

APPENDIX

APPENDIX

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A-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CIV-61521-ZLOCH
(12-CR-60235-ZLOCH)
MAGISTRATE JUDGE P.A. WHITE

ANDRE SANDERS, :
 :
 Movant, :
 :
 v. : REPORT OF
 : MAGISTRATE JUDGE
 UNITED STATES OF AMERICA, :
 :
 Respondent. :

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence entered in Case No. 12-CR-60235-ZLOCH.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the motion (CV-DE#1), Movant's memorandum of law in support thereof (CV-DE#6), the government's response (CV-DE#8), Movant's reply (CV-DE#9), the government's notice of supplemental authority (DE#11), Movant's response thereto (DE#12), and all pertinent portions of the underlying criminal file.

Claim

Movant's sole claim in this proceeding is that his § 924(c) conviction for using and carrying a firearm during and in relation to a crime of violence is no longer lawful after the Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015).

Procedural History

Movant pled guilty to four counts of bank robbery by force, in violation of 18 U.S.C. § 2113(a) (Counts 1-4); and one count of carrying and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2 (Count 5) (CR-DE#28, 29, and 29-1). The § 924(c) count was predicated upon one of the substantive bank robbery counts, specifically Count 4. On March 28, 2013, the Court sentenced Movant to 66 months' imprisonment as to Counts 1-4, followed by a consecutive term of 60 months' imprisonment as to Count 5 (CR-DE#36, 37 and 38). Movant did not appeal. Thereafter, on June 24, 2016, Movant filed the instant motion to vacate pursuant to § 2255.¹

Procedural Bar²

The government argues that Movant's claim is procedurally barred. Specifically, the government argues that Movant failed to raise his Johnson claim either at trial or on direct appeal, and that Movant cannot satisfy either the cause-and-prejudice or the actual innocence exceptions to the procedural default rule.

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

¹Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); see also Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (setting forth the "prison mailbox rule").

²The government has not raised any defense based on the statute of limitations. The Court thus specifically finds that, if there were any such defense in this case, that the government has waived it. See Day v. McDonough, 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) (the AEDPA statute of limitations defense is not jurisdictional and is subject to waiver by the failure to raise it in an initial, responsive pleading).

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). 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 [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). 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, yet another avenue exists 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) That is precisely the circumstance here. Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. However, no actual prejudice that would result from finding a procedural default here because the Eleventh Circuit has recently held that the rule of Johnson does not apply or extend to invalidate § 924(c)'s "risk-of-force" clause. See Ovalles v. United States, No. 17-10172, 2017 WL 2829371 (11th Cir. June 30, 2017) Accordingly, Movant cannot establish cause-and-prejudice overcome the procedural bar.³

Movant argues that the Court should refrain from relying on Ovalles at this time because a petition for rehearing has been filed, and that the Eleventh Circuit *sua sponte* withheld the mandate as a result. Movant also argues that the Supreme Court has recently ordered re-argument in Sessions v. Dimaya, U.S. No. 15-1498, which presents the question of whether Johnson renders an identical clause contained in § 16(b) of the INA unconstitutionally vague.

With regard to the Eleventh Circuit's *sua sponte* recall of the mandate in Ovalles, this would seem to be a routine ministerial act in light of the motion for rehearing and the significance of the

³And assuming without deciding that the rule of McKay v. United States, 657 F.3d 1190 (11th Cir. 2011) does not extend to cases where, as here, a § 2255 Movant challenges the conviction itself that is arguably unconstitutional, Movant would not be able to establish actual innocence of his § 924(c) conviction for the same reason; that is, because the Eleventh Circuit has determined that Johnson does not extend to § 924(c).

issue presented. However, it still seems unlikely that the Court will vacate its decision in Ovalles. More specifically, in Ovalles the Eleventh Circuit followed and expanded upon the rationale of prior rulings issued by the Second, Sixth and Eight Circuits coming to this same conclusion that Johnson did not extend to § 924(c), and criticized the contrary ruling of the Seventh Circuit Court of Appeals as summary, which at this point is the outlier Circuit. See Id.

With regard to DiMaya, supra, the pendency of a collateral matter in the Supreme Court does not provide a basis for this Court to ignore the Eleventh Circuit's decision in Ovalles, supra, under the circumstances of this case. More specifically, the Supreme Court has already considered § 16(b) in Leocal v. Ashcroft, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), and stated that it "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." 543 U.S. at 10, 125 S.Ct. 377. And despite the Solicitor General's suggestion in Johnson that § 16(b) was "equally susceptible to [Johnson's] central objection to the residual clause,"⁴ the Court did not even mention Leocal in Johnson. But perhaps most fundamentally, the Supreme Court's decision in DiMaya will resolve questions only with regard to § 16(b). Simply put, in light of the Court's restraint in Johnson and the well-settled principle that the Court should not decide issues that are not before it, it seems unlikely that the DiMaya Court will say anything about § 924(c). See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 64 n.19, 109 S. Ct. 2782, 2802, 106 L. Ed. 2d 26 (1989) ("[W]e cannot properly reach out and decide matters not before us."). Moreover, Johnson and DiMaya concern

⁴Supplemental Brief for Respondent at 22-23, Johnson v. United States, --- U.S. ---, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (No. 13-7120).

themselves with prior convictions, while § 924(c) concerns itself with contemporaneous crimes.

In sum, given the ever-shifting legal landscape in this area, the Court cannot be continually waiting for speculative and tangentially-related resolutions. Unless and until the Supreme Court speaks specifically with regard to § 924(c), there will continue be splits regarding the status of its "risk-of-force" clause, and DiMaya is likely to only add fuel to this fire. Meanwhile, Ovalles, supra, is directly on point and, while the decision may not be technically final, there is no sound reason not to follow it at this juncture. See Colo. River Water Conservation Dist., 424 U.S. 800, 817 (1976) (When a federal court possess subject matter jurisdiction over a case before it, it generally has an "unflagging obligation" to exercise its power to adjudicate the controversy).

Finally, it bears noting that, Movant's challenge to his § 924(c) conviction would fail on the merits regardless. Specifically, as set forth above, Movant's § 924(c) conviction was predicated upon one of his companion charges for bank robbery in violation of 18 U.S.C. § 2113. But the Eleventh Circuit has also held that § 2113 bank robbery still categorically qualifies as a predicate "violent felony" for purposes of the ACCA, the statute that of course was at issue in Johnson. See United States v. Horsting, 678 F. App'x 947, 949 (11th Cir. 2017) ("Here, the only question before us is whether § 2113(a) bank robbery categorically qualifies as a violent felony under § 924(e). We conclude that it does.").

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the

applicant," and that if a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where a §2255 movant's constitutional claims have been adjudicated and denied on the merits by the district court, the movant must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a §2255 movant's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the movant can demonstrate both "(1) 'that jurists of reason would find it debatable whether the [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001) (quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Movant's claims are barred on procedural grounds, the court considers whether Movant is

nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find debatable the correctness of the court's procedural rulings. Accordingly, a certificate of appealability is not warranted. See Slack, 529 U.S. at 484-85 (each component of the §2253(c) showing is part of a threshold inquiry); see also Rose, 252 F.3d at 684.

Conclusion

Based upon the foregoing, it is recommended that the motion to vacate be DENIED, and that no certificate of appealability be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections with regard to the denial of a certificate of appealability.

SIGNED this 26th day of July, 2017.



UNITED STATES MAGISTRATE JUDGE

cc: Robin Cindy Rosen-Evans
Federal Public Defender's Office
450 Australian Avenue
Suite 500
West Palm Beach, FL 33401

Donald F. Chase, II
United States Attorney's Office
500 E Broward Boulevard
7th Floor
Fort Lauderdale, FL 33394

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-61521-ZLOCH
(Underlying Case No. 12-CR-60235-CR-ZLOCH)

ANDRE SANDERS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

OBJECTIONS TO REPORT AND RECOMMENDATION

Andre Sanders through undersigned counsel, objects to the Report and Recommendation of the Magistrate Judge finding that his bank robbery is a crime of violence under § 924(c)(3)(A)'s elements clause and recommending that his § 2255 motion be denied, and that no certificate of appealability be issued.¹ In support he states:

I. Bank Robbery is Not a Crime of Violence

As held by the Eleventh Circuit in *Gibson v. United States*, No. 16-16584 at *7-8 (11th Cir. March 8, 2017), "if bank robbery can be committed without 'the use, attempted use, or threatened use of physical force,' then that crime obviously can't have 'as an element the use, attempted use, or threatened use of physical force.'" The Court opined that bank robbery may be committed "by force and violence," or

¹ He further reasserts and reaffirms all arguments in support of his position advanced in his Motion to Correct Sentence, Reply in Support of his Motion to Correct Sentence, and Response to Government's Supplemental Authority.

“by intimidation,” or “by extortion,” or “by entering or attempting to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank.” *Id.* at *8-9. Only if the bank robbery is committed “by force and violence” would it involve the *Johnson*² level of “physical force” as used in § 924(c)(3)(A). Because not every case of bank robbery involves that level of “physical force,” bank robbery is not a crime of violence.

In examining the bank robbery statute, it clearly matters whether “by force and violence” or “intimidation” constitutes “means or elements.” In *Mathis v. United States*, 136 S.Ct. 2243 (2016), the Court examined the distinction between the elements that define a crime and the means by which those elements can be committed in analyzing a burglary statute. Addressing *Mathis*, the Court in *Gibson* held:

[t]his distinction may even be more significant for § 924(c)’s “elements clause.” The “elements clause” expressly requires a particular kind of “element” - the use, attempted use, or threatened use of physical force against the person or property of another. The law has long been clear that alternative means in a federal criminal statute are not alternative “elements.” *See, e.g. Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707 (1999) (explaining that “a jury in a federal criminal case cannot convict unless it unanimously finds that the government has proved each element,” but a “jury need not always decide unanimously . . . which of several possible means the defendant used to commit an element of the crime”). And again, whether a crime is “within the ambit of 18 U.S.C. § 924(c) . . . is a question . . . we must answer ‘categorically’ - that is, by reference to the *elements* of the offense.”

Id. at *10-11. Significantly, this Circuit’s jury instructions make clear that the bank’s property may be taken “by *means* of force and violence” or “by *means* of

² *Curtis Johnson v. United States*, 559 U.S. 133, 139, 130 S.Ct. 1265 (2010).

intimidation.” See Eleventh Circuit Std. Jury Inst. (Crim) No. 76.1 (2010); see also *United States v. Howard*, 742 F.3d 1334, 1343, n.3 (11th Cir. 2014) (jury instructions often list all of the charged alternatives, and juries are rarely asked to specify in their verdict which of the alternatively charged means they unanimously found beyond a reasonable doubt).

Recently, the Middle District of Florida granted a COA in an armed bank robbery case, allowing the petitioner to appeal the denial of a § 2255 motion on this exact issue -- whether the use of “intimidation” is a separate and distinct means or mode of violating 18 U.S.C. § 2113(a), in addition to, and apart from, the use of “force and violence,” and if so, whether a conviction under § 2113(a) resting upon a finding of “intimidation” as the means of committing the offense may constitutionally be used as a crime of violence predicate under § 924(c)’s elements clause. See *Reinta Rayner v. United States*, No. 16-414-Civ-Hodges, DE 14 (M.D. Fla. Dec. 28, 2016) (11th Cir. No. 16-166644); see also *Davenport v. United States*, No. 16-15939 at **3, 6 (11th Cir. Mar. 28, 2017) (COA granted on Hobbs Act robbery and § 924(c), finding that *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), which held that Hobbs Act robbery is a crime of violence for § 924(c) purposes, even though of precedential value, is not binding outside of the second or successive application context; recognizing that there is “the possibility that Hobbs Act robbery can be committed without the type of force described in *Curtis Johnson*”).

Because a defendant can commit an armed bank robbery without the use, attempted use, or threatened use of physical force, it does not qualify as a crime of

violence under § 924(c)(3)(A)'s elements clause. Sanders' § 924(c) conviction as it relates to bank robbery must be vacated.

II. Impact of Ruling in *Ovalles v. United States*

In *Ovalles*, the Court held, *inter alia*, that *Johnson v. United States*, 135 S.Ct. 2551 (2015), which declared unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(2)(B)(ii), did not invalidate the similar residual clause in 18 U.S.C. § 924(c)(3)(B). The Magistrate concludes incorrectly in his Report and Recommendation that *Ovalles* requires this Court to deny Sanders' § 2255 motion.

This Court should however refrain from relying on *Ovalles* at this time for a number of reasons. First, on July 6, 2017 – one week after *Ovalles* was issued, and before a rehearing petition was filed – the Eleventh Circuit *sua sponte* withheld the mandate in the case. *See Ovalles*, 11th Cir. Case No. 17-10712 (DE of July 6, 2017) (“Mandate Withheld Pursuant to Court Instructions.”). This near-immediate, *sua sponte* reaction indicates that there is an interest on the Court in rehearing *Ovalles* en banc. Second, and independently, the Supreme Court has already heard oral argument, and has recently ordered re-argument, in *Sessions v. Dimaya* (U.S. No. 15-1498) (Des of Jan. 17 and June 26, 2017), where it will decide whether *Johnson* renders 18 U.S.C. § 16(b) unconstitutionally vague. Because § 16(b) is perfectly identical to § 924(c)(3)(B), a favorable decision in *Dimaya* could very well abrogate *Ovalles*. Notably, *Ovalles* made no mention of *Dimaya*, even though the government in *Dimaya* is seeking to distinguish § 16(b) from the ACCA's residual

clause on the same bases that *Ovalles* accepted.

In short, *Ovalles* is not yet final and may be short-lived. Because the law in this area remains in flux, it would be imprudent and inefficient for the Court to rely on *Ovalles* at this juncture. Doing so would needlessly result in an additional round of litigation if *Ovalles* is ultimately overruled by the en banc Court or abrogated by *Dimaya*.

III. Procedural Default Poses No Bar to Relief

The Magistrate incorrectly concludes Sanders cannot demonstrate cause and prejudice arising from any constitutional error in order to excuse or otherwise overcome the procedural default doctrine. (Report and Recommendation at 4) The Magistrate's conclusion is simply wrong. Sanders has demonstrated that he is actually innocent of his § 924(c) conviction.

Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding. *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004) (per curiam). There are two exceptions to this rule. Under the first exception, a defendant must show cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error. *Id.* The second exception applies where a constitutional violation has probably resulted in the conviction of one who is actually innocent. As Judge Marra found in *Duhart v. United States*, 16-61499-CV-MARRA, both exceptions

apply to Sanders.³

The first exception protects litigants, such as Sanders, who did not predict that approximately five years after his convictions became final, the Supreme Court would overrule settled precedent in two cases and hold that the ACCA's residual clause was void for vagueness. Cause for not raising the claim can be shown where the claim "is so novel that it's legal basis [wa]s not reasonably available to counsel." *Bousely v. United States*, 523 U.S. 614, 622 (1998) (quoting *Reed v. Ross*, 468 U.S. 1, 16 (1984)). Where the Supreme Court explicitly overrules well settled precedent and gives retroactive application to that new rule after the 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*, 468 U.S. at 17. That is precisely the circumstance here. *Johnson* overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. The actual prejudice that would result from finding a procedural default here is obvious -- if Sanders is correct in his analysis of the law, he should not have been convicted and sentenced for a violation of § 924(c). Accordingly, the procedural default rule is inapplicable to his claim. The second exception for actual innocence also applies to Sanders' claim and bars procedural default. As discussed previously, Sanders is actually innocent of his § 924(c) conviction because the conviction relies on a predicate which is not a crime of violence under that statute's elements clause

³ Adams takes his argument on this issue directly from Judge Marra's well reasoned order in *Duhart*.

IV. A Certificate of Appealability is Warranted

A 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 must “sho[w] that reasonable jurists could debate whether (or, for that matter, agreed that) the petition should have been resolved in a manner different 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)).

As the Supreme Court has emphasized, 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). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained: “We do 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 in the case has received full consideration, that petitioner will not prevail.” *Id.* at 338. Any doubt about whether to grant a COA is 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).

The Supreme Court recently applied this standard in *Welch v. United States*, ___ U.S. ___, 136 S.Ct. 1257 (2016), which arose from the denial of a COA. *Id.* at 1263-1264. In that case, the Court broadly held that *Johnson* announced a substantive rule that applied retroactively to cases on collateral review. *Id.* at 1268. But in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA because “reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence.” *Id.* at 1264, 1268. In that case, the parties disputed whether Welch’s robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. *See id.* at 1263-1264, 1268. Accordingly, the Court held that a COA should issue.

Here, reasonable jurists could at least debate whether Sanders is entitled to relief on his § 924(c) claim following *Johnson*. *See Welch*, 136 S.Ct. at 1268. This is because it is at least debatable whether his conviction for bank robbery remains a crime of violence under the elements clause in § 924(c). Undersigned counsel acknowledges that *In re Sams*, 830 F.3d 1234 (11th Cir. 2016) and *In re Hines*, held that bank robbery and armed bank robbery qualify as crimes of violence under § 924(c)’s elements clause. However, the existence of precedent does not mean that reasonable jurists could not debate the issue. *See, e.g., Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000) (“Under *Slack*, it is thus clear that we should not deny a petitioner an opportunity to persuade us through full briefing and argument to reconsider circuit law that apparently forecloses relief”); *United States v.*

Gomez-Sotelo, 18 Fed.Appx. 690, 692 (10th Cir. 2001) (granting COA where there was “a split among the circuits,” even though the “issue had been settled in this circuit and not overturned by the Supreme Court”).

V. Conclusion

For those reasons stated herein, this Court should grant Sanders’ Motion to Vacate, or in the alternative grant a COV as to those issued raised therein.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

By: *s/Robin C. Rosen-Evans*
Robin C. Rosen-Evans
Assistant Federal Public Defender
Florida Bar No. 438820
450 Australian Ave. S., Ste 500
West Palm Beach, Florida 33401
Tel: (561) 833-6288
Fax: (561) 833-0368
E-mail: *Robin_Rosen-Evans@fd.org*

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Robin C. Rosen-Evans
Robin C. Rosen-Evans

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61521-CIV-ZLOCH

ANDRE SANDERS,

Movant,

vs.

O R D E R

UNITED STATES OF AMERICA,

Respondent.

THIS MATTER is before the Court upon the Report Of Magistrate Judge (DE 13) filed herein by United States Magistrate Judge Patrick A. White, Movant's Objections To Report And Recommendation (DE 14), and Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence (DE 1). The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

Magistrate Judge White's Report (DE 13) concludes that Movant's claim is procedurally barred and fails on the merits. Magistrate Judge White's conclusion rests on two principal rationale. First, 18 U.S.C. § 924(c)'s "risk-of-force" clause is not unconstitutionally vague. And Second, Movant's predicate crime for applying 18 U.S.C. § 924(c)—bank robbery by force, in violation of 18 U.S.C. § 2113(a)—qualifies as a "violent felony" under § 924(c) regardless of the validity of the "risk-of-force" clause. The Court adopts Magistrate Judge White's reasoning and conclusions. See In re Sams, 830 F.3d 1234, (11th Cir. 2016) (holding "that a bank robbery conviction under § 2113(a) by force and violence or by intimidation qualifies as a crime of violence under the § 924(c) (3) (A) use-of-force clause"); Ovalles v. United

States, 861 F.3d 1257, 1266 (11th Cir. 2017) (holding "that Johnson does not apply to, or invalidate, the 'risk-of-force' clause in § 924(c)(3)(B)"); Duran v. United States, Case No. 16-61412 (S.D. Fla. Jun. 7, 2017) (same); Menard v. United States, Case No. 16-2232 (S.D. Fla. May 31, 2017) (same).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Movant's Objections To Report And Recommendation (DE 14) be and the same are hereby **OVERRULED**;

2. The Report Of Magistrate Judge (DE 13) filed herein by United States Magistrate Judge Patrick A. White be and the same is hereby approved, adopted, and ratified by the Court;

3. Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1) be and the same is hereby **DENIED**; and

4. Final Judgment will be entered by separate Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of August, 2017.


WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

The Honorable Patrick A. White
United States Magistrate Judge

All Counsel of Record

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61521-CIV-ZLOCH

ANDRE SANDERS,

Movant,

vs.

FINAL JUDGMENT

UNITED STATES OF AMERICA,

Respondent.

_____/

THIS MATTER is before the Court upon Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1). For the reasons expressed in this Court's Order denying said Motion, entered separately, and pursuant to Federal Rule of Civil Procedure 58, it is

ADJUDGED as follows:

1. Final Judgment be and the same is hereby **ENTERED** in favor of Respondent United States of America and against Movant Andre Sanders upon the Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1) filed herein. Movant shall take nothing by this action and said Respondent shall go hence without day; and

2. To the extent not otherwise disposed of herein, all pending motions are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of August, 2017.



WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

See Attached Mailing List

ANDRE SANDERS v. UNITED STATES OF AMERICA, Case No. 16-61521-CIV-
ZLOCH

The Honorable Patrick A. White
United States Magistrate Judge

All Counsel of Record

A-5

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 COA 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

**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 22, 2018

Michael Caruso
Federal Public Defender's Office
150 W FLAGLER ST STE 1700
MIAMI, FL 33130-1555

Robin Cindy Rosen-Evans
Federal Public Defender's Office
450 S AUSTRALIAN AVE STE 500
WEST PALM BEACH, FL 33401-5040

Appeal Number: 17-14746-G
Case Style: Andre Sanders v. USA
District Court Docket No: 0:16-cv-61521-WJZ
Secondary Case Number: 0:12-cr-60235-WJZ-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: Bryon Robinson, G
Phone #: (404) 335-6185

Enclosure(s)

DIS-4 Multi-purpose dismissal letter