing to plead pleaded guilty to conspiracy to commit offenses against the United States, to-wit, robbery of a postal employee, in violation of 18 U.S.C. §371 (Count 1), robbery of a U.S. postal employee, in violation of 18 U.S.C. §2114(a) (Count 2), felon in possession of a firearm, in violation of 18 U.S. §922(g) (Count 4), and carrying and brandishing a firearm during and in relation to a crime of violence (Count 6). (Cr-DE#s31,81,98). These federal offenses all arose out of conduct which occurred on April 17, 2006, and involved the same victim, T.J., a U.S. postal employee.⁶ (Id.).

In exchange, the government agreed to dismiss all remaining charges after sentencing. (Cr-DE#37:3). Movant also understood the court could impose a statutory maximum of up to 5 years imprisonment as to Count 1, a 25-year term of imprisonment as to Count 2, a statutory maximum of 10 years as to Count 4, and a minimum of 7 years and up to a maximum of life imprisonment as to Count 6. (Id.:3-4). The plea agreement also contained a limited direct appeal waiver, in which the movant agreed to waive all rights under 18 U.S.C. §3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or variance from the guideline range that the court establishes at sentencing. (Id.).

⁶At the time, the movant and his coconspirator watched as T.J. obtained \$280.00 in funds from Bank of America. (Cr-DE#82). They followed T.J. to the U.S. postal bank, where they eventually brandished a firearm and demanded that T.J. hand over the \$280.00. (Id.). After T.J. did so, the movant and his codefendant sped away in a green Honda belonging to the movant's girlfriend's mother, who gave consent to search the vehicle. (Id.). The vehicle was located, and a search therein revealed a concealed firearm and ammunition. (Id.). The movant apparently had also previously been convicted of a felony offense, punishable by a term of imprisonment exceeding one year. (Id.).

Prior to sentencing, a PSI was prepared which combined and/or otherwise grouped the offenses, in both criminal cases together, resulting in a combined adjusted offense level 29. (PSI ¶¶23-42). A 3-level reduction to the base offense level was given based on movant's timely acceptance of responsibility, resulting in a total adjusted offense level 26. (PSI ¶¶44-46). The probation officer determined the movant had a total of 11 criminal history points, resulting in a criminal history category V. (PSI ¶57). Based on a total offense level 26 and a criminal history category V, the movant faced 110 months imprisonment at the low end, and 137 months imprisonment at the high end of the guideline range, as to Counts 1, 2, and 4. (PSI ¶82). As to Count 6, he faced 7 years imprisonment to run consecutive to any other term of imprisonment. (PSI ¶83). Pursuant to U.S.S.G. §5G1.3(c), in any case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to achieve a reasonable punishment for the instant offense. (Id.).

Statutorily, as to Count 1, the movant faced a term of 0 to 5 years imprisonment for violation of 18 U.S.C. §371. (PSI §82). As to Count 2, movant faced a term of 0 to 25 years imprisonment, for violation of 18 U.S.C. §2114(a); as to Count 4, movant faced 0 to 10 years imprisonment, for violation of 18 U.S.C. §924(a)(2); and, as to Count 6, he faced a minimum of 7 years and up to life imprisonment to run consecutive to any other term of imprisonment, for violation of §924(c)(1)(A)(ii) and (c)(1)(D)(ii). (PSI ¶82).

On August 12, 2008, movant appeared for sentencing. (Cv-DE#10-2:Ex.2-Sentencing Transcript). At that time, both parties acknowledged that there were no objections to the PSI. (Id.). The court then heard from the parties regarding the §3553 factors,

after which it noted on the record, that it had "carefully" reviewed the PSI, was "very familiar with the case." (Id.:5). The court then agreed to impose a sentence, consistent with the partes' agreement, at the low end of the applicable guideline, finding it sufficient to deter future criminal activity by the movant. (Id.:5).

It is worth mentioning that the change of plea and sentencing proceedings in this case were held on the same date as the change of plea and sentencing in case no. 07-60268-Cr-Altonaga. After a Rule 11 change of plea proceeding, the movant was adjudicated guilty and sentenced to a total term of 194 months imprisonment, consisting of: 60 months as to Count 1, two concurrent terms of 110 months as to Count 2 and 4, to run concurrently with Count 1, to be followed by a consecutive 84 months imprisonment as to Count 6, and upon release from imprisonment, to serve a total of 5 years supervised release. (Cr-DE#98). The Judgment was entered on the docket on **August 14, 2008**. (Id.). No direct appeal was prosecuted. The time for appealing this conviction expired on **August 28, 2008**, when the 10-day appeal period expired.

Consequently, the movant had one year from the time his conviction became final, or no later than **August 28, 2009**, within which to timely file this federal habeas petition. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008) (citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005,

1008-09 (7th Cir. 2000)). Applying the anniversary method to this case means petitioner's limitations period expired on **August 28, 2009**.

Movant returned to this court filing his first §2255 motion, on **June 21, 2016**, after he signed and then handed the motion to prison authorities for mailing in accordance with the mailbox rule.⁷ (Cv-DE#1:15).

IV. Threshold Issues

A. Timeliness

The government argues correctly that this federal §2255 motion is not timely filed under §2255(f)(1) because it was filed more than one year after the movant's conviction became final in 2008. As previously noted, under §2255(f)(1), the movant had until **August 28, 2009** within which to timely file this §2255 motion. He did not do so, therefore, this motion is not timely filed within a year from the time his conviction became final.

That, however, does not end the inquiry. The movant appears to argue that the **June 21, 2016** filing of this §2255 motion is timely because it was filed within one year of the Supreme Court's **June**

⁷Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1) ("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

26, 2015 Johnson decision which was made retroactively applicable to cases on collateral review by Welch v. United States, ___ U.S. ___, ___, 136 S.Ct. 1257, 1264-65 (2016). The government, however, argues that the movant's attempt to circumvent the AEDPA's one-year limitations period under §2255(f)(3) fails because Johnson's new rule of constitutional law applies retroactively only to ACCA cases involving the ACCA's residual clause. As explained by the Supreme Court in Welch v. United States:

[T]he rule announced in Johnson is substantive. By striking down the residual clause as void for vagueness, Johnson changed the substantive reach of the Armed Career Criminal Act, altering "the range of conduct or the class of persons that the [Act] punishes." Schriro, supra, at 353, 124 S.Ct. 2519. Before Johnson, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After Johnson, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under Johnson, so it can no longer mandate or authorize any sentence. Johnson establishes, in other words, that "even the use of impeccable factfinding procedures could not legitimate" a sentence based on that clause. United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971). It follows that Johnson is a substantive decision ... Johnson is thus a substantive decision and so has retroactive effect under Teague in cases on collateral review.

136 S. Ct. 1257, 1265 (2016). As applied here, since the movant was not sentenced under the ACCA, the Government argues that Johnson did not restart the AEDPA one-year clock under §2255(f)(3) and his §924(c) claims 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 the AEDPA's one-year limitations period. Consequently, this federal petition is time-barred.

Finally, movant has not alleged, let alone demonstrated that this federal petition is subject to equitable tolling of the limitations period, which is a rare and extraordinary remedy. See San Martin, 633 F.3d at 1271. A petitioner is entitled to equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Holland, 560 U.S. 649 (citation and internal quotation marks omitted); see also Diaz v. Sec'y for Dep't of Corr's, 362 F.3d 698, 702 (11th Cir. 2004) (characterizing the equitable-tolling standard as a two-part test, stating that "equitable tolling is available only if a petitioner establishes *both* extraordinary circumstances and due diligence." (emphasis supplied)).

The extraordinary circumstances must be circumstances beyond the petitioner's control. See Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir. 2009). Further, there must be a causal connection between the alleged extraordinary circumstances and the late filing of the petition. See San Martin, 633 F.3d at 1267. The diligence required for equitable tolling to be warranted is "reasonable diligence, not maximum feasible diligence." Id. (quotations omitted).

For example, the Supreme Court has rejected the contention

that counsel's mistake in miscalculating the federal limitations period entitles a petitioner to equitable tolling. See Lawrence v. Florida, 549 U.S. 327, 336-37, 127 S.Ct. 1079, 1088-89, 166 L.Ed.2d 924 (2007). Specifically, the Court has held that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel." Id.

Next, in Holland, the Supreme Court, while reiterating that mere attorney negligence does not warrant equitable tolling, nevertheless held that an attorney's serious misconduct may warrant such tolling. 560 U.S. at 652. The defendant in Holland filed a *pro se* federal habeas petition after the filing deadline had already passed, but he contended that the statute of limitations should have been equitably tolled. Id. at 635. In support, he alleged that, during the two years while his state habeas petition was pending before the Florida Supreme Court, his attorney, Mr. Collins, communicated with him only three times, and each time only by letter. Id. at 635-36. During this time, Mr. Collins never met with him or updated him on the status of his case. Id. After Collins argued Holland's appeal before the state supreme court, Holland wrote him multiple letters regarding the importance of filing his federal habeas petition timely. Id. at 637-39. Despite Holland's attempts to communicate, Mr. Collins ultimately missed the filing deadline for his federal habeas petition. Id. at 638-39. Once Holland learned-in the prison library, not from his attorney-that the Florida Supreme Court had already decided his case and the federal filing deadline had passed, he immediately filed his own *pro se* federal habeas petition. Id. at 639.

While the Supreme Court reiterated that "a garden variety claim of excusable neglect, such as a simple miscalculation that

leads a lawyer to miss a filing deadline, does not warrant equitable tolling," it concluded that Holland had not presented such a "garden variety claim." 560 U.S. at 651-52 (internal quotation marks omitted). Rather, the facts of Holland's case presented "far more serious instances of attorney misconduct." Id. The Court found that, while Mr. Collins' failure to timely file Holland's federal habeas petition and his apparent unawareness of the filing deadline date suggested simple negligence, that did not mark the end of Collins' failures:

Here, Collins failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.

Id. at 652. Further, during his state post-conviction proceedings, Holland had unsuccessfully sought to discharge his attorney, complaining to the Florida Supreme Court that there had been "a complete breakdown in communication," that counsel had "not kept him updated on the status of his capital case," and that counsel had "abandoned" him. Id. at 636-37 (quotation marks and brackets omitted). The Court concluded that under the circumstances, Mr. Collins' misconduct may have constituted extraordinary circumstances warranting equitable tolling, and remanded the case for such a determination. Id. at 652.

Two years later, in Maples v. Thomas, ___ U.S. ___, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012), the Supreme Court revisited the question of when attorney misconduct may rise to the level of "extraordinary circumstances beyond a [petitioner's] control," albeit in the context of what it takes to establish cause to excuse a state procedural bar to federal habeas relief. Id. at 924. In Maples, the petitioner, an Alabama death-row inmate, had been represented by two *pro bono* attorneys from a New York law firm and a local attorney recruited for the sole purpose of allowing the out-of-state attorneys to be admitted *pro hac vice*. Id. at 918-19. While Maples' state post-conviction petition was pending, the two New York attorneys left their law firm for positions that rendered them ineligible to continue to represent him. Id. at 919, 924. Neither attorney, however, notified Maples of his departure and resulting inability to represent Maples. Id. at 919. Nor did either of them ask the state trial court for leave to withdraw or move for substitution of counsel. Id. Without the assistance of his listed attorneys of record, Maples did not receive timely notice of the denial of his state post-conviction petition and, as a result, failed to timely appeal that ruling, which led to the procedural default of his claims in federal court. Id. at 920-21.

As a result, in Maples, the Supreme Court reaffirmed the general rule that, "under well-settled principles of agency law," a petitioner "bears the risk of negligent conduct on the part of his [attorney]" and, for that reason, is ordinarily bound by counsel's failure to meet a filing deadline. Id. at 922 (quotation marks omitted). The Court held, however, that "[a] markedly different situation is presented ... when an attorney abandons his client without notice" and thereby "sever[s] the principal-agent relationship," at which point counsel's "acts or omissions ... cannot fairly be attributed to the client." Id. at 922-23

(quotation marks and brackets omitted). The Court concluded that counsel had abandoned Maples because, as a matter of both common sense and agency law principles, he was effectively "left without any functioning attorney of record" and had "been reduced to pro se status." Id. at 927.

The Eleventh Circuit, in Cadet v. Fla. Dep't of Corr's, 742 F.3d 473 (11th Cir. Jan. 31, 2014), considered Holland and Maples, in determining the test for equitable tolling of the AEDPA's statute of limitations period, where a petitioner alleges the late filing was caused by his attorney's conduct. The Eleventh Circuit held that "attorney negligence, however gross or egregious, does not qualify as an 'extraordinary circumstance' for purposes of equitable tolling; abandonment of the attorney-client relationship, such as may have occurred in Holland, is required." Cadet, 742 F.3d at 481-82, at **8 (footnote omitted).

Unlike the situation in Holland, the circumstances in this case do not involve attorney misconduct. Rather, if movant attempts to argue that he is an unskilled layperson who has limited knowledge of the law and is, therefore, entitled to liberal treatment, that argument warrants no relief.⁸ It is well settled that mere ignorance of the law or lack of knowledge of filing deadlines does not justify equitable tolling of AEDPA's limitation period. See Johnson v. United States, 544 U.S. 295, 311, 125 S.Ct. 1571, 1582 (2005) (stating that "the Court has never accepted *pro se* representation alone or procedural ignorance as an excuse for

⁸It is true that *pro se* filings are subject to less stringent pleading requirements, Estelle v. Gamble, 429 U.S. 97, 106 (1976), and should be liberally construed with a measure of tolerance. See Haines v. Kerner, 404 U.S. 519 (1972). See also Gomez-Diaz v. United States, 433 F.3d 788, 791 (11th Cir. 2005); Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991). However, the policy of liberal construction for *pro se* litigants' pleadings does not extend to a "liberal construction" of the one-year limitations period.

prolonged inattention when a statute's clear policy calls for promptness.").

The Eleventh Circuit has further held that a lack of a legal education and related confusion or ignorance about the law as excuses for a failure to file in a timely fashion does not warrant equitable tolling of the limitations period. See Perez v. Florida, 519 Fed.Appx. 995, 997 (11th Cir. 2013) (quoting, Rivers v. United States, 416 F.3d 1319, 1323 (11th Cir. 2005) (holding that while movant's lack of education may have delayed his efforts to vacate his state conviction, his procedural ignorance is not an excuse for prolonged inattention when promptness is required)); Felder v. Johnson, 204 F.3d 168, 172-73 & n. 10 (5 Cir. 2000) (citing cases), cert. den'd, 531 U.S. 1035 (2000) (holding that ignorance of law and pro se status are insufficient to toll statute of limitations). As with any litigant, pro se litigants "are deemed to know of the one-year statute of limitations." Outler v. United States, 485 F.3d 1273, 1282 n.4 (11th Cir. 2007).

Next, if movant attempts to suggest that he is entitled to equitable tolling of the limitations period, in that the failure to review his challenge on the merits will result in a fundamental miscarriage of justice, that claim also warrants no relief. The law is clear that a petitioner may obtain federal habeas review of a procedurally defaulted claim, without a showing of cause or prejudice, if such review is necessary to correct a fundamental miscarriage of justice. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Henderson v. Campbell, 353 F.3d 880, 892 (11th Cir. 2003). This exception is only available "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent." Henderson, 353 F.2d at 892.

As a threshold matter, 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. See e.g., Taylor v. Sec'y, Dep't of Corr's, 230 Fed. Appx. 944, 945 (11th Cir. 2007) ("[W]e have never held that there is an 'actual innocence' exception to the AEDPA's one-year statute of limitations, and we decline to do so in the instant case because [the petitioner] has failed to make a substantial showing of actual innocence."); Wyzykowski v. Dep't of Corr's, 226 F.3d 1213, 1218-19 (11th Cir. 2000) (leaving open the question whether the \$2244 limitation period to the filing of a first federal habeas petition constituted an unconstitutional suspension of the writ). But cf. United States v. Montano, 398 F.3d 1276, 1284 (11th Cir. 2005) ("Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by appellant's failure to timely file his \$2255 motion."). However, several other circuits have recognized such an exception. See, e.g., Souter v. Jones, 395 F.3d 577 (6th Cir. 2005); Flanders v. Graves, 299 F.3d 974 (8th Cir. 2002). Assuming, without deciding, that a petitioner's actual innocence might support equitable tolling of the limitation period, notwithstanding, petitioner has failed to make a substantial showing of actual innocence.

Were "actual innocence" an exception to the application of the one-year limitations provisions of \$2255, the Court would still be precluded from reviewing the claim presented in the instant petition on the merits. "To establish actual innocence, [a habeas petitioner] must demonstrate that ... 'it is more likely than not that no reasonable [trier of fact] would have convicted him.' Schlup v. Delo, 513 U.S. 298, 327-328, 115 S.Ct. 851, 867-868, 130 L.Ed.2d 808 (1995)." Bousley v. United States, 523 U.S. 614, 623

(1998). "[T]he Schlup standard is demanding and permits review only in the "'extraordinary' case." House v. Bell, 547 U.S. 518, 538 (2006).

Courts have emphasized that actual innocence means factual innocence, not mere legal insufficiency. Id.; see also High v. Head, 209 F.3d 1257 (11 Cir. 2000); Lee v. Kemna, 213 F.3d 1037, 1039(8 Cir.2000); Lucidore v. New York State Div. of Parole, 209 F.3d 107 (2 Cir. 2000)(citing Schlup v. Delo, 513 U.S. 298, 299, (1995); Jones v. United States, 153 F.3d 1305 (11 Cir. 1998) (holding that appellant must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him). See also Bousley, 523 U.S. at 623-624; Doe v. Menefee, 391 F.3d 147, 162 (2 Cir. 2004) ("As Schlup makes clear, the issue before [a federal district] court is not legal innocence but factual innocence.").

To be credible, a claim of actual innocence requires the movant to "support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." Schlup v. Delo, 513 U.S. at 324. All things considered, the evidence must undermine the Court's confidence in the outcome of the trial. Id. at 316. No such showing has been made here. Even if such an exception exists, the movant has failed to make the requisite showing of actual innocence that would support consideration of his untimely motion to vacate on the merits. On the record before this court, no fundamental miscarriage of justice will result by time-barring this federal petition.

Movant has, therefore, not made the threshold showing of

actual innocence. In other words, movant has not presented sufficient evidence to undermine the court's confidence in the outcome of his criminal proceedings. See Milton v. Sec'y, Dep't of Corr's, 347 Fed.Appx. 528, 531-532 (11th Cir. 2009) (unpublished) (holding that affidavits proffered by pro se habeas petitioner were insufficient to establish actual innocence of murder, as would allegedly have created an exception to one-year limitations period, because affidavits were presented more than ten years after murder and eight years after petitioner's trial, the affiants were in most cases aware of the alleged facts to which they attested before petitioner's trial, the affidavits were either not new evidence or were of questionable reliability, and none of the evidence negated petitioner's confession or his taped conversation with the victim's mother wherein he implicated another individual in the murder).

Under the totality of the circumstances present here, the movant's dilatory behavior cannot qualify him for equitable tolling. As a result of movant's failure to diligently pursue his rights, he has failed to demonstrate that he qualifies for equitable or statutory tolling. Consequently, this §2255 motion should be dismissed as time-barred. Nevertheless, since the claim also warrants no relief on the merits, it is discussed in detail below.

B. Procedural Default

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding. Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for

failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010); Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004).

To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can be shown when a claim "is so novel that its legal basis was not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998); see also, Reed v. Ross, 468 U.S. 1, 16 (1984).

Further, a meritorious claim of ineffective assistance of counsel can constitute cause. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000). Ineffective assistance of counsel claims, however, are generally not cognizable on direct appeal and are properly raised by a §2255 motion regardless of whether they could have been brought on direct appeal. Massaro v. United States, 538 U.S. 500, 503, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); see also United States v. Patterson, 595 F.3d, 1324, 1328 (11th Cir. 2010). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

If a petitioner is unable to show cause and prejudice, another avenue may exist for obtaining review of the merits of a

procedurally defaulted claim. Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96; see also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Id. at 496; see also Bousley, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992) ("the miscarriage of justice exception is concerned with actual as compared to legal innocence").

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984). In other words, the Supreme Court has found cause to excuse the procedural default in situations where a claim is not "reasonably available to counsel" at the time of appeal because of the Supreme Court's subsequent articulation of a previously unrecognized constitutional principle that is held to have retroactive application. See Reed, 468 U.S. at 16. The Supreme Court in Johnson overruled precedent, announced a new rule, and then gave retroactive application to that new rule. Thus, Johnson constitutes a new rule unavailable to defendants convicted before it was handed down by the Supreme Court on June 26, 2015.

Here, the movant is also unable to demonstrate actual prejudice to excuse the procedural default because, regardless of Johnson's applicability on the residual clause of §924(c), the companion charge for robbery of a U.S. postal employee qualifies as a "crime of violence," as discussed in detail below.

Where the merits of the claims may be reached and readily disposed of, judicial economy has dictated reaching the merits of the claim while acknowledging the procedural default and bar in the alternative.⁹ See Lambrix v. Singletary, 520 U.S. 518 (1997). See also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999) (stating that judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 528 U.S. 846 (1999); Chambers v. Bowersox, 157 F.3d 560, 564 n. 4 (8th Cir. 1998) (stating that "[t]he simplest way to decide a case is often the best.").

V. General Legal Principles

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to §2255 are extremely limited. A prisoner is entitled to relief under §2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28 U.S.C. §2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8

⁹Even if certain claims are technically unexhausted, the Court has exercised the discretion now afforded by Section 2254, as amended by the AEDPA, which permits a federal court to deny on the merits a habeas corpus application containing unexhausted claims. See Johnson v. Scully, 967 F.Supp. 113 (S.D.N.Y. 1996); Walker v. Miller, 959 F.Supp. 638 (S.D. N.Y. 1997); Duarte v. Miller, 947 F.Supp. 146 (D.N.J. 1996).

(11th Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations omitted). The "fundamental miscarriage of justice" exception recognized in Murray v. Carrier, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent"

The law is well established that a district court need not reconsider issues raised in a section 2255 motion which have been resolved on direct appeal. Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Mills v. United States, 36 F.3d 1052, 1056 (11th Cir. 1994); United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981). Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255. Nyhuis, 211 F.3d at 1343 (quotation omitted). Broad discretion is afforded to a court's determination of whether a particular claim has been previously raised. Sanders v. United States, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) ("identical grounds may often be proved by different factual allegations ... or supported by different legal arguments ... or couched in different language ... or vary in immaterial respects").

Post-conviction relief is available to a federal prisoner under §2255 where "the sentence was imposed in violation of the Constitution or laws of the United States, or ... the court was without jurisdiction to impose such sentence, or ... the sentence was in excess of the maximum authorized by law." 28 U.S.C.

§2255(a); see Hill v. United States, 368 U.S. 424, 426-27 (1962). A sentence is "otherwise subject to collateral attack" if there is an error constituting a "fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979); Hill v. United States, 368 U.S. at 428.

Applicable Law re 18 U.S.C. §924(c)

Title 18 U.S.C. § 924(c) (1) (A) provides for enhanced statutory penalties in cases where, among other things, the defendant uses or carries a firearm during and in relation to any "crime of violence or drug trafficking crime." The statute further defines "crime of violence" as any felony that

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §924(c) (3) (A)-(B). As such, §924(c) (3) contains a "residual clause," very similar to the residual clause declared unconstitutionally vague in Johnson.¹⁰ However, unlike the ACCA, §924(c) imposes a 5-year mandatory consecutive sentence for any defendant who uses a firearm during a "crime of violence" or "drug trafficking crime." 18 U.S.C. §924(c) (1) (A) (i).

¹⁰The ACCA's residual clause that was held to be unconstitutionally vague in Johnson defines "violent felony" as 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).

In Johnson, the Supreme Court struck down a portion of the Armed Career Criminal Act's definition of "violent felony," finding part of 18 U.S.C. §924(e)(2)(B)(ii), the so-called "residual clause," to be void for vagueness. See Johnson, ___ U.S. ___, ___, 135 S.Ct. at 2557-2560. In so ruling, the Supreme Court found the phrase "physical force" in paragraph (i) "means violent force--that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010) ("Johnson I").

As the Supreme Court noted, the term "violent felony" has been defined as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a deadly weapon, [and] calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." Id. (internal quotations and citations omitted); see also Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 383, 160 L. Ed. 2d 271 (2004) (stating that the statutory definition of "crime of violence," in 18 U.S.C. §16, is similar to §924(e)(2)(B)(i) because it includes any felony offense which has as an element the use of physical force against the person of another, and as such, "suggests a category of violent, active crimes...").

In addition, the Supreme Court has stated that the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" and, the phrase "use...of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9-10; see also United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element

the use of physical force;" citing Leocal).

While the meaning of "physical force" is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the (statutory) elements of state crimes. Johnson I, 599 U.S. at 138. Further, a federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise. See Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir.1983).

To determine whether a past conviction is for a "violent felony" under the ACCA (and thus whether a conviction qualifies as a "crime of violence" for purposes of §924(c), assuming Johnson extends to §924(c)), courts use, what has become known as, the "categorical approach." Descamps v. United States, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013); see also United States v. Estrella, 758 F.3d 1239 (11th Cir. 2014). To determine if an offense "categorically" qualifies as a "crime of violence" under the "elements" or "use-of-force" clause in §924(c)(3)(A) then, the court would have to determine if Hobbs Act robbery has an element of "force capable of causing physical pain or injury to another person," as contemplated by Johnson I and its progeny. See Johnson, 559 U.S. at 140; Leocal, 543 U.S. at 11.

The Supreme Court has also approved a variant of the categorical approach, labeled the "modified categorical approach," for use when a prior conviction is for violating a so-called "divisible statute." Id. That kind of statute sets out one or more elements of the offense in the alternative. Id. If one alternative matches an element in the generic offense, but another does not,

the modified categorical approach permits sentencing courts to consult a limited class of documents, known as Shepard documents,¹¹ to determine which alternative formed the basis of the defendant's prior conviction. Id. The modified categorical approach then permits the court to "do what the he categorical approach demands: [analyze] the elements of the crime of conviction...." Id.

However, the modified categorical approach does not apply when the crime of which the defendant was convicted has a single, indivisible set of elements. Id. at 2282. Thus, when a defendant is convicted of a so-called "'indivisible' statute" - i.e., one not containing alternative elements- that criminalizes a broader swath of conduct than the relevant generic offense," that conviction cannot serve as a qualifying offense. Id. at 2281-82.

In sum, when determining whether a conviction qualifies as a predicate offense, the courts can only look to the elements of the statute of the conviction, whether assisted by Shepard documents or not, and not to the facts underlying the defendant's prior conviction. See Descamps, 133 S.Ct. 2283-85. In so doing, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." Moncrieffe v. Holder, ___ U.S. ___, 133 S.Ct. 1678, 1684 (2011) (quoting Johnson I, 559 U.S. at 137).

More recently, the Supreme Court in Mathis v. United States, ___ U.S. ___, 136 S. Ct. 2243 (2016), the Supreme Court was called upon to determine whether federal courts may use the modified

¹¹In Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court held that a sentencing court could examine only a limited category of documents in determining whether a prior guilty plea constituted a "burglary," and thus a "violent felony," under the Armed Career Criminal Act ("ACCA"). See id. at 16, 125 S.Ct. 1254.

categorical approach to determine if a conviction qualifies as a predicate offense when a defendant is convicted under an indivisible statute that lists multiple, alternative means of satisfying one (or more) of its elements. Mathis, __ U.S. at ___, 136 S. Ct. at 2247-48. The Mathis Court declined to find any such exception and, in so doing, addressed how federal courts are to make the threshold determination of whether an alternatively-phrased statute sets forth alternative elements (in which case the statute would be divisible and the modified categorical approach would apply to determine which version of the statute the defendant was convicted of violating), or merely lists alternative means of satisfying one element of an indivisible statute (in which case the categorical approach would apply). Id. at 2256-57.

Here, the Court need not conduct the above analysis to determine whether, as a threshold matter, the substantive robbery of a U.S. postal employee the movant was alleged to have violated is divisible or indivisible. Similarly, the Court also need not conduct the above analysis, regardless of whether it may employ a modified categorical approach or is limited to the categorical approach, to determine whether movant's companion charges for robbery of a U.S. postal employee, a violation of 18 U.S.C. §2114(a), qualifies as "crimes of violence" for purposes of §924(c) after Johnson, because the Eleventh Circuit has resolved this issue. See In re Watt, 829 F.3d 1287, 1289-90 (11 Cir. 2016) ("holding that Johnson did not invalidate the movant's firearm conviction under §924(c) because his companion conviction for assaulting a postal employee under 18 U.S.C. §2114(a) 'indisputably describes a crime of violence[,]'") (quoting United States v. Dowd, 451 F.3d 1244, 1251 (11 Cir. 2006)); accord, Morrow v. United States, 2016 WL 4146125, at *1 (E.D. Tenn. Aug. 3, 2016); United States v. Mitchell, 743 F.3d 1054, 1058-60 (6 Cir. 2014).

In the In re Watt decision, the Eleventh Circuit, in the context of an application for leave to file a second or successive motion under §2255, considered whether Johnson invalidates a conviction for using a firearm in furtherance of an assault with intent to rob a postal employee, in violation of 18 U.S. §924(c)(1)(A)(ii). The Eleventh Circuit denied the application, finding:

Johnson does not invalidate Watt's conviction under section 924(c). A jury convicted Watt of knowingly using, carrying, and possessing 'a firearm in furtherance of a violation of Title 18, United States Code, Section 2114(a).' 18 U.S.C. §924(c)(1)(A). Johnson invalidated the residual clause of section 924(e), but the decision did not address the validity of the definition of a crime of violence found in section 924(c) nor have we held that Johnson affects section 924(c)(3)(B). See In re Hines, No. 16-1245-F, 824 F.3d 1334, 1336-37, 2016 WL 3189822, at *2 (11th Cir. June 8, 2016). Even were we to extrapolate from Johnson that section 924(c)(3)(B) is also unconstitutional, it would not help Watt. See id. Watt's firearm conviction was based explicitly on his companion conviction for assaulting a postal employee, which we have stated "indisputedly describes a crime of violence," United States v. Dowd, 451 F.3d 1244, 1251 (11th Cir. 2006)....Based on the allegations in Watt's indictment, the jury had to have found that he 'assault[ed]' the victim and that her 'life was put in jeopardy,' which satisfies the requirement of the elements clause that the underlying felony offense have 'as an element, the use, attempted use, or threatened use of physical force against the person or property of another,' id. §924(c)(3)(A)....Watt's conviction would be valid even if Johnson renders the definition of 'crime of violence' in section 924(c)(3)(B) unconstitutional.

~~In re Watt, 829 F.3d 1287, 1289-90 (11th Cir. 2016).~~

It must be noted that this Court is still bound by the In re Watt decision even where it wholly fails to conduct the requisite analysis under Taylor and its progeny for determining whether U.S.

postal robbery, in fact, still qualifies after Johnson. See Scalia, Antonin, J., The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1177 (1989) (lower courts are not only bound by the narrow "holdings" of higher court decisions, but also by their "mode of analysis").

VI. Discussion

Regardless of the foregoing, the movant alleges in this \$2255 proceeding that his conviction and resulting sentence for brandishing, carrying and using a firearm during and in relation to a crime of violence, to-wit, the robbery of a U.S. postal employee, pursuant to 18 U.S.C. §924(c), is unconstitutional under the Supreme Court's decision in Johnson v. United States, __ U.S. ___, 135 S.Ct. 2557 (June 26, 2015). (Cv-DE#1,4,14). The government argues, however, that this \$2255 motion should be denied, in pertinent part, because: (1) the movant procedurally defaulted the claim since he failed to raise it on direct appeal; (2) the Johnson decision does not apply to convictions under 18 U.S.C. §924(c); and, (3) the Johnson claim warrants no relief on the merits, since §2114(a) robbery qualifies under the use-of-force clause of §924(c). (Cv-DE#9).

It is evident that the robbery definition in §924(c) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." See 18 U.S.C. §924(c) (3) (A); see also, In re Fleur, 824 F.3d 1337, 1340 (11 Cir. 2016); United States v. Anglin, 846 F.3d 954, 965 (7 Cir. 2017) (referring to the "unbroken consensus" among sister circuits to decide Hobbs Act robbery is a crime of violence under the elements clause) (citations omitted). Physical force requires "violent force," or "force capable of causing physical pain or

injury to another person," not just an "intentional, unwanted touching." Johnson v. United States, 559 U.S. 133, 140 (2010).

Whether an offense is a "crime of violence" under Section 924(c) requires a categorical analysis of the offense's elements and not the actual facts of the Movant's conduct. United States v. McGuire, 706 F.3d 1333, 1336-37 (11th Cir. 2013). The relevant inquiry in the instant case, therefore, is whether robbery of a U.S. postal employee under §2114(a) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or that "by its nature, involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. §924(c) (3) (A)-(B).

"The generic definition of robbery is 'the taking of property from another person or from the immediate presence of another person by force or intimidation.'" United States v. Jenkins, 651 Fed. Appx. 920, 924-25 (11th Cir. 2016) (quoting Lockley v. United States, 632 F.3d 1238, 1244 (11 Cir. 2011)). The Jenkins court further noted that the elements of a §2113(a) offense are nearly identical to the elements of generic robbery, in that both, "at a minimum require [that] the taking to be by intimidation, i.e., a perceived threat of bodily harm." Jenkins, supra. The Eleventh Circuit in Jenkins concluded that "bank robbery, or attempted bank robbery, under §2113(a), qualifies as a crime of violence "under the elements clause," noting that to do so, an offense must have as an element "the use, attempted use, or threatened use of physical force against the person of another...." Jenkins, supra.

In Jenkins, the Court further concluded that the defendant's §2113(a) offense has as an element the "threatened use of physical force" and as such, "requires the defendant to take actions from

which an ordinary person could reasonably infer a threat of bodily harm." Jenkins, supra. Thus, Section 924(c)'s use of force clause was not called into question by Johnson. Therefore, like Jenkins and Watts, the movant's §924(c) conviction based on the companion conviction of §2114(a)¹² robbery of a U.S. postal employee continues to remain valid after Johnson.

Although In re Watt was decided on Section 2255(h) review, this is not to say that the Eleventh Circuit's determination in that case is without precedential value. See generally Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351, 1358 (11th Cir. 2007). Published panel decisions issued in the Section 2255(h) context are subject to the prior-panel-precedent rule and, therefore, are binding on all subsequent panels unless and until they are overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit sitting *en banc*. In re Provenzano, 215 F.3d 1233, 1235 (11th Cir. 2000); In re Holsey, 589 Fed. Appx. 462, 466 (11th Cir. 2014). In re Watt's holding, together with the decision in Jenkins, supra, makes it clear that a §2114 robbery conviction remains categorically a crime of violence under Section 924(c) after Johnson since they are factually on point, resolve the issue at hand, and are binding on this Court. See In re Gordon, 827 F.3d 1289, 1294 (11th Cir. 2016). Therefore, in this case, the Court need not resolve the difficult question of whether Johnson has invalidated Section 924(c)'s residual clause. Id.

¹²Under 18 U.S.C. §2114(a), provides that "[A] person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned not more than twenty-five years.

Further there is also persuasive authority from this and other courts that §2114(a) robbery qualifies as a crime of violence under the use-of-force clause of §924(c). See United States v. Enoch, 2015 WL 6407763, at *3 (E.D. Ill. Oct. 21, 2015) (concluding violations of 18 U.S.C. §2114(a) categorically qualifies as crime of violence under §924(c)(3)(A)); United States v. Mitchell, 743 F.3d 1054, 1058-60 (6th Cir. 2014) (finding that Tennessee robbery categorically qualifies as a violent felony under the use-of-physical-force clause); Poindexter v. United States, 2017 WL 1025879, at *2 (E.D. Tenn. Mar. 15, 2017); Williams v. United States, 2017 WL 1166141, at *7 (W.D. Wash. Mar. 29, 2017) (underlying offense under §2114(a) qualifies under the elements clause of §924(c)(3)(A) as crime of violence); Bryant v. United States, 2017 WL 878041, at *2 (D.S.C. Mar. 6, 2017) (Borrowing phrase from Enoch, supra, the court found defendant's §924(c) conviction and sentence valid because the §2114(a) predicate offense fits within §924(c)'s use of force clause.); Fairnot-Woods v. United States, 2016 WL 7192144, at *4 (N.D. Ga. Nov. 17, 2016), report and recommendation adopted, 1:13-CR-127-2-TWT, 2016 WL 7188174 (N.D. Ga. Dec. 12, 2016) (accord).

Like the applicant in In re Watt, the Movant was charged with robbery of a U.S. post service employee in accordance with the statutory language. He pled guilty to the robbery offense that contains the element of actual or threatened force, violence, and fear. Similarly, like the defendant in In re Watt, the movant's conviction for that offense remains valid even if Johnson is found to invalidate Section 924(c)'s residual clause. In re Watt, supra.

The Movant did not argue at the trial level or on appeal that the §2114(a) robbery fails to support a §924(c) brandishing a

firearm conviction. He appears to argue that this claim is nevertheless cognizable on Section 2255 review because, post-Johnson, it is a non-existent offenses of which he is actually innocent and that his conviction as to that offense resulted in a manifest injustice. This argument should be rejected. The Movant admitted in the written plea agreement, written factual proffer, and under oath at the change of plea hearing, that he violated §924(c) by robbing a U.S. postal employee while brandishing a firearm. His contention that he is "actually innocent" of the brandishing offense is thus conclusively refuted by the record. See Blackledge, 431 U.S. at 74.

Under the totality of the circumstances present here, because the movant's conviction for §2114 robbery is a crime of violence under §924(c)'s use-of-force clause, he cannot demonstrate actual prejudice arising from any constitutional error in order to excuse or otherwise overcome the procedural default doctrine. See generally Bousley, 523 U.S. at 622; see, e.g., Chasse v. United States, 2016 WL 4926154 (D. New Hampshire Sept. 15, 2016) (the two convictions underlying the movant's Section 924(c) convictions, federal bank robbery and pharmacy robbery, both qualify as crimes of violence under Section 924(c)'s use of force clause, therefore, he cannot establish prejudice to excuse his procedural default even if Johnson renders Section 924(c)'s residual clause unconstitutional). His contention that he is "actually innocent" of the brandishing offenses are thus conclusively refuted by the record. See Blackledge, 431 U.S. at 74.

Additionally, the movant is again reminded that he may not raise for the first time in objections to the undersigned's Report any new arguments or affidavits to support these claims. Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga.

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