

APPENDIX

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Decision of the Court of Appeals for the Eleventh Circuit,
United States v. Sanders, No. 17-14746-G (11th Cir. January 22, 2018).....A-1

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14746-G

ANDRE SANDERS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Andre Sanders is a federal prisoner who is serving a 126-month total sentence of imprisonment after pleading guilty to 4 counts of bank robbery, in violation of 18 U.S.C. § 2113(a), and 1 count of carrying a firearm during and in relation to a crime of violence – bank robbery – in violation of 18 U.S.C. § 924(c)(1)(A). He now seeks a certificate of appealability (“COA”), following the denial of his counseled 28 U.S.C. § 2255 motion to vacate. His § 2255 motion challenged his § 924(c) sentences as unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which struck down the residual clause of the Armed Career Criminal Act (“ACCA”) as unconstitutionally vague.

To merit a COA, Sanders must demonstrate that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*,

529 U.S. 473, 484 (2000). In this case, reasonable jurists would not debate the district court's determination that the claim in Sanders's § 2255 motion was procedurally defaulted, as he did not establish cause and prejudice, or actual innocence, to excuse not raising the claim on direct appeal. See *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (stating that a defendant can overcome procedural default by establishing either: (1) cause for the default and actual prejudice from the alleged error, or (2) that he is actually innocent of the crimes for which he was convicted).

The record reflects that Sanders did not pursue a direct appeal. See *id.* Although he contends that he is actually innocent of the § 924(c) conviction, his argument fails because he has presented no new, reliable evidence that he is factually innocent of the crime. See *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (stating that, to show actual innocence, a movant must present new, reliable evidence that he is factually innocent of the crime of conviction). Rather, his actual-innocence argument is based on legal insufficiency, which does not satisfy the actual-innocence exception for overcoming the procedural default. See *Bousley v. United States*, 523 U.S. 614, 623 (1998).

As for his argument that the procedural default is excused because *Johnson* established the basis of a new claim that he could not have raised on direct appeal, this argument also fails because Sanders's claim is not cognizable under *Johnson*. We recently held that "*Johnson* does not apply to, or invalidate, the risk-of-force clause in § 924(c)(3)(B)." *Ovalles v. United States*, 861 F.3d 1257, 1265-66 (11th Cir. 2017). Consequently, Sanders's underlying claim that the holding in *Johnson* applied to, and invalidated, § 924(c)'s risk-of-force clause is now foreclosed by binding circuit precedent. See *id.*; see also *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (stating that no CCA should issue where the claim is

foreclosed by binding Circuit precedent because reasonable jurists will follow controlling law). Furthermore, we also have determined that a conviction for bank robbery under § 2113(a) qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause. *See In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016).

Therefore, because his argument that his procedural default was excused by cause and prejudice resulting from the *Johnson* decision fails, and reasonable jurists would not debate the denial of his § 2255 motion, his motion for a COA is DENIED. *See* 28 U.S.C. § 2253(c)(2); *Hamilton*, 793 F.3d at 1266.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE