APPENDIX

APPENDIX

A-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.:16-CV-81074-HURLEY/HOPKINS
06-CR-80179-HURLEY

MICHAEL CHANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.
_______________________________/

REPORT AND RECOMMENDATION ON MOTION TO CORRECT SENTENCE (DE 1) AND AMENDED MOTION TO CORRECT SENTENCE (DE 3)

THIS CAUSE is before this Court upon the District Court's Order referring Petitioner's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 for a Report and Recommendation. (DE 5).[1] Petitioner, a federal prisoner, challenges his career offender and armed career criminal sentence enhancements, as well as his convictions for using, carrying, or brandishing a firearm during and in relation to a crime of violence. (DE 1); (DE 3).

On March 8, 2007, a jury found Michael Chance guilty of armed bank robbery, in violation of 18 U.S.C. § 2113 (a) and (d) [Count 1]; brandishing a firearm during the armed bank robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) [Count 2]; attempted Hobbs Act robbery, in violation 18 U.S.C. § 1951(a) [Count 3]; brandishing a firearm during the attempted Hobbs Act robbery, in violation of in violation of 18 U.S.C. § 924(c)(1)(A)(ii) [Count 4]; and possession of

[1] Docket entries referring to the instant civil case (16-cv-81074) are referenced as (DE XX). Docket entries referring to the underlying criminal case (06-cr-80179) are referenced as (DEcr XX).

a firearm and/or ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) [Count 5]. (DEcr 70); (DEcr 83). On May 18, 2007, Chance was sentenced to 660 months of imprisonment – 240 months for each of Counts 1, 3, and 5, to be served concurrently; 120 months for Count 2; and 300 months for Count 4 – as well as 3 years of supervised release. (DEcr 83 at 2-3).

Chance seeks relief in light of the United States Supreme Court's ruling in *Samuel Johnson v. United States*, where the Court invalidated the residual clause of the Armed Career Criminal Act ("ACCA") because it was unconstitutionally vague. *See* 135 S.Ct. 2551, 2563 (2015) ("[I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process."). Chance argues that the holding of *Samuel Johnson* also applies to invalidate the residual clauses of U.S.S.G. § 4B1.2(a)(2)[2] and 18 U.S.C § 924(c)(3)(B). (DE 1 at 13-18); (DE 3 at 13-18, 39-42). Chance argues that his sentence is therefore improper in several ways. Chance asserts that he doesn't have the two predicate offenses necessary to support his U.S.S.G. § 4B1.1(a), or career offender, general sentencing enhancement nor the three predicate offenses necessary to support the 18 U.S.C. § 924(e), or ACCA, sentencing enhancement imposed on his sentence for Count 5. (DE 1 at 37-38); (DE 3 at 37-42). Chance further argues that armed bank robbery and attempted Hobbs Act robbery are not crimes of violence and, therefore, that he is "actually innocent" of the 924(c) charges in Counts 2 and 4. (DE 1 at 18-37); (DE 3 at 18-37).

Because Chance had previously filed a § 2255 petition, (DEcr 107), he was required to

[2] "Effective August 1, 2016, the USSG definition of "crime of violence" was amended to eliminate "burglary of a dwelling" from the enumerated offenses listed in § 4B1.2(a)(2) and to delete the residual clause." *Buckles v. United States*, No. 3:12-CR-89-TAV-HBG-1, 2017 WL 3470929, at *4 (E.D. Tenn. Aug. 11, 2017) (citing Amendment 798, U.S. Sentencing Guidelines Manual app. C supp. (U.S. Sentencing Comm'n 2016)).

obtain certification from the Eleventh Circuit for the instant § 2255 petition. *See* 28 U.S.C. § 2255(h). The Eleventh Circuit granted certification for Chance's ACCA and 924(c) claims, but declined to do so for any career offender claim because it was foreclosed under Eleventh Circuit precedent. *See In re Michael Chance*, Nos. 16-13311-J & 16-13335-J at 7 n.1 (11th Cir. June 30, 2016) (citing *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016); *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015)), filed at docket entry 6. Thus, this Court lacks jurisdiction over Chance's career offender claim. *See Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003) (without authorization from court of appeals, "the district court lacks jurisdiction to consider a second or successive petition"). Even if this Court could consider the claim, it is bound to recommend denial because the United States Supreme Court ("Supreme Court") has since ruled "that the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness." *Beckles v. United States*, 137 S. Ct. 886, 895 (2017). Chance was sentenced in 2007, (DE 1 at 1); (DE 3 at 1), after the *Booker* case rendered the Guidelines "effectively advisory." *See Beckles*, 137 S. Ct. at 894 ("The Guidelines were initially binding on district courts, but this Court in *Booker* rendered them 'effectively advisory.'") (citing *United States v. Booker*, 543 U.S. 220 at 233, 245 (2005)). This Court recommends that Chance's Motion to Correct Sentence, as it relates to his career offender sentencing enhancement, be DISMISSED for lack of jurisdiction. (DE 3).[3]

I. Procedural Default

The Government argues Chance's claims are barred because he has not previously raised the arguments presented in his Motion. (DE 18 at 5-8). Chance doesn't dispute that he did not

[3] As Chance's Amended Motion to Correct Sentence, (DE 3), was amended only to add his career offender claim, this Court hereafter evaluates only Chance's initial Motion to Correct Sentence, filed at docket entry 1.

raise his claims during sentencing or on appeal. (DE 19 at 51-52). "A motion under § 2255 is not a substitute for direct appeal, and issues which could have been raised on direct appeal are generally not actionable in a § 2255 motion and will be considered procedurally barred." *Krecht v. United States*, 846 F. Supp. 2d 1268, 1278 (S.D. Fla. 2012).

However, "[a] defendant can avoid a procedural bar" if he "show[s] cause for not raising the claim of error on direct appeal *and* actual prejudice from the alleged error." *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004) (per curiam). "[W]here a constitutional claim is so novel that its legal basis [wa]s not reasonably available to counsel, a defendant has cause for his failure to raise the claim . . . ." *Reed v. Ross*, 468 U.S. 1, 16 (1984). And when "a decision of th[e] [Supreme] Court [ ] explicitly overrule[s] one of [its] precedents," "there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a court to adopt the position that th[e] [Supreme] Court [ ] ultimately adopted." *Id.* at 17. In determining whether the legal basis for a defendant's claim was reasonably available, a court looks to the state of the law at the time of his sentencing and appeal. *See Geter v. United States*, 534 F. App'x 831, 836 (11th Cir. 2013) (examining state of the law at time of sentencing and appeal in evaluating whether § 2255 movant had established excuse for procedural default).

Chance was sentenced on May 18, 2007, (DEcr 82), and the Eleventh Circuit affirmed on June 13, 2008, (DEcr 106). The basis for Chance's challenge to his ACCA enhancement and § 924(c) convictions is the Supreme Court's *Samuel Johnson* case, where the Court found the ACCA residual clause to be unconstitutionally vague. *See Samuel Johnson,* 135 S. Ct. at 2563 (2015) ("We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process."). This decision overruled the Court's earlier precedent to the contrary and was the first time in over sixty years that the Court found a criminal sentencing statute to be unconstitutionally vague. *See id.* ("Our contrary holdings in *James* and *Sykes* are overruled."), *overruling James v. United States*, 550 U.S. 192 (April 18, 2007) *and Sykes v. United States*, 564 U.S. 1 (2011); Katherine Menendez, Johnson v. United States *Don't Go Away*, CRIM. JUST., Spring 2016, at 12, 17 (Before *Samuel Johnson,* "it had been decades [ ] since the Court held a sentencing provision in a criminal statute to be unconstitutionally vague.") (pointing to *United States v. Evans*, 333 U.S. 483 (1948)). This shift was "virtually unforeseeable," such that "reasonably competent counsel [ ] cannot be said to have reasonably anticipated such [a] change[ ]." *See Moore v. Zant,* 885 F.2d 1497, 1507 (11th Cir. 1989). Accordingly, Chance has shown cause for failing to raise the issue. *See Reed*, 468 U.S. at 16-17. *See also Duhart v. United States*, No. 16-61499-CIV, 2016 WL 4720424, at *4 (S.D. Fla. Sept. 9, 2016) (petitioner showed cause for not raising vagueness challenge to § 924(c) residual clause because petitioner was sentenced before the *Samuel Johnson* case, which "overruled precedent, announced a new rule, and [is retroactively applicable]"); *United States v. Webb*, 217 F. Supp. 3d 381, 388 (D. Mass. 2016) ("[petitioner's] case is textbook *Reed*, since [*Samuel*] *Johnson* [ ] explicitly disavowed *James's* conclusion that the residual clause of the ACCA is not unconstitutionally vague, and *James* predates [petitioner's] sentencing").

"To show prejudice, a petitioner need show only that without an error, the proceedings would have been different." *United States v. Brown*, No. 7:02-CR-024, 2016 WL 7441717, at *6 (W.D. Va. Dec. 23, 2016) (citing *Strickler v. Greene*, 527 U.S. 263, 289 (1999)). Chance has shown prejudice; if his § 924(c) convictions and ACCA enhancement were in error, then the corresponding sentences should be vacated. *See Blackstone v. United States*, No. 2:16-CV-03872-CAS, 2016 WL 7469579, at *2 (C.D. Cal. Dec. 27, 2016) (prejudice shown where movant argued predicate crime was no longer crime of violence and, therefore, that 924(c) sentence was error); *Brown*, 2016 WL 7441717 at *6 (prejudice shown where movant argued ACCA predicates were no longer violent felonies and, therefore, that ACCA enhancement was error).

II. Chance's ACCA Sentence Enhancement

"Under the ACCA, a defendant convicted of violating 18 U.S.C. § 922(g) is subject to a mandatory minimum sentence of 15 years (180 months) if he has three prior convictions for a violent felony or serious drug offense." *United States v. Fritts*, 841 F.3d 937, 938 (11th Cir. 2016) (citing 18 U.S.C. § 924(e)(1)). A violent felony is "any crime . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). "The first prong of this definition is referred to as the elements clause, while the second prong contains the enumerated crimes clause and, finally, [ ] the residual clause." *Fritts*, 841 F.3d at 939. It is this residual clause that *Samuel Johnson* invalidated. 135 S. Ct. at 2563.

The Presentence Investigation Report ("PSI") does not identify which of Chance's previous convictions served as predicates for his ACCA enhancement. (DE 28-1). However, the PSI did identify the predicate convictions for Chance's career offender enhancement as: (1) bank robbery[4] [case no. 83-8035-CR-JCP[5]]; (2) bank robbery[6] [case no. 83-8034-CR-JCP]; and bank

[4] Although paragraph 35 of the PSI states that the conviction in case no. 83-8035-CR-JCP was for armed bank robbery, paragraph 47 of the PSI lists the conviction as bank robbery. (DE 28-1 at 8, ¶ 35; at 12, ¶ 47). The PSI prepared in that case (83-8035-CR-JCP) states that Chance was convicted of bank robbery, in violation of 18 U.S.C. 2113(a). (DE 29-1 at 1). It appears that the use of the word "armed" in paragraph

robbery[7] [case no. 94-8081-CR-ZLOCH]. (DE 28-1 at 8, ¶ 35). Both Chance and the Government assert that these three bank robbery convictions served as the predicate convictions for Chance's ACCA enhancement. (DE 1 at 39); (DE 18 at 17).

To determine whether a conviction for bank robbery pursuant to 18 U.S.C. § 2113(a) qualifies as a crime of violence under the elements clause, this Court must determine whether the offense "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C.A. § 924(e)(2)(B)(i). In doing so, this Court uses either the categorical or the modified categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (discussing the two approaches in evaluating whether a conviction constituted a violent felony pursuant to the enumerated clause of the ACCA); *United States v. Braun*, 801 F.3d 1301, 1305 (11th Cir. 2015) (evaluating whether conviction constituted a violent felony pursuant to the elements clause of the ACCA; applying *Descamps* to determine whether the

35 of the PSI was in error. *See In re Michael Chance*, Nos. 16-13311-J & 16-13335-J at 8 (11th Cir. June 30, 2016) (stating, in evaluating ACCA claim, that "Chance was not convicted of armed bank robbery; he was convicted of bank robbery, and according to the undisputed facts in Chance's PSI, his offenses did not involve a firearm").

5 Although the PSI refers to this case as 83-8035-CR-JAG, the PSI from that case states that the case was styled 83-8035-CR-JCP. *Compare* (DE 28-1 at 8, ¶ 35; at 12, ¶ 47) *with* (DE 29-1 at 1).

6 Although paragraph 35 of the PSI states that the conviction in case no. 83-8034-CR-JCP was for armed bank robbery, paragraph 47 of the PSI lists the conviction as bank robbery. (DE 28-1 at 8, ¶ 35; at 12, ¶ 47). In the underlying criminal case, 06-80179, Defense counsel objected to the characterization, in paragraph 47 of the PSI, of this conviction as an armed robbery. (DEcr 81 at 2, ¶4). Both the Probation Officer and the Government agreed that the word "armed" should be removed and it was therefore stricken. (DE 14-1 at 9). Further, the PSI prepared in that case (83-8034-CR-JCP) states that Chance was convicted of bank robbery, in violation of 18 U.S.C. 2113(a). (DE 29-1 at 1). It appears that the retention of the word "armed" in paragraph 35 of the PSI was in error. *See In re Michael Chance*, Nos. 16-13311-J & 16-13335-J at 8 (11th Cir. June 30, 2016).

7 Although paragraph 35 of the PSI states that the conviction in case no. 94-8081-CR-ZLOCH was for armed bank robbery, paragraph 51 of the PSI lists the conviction as bank robbery. (DE 28-1 at 8, ¶ 35; at 15, ¶ 51). Further, the PSI prepared in that case (94-8081-CR-ZLOCH) states that Chance was convicted of bank robbery, in violation of 18 U.S.C. 2113(a). (DE 29-1 at 15). It appears that the use of the word "armed" in paragraph 35 of the PSI was in error. *See In re Michael Chance*, Nos. 16-13311-J & 16-13335-J at 8 (11th Cir. June 30, 2016).

statute was divisible).

If a statute "sets out a single (or 'indivisible') set of elements to define a single crime," a court must use the categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under this approach, a court examines only "the fact of conviction and the statutory definition of the prior offense." *United States v. Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015) (quotation omitted). The operative question is "whether in every case a conviction under the statute *necessarily* involves proof of the [physical force] element." *United States v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014) (citation and quotation omitted). If so, the crime is categorically a crime of violence. *See United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011) (concluding that predicate crime was categorically a crime of violence because every chargeable version of the crime required the use or threatened use of physical force).

On the other hand, when a statute "ha[s] multiple alternative elements," or is "divisible," a court must determine "which of the alternative elements listed . . . was integral to the defendant's conviction (that is, which was necessarily found or admitted)." *Mathis,* 136 S. Ct. at 2249. "To address that need, th[e] [Supreme] Court approved the modified categorical approach." *Id.* This approach permits a court to "look[ ] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* (citing *Shepard v. United States,* 544 U.S. 13, 26 (2005); *Taylor v. United States,* 495 U.S. 575, 602 (1990)). These documents are often called *Shepard* documents. *See, e.g., Braun*, 801 F.3d at 1304 ("Under the modified categorical approach, we consult [ ] *Shepard* documents . . . to determine which version of the crime [defendant] was convicted of.").

In a panel opinion denying an application for leave to file a second or successive § 2255 petition, the Eleventh Circuit held 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." *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016). The *In re Sams* panel did not address whether § 2113(a) is divisible; nor did it address the recent Supreme Court *Mathis* decision. *Id.* A later panel opinion granted such an application, stating that "bank robbery under § 2113(a) may not 'categorically' qualify as a crime of violence for purposes of § 924(c)'s [use of force] clause." *In re Watson,* No. 16-14123-J, slip op. at 5 (11th Cir. Aug. 5, 2016) (unpublished) (granting application, but noting that "[t]he question of whether [*Samuel*] *Johnson* invalidates [movant's] sentence must be decided in the first instance by the [d]istrict [c]ourt").

The *In re Sams* decision constitutes binding precedent, regardless of the *In re Watson* panel's suppositions to the contrary and notwithstanding the fact that the *In re Sams* panel neither engaged in a divisibility analysis nor addressed the *Mathis* decision. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (Under the Eleventh Circuit's prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by [the Eleventh Circuit] sitting *en banc*."); *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (The Eleventh Circuit's "prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions."); *Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006) ("[A] prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel."); *Jallali v. Sun Healthcare Grp.*, No. 15-14231, 2016 WL

3564248, at *1 n.3 (11th Cir. July 1, 2016) ("We are unpersuaded by any suggestion that an unpublished opinion of this Court in any way alters the law as stated in a prior, published opinion of this Court."). And the reasoning of the *In re Sams* decision applies equally within the context of determining whether bank robbery is a violent felony under the ACCA elements clause. *See United States v. Horsting*, 678 F. App'x 947, 949-50 (11th Cir. 2017) (concluding that similarity between ACCA elements clause, § 924(e)(2)(B)(i), and 924(c) use-of-force clause, § 924(c)(3)(A), was such that *In re Sams* holding regarding bank robbery under 924(c) applied equally to the ACCA; holding that "bank robbery by intimidation also satisfies the ACCA elements clause's requirement of 'threatened use of physical force against the person of another.'").

Furthermore, engaging in a divisibility analysis – as elucidated by *Mathis* – confirms the conclusion reached by the *In re Sams* panel. In *Mathis,* the Supreme Court distinguished statutes "that list[ ] multiple elements disjunctively," and are thus divisible, from those that "enumerate[ ] various factual means of committing a single element," or are indivisible. 136 S. Ct. at 2249. "[T]he Court held that the modified categorical approach does not apply 'when a statute happens to list possible alternative means of commission . . . .'" *United States v. Esprit*, 841 F.3d 1235, 1239–40 (11th Cir. 2016) (quoting *Mathis,* 136 S. Ct. at 2257). Thus, if § 2113(a) lists alternative means of commission, then this Court must apply the categorical approach and "'presume that the conviction rested upon nothing more than the least of the acts criminalized . . . .'" *United States v. Seabrooks*, 839 F.3d 1326, 1347 (11th Cir. 2016) (quoting *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013)). However, if § 2113(a) lists "different crimes" – or "alternative elements" – then the statute is divisible and this Court can apply the modified categorical approach to determine which version of the crime Chance was convicted of. *See Mathis,* 136 S.

Ct. at 2253-55.

Section 2113(a) states, in relevant part:

> "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to . . . any bank . . . ; or
>
> Whoever enters or attempts to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both."

The first and second paragraphs describe two "different crimes, not [ ] different methods of committing one offense," and are therefore divisible. *See Mathis*, 136 S. Ct. at 2254. *See also United States v. McGuire*, No. 16-3282, 2017 WL 429251, at *2 n.4 (10th Cir. Feb. 1, 2017) ("Section 2113(a) includes at least two sets of divisible elements: (1) taking, or attempting to take, by force, violence, or intimidation, property from a bank; and (2) entering or attempting to enter any bank . . . with the intent to commit a felony."); *United States v. Williams*, 841 F.3d 656, 659 (4th Cir. 2016) ("As its text makes clear, subsection 2113(a) can be violated in two distinct ways: (1) <u>bank robbery</u>, which involves taking or attempting to take from a bank by force and violence, intimidation, or extortion; and (2) <u>bank burglary</u>, which simply involves entry or attempted entry into a bank with the intent to commit a crime therein.") (quoting *United States v. Almeida*, 710 F.3d 437, 440 (1st Cir. 2013)); *United States v. Loniello*, 610 F.3d 488, 491 (7th Cir. 2010) (concluding that "paragraphs 1 and 2 of § 2113(a) create different offenses" for purposes of double jeopardy; detailing differences between the two offenses). Thus, to determine which of these crimes Chance was convicted of, this Court may look to Chance's second superseding indictment ("Indictment") – a *Shepard* document. *See Mathis,* 136 S. Ct. at 2253-55;

Braun, 801 F.3d at 1304. The Indictment reveals that Chance was convicted under the first, not second, paragraph of § 2113(a). (DEcr 41 at 1-2).

The exclusion of "extortion" from both Chance's indictment and the Eleventh Circuit's pattern jury instructions indicates that extortion is likewise a separate element. *See Mathis*, 136 S. Ct. at 2257 (When an indictment and jury instructions "referenc[e] one alternative term to the exclusion of all others," this may indicate "that the statute contains a list of elements, each one of which goes toward a separate crime."); (DEcr 41 at 1) (Chance's Indictment, charging him with taking "by force or violence or by intimidation."); Eleventh Circuit Pattern Jury Instructions O76.1 (Bank Robbery) (Government must prove that: "(1) the Defendant knowingly took [or attempted to take] money or property possessed by a federally insured [bank] [credit union] [savings-and-loan association] from or in the presence of the person described in the indictment; and (2) the Defendant did so [by means of *force and violence*] [by means of *intimidation*]") (emphasis added).

In a similar context – under the Hobbs Act – courts treat robbery and extortion as separate elements. *See United States v. Hancock*, 168 F. Supp. 3d 817, 821 (D. Md. 2016) ("[T]he Hobbs Act is divisible as there are two or more alternative sets of elements. The [c]ourt must therefore use the modified categorical approach . . . to determine which of these forms of the Hobbs Act (robbery or extortion) is at issue in this case."). Courts frequently analogize Hobbs Act robbery and § 2113(a) bank robbery. *See United States v. Parks*, No. 3:15-CR-0152, 2017 WL 679945, at *7 (M.D. Pa. Feb. 21, 2017) (citing to Third Circuit case finding Hobbs Act robbery was a crime of violence in concluding that § 2113 bank robbery was a crime of violence); *United States v. Pena*, 161 F. Supp. 3d 268, 274–75 (S.D.N.Y. 2016) (looking to

Second Circuit's treatment of "federal bank robbery under 18 U.S.C. § 2113(a), which is defined similarly to Hobbs Act Robbery," in evaluating whether conviction for Hobbs Act robbery was a § 924(c) crime of violence). Indeed, the extortion language was added to § 2113(a) to ensure that extortion directed at federally insured banks was prosecuted under that section and not under the Hobbs Act, as courts had found it chargeable under either. *See* H.R. Rep. No. 99-797, 32-33, 1986 U.S.C.C.A.N. 6138, 6155-56.

As is the case under the Hobbs Act, bank robbery and bank extortion under § 2113(a) are separate offenses. *See Delion v. United States*, No. 16-14265, D.E. 12 at 31 (S.D. Fla. Dec. 07, 2016) ("additional versions" of § 2113(a), "for extortion or for committing a felony that affects the bank," are "divisible elements representing separate offenses"; analogizing to "the extortion version of Hobbs Act robbery"), *report and recommendation adopted*, D.E. 15 (May 26, 2017); *United States v. McGuire*, No. 6:16-CV-01166-JTM, 2016 WL 4479129, at *2 (D. Kan. Aug. 25, 2016) ("§ 2113(a) also includes what is essentially a separate extortion offense"), *certificate of appealability denied,* No. 16-3282, 2017 WL 429251, at *2 (10th Cir. Feb. 1, 2017). To determine which of these offenses – bank robbery or bank extortion – Chance was convicted of, this Court again looks to Chance's Indictment. *See Mathis,* 136 S. Ct. at 2253-55; *Braun*, 801 F.3d at 1304. The Indictment reflects that Chance was charged with taking "by force or violence or by intimidation," not by extortion. (DEcr 41 at 1-2). This conviction is a crime of violence under § 924(c)(3)(A) regardless of whether "by force and violence" and "intimidation" constitute means or elements because the Eleventh Circuit has concluded that bank robbery by intimidation has as an element the use, attempted use, or threatened use of physical force. *See In re Sams*, 830 F.3d at 1239 ("[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."). This Court recommends that Chance's Motion to Correct Sentence be DENIED as to his ACCA sentence enhancement. (DE 1).

III. Chance's § 924(c) Convictions

"Distinct from § 924(e)(1) of the ACCA, § 924(c)(1)(A) provides for a separate consecutive sentence if any person uses or carries a firearm during an[d] in relation to a crime of violence." *Wallace v. United States*, No. CV 116-048, 2016 WL 4147164, at *1 (S.D. Ga. Aug. 4, 2016). A crime of violence is defined as a felony offense 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). "[T]he former clause" is often referred to "as the 'use-of-force' clause" and "the latter clause as the 'risk-of-force' clause," although the "'risk-of-force' clause in § 924(c)(3)(B) has been called a residual clause, too." *Ovalles v. United States*, 861 F.3d 1257, 1263 (11th Cir. 2017).

Chance argues that the holding in *Samuel Johnson* invalidates the § 924(c)(3)(B) risk-of-force, or residual, clause. (DE 1 at 13-18). He further asserts that the predicate convictions for his 924(c) charges - armed bank robbery and attempted Hobbs Act robbery - fail to satisfy the § 924(c)(3)(A) use-of-force clause,[8] and thus fail to qualify as a crimes of violence. (DE 1 at 18-37). Neither party disputes that Chance's 924(c) convictions remains valid if bank robbery and attempted Hobbs Act robbery qualify as § 924(c)(3)(A) crimes of violence.

The Eleventh Circuit has rejected Chance's first argument, holding that "[*Samuel*]

[8] Chance refers to 18 U.S.C. § 924(c)(3)(A) as the elements clause of § 924(c). (DE 1 at 18).

Johnson does not apply to, or invalidate, the 'risk-of-force' clause in § 924(c)(3)(B)." *Ovalles,* 861 F.3d at 1266. The Eleventh Circuit has likewise foreclosed any argument that armed bank robbery, in violation of 18 U.S.C. § 2113 (a) and (d), is not a § 924(c)(3)(A) crime of violence. *See Freeman v. United States*, No. 16-15678-B, 2017 WL 3923326, at *2–3 (11th Cir. Mar. 30, 2017) (stating that the Eleventh Circuit had "decided that armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d) clearly qualifies as a 'crime of violence' under the elements clause of § 924(c)(3)(A)") (citing *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. June 8, 2016)).

Although the Eleventh Circuit has determined the Hobbs Act robbery constitutes a § 924(c)(3)(A) crime of violence, it has not explicitly extended that conclusion to attempted Hobbs Act robbery. *See In re James*, No. 16-13772-J, 2016 WL 4608125, at *3 (11th Cir. July 21, 2016) ("While, *post-[Samuel] Johnson*, we have held that substantive Hobbs Act robbery qualifies as a companion crime of violence under § 924(c), we have not addressed whether attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)."). However, numerous courts within this District have concluded that attempted Hobbs Act Robbery likewise qualifies as a § 924(c)(3)(A) crime of violence. *See, e.g. James v. United States*, No. 2:16-CV-14245-KMM, 2017 WL 1831671, at *3 (S.D. Fla. Mar. 1, 2017) (holding that "attempted Hobbs Act robbery constitutes a crime of violence under the 'use-of-force' clause"); *Chatfield v. United States*, No. 16-22591-CIV, 2017 WL 1066776, at *11 (S.D. Fla. Mar. 2, 2017) (same; noting that "numerous courts across the country have reached the same conclusion" and collecting cases), *report and recommendation adopted,* No. 09-20870-CR, 2017 WL 1066779 (S.D. Fla. Mar. 21, 2017). Indeed, the fact that Chance's conviction was for *attempted* Hobbs Act robbery makes no difference, as the use-of-force clause includes the *attempted* use of physical force. *See*

18 U.S.C. § 924(c)(3)(A) ("crime must ha[ve] as an element the . . . *attempted use* . . . of physical force"). This Court recommends that Chance's Motion to Correct Sentence be DENIED as to his § 924(c) convictions and sentences. (DE 1).

RECOMMENDATION

Based on the foregoing, this Court **RECOMMENDS** that Defendants' Motion to Correct Sentence (DE 1) be **DENIED.**

NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with the Honorable Daniel T. K. Hurley, Senior United States District Court Judge for the Southern District of Florida, within **fourteen (14) days** of being served with a copy of this Report and Recommendation. Failure to timely file objections shall constitute a waiver of a party's "right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." 11th Cir. R. 3-1 (2016).

DONE and SUBMITTED in Chambers this 27th day of October, 2017, at West Palm Beach in the Southern District of Florida.

James M. Hopkins

JAMES M. HOPKINS
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-81074-CV-HURLEY/HOPKINS
(06-80179-Cr-HURLEY)

MICHAEL CHANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

______________________________/

PETITIONER'S OBJECTIONS TO REPORT AND RECOMMENDATION

Petitioner, Michael Chance, through undersigned counsel, files the following objections to the Report and Recommendation issued by the Magistrate Judge in the instant case. Specifically, Petitioner states:

1. The Magistrate Judge ruled in his Report and Recommendation that both armed bank robbery and attempted Hobbs Act robbery are crimes of violence for purposes of both the ACCA and § 924(c).

2. The Magistrate Judge further ruled that § 924(c)'s use of force, or residual clause, was not invalidated by *Samuel Johnson*.

3. Petitioner objects to the legal conclusions reached by the Magistrate Judge on all issues previously raised.

MEMORANDUM OF LAW IN SUPPORT OF OBJECTIONS TO REPORT AND RECOMMENDATION

I. Bank Robbery is not a "crime of violence" for purposes of ACCA's Element's Clause.

Courts employ the categorical approach to determine whether a predicate offense qualifies as a "crime of violence" under the ACCA. *See Descamps v. United States,* 133 S.Ct. 2276, 2283 (2013); *United States v. Royal,* 731 F.3d 333, 341-42; *United States v. Serafin*, 562 F.3d 1105, 1107-08 (10th Cir. 2009); *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006). "Categorically" means by reference to the elements of the offense, and not the actual facts of [the defendant's] conduct." *United States v. McGuire*, 706 F.3d 1330, 1336 (11th Cir. 2013). As the Eleventh Circuit states in *McGuire*, the courts are directed to employ the categorical approach because of the statute's terms: "it asks whether [the defendant] committed 'an offense' that '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.'" *McGuire*, 706 F.3d at 1336-37 citing 18 U.S.C. § 924(c)(3)(A)-(B).

This approach requires that courts "look only to the statutory definitions – *i.e.*, the elements -- of the defendants [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "crime of violence." *Descamps*, 133 S.Ct. at 2283 (citation omitted); *Royal*, 731 F.3d at 341- 42; *Serafin*, 562 F.3d at 1107; *Acosta*, 470 F.3d at 135. A prior offense can only qualify as a "crime of violence" if all of the criminal conduct covered by statute, "including the most innocent conduct," matches or is narrower than the "crime of violence" definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). If the most innocent conduct penalized by a statute does not constitute a "crime of violence," then the statute categorically fails to qualify as one. And so post-*Descamps*, for the federal bank robbery statute to qualify as a "crime of violence" under the Force Clause, it must necessarily have an element of "physical force." In this context, "physical force" means "violent force" -- that is, "strong physical force" that is "capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010).

As noted above, the bank robbery statute provides: "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money" from the bank commits bank robbery. *See* 18 U.S.C. § 2113(a). Applying the categorical approach, this offense fails to qualify as a crime of violence for several reasons.

As an initial matter, the plain language of the statute makes clear that bank robbery can be committed by extortion. Extortion, then constitutes an alternative "means" of satisfying the second element of the offense. And, the jury instructions make clear that the bank's property can also be taken by these alternative means: "by force and violence" or "by intimidation." *See* Eleventh Circuit Pattern Jury Instr. No. 76.1 (2010). Thus, the statute is indivisible under *Descamps* and *Mathis v. United States*, __ U.S. __, 136 S.Ct. 1678 (2013). This Court thus must assume that Chance committed his prior bank robbery offenses by means of conspiracy to commit extortion.

In that regard, it is well settled in this Circuit that extortion can be committed by putting the victim in "fear of economic loss as well as fear of physical violence." *United States v. Vallejo*, 297 F.3d 1154, 1165 (11th Cir. 2012); *see United States v. Bornscheuer*, 563 F.3d 1228, 1236-37 (11th Cir. 2009); *United States v. Grassi*, 783 F.2d 1572, 1577 (11th Cir. 1986), thus, no use or threatened use of physical violence is required to commit robbery by extortion. *See i.e., United States v. Paul*, 175 F.3d 906, 908 (11th Cir. 1999) (upholding § 2113(a) conviction were defendant placed extortion note under the front door of bank and directed bank employee to bring money to location). Thus, the second element of the bank robbery statute is both indivisible and categorically overbroad. Federal bank robbery cannot be a crime of violence for this reason. *See In re Jones*, No. 16-14106, Order at 15 (Martin, J., concurring in judgment) ("surely bank robbery by extortion does not" qualify under § 924(c)'s elements clause).

Furthermore, even if bank robbery by extortion was a separate offense rather than an alternative means, that offense would still not be a crime of violence. The jury instructions make clear that, at the very least, "force and violence" and "intimidation" are alternative means of committing the offense under *Mathis*.

Federal bank robbery by intimidation is not a crime of violence for two independent reasons. First, a defendant need not use violence, or physical force to take money or property by intimidation. The jury instructions explained that"[t]o take 'by intimidation' is to say or do something in a way that would make an ordinary person in fear of bodily harm." *See* Eleventh Circuit Pattern Jury Instr. No. 76.1 (2010). In other words, "under section 2113(a), intimidation occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Kelley*, 412 F.3d 1240, 1244 (11^{th} Cir. 2005). But placing a person in fear of bodily harm does not necessarily entail the use or threatened use of violent physical force. For example, that fear can arise merely from the defendant's presentation of a demand note, which "does not require any physical force, let alone strong physical force." *In re Jones*, No. 16-

14106, Order at 15 (Martin,J., concurring in judgment); *see i.e., United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996). Or it may arise from a threat to use poison, toxins, or infectious disease, which also does not require the use of force.

The second reason why bank robbery by intimidation does not constitute a crime of violence is that it does not require an intentional threat of violent physical force, as required by *Leocal v. Ashcroft*, 543 U.S. 1 (2004). As the Eleventh Circuit explained in *Kelley*, "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating," let alone threatening violent physical force. 412 F.3d at 1244. In point of fact, a certificate of appealability has been granted recently on this exact issue -- whether the use of "intimidation" is a separate and distinct means or mode of violating § 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 or mode of committing the offense may constitutionally be used as a crime of violence sentencing enhancer under § 924(c)(3)(B) in view of *Johnson v. United States*, 576 U.S. __, 135 S.Ct. 2151 (2015). *See Renita Mount Rayner v. United States*, Case No. 16-414-CV-Hodges, DE 14 (M.D. Fla. Dec. 12, 2016).

Finally, there is yet another reason why bank robbery is categorically not a crime of violence: it can be committed not only by extortion and intimidation, but by entering the bank with intent to commit "any felony affecting [the] bank." 18

U.S.C. § 2113(a). "That language can easily cover many nonviolent felonies," such as entering the bank to "commit loan fraud." *In re Jones*, No. 16-14106, Order at 17 (Martin, J., concurring in judgment). This does not represent an alternative crime, but rather an alternative means of committing the same offense, thus rendering the statute indivisible (and therefore categorically overbroad) on this additional basis. *Id.* at 17-18 (so suggesting).

In sum, federal bank robbery does not qualify as a crime of violence under § the ACCA's elements clause. A defendant can commit this offense without the use or threatened use of "violent, physical force," as required by *Curtis Johnson*, or the intentional *mens rea* required by *Leocal*. The statute is therefore categorically overbroad.

That the charged offense here deals with armed bank robbery under § 2113(d) does not alter this conclusion. Indeed, there is no reason why an assault during a bank robbery or the use of a dangerous weapon would transform this offense into a crime of violence. Nor can there be any dispute that under *Mathis*, these represent two alternative means of satisfying the third element of § 2113(d), such that even one of them is overbroad, that entire element is overbroad. *See* Eleventh Circuit Pattern Jury Instr. No. 76.3 (2010) (alternative means to satisfy third element as "assaulted someone" or "put someone's life in jeopardy by using a dangerous weapon or device").

First, assaulting another person does not require a threat or the use of violent physical force. The law in this Circuit is clear that "only some amount of force must be used" to commit an assault. *United States v. Fernandez,* 837 F.2d 1031, 1035 (11th Cir. 1991) (assault may occur "by minimal physical contact"); *United States v. Fallen*, 256 F.3d 1082, 1087-88 (11th Cir. 2001) (same); *see also United States v. Martinez*, 486 F.3d 1239, 1246 (11th Cir. 2007) (assault may be committed by physical contact without threat). Furthermore, where assault is committed by physical contact, a jury is not required "to find intent to inflict serious bodily injury," and the offense therefore lacks the *mens rea* element required by *Leocal*. *United States v. Gutierrez*, 745 F.3d 463, 470-71 (11th Cir. 2014).

Second, putting another person's life in jeopardy by the use of a dangerous weapon or device also does not require an intentional threat of violent physical force. The "use" of a firearm, for example includes the mere "reference" to it. *Bailey v. United States*, 516 U.S. 137, 148 (1995). Thus, "a defendant could be convicted of armed bank robbery for mentioning a firearm that he never brandished, displayed, or even possessed during the crime." *In re Jones*, No. 16-14106, Order at 16 (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'"). In that regard, Eleventh Circuit precedent makes clear that the mere presence 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 § 2113(d) without any intent to threaten or use violent physical force. Indeed, a defendant can violate this provision merely by carrying a gun during the bank robbery because "he feels secure with it", even though he has no intention to intimidate another. *United States v. Martinez*, 864 F.2d 664, 667 (9th Cir. 1989). No nexus is required between the weapon and the intimidation required under the statute. A defendant therefore need not possess the intentional *mens rea* under *Leocal.*

II. Attempted Hobbs Act Robbery does not satisfy the Elements Clause of § 924(c).

A. Hobbs Act Robbery

The Hobbs Act statute, 18 U.S.C. § 1951, defines the term "robbery" in subsection (a) to mean:

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

18 U.S.C. § 1951(b)(1).

As detailed *supra*, in determining whether an offense qualifies as a crime of violence under either the elements clause of the ACCA or § 924(c), a sentencing court must employ the categorical approach as clarified in *Moncrieffe, Descamps, Estrella, Lockett*, and *Mathis*, because binding Eleventh Circuit precedent requires that the "crime of violence" determination be made "categorically"-- based upon the elements, not the underlying facts, of the companion/predicate offense. *United States v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013).

Application of the post-*Descamps/Mathis*, elements-driven categorical approach to Hobbs Act robbery compels the conclusion that a Hobbs Act robbery is not a divisible offense; it is categorically overbroad vis-à-vis an offense within the elements clause of § 924(c); and is thus not a crime of violence.

In *Mathis*, the Court confirmed that *Descamps'* distinction between "means" and "elements" must be strictly adhere to in performing the categorical approach, and clarified that it is irrelevant to the analysis that statutory terms might be listed in the "disjunctive." *See Mathis*, 136 S.Ct. at 2249, 2257 (a statute that merely "spells out various factual ways of committing some component of the offense-- a jury need not find (where a defendant admits) any particular item" -- is indivisible; Iowa burglary statute was overbroad and indivisible because "a jury need not agree" on which of the alternative locations specified was burglarized; jury instructions generally will confirm whether a statutory alternative is an element that the prosecutor must prove to the jury beyond a reasonable doubt, or rather "only possible means of commission" on which proof beyond a reasonable doubt is not required).

Mathis, notably, confirmed the correctness of the Eleventh Circuit's earlier decision in *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 20160, which had similarly identified the standard jury instructions as the key to determining whether a statute is divisible, as they will confirm whether the jury is "required" to find one of several "alternative elements beyond a reasonable doubt, rather than just convicted under a statute that happens to list alternative definitions or alternative means for the same crime without requiring jurors to pick which one applies." *Id.* at 1267, 1269.

This Court is bound by the prior precedent rule. And, as such is now compelled to adhere to the approach dictated by *Lockett,* particularly given the Supreme Court's subsequent validation of *Lockett's* approach in *Mathis*.

The Supreme Court has long emphasized in its statutory construction jurisprudence that the meaning of terms in a statute cannot be determined in a vacuum, divorced from "context;" that "context" includes a statutes legislative history and specific indications of Congressional intent; and that identical terms or phrases in different statutes may have different meanings because of different "contexts." *See, i.e., Begay v. United States*, 533 U.S. 137, 143- 144 (2008) (referencing the ACCA's history, and Congress' intent, as support for interpretation of the residual clause); *Castleman v. United States*, 134 S.Ct. 1405, 1413, 1415 (2014) (the term "physical force" in definition of "misdemeanor crime of violence" in 18 U.S.C. § 922(g)(2), had a different meaning than the identical term in 18 U.S.C. § 922€(2)(B)(i), which was interpreted in *Curtis Johnson* to mean "violent force"). This Court must now consider the unique legislative history of the Hobbs Act to construe how the term "force" as used therein should be construed.

1. Under the categorical approach is clarified in *Moncrieffe, Descamps, Estrella, Lockett,* and now *Mathis*, a Hobbs Act robbery conviction categorically does not qualify as a "crime of violence" within the elements clause of 18 U.S.C. § 924(c)(3)(A).

Although the Hobbs Act prohibits at least two different crimes-- robbery and extortion—"and is thus, technically 'divisible,'" where a case such as this "plainly involves Hobbs Act robbery, Hobbs Act robbery itself is not further divisible. Indeed, the correctness of Chance's position to that threshold question—that Hobbs Act robbery itself is not further divisible—is confirmed by the Eleventh Circuit's pattern jury instructions. Specifically, 11th Cir. Pattern Jury Instr. 70.3 (2010) confirms that the second element of the offense is itself indivisible, as it does not include any bracketed alternatives, and requires that the government simply prove beyond a reasonable doubt that

> the Defendant took the property against the victim's will by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future.

It is plain from this that federal juries are not required to agree on whether the property was taken by means of "force," or "violence," or "causing the victim to fear harm," or that the fear must be "either immediately" or "in the future." While it may be unclear simply from the face of the statute which of these "means" is the "least of the acts criminalized" in a Hobbs Act robbery offense, the interpretive case law makes clear that several different "acts" or "means" criminalized under § 1951 most definitely do not require the use of "violent force" either against a person or against property. And post-*Descamps* and *Mathis*, if the statute does not require the threat of violent physical force against person or property in every case, under the now- clarified categorical approach a Hobs Act robbery conviction under § 1951 cannot qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A).

Post-*Descamps* and *Mathis*, it is error for a court to presume that an offense meets the elements clause simply from the language of the statute (or the language of the statute tracked in the indictment), without considering either interpretive case law or this Circuit's Pattern Hobbs Act jury instruction to determine whether the statutory language is an "element" or simply a "means" of committing the offense of which the jury need not unanimously agree. Under current law, both the standard instructions and interpretive case law must be carefully examined to determine how broadly the true "elements" of a Hobbs Act offense sweep, and whether there is a precise "match" or fundamental "mismatch" with § 924(c)(3)(A)'s elements clause. It is error to consider only one "means" of committing the offense, without confirming the correct interpretation of that "means" requires the use or threat of violent force in every case. It is error not to consider whether any "means" requires the use or threat of violent force in every case. It is error not to consider whether any "means" requires less than violent force. Finally in that regard it is error to ignore the unique and well reported legislative history of the Hobbs Act, given that the legislative history confirms that the level of "force" required for taking by means of "force" against a person is not the type of violent physical force the Supreme Court has required interpreting the similar elements clause language in *Curtis Johnson.*

It has long been recognized that in passing the Hobbs Act, Congress expressly adopted New York's definition of "robbery." *See United States v. Nedley*, 255 F.2d 350, 355, 357 (3^{rd} Cir. 1958); *United States v. Aguon*, 851 F.2d 1158, 1164 (9^{th} Cir. 1988)(en banc) ("Congressman Hobbs said explicitly that the definitions of robbery and extortion were modeled on the New York Penal Code"), *overruled on other grounds by Evans v. United States*, 504 U.S. 255 (1992); *Nat'l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807, 813 (7^{th} Cir. 2005) ("Congress use the Penal Code of New York as a model for the Act."); *United States v. Capati*, 980 F.Supp. 1114, 1125 (S.D. Cal. 1997) ("The legislative history of the Hobbs Act indicates that Congress took its definition of robbery from the New York statute. Congress manifested no intention to alter that definition substantially. Thus, a presumption exists that Congress intended to incorporate New York's interpretation of its robbery statute."), aff'd, 162 F.3d 1170 (9th Cir. 1998); *Dooley v. Crab Boat Owners Ass'n*, 271 F.Supp.2d 1207, 1213 (N.D. Cal. 2003) (noting "the legislative history of the Hobbs Act and its origins in New York penal Law").

Accordingly, the recent decision by the Second Circuit in *United States v. Corey Jones*, ___ F.3d ___, 2016 WL 3923838 (2nd Cir. July 21, 2016), is now extremely instructive. In *Jones*, the Second Circuit recognized that a defendant could be convicted of first-degree robbery under New York Penal Law without using the type of "violent force" required by *Curtis Johnson*. And, therefore, the Court held that such a conviction was not categorically a "crime of violence" under the elements clause of the Guidelines. *Id.* at *6. *See also id.* at **5-6 (acknowledging that the New York robbery statute required "forcible stealing" in every case, noting with significance that, under New York case law, "forcible stealing" can occur without "force capable of causing physical pain or injury to another;" to the extent prior Second Circuit decisions held that a New York robbery was a "crime of violence," they were no longer persuasive because they "predate [*Curtis*] *Johnson* and are thus irrelevant to the question" Jones raised).

"[I]t is a well-established principle of statutory construction that when one jurisdiction adopts the statute of another jurisdiction as its own, there is a presumption that the construction placed upon the borrowed statute by the courts of the original jurisdiction is adopted along with the statute in treated as incorporated therein." *Aguon*, 851 F.2d at 1164 (citations omitted). Applying the presumption here, the Court should hold that since a Hobs Act robbery, like a New York robbery (on which it was modeled), can be committed by "less than violent force," it is not categorically a "crime of violence" within § 924(c)(3)(A). *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) has no persuasive value on the "level of force" required for a Hobbs Act robbery, since *Lockley* was not a Hobs Act case. It simply construed the Florida robbery statute. In the Florida robbery statute, by contrast to the New York robbery statute, has no bearing on the level of force required for a Hobbs Act robbery. Moreover since *Lockley* was decided before *Moncrieff, Descamps,* and *Mathis*, it is no longer controlling even for Florida robberies. In fact, the Eleventh Circuit has recently recognized that whether certain Florida robberies have "violent force, as a necessary element remains an open issue in this Circuit (notwithstanding *Lockley*). *See In re Jackson*, 826 F.3d 1343, 1346-47 (11th Cir. 2016).

Notably, beyond the "level of force" mismatch discussed above, Hobbs Act robbery under 18 U.S.C. § 1951 is categorically overbroad in other ways as well. By the statute's plain terms, the offense can be committed by putting one in fear of "future" injury to either his person or his property. And neither type of fear of future injury is an exact match to the elements clause in § 924(c)(3)(A).

Taking these two "means" of committing the offense in reverse order, placing someone in fear of injury to his property not require the use of violent physical force in every case. For indeed, as the courts interpreting the Hobbs Act have long recognized, and Eleventh Circuit Pattern Jury Instruction 70.3 confirms, "[t]he concept of 'property' under the Hobbs Act is an expansive one" that includes "tangible assets, such as rights to solicit customers and to conduct a lawful business." *United States v. Arena*, 180 F.3d 380, 392 (2nd Cir. 1999), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women Inc.*, 537 U.S. 393, 401 n.8 (2003). *See* 11th Cir. Pattern Jury Instruction 70.3 "(Property includes . . . intangible rights that are a source or element of income or wealth"); *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3rd Cir. 1986) (noting that "other circuits which have considered this question "are unanimous in extending the Hobbs Act to protect intangible as well as tangible property""); *United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction when boss threatened "to slow down or stop construction projects unless his demands were met").

Such threats to intangible economic interests are certainly not threats of "violent force" to property. And indeed, whenever a Hobs Act robbery is committed by "causing the victim to fear harm, either immediately or in the future," the Eleventh Circuit has clearly explained in its pattern instruction that the term "fear" "includes the fear of financial loss as well as fear of physical violence."

In sum, the full range of conduct covered by the Hobbs Act robbery statute plainly does not require the use of "violent force" to a person or property in every case, as it must under the categorical approach is clarified by *Descamps* and *Mathis*. Accordingly, the Court should hold that a Hobbs Act robbery conviction cannot qualify as a "crime of violence" under the elements clause in 18 U.S.C. § 924(c)(3)(A).

2. Attempted Hobbs Act Robbery Does Not Satisfy the Elements Clause of § 924(c).

As explained above, because substantive Hobbs Act robbery does not qualify as a crime of violence, attempting to commit that offense cannot either. But even if substantive Hobbs Act robbery did satisfy the elements clause in § 924(c), attempted Hobbs Act robbery does not.

Several cases, including those from the Eleventh Circuit, establish that one can attempt to commit Hobbs Act robbery without actually using, attempting to use, or threatening to use violent, physical force. *See, i.e., United States v. Gonzales*, 322 Fed.App'x 963, 969 (11th Cir. Apr. 15, 2009)(unpublished) (upholding conviction for attempted Hobbs Act robbery where defendants merely traveled to location in preparation for committing robbery); *United States v. Muratovic*, 719 F.3d 809, 815-16 (7th Cir. 2013) (upholding conviction were defendant finalized plans, conducted surveillance, procured supplies, and arrived at destination point on the date set for the robbery); *United States v. Gonzales*, 441 Fed.App'x 31, 36 (2nd Cir. Oct. 13, 2011) (upholding conviction were defendant was casing location and began preparations to commit robbery); *United States v. Turner*, 501 F.3d 59, 68- 69 (1st Cir. 2007) (upholding conviction were defendant plan the robbery, took preparatory action, and gathered at designated assembly point); *United States v. Williams*, 2011 WL 2621005, at *1 (E.D. Pa. July 5, 2011) (upholding convictions were defendant participated in numerous meetings, gather documents to use as part of the scheme, and armed himself); *United States v. Villegas*, 2009 WL 1657072, at *3 (N.D. Ill. June 11, 2009) (similar, noting that no force was used or threatened); *see also United States v. Kaplan*, 171 F.3d 1351, 1354 (11th Cir. 1999)(en banc) (attempt to commit Hobbs Act violation requires the government to show only that "the scheme would have produced an effect on commerce," not that it actually did). Under the least culpable rule, this Court must assume that Chance committed the attempted Hobbs Act offense in this manner.

III. Armed bank robbery does not qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A).

In that the elements clause analysis is the same for both the ACCA and § 924(c), for those reasons stated in Section I of these objections, armed bank robbery is not a "crime of violence" under the elements clause of § 924(c)(3)(A).

IV. Section 924(c)(3)'s Residual Clause is Unconstitutionally under *Johnson.*

In *Johnson*, the Supreme Court decided ACCA's "residual clause" is unconstitutionally vague. *Johnson* applies to the parallel "crime of violence" definition in § 924(c)(3)'s residual clause. Section 924(c)(3)(B) suffers from the same flaws that compelled the Supreme Court to declare the ACCA residual clause void for vagueness. Using § 924(c)(3)(B) to categorize a predicate conviction as a "crime of violence" therefore violates due process.

A. Section 924(c)'s Residual Clause is Unconstitutionally Vague in Light of Johnson

Johnson held the residual clause in the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii) (otherwise involves conduct that presents a serious risk of physical injury to another), to be unconstitutionally vague because the "indeterminacy of the wide ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges." 135 S.Ct. at 2557. In the Supreme Court's view, the process espoused by *James v. United States*, 550 U.S. 192 (2007), of determining what is embodied in the "ordinary case" of an offense, and then of quantifying the "risk" posed by that ordinary case, was constitutionally problematic: "[t]he residual clause offers no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Id.* at 2558. As a result, "[g]rave uncertainty" as to how to determine the risk posed by the "judicially imagined ordinary case" led the Court to conclude that the residual clause was void for vagueness. *Id.* at 2557.

The same "ordinary case" inquiry that in *Johnson* led the Supreme Court to conclude that the ACCA residual clause is unconstitutional is applied to § 924(c)(3). *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013). That is, like the ACCA, the Residual Clause of § 924(c) requires courts to picture the "ordinary" case embodied by a felony, and then assess the risk posed by that "ordinary" case. *See id.*

On June 30th, without hearing oral argument, a panel of the Eleventh Circuit issued a published decision holding as a matter of first impression that *Johnson*'s determination that the ACCA's residual clause was unconstitutionally vague "does not apply to or invalidate" the similar residual clause in 18 U.S.C. §924(c)(3)(B). *Ovalles v. United States*, ___ F.3d ___, 2017 WL 2829371 at *7 (11th Cir. June 30, 2017). However, the correctness of the *Ovalles* panels reasoning can be -- and is being -- debated among reasonable jurists both within this Circuit and across the country at this time.

1. Only a week after the issuance of the decision in *Ovalles*, July 6, 2017, the mandate was *sua sponte* withheld by this Court, and that non-final decision may still be reconsidered and withdrawn. *See Ovalles*, 11th Cir. Case No. 17-10712 (DE of July 6, 2017) ("Mandate Withheld Purusant to Court Instructions."). This near immediate, *sua sponte* reaction may indicate that there is interest on the Court in re hearing *Ovalles en banc*. Or, it may mean that members of this Court believe *Ovalles* could be affected by the Supreme Court's decision in *Sessions v. Dimaya* (U.S. No. 15-1498) on the related issue of whether *Johnson* renders the identically worded residual clause in § 16(b) unconstitutionally vague.

Notably, it appears that the Court is itself still debating the constitutional issue in *Dimaya,* since it has ordered re-argument at the beginning of the new term to definitively decide the case. See Des of Jan. 17 and June 26, 2017. And plainly, because § 16(b) is perfectly identical to § 924(c)(3)(B), a favorable decision in *Dimaya* could itself 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 the *Ovalles* panel distinguished § 924(c)(3)(B).

In any event, whatever the reason for the withholding of the mandate in *Ovalles*, the panel's decision is not yet final. And significantly, multiple judges on this Court have now granted joint motions by the defense and the government to stay the briefing schedule in § 924(c)/*Johnson* appeals pending issuance of the *Ovalles* mandate. See *Davenport v. United States*, Case No. 16-15939-GG (11th Cir. July 21, 2017)(Jordan, J.); *Barriera-Vera v. United States*, Case No. 17-10029 (11th Cir. July 24, 2017)(Tjoflat, J.); *Wilkes v. United States*, Case No. 16-17658 (11th Cir. July 25, 2017)(Wilson, J.); *Blackman v. United States*, Case No. 16-17294 (11th Cir. July 26, 2017)(Martin, J.); *Young v. United States*, Case No. 16-17300 (11th Cir. July 27, 2017)(Tjoflat, J.); *Paige v. United States*, Case No. 16-16043 (11th Cir. July 28, 2017)(Rosenbaum, J.); *Trubey v. United States*, Case No. 16-17663 (11th Cir. Aug. 1, 2017)(Wilson, J.). These stays would not likely have been granted if the analysis in *Ovalles* was "beyond all debate." Clearly, it is not. The decision may well be short-lived.

Since the law in this area remains in tremendous flux, it would be imprudent and inefficient for this Court to rely on *Ovalles* in denying Chance's petition. Doing so would needlessly result in an additional round of litigation if *Ovalles* is abrogated by *Dimaya*. Even if *Ovalles* is not completely abrogated, *Dimaya* may at least require reconsideration of certain conclusions in *Ovalles* either by the panel or this Court *en banc*. The constitutional issue resolved by the *Ovalles* panel is now being vigorously debated among reasonable jurists throughout the country. And that debate will continue—at the very least—until *Dimaya* is decided.

2. Whether *Johnson*'s invalidation of the ACCA's residual clause as unconstitutionally vague has rendered § 924(c)'s residual clause unconstitutional as well, is an issue that has divided the circuits and it remains debatable among reasonable jurists at this time. In *Johnson*, the Supreme Court held the residual clause in § 924(2)(B)(ii) (" otherwise involves conduct that presents a serious risk of physical injury to another") to be unconstitutionally vague because the "indeterminacy of the wide ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges." 135 S.Ct. at 2557. In the Supreme Court's view, the process espoused by *James v. United States*, 550 U.S. 192 (2007), of determining what is embodied in the "ordinary case" of an offense, and then of quantifying the "risk" posed by that ordinary case, was constitutionally problematic: "[t]he residual clause offers no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Id.* at 2558. As a result, "[g]rave uncertainty" as to how to determine the risk posed by the"judicially imagined ordinary case" led the Court to conclude that the residual clause was void for vagueness. *Id.* at 2557.

It is well settled in this Circuit that the same, categorical "ordinary case" inquiry that led the Supreme Court to conclude that the ACCA residual clause is unconstitutionally vague applies to the similarly worded residual clauses in §§ 924(c) and 16(b). In *McGuire*, Justice O'Connor sitting by designation held that whether an offense is a "crime of violence" "within the ambit of § 924(c)" is a question"that we must answer 'categorically' -- that is, by reference to the elements of the offense, and not the actual facts of McGuire's conduct." *Id.* at 1336. And, she explained, "[w]e employ the categorical approach" under both the elements and the residual clauses of § 924(c), because of the statute's terms: It asks whether McGuire committed "an offense" that "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). *Id.* at 1336.

Notably, the residual clause in § 924(c) is identical to § 16(b). Compare § 924(c)(3)(B) (offense "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") with § 16(b) (offense "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"). And the law in this Circuit is clear that the same "ordinary risk" analysis this Court needs to apply pursuant to the categorical approach in ACCA residual clause cases applies equally in the § 16(b) context. *See United States v. Keelan*, 786 F.3d 865, 871 (11th Cir. May 13, 2015 (as a matter of first impression, "adopt[ing] the 'ordinary case' standard [from

James] for analyzing § 16(b);" "applying the categorical approach looking only to the ordinary case;" concluding that a violation of 18 U.S.C. § 2422(b) for enticing a minor is a "crime of violence" under § 16(b) since the "ordinary" violation involves a substantial risk that the defendant may use physical force in the course of committing the offense).

Because other circuits as well have employed similar approaches in analyzing these provisions, in the aftermath of *Johnson* the Third, Seventh, Ninth, and Tenth Circuit's have each ruled that § 16(b) -- which again, is identical to § 924(c)(3)(B) -- is void for vagueness in light of *Johnson*. *See Baptiste v. Attorney Gen.*, 841 F.3d 601 (3d Cir. 2016), *gov't pet. for cert.* filed Feb. 6, 2017 (No. 16-978); *Golikov v. United States*, 837 F.3d 1065 (10th Cir. 2016), *gov't pet. for cert.* filed Feb. 2, 2017 (No. 16-966); *United States v/ Vova-Ceja*, 808 F.3d 719 (7th Cir. 2015), *gov't pet'n for reh'g denied* (Mar. 22, 2016); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) *cert. granted*, 2016 WL 3232911 (U.S. Sept. 29, 2016); *see also Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016), *gov't pet. for cert filed* Feb. 13, 2017 (No. 16-991); *In re Hubbard*, 825 F.3d 225, 232 n.4 (4th Cir. 2016) (noting split); *United States v. Hernandez-Lara*, 817 F.3d 651 (9th Cir. 2016) (§ 16(b)'s residual clause as incorporated in § 2L1.2(b)(1)(C) is void for vagueness in light of *Dimaya*), *gov't pet. for cert.* filed Nov. 7, 2016 (No. 16-617).

On November 18, 2016, in *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016), the Seventh Circuit became the first federal circuit to specifically address the constitutionality of § 924(c)'s residual clause in light of *Johnson.* And notably, the Seventh Circuit held that because § 924(c)'s residual clause was "virtually indistinguishable" from the ACCA's residual clause which "*Johnson* found to be unconstitutionally vague," § 924(c)(3)(B) was unconstitutionally vague as well. *Id.* at 996 (noting that § 924(c)'s residual clause was "the same residual clause" in § 16(b) that the court had already invalidated in *Vivas-Ceja*). The panel's decision in *Ovalles* directly conflicts with that of the Seventh Circuit in *Cardena.*

The clear debatability of the *Ovalles* decision is confirmed by the number of reasonable jurists at the district court level throughout this country who have specifically found the residual clause of § 924(c)(3)(B) unconstitutionally vague in light of *Johnson*.

For decisions outside this Circuit, *see i.e., United States v. Smith*, No. 2:11-CR-058-JAD-CWH, 2016 WL 2901661 (D. Nev. May 18, 2016): *United States v. Lattaphom*, 159 F.Supp.3d 1157 (E.D. Cal. Feb. 2, 2016); *United States v. Bell*, 158 F.Supp.3d 906, 920 (N.D. Ca. Jan. 28, 2016); *United States v. Edmondson*, 153 F.Supp.3d 857, 859-60 (D. Md. Dec. 30, 2015).

For decisions within this Circuit, *see, i.e., Mann v. United States*, Case No. 16-22606-CV-Ungaro, DE 22 & DE 27 (Orders of March 16 and April 19, 2017);

Jardines v. United States, Case No. 16-22604-CV-Ungaro, DE 17 and DE 21 (Orders of March 17 and April 19, 2017); *Duhart v. United States*, Case No. 16-61499-CV-Marra, DE 13 and DE 18 (Orders of September 9, 2016 and February 1, 2017); and *Hernandez v. United States*, Case No. 16-22657-CV Huck (Order of September 27, 2016).

In rejecting the views of these jurists, the *Ovalles* panel emphasized that the ACCA and § 924(c) are not word for word identical. In particular, the panel found "significant" and "material" the fact that § 924(c)(2)(B)(ii), defines a "violent felony" as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," while § 924(c)(3)(B) defines a crime of violence as one 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." *See* 2017 WL at **5-8.

These are minor differences in the wording of the two provisions. They are neither significant materially when considered against the Supreme Court's actual reasoning in *Johnson*. For the reasoning detailed below, the *Ovalles* panel's conclusions to the contrary are debatable for multiple reasons.

B. Section 924(c)'s residual clause is not "markedly narrower" than the ACCA residual clause at issue in *Johnson*.

The textural differences between the residual clause of the ACCA at issue in *Johnson* and the residual clause of § 924(c) (and its twin § 16(b)) are not material because they do not impact the constitutional analysis in any manner. The *Ovalles* panel ignored the fact that not only in this Circuit, but in other circuits as well, these provisions have always been regarded as analogous and analyzed identically. *See United States v. Keelan*, 786 F.3d 865, 871 n.7 (11th Cir. 2015) (describing the ACCA residual clause in the residual clause of § 16(b) as "analogous"); *Vivas-Ceja v. United States*, 808 F.3d at 722 "§ 16(b) substitutes 'substantial risk' for the residual clauses 'serious potential risk.' Any difference between the two phrases is superficial. Just like the residual clause [in § 924(c)], § 16(b) offers courts new guidance to determine when the risk involved in the ordinary case of a crime qualifies as 'substantial.'"); *Jimenez-Gonzales v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008). (noting that, "[d]espite the slightly different definitions," the Supreme Court's respective analyses of the ACCA and § 16(b) "perfectly mirrored" each other). *See United States v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008); *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998); *United States v. Kirk*, 111 F.3d 390, 394 (5th Cir. 1997); *United States v. Bauer*, 990 F.2d 373, 374 (8th Cir. 1993) (describing the differences between the statutes as "in material" and holding that U.S.S.G. § 4B1.2, which uses the ACCA language, "is controlled by" a decision that interprets § 16(b)).

Federal courts have historically and regularly analyze and imported decisions from one residual clause to another due to their substantial similarities.

Although the risk at issue in the ACCA is a risk of injury, and the risk at issue in both §§ 16(b) and 924(c) is a risk that force will be used against person or property, this difference is immaterial to the due process problem and has no impact on the applicability of *Johnson* to this case. This is because the Supreme Court's holding in *Johnson* did not turn on the type of risk, but rather how a court assesses and qualifies the risk. In fact, the Solicitor General has candidly conceded that § 16(b) is "equally susceptible to . . . the central objection" in *Johnson* -- namely, that they both "require[d] a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters." *Johnson*, U.S. Supp. Br., 2015 WL 1284964, at 22-23.

The two-step process is the same under the ACCA and § 924(c) (a twin to § 16(b))). All three statutes require courts first to picture the "ordinary case" embodied by a felony, and then decide if that qualifies as a crime of violence by assessing the quantum of risk posed by the "ordinary case." The *Ovalles* panel unfairly ignored this material identity in the way predicate crimes have always been analyzed under the statutes -- not only in other circuits, but in our Circuit. There is no acknowledgment of *McGuire, Keelan*, or the dictates of the categorical approach in the panels entire discussion of § 924(c)'s residual clause.

As other courts have rightly explained, the "§ 924(c) residual clause suffers from exactly the same double indeterminancy as the ACCA residual clause." *Edmondson*, 2015 WL 9582736, at *4. Moreover, the Ninth and Seventh Circuits have recognized the same in invalidating § 16(b), the identical twin to § 924(c)(3)(B), as being void for vagueness under *Johnson*. *See Vivas-Ceja*, 808 F.3d at 722; *Dimaya*, 803 F.3d at 1117.

Section § 924(c)'s residual clause, like the ACCA residual clause, similarly requires the "ordinary case" analysis to assess the risk involved in a predicate offense, and how risky that ordinary case is -- the identical analytical steps that brought down the ACCA residual clause -- and thus § 924(c)'s residual clause cannot survive constitutional scrutiny under the due process principles reaffirmed in *Johnson*. As a consequence, the residual clause cannot be used to support a conviction under § 924(c).

To the extent the *Ovalles* panel characterize the residual clause of § 924(c) as "markedly narrower" than the ACCA's residual clause in two respects, it erred. The panel noted first that § 924(c)'s residual clause requires a "risk of injury" to the victim and in its view that was "more definite" than a "risk of physical force" being used against the victim. Second, it argued, § 924(c)'s residual clause is also temporally "narrower" than the ACCA's residual clause because it looks to the risk of force "aris[ing] during the commission of the offense." 2017 WL 289371 at **5,7.

But like the absence of enumerated offenses (discussed infra), these textual differences simply have no bearing on the threshold "ordinary case" inquiry that the Supreme Court determined is impossibly arbitrary, and that the Eleventh Circuit held in *Keelan* applies to the precise language at issue here. In focusing specifically on the risk during the predicate offense, § 924(c)'s residual clause does not call for any narrower inquiry than the ACCA's residual clause. The Supreme Court's determinations whether certain crimes were sufficiently risky under the ACCA also focused on the risk during the commission of the offense, rather than some time later after it had ended. *See, i.e., James*, 550 U.S. at 203-04, 210 (looking to conduct that typically occurs "while the crime [attempted burglary] is in progress," "while the break-in is occurring," and "during attempted burglaries"); *Sykes*, 131 S.Ct. at 2273-74 (same for crime of vehicular flight from police).

Likewise, the supposedly "typical" conduct the Supreme Court found sufficiently risky in the ACCA cases involved conduct during the predicate crime, rather than at some later time. *See, i.e., James*, 550 U.S. at 211-12 ("An armed would-be burglary may be spotted by a police officer, a private security guard, or participate in a neighborhood watch program. Or a homeowner . . . may give chase"); *Sykes*, 131 S.Ct. at 2274 (driver's knowingly fleeing law enforcement officer held a violent felony given risk that, during pursuit, driver might cause accident or commit another crime to avoid capture). In no case did the Supreme Court actually rely on "post offense conduct" to find a predicate crime sufficiently risky under the ACCA's residual clause. And in fact, the Court specifically questioned whether this would even be a statutorily permissible basis to qualify an offense a "crime of violence." *See Chambers v. United States*, 555 U.S. 122, 129 (2009).

Moreover, in assessing riskiness, § 924(c)(3)(B) and its twin, § 16(b) -- just like the ACCA -- looks not just at the initiation of the predicate crime (*i.e.*, the burglar's climbing through the window), but beyond that, through the entire "course" of the offense to its completion (*i.e.*, while the burglar is in the house, until he successfully flees). *See Leocal*, 543 U.S. at 10 ("[B]urglary, by its nature, involves a substantial risk that the burglar will use force against the victim in completing the crime.").

The *Ovalles* panel attempted to distinguish § 924(c)(3)(B) from both § 16(b) and the ACCA residual clause by pointing to "different function" of the statutes -- namely, that § 924(c) is is not concerned with recidivism, and requires a "nexus" to the instant companion crime -- which it claimed makes that clause "more precise and predictable." 2017 WL 2829371 at *7. But the functional difference between the statutes does not change the vagueness calculus in any manner for the simple reason the *Ovalles* panel ignored: According to *McGuire* and *Keelan* the proper analysis under § 924(c) is not fact-centric, based upon the defendant's real-world conduct. Rather, due to the "by its nature" language used by Congress in both §§ 924(c)(3)(B) and 16(b), it is categorical and based entirely on the elements of the offense. It's categorical approach uses the hopelessly indeterminate, impossibly vague "ordinary case" benchmark to measure risk.

In sum, neither the textual or functional distinctions identified by the *Ovalles* panel establish a material difference between the unconstitutional residual clause in the ACCA and the residual clauses in §§ 924(c) and 16(b). All three clauses require courts to divine what the "ordinary case" of a crime is, and then decide whether that abstraction poses enough of a risk to be a qualifying offense. *See Shuti v. Lynch*, 828 F.3d 440, 448 (6th Cir. 2016) ("[A] marginally narrower abstraction is an abstraction all the same."). Whatever textual differences exist between these clauses they are not significant enough to treat § 924(c)(3)(B) differently with respect to *Johnson*'s vagueness analysis. At the very least, reasonable jurists could debate -- and are debating -- the materiality of the distinctions drawn in *Ovalles*.

C. The list of enumerated offenses preceding the ACCA residual was not dispositive in *Johnson*.

Another basis upon which the *Ovalles* panel distinguished § 924(c)'s residual clause from the ACCA's was the fact that the ACCA's residual clause contained a confusing prefatory list of enumerated offenses which complicated the assessment of risk, whereas § 924(c) does not have such a list. 217 WL 2829371 at *6-*8. While the *Ovalles* panel deemed this difference "material," *id.*, analytically it is not because the Supreme Court's decision in *Johnson* did not hinge on the list of enumerated offenses that precedes the ACCA's residual clause. The Supreme Court simply noted that the enumerated offenses which precede the ACCA residual clause were an added problem. *Johnson*, 135 S.Ct. at 2558. The Supreme Court said the residual clause was void for vagueness based on the "two features" turning on the ordinary case - not a third feature turning on the enumerated offenses. *Id.* at 2557; *see also Vivas-Ceja*, 808 F.3d at 723 ("The list [of enumerated offenses] itself wasn't one of the 'two features' that combine to make the clause unconstitutionally vague.") (citing *Johnson*, 135 S.Ct. at 2557).

As a matter of pure logic, *Johnson* could not have turned on the enumerated offenses. The "ordinary case" problem exists with or without enumerated offenses because a lower court must determine the idealized ordinary case of the predicate offense before it can even begin to evaluate and compare the type of risk presented by that offense. *Id.* at 2557-58. Because courts cannot answer the threshold question with any certainty, logic compels that the "ordinary case" analysis itself renders the residual clause unconstitutionally void. If a court cannot determine the "ordinary case" of the predicate offense, then a court cannot proceed with its risk analysis -- enumerated offenses or not. The *Johnson* Court made clear that the "ordinary case" problem was really the central distinguishing and dispositive feature, by stating: "More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual engages on a particular occasion . . . The residual clause, however, requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Johnson*, 135 S.Ct. at 2561. For this very reason, *Dimaya*, 803 F.3d at 1117-18, *Vivas-Ceja*, 2015 WL 9301373 at *4, and *Edmonson*, 2015 WL 9582736, at *5, all flatly rejected the government's argument that *Johnson* turned on the enumerated offenses. Reasonable jurists, thus, have seriously debated the very argument in the *Ovalles* panel adopted without responding to any of the above concerns.

Notably, this very issue was one that split the Fifth Circuit in *United States v. Gonzales-Longoria*, 831 F.3d 670 (5th Cir. Aug. 5, 2016)(en banc). As four reasonable jurists on that court rightly pointed out in their dissent from that decision, even without a prefatory list of examples "through judicial interpretation, § 16(b) not only contains an example, it contains the very example that most troubled the *Johnson* Court. Specifically, the Supreme Court has previously explained that burglary is the 'classic example' of a § 16(b) crime," "[a]nd 'burglary' was the most confusing of the residual clauses 'confusing examples.' If 'burglary' is a confusing example in one statute, then it is just as confusing in the other." 831 F.3d at 685 (Jolly, J. joined by Stewart, C.J., Dennis, J., and Graves, J., dissenting) ("the (judicially created) example in § 16(b) is nearly as confusing as the textual examples in the residual clause;" and again any distinction between the two statutes is not salient enough to constitutionally matter").

The lack of enumerated examples in § 924(c) thus does not make its residual clause any more clear. If anything, the lack of a prefatory list makes § 924(c)'s residual clause more capacious than the ACCA's residual clause. Indeed, because § 924(c) lacks a prefatory list of examples, it's residual clause covers every offense that involves a "substantial risk of the use of physical force against the person or property of another." *See Begay v. United States*, 553 U.S. 137, 144 (2008) (" Congress rejected a broad proposal that would have [amended the ACCA to cover] every offense that involves a substantial risk of the use of physical force against the person or property of another." (internal quotation marks omitted).

In *Welch*, the Supreme Court confirmed that "[t]he residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." 136 S.Ct. at 1262. Significantly, the *Welch* Court did not even mention the list of enumerated crimes, let alone indicate the list was relevant to its holding. Thus, contrary to the findings in *Ovalles*, the list of examples within the ACCA is not a legally "material" difference between the two clauses.

D. The same confusion surrounds § 924(c)'s residual clause (and its twin § 16(b)'s residual clause) as surrounded the ACCA's and, in any event, this was not a dispositive part of the *Johnson*'s holding.

A final reason given by the *Ovalles* panel for why § 924(c)'s residual clause is not unconstitutionally vague is that courts have not had the same difficulty construing it as they have had with the ACCA's residual clause. 2017 WL 2829371 at *7. But that argument simply "ignores the reality of judicial review." *Shuti*, 828 F.3d at 450. That the Supreme Court has not taken any cases regarding § 924(c)'s residual clause, and therefore has not experienced "repeated failures" in interpreting § 924(c)'s residual clause, is "probative only of the Courts composition of its docket - not absence of vagueness in the provision." *Baptiste v. Attorney Gen.*, 841 F.3d 601, 620 n.21 (3d Cir. 2016); *Shuti*, 828 F.3d at 450 (citing *Singleton v. Commissioner*, 439 U.S. 940, 942 (1978) (Stevens, J., respecting the denial of certiorari) ("The Supreme Court's docket is almost entirely discretionary."). The *Johnson*'s Court's discussion of its repeated failures in crafting a "principle an objective standard" was simply additional evidence confirming the residual clauses vagueness. *Shuti*, 828 F.3d at 450 ("[T]he government mistakes correlation for causation; conflicting judicial interpretations only provide ex post 'evidence of vagueness'"). The Supreme Court's failures in attempting to develop a workable standard for the ACCA's residual clause "was not a necessary condition to the Courts vagueness determination." *Vivas-Ceja*, 808 F.3d at 723.

Moreover, the *Ovalles* panel's suggestion that § 924(c)(3)(B), unlike the ACCA, is not shrouded in confusion, is at the very least debatable if not demonstratably incorrect since the panel glossed over the fact that cases addressing §§ 16(b) and 924(c) regularly rely on ACCA cases, and vice a versa. Confusion over the meaning of § 924(c)'s residual clause is subsumed in the confusion surrounding the ACCA because federal courts use the same body of precedent to interpret all three. Thus, confusion surrounding the ACCA reflects difficulties with §§ 16(b) and 924(c)(3)(B), even without the same explicit course of criticism. And indeed, some circuits have actually split over how to apply § 16(b), which is additional evidence of the confusion surrounding the language of the residual clause of § 16(b) and its twin in § 924(c)'s residual clause. *See also Dimaya*, 803 F.3d at 1119 ("That the Supreme Court has decided more residual clause cases than § 16(b) cases, however, does not indicate that it believes the latter clause to be any more capable of consistent application.").

E. The Contrary Circuit Decisions followed in *Ovalles* are Unpersuasive

The *Ovalles* panel explicitly adopted the arguments advanced in *United States v. Taylor*, 814 F.3d 340, 376-79 (6th Cir. 2016), pet. for cert. filed Oct. 12, 2016 (No. 16-6392); *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); and *United States v. Prickett*, 893 F.3d 697(8th Cir. 2016), pet. for cert. filed Dec. 30, 2016) (No. 16-7373). But the reasoning in these decisions is not only debatable by jurists from other circuits who have rejected as immaterial the points of distinction upon which these decisions have relied. The reasoning *Ovalles* relied upon most extensively -- that of the Sixth Circuit in *Taylor* -- is highly debatable even within the Sixth Circuit itself.

As a threshold matter, the panel decision in *Taylor* upon which *Ovalles* relied, was not itself a unanimous decision. Dissenting judge, Judge Helene White, persuasively criticized the majority opinion. In doing so, Judge White reiterated the importance of the categorical approach in analyzing crimes of violence under § 924(c)(3)9B), notably citing this Circuit's decision in *McGuire* for that proposition. *See i.e.*, at 393-98 & n.19 (White, J., dissenting) (" Although a fact centric approach might make sense in the § 924(j) context because th[at] statute addresses present rather than past conduct, case law squarely holds that the ["by its nature"] language of § 924(c) requires courts to use a categorical approach; citing *McGuire*, 706 F.3d at 1336-1337). The *Taylor* majority opinion, however, minimizes that key point of similarity. *See id.* at 378. For the reasons set forth in Judge White's dissenting opinion, as well as those advanced by the Seventh, Ninth, and Tenth Circuit's, the majority opinion in *Taylor* is unpersuasive.

Furthermore, it is noteworthy that the Sixth Circuit itself appears to have receded from, or at least substantially limited, its decision in *Taylor*. In its July 2016 decision in *Shuti v. Lynch*, a unanimous panel of that court squarely held that *Johnson* rendered § 16(b) unconstitutionally vague in the immigration context, notwithstanding its earlier decision in *Taylor*. Specifically, it accepted the petitioner's argument, and expressly agreed with the Seventh and Ninth Circuits, that § 16(b) "suffer[ed] from the same defects as the statute at issue in *Johnson* and, so too, runs afoul of the Fifth Amendment's prohibition of vague laws." 828 F.3d at 445. In doing so, the Sixth Circuit rejected the government's attempts to distinguish the two residual clauses. See, i.e., *446-50.

Even more notable, the Sixth Circuit in *Shuti* understood its earlier decision in *Taylor* to be based on the fact that § 924(c) involves "real-world conduct," and therefore did not require application of the categorical approach. *Id.* at 449-50. According to the *Shuti* court, that "ma[de] all the difference," since *Johnson* was limited only to statutes applying the categorical/ordinary case approach. *Id.* at 450. ("We understand *Taylor,* then, as applying *Johnson*'s real-world conduct exception to upholding the constitutionality of" § 924(c)'s elements clause). In that regard, the Sixth Circuit emphasized that this limitation of *Johnson* was subsequently reiterated by the Supreme Court in *Welch*, and the court in *Taylor* "did not have the benefit of the Court's guidance in that regard." *Id.*

That limited reading of *Taylor* is critical here, because as explained above, binding Eleventh Circuit precedent in *McGuire* makes clear that the same categorical approach governing the ACCA also governs § 924(c)'s residual clause. Accordingly, under this Circuit's prior panel precedent rule, the *Ovalles* panel should have been legally precluded by *McGuire* from following *Taylor,* given that the Sixth Circuit has since clarified that *Taylor* rests on the premise that the categorical approach does not apply to § 924(c). And that premise is contrary to this Circuit's binding precedent in *McGuire.*

CONCLUSION

For the reasons stated herein, Petitioner requests this Court overrule the Magistrate Judge's Report and Recommendation and grant the relief requested in his petition.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-81074-CIV-HURLEY
CASE NO. 06-80179-CR-HURLEY

MICHAEL CHANCE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_______________________________/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION AND DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE AND CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

THIS CAUSE is before the court upon the Movant's motion to vacate, set aside and correct sentence pursuant to 28 U.S.C. §2255 [DE # 1], which matter was previously referred to Magistrate Judge James Hopkins for proposed findings and a recommended disposition.

On October 30, 2017, Magistrate Judge White filed a Report and Recommendation [DE 30] recommending that the Movant's motion to vacate, set aside and correct sentence be denied. On November 9, 2017, the Movant filed his Objections to the report and recommendation [DE 32] .

After carefully reviewing the Magistrate Judge's Report and Recommendation, and after making a *de novo* determination on the record as to all portions of the Magistrate Judge's disposition as to which specific written objection has been made, it is **ORDERED** and **ADJUDGED**:

1. Magistrate Judge James Hopkins' Report and Recommendation [DE 32] is **APPROVED AND ADOPTED** in full.

2. The Movant's motion to vacate, set aside and correct sentencing pursuant to 28 U.S.C. § 2255 [DE 1] is **DENIED.**

3. Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) is **DENIED**.

4. Pursuant to Rule 58, final judgment shall be entered by separate order of the Court.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 13 day of November, 2017.

Daniel T. K. Hurley
United States District Judge

cc. All counsel

For updated court information, see unofficial website at www.judgehurley.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-81074-CIV-HURLEY
CASE NO. 06-80179-CR- HURLEY

MICHAEL CHANCE,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

_________________________________/

FINAL JUDGMENT DENYING MOTION TO VACATE SENTENCE, DENYING CERTIFICATE OF APPEALABILITY & CLOSING CASE

THIS CAUSE comes before the Court following its Order Adopting the Magistrate Judge's Report and Recommendation and Denying the Movant's motion to vacate sentence under 28 U.S.C. § 2255. Bearing in mind that Rule 58 of the Federal Rules of Civil Procedure requires a court to "set out . . . in a separate document" its judgment on a motion to vacate, set aside or correct sentence, Fed. R. Civ. P. 58 (a) and *Perez v. United States*, 277 Fed. Appx. 966, 967 (11th Cir. 2008), it is **ORDERED** and **ADJUDGED**:

1. Movant's Motion to Vacate, Set Aside or Correct Sentence [DE 1] is **DENIED**.

2. A Certificate of Appealability is **DENIED**.

3. This case is **CLOSED**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida, this 13 day of November, 2017.

Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

cc. all parties

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10083-K

MICHAEL CHANCE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Michael Chance moves for a certificate of appealability ("COA"), in order to appeal the denial of his counseled 28 U.S.C. § 2255 motion to vacate sentence. To merit a COA, Chance must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). He has not met this standard, and his motion for a COA is DENIED.

/s/ Stanley Marcus
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

February 26, 2018

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

Appeal Number: 18-10083-K
Case Style: Michael Chance v. USA
District Court Docket No: 9:16-cv-81074-DTKH
Secondary Case Number: 9:06-cr-80179-DTKH-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: Beth Johnson-Kellmayer, K
Phone #: (404) 335-6172

Enclosure(s)

DIS-4 Multi-purpose dismissal letter